

Prof. Albert Mumma & Company Advocates

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BENEFICIAL OWNERSHIP LEGAL UPDATE SERIES

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Disclaimer: This Article does not form part of a Legal Opinion and is purely informative.

INTRODUCTION

In September 2022, the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) published its Mutual Evaluation Report documenting its assessment of Kenya's anti-money laundering and counter-terrorist and proliferation financing system. The report pointed out significant strategic, legal, and institutional gaps in Kenya's anti-money laundering and counter-terrorist and proliferation financing system and provided recommendations on how the system could be strengthened. To address the multi-faceted deficiencies highlighted by the Mutual Evaluation Report, the Kenyan National Assembly on 23rd August, 2023 passed an omnibus amendment bill, The Anti-Money Laundering and Combatting of Terrorism Financing Laws (Amendment) Bill, 2023. The Bill which sought to make emendation to a plethora of statutes was subsequently ratified into law on 1st September, 2023. The new law amends various statutes such as the Capital Markets Act, Cap 485A; Banking Act, Cap 488; Central Bank of Kenya Act Cap 491; Microfinance Act, 2006; Limited Liability Partnership Act, 2011, No. 42 of 2011, the Companies Act 2015 among others all with similar emphasis on increased transparency on the beneficial ownership ("BO") information. In our earlier issue (Legal update July 2021 <https://www.amadvocates.com/2021/07/16/legal-update-beneficial-ownership/>) we discussed the definition of a Beneficial Owner, particulars that need to be disclosed and the penalties for non-disclosure. In this issue, we are going to discuss the enhanced provisions on beneficial owners that have been imposed by the new law amidst other provisions with a primary focus on Companies and LLPs.



AMENDMENTS TO THE COMPANIES ACT, 2015

Enhanced Provisions Relating to the Disclosure of Beneficial Owners

A new company is now required to disclose its register of beneficial owners at the point of registration while existing companies now have a period sixty (60) days from the commencement date of new law to disclose their beneficial owners. However, the Registrar may extend the sixty (60) day period for a further period not exceeding thirty (30) days upon the application of the company.

A company is further required to lodge with the Registrar a copy of any amendment to its register of beneficial owners within fourteen (14) days after making the amendment.

Additionally, companies are required to keep records of its beneficial owner's information for at least ten years from the date which a person ceases to be a beneficial owner.

Disclosure of Beneficial Owners

Foreign companies registered in Kenya are now obligated to disclose their beneficial owners at the point of registration while existing foreign companies will need to disclose their beneficial owners within sixty (60) days for purposes of full compliance of their operation in Kenya.

Also, in the event the beneficial owner in the mother company is changed, they are now mandated to notify the Registrar of the same within a month after such changes occurs in its beneficial owners.

Introduction of a Nominator

A nominator is defined as an individual, group of individuals or legal person that issues instruction directly or indirectly to a nominee to act on their behalf in the capacity of a director or a shareholder.

A company is now required to maintain a register and disclose its nominee directors and nominee shareholders. The nominee directors should disclose the fact that they are nominees and particulars of the nominator.

Every company now is required to lodge with the Registrar a copy of its register of nominee directors within sixty (60) days after making the amendment. The register of nominee directors however shall not be open to inspection by members of the public. (What if the company does not have nominee directors? Would it be in breach of this provision? What is the mischief that this provision is trying to solve?)

Failure to disclose particulars of nominee directors attract an administrative penalty of Kenya Shillings Two Thousand (Kshs 2,000/=) only.

Appointment of Company Secretaries or Contact Persons

Private companies with a share capital of less that Kenya Shillings Five Million or a company limited by guarantee now have the option of appointing either a company secretary. In the event the company does not have a company secretary, it shall be required to appoint a contact person who shall be a natural person with a permanent residence in Kenya. Existing companies are required to lodge a notice with the Registrar of the said appointment within sixty (60) days from the commencement date of the Act.



The contact person is required to keep the record relating to directorship, shareholding, beneficial ownership and any other information required to be kept by the company under the Companies Act.

It is important to note that a contact person who fails to keep proper records and fails to avail copies of the same to the Registrar and other competent authorities commits an offence and upon conviction is liable to a fine not exceeding Kenya Shillings Five Hundred Thousand (Kshs 500,000/=).

The company is required to notify the Registrar in the event the contact person dies, resigned or otherwise ceased to be the contact person and that a new contact person has been appointed in their place. Failure to notify the Registrar of such changes shall attract a fine not exceeding Kenya Shillings Five Hundred Thousand (Kshs 500,000/=) upon conviction of the company and each officer.

AMENDMENTS TO THE LIMITED LIABILITY PARTNERSHIPS ACT, 2011

Disclosure requirements of beneficial owners by LLPs

Limited Liability Partnerships (“LLPs”) are now mandated to disclose who the beneficial owners are. This provision also applies to foreign Limited Liability Partnerships that are registered in Kenya.

The LLP Act has adopted the definition of a beneficial owner as per the Companies Act 2015 which essentially is defined as a natural person who is the ultimate owner or controls a legal person or arrangement or the natural person on whose behalf a transaction is conducted, including persons who exercise ultimate effective control over a legal person or arrangement.

Introduction of a Nominator

The LLP Act now also provides for a nominator who is an individual, group of individuals or legal person that issues instructions, directly or indirectly, to a nominee to act on their behalf in the capacity of a partner.

Filing of Annual Returns

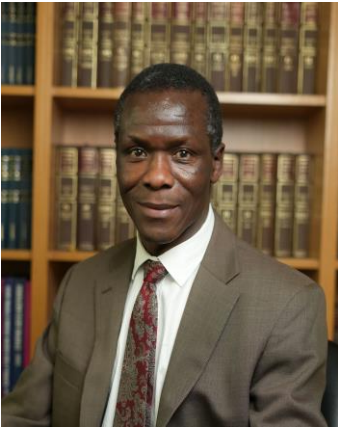
It is a mandatory provision for LLPs to file annual returns with the Registrar within thirty days of the anniversary of its registration and failure to comply with this requirement attracts an administrative penalty of Kenya Shillings Two Thousand (Kshs 2000/=) on default by the officers.

CONCLUSION

The Kenyan government is really trying to cure the mischief behind ‘who calls the shots’ in business by requiring disclosure of beneficial owners. However, it is instructive to note that implementation of the law depends entirely on the good will of the citizens. Businesses may simply comply with the provisions as part of routine compliance however, the mechanisms put in place still do not guarantee that the individuals disclosed as the beneficial owners are the actual beneficial owners.

That being said, existing local companies, foreign companies and LLPs are required to disclose who the beneficial owners are within a period of sixty (60) days from the commencement date of the new law which is from 15th September, 2023 otherwise failure to comply with the provisions shall attract significant penalties. The Bill is available here: http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2023/TheAnti-MoneyLaunderingandCombatingofTerrorismFinancingLaws_Amendment_Bill_2023.pdf

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Prof. Albert Mumma & Company Advocates specialize in Litigation and Dispute Resolution, Property Law, Construction Law and Conveyancing, Employment and Labor Relations, Public Procurement, Energy and Natural Resources Law, Legal and Policy Research and Consultancy, Commercial and Financial Services, Institutional Restructuring and Legislative Drafting and Legal Audits.

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