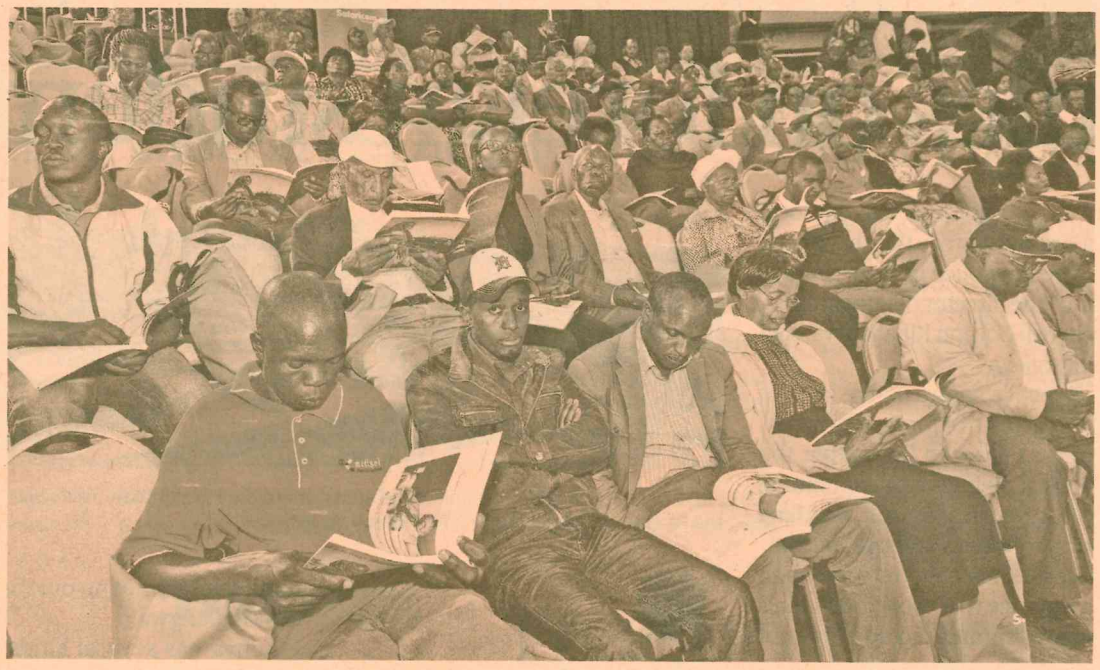
RADAR SCREEN WILLIAM MAEMA

Law shines a light on shady owners of companies



MEMBERS' DAY
Shareholders follow proceedings during a recent Safaricom Annual General Meeting in Nairobi.
--SALATON NJAU

CORPORATE GOVERNANCE Amendments to the Companies Act, 2015 require firms incorporated in Kenya to disclose beneficial owners in the register of members

Kenya's intensely contested political scene has no doubt overshadowed important developments in key segments of the economy such as education, business, law and medicine.

Changes in laws relating to business have particularly tended to go largely unnoticed despite their far-reaching ramifications on the lives of ordinary people.

Take the recent amendments to the Companies Act, 2015 that was published in August 2017, for instance. In addition to asserting his position as the minister responsible for all matters and laws relating to companies in Kenya, the Attorney-General introduced a raft of other amendments to the Companies Act that the business community and commercial law practitioners have been lobbying for since the law came into force in June, 2016.

The amended law also provides that the rights of any class of shareholders cannot be altered without their consent

While the amendments do not fully address all the shortcomings and inconsistencies in the law, they constitute a commendable starting point to making it a realistic driver of economic development in Kenya.

It starts with the provision that seeks to unmask shadowy operatives, who conduct dubious businesses with untraceable personal identity by introducing the requirement that companies must disclose their beneficial owners.

The law provides that henceforth, all natural persons, who ultimately own or control a company, shall be disclosed in the register of members. It is worth noting that the provision requires firms to make known the identity of the natural person(s) rather than corporations that ultimately own or control any company incorporated in Kenya.

It is no longer lawful to hide under the usual impregnable layers of holding companies

With the stroke of a pen, therefore, the era of faceless company owners has ended. It is no longer lawful to hide under the usual impregnable layers of holding companies.

Because a members' register is one of the mandatory documents that must be filed with the Registrar of Companies, it follows that the identity of the beneficial owners of companies will be available for public inspection (unless, of course, the official file is deliberately kept under lock and key at the Registry).

This provision is a double-edged sword. On one hand, it is arguable that this level of transparency will make Kenya an unattractive investment destination for discreet investors.

There are wealthy and honest individuals, who for very valid and legitimate reasons, prefer to invest under the veil of anonymity to avoid the weight of public limelight.

On the flip side, however, it is reasonable to argue that the challenges posed by modern-day crimes such as money laundering, terrorism and corruption demand this level of probity. The jury is still out on this issue and the debate is likely to linger on for some time. Another amendment addresses the all too common practice by unscrupulous businessmen who register companies under names that are confusingly similar to those of existing companies or which constitute the trademarks of other businesses, particularly foreign companies with no physical presence in Kenya.

The sole intention of such entrepreneurs is simply to ride on the goodwill of established brands without incurring the cost of research and development in creating brand equity for a new name.

On these and other grounds, the Registrar of Companies is empowered to compel such a company to change its name to one that does not comprise the offending element. If the company fails to comply, the law empowers the Registrar to strike it off the register within 14 days of the order. In addition to its fairness, this amendment provides much-needed succour to owners of established names and brands.

There was also the rather vexing requirement that all official company records, including the register of members, register of debentures and minute books be kept at the registered office of the company.

In practice, however, these documents are normally kept by company secretaries or in premises that are not necessary the registered office of the company.

This anomaly has now been rectified by permitting copies of such records to be kept at any other office of the company, where they are prepared or at the office of the officer who prepared them. That should be good news too for company secretaries of public companies.

The amendments have also dealt with the rather onerous requirement that all companies must lodge with the Registrar an updated register of members whenever there was a change in the membership – an impractical obligation in respect of public companies whose shares are traded on the securities exchange and where membership changes each trading day. Public companies have now been exempted from this requirement.

Perhaps even more important for good corporate governance, the boundaries of conflict of interest among directors have been expanded to capture not only the director's immediate family, but his siblings, the siblings of his spouse, his grandchildren and spouses of practically all his immediate relatives through birth or marriage.

In all cases where any such "connected person" is involved in a deal about to be entered into with the company, a full disclosure is required. In addition, the approval of other directors, who are not conflicted and, in certain cases, of the shareholders must also be obtained. In the case of public companies, the disclosure must be done within 72 hours.

While this amendment is well intentioned, it does come with a practical challenge. The fact is that a director may not be aware that one of the named relatives is involved in a contemplated transaction. One can only hope that this will be a valid defence against a claim of non-disclosure.

The amendments have also reduced the period for keeping minutes of board meetings from 10 to seven years in line with other provisions in the Act as well as the tax laws.

The amended law also provides that the rights of any class of shareholders cannot be altered without their consent. Further, such shareholders are entitled to vote as a group on the variation of any rights attaching to their shares. While this provision applies to all shareholders, it will prove more beneficial to minority shareholders.

That is not all. The amendments also address the concept of pre-emption rights. Generally, all new shares in a company are supposed to be issued to existing shareholders on a pro rata (proportional) basis. Only when a member is unable to take up his allocated portion can it be issued to a third party.

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