UNIVERSITY OF NAIROBI

SCHOOL OF LAW

CORPORATE GOVERNANCE: A TOOL FOR SUSTAINABILITY IN FAMILY-OWNED ENTERPRISES IN KENYA

THESIS SUBMITTED IN PARTIAL FULFILLMENT OF THE AWARD OF MASTER OF LAW (L.L.M) DEGREE

BY

CICILY M. MUIRURI

REGISTRATION NUMBER: G62/34719/2019

SUPERVISOR: DR. KENNETH WAYNE MUTUMA

NOVEMBER, 2023

DECLARATION

I, **CICILY M. MUIRURI**, declare that this research project is my original work, submitted in partial fulfilment of the Master of Laws (L.L.M) program at the University of Nairobi School of Law. I confirm that this research paper has not been offered for award of credit to this or any other University for examination. That the articles, papers, references to text, journals among others have been recognised in full.

Signature: .... **Date: 20TH NOVEMBER, 2023**

CICILY MUTHONI MUIRURI

REGISTRATION NUMBER: G62/34719/2019

Signature: …………………………………... **Date: 21ST NOVEMBER, 2023**

SUPERVISOR

DR. KENNETH WAYNE MUTUMA

DEDICATION

To my friend, **Larry Liza,** I appreciate you very much and thank you for believing in me and supporting my academic pursuit from day one. My family and friends, you have prayed with me, provided financial support and encouragement to my quest for advanced knowledge and education.

ACKNOWLEDGEMENT

My sincere gratitude to the Lord God Almighty for the opportunity to pursue this Master's degree programme at a time like this and bring forth impact to the field of law, the society and the world at large. I proudly credit my teacher, Dr. Kenneth Wayne Mutuma for his dedication and time during this process and continuous inspiration. All the countless guidance, information and insights, corrections and clarifications that I received from Mwalimu are highly appreciated. Finally, I extend appreciation to my fellow research students and colleagues with whom I learnt from deeply, exchanged information and ideas during the thesis writing process. The truth telling with love has resulted in the successful completion of my research and the unending desire to always engage and learn.

TABLE OF CASES

J.S.K (Cargo) Limited V Kenya Airways Limited [2008] eKLR

Nakumatt Holdings Limited v Junction limited [2017] eKLR

Republic v. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others [2013] eKLR

Primrose Management Limited & 3 others v Nakumatt Holdings Limited & another [2018] eKLR.

Succession Cause No. 92 0f 2011, eKLR

NSSF v. Ali Khan Holdings [CC NO. 268 OF 2004].

Nyali Limited v. Attorney General of Kenya [1955] 1 All ER. 646.

TABLE OF STATUTES

The Constitution of Kenya, 2010, Laws of Kenya
The Companies Act, No. 17 of 2015, Laws of Kenya
Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 Code
Kenya's Corporate Governance Practices Code, 2015
Capital Markets Authority Act, Chapter 485A
Insolvency Act No. 18 of 2015, Laws of Kenya

ABBREVIATION

AFBE- Association for family Business Enterprise in Kenya

BOD- Board of Directors

CG- Corporate Governance

CGC- Corporate Governance Code

FOE- Family Owned Enterprise

GDP- Gross Domestic Product

GRI- Global Reporting Initiative

IFC- International Financial Corporation

PWC-PricewaterhouseCoopers

KPMG- Klynveld Peat Marwick Goerdeler

ABSTRACT

This research project examines the utility of corporate governance as a tool for sustainability in family-owned enterprises. It outlines and discusses in detail how the key principles and best practices of corporate governance can be leveraged to guarantee lengthy lifespans in family-owned enterprises in Kenya, which are instrumental to the economy. To this end, it also looks into the roles of various institutions responsible for monitoring and enforcing compliance with proper governance systems such as the courts, Registrar of Companies, the Institute for Family Business and the Association of Family Business Enterprises amongst others. The project is based in Kenya and it focuses on the post-independence period with a keen interest on the years between 2007 and 2022 where significant changes in the law happened such as the enactment of the current Companies Act. Although some family-owned enterprises have a great record of success in Kenya, the recent wave of collapses among companies such as Nakumatt, Tuskys and the Akamba Bus Company call for an investigation as to how the life expectancy of family businesses can be increased beyond the 2nd and 3rd generations. This research project argues that the entrenching of practices and principles of corporate governance can be a vital tool for sustainability in these companies. The relevant principles include accountability, fairness, transparency, and responsibility. This project employs doctrinal research methodology to unearth critical answers to legal questions surrounding the sustainability of family-owned businesses. Additionally, it utilises the case study methodology and reviews some of the best practices to identify the common pitfalls that executives should avoid when running family enterprises especially from a corporate governance perspective. The implications of this research project are broad as it adds to the existing local literature and shapes the discussion on corporate governance within family-owned enterprises in a positive direction. The project draws key principles and best practices from jurisdictions such as United Kingdom and South Africa which are potentially beneficial in improving corporate governance situations in Kenya if applied contextually. Lastly, the project is likely to contribute positively towards diversified ownership, management and control in the running of family-owned enterprises.

TABLE OF CONTENTS

DECLARATION ii

DEDICATION iii

ACKNOWLEDGEMENT iv

TABLE OF CASES v

J.S.K (Cargo) Limited V Kenya Airways Limited [2008] eKLR v

Nakumatt Holdings Limited v Junction limited [2017] eKLR v

Republic v. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others [2013] elk v

Primrose Management Limited & 3 others v Nakumatt Holdings Limited & another [2018] eKLR v

Succession Cause No. 92 0f 2011, eKLR v

NSSF v. Ali Khan Holdings [CC NO. 268 OF 2004]. v

Nyali Limited v. A.G of Kenya [1955] 1 All ER. 646. v

TABLE OF STATUTES vi

The Constitution of Kenya, 2010, Laws of Kenya vi

The Companies Act, No. 17 of 2015, Laws of Kenya vi

Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 Code vi

Kenya's Corporate Governance Practices Code, 2015 vi

Capital Markets Authority Act, Chapter 485A vi

Insolvency Act No. 18 of 2015, Laws of Kenya vi

ABBREVIATION vii

AFBE- Association for family Business Enterprise in Kenya vii

BOD- Board of Directors vii

CG- Corporate Governance vii

CGC- Corporate Governance Code vii

GDP- Gross Domestic Product vii

GRI- Global Reporting Initiative vii

IFC- International Financial Corporation vii

PWC-PricewaterhouseCoopers vii

ABSTRACT viii

CHAPTER ONE: INTRODUCTION 4

1.1 Background of the study 4

1.2 Statement of the Problem 8

1.3 Research Objectives 8

1.4. Research Questions ... 9
1.5 The Hypothesis ... 9
1.6. Theoretical Framework ... 9
1.6.1 Agency Theory ... 9
1.6.2 Stewardship Theory ... 11
1.6.3 Stakeholder Theory ... 12
1.7 Justification of Study ... 13
1.8 Research Methodology ... 14
1.9 Limitations ... 15
1.10 Chapter Breakdown ... 15
Chapter One: Introduction ... 15
Chapter Two: Literature Review ... 16
Chapter Three: History, Nature of family-owned enterprises, Legal and Institutional Framework ... 16
Chapter Four: The Legal and Institutional Gaps ... 16
Chapter Five: Enforcement and Compliance with best Corporate Governance practices for South Africa and United Kingdom: Lessons for Kenya ... 16
Chapter Six: Conclusions and Recommendations ... 16
CHAPTER TWO: LITERATURE REVIEW ... 17
2.1 Introduction ... 17
2.2 Family-owned enterprises ... 17
2.3 Family-owned enterprises and sustainability ... 19
2.4 Corporate governance in family-owned enterprises ... 19
2.5 Kenya Literature on Corporate Governance Best Practice for family-owned enterprises 22
2.6 Conclusion ... 23
CHAPTER THREE: THE HISTORY, NATURE AND REGULATORY GOVERNANCE FRAMEWORK FOR FAMILY-OWNED ENTERPRISES IN KENYA ... 25
3.1 Introduction ... 25
3.2. History and Nature of Family-Owned Enterprises in the World ... 25
3.3 History of Family-Owned Enterprises in Kenya ... 26
3.3.1 Before Independence ... 26
3.3.2 During Independence ... 28
3.3.3 Post-independence ... 28
3.3.4 The Growth of Corporate Governance for Family-Owned Enterprises in Kenya ... 29
3.3.5 Case Studies ... 30
3.3.5.1 Nakumatt Holdings Limited ... 30
3.3.5.2 Akamba Bus Company ... 33

3.3.5.3 Bidco Africa 35
3.3.5.3 Naivas Limited 36
3.3.6 Legal, Regulatory and Institutional Framework of Corporate Governance for Family-Owned Enterprises 40
3.3.6.3 Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 47
3.3.6.4 Code of Corporate Governance in Regulated Industry 51
3.3.6.5 Code of Corporate Governance for Private Companies 53
3.3.6.6 The Institutional Framework of Corporate Governance in Kenya 56
CHAPTER FOUR: LEGAL AND INSTITUTIONAL GOVERNANCE GAPS FOR FAMILY-OWNED ENTERPRISES 65
4.1 Introduction 65
4.2 Corporate Governance Best Practices 65
4.3 Components of Good Corporate Governance 66
4.4 Kenya Corporate Governance 67
4.5 Corporate Governance for Family-Owned Enterprises 68
4.6 Gaps in the Corporate Governance Legal and Institutional Framework 70
4.6.1 Legal Framework Shortcomings 71
4.6.2. Institutional and Supervisory Framework Shortcomings 72
CHAPTER FIVE: ENFORCEMENT AND CORPORATE GOVERNANCE COMPLIANCE IN FAMILY-OWNED ENTERPRISES FOR SOUTH AFRICA AND UNITED KINGDOM: LESSONS FOR KENYA 74
5.1 Introduction 74
5.2 South Africa 75
5.2.1 South Africa Corporate Governance Framework 75
5.2.2 South Africa family-owned enterprises legal framework 78
5.2.3 Lessons for Kenya Family-Owned Enterprises 80
5.3 United Kingdom 83
5.3.1 United Kingdom Corporate Governance Framework 83
Code of Corporate Governance for UK Family Firms 91
The Wates Corporate Governance Principles, 2018 92
5.4 Lessons for Kenya 93
CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS 97
6.1 Introduction 97
6.2 Analysis of the Hypothesis 97
6.3. Summary of findings and conclusions 98
6.4 Recommendations 102

5.3.1 Short-Term Recommendations 102
5.3.2 Medium-Term Recommendations 105
BIBLIOGRAPHY 108
Books 108
Articles and Journals 108
Reports 110
Theses .... **Error! Bookmark not defined.**15
Websites 11116

CHAPTER ONE: INTRODUCTION

1.1 Background of the study

Family-owned enterprises/firms are highly significant to the global economy. They are projected to account for over 70 per cent of global gross domestic product.[1] In recent times, however Kenya has witnessed increased vulnerability among some of the most successful of its family-owned firms. Warren Buffet once remarked that *"vulnerability among businesses is evident primarily during or after a financial crisis…"*[2] Nowhere has this business reality manifested like in Kenya through family firms such as Nakumatt, Tuskys and the Akamba Bus Company among others. The decline and ultimate exposure of these firms is attributable to a diverse range of reasons with the primary one being poor governance structures.

A wide range of scholars have provided diverse definitions of what a family-owned business embodies. However, the common point of convergence is that the definition includes aspects of the "family member ownership" and "family level management".[3] Notably, the design of this research project is highly persuaded by Louise Kelly, Nicholas Athanassiou and William Crittenden's description which conceptualizes a family-owned business as *"that with a substantial private ownership and eminent family participation in the controlling of the business."*[4]

Ownership is structured to mean full equity or the possession of dominance in regular operations of a business with the expectation of preserving governance within the family set-up and consequently passing the management to future generations.[5] This brings comfort by creating an autonomous environment which presents the possibility for families to interpret achievement on their own terms beyond "profitability and perhaps based on their personal values".[6] These kinds' of practices within business establishments are among the long-

[1] King, David R., Olimpia Meglio, Luis Gomez-Mejia, Florian Bauer, and Alfredo De Massis. "Family business restructuring: A review and research agenda." *Journal of Management Studies* 59, no. 1 (2022): 197-235.
[2] Dissanaike and Gishan, Ranadeva. "Why do unsuccessful companies survive? 2000–2008." *Business History Review* 96, no. 3 (2022): 615-642.
[3] Hennart, Jean-François, Antonio Majocchi, and Emanuele Forlani. "The myth of the stay-at-home family firm: How family-managed SMEs can overcome their internationalization limitations." *Journal of International Business Studies* 50 (2019): 758-782.
[4] Louise M. Kelly, Nicholas Athanassiou & William F. Crittenden, "Founder Centrality and Strategic Behaviour in the Family-Owned Firm", Entrepreneurship Theory & Practice, *Baylor University* (2000) 28.
[5] Ibid 1.
[6] Daniel Denison, "Culture in Family-Owned Enterprises: Recognizing and Leveraging Unique Strengths", (2004) *Family Business Review* 63.

standing methods of business administration.[7] Their applicability in family firms manifest not just in start-ups but also in average and big firms hence featuring in all sectors of the economy where they have an impact in employment and income creation as well as wealth accumulation[8].

It is significant to note that in Kenya, approximately 70% of the start-ups and average enterprises (SMEs) are family businesses that create around 70% of jobs in the country, to over 60% of the labour force hence contributing 31.4% to Gross Domestic Product (GDP).[9] The foregoing data indicate that family-owned enterprises are among the major contributors to the economic sustainability in Kenya. These enterprises are crucial determinants of the social environment, economic and politics of a country hence necessary to strengthen their governance structures for sustainability purposes.[10]

While the Corporate governance principles are already coded in several legal frameworks within the country, their direct applicability and implementation to family enterprises is minimal. This is not say that there are no family firms that have achieved sustainability and significant levels of success in the past. On the contrary, there exist firms such as Naivas Kenya Limited, Chandaria Industries and Bidco Africa which have exhibited admirable sustainability over the years.[11] The common thread in the success of these companies is the seriousness that has been placed in their governance cultures over the years. The contrasting picture on matters corporate governance displayed by failed family companies like Nakumatt, Tuskys and the Akamba Bus Company call for a serious discourse on the laws and an evaluation of how the current implementation deficit in Kenya can be cured.[12]

The term corporate governance has varied definitions but one that captures its essence is its definition as the procedure through which corporations are placed under strict accountability

---

[7] Carl Osunde, "Family Businesses Impact on the Economy", Journal of Business & Financial Affairs, (2017), *Volume 6, Issue 1*, 1.
[8] Andrea Colli & Mary Rose, "Family Business" Chapter 9, 194
[9] "Stronger Together: Private Equity Offers Route to Growth for Businesses That Are Prepared to Cede Some Ownership Control", East Africa's Family-Owned Business Landscape, Asoko Insight, Pg. 14 <file:///C:/Users/np/Downloads/FOB_Book_Digital_2020.pdf> Accessed last on April 16, 2021.
[10] R Kaur, "Corporate Governance in Family Businesses -A Review" (2019) XI issue 5, Pacific Business Review International, 131.
[11] Musyoka, C. (2022) *Good luck with Naivas, but bolster governance*, *Business Daily*. Available at: https://www.businessdailyafrica.com/bd/opinion-analysis/ideas-debate/good-luck-with-naivas-but-bolster-governance-3875502 (Accessed: 01 October 2023).
[12] Ibid

for their actions and decisions through the code of checks and balances.[13] Further, Corporate governance is predominantly concerned with effective company operations, improved access to capital, risk mitigation, checks and balances in the management of the business to avoid fraud and mismanagement as well as guidelines on succession planning in the interest of the future generations. To achieve the foregoing, corporate governance promotes the principles of responsibility and transparency, accountability and fairness within the leadership structures of the businesses. This research project indicates that corporations, parastatals and some businesses in Kenya are embracing corporate governance best practices as a means of increasing the culture of accountability, responsibility and integrity among the directors and managers of organisations.[14] Ultimately, this is aimed at building business value and making profits in the interest of investors and shareholders leading to progressive performance and a sustainable business.[15]

Corporate governance in Kenya does not operate in vacuum. It is underpinned in legal frameworks such as the Companies Act 2015, for example, which codifies the roles of directors hence ensuring that companies are managed properly and in an efficient manner. Equally, the Capital Markets Act[16] outlines compliance guidelines for companies that trade in the Nairobi Securities Exchange (NSE).[17] Similarly, companies are encouraged to promote good governance and responsible stewardship in the quest for sustainable success guided by the Stewardship Code of Corporate Governance and the Code of Corporate Governance Practices for Issuers of Securities to the Public.[18]

The nature of family businesses makes it difficult to differentiate and separate ownership from management.[19] The functions carried out by family members in both capacities make it extremely challenging especially from a corporate governance perspective.[20] In instances where family-owned enterprises have boards of management, majority of the board members

---

[13] Benjamin Mwanzia, "Corporate Governance Practices in Developing Countries:Case for Kenya", (2011) International Journal of Business Administration, Vol. 2, 14

[14] Cynthia K. Njeri, "Treatment of Family Owned Companies by Existing Corporate Governance Framework in Kenya: Case for Review", (2017),University of Nairobi, 5

[15] Ibid

[16] Chapter 485A.

[17] Capital Markets Authority,"Report on State of Corporate Governance of Issuers of Securities to the Republic of Kenya", (2020).

[18] 2015 (the Code).

[19] Berrone, Pascual, and Marc van Essen. "Impact of informal institutions on the prevalence, strategy, and performance of family firms: A meta-analysis." *Journal of International Business Studies* (2020): 1-25.

[20] Ibid

and shareholders are family members.[21] It is such business models that hinder risk management and diminish the value of corporate ideals such as internal controls, accountability, disclosure and transparency for there is a lot of secrecy. These challenges lead to lack of diversified leadership in management, hinder effective governance to affect business longevity over generations.[22]

Currently, family-owned enterprises in Kenya have diversified their portfolio and considerably increased their economic and financial competence while remaining the largest output providers of goods and services and employers in the Country. However, their governance and management structures have remained traditional, commonly referred to as "one man show" type of management that is equally basic and increasingly proving difficult to handle the needs and challenges accruing to family-owned businesses in the modern-day economy.[23]

A survey on global family business conducted by Deloitte East Africa suggest that less than 30% of family owned enterprises, live only up to the third generation of family ownership.[24] This trend brings attention to the fragile nature and capability of the managements to spur the companies head after founder's handover.[25] It also draws attention as to whether there exist governance structures in place that ought to ensure businesses progress on well.[26] The survey concludes that family businesses are not focused on implementing and complying with best practice governance structures but on maximising profits. In the end, they miss out on tenets that are essential for their growth, employment creation, and economic contribution for societal development, sustainability and longevity.[27]

This project is as well focused on highlighting how adopting the principles of corporate governance has influence on the success and survival rate of family-owned enterprises. To this extent, it draws examples of how good corporate governance best practices such as diversified ownership and control, unitary board structures, separation of chief executive

---

[21] Ibid
[22] A Nixha, A Hashani, L Abdixhiku and S Mustafa, "Corporate Governance in Family-Owned Businesses in Kosovo" (2015) The Centre for International Private Enterprise (CIPE) Washington D.C, Riinvest Institute, 12.
[23] Deloitte Insight Publication, "Long Term Goals Meet Short-Term Drive", (2019) Global Family Business Survey, 2.
[24] A Deloitte Insight Publication, "Long Term Goals Meet Short-Term Drive", (2019) Global Family Business Survey, 2.
[25] Ibid
[26]Ibid .
[27] PWC, "Family Business Corporate Governance Series; CEO Succession Planning, June (2015)

officer (CEO)/founder duality and the maintenance of good family relations can create value, maximize profits and manage markets risks while guaranteeing sustainability of the corporations.[28] Further, it is evident that a robust corporate governance framework for family-owned enterprises not only leads to diversified leadership but also enhances transparency and accountability in management, contributes to better business performance as processes and risk management is observed, have a positive impact on the related economic units such as wholesaler, distributors, business partners and consumers while benefiting the country's economy as whole.[29]

1.2 Statement of the Problem

One of the defining features of the most successful companies around the world is the ability to embrace the corporate governance principles in their structures and decision-making procedures. In such companies, board operations, stakeholder relations, accountability, transparency, risk management, internal controls, fairness and disclosures comprise traits that are treated with utmost seriousness over the course of management. The recent collapses of big family firms in Kenya are, however, a sign that most of these enterprises do not place significant consideration in adopting corporate governance principles. This grim reality is aggravated by the fact that the prevailing legal framework on corporate governance is not strictly applicable to family-owned enterprises. This is aggravated by lack of corporate governance entrenchment by institutions such as the registrar of companies owing to their limited legal powers.

1.3 Research Objectives

The overall objective of this research project is to promote the enforcement of corporate governance principles in family-owned enterprises and to address the gaps in law that exclude the enterprises from the purview of the current legal framework.

Other objectives of the research include:

1. To recommend for the creation of a legal statutory body to guarantee family-owned enterprises comply with existing corporate governance laws and principles.

---

[28] OECD, "OECD Corporate Governance Factbook", 2019, accessed on <http://www.oecd.org/corporate/corporate-governance-factbook.htm> , accessed on 23/11/2022

[29] David Yermack, "Corporate Governance and Blockchains" Review of Finance, Vol 21,Issue 1 March 2017, 7–31; Published by Oxford University Press on behalf of the European Finance Association Advance Access, 10 January, 2017< https://doi.org/10.1093/rof/rfw074>

2. To analyse corporate governance best practices especially in family-owned firms from the jurisdictions of United Kingdom and South Africa.
3. To entrench principles of corporate governance in family-owned enterprises.
4. To review key pieces of literature on the principles of corporate governance and their connections to the history and unique nature of family-owned enterprises.

1.4. The Research Questions

The research project provides answers to below questions: -

1. How can the legal enforcement challenge be solved to entrench effective corporate governance in family-owned enterprises?
2. What are the essential principles of corporate governance?
3. What lessons and best practices can Kenya learn from countries such as Republic of South Africa and the United Kingdom to elevate the adoption of corporate governance in its family firms?
4. What is the effect of establishing a new statutory body to oversee the implementation of corporate governance in family-owned enterprises within Kenya?
5. What is the history and unique nature of Kenya's family firms?

1.5 Hypothesis

Research project will prove the hypothesis that:-

1. Narrowing gaps in the legal implementation and compliance of principles of corporate governance within family-owned enterprises is a key step in guaranteeing them sustainability.

1.6. Theoretical Framework

Adoption of best practices in Corporate governance leads to value creation and ultimately to business success in a sustainable manner. This is consequentially beneficial to both the business and its stakeholders as stipulated by different arguments. This research project relies on the stewardship theory, stakeholder theory and agency theory to prove the instrumentality of good corporate governance practices on the sustainability of family-owned enterprises.

1.6.1 Agency Theory

Agency theory explains and explores the relationship between two cooperative parties constituting a principal and an agent to whom responsibilities are delegated.[30] This theory is categorised as a basic corporate governance concept as it highlights the purpose to which a

---

[30] Schillemans and Karl Hagen. "Trust and verification: Balancing agency and stewardship theory in the governance of agencies." *International Public Management Journal* 23, no. 5 (2020): 650-676.

business exists and whom it ultimately benefits. In principle, this approach elaborates the connection among business owners (shareholders) and directors managing the business.[31]

Jensens and Meckling (1976), are primary proponents of the agency theory, and they describe it as a treaty where the business owner (principal) employs a representative to oversee and manage services on owner's behalf.[32] The research resolves that the formentioned definition properly describes the concept of diversified ownership and control in the day to day activities of running the firm.

This theory is critical to the running of companies and particularly family-owned enterprises because of its prominence on the relationship and responsibilities among shareholders and directors.[33] The theory implies that businesses ought to embrace the concept of separate ownership and control. This means that directors should act as agents of the shareholders by controlling family companies and managing the same. In essence, the engagement of directors as agents to run companies should encourage business growth and promote separation of ownership and control by embracing diversified skills, knowledge and experience.[34] Moreover, agency theory is important as it advances that businesses exist to maximize shareholders' wealth as owners of the business in a sustainable manner. In addition, it encourages adoption of unitary board governance model as an important factor of best corporate governance practice that advances accountability as well as transparency. Agency theory easily illuminates the principles such as accountability, equality and transparency as best corporate governance practices to adopt.[35] This is possible not only because directors have certain duties such as the exercise of reasonable care and skill imposed on them to that regard but also because they are accountable to shareholders for every decision that they make. This preserves integrity and encourages the directors to conduct board operations in fair, open, accountable and transparent ways.

Based on the foregoing, the agency theory has been chosen for this research project. It will also serve to explain why it is essential for family-owned enterprises to be brought within the

[31] Bob Tricker, "*Corporate Governance: Principles, Policies and Practices"* (1st edn. Oxford University Press, 2015).
[32] Michael C. Jensen, "*Theory of the Firm": "Managerial Behaviour, Agency Costs and Ownership Structure"*, Journal of Financial Economics 3 (1976).
[33] Ibid
[34] Ibid.
[35] Ibid

express purview of corporate governance frameworks so that concepts such as diversified management and control are easily embraced. Under agency theory, directors are better placed to balance both interests and power between the business and shareholders as they identify and manage risks, create internal financial controls, act with integrity to supress abuse of shareholders while making profits to successfully create value for the business and shareholders in a sustainable manner.[36]

Despite the agency theory being an imported concept, it highly resonates with local African realities in Kenya because of the similarities that exist between Kenyan corporations and countries such as the United Kingdom where the theory has prevailed for ages. Some of the similar realities that explain the reliance of the theory in this research project include the existence of similar company structures, the prevalence of family enterprises in both jurisdictions and the actuality that Kenyan company law is largely borrowed from the common law jurisdiction.[37]

1.6.2 Stewardship Theory

A steward can be defined as *"one who takes on the responsibility of caring for something on behalf of another person or group of people".*[38] The stewardship theory of corporate governance implies that directors have the responsibility of caring for companies on behalf of shareholders.[39] Despite not being owners of the companies, they ought to embody principles such as transparency and accountability when executing their functions.[40]

The development of the stewardship theory came shortly after the agency theory was crystallised. Donaldson and David (1989) state that it is rightly derived from the word steward to mean "one who looks after".[41] In the context of this research project, the stewardship theory is highly significant not only because of its applicability within the Kenyan corporate context but also because it can be utilised as an incentive of encouraging directors to look after the property, assets and finances of a family-owned business on behalf

---

[36] Ibid.
[37] Muturi Wachira. "Corporate governance and risk disclosures: An empirical study of listed companies in Kenya". (2019).
[38] Menyah, K. "Stewardship Theory. In book: Encyclopaedia of Corporate Social Responsibility." *Doi* 10 (2013): 978-3.
[39] Ibid
[40] Ibid
[41] H. Kent Baker; "*Corporate Governance, A synthesis of Theory, Research and Practice",* (8th edn, John Wiley & Sons, 2010).

of the shareholders in a responsible and sustainable manner. The theory explains the importance of directors within corporate governance structure especially as they execute their codified duties in the best interest of the businesses to guarantee them success.[42]

Furthermore, the theory highlights need for the directors to embrace business values and ideologies as stewards to achieve the set objectives of companies.[43] Directors are regarded as forefront implementers of good corporate governance practices because of the fiduciary duty that they owe shareholders. Through the stewardship theory, they are certainly poised to manage risks well, formulate internal financial controls properly and ensure that audits are conducted for purposes of reporting to the shareholders.[44] Moreover, the theory recommends that all classes of shareholders and investors should possess stewardship mentality as an important skill to run the business. A good example is how the 2017 Stewardship Code for Listed Companies guides institutional investors to create customer confidence and increase trust as a measure act as good agents.[45]

1.6.3 Stakeholder Theory

Family firms, like all companies, exist in an ecosystem of different entities. These entities can be classified as the stakeholders to such companies because of the different interests that they have in the enterprises.[46] This explains why the stakeholder theory is very important in corporate governance and especially from a Kenyan perspective where companies form a key part of communities. The directors of family corporations have no option but ensure that they embrace the principles of corporate governance to enhance their sustainability for the benefit of existing and prospective stakeholders.

According to Edward Freeman, the stakeholder approach is primarily concerned with stakeholders such employees, customers, suppliers, the government, investors, and the community at large where the business operates.[47] This is in addition to the shareholders

---

[42]Ibid.
[43] Ibid
[44] Ibid.
[45] Cossin et al.,"P*ractical perspective: Stewardship fostering responsible long-term, wealth creation"*; IMD global board center (2015) available at file:///C:/Users/Downloads/stewardship_2015.pdf accessed on 16/11/2022.
[46] Freeman, R. Edward, Jeffrey S. Harrison, Andrew C. Wicks, Bidhan L. Parmar, and Simone de Colle. "The problems that stakeholder theory tries to solve." In *R. Edward Freeman's Works on Stakeholder Theory and Business Ethics*, pp. 3-27. Cham: Springer International Publishing, 2023.
[47] Ibid

catered for under the agency and stewardship theories. The theory emphasises that businesses owe a responsibility to a larger group of persons who are not shareholders but are indirectly connected to the business through the various roles that they play. Stakeholders are concerned with the performance, success and sustainability of the business equal to that of shareholders.[48]

Edward suggests that the theory is focused on expanding the agency theory question, "*for whose benefit the firm is managed?*"[49] The theory does this by adding another twist to it focused on *"and at whose expense should the business be managed to create value in a sustainable manner?"*[50] The study resolves that this theory is very important for family-owned enterprises for it guides them towards identifying their stakeholders and modes of ensuring stakeholder engagement and that their interests are taken care of. The theory signifies to family-owned enterprises that there exist other parties that are indirectly part and parcel of the family business, and should therefore be considered during decision making processes.[51] In conclusion, family-owned enterprises are challenged to embrace good corporate governance best practices that champion for integrated reporting and compliance to safeguard interests of stakeholders for the benefit and success of the business.

1.7 Justification of Study

Through companies such as Naivas Kenya Limited, Chandaria Industries and Bidco Africa, the impact of successful family-owned enterprises has been witnessed first-hand in Kenya. The benefits that accrue to the economy and trickle to different stakeholders are enormous. It is against this backdrop that this research project is justified. Through the various theories of agency, stakeholder and stewardship, this research will improve corporate governance in family-owned enterprises and pave way for their sustainability over multiple generations. It will reinforce the need for a strong legal enforcement and implementation network to ensure that family-owned enterprises are able to function effectively by employing all the fundamental principles of corporate governance. Additionally, this research project will elaborate on some of the significant principles and practices of corporate governance and their utility to family-owned companies. The research will also influence the law in Kenya by drawing on some of the best practices from the jurisdictions of South Africa and the United

[48] Stieb J, "*Assessing R. Edward Freeman's Stakeholder Theory*" (2009) Journal of Business Ethics; Vol. 87 No.3 <https://www.jstor.org/stable/40294933>accessed on 15/11/2022
[49] Ibid 46.
[50] Ibid
[51] Ibid.

Kingdom. Lastly, it will aid in strengthening the framework for overseeing the application of best principles in family-owned enterprises by recommending for the establishment of a statutory body with the mandate of monitoring and entrenching such practices in the enterprises.

1.8 Research Methodology

This research project uses different research methodologies to achieve its core objectives. The first methodology is doctrinal research approach. Doctrinal legal research refers to a methodology that utilises rigorous evaluation and a creative combination of many doctrinal strands to arrive at a conclusion.[52] The methodology is further concerned with finding the law, analysing it and formulating a logical reasoning behind it hence contributing to consistency and certainty of the law.[53] This research utilises the doctrinal research methodology to investigate the laws on corporate governance, the doctrines behind such laws and their utility in family-owned enterprises in Kenya. To this end, it examines statutes, government policies, books, articles and relevant documents on corporate governance to inform the sustainability of family firm's connection with corporate governance.

This research also uses the case study research methodology to attain its objectives. The case study methodology refers to the approach that allows for multi-faceted exploration of issues using case examples.[54] In this project, case studies are used of not just the most successful family enterprises in Kenya such as Naivas Kenya Limited, Chandaria Industries and Bidco Africa but also of those that have failed such as Nakumatt, Tuskys and Akamba Bus Company. Through the experiences of these entities, the methodology aids in highlighting the significance of corporate governance and its effective implementation in family corporations.

The last research methodology employed by this research project is the review of best practices from other jurisdictions. The utility of this methodology cannot be discount especially because humans and their entities do not exist in isolation.[55] It is thus important to sometimes compare the human experiences from different jurisdictions and adopt some of the

---

[52] Ishwara Bhat. "Doctrinal Legal Research as a Means of Synthesizing Facts and Legal Principles."*Idea and Methods of Legal Research"* (2020): 88-91.

[53] Ibid

[54] Paparini, Sara, Judith Green, Chrysanthi Papoutsi, Jamie Murdoch, Mark Petticrew, Trish Greenhalgh, Benjamin Hanckel, and Sara Shaw. "Case study research for better evaluations of complex interventions: rationale and challenges." *BMC medicine* 18, no. 1 (2020): 1-6.

[55] Zaring, David. "Best practices." *NYUL Rev.* 81 (2006): 294.

best practices then apply them accordingly.[56] The jurisdictions chosen for this research are the United Kingdom and South Africa. South Africa has been chosen because of the similarity to Kenya in relation to factors such as economic realities, political stability, geographical positioning and corporate realities. Most importantly, South Africa has a great history of corporate governance since the year 1994 when it advanced the first Code of Corporate Practices and Conduct to date where its corporations are led by the King IV Report for South Africa 2016.[57] The United Kingdom too has an advanced system of corporate governance that cuts across to family-owned enterprises. The country's corporate governance comprises not just a set of laws such as the Companies Act 2006 but also codes of practice and market guidance. This project explores the two jurisdictions with the aim of drawing relevant best practices that can be utilised by family-enterprises in Kenya.

1.9 Limitations

The research project has a number of limitations that future researchers and current readers ought to be aware of. First of all, the use of the doctrinal research methodology does not stretch to interrogate the influence of certain factors such as politics and economics hence the outcomes of this research may be restricted. Secondly, the case study approach only limits itself to a handful of companies that failed in recent times hence perspectives from way back may not be unearthed. Lastly, the research restricts itself when reviewing corporate governance best practices from different jurisdiction to only two countries namely South Africa and the United Kingdom that resonates with Kenya's and African reality. This implies that the study does not cover other countries that may have gained prominence in corporate governance over the recent years.

1.10 Chapter Breakdown

Chapter One: Introduction

Chapter One covers the introduction. It comprises a detailed analysis of the backdrop of the research, outlines the problem statement, states the hypothesis and includes a justification for the study. Additionally, it discusses the research project objectives, states the research questions, analyses the theoretical framework of the study, discusses the various methodologies used in the research and finally underscores the key limitations of the study.

---

[56] Ibid

[57] Vuuren and Heleen. "The disclosure of corporate governance: a Tick-Box exercise or not. " *International Journal of Business and Management Studies".* 12, no. 1 (2020): 50-65.

Chapter Two: Literature Review

Chapter two deliberates on the literature of principles of corporate governance and how such principles have positively influenced the sustainability of family-owned enterprises. The chapter entails literature from books, journals and articles not only from Kenya but also from other countries where corporate governance has been utilised in companies as a resource for sustainability.

Chapter Three: History, Nature of family-owned enterprises, Legal and Institutional Framework

This chapter looks at the history and the unique nature of family –owned firms in Kenya, the legal and institutional framework in supporting family-owned enterprises to adopt corporate governance best practices. To achieve this, the study focuses on Constitution of Kenya, the Companies Act 2015, the South African King IV Report 2016 and the United Kingdom Code of Corporate Governance among others.

Chapter Four: The Legal and Institutional Gaps

Chapter Four addresses the legal and institutional structures that deal with corporate governance compliance practices in Kenya in particular the registrar of companies, the Institute of Family Business and the Courts to identify their shortcomings in contributing to corporate governance best practices for family owned enterprise.

Chapter Five: Enforcement and Compliance with best Corporate Governance practices for South Africa and United Kingdom: Lessons for Kenya

Chapter five investigates legal and institutional frameworks that deal with best corporate governance practices in South Africa and the United Kingdom in order to report on lessons to be learnt and which may be applied in Kenya to ensure adoption with corporate governance best practices and compliance in the running of family enterprises to guarantee value creation, success and sustainability. Both Countries have strict corporate governance frameworks for family-owned enterprises known regionally and across the world.

Chapter Six: Conclusions and Recommendations

Finally, chapter six provides the final observations and outlines the research's primary findings and proposes appropriate recommendations. It is suggested that Kenya's family-owned enterprises should open up to adopt corporate governance best practices to sufficiently address the issues observed in this study.

CHAPTER TWO: LITERATURE REVIEW

2.1 Introduction

This research project employs the systematic literature review. Systematic literature review is a fundamental research tool that helps in the examination of data and findings of other authors in relation to a specified research question.[58] It is applied in this research to draw on the significant contributions of different authors and assess their relevance in regard to the objectives of the research project. The literature review is shaped by numerous factors. At the core of this research project are numerous relevant concepts that ought to be investigated further and understood fully before final recommendations can be made. These concepts include the best practices around corporate governance both in Kenya and beyond its borders, the significance of family-owned enterprises and the connection that subsists between corporate governance and the sustainability of such enterprises. To this extent, the chapter entails a review of relevant literary works on, among others, the key precepts of corporate governance. The review is based off numerous literary materials. Not only does it rely on ideas from books and journals but also a wide range of articles authored on areas such corporate histories. While analysing the practices surrounding good corporate governance, the collected works looks into the purpose of adoption, implementation, reporting and compliance with standard practices particularly on the significance of ideas like the divorce of management from control to ultimately create value in ways that positively impact family-owned firms in a sustainable manner.

2.2 Family-owned enterprises

Andrea Colli and Mary Rose, while discussing contemporary family firm, theorise that most family-owned enterprises are destined for short lives, whether small, medium or large businesses.[59] The authors acknowledge the significant importance of large firms particularly across the globe.[60] They state that family firms' potential for growth and sustainability are likely to be influenced by the provisions of the legal system as well as market dynamics. The authors list out property and inheritance laws including tax law as some of the forces influencing the family firm strategy where success and sustainability of family businesses is concerned. Mary Rose opines that the intimate family intentions contribute to the business

[58] Xiao, Yu, and Maria Watson. "Guidance on conducting a systematic literature review." *Journal of planning education and research* 39, no. 1 (2019): 93-112.

[59] Andrea Colli & Mary Rose, "Family Business" Chapter 9, 194

[60] Ibid

strategies that affect how family businesses are run and controlled.[61] Additionally, the authors opine that loyalty to family members in a family-run business assumedly leads to altruism by the parents towards their offspring's. Though family businesses are influenced by their external environment, it is family members who build the culture of their firm so much so, linked to their leaders. Further, the authors conclude that family and family business prosperity depend on other factors too such as the founder/owner social networks, their knowledge and expertise.[62] The authors mention that there exist powerful family business groups in the world, that have been cited as opposing agency theory reforms towards adoption of corporate governance best practices among family-owned businesses.[63]

Moche records that family-owned enterprises are the predominant ownership models of businesses around the world hence have a massive influence on the global economy.[64] He, however, laments the lack of a proper, universal and uniform definition that can be used to understand what constitutes a family-owned enterprise. He underscores that previous works of research have estimated that family-owned enterprises add over 70% to the global gross domestic product.[65] Importantly, his research aids in understanding the diverse classifications of owners in a family business. He stipulates that there exists a category where an owner occupies three concurrent roles as a family member, an owner and a manager.[66] He also outlines a second category which comprises an owner who is not active in governance. Last, he depicts a category that comprises outsiders as board of directors.

Curado, Carla and Mota argue that from a historical perspective, family firms have always consisted of both small and middle businesses as well as big companies.[67] They point out that the economic impacts of family firms are significant to nations as they lead to long-term stability and promote a sense of high economic commitment in the communities that they exist in. They observe further that family firms are demonstrative of the responsibility of business owners since they feel that the firms depict family values.[68] It is notable that key references from previous authors seeks to indicate the disparity in instance where members of

[61] Andrea Colli, "Family Business"(2009) Oxford Handbook of Business History Chapter 9.7, (Pp. 200-201)
[62] Ibid
[63] Ibid
[64] Moche, Stephen W. "Firm performance of listed family firms in Kenya." PhD diss., 2014.
[65] Ibid
[66] Ibid
[67] Curado, Carla, and António Mota. "A systematic literature review on sustainability in family firms." *Sustainability* 13, no. 7 (2021): 3824.
[68] Ibid

family are involved in the running and operations of the business as compared to instances where diversified ownership and management permits externals to run and operate business.[69]

2.3 Family-owned enterprises and sustainability

Alan Dignam and Michael Galanis suggest that most of the founders of family-owned enterprises are keen to witness the transition of their businesses to the next generation.[70] However, the authors estimate that 70% of them will not survive into the second generation due to poor or lack of governance structures, while 90% will fail to reach the third generation due to mismanagement of the business.[71] Therefore, the authors advance that it is crucial that family-owned enterprises establish governance models that accommodate the principles of good governance to advance the connection between family business ownership and management models and the sustainability of the enterprises beyond first generation[72].

Curado, Carla and Mota point out that the rising development of sustainability practices has elevated the need to think of ways through which family-owned enterprises can be positively influenced to increase their lifespan.[73] It is their argument that there exist several factors in family-owned enterprises universally which ought to be considered against the backdrop of sustainability. These include family values, personal interest and management systems. Additionally, they observe that the founder's participation in decision making and a firm's culture may be highly influential in the trajectories that are taken by family-owned enterprises.[74] To explain why sustainability is a key issue in family firms, they underscore that families are rooted in a community and are committed to maintaining good reputations hence the reason why they are inclined to adopt sustainability practices that would be beneficial to firms for long periods.[75]

2.4 Corporate governance in family-owned enterprises

---

[69] Ibid
[70] Dignam, Alan, and Michael Galanis. *The globalization of corporate governance*. Routledge, 2016.
[71] Ibid
[72] A Deloitte Insight Publication, “Long Term Goals Meet Short-Term Drive”, (2019) Global Family Business Survey, 2.
[73] Curado, Carla, and António Mota. "A systematic literature review on sustainability in family firms." *Sustainability* 13, no. 7 (2021): 3824.
[74] Ibid
[75] Ibid

Neubauer and Lank pronounce that effective and good corporate governance influences family business positively especially in the areas of succession and strategic planning.[76] The authors list out the advantages of good governance in family-owned enterprises to include the advancement of formal policies that are crucial to the firms, the employment of the right workforce, the infusion of moral responsibility in management and the enhancement of accountability.[77] As a response to why many family businesses lack effective independent boards and frequent family meetings as a good governance practice, they observe that majority of the owners of this businesses do not understand the instrumentality of corporate governance in their ultimate development and sustainability.[78] Additionally, many family-owned businesses lack good models to guide them on how to embrace governance practices.[79] The authors, however, acknowledge that corporate governance in family-owned enterprises is a rather novel subject that has been overlooked for many years by research despite the significance that they have to the global economy.[80] This is explained by the fact that not many works of literature directly discuss the connection between corporate governance and sustainability in family-owned businesses with a view of entrenching the former in the management of the latter organizations.

Neubauer and Lank make an important point in outlining that most family-owned businesses have a governance system that is highly traditional to the extent that there is no control[81], direction[82] and accounting[83] over the businesses' day to day activities outside the family founder/owner. Another key feature observed is that the advanced stages of development focus on, the family founders as ultimate source of authority and decision makers. The board of directors are said to be significant actors in corporate governance, but a board can only discharge governance mandate in close collaboration with members of the family and the top management.[84]

---

[76] Fred Neubauer & Alden G. Lank; "*The Family Business; Its Governance for Sustainability"* (1998) Macmillan
[77] Ibid
[78] Ibid
[79] Ibid .
[80] Ibid
[81] Control defined as oversight of management performance and monitoring of the achievements and objectives.
[82] Directing means being part of strategic decision making.
[83]Accounting refers to reporting to the legitimate demands for accountability on the part of the firms to shareholders, employees and stakeholders.
[84] Fred Neubauer & Alden G. Lank; "*The Family Business; Its Governance for Sustainability"* (1998) Macmillan

Despite the obvious governance limitations in most family firms, Neubauer and Lank state that there exist corporate governance areas of importance such as directing and controlling/reporting aspects, that the board ought to concentrate on while engaging with the enterprises. Moreover, making a CEO separate and distinct from the chairperson of the board, developing a business strategy, raising capital and establishing directors' responsibilities go a long way in creating business value and improving sustainability.[85]

In conclusion, the authors opine that the introduction of excellent management systems for family and non-family personnel, training members of the family on principles of corporate governance that ensure fair treatment of employees, engagement in corporate social responsibility reflected in time and money to community projects are some of aspects that contribute to the success of family-owned enterprises beyond second generation. This research appreciates that the authors' keenness on embracing good corporate governance practices within governance structures of family-owned enterprises as a measure of curbing business failures and guaranteeing profit making as well as value creation within family-owned enterprises in a sustainable manner.

Steier, Chrisman and Chua highlight various studies in United Kingdom and South Africa that have enumerated how management models in family-owned enterprises is achieved through group decision, a model known to be cagey and conservative.[86] Generally, an owner of a family business can successfully manage the business. However, the authors hold that to successfully do so and grow a business sustainably, it is important to implement a solid structure of governance that increases sustainability of the business. Additionally, the author's credit good corporate governance practices such as introduction of independent director's leading to separate ownership and control that differentiate ownership and management as important for it is associated with more stable business growth and profit ratio.[87] This research project draws from the authors that most family-owned enterprises are not keen on divorcing management from ownership and diversifying management. That voluntary governance system for family-owned enterprise is not yielding, resulting in the critical review of the family-owned management styles geared towards having family

[85] Ibid.
[86] Lloyd P. Steier, James J. Chrisman and Jess H. Chua, "Governance Challenges in Family Businesses and Business Families" (2015) Baylor University
[87] Ibid

businesses divorce management from ownership and/or diversifying management and leadership for business profit growth and survivability[88].

2.5 Kenya Literature on Corporate Governance Best Practice for family-owned enterprises

Murithi, Muiruri, Waithira and Muturi admit that family-owned enterprises are intrinsic and multidimensional in nature hence proving very difficult to define.[89] They, however, recognize and define them as businesses that own enough equity, for the benefit of family to enable them exert enough control over day-to-day business operations.[90] The authors indicate that the true success and sustainability of a family-owned enterprise across generations, is determined by the founder, who is solely responsible to institute governance structures and succession plans. They draw on the success and sustainability of Indian family-owned enterprises in Kenya to illustrate this fact. Additionally, they acknowledge the importance of close family ties, strong family member relationships and trust as key ingredients of success and sustainability in family-owned enterprises.[91] In their call for corporate governance in family firms, the authors affirm that 96% of the start-ups and average registered businesses in Kenya are family-owned. The sad news is that such enterprises are also characterized by the transition instability between generations as only a third of these business transition successfully to the second generation after the death of the founder/owner while only 10 to 15% pass on to the third generation.[92]

In discussing family businesses challenges, the authors note that they record low business survival rates as only a third of such business, being 30%, live up to the changeover from the founder to the second generation of owner-manager while only a mere 10% succeed to the third generation.[93] In issuing recommendations on corporate governance best practices, the authors state require actions such as the need to establish sustainable governance structures, succession plans, internal financial and risk controls for growth and development of the

---

[88] Davies Adrian. “Best Practice in Corporate Governance:Building Reputation and Sustainable Success” (Republished in 2016) 1 Routledge 2 Park Square, Oxon OX14 4RN 711 Third Avenue, New York, NY 10017, USA.

[89] Muriithi, Samuel Muiruri, Veronicah Waithira, and Muturi Wachira. "Family business founders’ influence on future survival of family businesses." (2016).

[90] Ibid

[91] Ibid, p. 561.

[92] Ibid, p. 563.

[93] Ibid, p.562

business after the founder passes on. However, the author notes that due to family businesses' caginess, most family founders avoid planning as they worry about their "privacy and family aspect" while focusing on family relations-centred governance, thus making it difficult to separate family operations from business operations.[94] In articulating the effect combined ownership and control among family businesses, Samuel and others indicate that a founder-driven family business is heavily dependent on the founder management leadership such that when the founder is temporarily or permanently unable to perform their control and management roles, the business will automatically become fully non-functional without the founder's control and management. Additionally, since family businesses are profit making in nature, their income and wealth creation grows overtime, and they experience high unimaginable growth. However, due to lack of managerial skills, employee management skills, risk management and financial internal control tools, there is massive business failure limiting sustainability and success. To this, the authors recommends that family business adopt a diversified model of governance to on-board persons with managerial and entrepreneurial skills including relevant knowledge to run the business presently and in the future.[95]

The research records that the author's proposals on embracing good corporate governance practice in family run enterprises through a range of mechanisms. These include, among many others, the promotion of separate ownership and control through the on boarding of diversified management teams reporting to a family member CEO, to guarantee business value creation in a sustainable manner.

2.6 Conclusion

Throughout this literature review, the different authors point out that lack of sustainability for family-owned businesses is not encouraging especially in light of their short-lived nature as only a mere 15% transition into the third generation. The authors allude to the lack of internal controls or separation of ownership and management as one of the major contributors to this lack of sustainability. There is, however, an optimistic future for family businesses as the discourse on their preservation increases with each passing day. This research project derives that globally, there is increasing awareness that family-owned enterprise are unique with

[94] Ibid
[95] Ibid, p. 563

generic challenges unlike other forms of enterprises. Notably, the authors referenced in this study opine that there is hope for family-owned enterprises in the journey of embracing good governance practices, for reasons that incoming generation is well and better educated than the former founders, with skills and expertise in business degrees and thus not less entrepreneurial. Additionally, the incoming generation who will be owners of these family enterprises have more access to knowledge, information and research about nature, history and governance models for family-owned enterprises and will leverage on this awareness to increase the value and sustainability for family-owned enterprise. More opportunities have also been created across the borders as there exists comparison knowledge by other states that have incorporated corporate governance best practices for their family-controlled enterprises and therefore, drawing the lessons on the importance of adopting good corporate governance practice, will be easy.

CHAPTER THREE: THE HISTORY, NATURE AND REGULATORY GOVERNANCE FRAMEWORK FOR FAMILY-OWNED ENTERPRISES IN KENYA

3.1 Introduction

Chapter 3 scrutinises unique nature of family-owned enterprises and the existing regulatory governance structure to evaluate its efficacy in protecting the unique nature of family businesses. The adequacy of the legal regulatory framework is also analysed to assess whether it provides for the mandatory adoption of principles of corporate governance within family-owned enterprises as a means of value creation while making profits in a sustainable manner.

Moreover, this chapter while looking at the history of family-owned enterprises and their unique nature examines the legal and institutional regime and its contribution towards adoption of corporate governance best practices. The chapter therefore focuses on legislations and codes that such as the Constitution of Kenya 2010, the Companies Act 2015, Insolvency Act 2015, the South African King IV Report 2016 and a cursory glance at the roles of the Registrar of Companies and courts.

3.2. History and Nature of Family-Owned Enterprises in the World

There exists an extensive history in the world pertaining to the nature of family-owned enterprises. Family-owned enterprises primarily concern “family” which implies that they are privately run and managed for the benefit of families. Historically, decision making in family-owned enterprises has always lied with the owner of the business and other family members. This is evident from Andrea Colli's definition of a family firm to mean "one where control and property are firmly intertwined and family members are involved in both strategic and managerial day-to day decision making".[96] Additionally, the author notes family businesses are formed based on intimate values, culture and successional motives.[97]

---

[96] Andrea Colli, “*The History of Family Business*”, 1850-2000. Cambridge, UK: Cambridge University Press, 114 pp.
[97] Ibid

The author, further underscores that during the industrial revolution and the pre-industrial period, family firms were popular. While referencing Raymond De Roover[98], Andrea Colli mentions that industrious family enterprises existed in various forms such as banks, retail and workshops. Notably, familial partnerships also became common among the merchants of the Adriatic Sea Republic and are still recognized as the backbone of recently industrialized economies and sectors in the world.[99]

David Wise, in articulating the historical context of family enterprises from the period of First World War to date, remarks that nearly all established or start-up companies in the world such as Samsung, Ford and Walmart kick-started as family ventures. However, the sustainability of most have been hampered by universal challenges. An analysis of the history and nature of governance in family firms as reported by a Deloitte's statistical report indicate that there exist a lack of unitary board structure system among 28% of the family businesses and for those with such structures, the insider executive-directors outnumber the outsider's non-executive directors.[100]

3.3 History of Family-Owned Enterprises in Kenya

3.3.1 Before Independence

Baron Lord Hugh Delamere, being the third baron arrived in Africa around late 19th century as a hunter. During his migration to Kenya in 1903, he was accompanied by Florence, his wife and their son. The Delameres settled for the country side in Njoro, a place he named as the Equator farm where he is known for his agricultural business projects that entail numerous ventures such as an attempt at genetic crossbreeding of local breeds of cattle with his New Zealand and Britain purebred cattle and merino sheep to produce resilient productive rears for trade in the agricultural sector in Kenya.[101]

---

[98] De Roover, 1963 (Lane 1944a and 1944b)
[99] Ibid 49
[100] David W. Wise, Family businesses in historic context, Family Business Magazine, Issue (2014) https://www.familybusinessmagazine.com/family-businesses-historic-context-0> Accessed 17th November 2022
[101] Lord Delamere: A story of misfortune, resilience and smile at the end of it (2013) <https://nation.africa/kenya/kenya-50/lord-delamere-a-story-of-misfortune-resilience-and-smile-at-the-end-of-it-925858> Accessed on 17th November 2022

Lord Delamere was also the first settler in Kenya during colonial era, to test cattle nurturing which eventually failed, but he did not stop there. Instead, he offered his Cheshire family home as security and ventured into business of farming wheat on both his lands at Equator farm and Florida Farm in Rongai, Nakuru. This too later failed. A frustrated Delamere would later on acquire a vast estate in Soysambu, Naivasha, which he converted into an agricultural lab. At this point, he engaged the services of a professional wheat breeder, known as G.W Evans assisted by scientists who advanced a resistant rear to Yellow to Black Stem Rust and Stripe Rust. This venture experienced challenges too as the crop did not survive fungal rust. Delamere's business adventurism saw him try out poultry farming, pig and ostrich rearing businesses as he tried to make profits from his family businesses. Further, he ventured into maize and dairy farming trades that endure his legacy to date.[102]

Later on, exactly 100 years ago, Lord Delamere and his fellow settler farmers formed the Kenya Coop Creameries (KCC) in 1922 with the intention of capturing the regional dairy market. According to Delamere and business partners, KCC would close out Africans from directly selling milk to other businesses such as hotels and in the end, the settlers would have exclusive market access. Further, Delamere established the well-known Unga Limited flour mill with the intention to inspire wheat farming within Nakuru County and regionally.[103] Delamere succeeded in making profits from his multiple family business ventures three decades after his first arrival to Kenya in 1903. Nevertheless, Delamere’s means of running his family businesses brough financial challenges to his companies as they plunged deeply in debt thus leading to his bankruptcy which consequently affected his family estate negatively long after he had died in 1931. Currently, the existing succession plan has seen the fifth Baron Delamere take over the affairs of Delamere family businesses.

This research derives that to date, the Delamere family led by Tom Cholmondeley (the grandson) continue to manage the estate of the third baron in whole as they leased out part of their vast lands to hoteliers such as Serena Hotels and continue to manage the Soysambu animal Conservancy to date. In what is viewed as playing their corporate social responsibility role, now encouraged under integrated corporate governance reporting rules enunciated in King IV Report 2016, the Delamere family donated part of their vast land for a local school project, invited their former employees to purchase land out of the available 5,000 acres as

[102] Ibid.
[103] Ibid.

well as allowed Government to compulsorily acquire land for the Nakuru County airstrip project.[104]'

3.3.2 During Independence

After Kenya obtained independence in 1963, the white settlers exited the stage and President Jomo Kenyatta took over. Under his leadership, the Sessional Paper number 1 of 1965 was developed speaking into African socialism and its bid to develop Kenya by introducing free market policies and alleviating poverty.[105] It is notable that the business industry evolved drastically since businesses formerly owned by the white settlers such as Kenya Coop Creameries eventually became parastatals. This implies that they were now owned by the government. Notably, it is during this period that Delamere sold 40% of his shareholding in Unga Limited Company to Kenya Farmers Association (KFA), to allow the company obtain capital in form of loans to expand wheat farming business to the new emerging markets.[106]

The homebased family business elites started emerging in 1980s as Kenya endorsed speedy economic growth by promoting smallholder agricultural production, issued incentives for private industrial investment and encouraged public investment.[107] The elite family business are reported to have developed a keen interest in dairy farming, media and banking hospitality and real estate even as they explore international markets outside Kenya's borders to be known as the "dynasties."[108]

3.3.3 Post-independence

The new elite African business families replaced the white farmers and inherited the State's protection and the attitude of the white settlers and they dominated and monopolized different business sectors from manufacturing, dairy, hotel and hospitality, banks and institutions, service providers and supermarket retail chain store. For example, the Kenyatta family (Brookside Dairy), Asians (Nakumatt Holdings), Indians (manufacturing industry), the Ndegwas (banks and financial institutions) including ordinary Kenya elite business men and women as owners of Tusker Mattresses Limited (Tuskys Supermarket), Naivas Limited

---

[104] Ngigi G; Delameres divide Sh5bn estate in succession plan (2013) <https://www.businessdailyafrica.com/bd/markets/delameres-divide-sh5bn-estate-in-succession-plan-2032694> accessed 17 November 2022

[105] Odada, J. E. O., and A. B. Ayako. "The Impact of structural Adjustment Policies on the Well Being of the Vulnerable Groups in Kenya." (1988).

[106] Ibid

[107] Ibid.

[108] Ibid.

(Naivas retail supermarket), among others.[109] This research project reports that presently, Kenya's economic landscape has been dominated by a group of influential individuals as owners of family-owned enterprises.[110]

3.3.4 The Growth of Corporate Governance for Family-Owned Enterprises in Kenya

Journey to indoctrinating corporate governance practice among Kenya's private companies can be attributed to Private Sector Initiative for Corporate Governance (PSICG). The PSICG formally launched sample code of corporate governance best practice in 1999.[111] The code existed for over a decade and a half until 2015 when the new Companies Act, 2015 was enacted repealing the old Act which lacked express corporate governance practices provision for private companies[112]. The new law is valuable for it scaled up the PSICG's development of corporate governance among private firms for it expressly differentiates public and private firms within its provisions.[113]

A look into the Companies Act, 2015 reveals that it describes a private company as one which is restricted by its articles of association in terms of membership that is limited to fifty (50) only, member's rights on share transfer noting that it excludes invitation to the public as subscribers of debentures or shares of the company.[114] In contrast, the Act states that for public companies, their articles of association are open for public share trade with the company. Further, there is no limitation as to the membership in a public company.[115]Additionally, the Act now provides for "small companies regime" within its provisions, to mean a company whose total net asset value is not more than twenty million (Kshs. 20,000,000/=) or one whose turnover is less than fifty million (Kshs. 50,000,000/=).[116]

---

[109] Nsehe, M. (2023) *Kenya's Ndegwa Family Overtakes Kenyattas, takes center stage as NCBA's top shareholder*, *Billionaires.Africa*. Available at: https://billionaires.africa/2023/05/25/kenyas-ndegwa-family-overtakes-kenyattas-takes-center-stage-as-ncbas-top-shareholder/ (Accessed: 03 October 2023).

[110] Edwin Okoth; "Rise of the Kenyatta family business empire", < https://nation.africa/kenya/news/rise-and-rise-of-the-kenyatta-family-business-empire-139094> Accessed on 17/11/2022

[111] Private Sector Initiative for Corporate Governance: "Principles for Corporate Governance in Kenya", 1999, 6.

[112] Ibid.

[113] Companies Act (No.17 of 2015), 2015, S. 9-10.

[114] Companies Act (No.17 of 2015), 2015, S. 9.

[115] Companies Act (No.17 of 2015), 2015, S. 10.

[116] Companies Act (No.17 of 2015), 2015, S. 624.

This research terms the legislation of "small companies' regime" as recent form of corporate governance codification for private companies under the 2015 Act.[117]

The provisions of the 2015 Act stipulate that entities under the "small companies' regime" are required to issue abbreviated financial reports that are concise, without necessarily attaching the audit report, as a measure of ensuring transparency and responsibility which are some of the principles of good corporate governance. However, this research project notes that the exemption to comprehensive financial reporting for small regime companies impedes on economic growth of these companies, as makes it possible for them to understate their financials leading to the filing of sham business reports in order to comply while incurring low operation costs. In the end, the transparency, responsibility and accountability principles of corporate governance are breached leading to non-compliance by the directors of these companies, a practice that is against codified duties of directors who bear fiduciary duty over the welfare of the company and shareholders.[118] In the foregoing, the research concludes that despite the existing Kenya legal framework taking steps to support small companies to adopt principles of corporate governance there still exists certain measures that need to be taken to improve the concept.

3.3.5 Case Studies

This project intends to present case study analyses of embracing or neglecting principles of corporate governance in the context of Kenya's retail chain supermarket industry. In the process, it will enunciate the value of adopting, applying, implementing, reporting and complying with the above mentioned principles.

3.3.5.1 Nakumatt Holdings Limited

In an interview with the standard newspaper published on 7th August 2014, Mr. Atul Shah provided a detailed history on the rise of Nakumatt where he disclosed that Nakumatt started in 1992 as Nakuru Mattress Supermarket.[119] Later on, the supermarket grew into one of the largest retail store in East Africa, operating twenty four hours every day as a one stop retail shop offering different products and services with more than 65 stores across Kenya, Uganda,

[117] Companies Act (No.17 of 2015), 2015, S. 624.
[118] Ibid.
[119] Nandonde, Felix Adamu. "In the desire of conquering east African supermarket business: what went wrong in nakumatt supermarket." *Emerging Economies Cases Journal* 2, no. 2 (2020): 126-133.

Rwanda and Tanzania serving over 200,000 customers with a range of over 100,000 products operating as convenience stores, supermarkets and hypermarkets.[120] Accordingly, Atul Shah confirmed that Nakumatt was an employer to over 5,500 people within the region having witnessed immense growth and profit making in 2003 as a result of which an additional 32 stores were opened across the region, up from 10 stores existing in the period from 1992 to 2002.[121]

In responding to a query on the secret to Nakumatt success, Mr. Atul mentioned that the business is founded on the principle of providing variety of affordable, quality brands accompanied by superior customer service.[122] Further, that Nakumatt did pride in its corporate mission and commitment to provide unique retail experience to its customers by providing all products and services under one retail solution. In addition, he noted that Nakumatt private brand promise “If you need it, we’ve got it” assured quality service, value and lifestyle.[123] In highlighting Nakumatt’s business position statements that embraced corporate governance practices, Atul Shah mentioned that retail chain conducted social engagement with its customers (as stakeholders), continuously built solid relationships with its employees, customers, supplier, corporate partners, and the environment, led in corporate social responsibility to the community through supporting health development projects, education and urban restoration, among others.[124] As at 2014, Mr. Atul Shah had a dream, a desire to be the sub-Saharan retail player having mentioned their 5-year strategic plan as to open 100 stores with operation in East Africa and beyond.[125]

Notwithstanding the foregoing, Nakumatt's governance challenges became known during its 2016 insolvency (under Administration) case, where the court was informed that the company's directors/founders and his son had borrowed from the business Kshs.1 Billion interest-free soft loans for personal use, all of which remained unpaid. The mismanagement of the loans led a financial crisis and as a result Nakumatt holdings was unable to pay its creditors to a tune of Kshs. 38 billion and its suppliers to a tune of Kshs. 1 8million.[126] At the time Nakumatt was undergoing the financial crisis, it was at its business peak with over 60

[120] Ibid
[121] Wambui; Nakumatt Supermarket: *This is our story;* (2014)— updated on March 30, 2021
[122] Ibid
[123] Ibid.
[124] Ibid
[125] Ibid.
[126] Nandonde, Felix Adamu. "In the desire of conquering east African supermarket business: what went wrong in nakumatt supermarket." *Emerging Economies Cases Journal* 2, no. 2 (2020): 126-133.

outlets across East Africa. Its revenue records were calculated at around $ 700 million (Kshs. 75.98 billion) annually.[127]

Nakumatt's financial crisis came as a surprise to the entire nation as the situation worsened with shutting down of most of its stores by February 2017 and remaining with only six (6) stores. Later, it sold assets from all the six (6) branches to Naivas Limited at a cost of Kshs. 455.9 million. Since Nakumatt owed its creditors Kshs. 41.2 billion and was struggling to make the repayments, the creditors approached the courts and filed a liquidation claim, with the intention to have the entity liquidated, and an order issued for the sale of all Nakumatt assets to enable the creditors recoup their monies.[128] The Courts invoked the voluntary supervision arrangement, provided for under the Insolvency Act, 2015 which in essence is a process that seeks to balance interests of both the creditors and the debtor, in that Nakumatt was allowed to continue being a going concern and thus to not be wound up immediately but again, it was mandated to appoint a liquidator who would administer Nakumatt assets in the interest of the creditors.[129]

Subsequently, Nakumatt nominated PKF auditors as the liquidators and the courts appointed them as such. Upon review of Nakumatt financial statements, Peter Kahi, the lead independent auditor noted that the company had issued interest-free soft loans amounting to Ksh1 billion to Atul Shah the director/founder and his son which they were yet to pay for the monies were later mismanaged and embezzled.[130] Additionally, Atul Shah had occasioned loss of over Ksh10.8 billion worth of stock. This research project indicates that to this extent, Nakumatt portrayed poor governance actions that contributed to the failure of the business. It is argued that absence of separation between family finances and business finances led to mismanagement of funds which were later embezzled. Additionally, weak internal controls led to loss of stock as Nakumatt lacked an inventory management letter to monitor regular stock-taking.

In the end, the liquidators' report to the court was to the effect that liquidation was the only recourse since Nakumatt Limited had no fixed assets for sale, so as to pay its creditors,

[127] Carolyne Mbatia and Abraham Wanjiku; The Collapse of Supermarket Chains: Evidence and Lessons for Retail Giants (2020) <https://businesstoday.co.ke/the-collapse-of-supermarket-chains-nakumatt-collapse-ukwala-supermarkets-nakumatt/> Accessed on 16 November 2022.
[128] Ibid
[129] Ibid
[130] Nandonde, Felix Adamu. "A PESTLE analysis of international retailing in the East African Community." *Global Business and Organizational Excellence* 38, no. 4 (2019): 54-61.

suppliers, landlords and banks. Consequently, the creditors and suppliers in the insolvency application, unanimously voted for the liquidation and winding up of Nakumatt. The retail chain would ultimately Nakumatt Holdings ceased its operations on Tuesday 7th January 2020 thus leading to the end of Nakumatt Supermarkets.[131]

This research project assesses that the collapse of Nakumatt and its financial problems is as result of lacking corporate governance structures, as it emanated from misappropriation of funds due to lack of principles of accountability. Family and employee pilferage constitute some of the characteristic attitudes that occasioned the failure of Nakumatt.[132] Additionally, the lack of separate ownership and control structures, the unplanned aggressive expansion, the lack of responsibility on the directors and the lack of a strategic business strategic plan have been touted by many observers and experts as some of the major causes of Nakumatt's failures.[133] In the effect, the collapse of Nakumatt not only affected the creditors, suppliers, landlords and banks but it also negatively impacted on the employees of Nakumatt who were owed Kshs. 400 million, Kenya Revenue Authority which was owed Kshs. 2.1 billion in taxes and NSSF which was owed Kshs. 78 million, among others.[134] Nakumatt's collapse remains Kenya's learning example for family-owned enterprises on the need and purpose of adopting good corporate governance anchored on principles of accountability, responsibility of directors, owner[135]s/founders, management transparency to ensure proper recording, stock taking and reporting and fairness to stakeholders in the running of the business.

3.3.5.2 Akamba Bus Company

Public transport is one of the key critical sectors of economic development not just in Kenya but in other countries around the world.[136] Such services take many forms. The forms are classified primarily based on the distance that is covered. In Kenya, travel by bus is one of the predominant means of movement. This implies that the public transport sector has a massive potential for businesses that are willing to explore and make the right investment

---

[131] Ibid

[132] Nandonde, Felix Adamu. "A PESTLE analysis of international retailing in the East African Community." *Global Business and Organizational Excellence* 38, no. 4 (2019): 54-61.

[133] Ibid

[134] Wainaina Wambu and Moses Michira; Rich Atul leaves creditors in tears as Nakumatt is buried (2020) <https://www.standardmedia.co.ke/business-news/article/2001355669/rich-atul-leaves-creditors-in-tears-as-nakumatt-is-buried> Accessed on 16 November 2022

[135] Ibid

[136] Odollo and Thuo J.K. "*Attaining Market Competitiveness through the Judo Strategy: The Success Case of the Easy Coach Company in Kenya*" European Journal of Business and Management *www.iiste.Org ISSN* (2014): 2222-1905.

choices. One of the major players of the sector in Kenya for the longest time was Akamba Bus Company.[137]

The company, which was a family-owned enterprise, was highly successful due to its day and night long distance travels.[138] It operated and dominated the East African region market for nearly 55 years.[139] During its peak years, it was widely recognised as the biggest intercity transport company in the East African region. According to Odollo, Lawrence and Thuo, what gave the company a huge competitive advantage could be boiled to an array of factors that worked well to aid the company in its success.[140] These factors included a positive and good corporate heritage, portraying an image of reliability, exhibition of consistency, demonstration of competence and a high level of professionalism in decision making.[141] In reflection, the company bus portfolio reported to have more than 100 buses serving over 50 destinations within Kenya, Tanzania and Uganda.[142]

The fall of Akamba Bus Company can be traced to many issues. While lack of succession planning ranks high among the reasons, there is slight reservation that there was no best corporate governance practices at the company.[143] After the death of its founder, Mr. Sherali Hassanali Nathoo in the year 2000, there followed massive squabbles and wrangles among family members and shareholders.[144]

As the wrangles progresses, the divided board of directors could not maintain the progressive elements that had sustained it for so long.[145] This lack of control and poor governance led to the rise and increase in negative practices such as theft of funds and lack of accountability.[146] The founder was succeeded by his son who took over and exhibited inexplicable practices such as the taking of cash from various company premises without any guarantee of return or assurance of proper use. With time, the other officers in the company developed a culture of thieving, creation of fake receipts, stealing of spare parts and poor management of relations

[137] Ibid
[138] Ibid
[139] Ibid
[140] Ibid
[141] Ibid
[142] Ibid
[143] Joseph Mabutu. "Human Resource Management Practices and Sustainability of Public Transport Organizations: A Case Study of Gateway Bus Service Limited." Phd Diss., Uganda Management Institute, 2013.
[144] Ibid
[145] https://www.businessdailyafrica.com/bd/lifestyle/society/akamba-s-collapse-offers-lessons-to-dying-giants--2005862
[146] Ibid

with creditors.[147] To compound these negative traits, the fact that there existed periods where the board of directors were not on talking terms made it very difficult for the problems to be solved adequately.[148] Constant clashes among the family members and ruinous behaviours would ultimately drive the company to the ground. Unchecked, the family members cut salaries of staff unnecessarily, took loans in undocumented ways and failed critically to apply the stakeholder theory in ensuring that various stakeholders such as creditors, customers, employees and shareholder were well taken care of. This case study is a definitive example of benefits of embracing corporate governance principles such as succession planning, unitary board structures, transparency, diversified management and accountability within the structure of family-owned enterprises to guarantee the sustainability and success.

3.3.5.3 Bidco Africa

Bidco Oil Refineries Limited (referred to in this project as Bidco Africa) was established in the year 1991 as a manufacturing company with a huge presence primarily in the East and Central Africa region.[149] With its headquarters in Thika, Kenya, the company manufactures several products such as laundry bars, personal care products, animal feeds and edible oils.[150] The company is considered to be a success story in Kenya and the wider African region primarily because of its strategic approach to business and good corporate governance practices. On top of its constant need to place the customer at the centre of the business, the company has maintained a culture of producing high quality products that are higher popular among its wider customer base. Most importantly, there exists a sense that it embraces a sense of practices such as transparency, diversified board management, accountability, responsibility and fairness despite being a family-owned enterprise.[151]

Good corporate governance is a predominant policy at Bidco. The company has some of the best management practices and policies which explains the reason for its success over a prolonged time.[152] Diversity in management at the company means that there exist external elements that bring in objective thoughts into decision-making without any sense of bias due to family affiliations.[153] One admirable trait of incorporating corporate governance structures

---

[147] Ibid
[148] Ibid
[149] Wanjohi, Millicent. "Role of Succesion Planning in Family Enterprises Performance: A Case Study of Bidco Oil Refineries Limited Kenya". Diss., University of Nairobi, 2018.
[150] Ibid
[151] Ibid
[152] Munyurwa, Francis V. "Strategies adopted by Bidco Oil Refineries Limited in their Operations within East Africa."MBA diss., University of Nairobi, 2015.
[153]Ibid 152.

lies in the aspect of responsibility. Responsibility is constantly embodied in making decisions especially in relation to the deployment of resources and in operations management. This is taken a notch higher by the fact that all critical decisions are weighed against metrics such as sustainability, competitiveness, effects on stakeholders and flexibility.[154]

There has been a lot of emphasis on enhancing business operations management as a means of entrenching corporate governance principle of responsibility. This has been particularly centred on the creation, operation and control of the transformational processes of taking inputs and converting them into desired outputs that satisfy the demands of consumers.[155]

The stakeholder approach at Bidco is quite admirable. The thoughtfulness that governance structures are in place, with a board of directors and management as separate unties of operation has been a key factor for success over the years that the firm has existed.[156] There exists a sense of understanding within the company that all employees and partners collectively form part of the larger Bidco family. Strategic board decisions on subjects such as promotion and marketing also play significant roles in elevating the company's status each passing day. This has been made possible by the sensibleness and balanced approach taken by the diversified board of management.[157] Lastly, the management espouses a lot of transparency and accountability particularly in the kind of people that it hires. The hiring is strictly based on competence. One of the reasons most family-owned enterprises fail lies in the fact that they only hire based on connections and familiarity without necessarily scrutinizing whether the new recruits are competent enough to perform well.[158] To this end, Bidco Africa is a family-owned enterprise that should be emulated for displaying principles of equality, accountability and transparency in the running and management of the firm.

3.3.5.3 Naivas Limited

The history of Naivas Limited (Naivas Supermarkets) is linked to two blood brothers, David Mukuha and Simon Gashwe Mukuha who in 1990s started a small family business serving Rongai location in Nakuru town.[159] In an interview with the business daily, Mr. David recalls urging his brother Simon Gashwe to contribute money to start off the small retail shop, to

---

[154] Ibid

[155] Omondi, Jane. "Strategy Implementation at Bidco Oil Refineries Limited Kenya."Diss., University of Nairobi, Kenya, 2011.

[156] Ibid

[157] Ibid

[158] Ibid

[159] Muasa, Sebastian M. "Cost leadership strategy and sustainable competitive advantage of Naivas supermarket limited in Kenya." PhD diss., University of Nairobi, 2014.

which they raised Kshs. 200,000 as capital for the retail shop then named as the Rongai Self Service Stores. Later on, the retail store grew into a wholesale and distribution business leading to its registration as a company in 1993.[160]

In 1995, the wholesale business grew and as a result, a new branch was opened in Elburgon, near Molo and later on, as the brothers reinvested the profits into the business, after which they launch a Naivasha town branch operating in the name and style of Naivasha Self Service Stores.[161] In 2001, the business established itself in Nairobi city, to open the Naivas first branch along Ronald Ngala Street even as the brothers closed down their two outlets in Rongai and Elburgon. Presently, Naivas Limited has presence across the country employing thousands of people. As the business grew, the two brothers welcomed their father, Peter Mukuha Kago (now deceased) and their sisters Linet Wairimu and Grace Wambui Mukuha into the business, making it a complete family-owned enterprise.[162]

In the year 2010, Peter Mukuha Kago passed on, leaving the business with his children. As a result, Simon Gashwe Mukuha took over the administration of the estate and the business as the Chairman, while David Mukuha together with Grace Mukuha and Linet Mukuha were named Directors of the company.[163] The business remained a family enterprise and continued in operation. Sadly, in August 2019, Simon Gashwe Mukuha died and left the business with David Mukuha together with Grace Mukuha and Linet Mukuha.[164]

David Mukuha spoke into the corporate governance structure within Naivas Limited, and indicated that in July 2018, Naivas Limited embraced the diversified management system anchored on corporate governance principle of accountability, and brought on board Advisor Andreas Von Paleske, to provide strategy and operation advisory to its 47 stores across the country.[165] As a result of the advisory, Naivas Limited sold its minority stake to African private equity firm Amethis who injected capital into the business. The partnership with the investors has seen Naivas Limited open the first ultramodern food-market store followed by

[160] Eric Matara. "Naivas Limited: From a small village shop to a supermarket chain" (2019) <https://www.businessdailyafrica.com/bd/news/counties/naivas-from-a-small-village-shop-to-a-supermarket-chain-2262430> Accessed 20 November 2022

[161] Ibid

[162] Ibid.

[163] Ibid

[164] Ibid.

[165] Ibid

its 53rd store in Rongai, Nakuru County where it started.[166] Further, David hinted that Naivas Limited has a separate ownership and control structure led by seven (7) executive team members out of which family members comprise the three directors/ co-directors (David, Grace and Linet) with the rest being external persons.[167] David attributes the good governance structure within Naivas as the reason for the success and smooth running of the multi-billion-shilling retail business in Kenya.[168]

Notably, David stated that Naivas is very keen to learn from the failures of others and thus gradually implements reforms within Naivas governance structure to evade failure.[169] David references the collapse of Naivas main competitors, who were one-time retail giants, that is Nakumatt and Tuskys supermarkets.[170]

In an interview with Standard Newspaper, David recalled a time when Naivas was ready to sale a 51% majority stake to Massmart, a South African retail chain, but due to news around sibling rivalry, the investor pulled out of the deal.[171] David indicates that this occurrence reminded the family of the importance of strengthening governance and having board structures that separate family and business affairs as an important factor that investors evaluates before they agree to be involved including the presence of a succession plan.[172] Thereafter, Naivas limited moved from running the business in an informal manner and adopted unitary board structure with separated roles of CEO and directors, governed by the corporate governance principle of responsibility and fairness as codified under the Companies Act, 2015. This significantly aided Naivas in sealing the deal with investors France's Amethis in 2019.[173]

In placing emphasis as to unitary board structure as embraced by Naivas, David disclosed that Naivas Limited welcomed the idea of onboarding an external investor into their business and therefore sold a 30% minority stake to France's Amethis, a consortium of investors in

[166] Ibid.
[167] Ibid
[168] Ibid.
[169] Ibid
[170] Wainaina Wambui; The Sh6 billion deal that separated Naivas from the limping retail crowd (2020) https://www.standardmedia.co.ke/the-standard-insider/article/2001383804/the-sh6-billion-deal-that-separated-naivas-from-the-limping-retail-crowd; accessed 20 November 2022
[171] ibid
[172] Ibid
[173] Wairimu, Ken Kago. "Impact of capital structure on financial performance: a case study of Naivas supermarkets in Nairobi region." (2021).

Africa.[174] David mentioned that the sale raised Kshs. 6 Billion capital for Naivas Limited while indicating that it was not an easy decision and commended the trust and trustworthiness received from Naivas partners.[175]

Further, Naivas managing director noted that enlisting of non-family members, often termed as outsiders in a business context, has increased fairness in governance of the business, principles of accountability where there are internal controls related to finances and risk management, including business professionalism that were lacking before the investment.[176] David is quickly quoted admitting to the fact that as family owners/founder of Naivas Limited, they never had school experience on how to run a retail shop leave alone a multi-billion shilling supermarket such as Naivas, and previously proceeded with ignorance, just learning on the job.[177] Nevertheless, and due to hurdles that impede certain business objectives, they made the conscious decision of onboarding people who are more experienced to support them to run the business successively as they bring in wealth of information and expertise in addition to supporting Naivas to remain highly liquid therefore able to take on business expansion.[178] David admits that since they embraced principles of corporate governance, unitary board governance structure and diversified management in terms of skills and experience managers, Naivas has experienced value creation and success, this being the main difference between Naivas and the collapsing retail supermarket chains in Kenya.[179]

Corporate governance at Naivas has significantly evolved currently.[180] There exists a policy that if a branch of the business is not performing within a period of two years, they proceed to shut it to avoid using profits from other branches to sustain a non-performing project. David confirmed, in his interview, that over the last three (3) years, Naivas has shut three non-performing branches. The influence of corporate governance in the company's current structure is highly evident in its performance and operations. Naivas Limited has adopted proper power checks and balances through the executive team. This has improved decision

---

[174] Ibid

[175] Reuters (2020) < https://www.standardmedia.co.ke/business/article/2001357801/french-firm-to-buy-30pc-stake-in-naivas> Accessed 16 November 2022

[176] Wairimu, Ken Kago. "Impact of capital structure on financial performance: a case study of Naivas supermarkets in Nairobi region." (2021).

[177] Ibid

[178] Ibid

[179] Ibid.

[180] Ibid

making because there currently exists a board with non-biased people who can keep the owners/founders of the business in check. Presently, the existence of a board led by the seven (7) executive team members, mandates that all decisions must be approved by the board, including expenditure.[181]

As a result of embracing for separate ownership and management, on-boarding independent directors who are non-family members, partnering with investor stakeholders who as a result of trust injected capital into the business, Naivas Limited has remained highly liquid and made tremendous in the right direction.[182] Moreover, the company continues to create value with its continued with strategic business expansion, including buying out assets worth Kshs. 422.5 million from the struggling Nakumatt supermarket.[183] In addition, Naivas has continued to thrive to outdo Chandarana, Quickmart and Tuskys supermarkets as the best governed and performing retail chain supermarket in the country.[184]

The research therefore credits the success and sustainability of Naivas Supermarket to adoption of principles of goof corporate governance, among them accountability, fairness, responsibility among directors, proper checks and balances, transparency, financial and risk internal controls and management including stakeholder engagement where they are seen to have abandoned the cagey and traditional nature and governance system that is "private for family-members only" and instead embraced the on-boarding of a private equity first external investor besides its other partners who are all part of the board of Naivas Limited with only three (3) family members. Naivas continues to impact the industry and economy in a successful and sustainable manner for the family, its stakeholders and society at large, an effect of good corporate governance best practice to a family-owned enterprise in Kenya**.**[185]

3.3.6 Legal, Regulatory and Institutional Framework of Corporate Governance for Family-Owned Enterprises

This section analyses Kenya's legislative, regulatory and institutional structures and procedures governing corporate governance. Additionally, it methodically examines the elements of ownership, management and shareholding for family-owned enterprises as defined by the Companies Act, No. 17 of 2015. It aids the research project in investigating

[181] Ibid.

[182] Ibid

[183]

[184] Kitonga, Noel. "The Promise and reality: winning ways for retail companies in Kenya through corporate governance". LLM diss., Strathmore University, 2021.

[185] Ibid.

whether the present legal provisions are deficient to cause a barrier to compliance with best corporate governance practices for family-owned enterprises in Kenya thus derailing their success and sustainability. The intrinsic nature of controlled companies continues to present a governance challenge for family enterprises to date.

Additionally, the research project examines works on legal and statutory provisions on corporate governance for family-owned enterprises derived from developed jurisdictions in the world. In the end, this section is focused to explore the effectiveness of the corporate governance standards in the legal regulatory regime for family-owned enterprises.

3.3.6.1 Constitution of Kenya, 2010

Constitution of Kenya is the supreme law since its promulgation in 2010. It is binding on all persons[186] and many other Acts of Parliament (Laws) are established to give effect to its provisions. It follows, that there is a basic duty on every individual to uphold the Constitution at all times.[187] This research project indicates that 2010 Constitution does not primarily provide framework on family-owned enterprises corporate governance. It supposes, however, that the 2010 Constitution sets out guidelines which are conditional to the family matters. As a result, a family enterprise is an artificial person, acting in its capacity therefore has an obligation to observe and promote these Constitutional guidelines as the law which applies equally to all persons in Kenya[188] and specifically laws relating to corporate governance and the principles guiding best practice. It is essential to underscore that the definition of the term "individual" under the Constitution includes an body of persons incorporated or unincorporated.

The people of Kenya are recognized under the preamble to the Constitution as persons committed to fostering and defending the welfare of family, individuals, societies and country.[189] In speaking to rights such as the establishment of a family, the Constitution provides a definition to the term family. It defines it as the accepted and unit of the society and the required standards which shall receive the acknowledgement and safeguard of the

[186] Constitution of Kenya 2010, Article 2
[187] Constitution of Kenya 2010, Article 3
[188] 'The Rule of Law' Lexis Nexis <https://www.lexisnexis.com/en-us/rule-of-law/default.page> Accessed 20 November 2022
[189] Constitution of Kenya, 2010: Preamble

State.[190] This provision is influential to effective family-owned enterprises because it places emphasis on the impact that is placed on the concept of family.

In Article 10 of the 2010 Constitution, details national values and principles of governance that bind all persons and state organs, during Constitution interpretation.[191] Examples of these values include inclusiveness, public participation, integrity, transparency, sustainable development and accountability.[192] The values mirror core corporate governance principles such as transparency and accountability hence espousing the significant role or bearing that the Constitution has on family-owned enterprises. This implies that family enterprises are obligated to precisely adhere to these principles in their operations and ensure that transparency, integrity, accountability and sustainable development, among others[193] are embedded in their day to day processes not just to promote their survival but also to embody the critical values that exist in familial set ups.

3.3.6.2 Companies Act, No. 17 of 2015

In its journey to update and modernise the law governing Companies, Kenya transitioned to the Companies Act[194] that replaced Companies Act, [195]which was an outdated colonial law enacted in 1962. Many legal experts and professionals thought that it was indeed time for a new law to regulate the operations of companies as the existing one had many legal and regulatory gaps. The 2015 Act has greatly relied on the UK Companies Act, 2006.[196] By comparison, the comprehensive 2015 Act, with many sections running over 1,600 pages is the most wide-ranging piece of legislation on Kenya's statute books.[197]

According to the preamble the 2015 Act, the intent behind its enactment was mainly to ease the processes of establishing and operating businesses, streamlining them and facilitating commerce through the effective regulation of the affairs of both private and public

[190] Constitution of Kenya 2010, Article 45
[191] Constitution of Kenya 2010, Article 10
[192] Ibid
[193] Constitution of Kenya 2010, Article 10 (2 c and d)
[194] 2015
[195] Cap 486 (Repealed)
[196] Richard Harney, "New Companies Act 2015 has Come into Operation in Kenya", Bowman Gilfillan Africa Group's Coulson Harney (2016) 1.<https://www.bowmanslaw.com/wp-content/uploads/2016/08/The-New-Companies-Act-2015-Has-Come-into-Operation-In-Kenya.pdf> Accessed 15 November 2022
[197] The Companies Act 2015

companies.[198] The Act took into consideration the benefits of technological development and procedures that would easily boost the conduct of business.[199] Although the Act, 2015 does not introduce a code for corporate governance, it in essence introduces a more substantial regime with strict compliance thresholds under the precepts that Companies will run their affairs in accordance with the law. One of the important features of the Act is the deliberate provision of regulation of different kinds of businesses including private companies. The research therefore delves into this analysis to find out whether the Act fulfils its obligations in the regulation of family enterprises and whether family enterprises have satisfactorily embraced the regulation for implementation.

3.3.6.2.1 Elements of Regulatory Regimes under the Act

a. Private and Public Companies

Richard Harney states that the Act has provided a clear distinction in the controlled activities of a private firms and publicly owned or listed companies.[200] It follows that for private-owned companies, the regulation regime is flexible and less strict as compared to that of publicly-owned or listed companies.[201] This research project recognises that most family enterprises fall under the category of private-owned companies. There, however, exists some family companies that have achieved immense growth and success to the point of listing as public companies. To this extent, the research project highlights some of the laws and regulations that would be applicable and binding to them.

b. Oversight Structures under the Act

The Act stipulates specific responsibilities to directors of companies as the bearer of the oversight role over the company.[202] The Act has codified director's duties to the company which are grounded on the principles of equity.[203] The emphasis of key provisions of the Act is that directors should guarantee shareholders engagement and impact to the community in the running of companies and act within their powers in the performance of their duties.[204] In stipulating the preferred form of directorship in Kenya, the Act mandates for a least of one ordinary person to act as a director while at least two directors for public companies.[205]

---

[198] Preamble of the Companies Act
[199] Companies Act, 2015, Laws of Kenya.
[200] Ibid 196
[201] Ibid.
[202] Companies Act 2015, s 140
[203] Ibid
[204] Companies Act, 2015. S. 142.
[205]Companies Act, 2015, S. 128 and 129.

Companies Act, 2015 dedicates an entire part IX to directors.[206] The part details the extent of director duties, powers and responsibilities. There exist seven codified responsibilities of directors are quite far reaching and instructive on how companies including family enterprises should be run. These include commitment to act within their control and ability,[207] providing support to ensure that the relevant company is able to thrive,[208] the application of self-governing judgement,[209] to reduce conflict of interest,[210] and the constant maintenance of integrity to the extent of shunning corrupt activities from third parties.[211] The Act recognises the existence of shareholders or owner as part of the company and thus places upon directors important duties and responsibilities that are to ensure a company thrives. Given that one of the intentions of the Act is to streamline business processes and create a business continuity plan, among the non-exhaustive list of functions and considerations for directors in implementation of their responsibilities to companies, is that they ought to be aware of decisions that impact employees and their satisfaction, consider the business relationship with stakeholders, clients, suppliers, contractors, auditors, and others.[212] The incorporation of integrated corporate governance that involves the community is thus one of the fundamental concepts that manifest in the Act to ensure all companies can make business profits, attain excellence and build a good reputation.

Notably, since directors are to avoid potential personal benefits to themselves in relation to opportunity, information and company property[213], they ought to adopt the disclosure principle when they are involved with company transactions, and to the exemption of transactions that are likely to result to conflict. In addition, the Act places a responsibility over financial disclosure, to which directors are expected to prepare and present company's financial statement reports.[214] The Act does not stop there as in its quest to expand financial disclosure element, specifies the structure of the financial statement report as one to include; statement of the company's operations, their operation portfolio, growth trends, risk appetite, among others. Furthermore, directors are obligated to make personal declaration and endorse their accuracy. Company auditors are statutorily recognized as key personnel in the running

[206] Companies Act, Part IX
[207] Companies Act, S. 141.
[208] Companies Act, S. 143.
[209] Companies Act, S. 144.
[210] Companies Act, S. 146.
[211] Companies Act, S. 147.
[212] Companies Act 2015
[213] Companies Act 2015, s. 145.
[214] Companies Act 2015, s. 727

of company's affairs, to which the directors must present the financials to the auditors and a report is prepared for good record keeping.[215]

Notwithstanding the legislation of company director's roles, family enterprises remain behind in the implementation of the relevant provisions in the course of their operations since the interaction between the unique nature of family enterprises (family) and the oversight structures act as the major hindrance. There are instances that can be drawn relating to the impact of Part IX of the Act to family enterprise such as the codified duty to directors which apply to all types of companies.[216] The recognition of shareholders invites family enterprises to embrace shareholding within their business. The element of financial information disclosure and working with an auditor is another indicator that the Act is more concerned with to ensure streamlining of business processes in terms of financial statements and audit reports presented to the shareholders and stakeholders on the true accounts of the business as a going concern.[217]

Additionally, the duty to avoid conflict of interest,[218] especially when dealing with people related to the directors that include their family members.[219] Family relations influence how family enterprises are run and thus the provision of this section can be interpreted to mean that family enterprises ought to ensure there exist scenarios of reduced conflict of interest. This means that family-owned enterprises should have governance models that fit to their unique nature to operate the business based on disclosure. Additionally, exporting the principles of the Act implies that they should embrace the concepts of separate ownership and control mechanisms in their business operations.

In defining control of a director over the company, the Act gives meaning to director's personal kindred and thus provides insights as to circumstances under which a director and their relations are considered to have influence over management and control of a company. For example, in the case of a director and their kindred own over and above 50% shareholding, they are deemed to own and manage the affairs of the company.[220] By

[215] Ibid.
[216] Part IX of the Companies Act 2015
[217] Ibid.
[218] Ibid.
[219] Companies Act, 2015, S. 122 and 123.
[220] Companies Act, 2015, S. 125.

inference, family enterprises fall into this category as controlled companies for the founder/owner/ director of the enterprise manages the business together with other blood family relations. Going forward on the aspect of controlled companies, the Act specifies that director's authorisation certain acts to benefit family relations is a violation of duty to avoid conflict of interest and thus provides a remedy to promote families within the business based purely on disclosure principles of governance.[221]

c. Accountability and Transparency under the Act

In the codification of principles of accountability and transparency, the Act regulates private companies and family enterprises may be well classified under this category and requires directors to make disclosure to board members in instances where they have interests in transactions relating to the business. Public company directors owe a duty of disclosure to the shareholders.[222] Threshold as to accountability and transparency is more strengthened for the Act stipulates that there must be an approval by members of the company in the event of acquisition of assets and loans exceeding Kshs. 1 million between the company and its director (s).[223] Further, the Act provides that shareholders' approval is required for any long-term service contract to directors that exceeds two (2) years.[224]

This research project therefore infers that the Act does in fact provide checks and balances system to the different regimes of companies that it regulates whether they are categorised as private or public companies. It follows that, family enterprises, in the classification of private companies, can draw lessons for implementation, so to address the governance challenges as to accountability and transparency in their unique situation where the family founder (director) and the family members control and manage the enterprise privately to exercise their powers without checks and balances, [225] thus causing a barrier to success and sustainability. Furthermore, the requirement as to disclosure of directors' remuneration and benefits in the budget and financial statements acts as a transparency mechanism within the company to discourage pilferage by directors. Though this project reports that this requirement is restrictive and does not apply to small companies[226], it advances it as a best practice principle that family enterprises can inculcate within their governance structures and deliberately comply.

---

[221] Companies Act, 2015, s. 146 (3) and (4).
[222] Companies Act, 2015, s. 151.
[223] Companies Act, 2015, s. 158, and 160,161,164,167,172.
[224] Companies Act, 2015, s. 157.
[225] Republic v Chief Magistrate Milimani & another, Ex-parte Tusker Mattresses Ltd & 3 others (2013) eKLR
[226] Companies Act, 2015, s. 624 (3).

Notably, the Act introduces the concept of investor's rights to information and safeguarding of shareholder value against insiders, privy to the company transactions. It follows that there exist other shareholder rights that family-owned enterprises can explore such as the inclusion of voting rights for removal of a director during meetings,[227] issuance of proposals to amend business governing documents and include the right to approve dividends. Additionally, under Part XI of the Act, the provision on derivative action provides shareholders (owners of a company) with an avenue to pursue an action against a director (s) on company's behalf for acts of breach of fiduciary duties that may include negligence, theft and ultra vires decisions among others.[228]

In the words of Ruparelia and Njuguna, the "implementation of business governance laws and regulations is considered a significant best practice".[229] This research project indicates that since the law exists in statutes, it is time for family enterprises to act and move the law into action through implementation and compliance. However, it goes without saying that family enterprises ought to adopt necessary principles of corporate governance including enhancing their knowledge and awareness among family members to operationalize implementation of this principles, just like their counterparts, the public companies, in order to experience the effects of corporate governance best practices. Additionally, it might be time for relevant bodies such as the registrar of companies and the capital markets authority to be empowered so that they can be more effective in ensuring that family-owned enterprises are adhering to corporate governance principles.

3.3.6.3 Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

The Capital Markets Act,[230] establishes an authority, the Capital Markets Authority under Section 11(3) (v)[231]. The authority has a supervisory mandate over listed and public companies in the Nairobi Securities Exchange (NSE). In exercising this mandate, the Authority issued the 2015 ("The Code"), superseding 2002 Corporate Governance Practices for Publicly Listed Companies guidelines and listed companies in securities exchange.[232] The

[227] Companies Act, 2015, s. 130 (Appointment) and 139 (Removal).
[228] Companies Act, 2015, s.238.
[229] Ruparelia and Njuguna (n30) 158.
[230] Chapter, 458A, Laws of Kenya.
[231] Ibid 230.
[232] Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015.

2015 Code has elevated Kenya's corporate governance standards to meet those of international corporate standards in its effort to enhance the shortcomings of the 2002 guidelines.

A cursory look at the Code reveals that it endeavours to provide guidance on corporate governance best practice as a fundamental governance tool in the control of a company and/or business to be embraced by businesses.[233] The broad rule compliance with laws and regulations is based on "comply or explain" approach, to which the code is reported to depart from the "apply or explain" approach of compliance. The former methodology as adopted by the code is ethical-based not behavioural-based. This implies that as a principle, apply or explain approach is aware that in certain occurrences of non-compliance, a satisfactory explanation is adequate. To this extent, boards of companies are obligated to exercise full disclosure as relates to any non-compliance with the code and other attendant laws, [234] and openly report to the Capital Markets Authority, while providing assurance on steps taken to ensure compliance.[235] Additionally, 2015 code does stipulate binding provisions that are a least requirement for issuers of securities to the public (whether equity or debt) and covers listed and non-listed companies. It is, therefore, a requirement for boards of directors in a private and public company of issuers of securities to develop internal guiding procedures and growth strategies focused on protecting the shareholders and stakeholder's rights and interests while advancing the growth of the company.[236]

It is notable that the code mirrors the spirit of the Companies Act, 2015, as it stipulates on matters timeous disclosure by board of directors on all valuable information pertaining to the company and shareholders management processes and safeguards, disclosure related to conflict of interest and financial accounts and statements, among others, all of which are represented as corporate governance best practices. Additionally, the code provides for legal and audit compliance as a measure to supplement financial audits and therefore promote principles of transparency and accountability to shareholders and stakeholders.[237] Also, as a measure to enhance efficiency and effectiveness of boards, the 2015 Code provides for

---

[233] Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, Chapter 1.
[234] Ibid, 88.
[235] Ibid, 89.
[236] Mweti, "Kenya's Corporate Governance Practices Code,2015", Bowman Gilfillan Africa Group's Coulson Harney (2016) 1.<https://www.bowmanslaw.com/wp-content/uploads/2016/08/Kenyas-Corporate-Governance-Practices-Code-2015.pdf> Accessed 17 November 2022
[237] Ibid, 91

required professional development training for directors.[238] Furthermore, the code stipulates that companies should incorporate internal corporate disclosure procedures that must comprise a section where the directors provide feedback to all shareholders and stakeholders on all aspects connected to the running of the business.[239] If implemented, this concept can aid the success of family-owned enterprises significantly as they will have no option but to follow principles of good corporate governance.

In summary, the research project stipulates that the 2015 Code does provide for a corporate governance structure through which family enterprises can derive the significance of a board of directors governing the enterprise, disclosure as a power instrument of governance, accountability and transparency through independent audit committee, evaluation of the directors and reporting on performance annually including conducting legal and compliance audit on the welfare of the enterprise among others. Given that the Code aligns with the Companies Act, 2015, the study does conclude that there exists additional information, legal and regulatory guidelines as to what constitutes corporate governance best practices. Therefore, family-owned enterprises ought to embrace, emulate and implement these provisions in the running and management of the family enterprise as a measure towards compliance with governance standards and practices. Moreover, the Companies Act can be amended to give the registrar of companies the additional mandate of ensuring that family-owned enterprises comply regularly.

The research however records a divergence relating to the application of "apply or explain" approach as introduced by the code. Most of the emerging international corporate standards that were published after the 2015 code, advocate for "comply or explain" approach that emphasises need for additional responsibility and transparency from directors. As a result, the 2015 Code is viewed as having very good guidelines but is not binding. Further, the code overlooks the stakeholder importance (employees, customers, creditors, debtors and the community), who according to this research are most central for the smooth running and management of the enterprise, and for purposes of this research, would easily be referred to as "family". The 2015 Code is in turn more focused on shareholders' and investors interests as the only owners of the company as provided for under Capital Markets Authority. Given that the main goal of this research project is to recommend for family enterprises to similarly

[238] Chapter 2: "Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015".
[239] Ibid.

embrace an outward approach (stakeholders) in addition to the inward approach (shareholders), it follows that the application of the code in guiding the management of family enterprise is still unsatisfactory. Also, in contrast to the Act, 2015, the code lacks stipulated penalties for non-compliance within its guidelines and without them, companies are left to decide whether to comply or not thus creates an opportunity for the code to be neglected.

As the regulatory body providing oversight to public listed and private listed companies, the Capital Markets Authority, in its bid to create awareness on adoption of corporate governance principles, published in the corporate governance report of 2018/2019 report, with intent of enhancing public awareness on the governance of Kenya securities issuers.[240] According to the then Chief Executive officer, Mr. Paul Muthaura, the authority desired continuous improvement in governance practices as it was reported that out of the fifty three (53) issuers evaluated, seventeen (17) demonstrated good governance practices, seven (7) issuers showed good leadership practices.[241] Further, twenty one (21) companies displayed the application of principles of fairness in the running and management of their corporate entities while only eight (8) demonstrated required improvement practices.[242] Moreover, the overall governance compliance weighted score for the fiscal year 2019/2020 recorded a 72 percent improvement compared to the 2018/2019 weighted score of 61 percent.[243] The Authority, has further escalated its engagement with issuers, where it introduced a one on one forum for issuers to discuss the draft governance report in the interest of providing clarifications and pursuing recommendations. Through this action plan, the Authority's engagement with issuers has improved, while the oversight role by the Authority is more transparent, goal focused and acceptable to every issuer.

This research states that it is time family-owned enterprises are informed and made aware of the importance of corporate governance best practices, modes of implementation and the oversight by an authority that provides them with awareness and feedback, with the ultimate goal of getting family enterprises to good leadership rankings in the running and managing of their enterprise for success and sustainability.

[240] Capital Markets Authority Annual Report, 2018/2019.
[241] Ibid
[242] Ibid 94.
[243] Ibid 95.

3.3.6.4 Code of Corporate Governance in Regulated Industry

Kenya has several industry regulators across various business sectors whose main mandate is to stipulate corporate governance guidelines that companies are to adhere to within their specific industry.[244] A cursory look at Central Bank of Kenya (CBK) as a regulator that has issued corporate governance guidelines (the "CBK Guidelines") which apply exclusively to licensed organization under Banking Act.[245]

Central bank procedures recommends that banking institution ought to be governed by board of directors, and recognises them as the primary body responsible for company oversight.[246] Additionally, the guidelines stipulate that the board is mandated to formulate business processes and policies that guide how decisions are made and the same ought to be in agreement with far-sighted banking transactions.[247] Further, CBK guidelines stipulate that the banking institution should be composed of at least five directors, out of which three of the directors are to be non- executive-directors.[248] From the foregoing, there is an inference from the CBK guidelines that the presence of a governing body in form of a board is important to a company as it acts in the interest of the company with the intention of steering it to the right direction.[249]

The Capital Markets Authority has formulated extensive notices, guidelines, regulations and reports that are focused on creating awareness to enhance governance compliance within the capital market and securities industry for private listed and public companies.[250] The code 2015 refers to the board of directors as a noteworthy governing body contributing to corporate governance practice in the company. The Code stipulates that the board of director's composition for private and public companies should be exhaustive to consider skills and experience of the director to manage and control the business.[251] Further, the CMA code stipulates for pre-emptive information sharing to stakeholders and shareholders of the company as a measure to enhance effective disclosure, trust and responsibility on the affairs

[244]Cytonn Corporate Governance Report; Kenya Listed Companies Corporate Governance Analysis (2018) <https://www.cytonn.com/uploads/downloads/Cytonn_Corporate_Governance_Report.pdf> Accessed on 29 October, 2022.
[245] The Banking Act, Chapter 488, Laws of Kenya.
[246] Central Bank of Kenya Prudential Guidelines 2013
[247] Ibid
[248] Central Bank of Kenya, " Prudential Guidelines on Corporate Governance", 2013: CBK/PG/O2/CG 3.2.2.1.
[249] Ibid.
[250] Capital Markets Act, Chapter 485 A, s. 11 (3) (v).
[251] Ibid.

of the company. In the end, effective communication builds trust and results to cordial business relationship among the board, shareholders and stakeholders.[252] CMA annual governance audit tool checks corporate governance best practice compliance levels for listed companies including formulating a template for companies to indicate the extent of compliance with CMA code.[253]

Generally, most family enterprises do not fall under the regulated sectors hence disqualifying them from being subject of the sector-specific regulations and guidelines. Notwithstanding the foregoing, there exist ways for family enterprises to operate within the regulated industry by buying in to the regulated businesses as investors who maintain controlling interest. This way, family enterprises will be mandated to conform to the guidelines and corporate governance best practice as stipulated by the codes and regulators within these industries thus guaranteeing their success and sustainability within their operations. A good example of families that have continued to maintain a steady control the regulated banking sector through their businesses are the Ndegwa, the Kenyatta and the Nyachae families [254] who are known to have maintained good corporate governance practices within the family hence diversifying their capabilities. This research project, therefore, stresses that it is possible for other family enterprises to emulate the Ndegwa family, for example, and not only remain successful but also achieve sustainability through the integration of key corporate governance principles in businesses.

In consideration of their unique nature, family enterprises, especially the ones that are not listed, should formulate sample guidelines and handbooks drawn from the regulated sector, providing for the importance of board structure as the governing body thus redirect family enterprises to embrace diversification in management and control while providing for composition of directors of the board that includes members of the family and their responsibilities. This research project thus resolves that family enterprises ought to embrace and emulate the guiding corporate governance principles, provisions and tools drawn from oversight of companies in the regulated sector as a mechanism to resolving the governance informalities present within the family enterprise.

---

[252] 2015 Code of Corporate Governance for Issuers of Securities to the Public, pg 4.2.1
[253] Ibid.
[254] Business Daily, "Ndegwa family puts empire on new path with asset sales" (2018) <https://www.businessdailyafrica.com/bd/corporate/companies/ndegwa-family-puts-empire-on-new-path-with-asset-sales--2231056> Accessed on 29 October, 2022.

3.3.6.5 Code of Corporate Governance for Private Companies

The Private Sector Initiative for Corporate Governance (PSICG) started the journey towards indoctrination of corporate governance practice among Kenya's private companies. Consequently, PSICG formally launched the sample code of corporate governance best practices in 1999.[255] The code has been in existence over a decade and a half. It existed and was actively used until 2015 when the new Companies Act 2015 was enacted repealing the Companies Act, Cap. 486 which lacked express corporate governance practice provision for private companies. The advantage of the new law is that it scaled up the PSICG development of corporate governance among private firms for it expressly differentiated public and private firms within its provisions.[256]

In defining corporate governance, the PSICG underscores that corporate governance stimulates value as it provides for the manner in which power in a company is applied.[257] Notably, the Sample Code for Best Practice (SCBP) in embracing the principles of accountability and transparency as a central philosophy of corporate governance, stipulates that disclosure of information to members of a company is material as they have a right to receive any information pertaining to their membership and voting rights in selection of directors and to receive a report as to the status and affairs of the company.[258]

Further, the Sample Code, in a similar way to the Act, 2015, outlines the concept of effective board leadership to which the responsibilities of directors are to act with integrity and good judgement, safeguard the best interest of the company in a responsible, accountable, fair and transparent manner in the management of the company with the intention of achieving continuity of the business.[259] In stressing the significance of director's role, the Sample Code provides a detailed manual on their responsibility to be transparent and accountable over the management of the company, jointly and severally. The research resolves that such a manual is essential for family enterprises while on boarding diversified control and management to which the board members in family enterprises can draw lessons from especially on reporting

[255] Private Sector Initiative for Corporate Governance, Principles for Corporate Governance in Kenya, 1999, 6.
[256]Ibid 255.
[257] Kimani, Danson et. al. "Analysing corporate governance and accountability practices from an African neo-patrimonialism perspective: Insights from Kenya." *Critical Perspectives on Accounting* 78 (2021): 102260.
[258] PSCGT (n129) 10.
[259] Ibid 105.

to the family board and the regulator.[260] The Sample Code is not short of providing governance tools for private companies to apply in enhancing adherence to governance practices. The tools include, sample code of ethics for the directors, board valuation forms, performance evaluation form for both the Board chair and individual assessment forms for the board members. The research resolves that such tools are applicable to family enterprises as soon as they embrace diversified management and control structures within their governance system.[261] Overall, the Code's viewpoint on the impact of corporate governance practices is that it results in well-governed and managed businesses that attracts investors, generates income and wealth, is viable, competitive in the global markets and remains sustainable.

It is the position of the Code that embracing corporate governance best practices in the running and management of corporation, ensures business sustainability as the business generates lasting value for all its stakeholders and shareholders.[262] In addressing the mechanisms to ensure accountability and transparency, the Code introduces the concept of directors ensuring that the risk assessment and internal controls plan, financial statements and auditing reports and procurement and information communication technology plan for presentation to the board of directors.[263] The plans and report are to provide an accountable and transparent interpretation of the status and affairs of the company to stakeholders and shareholders.[264] Further, the Code recommends for the existence of a business continuity plan, detailing all other plans of the company including the succession planning.[265] Additionally, in providing governance tools as a guide to private companies, directors are to ensure that there is a board charter and code of ethic which stipulates their vision and mission, duties and responsibilities aligned to the company constitution including the policies that guide in providing oversight and foresight in the management of the company.[266] Private firms are also guided to use legal and governance audit as tool to measure compliance with governance best practice and prepare a report for presentation to the board members.[267] This research project determines that in addition to the other guidelines under this code, this

[260] Ibid 106.
[261] Ibid 107.
[262] Code of Governance for Private Organizations, ICS (2014)
[263] Ibid 107.
[264] Ibid
[265] Ibid
[266] Ibid 108
[267] Ibid 110.

recommendation resonates fully with what family enterprises ought to adopt as a practice for it would work to resolve governance succession uncertainty, close the gap on failing enterprises, and guarantee business continuity leading to success and sustainability.

The Companies Act, provides for two categories of company regimes. These include the Private and Public company regimes. Accordingly, the Act describes a private company as one which is restricted by its articles of association in terms of membership which is limited to fifty (50) only, member's rights on share transfer noting that it excludes invitation to the public as subscribers of debentures or shares of the company.[268] In contrast, the Act states that for public companies, their articles of association are open to permit the public to transact with the company. Further, there is no limitation as to the membership in a public company.[269]

Additionally, the Act now provides for "small companies regime" within its provisions, to mean a company whose total net asset value is not more than twenty million (Kshs. 20,000,000/=) or one whose turnover is less that fifty million (Kshs. 50,000,000/=).[270] This research project recognises the incorporation of "small companies' regime" as a bad precedent for private companies in regard to corporate governance under the 2015 Act.[271] The provisions of the Act stipulate that companies under the "small companies' regime" are required to issue abbreviated financial reports that are concise, without necessarily attaching the audit report, as a measure to ensure transparency and responsibility which are principles of good corporate governance practice. However, this research indicates that the exemption to comprehensive financial reporting for small regime companies impedes on economic growth of these companies, as they are only required to submit abbreviated financial reports not necessarily accompanied by auditor's reports. The research further highlights that such exemption make it possible for these companies to understate their financials leading to filing of sham business reports in order to comply while incurring low operation costs. In the end, the accountability and transparency principles of corporate governance are breached hence leading to non-compliance by the directors of these companies, a practice that is against codified duties of directors who are answerable for the welfare of the company and

[268] Companies Act, 2015, S. 9.
[269] Companies Act, 2015, S. 10.
[270] Companies Act, 2015, S. 624.
[271] Companies Act , 2015), S. 624.

shareholders.[272] In the foregoing, the research concludes that the existing Kenyan legal framework has taken steps to support small companies to adopt principles of corporate governance. However, it remains to be in a prescriptive rather than a descriptive form like is the case for listed private and public companies for the SCR regime may on the flipside impede business growth of small companies due to lack of binding guidelines.

This research resolves from the analysis of existing laws on corporate Governance in Kenya that family enterprises have sufficient background from which to draw important corporate governance best practices in the running and management of the family enterprise. It is apparent that family enterprises remain to experience corporate governance tests despite the existence of several compliance guidelines depicted in the codes, guidelines, laws and regulations governing private companies where family enterprises are categorised. It follows that, if only family enterprises would embrace such guidelines, focus on implementation and enforcement supervised by the relevant regulators and stakeholders, the challenges they face that constantly impede their growth would be easily sorted out.

3.3.6.6 The Institutional Framework of Corporate Governance in Kenya

The functions and value of specific players who are largely responsible for supervising, monitoring and promoting compliance with corporate governance principles and practices by companies in Kenya will be examined against the context of ensuring good governance practice for family enterprises. Though the custodians of safeguarding compliance with good corporate governance standards are not restricted to industry specific supervisory body, this research project narrows down on the Association of Family Business Enterprise (AFBE), Registrar of Companies Office (RC), the Courts, the Institute of Certified Secretaries (ICS) and Centre for Corporate Governance (CCG).

3.3.6.6.1 The Association of Family Business Enterprise in Kenya (AFBE)

According to AFBE publication, family enterprises contributes to 60 to 80% of the Gross Domestic Production (GDP) hence remain a backbone of the economy.[273] AFBE serves the interests of family businesses since there existed no direct association that benefited the

[272] Ibid.
[273] Association of Family Enterprises (AFBE), 2019 “About us and What we do”< https://afbekenya.org/> Accessed on 30 October 2022

plight of family-owned enterprises as they experienced serious governance challenges yet they can perform much better and deliver much more to the economy of the country.[274]
Additionally, the association is focused on having family enterprises remain dedicated to the appreciation and implementation of best business practice in family enterprises.[275] In summary of the mission, vision and purpose of the association is to facilitate the existence of successful family businesses that prosper into future generations.[276] Furthermore, one of the purposes of the association is to promote for clear recognition of family businesses in legislation and policy while facilitating for the enhancement of skills and sharing of knowledge on matters success and sustainability over future generations[277]. The association goes further to organize seminars and conference talks for its members to support them with one-on-one guidance on best business practice standards including capacity building the members where they fall short. This research notes that, it is not unlikely to imply that the association, having recognized the need to promote recognition of family businesses in policy and legislation, derives knowledge from the existing legal framework and codes to stress on the importance of best business practice and draw lessons on what entails implementation, compliance, success and sustainability over generations. Further, the AFBE has gone a step further to publish reading materials specific to addressing the unique nature of family enterprises while enlightening the purpose of embracing corporate governance best practice in management of family enterprises.[278]

It follows that family enterprises have a great experience in gathering and sharing space on topics touching on their unique governance structures. Therefore, it is probable for family enterprises to derive best business practices such as diversification of management and control in the running of the enterprise and business succession planning from their own forum. This research, therefore, resolves that family enterprises have all the information to aid them to thrive and experience sustainability over generations. They, however, ought to concentrate on the implementation of best business practices when running and managing family-owned enterprises as stipulated under the AFBE.

[274] Ibid 115
[275] Ibid 116
[276] Ibid 116
[277] Ibid 117
[278] Ibid 118

3.3.6.6.2 Registrar of Companies Office

The 2015 Act[279] establishes the office of the registrar of companies which plays an crucial role in facilitating for the setting up of companies and checking for compliance thus playing an important role in the promotion of businesses in the country. The registrar of companies is a legal body under the Office of Attorney General and Department of Justice that is a central depository of public data relating to companies and businesses.[280] The Registrar is responsible for the overall operation of services related to incorporation, registration and operation of firms and partnerships, which are achieved through the established Business Registration Services Act,[281] which provides for the registration of business service under the Department of Justice and Office of Attorney General. The key mandate of the office is to ensure effective administration of a company in order to improve efficiency.[282] The registrar issues businesses in Kenya incorporated under the 2015 Act, with a certificate of incorporation, a unique serial identifier number and a Company registration certificate (CR12) detailing the directors/shareholders of the company as proof of registration. Prior to approving the registration, the Registrar of companies is to peruse through the documents as presented for authentication. It follows that, where the documents fall short, the registrar has a discretion to decline or accept the application and subsequently decline to register the company. This research highlights that a company needs the services of the office of registrar of companies not only at the preparatory stage of registration, but also during its life-long existence as a company, with certain obligations placed on the company and essentially undertaken by the directors/shareholders. For example, a company may decide to change its name, the particulars of directors, address of service, among others after registration. Any such changes must go through the registrar's office for approval.

The Companies Act 2015 provides that registered companies are obligated to submit annual returns with the registrar of Companies.[283] These are then to be submitted by the directors/shareholders, as well as any such resolutions on issues like the removal/appointment of new directors/shareholders, report on matters liquidation and insolvency of the company as prescribed by the Insolvency Act, among others.[284]. In addition, directors to private

---

[279] Companies Act, 2015, Laws of Kenya.
[280] Business Registration Service (BRS) Website <https://brs.go.ke/companies-registry.php> Accessed on 31 October 2022
[281] Business Registration Services Act No. 15 of 2015.
[282] Ibid 122, "preamble".
[283] Companies Act 2015, s 705
[284] Insolvency Act, 2015.

companies are responsible for ensuring that the annual financial statements concerning the company are audited in compliance with the law and submitted to the Registrar for scrutiny and record keeping. As for public companies, directors are obligated to ensure that members receive "true and fair" statements of accounts indicating the status of loss and revenue portfolio of the affairs of the company for their perusal and adoption to which the resolution is also forwarded to the registrar of companies. They are required to further file resolutions within thirty (30) days from the date of adoption by members in the annual general meeting.[285] Largely, the registrar of companies is responsible for what a company does and through its stipulated supervisory role in establishing governance standards and counter-checking compliance with the articles and company memoranda, it ought to ensure that the data relating to company's history, membership and governance structure as to directors/shareholders, financial statements and accounts, audit reports, resolutions is openly available for inspection therefore promotes corporate governance disclosure, transparency and accountability principles.

3.3.6.6.3 Criticism of the Registrar of Companies Office

a. Difficulties of supervision and prevention

One of the roles of the registrar of companies is to ensure compliance with provision of Companies Act, 2015 and more specifically, to ensure that the articles and memoranda of association in order are at the time of incorporation and registration.[286] Additionally, the registrar is responsible to receive liquidation and insolvency applications from companies to process the application prior, gazettement to the public, and prior to presentation of the application in court of law.[287] It is evident that in the recent past, the ORC has received several applications relating to liquidation and insolvency of companies, mostly family enterprise related companies, yet there is no guideline and/or framework from this office on the root cause and preventive mechanisms.

b. Non-existence market surveillance system

Drawing from the Capital Markets Authority practice, any abnormal trading patterns is a key indicator that the market has been tampered with when it comes to trading of securities in the Nairobi Securities Exchange platform. The authority has established an investigations unit whose mandate is to flag malicious trading volumes and transaction patterns in the trade and

[285] Companies Act, 2015, s. 705.
[286] Companies Act 2015, s. 832
[287] Ibid

securities transactions.[288] The study notes that, in the case of the Office of Registrar of Companies, there is no framework relating to market surveillance on matters non-compliance by companies. The registrar just receives information as submitted during the incorporation of companies' and when there is an application to liquidate and declare a company insolvent.

3.3.6.4 The Institute of Certified Public Secretaries

The Institute of Certified Public Secretaries (ICS) is a professional body of Certified Public Secretaries that exists under the Corporate Secretaries International Association (CSIA) umbrella body for the corporate secretaries and governance professionals.[289] Kenya has legislated on the profession through the Certified Public Secretaries of Act,[290]which was enacted in 1989 and a revised edition issued in 2012 to align to the new constitution and other attendant laws.[291] The general mission and vision of the institute are to entrench governance practices that inspire professionals and transform institutions in order to promote and develop governance in Africa in a manner that is guided by standards of excellence, ethics, and novelty and to remain responsive to the ever changing governance laws and practice.[292] The ICS website has a resource centre on numerous reading materials (journals and articles) on corporate governance including best practices that family enterprises can draw lessons from to resolve their governance challenges.

3.3.6.5 The Courts

In Kenya, courts place reliance on various laws and regulation such as Constitution, the Insolvency Act, 2015 and Companies Act, 2015 among others in determining disputes and/or interpretations of law on matters related to governance of companies (private or public, incorporated and unincorporated companies).[293] There exists the High Court Tax and Commercial Division, mandated to hear and determine commercial related disputes emanating from company transactions such as insolvency and liquidation proceedings.[294] Guided by the Insolvency Act that provides a framework for insolvency of both ordinary

---

[288] Capital Markets Act, Cap 458A

[289] Kimani, D., Ullah, S., Kodwani, D., & Akhtar, P. (2021). Analysing corporate governance and accountability practices from an African neo-patrimonialism perspective: Insights from Kenya. *Critical Perspectives on Accounting*, *78*, 102260.

[290] Cap 534.

[291] The Institute of Certified Secretaries of Kenya (ICS) https://ics.ke/about-us. Accessed on 31st October 2022

[292] Ibid 127 (mission, vision and values of ICS).

[293] This principle is encoded in Section 3 of the Judicature Act which provides for the hierarchy of laws.

[294] Insolvency Act, 2015, Laws of Kenya.

persons, private and public companies to enable for management (administration) of their affairs for the benefit of their creditors, the Courts make decisions in the interest of all parties.[295] In essence, the Act guides the court to consider redeeming the company whose financial position looks redeemable to enable them remain a going concern, continue in operation to meet their financial obligations and repay their creditors.[296]

Under the Insolvency Act, an application can be made to court by a creditor, seeking to declare a debtor bankrupt for purposes of commencing insolvency proceedings for the administration of their business by the Court.[297] Courts reserves the power to accept a voluntary arrangement proposal as an alternative to declaring a person or a business insolvent for purposes of liquidation in addition to prescribing negotiation and mediation as form of out of court settlement.[298]

From the foregoing, it is evident that Courts have taken part in their role to adjudicate and provide detailed supervision to companies (private or public, incorporated or unincorporated) after they have experienced governance challenges specific to financial crisis, mismanagement and family wrangles. There are instances where the courts have pronounced itself on matters family business as related to the fiduciary duty of the directors. There are equally instances where they have been deemed to have overstepped. In **Republic v. Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Limited & 3 others**,[299] the office of Director of Criminal Investigation was invited to investigate a criminal allegation in relation to theft of colossal sum of Kshs. 1.6 billion by directors of Tusker Mattress, a private company incorporated under the Companies Act, 2015 desired to investigate their accounts.[300]

The facts of the case emanate from a dispute with respect to the management of Tusker Mattress (a family business venture) and the complainants, who happened to be three (3) directors) who sought redress by way of criminal legal process, and engaged in antagonistic

---

[295] Nelly Gitau and Beryl Rachier; The Insolvency Act, 2015: The Impact on Creditors and Their Right to Realise Securities < https://www.oraro.co.ke/2018/10/17/the-insolvency-act-2015-the-impact-on-creditors-and-their-right-to-realise-securities/>. Accessed 20th November 2022
[296] Ibid, 130.
[297] Insolvency Act, No. 18 of 2015, s 15 (a) and 17
[298] Insolvency Act, No. 18 of 2015, s 310
[299] Miscellaneous Civil Application 179 of 2012
[300] Ibid

media publicity to further their grievances.[301] In his parting shot while determining the application, Justice G.V Odunga stated that Tuskys Supermarkets is a family-owned enterprise as parties to the dispute are family members. The Judge advised them to consider an amicable dispute resolution approach so as to safeguard the family and business interests.[302]

In family matters, competent courts such as the family division of the high court, adjudicate on family succession cases where they guide the litigants effectively. One of the core things that they are often reminded to remember is that they are a family and that ought to mediate or negotiate their way out of family related disputes because such issues ordinarily affect family business continuity due to unnecessary wrangles. In determining the case of **Samuel Gashwe Mukuha v. Newton Kagira Mukuha[303],** which is a succession matter over the estate of Peter Mukuha Kago (deceased shareholder of Naivas Ltd), an application was filed by Newton, in objection to the decision of his brother, Samuel and Naivas Ltd board of directors to sell shares of the company to Massmart Holdings Ltd of South Africa without involving him, as a key shareholder. The Court established that the history of Naivas Ltd as a family business was altered sometime back after it evolved, and it was found that the applicant (Newton) had no legal or justifiable interest in Naivas Ltd since the retail supermarket chain had evolved a long time ago and now included external directors/shareholders as indicated in the company's search form (CR12).[304]

Courts, guided by the Insolvency Act, 2015, which is the legal framework on insolvency causes have pronounced themselves on matters relating to liquidation and administration of companies. In the matter of **Re Nakumatt Holdings limited (under Administration) 2016[305],** the creditors approached the court for orders of liquidation of the properties of the company to repay sum unpaid by Nakumatt supermarkets to creditors, suppliers, landlords and employees among others.[306] The court issued an administration order over all the properties and the assets of Nakumatt Holdings, appointed an administrator to administer the properties for the benefit of the creditors. The Administrator, as an officer of the court, would report to the courts on the progress of administration. Therefore, courts in application of the

[301] Ibid 134.
[302] Miscellaneous Civil Application 179 of 2012; Paragraph 62 and 63 of the ruling
[303] Succession Cause No. 92 of 2011
[304] Ibid 137, Paragraph 52 of the Ruling
[305] Insolvency Cause No. 10 of 2017
[306] Ibid

law are seen to weigh their options to try benefit companies such as Nakumatt (a family business venture) which was facing financial mismanagement and poor governance structures. In the end, the financial troubles of Nakumatt holdings were irredeemable and the creditors approved sale of assets to clear outstanding debt to creditors in the sum of over 38 Billion Shillings. Nakumatt Holdings ceased its operation on Tuesday 7 January, 2020.

In alignment with the codified duties of directors under the Companies Act, courts have been quite proactive in enforcing the duties. In the case of **Johnstone Aggrey Ochola v. National Bank Of Kenya Ltd,** [307] the court held that board of directors are officers/agents of the company that represent the company. To complement the decision, the Court of Appeal in **J.S.K. (Cargo) Limited v. Kenya Airways Limited [2008] eKLR** [308] elaborated on the powers and authority of board of director of a company as stipulated in the Civil Procedure Rules **Order 5, Rule 2** which provides that the service of processes on a corporation are to be made on the director, secretary, other principal officer of the corporation. It follows that a director of a corporation constitutes one of the principal officers of a company in all matters including legal proceedings.[309]

This research project underscores that there exist very few reported convictions of directors of companies have previously violated codified duties under the Companies Act. Little action has particularly been experienced from the Registrar of Companies, as a regulator and the Office of Director of Prosecutions who are yet to pursue any civil and/or criminal proceedings claims against directors of companies such as Nakumatt Holdings who were faulted for breach of their fiduciary responsibilities to the company and further resulted to loss of money belonging to stakeholders as a result of which the business could not become sustainable and it collapsed.

3.3.6.6 Conclusion

This chapter concentrated on the history, nature, legal and supervisory governance framework for family-owned enterprises in Kenya and more specifically looked at the institutional framework such as the Office of Registrar of companies, the courts and the Institute of Family Business in relation to their corporate governance role within Kenya's legal framework. The effective supervision, monitoring and regulation of family enterprises

[307] Civil Appeal No. 139 Of 1999 (Unreported)
[308] Civil Appeal 83 of 2001.
[309] Civil Procedure Rules 2010 (Revised 2020)

remains a challenge even with the collapse of several giant retail supermarkets. Furthermore, the Registrar of Companies, has failed in monitoring, creating awareness and ensuring compliance with the codified duties of directors of companies, which in essence are universal and cut across many regimes of registration. The ineffective supervisory procedures relate to numerous issues such as difficulties in detecting or monitoring non-compliance with the Constitution, the various Acts and Codes of Corporate Governance. The failure to follow-up in establishing the root cause of failing family enterprises and to provide mitigating factors in the creation of awareness is a good manifestation of the same. Notably, the difficulty in not pursuing criminal sanctions and penalties against directors known for breach of codified duties and non-compliance with Kenya's corporate governance framework, indicate that there is lack of trained technical personnel within the office of Registrar of Companies to undertake effective checks and balances, in addition to lack of interest with regard to protecting family-owned business.

The Courts, as an institution are usually only invoked as a last resort arbiter, and mostly, with applications to administer liquidation orders for closure of companies for the benefit of the creditors. With the numerous back log of cases, courts experience in ordinate delays in the hearing and determination of disputes that touch on governance challenges for companies. Courts often advise family ventures to consider reconciliation with the creditors or other family members, in cases of family wrangles while buying them time to amend their ways.

In a significant way, this research has resolved that the key stakeholders such as the Officer of Registrar of Companies, the Institute of Family Business, the Institute of Certified Secretaries among others, have failed to support the courts in the quest to promote success and sustainability of family enterprises as no interventions have been advanced to aid family businesses before the media raises issues relating to governance challenges that these these enterprises face on a regular basis.

CHAPTER FOUR: LEGAL AND INSTITUTIONAL GOVERNANCE GAPS FOR FAMILY-OWNED ENTERPRISES

4.1 Introduction

This chapter deliberates on legal and institutional challenges within Kenya's corporate governance framework. It explores these issues as a cause to the collapse of family-owned enterprises. The chapter argues that Kenya's legal and institutional framework has not been keen on embracing or being proactive in the embracing corporate governance best practice. It is undeniable that the closure of various gaps within Kenya's institutional and legal framework will ultimately play a role in increasing strong and effective corporate governance practice for family-owned firms. In this Chapter, the research paper theorizes that evident gaps in the governance of family enterprises include the failure to divorce ownership and management. This is a major contributing factor to their collapse of family-owned enterprises as some if not all thrive for a limited period but are not sustainable over generations.

This research has so far analysed the legislative framework by first defining what corporate governance best practices entail and examining the missing pieces within Kenya's legal framework with respect to family-owned enterprises. Additionally, the research project introduces the corporate governance legal framework for family-owned enterprises with a view to identifying the challenges in governance and management. The study will hence proceed to investigate and discuss at length the identified gaps within the legal framework in management process and governance for family-owned enterprises in Kenya. Furthermore, it will delve specifically into the regional and international laws in comparison to the legal framework in Kenya. In the end, the chapter will focus on noting down all the possible proposals to adopting corporate governance best practices in the management and running of family-owned enterprises thus mitigating the collapse of these businesses as recently witnessed with supermarket retail chains in Kenya while championing for business value creation and sustainability.

4.2 Corporate Governance Best Practices

Sir Adrian Cadbury defined corporate governance and its importance to corporations as rules and procedures concerned with ensuring fairness and alignment between the economic and social objectives among individuals and the community. Further, corporate governance framework exists to promote accountability in the use of business resources.[310]

[310] Sir Adrian Cadbury, UK, Commission Report: Corporate Governance 1992.

Notably, corporate governance as described in the 1992 Cadbury Report, is a structure through which companies are controlled and directed to protect and safeguard shareholders and stakeholders benefits in relation to reasonable return on investments.[311] Stakeholders are described to include employees, suppliers and customers, among others.[312] Furthermore, corporate governance is termed by the Organisation for Economic Co-operation and Development (OECD) as a system that lays down the distribution of rights, responsibilities and relationship between diverse actors such as directors of the board, management, stakeholders and shareholders to ensure that the company is run and managed for value creation to ensure maximum operational output.[313] The Abdul-Qadir Corporate governance principles go further to define the modalities of decision making in the governance of the company affairs.[314] Lastly, Rupalelia R, Njuguna expresses that corporate governance system is a means through which companies strategic objectives, performance monitoring and financial input and output, including risk management plan are set.[315] The research therefore records that largely, corporate governance refers to a system that prescribes processes to control and manage corporate entity in adherence with principles of stewardship and accountability, fairness and transparency whether for a public or privately owned entity. The Corporate governance principles go further to define the modalities of decision making in the governance of the company affairs.[316]

4.3 Components of Good Corporate Governance

This research intends to analyse too what is termed as good corporate governance that can be adopted, implemented, complied with and reported on by corporations. In defining what corporate governance best practices are, it is apparent that corporations exist for the benefit of shareholders and stakeholders. Therefore, leaders and managers of these corporations have

[311] The Cadbury Report on Corporate Governance, 1992.
[312]Sullivan , "The moral compass of companies: business ethics and corporate governance as anti-corruption tools", IFC Corporate Governance FOCUS publication, 2009.
[313] European Central Bank, "Annual Report: 2004", July 2005 <https://stats.oecd.org/glossary/detail.asp?ID=6778> , Accessed on 9th November 2022
[314] Abdul-Qadir, "Corporate Governance and Financial Performance of Banks in the Post-Consolidation Era in Nigeria", (2012) International Journal of Social Science and Humanity Studies, 29.
[315] Rupalelia Njuguna, "The Evolution of Corporate Governance and Consequent Domestication in Kenya", (2016) Volume 7 (No.5), International Journal of Business and Social Science.
[316] Ibid 314.

the responsibility of safeguarding the welfare of shareholders and stakeholders in order to achieve these benefits.[317]

Corporations are profit-making entities in nature and therefore profit generation and business success are objectives for which corporates must endeavor to attain. It follows that for corporate governance to be attained, the procedures for disclosure and transparency have to be adopted and implemented to provide the shareholders and regulators including the community with true accounts and reports about the business financial reports and statements of accounts, operating environment, strategy implementation, risk management portfolio and audit report aspects, among others in the company. This research, therefore, resolves that good corporate governance constitutes the accountable and transparent mode of managing, operating and directing a corporations in accordance with standard ethical procedures and processes while pursuing profits for the corporation.[318]

In conclusion, the research further adopts the view of Mervyn King, the Chair of King Report committee that good corporate governance is qualitative in nature and its adoption and practice by corporations should happen naturally as a form of good behavior to guarantees proper control and management of corporations for the benefit of shareholders. Mervyn King suggests that good behavior cannot be legislated.[319]

4.4 Kenya Corporate Governance

Corporate governance is defined under the Kenya's Code of 2015 as a system through which companies are structured and managed to protect for purposes of advancing business success while safeguarding shareholders and stakeholders benefits.[320] A cursory look at the journey to embrace corporate governance best practices in Kenya dates back to 2002, after Capital Markets Authority articulated corporate governance guiding principles for listed companies.[321] Further, capital market authority issued the 2015 Code and 2017 Code of Corporate Governance Practices for Public Listed Companies that detail principles that companies should adopt towards integrating corporate governance best practices in their businesses governance structures while working towards a culture of implementation and

---

[317] Prachi Juneja; What is Good Corporate Governance? ISO 2001 Certified Education Provider (2015) <https://www.managementstudyguide.com/what-is-good-corporate-governance.htm>.
[318] Ibid. 153.
[319] King IV report Committee, 2016.
[320] Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015, Chapter 1.1.2
[321] Ibid 145.

compliance.[322] The Companies Act, 2015 introduced new corporate governance measures and standards as it incorporates governance best principles within it provisions and therefore requires established companies under the framework to set out and institute polices of embracing corporate governance best practice standards. The Act codifies the responsibilities of directors which are now well-defined within the OECD principles as paramount towards achieving corporate governance in the control and management of companies.[323]

This research concludes that elements of corporate governance are intended to safeguard stakeholders, shareholders and investors welfare within a company by providing for adoption of appropriate governance structures that are important to ensure that the companies are run and managed in well-thought-out manner where the duties and responsibilities of all players are known, the objectives and goals of the company are defined and strategies are put in place to guide how they will be met and there is performance monitoring and reporting by the board of directors to the shareholders and stakeholders of the company. In the end, the organisation is able to shield itself from the unscrupulous corporate practices coupled with the ineffective economic effects that contribute to the collapse of these entities.

4.5 Corporate Governance for Family-Owned Enterprises

Family Business Governance Handbook of 2008 is instructive on how family businesses ought to be run. It defines a family business or family-owned company as one where control and management is with family, led by its owner for purposes of handing over to their children.[324] Globally, a large percentage of private companies are family owned and controlled businesses. The "Founder syndrome" is prevalent within their governance structure as ownership and control, power and influence is centrally exercised by the owner and founder of the business to the exclusion of others.[325]

In Kenya, family enterprises are a great contributor to the economy,[326] as every industry is predominantly influenced by the wide presence of family. For example, the Kenyatta family is known in the diary and large-scale horticulture farming, the Ndegwa family has presence in banking, financial services and securities business investments, the Chandaria family is

---

[322] Ibid 148.
[323] Companies Act, 2015), Section 770
[324] Sanaa Abouzaid, IFC Family Business Governance Handbook, 2018 International Finance Corporation 2121 Pennsylvania Ave. NW, Washington, DC 20433, United States of America (2018) <https://www.ifc.org/wps/wcm/connect/2c93b2cb-dec6-4819-9ffb-60335069cbac/Family_Business_Governance_Handbook.pdf?MOD=AJPERES&CVID=mskqtDE> Accessed
[325] Ibid 159.
[326] PricewaterhouseCoopers(N9)3.

known for its manufacturing of tissue papers and toiletry related products, the Mbiyu Koinange's has thrived in real estate and land business not forgetting the retail supermarket chain industry owned by both locals and non-locals. Both the Companies Act, 2015 and 2015 Code of corporate governance practice have no direct substantive information touching on corporate governance for family-owned enterprise but indirectly provides for a legal regulatory governance structure for privately owned entities as family-owned enterprises are established and/or incorporated under the Act as either private or public companies.[327]However the Act does not plainly make available for the governance of family-owned business, it is inferred that by their private nature and by virtue of their incorporation under the Act, their governance structure is controlled by the requirements of the Act thus the common-sense principles 2.0 on corporate governance are applicable to them and they are regulated by the Office of Registrar of Companies[328].

Globally, family-owned enterprises have remained cagey and private on matters their governance structure, as they consider themselves "private" and hence they tend to hide their affairs from the rest of the world despite operating within the same market environment as other businesses. According to the IFC handbook, corporate governance for family businesses is tied with a long history of highly concentrated ownership and management on the founder, absence of accountability, poor transparency and fairness principles, among others. Additionally, family businesses experience prevalent corporate governance challenges due to the combined ownership and control aspect, where the founder is the manager of the business.[329] Further, there is lack of structured distinction with respect to business properties and financials, and the family financials as they are legally not separated. As a general rule, most family businesses operate in an informal manner without policies and strategy, and this remains their greatest governance weakness. They lack internal control mechanisms, internal risk management and audit controls as the control is only personalised to their needs.[330]

Kenya has seen a sequence of threats that have led to the collapse and of family-owned businesses with the retail supermarket chain industry failure rate being prevalent. The Courts have been involved in resolving family-related wrangles that have crippled these family-

[327] Companies Act, 2015, LOK

[328] Common Sense Principles 2.0 <https://www.governanceprinciples.org/wp-content/uploads/2018/10/CommonsensePrinciples2.0.pdf> Accessed 17th November 2022

[329] Ibid.

[330] Ibid.

owned businesses as fights over power, control and influence continue to remain at the centre of running and managing these businesses.[331] During the public display of disagreements within the family-owned businesses, poor corporate governance structures have been noticeable as most of these businesses are troubled with complexity, informality in governance structures, and lack of clarity of roles and poor financial management and reporting, among others.[332] To this extent, the study focuses on retail chain supermarkets in Kenya as seen in Chapter 2, to provide analysis on corporate governance practices for Kenya's family enterprises. In conclusion, IFC handbook acknowledged that family enterprises are in a position to thrive and remain sustainable by adopting principles of corporate governance to refine their governance model. The handbook thus stipulates for training on key governance tools that are effective to respond to the unique governance challenges encountered by family enterprises.

4.6 Gaps in the Corporate Governance Legal and Institutional Framework

First notable and prevalent gap emanates from the concept of regulation for family-owned enterprises. The model of governance for these businesses is self-regulation. It is notable that most private entities in Kenya, where family-owned enterprises are categorised, adopt self-regulation as their model of governance. According to Rachel Ntabangho,[333] the Kenyan Corporate Governance Code lacks provisions as to punishment of unethical and non-compliant company directors thus resulting in falling back on the Companies Act.[334]

The author notes that self-regulation governance mechanism may not be the best governance option for private enterprises in pursuit for adherence with corporate governance best practice due to lack of guarantee on the ability of the set regulatory bodies to effectively facilitate compliance.[335] To this, the writer notes more of the weaknesses of self-regulation governance which results in having very few directors' employ accountability measures within their management structures of running private–owned companies.[336] Additionally, the lack of punishment mechanisms leaves room for board of directors of private owned companies to be at liberty to favour the management more than the shareholders and other stakeholders. Additionally, even in instances where most family-owned enterprises argue that they are best

[331] Ibid
[332] Ibid
[333] ibid
[334] Companies Act (2015) No. 17 Laws of Kenya
[335] Ibid
[336] Ibid

at regulating themselves, there still exists gaps in ethics and integrity as most family enterprises adhere only on paper to pass off as compliant.

4.6.1 Legal Framework Shortcomings

Corporate governance best practice implementation process is far from perfect for family-owned enterprises under currently existing legislations and codes. The prevailing inadequacies that contribute to lack of enhanced success to corporate sustainability in family-owned enterprises are glaring. It is no better that Companies Act, 2015 provides for "small companies regime" referring to them as companies whose revenue is below Kenya or those whose total assets value is equivalent to Kenya shillings twenty million.[337] Though this legislation can be described as corporate governance regulation for private companies, and accordingly family-owned enterprises, the regime impacts on principles of accountability, fairness, responsibility and transparency, which are corporate governance practices for companies. It is notable that requirements on fiscal reporting and audit for small entities under this regime is basic and has no severity to compliance as compared to adherence requirements for public companies and private listed companies. This is because, the Act only provides for small companies regime to issue shortened fiscal statements without essentially including the auditor's report. It follows that companies under the regime lack mandatory and express obligation to issue concise statements of accounts in addition to sharing their audit reports.[338]

The research concludes that such permissive provisions impede on economic growth for such companies. In earnest, the companies will not prepare comprehensive financial accounts and audit reports available for review by shareholders and investors as a basis to make investment decisions so as to provide capital to small companies. Additionally, such a gap in the law creates a latitude for small company's regime to file sham fiscal and audit reports including, overstating or understating their profits and loss accounts as they continue to incur low costs of operations. In the end, these companies will operate in an ineffective environment where there is full proof accountability, responsibility, and transparency.

Additionally, there is variability instead of uniformity in the provisions of the Act which ought to be the best tool providing guidelines to cure non-compliance with corporate governance best practices. The Act is seen to perpetuate prescriptive voluntary corporate governance compliance for family-owned enterprises but descriptive mandatory corporate

[337] Companies Act, 2015, s. 624.
[338] Ibid 167.

governance compliance requirements for public companies or private listed companies all aim at ensuring good corporate governance practices. This research notes that such inconsistencies and inadequacies in the Act, lead to unsuccessful adoption and adherence to corporate governance best practices for family-owned enterprises as it creates uncertainty and culture of choice thus affecting the success and sustainability of such enterprises.

Moreover, self-regulation concept propagated by the Companies Act has worked against adoption of separate ownership, control and management for family-owned enterprises and instead the founder and owner of the businesses double up as their managers hence affecting responsibility and openness in their management. The negatives are that there is no division between management of family finance and business finances, which leads to mismanagement due to lack of accountability, risk management and audit forgetting that the purpose of family-owned enterprises is to make profit in a sustainable manner and remain productive. In providing solutions, Family council stated that family-owned enterprises ought to adopt the unitary board system, embrace separate ownership and control concept where there are non-executives who are skilled and knowledgeable in the management of the business, working towards providing oversight over the business while taking over various roles as directors, board chair and employees.[339]

In conclusion, it is notable that due to lack of strict compliance prerequisites for family-owned enterprises, the adoption of corporate governance principles remains on paper only and not in action. This has proved detrimental as witnessed from the recent court cases affecting supermarket businesses in Kenya which have been grappling with mismanagement of finances in actual fact but in the end, they report that they are a going concern by tabling fictitious accounting figures and balance sheets leading to the collapse of the business, to the detriment of stakeholders welfare, the community and the economy.

4.6.2. Institutional and Supervisory Framework Shortcomings

The Companies Act, 2015 should be updated to incorporate possible reporting and disclosure mechanisms towards amenability to corporate governance best practices linked to the Office of Registrar of Companies. This will ensure mandatory reporting, disclosure, transparency and compliance with best corporate governance standards among family-owned enterprises in order to mitigate their collapse and guarantee value creation in a sustainable manner beyond

[339] Family Business Governance Handbook, pp. 23-27.

third generation in the interest of the business, the family and all its stakeholders. Further, absence of training and awareness among owners of family-owned enterprises on the purpose of corporate governance practice within existing framework in Kenya, and its application has been identified as deficient. It is a truism that most founders of family-owned enterprises in Kenya are not learned but are book smart and lucky to start a business and it thrives to one successful business where they report to every day, sell, make profits and restock and the cycle continues day in day out.

This research therefore reference the proposals published by the international finance council (IFC) derived from the family business governance handbook to conclude that there is need for the Registrar of Companies office, the Institute for Family Businesses in Kenya and the Institute of Certified Secretaries, to collaborate and train executive and non-executive governance of family-owned enterprises on the importance of corporate governance, the need align to the ever-changing global markets where other profit making businesses are in compliance with corporate governance best practices to thrive and succeed while creating value in a sustainable manner. The trainings could cover areas such as general overview of corporate governance, board composition, role and responsibilities of directors, administrative knowledge, strategic planning, accounting and budgeting, business finance, cash and wealth management in addition to succession planning. Additionally, these institutes to organize benchmarking trainings with businesses in the developed countries that have since adopted corporate governance practices as well as encourage learning from public and private limited entities that are thriving in the country. This research recommends to embrace corporate governance principles, implement, comply and adopt integrated reporting in alignment with corporate governance best practice standards, as a solution specific to family-owned enterprises that guarantees value creation while remaining productive in a sustainable manner.

CHAPTER FIVE: ENFORCEMENT AND CORPORATE GOVERNANCE COMPLIANCE IN FAMILY-OWNED ENTERPRISES FOR SOUTH AFRICA AND UNITED KINGDOM: LESSONS FOR KENYA

5.1 Introduction

Family-owned enterprises remain guarded in their operations as they exercise traditional model of governance where ownership and control is within the family and rarely open up to the existing market frameworks due to their private and unique nature derived from the family concept.[340] The research project objective is to collate existing corporate governance legal and regulatory framework that is aligned to good corporate governance best practice, through which family-owned enterprises are urged to adopt the structured principles, guarantee their success and sustainability beyond the second or third family generation. Further, the research theorizes that there is plenty knowledge and information to provide information on the importance of embracing corporate governance in the control and administration of family firms, locally and internationally. Therefore, it is time for directors and managers of operations in family-owned enterprises to work unceasingly in drawing from both private and public companies' practices on the importance of adopting corporate governance best practice.

This chapter relies on works from specific jurisdictions from which Kenya's family-owned enterprises can learn the significance of intentionally adopting corporate governance best practices in their governance structures. The research paper selected South Africa and United Kingdom as reference points for noteworthy reasons. The primary one is that this nations are recognised as being most advanced in their corporate governance systems in the ever changing corporate landscape of the 21st Century. Additionally, Kenya has borrowed some aspects of the South Africa Company law in the development of its Companies Act 2015.[341] This can be said regarding the current Companies Act of the United Kingdom to which Kenya has a nexus to.[342] The South Africa governance King IV report is based on the central concept of creating value for companies in a sustainable manner.[343] Similarly, the United Kingdom, being a first world class country, has one of the most developed legislative frameworks in relation to corporate governance for family firms. Moreover, there is an

[340] Isac, Claudia. "Management of succession in family businesses." *Quality-Access to Success* 20 (2019).
[341] Obade, Sharon. "Corporate Governance: Insider Trading Perspective in Kenya." LLM diss., University of Nairobi, 2021.
[342] Ibid
[343] King IV Report on Corporate Governance for South Africa; Foreword; The Institute of Directors in South Africa (2016)

established Institute for Family Business (IFB) Research foundation in the UK, whose role is to create awareness on the need for corporate governance systems among family firms including notifying them of the opportunities and challenges facing family firms, in the ever changing world.[344] The two countries also have the common law legal system which is similar to Kenya but they enjoy developed economic status in contrast to Kenya. Nevertheless, they make available lessons from which Kenya family-owned enterprises may possibly benefit.

5.2 South Africa

5.2.1 South Africa Corporate Governance Framework

The Republic of South Africa first entrenched corporate governance in 1992 through the King Committee which came up with reported on matters relating to corporate governance best practices.[345] Mervyn King led the committee to develop its first report, the King I report, which was intended to provide corporate governance guidelines in South Africa. Ultimately, Mervyn King Committee (King Committee) since developed King II, King III and King IV reports. King IV report is a recent publication that was finalized in the year 2016.[346]

King I Report (1994)

King I report which set the pace for evolution of corporate governance best practice in South Africa acted as a point of reference for legislative and regulatory development and encouraged the adoption of some of the highest standards of corporate governance by endorsing responsible corporate conduct in organisations including the conduct of directors.[347] The report raised awareness as to what constitutes good governance both in public and private sector industries.[348] It depicted a coherent corporate governance framework as that which practices combined approach to good governance to safeguard the welfare of stakeholders and implement effective financial, ethical, social and environmental practice. King I report championed for organisations to adopt the unitary board structure governance system where there is greater interaction on strategy, standard of governance

---

[344] Dr Josip K et.al, "Corporate Governance in Large UK Family Firms"; IFB Research Foundation Report (2019)

[345] Foreword; The Institute of Directors in South Africa (2016) < https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf > Accessed on 9th November 2022

[346] Ibid

[347] Wang, Ruizhe, Shan Zhou, and Timothy Wang. "Corporate governance, integrated reporting and the use of credibility-enhancing mechanisms on integrated reports." *European Accounting Review* 29, no. 4 (2020): 631-663.

[348] Ibid

conduct, communication with stakeholders, planning and performance, among board members aimed at achieving responsible corporate governance conduct.[349]

King II Report (2002)

Due to the progressive legislative developments in South Africa and the changes occasioned by the global economic environment, the King Committee sought to update the King I report to align with these developments and thus introduced King II report in 2002.[350] King II report was developed around King I principles and therefore, it only progressed to introduce the concept of corporate citizenship and the need to embrace economic, social and environment aspects into the activities of a company.[351] At the launch of King II report, (2002), the King committee advised companies that desire to thrive in the 21st century, to consider embracing an all-inclusive approach to governance and therefore ensure that their governance body embraces principles of corporate governance that include role clarity, fairness, accountability, and responsibility in addition to being responsive to the stakeholders. [352] The King II report proposed for the maintenance of unitary structures in boards within the governance body of companies, to provide for directors that are independent from management as a measure to safeguard minority shareholders' welfare.

King III Report (2009)

King III report made several recommendations but most importantly, it highlighted that the use of the codes of governance is for all South Africa incorporated entities regardless of the mode of registration (private, public or non-profit).[353]Additionally, it introduced the responsibility to account and remain compliant as a key consideration for companies.[354] King III report is seen to lean more towards enhanced transparency, accountability and disclosure principles of governance.[355]

---

[349]K.A. Mashamaite & Another; Transgression of Corporate Governance in South Africa's State-owned Enterprises, Bangladesh e-Journal of Sociology. Volume 16, Number 1. (2019) <https://www.researchgate.net/profile/Alfred_Eboh/publication/331608610_Bangladesh_e-Journal_of_Sociology_Bangladesh_Sociological_Society/links/5c82db40299bf1268d486536/Bangladesh-e-Journal-of-Sociology-Bangladesh-Sociological-Society.pdf. p. 124> Accessed 19th November 2022

[350] Ibid

[351] Ibid, 162.

[352] The Institute of Directors Conference; King Committee on Corporate Governance at the launch of King II Report (2002) on Corporate Governance for South Africa, Sandton Convention Centre, March 26, 2002.

[353] Institute of Directors in Southern Africa, King III Report on Governance for South Africa, 2009, p.5.

[354] Ibid

[355] Institute of Directors in Southern Africa, King III Report on Governance for South Africa, 2009,p. 14-15.

The report recommended for the adoption of risk based internal audit systems where companies or organisations are required to engage auditors in review of their financial statements.[356] The audit report is to be furnished to the directors of the board for assessments through a committee of Audit and Risk which must detail the effectiveness of the reports. Notably, the report introduced board evaluations as an important tool to assess the performance, oversight and insightful role of the board and its committees which has since been recognised internationally.[357] In conclusion, this research derives that the all-inclusive mandatory approach to corporate governance practice, introduced in King III report has a descriptive compliance approach for South African incorporated entities including family firms.[358]

King IV Report (2016)

King IV report was refined though there is no significant change from the theoretical foundations of King III report. The report provides governing bodies of corporations, companies, institutions and enterprises with recommended corporate governance best practices that are needed in accomplishing their roles and responsibilities.[359] The models of King IV Report are attentive to promoting corporate governance as an essential part of controlling and managing an organisation and conveying effects of governance such as control and legality, performance and principled values.[360]Additionally, the report champion for integrated governance practice, sustainable development, stakeholder engagement, among others, as measure to ensure that organisations are an integral part of society.

Notably, the King IV report champions for value creations that is attained in a sustainable manner.[361] It, therefore, appeals to corporations to embrace in their governance structure, a three-layered reporting perspective that focuses on the community, the environment and the economy, to ensure there exists a human relationship and financial capital, intellectual capital, social capital, which are to be achieved in addition to the procedures that govern proper practices leading to company profitability.[362] Further, King IV is centred on the concept of corporate citizenship, ethical leadership, stakeholder inclusivity, and sustainable

[356] Ibid
[357] Ibid
[358] Ibid.
[359] Institute of Directors in South Africa, 1 November, 2016, p. 26
[360] Ibid, 168
[361] Ibid
[362] Ibid, p. 3.

development, organisation in society, integrated thinking and integrated reporting, all of which are linked to the standard shifts in corporate governance.[363]

In expounding on the paradigm shifts in corporate governance articulated in the King IV report, this research project looks at the first shift concerned with the need to adopt inclusive capitalism and not financial capitalism. Businesses are advised to consider that the more they positively impact on both the community and environment, the more the welfare around the business will progress to affect the productivity, prospects and guarantees sustainability.[364] The second paradigm shift advocates for enduring capital markets as compared to temporary capital markets to evade and avoid financial crisis that is largely caused by the narrow immediate objectives which are focused on temporary performance incentives. To this extent, it is recommended for companies to look at performance in terms of an all-inclusive value assessment that is more rewarding.[365] Thirdly, in the era of radical transparency, accountability and disclosure, companies are expected to shift to a combined reporting standard that is systematic with the inclusive model of sustainable capital market system. Further, reporting to the regulator and boards of companies ought to reflect interconnectedness, while indicating how company activities are affected by different kinds of capital in their operations. Additionally, Stakeholder management is given emphasis in the report where companies are obliged to know the legitimate interests, equitable needs and prospects of their stakeholders. In addition, technology governance and security is encouraged with the presence of organisational strategy that is focused on the outcome to the society and environment.[366] The King IV report, without deviating, makes explicit the applicability and compliance with principles of good governance unlike in King I, II and III reports where it is implicit.

5.2.2 South Africa family-owned enterprises legal framework

According to KPMG South Africa, starting a family-owned enterprise is doable nonetheless, sustaining it beyond generations is the hardest part.[367] Most founders of family businesses, start from the drawing board thus the rags to riches analogy but due to corporate governance

[363] ibid
[364] Ibid.
[365] Ibid.
[366] Ibid. < https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214-E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf > Accessed on 9/11/2022

[367] KPMG Family Business Blogs <https://home.kpmg/za/en/home/services/enterprise/family-business/family-business-services.html> Accessed 18th November 2022

challenges that they face, the reverse takes effect, their businesses fail and they end at from riches to rags as their enterprises collapse.[368]

In South Africa, family-owned firms are the major systems of business consisting approximately 80% of South African businesses out of which 60% are listed in the Johannesburg Stock Exchange (JSE).[369] The institutional family body is known as the Family Business Association of Southern Africa (FABASA), an accredited spokesperson of South Africa family-owned enterprises.[370] The Association commands various key responsibilities and interests towards South Africa's family businesses. This includes role to provide real-world economic solutions to these businesses in light of the ever-changing market dynamics, to provide effective strategies related to business management and most importantly, to support family-owned businesses with succession planning and inform them of the purpose of embracing corporate governance best practices intended at promoting the achievement of family business success and sustainability.[371] FABASA (2014, a and b) defines a family business as an enterprise where bulk of the votes are owned by the founder/ owner of the enterprise and ownership extends to their wife and children, parents and all direct successors.[372] FABASA records that where a family enterprise is listed in the JSE, the requirement is that there must be an active family member on the board in addition to the founder/owner, in the alternative, the family must possess 25% of the voting rights in the business as part of owners' share investment.[373]

South Africa family businesses have embraced the model of identifying employees as part of the family, by virtue of them being stakeholders of the business contributing to its success through provision of labour and human resource.[374] To this degree, South Africa confirms the prevalence of successful family enterprises in several sectors of the country. Moreover, the report noted that their success is primarily attributed to common practices that are drawn from the King IV report such as dedication to family values where family members control

[368] Ibid
[369] Thea Visser and Evelyn Chiloane-Tsoka; "An exploration into family business and SMEs in South Africa, Problems and Perspectives in Management, Volume 12, Issue 4, 2014. P. 3
[370] Urban, Boris, and Ruth Palesa Nonkwelo. "Intra-family dynamics and succession planning in family businesses in South Africa: The daughter as a potential successor." *Journal of Family Business Management* 12, no. 2 (2022): 266-279.
[371]Thea Visser and Evelyn Chiloane-Tsoka; "An exploration into family business and SMEs in South Africa, Problems and Perspectives in Management, Volume 12, Issue 4, 2014.
[372] Ibid
[373] Ibid 161.
[374] Ibid

the business but are open to permitting other stakeholders such as the employees in managing the business as part of the family; presence of an inspiration founder/owner leading from the front thus maintains the concept of family ownership and embrace the directorship concept; customer centricity where the business gives focus to the consumer and fosters good relationship thus extending the stakeholder principles, among others.[375]

5.2.3 Lessons for Kenya Family-Owned Enterprises

The South African Corporate Governance legal framework is recognized as one of the best in the world, and on matters corporate governance for family-owned enterprises.[376] Kenya can draw lessons from the universal applicability approach in the King IV Report (2016). First and foremost, the King IV Report seeks to make explicit the universal applicability of good leadership reinforced by the principles of good governance, similarly workable and indispensable to all types of organisations in private, public, for profit, not-for profit, large and small entities.[377] This research project resolves that since the King IV Report refers to organisations and governing bodies, rather than board of directors and companies, it makes it easier for family-owned enterprises in Kenya to use King IV report as a guide towards embracing corporate governance best practices in the control and management of family-owned enterprises as it propagates the need to create value in a sustainable manner which aligns with the concept of family as a profit making business in focused on benefitting the family in the long run.[378]

In addition, the universal applicability approach in King IV report, guided by the apply and explain concept, challenges family-owned enterprises in Kenya to adopt and substantiate practice of good corporate governance especially to stakeholders to make informed decisions about their businesses as they are the users of the end products and services from the enterprises and when they are well informed, it encourages consistent indirect investment into the firm to create value in a sustainable manner.[379] Like South Africa where family-owned enterprises have embraced the concept of identifying employees as part of the family, by virtue of them being stakeholders of the business contributing to its success through the

[375] Institute of Directors in Southern Africa NPC (2016) <https://cdn.ymaws.com/www.iodsa.co.za/resource/collection/684B68A7-B768-465C-8214E3A007F15A5A/IoDSA_King_IV_Report_-_WebVersion.pdf>Accessed on 9th November 2022

[376] Ibid

[377] Ibid

[378] Ibid

[379] Ibid

provision of labour and human resources in several sectors in the country, Kenya can draw from this by involving employees in decision making and requesting for feedback as a measure to evaluate the business concern of the enterprise from an outside-inside perspective, and thus create value in a sustainable manner.

The applicability of this lesson will not hinder Kenya's family-enterprises from protecting their "family interests" for they still can remain independently committed to their values even as family members continue to control the business while embracing external managers and investors as part of the family. Most importantly, by adopting such a system, Kenya family-owned firms would be assured that separating ownership and management through the adoption of a board unitary system is not a negative approach but rather a positive one.[380] In the South African context, this is explained in such a manner where the corporate governance framework recommends and acknowledges the presence of an inspirational founder or owner of the business as the one who leads from the front hence maintaining the model of family ownership. To the contrary, the directorship concept is concentrated with management and running of day-to-day operations such as customer centricity where the business gives focus to the consumer and fosters good relationship thus extending the stakeholder principles, among others while reporting to the founder or owner.

Further, family-owned enterprises in Kenya, like South Africa should acknowledge that durable sustainable development is more important than temporary development. King IV report elaborates that sustainable development of companies meets the wants of the present generation without trading the capacity of future generations to meet their wants. The definition in itself aligns to Kenya's Constitution and the Vision 2030 sustainable development agenda and thus provides a response to the implication of a company being an integral part of the society to which its survival and success is intertwined with society, stakeholders and environment, and not for the family benefit only. Founders/ owners of family-owned enterprises should intentionally interact with and respond to the opportunities and challenges presented in evolving world of business so to achieve value overtime, remain successful and sustainable beyond the 3rd generation.

[380] Ibid

Notably, South African organisations have maintained proud practices of corporate governance to date since the publication of the various King Committee Reports. Compliance is one of the fundamental concepts of King IV report and it speaks to those charged with governance over organisations, ultimately referring to the regulators and institutions responsible to provide oversight and foresight. King IV report is explicit in its recommendations as it stipulates that those charged with ensuring compliance with governance for organisations should ensure that compliance is understood, as a source of rights and protection for these organisations rather than as an obligation.[381] Kenya's office of the registrar of companies and other related regulators and institutions can therefore learn from the King IV report recommendation and intentionally work towards providing oversight, creating awareness on matters good corporate governance practice to all organisations incorporated under the Companies Act, 2015 in the country. It follows that the adoption of this recommendation will support family-owned enterprises in Kenya to understand first the purpose of adopting good corporate governance practice, understand what compliance is and how to comply and its importance to their enterprises as King IV report notes that it is a source of protection for an organisation as it reduced governance challenges thus the family is managed well towards creating value in a successful and sustainable manner.

This research concludes that is it time for family-owned enterprises to get out of their cagey model of governance and embrace unitary board structure as intensely maintained in all the King Committee reports on South Africa Corporate governance. In essence, they are obligated to adopt an inclusive not exclusive approach of governance, and as a result, embrace separate ownership and control governance structure, on-board a unitary board of director's as the governing body with diversified skilled and experienced management. Further, family firms are encouraged to learn that it is through the adoption of unitary board structure that they will accomplish test of clarity, responsibility and transparency, fairness and accountability, to the family and the business but also remain responsible towards their stakeholders while maintaining their unique nature. The lessons from South Africa King IV report to family-owned enterprises in Kenya is to view corporate governance as something that will help them yield results only if they approach it attentively with due openness to their circumstance as a family-owned enterprise.

---

[381] Ibid

5.3 United Kingdom

5.3.1 United Kingdom Corporate Governance Framework

The UK actualized the development of a corporate governance framework after a sequence of business collapse in the early 1990s. United Kingdom entities such Polly Peck, including the well-known Robert Maxwell pension fund were not left out of the corporate scandals that exposed gaps within UK corporate governance legal and regulatory framework. The UK Financial Reporting Council FRC), informed that the legal position of statutory auditors was compromised as they had issued clean bill of health on the accounts and financial statements of most of the collapsed companies.

As a result, UK corporate Governance Codes were gradually developed through a series of improved codes in line with the challenges that faced UK companies to set out good corporate governance practice that boards of organisations should adopt for purposes of being effective, accountable, and transparent and focused on value creation in a sustainable manner.

a. Cadbury Report, 1992

Due to the corporate scandals, the Financial Reporting Council (FRC) formed a committee commonly known as "Cadbury Committee" led by Sir Adrian Cadbury was mandated to evaluate the business aspects of legal and institutional corporate governance systems in United Kingdom and issued recommendations into the efficiency or lack thereof of corporate governance framework.[382] The Cadbury committee, in its review concerned itself with a number of issues including board structure, board duties and responsibilities, board relationship with shareholders including responsibilities of institutional shareholders, the value of audit and its effectiveness to good corporate governance, among others. The final proposals of the committee were issued in December, 1992, labelled as "Cadbury Report".[383]

The report contained the code of practice in the UK intended to attain utmost principles of corporate behaviour among corporates in the UK.[384] In conclusion, it is from the recommendations of the Cadbury report that corporate governance foundation that is known today was moulded, which has since evolved in both UK, and other jurisdictions. This research centres on the particular Cadbury report findings and recommendations and states that the challenges in corporate financial reporting and role of auditors in failing to provide

---

[382]Ibid.

[383] Dedman, "The Cadbury Committee recommendations on corporate governance- A review of compliance and performance impacts", Wiley Online Library<https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2370.00091> Accessed 17th November 2020

[384] Ibid

safeguards to company accounts and issue true records of financial statements, resulting from the lack of ability by directors to review internal financial audit controls in the business tied with lack of independence among auditors who yield to pressure from management. Further, the report noted that there was prevalence of ineffective board accountability due to reliance on self-regulation.[385]

In its recommendations to close the identified gaps and improve on corporate governance standards, Cadbury report introduced three methodologies which include functional and structural adaptations, codified duties and responsibilities within the company governance structure including disclosure to the stakeholders.[386] The functional and structural alteration approach is intended to ensure power balance.[387] The report, therefore, recommends for separation of duties and responsibilities at the top leadership of the company thus ensure that the chair of the board and chief executive officer are in principle not the same person (s).[388] The approach to available codified director's duties is increase the creation of awareness and easing understanding in the roles directors to ensure full performance of their responsibilities in interest of the company. The report therefore recommended for codified statement of director's responsibilities on matters financial accounts accompanied by auditor's responsibilities as a counterpart.[389]

Cadbury report put emphasis on the importance of quality disclosure and transparency to ensure functional financial and audit reporting.[390] In a bid to provide guidance on matters board independence, the Cadbury report details extensive discussion on the significance of external directors in company governance structure, stating that external directors bring forth independent judgement given that they are free from any kind of ties with the company, and it will be an even better situation for family-owned enterprises, as the external directors have no known family ties with the founder/owner, and they therefore exert and exercise impartiality in decision making, for most are professionals with skills and experience to steer the company towards value creations while making profits for the company in a sustainable manner.[391] In conclusion, compliance with Cadbury report proposals continued with suggestions to appoint a new committee, for purposes of conducting monitoring on the

[385] Ibid, 188.
[386] Ibid
[387] Ibid
[388] Ibid.
[389] Ibid. 190
[390] Ibid
[391] "The Committee on Corporate Governance, Report of the Committee on the Financial Aspects of Corporate Governance". (1992)

implementation of Cadbury report and assessing compliance, to indicate needed review that align to the changing corporate governance practices.[392]

a. The Greenbury Report, 1995

In 1995, Sir Richard Greenbury presided over the review of director's remuneration and compensation among UK companies, following an uproar from the public and shareholders.[393] The Confederation of British Industry (CBI), acknowledged the need to review the concerns that lead to would be clash for example, in instances where directors are to set their own remuneration. The report therefore proposed for the establishment of a remuneration committee to guide and determine director's remuneration for all UK listed companies with external directors.[394]

b. The Hampel Report

In 1995, the financial reporting council mandated Sir Ronald Hampel to establish a committee with the intention of reviewing responsibilities of directors as stipulated in the Cadbury code. Later on, in 1998, Sir Ronald's committee issued the Hampel report which highlighted that the previous reports and UK codes of corporate governance, had given significant prominence to business prosperity and neglected the issuance of descriptive obligations for director's to comply with corporate governance best practice principles as well as offer a basis for the application. The proposal acquired "comply or explain" approach, now engrained in various frameworks of corporate governance.[395]

Notably, Sir Hampel committee proposed for formation of a combined code comprising of all recommendation from Cadbury, Greenbury and the Hampel reports with the intention of issuing the guidelines for companies to form nominations committee of boards, whose role is to oversight the business operational mandates including decision making on matters appointment of directors, responsibility of directors, purpose of external board members and presence of Audit Risk committee comprising at least three (3) external board members,

[392] Pilot S, "Cadbury Report Was More Than A Product of its Time". The Chartered Governance Institute, 2017 -https://www.icsa.org.uk/knowledge/governance-and-compliance/features/cadbury-report-legacy-25-years?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original.com Accessed 2022

[393] Confederation of British Industry (CBI), Directors Remuneration (1995)

[394] Confederation of British Industry (CBI), Directors Remuneration, July 1995, 10-13.

[395] Ibid 394

adoption of shareholder engagement including a remuneration committee to discuss directors remuneration and packages.[396]

d. Combined UK Corporate Governance Codes

Beginning 2003, UK occasioned changes to its corporate governance codes due to continued corporate governance challenges within the legal framework such as the codes whose implementation was especially impractical for small, listed companies in the UK.[397] Accordingly, financial reporting council started the revisions of the implementation of 2003 code to which it proposed changes that led to the adoption of the 2006 Code.[398] The study details two key changes to the 2003 code, now adopted in the 2006 Code to include an obligation for companies to publish in their website, details of the proxies for purposes of Annual General Meeting as they represent the absent Director. Moreover, the code proposed changes to the responsibility of the chairman of the board, to which it was proposed that it is important for the Chair to participate in such meetings.[399]

---

[396] Ibid
[397] Ibid
[398] Financial Reporting Council, The UK Corporate Governance Code, June 2006, 1
[399] Financial Reporting Council, The UK Corporate Governance Code, June 2006, 1. 17 2.2.5.

UK 2006 Code of Corporate Governance

United Kingdom developed corporate governance code, 2006 which introduced mandatory requirements for listed companies to use "comply or explain" approach of corporate governance, an approach now viewed as flexile among UK boards and investors. As such, directors of listed companies are expected to issue disclosure statement reports to the regulator in two measures. In the initial part, the disclosure report must indicate how the company applied the ethical business standards and corporate governance best practices. Even more, the disclosure statement should indicate instances of compliance or not with corporate governance principles and in such a situation, issue reasons for the non-compliance.[400]

UK Code of Corporate Governance, 2010

The UK 2008/2009 financial crisis which affected banking and financial institutions necessitated the Financial Reporting Council (FRC) to pursue an investigation as to the cause of the corporate failures and to examine the role and efficacy of corporate governance hence necessitating a revision of 2003 UK corporate governance as well as 2006 codes that were in place. Subsequently, the revision committee was led by Sir David Walker after which their findings and recommendations led to the 2010 UK Corporate Governance code.[401]

The Code is grounded on principles of good corporate governance that entail effective leadership spearheaded by board of directors, who are responsible to provide oversight roles for both short-term and lasting success of the business. Additionally, the Code underscores that the directors of the board, ought to be effective in discharging their mandate, to which independence, skills, knowledge and diversity should be embraced in the board composition.[402] Moreover, the Code promotes accountability and transparency to the extent that the board should provide oversight over the control and management of companies and implementation of the objectives of such companies and assess the value creation and whether it is sustainable. Lastly, the board to enhance relationship with shareholder to safeguard their welfare in the company. In the report, Sir David Walker committee indicated that the understanding of the objective of corporate governance code by companies was important as it helps them to enhance relationship between the shareholders and directors of the board. It is notable that 2010 UK corporate governance code does not depart from

[400] Financial Reporting Council, The UK Corporate Governance Code, 2006.
[401] Ibid 400.
[402] Ibid

‘comply or explain” corporate governance approach thus maintain consistency as to the application, implementation and compliance within the 2003 and 2006 UK codes of governance that are the backbone to UK corporate governance best practice.

In summary, the 2010 UK Corporate Governance Code covers inclusive adoption of principles of good governance from board leadership and composition to responsibilities and accountabilities of directors to the safeguarding of shareholder welfare through stakeholder engagement based on mutual understanding of the company objectives, value creation, and profit making in a sustainable manner. This research project notes that the Code details purpose and importance of embracing corporate governance to privately-owned corporations in the UK in a bid to validate corporate governance benefits to these firms.

Organisation for Economic Co-operation and Development (OECD)

OECD principles though not legally binding, were developed in 1999 with the intention to offer corporate governance framework for adoption by governments to support them in improving the standards of their legal, regulatory, institutional frameworks for the benefit of state-owned corporations.[403] The principles are recognized world over as international yardstick for good corporate governance best practices and how implementation of the principles would look like for an organisation. It follows that OECD principles only act as an overall guiding framework for Country’s that are formulating their corporate governance code, accordingly, the application, implementation and compliance with OECD principles is voluntary.[404]

OECD provide a great advantage to policy makers and legislators, for it provides guidance in what way to develop their own governance structure that are fit for purpose in their jurisdiction to formulate local laws to guide on compliance with corporate governance best practices. In 2004, a revision of the OECD principles was advanced, to have the principles align to the new corporate governance trends experienced globally. As a result, two new principles, which are business value maximization and shareholder rights were adopted for purposes of enhancing disclosure and transparency thus promoting accountability within a company governance structure. Additionally, OECD principles were reviewed in 2015 and recognised during the 2015 G20/ OECD forum. The 2015 principles now encompass more principles towards ensuring effective adherence to corporate governance practices. These

[403] Organisation for Economic Co-operation and Development, OECD Principles of Corporate Governance, 1999.
[404] Ibid.

overall principles include; equitable treatment of shareholders, board structure and composition, stakeholder's role in corporate governance, responsibilities of directors, stock markets, institutional investors and intermediaries and disclosure and transparency.

Corporate Governance in Large UK Family-Owned Enterprises

United Kingdom acknowledges the prominence of family businesses to the economy. IFB research foundation, which is an independent registered charity (No. 1134085) is well-known to nurture awareness among family firms on matters corporate governance to achieve shareholder value as well as address the evolving 21st century challenges and opportunity that family business experience.[405] IFB references that corporate governance is the cause of family firms' strategic behaviour and performance.[406] Dissemination of corporate governance best practice information is done by the foundation through print publication, via the IFB website and online media.[407] The foundation collaborates with UK Institute for family business (IFB) and UK family business organisations to promote understanding and knowledge on the necessity to adopt corporate governance best practices for family enterprises so to remain successful across generations.[408] IFB report indicates the private business sector in the UK is made of family firms that make up almost 90% of all businesses, thus a greater contributor to the economy. Additionally, reports from the London Stock Exchange (LSE) covering the period 1995 to 2011, points to a 26% of family firms being listed companies.[409]

The IFB Research Foundation Report of 2019 examines corporate governance arrangements among the 1,000 largest registered family firms in the United Kingdom (UK). The scrutiny covers information on ownership, strategy performance and governance models leading to value creation in a sustainable manner.[410] The report indicates that by turnover, family firms represent 20.1% out of UK's 1,000 family firms, thus an equivalent of 201 firms out of which, 22 are categorised as firs-generation family-owned firms.[411]

---

[405] Arcot, S., Bruno, V., & Faure-Grimaud, A; Corporate governance in the UK: Is the comply or explain approach working? (2010) International Review of Law and Economics, 30: 193–201
[406] Ibid
[407] Josip Kotlar and 3 others; Corporate Governance in large UK Family Firms; IFB Research Foundation Report (2019) < https://www.ifb.org.uk/media/3982/corporate-governance-in-large-uk-family-firms-web.pdf> Accessed 19th November 2022
[408] Ibid 167
[409] Ibid 181.
[410] IFB Research Foundation Report 2019
[411] Ibid p.1

Family business in the UK is more trusted than business in general,[412] because its corporate governance arrangement especially for large family firms is characterised by high degree of board impartiality from the family shareholders.[413] IFB reports that there exists standardised guidelines to monitor reporting practices with the corporate governance code among UK large private firms that include family-owned firms. The standardised guidelines provide awareness to UK family firms, who are generally not transparent for they fail to make known their compliance level with corporate governance code to adopt integrated reporting practice.[414]

According to data sampling of 35 large family-owned firms in the UK, on average they are reported to have boards of directors in contrast to non-family firms. This is because, the average board size is at 5.8 members connotation that UK family forms possess strong indicators of board capital as the directors create value to the family-owned firms and provide access to valuable resources for the success and sustainability of the business. Additional analysis indicate that sole directorship is uncommon as 98 of the 201 family firms (48.8%) have six (6) or more members of the board likening to other six (6) companies having twelve (12) or a higher number. [415] Moreover, board diversity is embraced as part of corporate governance practice as it focuses to bring new knowledge, skills and perspectives to the boards of UK family firms. Diversity within the board is scrutinised in the lenses of skills and experience, gender and age, nationality and religion, among others. These dimensions play a key role into providing effective leadership and decision-making, oversight and foresight including risk management, all of which provide collective corporate governance to positively impact the culture and success of the business in a sustainable manner.[416]

It is evident that UK family firms have embraced the concept of board independence, thus support balance of power between owners of family businesses and shareholders. The involvement of Family in the boards is little as UK family firms have embraced the theory of separate ownership and control in this firms, an agency theory concept of good governance practice as the board and owning family are separated.[417]The IFB report indicate that on average, the level of family involvement is only 20.5% within the board of UK family firms.

[412] Anderson, R. C., & Reeb, D. M. (2004). Board composition: Balancing family influence in S&P 500 firms. Administrative Science Quarterly, 49(2), 209-237.
[413] Bammens, Y., Voordeckers, W., & Van Gils, A. (2011). Boards of directors in family businesses: A literature review and research agenda. International Journal of Management Reviews, 13(2), 134-152.
[414] Ibid.
[415] Ibid.
[416] Ibid.
[417] Ibid.

In detail, only 34 firms out of 201 being a 16.9% have members of the family representing a majority within the board while the rest have external, diversified board composition. Additionally, only 13.7% of shareholders are part of board members within UK family firms as direct family member's involvement is disregarded thus relatively low thus heightened board independence among UK family firms.[418] The research resolves that this governance practice among large UK family firms, outdates the commonly known cagey traditional model of governance within family-owned businesses where the founder is engaged in daily control of the business and also remains as part of the executive team together with other members of the family.

Notably, family firms have eradicated founder-chief-executive-Officer (CEO) duality governance structure as family members are no longer permitted to act as both CEO and board chair in the company. The IFB report data analysis show that in 106 family-owned firms representing (52.7%), the CEO is neither a family member nor the board chairman while only 17 representing (18.4%) family-owned businesses have a dual board chair and CEO model of governance.[419] The research notes that there is a further heightened corporate governance practice among UK family-owned businesses through the introduction of choice of CEO concept. The IFB analysis indicate that 134 family firms, representing (66.8%) are currently led by a non-family CEO while only 47 family firms representing (23.3%) have a family member as CEO.[420] In conclusion, it is correct to state that UK family firms are led by non-family members as family governance is now uncommon.[421]

Code of Corporate Governance for UK Family Firms

Financial reporting council issued standardised guidelines to provide for corporate governance practice for UK family firms. The guidelines require the family firms to report on compliance with corporate governance practices on a voluntary basis. Accordingly, the research analyses the Wates corporate governance principles for large private companies issued in 2018.[422]

---

[418] Ibid.
[419] Ibid.
[420] Ibid p.1.
[421] Ibid p. 17
[422] A summary of the UK's recent Corporate Governance Reforms <https://commonslibrary.parliament.uk/research-briefings/cbp-8143/>accessed on 16/11/2022

The Wates Corporate Governance Principles, 2018

In April 2017, United Kingdom legislature recommended for value-add disclosure and accountability among large UK family companies as it noted that these companies have substantial community presence and should thus report on matters that focus on stakeholder welfare, environment and community in addition to the financial reporting. Consequently, the proposal for the establishment of corporate governance code for large private companies was fronted to ensure that it creates awareness on the purpose of corporate governance practice while overall working towards encouraging private firms to advance corporate governance standards in large or small private companies.[423]

In the year 2019, Wates Principles were developed to give guidance on integrated corporate governance reporting for all UK companies left out of the UK corporate governance code. Wates principles took effect in year 2020 with the main purpose being to benefit family firms that lack reporting procedures to support compliance with corporate governance standards. The Principles act as a tool providing various models of governance practices for use by family firms in achieving compliance reporting in the sector.[424] The Wates Principles form part of an extension to the Companies Act, 2006, in that, without any strictness, offer adequate flexibility for all companies in UK, to explain the application and purpose of their corporate governance arrangements through duties of a director as anchored in sections 170-177 of Companies Act, 2006. Therefore, this duty is universally applicable to all directors of UK companies regardless of the nature of the company, private or public, small or large, family or non-family firm's thus reporting compliance is not on a voluntary basis but an obligation.[425] Further, the principles indicate that director's responsibilities to act in good faith requires that they evaluate temporary and lasting decisions to consider stakeholder's welfare and nurture good relationship with them, assess likely risks (positive or negative) that may affect the company operations while considering the impact to the environment and community, and ensure that the business conduct is of high standards to protect its reputation, among others[426]. The research concludes that Wates principles therefore deem it fit to ensure that as director's report on the aforementioned action points emanating from their fiduciary

[423] Financial Reporting Council, "Wates Corporate Governance Principles", 2018 <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec 2018.pdf#:\>accessed on 16/11/2022
[424] Ibid.
[425] Ibid.
[426] Ibid.

responsibility, they do so in all objectivity. To that extent, directors of UK large family firms ought to report on their corporate arrangements focusing on fulfilling this duty.

Additionally, Wates Principles includes stakeholder engagement as part of the new governance reporting prerequisite to which, board of directors of UK large family firms are required to issue a strategic report separate from the directors report, published on their company website detailing how they engaged with employees and responded to their concerns, interaction with stakeholders, and their relationship with the company. In essence, Wates Principles support UK large family firms to consider comply and explain approach to corporate governance compliance, to safeguard shareholders welfare while creating value to achieve business productivity for corporate governance reporting builds transparency and contributes to building trust with stakeholders thus guaranteeing business success and sustainability.[427]

5.4 Lessons for Kenya

UK Corporate Governance legal framework is acknowledged as the epitome of corporate governance best standards and practice to be emulated globally. The adoption and adherence to corporate governance principles while ensuring compliance and conducting corporate governance reporting remain as key contributor to value creation for all businesses in the UK, leading to success in a sustainable manner. Further, the 2010 code guides all companies in the UK to apply each corporate governance principle in the context of the company specific circumstances. The code obligates companies to be in a position to explain if they have adopted corporate governance best practices, how they have applied the principles in the control of the company's affairs and the purpose of such an application in a manner that shareholders can evaluate. Additionally, the code puts a requirement to explain non-compliance. According to the study, Kenya can learn from this requirement to guide family firms to comply with the adoption of corporate governance principles and explain reasons for compliance and non-compliance with corporate governance principles, as the case maybe so as to create a data base with the regulator and monitor the gaps as especially on non-compliance and respond in view of that. Additionally, the code call for understanding of the importance of corporate governance codes as a key tool to support board of directors and shareholders relationship.

[427] Ibid.

Accordingly, Kenya has a lot to learn from the UK corporate governance regime. The 2015 Code is anchored on corporate governance principles read together with the Companies Act, 2006. These legislation and codes provide guidance to companies on what entails corporate governance best practice and the importance of embracing the same as well as the impact to the UK companies in creating value and success in a sustainable manner. UK code embraces the 'apply or explain approach to corporate governance which provides UK companies with an avenue to adopt and apply corporate governance principles and explain why they did it and how they did it. The approach allows UK companies to commit to adherence for purposes of monitoring and compliance.

Additionally, UK legal framework has adopted a uniform regulatory structure providing guidance to UK incorporated businesses. UK 2010 code, Companies Act, 2006 and Wates Principles, reference the significance of a board unitary system of governance as a corporate governance best practice. UK companies are guided to formulate a structure with board of directors in charge of the affairs of the businesses and that is separate from management and the founder of the company. In the UK, large family firms that are private in nature have also adopted the unitary board structure system, and many of them are run by established board of directors that is separate from the owner of the business and the family.

Kenya is to clearly note that, UK large family firms have eradicated sole-directorship concept and in place adopted the unitary board system. The study therefore recommends to Kenya's family firms to shun sole directorship, combine ownership and control concept as it is a traditional mode of governance that is not creating value. Moreover, UK large family firms are reported to have embrace board capital concept with at least 5.8 members in the board who are not necessarily family members. The study indicates that the is an advantage to embracing board capital concept as diversified board members bring skills, knowledge, professionalism and independent oversight into the control of the business in the business interest, as a profit creating entity first before anything else. Further, board independence is prevalent among UK family firms to which there is a balancing of power between the family and members of the board who are mostly non-family members.

Notably, UK corporate governance structure for family-owned enterprises has eradicated the Founder-CEO duality concept, and presently, almost all family firms in UK have a CEO and board chairperson who is not a family member. Kenya should note that the advantage of adopting separate Founder/ CEO concept in running and management of their family firms

not only creates balance of power but provides foresight guidance to the managers of the company without limitations. The business is able to identify its risks (positives and negative) and handle them in an impartial manner as there is no conflict of interest from that perspective. Additionally, the CEO is able to directly report to the board, and since they are not a family member nor the board chair of the company, there is transparency and disclosure as to the affairs of the business, the directors are able to achieve their codified duties under the companies Act, in the best interest of the stakeholders and the business.

Most importantly, Kenya to reference the Wates principles which provides for a reporting structure on corporate governance for family firms, thus assists them in the fulfilment of their legal duty while allowing these firms to excel as they have adopted all the good corporate governance models such as board diversity in their composition, board independence, eradicated the CEO duality concept among others. Further, the principles aid family firms to operate beyond box-ticking on matters reporting and compliance, but also, assist them to increase business confidence as companies appreciate the purpose of good corporate governance practice and explain how they implement and achieve compliance.[428] Business confidence is important to remain a going concern as a family business, thus once Kenya family firms adopt the corporate governance reporting requirements appropriate to their circumstance, report to the regulators such as the Registrar of companies office, they are guaranteed of business value creation in a sustainable manner.

Further, the Wates Principles provide guidelines to all UK family firms on the importance of strategic report statement which in essence details how directors of a company achieve codified duties of directors under the Act, 2015 and the impact of such compliance to the company and the stakeholders. To this extent, Kenya family firms are prompted that the codified duties of directors under the Companies Act, 2015 possess a universal applicability to all types of companies with no concern to the nature of registration, ownership or circumstance of the business, whether private or public, listed or unlisted, family firm or non-family firm, large or small company. The study therefore recommends to Kenya family firms to swiftly emulate UK Wates Principles, adopt and comply with the provisions of Act, 2015 that are already codified as a measure of corporate governance best practice. Stakeholder engagement and inclusion is overemphasised under UK corporate governance legal and

[428] The Wates Corporate Governance Principles for Large Companies: Governance Institute, Financial Reporting Council Limited (2018) <https://www.frc.org.uk/getattachment/31dfb844-6d4b-4093-9bfe-19cee2c29cda/Wates-Corporate-Governance-Principles-for-LPC-Dec-2018.pdf> Accessed 19th November 2022

institution framework. UK companies are under duty to outline the procedures of stakeholder engagement while demonstrating how directors of the board respond to their concerns.

In the UK context, stakeholders are defined to comprise customers, suppliers, employees, partners, community and the environment in which the business operates. Therefore, the UK Codes and regulations consider the aforementioned stakeholders as part of the business though indirectly and therefore places a requirement on the directors to ensure that decisions made within the business should factor their input. Also, the directors are required to include the interaction with stakeholders and steps taken to foster relationship among them and the board, as part of corporate governance reporting requirements. It follows that family-owned firms do not operate in isolation, and the mentioned stakeholders are part and parcel of the business. Kenya can draw on the importance of stakeholder engagement from the UK practice and adopt reporting on their relationship and interaction on matters business as they remain key players to creating value for the business and without them the business may fail to thrive thus unsustainable.

Office of the registrar of companies is also called to draw various lessons as to the prerequisite corporate governance reporting guidelines for family-owned enterprises as listed in UK legal and regulatory corporate governance framework as well as the recent Wates Principles on corporate governance for UK family firms. The guidelines will aid the Registrar to gradually ensure adoption with good corporate governance principles and monitor compliance while working towards amending the Kenya Corporate governance Code, codify the prerequisite guidelines into the Companies Act and eventually develop a Kenya code of corporate governance for family-owned enterprises.

CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

6.1 Introduction

This research project was motivated by need to influence adoption of existing corporate governance best practices that encourage diversified ownership and control in the management of family-owned enterprises, so as to remain successful and sustainable. This chapter follows a summary of the research project by placing emphasis on opinions and findings collected throughout collected the research project to present proposals for reforms. Additionally, the chapter will examine applicable recommendations for unique intentional recognition of family enterprises within the existing framework that promotes implementation and compliance to promote success and sustainability of family enterprises. The research brings out identified strengths and gaps in legal and regulatory framework that that promote and hinder effective supervisory and monitoring compliance with corporate governance best practice for family enterprises in Kenya.

6.2 Analysis of the Hypothesis

The research was centred on the hypothesis that: -

> Narrowing gaps in the legal application and implementation of principles of corporate governance within family-owned enterprises is a key step in guaranteeing them sustainability.

The hypothesis has been tested in various chapters of this research project and in particular the case studies of Naivas Ltd (Naivas Supermarkets), Nakumatt, Bidco and the Akamba Bus Company. The primary factors in this theory are history and nature of family enterprises, legal framework and supervisory framework, adoption, implementation and submission to corporate governance best practices. According to this research paper, the foregoing elements are interdependent. The history and nature of family enterprises speak into their cagey nature of operating as "family" and the effect of traditional mode of governance to compliance with corporate governance practices. Corporate governance framework in Kenya exists within the legal and regulatory framework that includes the Companies Act, 2015, Corporate Governance Codes specific to private and public companies from which family enterprises are guided and ought to draw governance lessons. On the other hand, the supervisory framework looks at the institutions mandated to regulate and monitor compliance with best practices in corporate governance to ensure adoption as well as implementation by family-owned firms. Therefore, this research project has focused on the reasons why family-owned enterprises continue to experience corporate governance challenges in light of existing legal,

regulatory and institutional framework leading to their collapse thus hindering success and sustainability over generations. The hypothesis was validated. Certainly, the present legal and regulatory framework though not expressly dedicated to family enterprises, does provide guidelines on the purpose of adopting corporate governance best practices in the management and control of business firms and additionally, tributes success and sustainability of companies to the practice.

The theoretical research asserted that the regulatory and legal framework on Corporate Governance in Kenya, rightly address and provide guidelines not only on the basic corporate governance principles but on best practice principles, now codified under the Act, 2015. The codified best practice principle related to but are not limited to presence of director responsibility to both the shareholders and stakeholders including fiduciary duty to act with fairness to safeguard the welfare of the company. Further, the directors have responsibilities that mandate them to ensure there is transparency, accountability and disclosure related to conflict of interest, disclosure as to financial statements of accounts related to the company in response to guarantee trust and attract human and financial capital. Additionally, directors are formulate business risk management and audit reporting plan for purposes of updating on financial status and operations of the company to create value, profits in a suitable manner for the welfare of the business, shareholders and stakeholders.

6.3. Summary of findings and conclusions

As outlined in *Chapter 1,* the research investigated various objectives. Foremost, it examined what corporate governance practice looks like for family-owned enterprises and whether it is effective. Additionally, the paper interrogates Kenya's prevailing institutional and legal framework on corporate governance compliance and intends to find out how suitable it is for family owned-enterprises. Further, in its comparative nature, the study explores compliance lessons and experiences that Kenya can pick up from corporate governance best practices jurisdictions in to guarantee success and sustainability over generations. Finally, to address the collapse of family-owned enterprises associated with corporate governance challenges, and the possible recommendations on successful businesses that are sustainable.

The research project has evaluated the history and unique nature of family-owned enterprises in addition to detailing how effective or not is the regulatory and legal corporate governance framework regime in Kenya. The chapter focused on the nature in terms of registration and intrinsic characteristic of family-owned firms, history of family-owned enterprises in the pre-colonial period, post-colonial period and the rise of family-owned enterprises and their

governance structures to date. The Constitution of Kenya 2010, Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, the Companies Act, 2015 and the Insolvency Act 2015 were all discussed in this chapter.

A Cursory look at the aforementioned laws and codes of corporate governance, is that they have stipulated on principles of corporate governance and what compliance looks likes for both private and public companies. Under the Companies, Act, 2015, the research resolves that it provides for the regulation of private and public companies including small companies. Therefore, family-owned enterprises fall within the ambit of private companies, incorporated under the Act, thus the Act is the legal and regulatory framework governing family enterprises. It thus follows that the codification of company director's responsibilities, disclosures as to financial accounts and statements, conducting audit and risk management reporting, operating the company to safeguard the welfare of shareholders and stakeholders, are best principles of corporate governance that family-enterprises ought to adopt in the management of the business.

Most importantly, to achieve the aforementioned corporate governance principles, it requires for family enterprises to step away from the inward-looking approach in the interest of the family only but instead embrace separate ownership and control, a concept that will contribute to diversification of skills, innovation and growth of the business while adhering to best corporate governance practices under the Act for the success and sustainability of the business for future generation and the greater good of the economy. Further, the Act has a provision for small companies, where family-owned enterprises can also be categorised as such, and in its attempt to regulate the small companies, the Act obligates them to conduct financial reporting by providing abbreviated financial statements to their regulators.

Notably, through procedures of corporate governance set out in the sample code for best practice, the private company's codes, family enterprises have sufficient background from which to draw the significance of corporate governance best practices in control and management of family-owned enterprise. The sample code, in a similar way as Companies Act, 2015, outlines the concept of effective board leadership to which it stipulates the responsibilities of directors, who are to act with integrity and good judgement, safeguard the welfare of the company in a responsible, accountable and transparent manner in the management of the company with the intention of achieving continuity of the business.

The sample code, in stressing the significance of directors, guides businesses to make available a detailed manual on duties of directors for them to internalize being accountable and transparent over the management of the firms, jointly and severally. The research resolves that such a manual is essential for family enterprises while on boarding diversified control and management to which the board members in family enterprises can draw lessons from especially on reporting to the family board and the regulator. The sample code is not short of providing governance tools for private companies to apply in enhancing adherence to governance practices. The tools include, sample code of ethics for the directors, board valuation forms, Performance evaluation form for both the Board chair and individual assessment forms for the board members. The study resolves that such tools are applicable to family enterprises as soon as they embrace diversified management and control structures within their governance system. Generally, the Code's view as to impact of corporate governance best practices is that it results to well-governed and managed businesses that attracts investors, generates income and wealth, is viable, competitive in the global markets and remains sustainable.

On the other hand, the private companies Code stipulate the purpose of adopting corporate governance best practices within the running and management of corporation as it ensures business sustainability as the business generates long-term value for all its shareholders and stakeholders. The Code guides that directors are to ensure there exist internal risk controls plans, financial statements, auditing reports and procurement and information communication technology plan for presentation to members of the boards, as a measure of governance culpability and transparency and equity in the management of the firm. Plans and reports are to provide for an accountable and transparent view of the status and affairs of the firm to the members of board of directors, shareholders and stakeholders. Further, the code emphasises significance of a succession plan for private companies detailing strategic and leadership structure of the company.

Additionally, in providing governance tools as a guide to private companies, the code mandates directors to ensure that there is a board charter and code of ethic which stipulates their vision and mission and responsibilities aligned to the firms' constitution including policies that guide in providing oversight and foresight in the governance of the company. Private companies are also guided to use legal and governance audit as tool to measure

compliance with governance best practice and prepare a report for presentation to the board members.

The research has determined that in addition to the other guidelines under this code, this recommendation resonate fully with what family enterprises ought to adopt as a practice for it would work to resolve governance succession uncertainty, close the gap on failing enterprises, and guarantee business continuity leading to success and sustainability. It is apparent that family enterprises continue to experience corporate governance challenges irrespective of the several compliance guidelines depicted in the above codes governing private companies where family enterprises are categorised. It follows that, if only family owned-enterprises and specific to the study, supermarket retail chains, just like Naivas Limited (Nakumatt Supermarkets), would embrace such guidelines, focus on implementation and enforcement supervised by the relevant regulators and stakeholders, the governance challenges would remain resolved.

In the research, there also exists an evaluation of the institutional corporate governance framework to establish its capability to regulate and monitor compliance with corporate governance practices stipulated under the law and various codes, and address the challenges therein that lead to the collapse of family firms to hinder success and sustainability. The primary gaps of the Kenya's legal and institutional framework were identified to include inadequate monitoring techniques, non-existence monitoring and compliance procedures, scanty supervisory functions and absence of audit trail system. Furthermore, the research reports that lack of awareness and knowledge as to the existence of codified corporate governance principles and the advantages of compliance is lacking among family-owned enterprises thus the prevalent corporate governance challenges as most remain ignorant.

However, the proposal is for family-owned enterprises to adopt the mandatory rule where they should be obliged to submit their compliance status to the authority of Office of Registrar of companies for approval and recording. Further, family businesses, gradually be supported to embrace the concept of divorcing of ownership from control in the governance of the business, and subsequently, focus on on-boarding salaried, experienced managers to run the business. The ensuing effect is that mean that owners of the family-owned businesses will retain power and authority through the well-established corporate governance structures vide the cross-ownership centred agency principle, a best corporate governance practice. The

adoption of the command-and-control approach to regulation which is hard law that requires mandatory compliance and strict application by family-owned firms, will result in strict implementation of corporate governance best practices thus avoid fraud, financial mismanagement and evade criminal and civil sanctions respectively. The Kenyan codified legislation framework ought to expressly spell out the accounting, auditing, managerial, governance best practices for the family-owned firms. Additionally, the information on corporate governance for family-owned businesses, which ought to be adhered to should be well communicated to managers, directors and investors of businesses. Moreover, certainty and uniformity in the practice of corporate governance be encouraged to allow better enforcement of the governance rules.

Most importantly, the research has looked into the Republic of South Africa and UK best corporate governance frameworks and practices including lessons and experiences that Kenya can be drawn from them. UK code of corporate governance approach maintains the "approach and explain" concept while emphasising on the need for transparency, accountability and integrity of managing a business while allowing the business to make profits in a sustainable manner.

6.4 Recommendations

5.3.1 Short-Term Recommendations

The section comprises several suggestions for overcoming corporate governance challenges for family-owned enterprises, including suggestions on enhancing compliance with corporate governance best practices. The following are the recommendations being presented by the study in a bid to have family-owned enterprises embrace existing corporate governance best practices and comply to the existing laws and procedures of corporate governance even as they push for some amendment to law to ensure that it provides specific requirement for the private regime and small companies as is the case for public companies.

a. Amendment to the Companies Act, 2015 on Small Companies Regime

With regards small companies' regime[429], the Act should be amended to expressly stipulate a mandatory compliance to corporate governance provisions within the Act and other attendant regulations in the codes for privately-owned companies as is the case for public companies to ensure existence of a descriptive requisite requirement. At the moment, there is nowhere the Act accords strict compliance with best principles for private limited companies and the

[429] Companies Act, 2015, s. 624

research project infers that it is mentioned as a by the way to fit into the small company's regime under Companies Act, 2015 thus hindering them from full compliance to deal with corporate governance challenges as is the case for family-owned enterprises.

Additionally, since the Act provides a financial reporting obligation over small company regime as a measure to guarantee disclosure over financial management dealings of the firm, it follows that family-enterprises are to adopt the same as they are categorised under this regime. That said, the Act needs to amend this proviso from allowing small companies to just issue abbreviated financial statements and create stringent compliance requirement such as those imposed on other types of companies under the Act as a measure of good corporate governance practice. By exempting small companies from issuing concise financial accounts and from auditing, the Act encourages small company's regime to disregard compliance with principles of corporate governance for members of board of directors cannot report to shareholders and stakeholders. In addition, it hinders growth and enhances the corporate governance challenges related to financial management for private companies. In instances where financial institutions and investors are to approach the small companies including private companies for business partnership, it means that they will fall short for lack of audited statements of accounts as there is no report to inform on the net worth, going concern and/or stability of the companies.[430]

Further, the research resolves that it is feasible for small companies to just formulate fraudulent reports in a bid to work on an abbreviated version to meet the regulatory requirement. The subsequent effect of this proviso is that small companies are tempted to incur low operation costs thus going against the accountability principle of good governance in addition to creating a gap for which directors are to act against the codified directors duties. The amendment is beneficial to the small company's regime and to that extent, family-enterprises in particular as it ensures accountability and transparency.

b. **Amendment to 2015 Code on Issuers of Securities**

Capital Markets Authority guidelines to issuers of securities are found in the 2015 Code and they provide for minimum standards of corporate governance that issuers must adhere to and

---

[430] Mukoma J, "Comprehensive Review of the Corporate Governance Legislative Framework Encompassed in the Companies Act 2015 in Kenya"<https://www.semanticscholar.org/paper/A-comprehensive-review-of-the-corporate-governance Mukoma/e0759d71714c654c98a325ad3bdf1adaca44cd11?p2df> Accessed on 3rd November 2022.

implement.[431] According to the Capital Markets Act, private companies are to adhere to the code for it would be beneficial for them but it is not a mandatory obligation. The study recommends for amendments to the code to mirror the South Africa concept drawn from the King IV Report of 2016 which makes compliance with corporate governance practices mandatory, with uniform application by all companies within the South African Jurisdiction.[432] As discussed in Chapter 4, the application of South Africa King IV code is to all companies registered in the country. The code promotes the "apply and explain" approach which makes it mandatory for all companies to explain how and why the provision of the code have been applied.[433]

The research derives that as much as the 2015 Code stipulates compliance provisions with corporate governance through the "comply and explain" approach in which family enterprises can draw from, it ought to extend its application to all companies irrespective of incorporation regime through its provisions and adopt "apply and explain "approach. The "apply and explain" approach to compliance ensures every company within Kenya will be required to adopt corporate governance structure relevant to the needs of the company. The end result is that family-owned enterprises will adopt corporate governance best practices that would resolve their corporate governance challenges.

c. **Adopt Corporate Governance Guidelines for Private Unlisted Companies in Kenya**

Research project recommends to adopt a code of corporate governance for private companies that are unlisted similar to prevailing code for public/listed companies under the Act and, 2015 Code of corporate governance. The code will act as a guide for private companies where the directors, shareholders and stakeholders of private firms can draw corporate governance best practices thus making implementation and compliance mandatory for effective management and control of the private firm. Further, drawing from the family business governance handbook, a leading practical guide focused on advancing corporate governance for family-owned businesses in developing countries, family-owned enterprises to embrace structured governance system and adopt unitary board structure with presence of directors who are not family members. Decision making is therefore shared with the board of

[431] "Code of Corporate Governance Practices for Issuers of Securities to the Public 2015", Chapter 1.
[432] Institute of Directors, KING IV Report on Corporate Governance, 2016.
[433] Ibid 148.

directors who are skilled and responsible to control the business in best interest of the family, make profits and make profits in the interest of the family members and other shareholders. Moreover, the handbook is concerned with family togetherness and maintaining peace in the family, thus recommends for family-owned enterprises to establish business succession plan that guides the family on the replacement of the next high level leaders should a change happen especially after a key player such as the founder/owner of the business transitions from the business or in the event of death. In addition, the succession plan does stipulate roles, responsibilities and ownership percentages for all stakeholders in a family-owned enterprises thus closes the gap on future eventualities and disputes.

Additionally, since family- enterprises are reported as lacking independent directors, the handbook proposes that once ownership and control are separate, family enterprises to embrace unitary board structure and therefore have independent directors whose advantage is to provide an outside business perspective to the management of family firm and engage in objective decision making for the benefit of the business thus creating value in a sustainable manner. Decision making by members of the family will therefore be connected to their duties and responsibilities and not family ties. Further, the handbook emphasises that the creation of two-tier governance structure between owners and the managers enables the directors and some of the family members in the non-executive team to provide oversight as to the internal controls, integrity, disclosure and management of risks aspects of the business. Thus ensuring that there is a strategy of guaranteeing mandatory compliance with the best practices for family-owned enterprises to attain good corporate governance practice.

5.3.2 Medium-Term Recommendations

These proposals majorly boarder on institutional reforms applicable to the Registrar of Companies and the office and the Courts in Kenya. Registrar of companies' office has witnessed the collapse of several private owned firms in Kenya specifically of supermarket retail chain businesses such as Nakumatt, Tuskys and Ukwalaa that are family-owned enterprises. The research proposes for the scope of regulatory powers for office of registrar of companies to be explicitly defined and legally enshrined as is the case for the Capital Markets Authority.

Further, Registrar to invest in a market surveillance computer system, similar to the Nairobi securities market automated trading and surveillance system installed for monitoring of listed Companies. The surveillance system will not only facilitate Office of Registrar in monitoring

of performance by private companies but also, identify, isolate and react timely to all corporate governance challenges such as financial mismanagement and non-compliance with corporate governance best practices in the running of the firm. Further, the Office of Registrar of Companies could undertake to organize workshops and trainings with all the stakeholders associated with family-owned enterprises, as a measure to enhance enforcement and create awareness on the importance of compliance with all existing laws and codes on corporate governance best practices and the influence in the governance of family firms. The Office to invite family-owned enterprises that are thriving upon adoption of the best practices to share the knowledge and importance of compliance and the resultant effects to their businesses sustainability.

For example, an invite to the Directors and stakeholders of Naivas Limited (Naivas Supermarket) to the forum to speak into their history as a family business that revolutionized when it adopted the separate management and control corporate governance best practice, and is currently run by a diversified board comprising of family and other investors. It remains to be one of the most successful yet sustainable business in the supermarket industry in Kenya. On the other hand, the forum can draw lessons from the management of the infamous Nakumatt supermarket a family run enterprise, which until the time of its collapse, was seen as successful but on the day it was liquidated, the founder/owner and CEO, Mr. Atul Shah, in an interview with the business daily, disclosed that Nakummatt was expanding too fast on borrowed finances and their loan repayment plan was later affected by the changes in interest law. It follows that Nakumatt faced corporate governance challenges related to lack of advisory on proper governance structure in its management, which could only be provided by a board of directors and an independent manager to oversight the firm as is stipulated by corporate governance best practices.

Courts as an institution, is seen to treat family-owned enterprises as unique, to the extent that most of the rulings and judgement on matters related to family-owned enterprises are treated as delicate and the word “family” is invoked, with a request to the parties to mediate and settle their issues out of court as they are termed as “family wrangles” thus private and confidential. The study has reported instances where, in a clear case of financial mismanagement and director’s fraud in a family-owned enterprise set up, the Courts fail to issue prosecution directions against the individuals, to safeguard family welfare. The research recommends for the formation and improvement extra-specialized courts within the High

Court's Commercial and Tax Division to hear and determine corporate governance disputes, liquidation and insolvency.

The specialised attention will be the start of a journey towards mandatory compliance and adoption of corporate governance best practices by family-owned enterprises as they will no longer remain cagey to hide behind the “family” and their “unique nature” as their challenges and issues will be dealt with by experts within the courts. Family-owned enterprises ought to be made aware that they have a burden to thrive and remain sustainable not only for the family but for the overall best interest of the nation and its economy.

The research places emphasis on the role to be played by the Association of Family Business Enterprise in Kenya (AFBE) in collaboration with the registrar of companies, wherein they ought to share the available resources including the existing database on the number of family-owned enterprise that have embraced corporate governance best practices and those that are yet to and the resultant effect to the success and sustainability of their business. Both institutions ought to arrange for annual award galas to reward family-owned enterprises that have adopted good corporate governance practice, are implementing, complying and reporting in accordance with the requisite standards. This will in turn enhance adoption and compliance with corporate governance best practice for family enterprises in Kenya and thus promote success and sustainability. In conclusion, the research project resolves that embracing corporate governance best practice will reduce the frequent collapses of family-owned enterprises in Kenya. This is because in embracing corporate governance principles, they will embody attributes such as the automatic separations of ownership and management in the their governance structures and encourage a unitary board system that allows for positive checks and balances over the management, the business founder, family team and the finances of the business to identify and alleviate risks while creating value and making profits for the business in a sustainable manner.

BIBLIOGRAPHY

Books

Abdullah Asri Abdullah, Zarina Hamid Junaidah Hashim, "Family-Owned Businesses: Towards a Model of Succession Planning in Malaysia" (International Review of Business Research Papers, 2011 7(1), 251–264)

Bob Tricker, "Corporate Governance: Principles, Practices and Policies", (3rd ed, Revised Oxford University Press 2015)

Edward Pittman and Frank Navran, "Corporate Ethics and Sarbanes-Oxley" (The Wall Street Lawyer July 2003).

Jill Solomon and Aris Solomon, "Corporate Governance and Accountability" (4th edition, Revised, Wiley, 2013)

John H. Farrar, "Company Law" (Butterworths Law; 4th edition January 1, 1998)

John Lowry and Arad Reisberg, "A Pettet's Company Law: Company Law & Corporate Finance", 4th Ed, Pearson Publications, London, 2012

John D. Sullivan, 'The Moral Compass of Companies: Business Ethics and Corporate Governance as Anti-corruption Tools" (IFC Global Corporate Governance, publication Focus 7, 2009)

Kent Baker and Ronald Anderson "Corporate Governance: A synthesis of Theory, Research and Practice" (2010) John Wiley & Sons, Inc.

Paul Davies and Sarah Worthington, "The Principles of Modern Company Law" (7th ed, 2003)

Mwaura Kiarisse, "The Status of CSR in Kenya" (Wayne Visser and Nick Tolhurst (Eds), The World Guide to CSR: A Country-by-Country Analysis of Corporate Sustainability and Responsibility. (London: Greenleaf Publishing, 2010)

Ronald Berenbeim and Jeffrey Kaplan, "Ethics Programs: The Role of the Board: A Global Study" (The Conference Board, New York, 2004) page 12.

Journals and Articles

Davies A, 'Best Practice in Corporate Governance: Building Reputation and Sustainable Success' (2016) Routledge 2 Park Square, Milton Park, Abingdon: Oxon OX14 4RN 711 3rd Avenue, New York, NY 10017, USA

Eugene F and Michael J, 'Separation of Ownership and Control', (1983) The University

of Chicago Press

Gibson K., 'The moral basis of Stakeholder theory' (2000) Journal of Business Ethics, Vol26

Hnatek Milan, 'Succession Planning & Generational Transition: The greatest challenges for Family-owned Business' (2013), Journal of Eastern Europe Research in Business and Economics, Vol. 1: Do 10.5171/2012.421949

Jocelene Quansah, Paul Jones and Samuel Buane, 'Passing on the baton: A succession planning framework for family-owned businesses in Ghana' (2020) Journal of Entrepreneurship in Emerging Economies; 12(2), 259–278. https://doi.org/10.1108/JEEE-11-2018-0124

Louis Bernes and Simon Hershan, 'Transferring Power in Family Business' (1976) Business Review, 53(4), 105– 114

Nandonde Felix Adamu, 'In the desire of conquering east African supermarket business: what went wrong in Nakumatt supermarket' (2020) Emerging Economies Cases Journal, 2, no. 2

Muriithi S, Waithera V and Wachira M, 'Family Business Founders Influence on Future Survival of Family Businesses' (2016) IV Issue 1 International Journal of Economics, Commerce and Management

Mussolini Donnato and Andrea Calabrò, 'Paternalistic leadership in family firms: Types and impacts for Intergenerational succession' (2014) Journal of Family Business Strategy, 5(1), 197–210)

Peter Davis and Paula Englis, 'The influence of family on the family business succession process: A multi-generational perspective' (1998) Entrepreneurship Theory and Practice, 22(1), 31–53

Ruparelia Njuguna, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' (2016) International Journal of Business and Social Science

Rima Bizri, 'Succession in the family business: drivers and pathways' (International Journal of Entrepreneurial Behaviour and Research (2016) 22(1), 133–154.
https://doi.org/10.1108/IJEBR-01-2015-0020

Shan Zhou and Timothy Wang, 'Corporate governance, integrated reporting and the use of credibility-enhancing mechanisms on integrated reports' (2020) European Accounting Review 29, no. 4

Steier L, Chrisman J and Chua J, 'Governance Challenges in Family Businesses and Business Families' (2015) Baylor University

Reports

An Independent Non-Governmental Member based association run by and for family businesses ownership in Kenya, https://afbekenya.org/family-businesses-driving-growth-in-kenya/(2020)

Clarke Thomas, *"Theories of Corporate Governance: The Philosophical Foundation of Corporate Governance*, London and New York.

Cliff Decker Attorneys, King Report for Corporate Governance 2002: What it means for you, 2 <https://www.mervynking.co.za/downloads/CD_King2.pdf>

Dedman Elisabeth, 'The Cadbury Committee recommendations on corporate governance- A review of compliance and performance impacts<https://onlinelibrary.wiley.com/doi/epdf/10.1111/1468-2370.00091> (Wiley Online Library 2003)

Deloitte Insight Publication, *"Long Term Goals Meet Short-Term Drive"* (Global Family Business Survey 2019)

Harney Richard, '*The New Companies Act 2015 has Come into Operation in Kenya' Bowman Gilfillan Africa Group's Coulson Harney, 2016* < http://www.bowmanslaw.com/wp-content/uploads/2016/08/The-New-Companies-Act-2015-Has-Come-into-Operation-In-Kenya.pdf

Hendricks PSA & Wyngaard R.G, *'South Africa's King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations,* (The International 46 Journal of Not-for-Profit Law 2010) http://www.icnl.org/research/journal/vol12iss2/art_1.htm

IFC, "*Family Business Governance Handbook. International Finance Corporation*" (2011).

Lombard Mornray Roberts, Mpinganjira Mercy, 'South African Corporate Ethics Codes: Establishment and Communication" (European Business Review, 2019) <https://www.emerald.com/insight/content/doi/10.1108/EBR-08-2017-0150/full/html#sec001>

Mweti Christine Kamami, *'Kenya's Corporate Governance Practices Code, 2015', Bowman Gilfillan Africa Group's Coulson Harney,* 2016 <http://www.bowmanslaw.com/wp-content/uploads/2016/08/Kenyas-Corporate-Governance-Practices-Code-2015.pdf

Nixha A, Hashani A, Abdixhiku L and Mustafa S, "*Corporate Governance in Family-Owned Businesses in Kosovo"* The Centre for International Private Enterprise (CIPE) In Washington D.C, Reinvest Institute (2015)

Uhlaner L, Wright M, Huse M, *'Private Firms and Corporate Governance: An integrated Economic and Management Perspective'*, Small Business Economics, 2007, Volume 29, Issue 3, 232-233. <https://link.springer.com/article/10.1007/s11187-006-9032-z >

OW-Wong K and Guan C, *"Corporate Governance Codes: A comparison between Malaysia and the UK* (VIII No. 2, Blackwell Publishers Ltd, 108 Cowley Road 2000)

Theses

Moche Stephen, *"Corporate governance and firm performance of listed family-owned firms in Kenya*" (University of Nairobi school of business (2014). MBA diss.

Riitho Jonathan, *"Protection of Privately-Owned Companies: A Look into the Legal Framework Governing Corporate Governance Regulations for Private Companies in Kenya"* *(*Strathmore University Law School (2020) LLB project.

Mabutu Joseph, '*Human Resource Management Practices and Sustainability of Public Transport Organizations: A Case Study Of Gateway Bus Service Limited'* Uganda Management Institute (2013) MBA diss.

Muasa Sebastian. "*Cost leadership strategy and sustainable competitive advantage of Naivas supermarket limited in Kenya*." University of Nairobi (2014) LLM diss.

Omondi, Jane. "*Strategy Implementation at Bidco Oil Refineries Limited Kenya*." PhD diss., University of Nairobi, Kenya, 2011.

Wanjohi Millicent. "*The Role of Succesion Planning In Family Enterprises Performance: A Case Study Of Bidco Oil Refineries Limited Kenya*." University of Nairobi (2018) LLM diss.

Websites

"Corporate Governance in Kenya" (*ECGI,* October 14, 2019) <https://ecgi.global/content/corporate-governance-kenya/> accessed November 21, 2022

"Family Businesses Driving Growth in Kenya" (*AFBE Kenya*; February 6, 2018) <https://afbekenya.org/family-businesses-driving-growth-in-kenya/>accessed November 21, 2022

Gadhoke H, "Institute of Certified Secretaries of Kenya (ICS)" (*Home*) <https://ics.ke/>accessed November 21, 2022

Nsehe, M. (2023) Kenya's Ndegwa Family Overtakes Kenyatta's, takes centre stage as NCBA's top shareholder, Billionaires. Africa. Available at: https://billionaires.africa/2023/05/25/kenyas-ndegwa-family-overtakes-kenyattas-takes-center-stage-as-ncbas-top-shareholder (Accessed: 03 October 2023).

Private Company Governance Call for Sharper Focus - Assets.kpmg" <https://assets.kpmg/content/dam/kpmg/pdf/2016/02/private-company-governance-call-for-sharper-focus.pdf/> accessed November 21, 2022

Rivers W, "Three Barriers to Family Business Growth and Sustainability" (*Family Business Institute;* July 29, 2022) <https://www.familybusinessinstitute.com/three-barriers-family-business-growth-sustainability>accessed November 21, 2022

Success and sustainability in African family business; <https://www.howwemadeitinafrica.com/success-and-sustainability-in-african-family-business/31190/> (2013)