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THE PUBLIC BENEFITS ORGANIZATION ACT: IMPLICATIONS FOR THE NGO SECTOR IN KENYA

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

INTRODUCTION

The Public Benefits Organization (PBO) Act, operationalized through Legal Notice No. 78 of 2024, supersedes the Non-Governmental Organizations Coordination (NGO) Act No. 19 of 1990. This legislative transition brings forth significant regulatory changes impacting the operation of non-governmental organizations (NGOs) in Kenya. This article delves into the critical provisions of the PBO Act, assessing its implications for NGOs within the Kenyan context.

Definition and Scope of Public Benefit Organizations (PBOs)

Under Section 5 of the Public Benefit Organizations Act (PBO Act), a Public Benefit Organization (PBO) is comprehensively defined as a voluntary association comprising individuals or entities. This association can be membership-based or otherwise structured, but must fundamentally operate autonomously, be non-partisan, and function on a non-profit basis. The defining criteria for a PBO include the following: Operate at local, national, or international levels; Engage in public benefit activities as outlined in the Sixth Schedule; Be registered by the designated Authority.

The Sixth Schedule enumerates various areas in which an organization may qualify for registration based on its public benefit objectives. These areas include but are not limited to legal aid, agriculture, child welfare, cultural activities, disability support, energy, education, environmental conservation, gender equity, governance, poverty eradication, health, housing, human rights, HIV/AIDS, information dissemination, informal sector development, elderly care, peacebuilding, reproductive health, refugee support, disaster management, relief services, pastoralism, marginalized community support, sports, water and sanitation, animal welfare, and youth engagement. These areas reflect the Act’s commitment to fostering a wide range of public benefit activities, thereby promoting comprehensive societal development.



Section 5(1) of the Fifth Schedule of the PBO Act addresses the transitional provisions NGOs previously registered under the NGO Act. It stipulates that all such NGOs shall be deemed registered as PBOs. However, this provisional registration is valid for only one year from the commencement date of the PBO Act. Upon the expiration of this period, these previously registered NGOs must apply for formal registration with the Authority to maintain their status as PBOs.

This requirement underscores the Act's intent to streamline and unify the registration process, ensuring that all organizations engaged in public benefit activities are duly recognized and regulated under a coherent legal framework. The necessity for re-registration within a specified timeframe emphasizes the Act's focus on compliance and governance, facilitating an orderly transition and fostering accountability within the sector.

International Organizations

Section 11 of the PBO Act sets forth stringent requirements for international organizations registered outside Kenya that seek to operate within the country as PBOs. The Act mandates that such entities must apply for a certificate to operate in Kenya. The regulatory framework outlined in this section demonstrates a meticulous approach to ensuring that international organizations comply with national standards and oversight mechanisms.

Upon receiving an application from an international organization, the Authority is vested with discretionary powers to either exempt the organization from the formal registration process or require full registration under the Act, depending on the intended nature of the organization's activities in Kenya. Specifically, if the international organization does not intend to directly implement its programs or activities within Kenya, the Authority may choose to exempt it from registration. In such instances, the Authority will issue a permit, allowing the organization to operate in Kenya without undergoing the full registration process. This provision reflects a nuanced understanding of the varying operational models of international organizations, particularly those that operate through partnerships or indirect methods. Conversely, if the international organization intends to directly implement its programs or activities within Kenya, the Authority will require the organization to register formally as an international organization under the PBO Act. This requirement ensures that organizations with a direct operational presence in Kenya are subject to the same regulatory scrutiny and standards as domestic public benefit organizations, thereby safeguarding accountability and compliance with national laws.

Further reinforcing the regulatory oversight, Section 3 of the PBO Act stipulates that international organizations intending to register as PBOs must appoint an authorized agent. This agent, who must be a Kenyan citizen, serves as the legal representative of the international organization within Kenya. The authorized agent is entrusted with acting as the legal representative of the international organization in all legal matters within Kenya and being authorized to receive summons, notices and inquiries on behalf of the international organization.

The requirement for an authorized agent underscores the Act's emphasis on ensuring that international organizations have a tangible and accountable presence within Kenya. This provision facilitates effective communication and legal accountability, thereby enhancing the regulatory oversight of international entities operating in the public benefit sector.

Government's Role

The PBO Act explicitly mandates the government to facilitate an enabling environment for PBOs. This encompasses ensuring that PBOs can operate effectively, adhere to the Act's guiding principles, and engage in productive collaboration with the government and other stakeholders. The creation of such an environment is pivotal for the flourishing of PBOs and the realization of their public benefit objectives. Outlined in the First Schedule of the PBO Act, fourteen guiding principles form the cornerstone of the relationship between PBOs and the government. These principles underscore the ethos of transparency, accountability, mutual respect, and partnership, crucial for fostering a robust and effective public benefit sector.



Requirement to Register

Under Section 6(1) of the Public Benefit Organizations (PBO) Act, it is imperative for PBOs to secure registration under the Act to avail themselves of the statutory benefits it confers. This section delineates the fundamental prerequisite for PBOs to operate legally and effectively within the framework provided by the Act.

Section 6(2) introduces a crucial caveat: organizations already registered under other Kenyan laws cannot simultaneously register under the PBO Act unless they first relinquish their previous registrations. This provision ensures a streamlined regulatory environment by preventing dual registrations, which could lead to legal ambiguities and operational redundancies. The Act stipulates that registration under the PBO Act supersedes any previous registrations, rendering them invalid as per Section 6(3) and (4). This hierarchical approach underscores the Act's intention to create a clear and singular legal identity for PBOs.

Section 7 of the PBO Act prohibits any entity from presenting itself as a PBO unless it is duly registered under the Act or has obtained public benefit organization status from the designated Authority if registered under other laws. However, the Act is notably silent on the procedural intricacies for granting PBO status to non-registered entities, which may pose interpretative challenges and necessitate further regulatory clarification.

Upon successful registration, Section 10 accords the PBO the status of a body corporate with perpetual succession. This corporate status is critical as it confers legal personhood, enabling PBOs to enter into contracts, own property, and engage in litigation, thereby enhancing their operational capacity and legal protection. The issuance of a registration certificate formalizes this status and serves as a tangible acknowledgment of compliance with statutory requirements.

The Act imposes stringent penalties for fraudulent representation under Section 64. Misrepresenting an organization as registered under the PBO Act constitutes a criminal offense, punishable by a fine not exceeding Kshs. 300,000 or imprisonment for a term not exceeding two years, or both. This provision underscores the Act's commitment to maintaining the integrity of the public benefit sector and deterring fraudulent activities.

Application for Registration

The PBO Act significantly bolsters accountability and transparency within the registration process, thereby ensuring that only qualified entities can operate under its provisions. Section 8 delineates the stringent requirements for registration. These include the submission of a meticulously completed application form, substantiated proof of legal incorporation, and a comprehensive outline of the organization's objectives and activities. This multi-faceted approach ensures that only those organizations with clear, lawful, and beneficial aims can attain PBO status, thereby enhancing the overall integrity of the sector.

To promote efficiency and predictability in the registration process, Section 9 of the Act mandates that the Authority must render a decision within 60 days of receiving a complete application. This statutory deadline is crucial in fostering a responsive and streamlined registration process, which in turn encourages compliance and reduces bureaucratic delays. The inclusion of a definitive timeframe for decision-making reflects the Act's commitment to operational efficiency and responsiveness.

Notably, the Act extends its provisions to encompass international non-governmental organizations, allowing them to register as PBOs under the same regulatory framework. This inclusivity ensures a uniform standard of accountability and transparency across both domestic and international organizations operating within Kenya. By subjecting international organizations to the same rigorous registration criteria, the Act reinforces its overarching goal of maintaining high standards of integrity and operational excellence within the public benefit sector.



Institutional Framework

The PBO Act institutes a robust and all-encompassing institutional framework, fundamentally transforming the governance and oversight of public benefit entities. Central to this transformation is the replacement of the Non-Governmental Organizations Council, originally established under the NGO Coordination Act, with the National Federation of Public Benefits Organizations. As stipulated in Section 21, this Federation acts as the principal umbrella organization for all registered PBOs, providing a unified platform that enhances coordination, advocacy, and support for self-regulation forums acknowledged by the regulatory Authority.

The creation of the National Federation is a strategic enhancement designed to facilitate greater cohesion and collective representation among PBOs. By serving as a central body, the Federation is instrumental in fostering a culture of self-regulation, thereby promoting higher standards of accountability and transparency within the sector. It provides a structured mechanism through which PBOs can engage in policy dialogue, share best practices, and collaboratively address sectoral challenges. The Federation's recognition by the Authority further legitimizes its role, empowering it to effectively advocate for the interests of the PBO community.

Complementing the role of the Federation, the PBO Act also establishes the Public Benefit Organizations Authority (PBOA) under Section 34. The PBOA is envisaged as an independent regulatory body endowed with extensive powers to oversee the registration, regulation, and monitoring of PBOs. The Authority's mandate includes conducting inspections, audits, and investigations to ensure adherence to the Act's rigorous regulatory requirements.

Review of Decisions

The PBO Act introduces a comprehensive and meticulously structured administrative review mechanism for applicants aggrieved by the decisions of the PBOA. This review process is articulated with a focus on enhancing procedural fairness, accountability, and transparency, thereby addressing significant gaps observed under the previous NGO Coordination Act.

Section 17 of the PBO Act sets forth the initial step in the review mechanism. It allows any applicant dissatisfied with a decision rendered by the PBOA to request a review within 30 days of receiving the decision. This provision ensures that aggrieved parties have a clear and immediate recourse to challenge decisions they perceive as unjust or erroneous. If the applicant remains dissatisfied with the outcome of the Authority's review, the Act provides for a subsequent appeal to the Public Benefit Organizations Disputes Tribunal. The Tribunal is mandated to resolve such appeals within 60 days, ensuring a timely adjudication process. The establishment of this Tribunal introduces a specialized body equipped to handle disputes specifically related to public benefit organizations, thereby fostering expertise and consistency in decision-making.

For further recourse, the Act allows parties aggrieved by the Tribunal's decision to appeal to the High Court. The High Court's decision on such matters is deemed final, offering a conclusive resolution to the dispute. This tiered appeal process embodies a comprehensive review mechanism, providing multiple layers of oversight and scrutiny.

The introduction of specific timelines and a multi-tiered review process under the PBO Act serves several critical functions. By mandating specific periods within which reviews and appeals must be conducted, the Act ensures that disputes are resolved expeditiously, reducing uncertainty and potential operational disruptions for PBOs. The creation of the PBOs Disputes Tribunal as a specialized body underscores the importance of having a dedicated forum with the requisite expertise to handle sector-specific disputes, thereby enhancing the quality and consistency of decisions. Allowing appeals to the High Court introduces an additional layer of judicial oversight, ensuring that the Tribunal's decisions are subject to rigorous legal scrutiny, thus reinforcing the principles of justice and accountability.

Accountability and Transparency

By balancing the creation of an enabling environment with robust public interest protections, the Act addresses key deficiencies inherent in the previous NGO Coordination Act. Section 25 of the PBO Act mandates that the activities of PBOs



be accessible to stakeholder scrutiny, reinforcing principles of transparency and accountability. This requirement, however, judiciously exempts personal, legal, or proprietary matters, thereby safeguarding sensitive information while ensuring that the broader operations of PBOs remain transparent. This balanced approach enhances public trust and stakeholder engagement, which are critical for the legitimacy and sustainability of PBOs.

Section 29 of the PBO Act requires PBOs to implement comprehensive internal accounting and administrative procedures. These measures are designed to ensure the transparent and accountable use of resources, thereby mitigating risks of mismanagement and fraud. The emphasis on internal governance mechanisms reflects a proactive approach to accountability, encouraging PBOs to adopt best practices in financial and administrative management.

By mandating robust internal procedures, the Act not only protects public interests but also enhances the credibility and operational efficiency of PBOs. Transparent resource management is essential for maintaining donor confidence and securing sustainable funding. The PBO Act's requirements thus serve a dual purpose: safeguarding public funds and promoting the long-term viability of PBOs.

Transition Provisions

Under the PBO Act, NGOs previously registered under the NGO Coordination Act are automatically deemed to be registered as PBOs. However, this deemed registration is provisional and conditional. Section 5(1) of the Fifth Schedule mandates that these NGOs must seek formal registration under the PBO Act within one year from the commencement date of the new legislation. This provision ensures a seamless transition while requiring NGOs to comply with the updated regulatory framework. The one-year re-registration period serves as a critical compliance window for NGOs. During this period, organizations must align their operations and governance structures with the new PBO Act requirements. Failure to re-register within the specified timeframe results in the loss of PBO status, thereby rendering the organization ineligible for the benefits and recognition accorded under the new Act. This stringent requirement underscores the Act's emphasis on regulatory compliance and organizational accountability.

Schedule 5(7)(2) of the PBO Act provides a distinct timeline for exempt organizations, requiring them to apply for registration within three months from the commencement of the Act. This shorter compliance window reflects the unique status and operational dynamics of exempt organizations, which may have previously operated under different regulatory conditions.

Benefits of Registration with the Authority

Registration under the PBO Act confers a myriad of advantages for organizations dedicated to public welfare. Registered PBOs enjoy a spectrum of tax exemptions, providing significant financial relief and facilitating resource mobilization. These exemptions encompass certain income, taxes on interest and dividends from invested assets, stamp duty, and court fees.

The PBO Act extends preferential treatment to registered organizations in the realm of Value Added Tax (VAT) and customs duties on imported goods or services utilized for public benefit objectives. This preferential treatment underscores the government's recognition of the critical role played by PBOs in advancing societal welfare, providing them with essential cost-saving measures.

Registered PBOs benefit from incentives designed to encourage donations from both legal entities and individuals. Additionally, they enjoy employment tax preferences, fostering a conducive environment for organizational growth and sustainability. These incentives bolster the financial viability of PBOs, incentivizing philanthropic contributions and promoting workforce engagement.

Further, registered PBOs are eligible for direct government financing, including budget subsidies, grants for specific projects, and contractual engagements to execute designated tasks. This direct financial support strengthens collaboration between PBOs and the government, amplifying the impact of public benefit initiatives and fostering sustainable partnerships.

The PBO Act also grants registered organizations preferential treatment in public procurement procedures and bidding contracts. This preferential status enhances PBOs' competitiveness in accessing government contracts, expanding their



operational capabilities, and driving social impact through strategic collaborations with governmental entities.

PBOs also enjoy opportunities for meaningful engagement in policy-making processes, amplifying their advocacy efforts and ensuring that public policies align with societal needs. Moreover, they have access to specialized training courses offered by government institutions, enhancing their organizational capacity and fostering continuous learning and development.

Regulatory Challenges

The PBO Act, while presenting a robust legal framework, grapples with various regulatory challenges. One of the primary impediments to the effective implementation of the PBO Act is the lack of published regulations. This deficiency creates ambiguity and uncertainty, hindering stakeholders' ability to navigate the Act's provisions and operationalize its mandates. Urgent action is imperative to promulgate comprehensive regulations that provide clarity and guidance to stakeholders.

The Act introduces collaboration requirements between PBOs and the government, ostensibly to facilitate mutual engagement and access to incentives. However, this departure from the traditional ethos of NGOs may compromise their autonomy and independence. Striking a balance between collaboration and autonomy is crucial to uphold the integrity of civil society organizations.

While the Act empowers the Authority to bestow PBO status on entities not registered under the PBO Act, it fails to delineate the requisite procedures and eligibility criteria for such status. This ambiguity raises concerns regarding the fairness and transparency of the status bestowment process, necessitating clarity and procedural guidelines to ensure equity and accountability.

The Act imposes stringent requirements on board composition, mandating a third of board members to be Kenyan citizens and limiting the number of related members. This restriction, while ostensibly aimed at enhancing local representation, may impede the operational flexibility and international engagement of organizations. The Act has also limited the number of related members in any board to not exceed three. The imposition of a cap on the number of related members to three within a board framework carries significant implications for organizational governance and operational dynamics. This provision seeks to mitigate potential conflicts of interest and promote impartial decision-making processes. However, its efficacy and broader implications warrant critical examination. Moreover, the Act's dictates on constitution contents constrain organizational autonomy, potentially stifling innovation and diversity in governance structures.

Conclusion

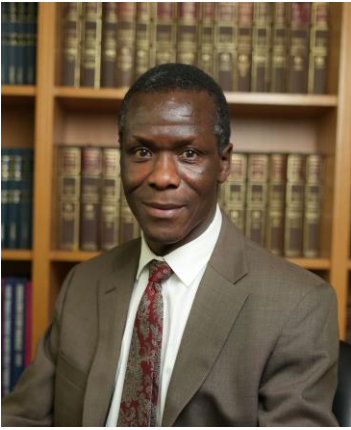
For entities previously registered under the NGO Act, the transition to the PBO Act represents a fundamental alteration in their legal status and regulatory obligations. The requirement for re-registration within a stipulated timeframe underscores the imperative for compliance with the new legislative regime. Section 5(2) of the Fifth Schedule delineates the consequences of non-compliance, signalling the cessation of PBO status for entities failing to adhere to registration mandates.

While the PBO Act delineates activities qualifying for PBO status, it stops short of mandating registration for all eligible entities. However, access to the benefits provided under the Act necessitates formal registration with the Authority. Moreover, stringent provisions exist to deter fraudulent claims of registration, reflecting the Act's commitment to safeguarding organizational integrity and public trust. Entities contemplating registration under the PBO Act must carefully evaluate their internal structures and operational dynamics. Considerations extend beyond mere compliance with registration requirements to encompass broader implications such as governance frameworks, accountability mechanisms, and access to regulatory incentives. A thorough assessment of the benefits and implications of registration is indispensable in guiding organizational decision-making processes.

The PBO Act is available here:

<https://kenyalaw.org/kl/fileadmin/pdfdownloads/Acts/PublicBenefitsOrganisationNo18of2013.PDF>

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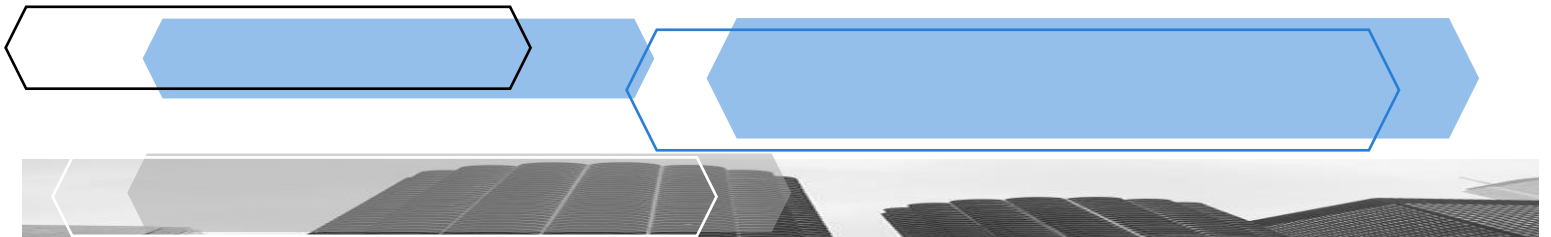
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