



## PN/06: Voluntary Strike Off, Dissolution & Restoration

This publication is not a legal document. It contains general information intended as a basic guide on the main requirements for the voluntary striking off of companies from the register as well their restoration under the Companies Act, 2015 (“Companies Act”). The note is not drafted with unusual or complex transactions in mind. This guide should not be deemed to substitute any need to take specialist professional advice.

This practice note will be relevant to you if:

- you are thinking of or would like to dissolve a company;
- or you wish to restore a company to the register; or
- you are a director or secretary of a company or you act as an adviser to a company and are looking for guidance on dissolution or restoration of a company to the register.

These Practice Notes were prepared by the Joint Liaison Committee (“JLC”) comprised of members from Business Registration Service, Law Society of Kenya – Nairobi Branch and Institute of Certified Secretaries.

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## Introduction

This note explains how you can remove your company from, and restore it to, the register of companies. It also provides guidance on:

- how you can ask the registrar to remove your company from the register (Chapter 1, Voluntary strike off and Dissolution);
- how the registrar may remove your company from the register if it is no longer carrying on business or in operation (Chapter 2, Companies no longer carrying on business or in operation);
- how the court can restore the company to the register (Chapter 3, Restoration to the register by Court Order); and
- how a former director or member may apply to the registrar to have the company restored (Chapter 4, Administrative Restoration).

You will find the relevant law in the following places:

- Part XXXIII of the Companies Act, 2015 (sections 893 to 921 inclusive)
- the Registrar of Companies (Companies Forms) Rules 2015 (Schedule 1)
- [the Companies (General) Regulations, 2016]

You should consider seeking professional advice.

## Chapter 1

### VOLUNTARY STRIKE OFF AND DISSOLUTION

#### 1. In what circumstances may a company apply to be struck off the register?

SECTION 897 provides that a company may apply to the Registrar to be struck off the register and be dissolved.

As a matter of practice, a company may apply to the Registrar to be struck off the register and dissolved if:

- (a) it is dormant or no longer trading, and has no assets or liabilities; or
- (b) if the shareholders decide that they no longer wish to continue with the company and would like it struck off the register.

N/B: Before the striking off procedure commences, all statutory compliance should be up-to-date. See PN/03 - Event Driven Filings and PN/04 - Ongoing Compliance Requirements.

This procedure is not an alternative to formal insolvency proceedings where these are appropriate. Even if the company is struck off and dissolved, creditors and others could apply for the company to be restored to the register subject to them meeting the prescribed conditions.

#### 2. When can I not apply to strike my company off the register?

An application for voluntary striking off can only be made by the company and must be made on the company's behalf by its directors or a majority of them. The application must contain any information prescribed by the regulations.

Section 898 and 899 of the Companies Act, 2015 sets out the circumstances in which the company may not apply to be struck off. A company may not make an application for voluntary strike off if, at any time, in the last 3 months, it has:

- (a) carried on business
- (b) changed its name
- (c) made a disposal for value of property that immediately before ceasing to carry on business, it held for the purpose of disposal for gain in the normal course of carrying on business. For example, a company in business to sell cars could not sell cars during that 3-month period but it could sell the showroom where the cars were displayed.
- (d) engaged in any other activity except one which is necessary or expedient for the purpose of:
  - making an application for strike off or deciding whether to do so (for example, a company may seek professional advice on the application and pay the costs of submitting the '*Application by Company to Have its Name Struck Off the Register*' Form CR 18)
  - concluding the affairs of the company

- complying with any statutory requirement or
- an order published in the Kenya *Gazette* by the Cabinet Secretary

Section 898(3) - A company shall not be regarded as having carried on business only because it made a payment in respect of a liability incurred in the course of carrying on business.

A company cannot apply to be struck off if it is the subject, or proposed subject, of:

- a voluntary arrangement under the insolvency Act which has not been concluded
  - Under administration
  - Under liquidation- voluntary or by the Court which has not been concluded.
- You can find further circumstances in which you cannot make an application in Sections 898 and 899 of the Companies Act, 2015. Please note you will commit an offence if you breach these restrictions.

### 3. What should I do before applying?

There are safeguards for those who are likely to be affected by a company's dissolution. You should warn the company's shareholders, directors, creditors, employees, managers, or trustees of any employee pension fund before applying as any of them may object to the company being struck off. You should deal with any pending items, such as closing the company's bank account, the transfer of any domain names before you apply for the strike-off.

Section 900(2) of the Companies Act provides that a copy of the application should not be given to a director who is a party to the application.

Please note you will commit an offence if you breach this provision.

You may notify any other organisation or party who may have an interest in the company's affairs otherwise they might later object to the application. For instance, the Kenya Revenue Authority, the County Government, particularly if the company is under any obligation involving planning permission or health and safety issues.

Section 905 of the Act states that from the date of dissolution, any assets of a dissolved company which have not been distributed or disclaimed will belong to the State. The company's bank account will be frozen and any credit balance in the account will pass to the State.

### 4. How do I apply?

You must complete the '*Application by Company to Have its Name Struck Off the Register*' Form CR 18.

The form (CR 18) should be dated and must be signed by:

- (a) the sole director, if there is only one
- (b) by both, if there are two
- (c) by all, or the majority of directors, if there are more than two.

The application is accompanied by a company's resolution (Form CR 19).

The application is lodged on the e-Citizen portal using the log in details of one of the director's upon payment of the requisite fee.

## 5. Who must I inform?

Under Section 900, the directors who make the application must, within 7 days of sending the application to the registrar, send a copy to the following persons:

- (a) the shareholders of the company
- (b) creditors such as banks, suppliers, former employees if the company owes them money, landlords, tenants (for instance, where a security deposit is refundable), guarantors and personal injury claimants. You must notify the appropriate offices including the Kenya Revenue Authority and the local labour officer if there are outstanding, contingent or prospective liabilities
- (c) employees
- (d) managers or trustees of any employee pension fund
- (e) any directors who have not signed the form (CR 18, '*Application by Company to Have its Name Struck Off the Register*')
- (f) A person of a class prescribed by the Regulations for the purpose of striking off

The company's directors must also send a copy of the application to any person who, after the application has been made, becomes a director, member, creditor or employee of the company, or a manager or trustee of any employee pension fund of the company. This must be done within seven days of the person becoming one of these. The directors must also send a copy of the application to any person who becomes one of the above at any time after the day the company made the application for voluntary strike off. This obligation continues until the dissolution of the company or the withdrawal of the application. Failure to circulate the notice to the various parties constitutes an offence.

## 6. How should I inform the various parties?

You can deliver a hard copy of the '*Application by Company to Have its Name Struck Off the Register*' Form CR 18 to the parties personally, person's proper address or post a copy to, or leave it at:

- (a) the last known address (if an individual)
- (b) the principal/registered office (if a company or other body)

It is also permissible to make a creditor of the company aware of the application by leaving a copy of it at, or posting a copy of it to, the place of business with which the company has dealings in relation to the current debts, for example, the branch from where you ordered goods or which invoiced you. However, if there is more than one such place of business, you should deliver a copy of the

application to each of those places. It is advisable to keep proof of delivery or posting.

## **7. What happens when the Registry of Companies receives the application?**

The Registry examines the application and if it meets the requirements, the Registrar shall cause to publish in the Kenya Gazette an intention to strike off the company to allow interested parties the opportunity to object.

A copy of this notice will be placed on the company's public record. If there is no reason to delay, the registrar will strike the company off the register not less than three months after the date of the notice. The company will be dissolved on publication of a further notice stating this in the relevant Kenya Gazette.

## **8. What is the Kenya Gazette?**

The Kenya Gazette is the official newspaper record in the Republic of Kenya and it is published weekly on Fridays. The Kenya Gazette may be purchased from the Government Printer, Haile Selassie Avenue, Nairobi, Kenya or downloaded from the Kenya Law website (<http://kenyalaw.org/kl/>).

## **9. What if the company ceases to be eligible or I change my mind and want to withdraw my application?**

The directors must ensure the application is withdrawn immediately by completing Form CR 47 if they change their mind or the company ceases to be eligible for striking off. This may be because, after applying to be struck off, the company:

- (a) trades or otherwise carries on business
- (b) changes its name
- (c) for value, disposes any property except those it needed in order to make or proceed with the application
- (d) becomes subject to formal insolvency proceedings or makes an application under Part XXXIV of the Companies Act, 2015 (for a compromise or arrangement between a company and its creditors)
- (e) engages in any other activity, unless it was necessary to:
  - make or proceed with a striking-off application
  - conclude those of its affairs that are outstanding because of the need to make or proceed with an application
  - comply with a statutory requirement

A director may file the application to withdraw the strike off action to the registrar by submitting a notice of withdrawal Form CR 47 at the Registry of Companies, Sheria House, Harambee Avenue, Nairobi Kenya together with a prescribed fee.]

Section 903 of the Companies Act, 2015 sets out the full list of circumstances that mean you must withdraw an application for strike off. Failure to withdraw an application is an offence.

## 10. Can anyone object to dissolution?

Any interested party can object to the registrar.

## 11. How and why can they object?

Objections or complaints must be in writing and sent to the registrar with any supporting evidence, such as copies of invoices that may prove the company is trading. Reasons could include:

- (a) if the company has breached any of the conditions of its application for instance, it has traded, changed its name or become subject to insolvency proceedings during the three-month period before the application, or afterwards
- (b) if the directors have not informed interested parties
- (c) if any of the declarations on the form are false
- (d) if some form of action is being taken, or is pending, to recover any money owed (such as a winding up petition)
- (e) if other legal action is being taken against the company

## 12. Offences and Penalties

It is an offence:

- (a) to apply when the company is ineligible for striking off
- (b) to provide false or misleading information in, or in support of, an application
- (c) not to copy the application to all relevant parties within seven days
- (d) not to withdraw the application if the company becomes ineligible

The offences attract a fine of up to Kenya Shillings Fifty thousand shillings (KES. 50,000) as provided under Section 900(4). If the directors breach the requirements to give a copy of the application to relevant parties and do so with the intention of concealing the application, they are potentially liable to not only a fine of up to Kenya Shillings Five hundred thousand (KES. 500,000) but also up to two years imprisonment as provided under Section 900(6).

## 13. Do I need to pay a fee with my application Form CR 18

Yes. A prescribed fee is payable to cover the cost of providing the service. The registry will not refund the fee if you withdraw the application after we have registered it the application has been registered. A further fee will be payable for a new application.

## Chapter 2

### Companies no longer carrying on business or in operation

#### 1. Can the registrar strike a company off the register on his own initiative?

Yes, under Section 894 if it is neither carrying on business nor in operation. The registrar may take this view if, for example:

- he has not received documents from a company that should have sent them to him
- mail that the registrar has sent to a company's registered office is returned undelivered
- the company has no directors

Before striking a company off the register, the registrar is required to write two formal letters and send notice to the company's registered office to inquire whether it is still carrying on business or in operation. If he is satisfied that it is not, he will publish a notice in the Kenya Gazette stating his intention to strike the company off the register unless he is shown reason not to do so.

A copy of the notice will be placed on the company's public record. If the registrar sees no reason to do otherwise, he will strike off the company not less than three months after the date of the Kenya Gazette notice. The company will be dissolved on publication of a further notice stating this in the Kenya Gazette. Further information about the Kenya Gazette can be found in Chapter 1 question 8.

#### 2. How can I avoid this action?

If you want your company to remain on the register, you must reply promptly to any formal inquiry letter from the registrar and deliver any outstanding documents. Failure to deliver the necessary documents may also result in the directors being prosecuted.

#### 3. Can I object?

The registrar will take into account representations from the company and other interested parties, for example, creditors. If there is good reason not to strike the company off the register, he may suspend the action until the objection is resolved.

#### 4. What happens to the assets of a dissolved company?

From the date of dissolution, any assets of a dissolved company (except any asset held in trust for another person) will pass to the State because they do not have a legal owner. The company's bank account will be frozen and any credit balance in the account will be passed to the State. [You should address any enquiries about property that has vested in the State to the Office of the Attorney General, Sheria House, Harambee Avenue, Nairobi, Kenya.]

## Chapter 3

### Restoration by Court Order

The registrar can only restore a company if they receive a court order, unless a company is administratively restored to the register (see chapter 4). Anyone who intends to make an application to the court to restore a company is advised to obtain independent legal advice.

Any company which is restored to the register is deemed to have continued in existence as if it had not been struck off and dissolved.

#### 1. Who can apply to the Court to restore a company to the register?

Generally, any of the following may make an application for restoration under Section 916(2)

- the Attorney General
- any former director, member, creditor or liquidator
- any person who had a contractual relationship with the company or who had a potential legal claim against the company
- any person who had an interest in land or property in which the company also had an interest, right or obligation
- any manager or trustee of the company's former employees' pension fund
- any other person who appears to the Court to have an interest in the matter
- A former liquidator of the company.
- A person with a potential legal claim against the company.
- A former member of the company, or the executor, or the administrator of such a person.
- A person who was a creditor of the company at the time of it being struck off the Register or dissolved.

#### 2. How long have I got to make an application to the Court?

As a general rule restoration by court order can be applied for up to six years from the date of dissolution. However, this time limit does not apply where the purpose of the application is to enable a person bring proceedings against the company for damages for personal injury.

Applications for restoration where the dissolution was done under section 894 and section 895, and where the Registrar has refused administrative restoration lodged

within the stipulated timeline, can be done to the court outside the 6 year period (section 917(4) & (5)).

### **3. Where do I apply for a Court Order for restoration?**

The application should be made to the High Court in Kenya.

### **4. How do I serve documents?**

You should serve the claim (and any supporting evidence) on the registrar of companies and the Attorney General dealing with any assets of the company that have vested in the State<sup>1</sup>.

### **5. What supporting evidence must I give?**

If the company was struck off the register because it was not carrying on business or in operation, you will need to show the Court that the company was, at the time of the striking off, carrying on business or was in operation. If the company was struck off pursuant to an application by the directors, you will need to show that any of the legal requirements were not complied with, for example, that there were ongoing insolvency proceedings against the company or that the company had changed its name or carried on business during the preceding three months before the application was made to the registrar.

### **6. Why might a company be restored with a different company name?**

The registrar will normally restore a company with the name it had before it was struck off and dissolved. However, if at the date of restoration the company's former name is likely to give the impression that the company is connected with a state organ, county government or any prescribed public authority, s/he cannot restore the company with its former name. [*See also Chapter 4 (7) below*]

If the name is no longer available, the court order may state another name by which the company is to be restored. On restoration, we will issue a change of name certificate as if the company had changed its name.

Alternatively, the company may be restored to the register as if its registered company number is also its name. The company then has 14 days from the date of restoration to pass a resolution to change the name of the company. You will lodge a '*Notice of Change of Name by Means Provided for in a Company's Articles*' (Form CR 15) together with the company's resolution (Form CR19) on the e-citizen portal. with the appropriate fees. A certificate of change of name will then be issued.

It is an offence if the company does not change its name within 14 days of being restored with the number as its name.

Please note that the change of name does not take effect until a Certificate of Change of Name is issued.

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<sup>1</sup> To be prescribed in the Regulations

## **7. Are there costs or penalties?**

Yes. Where the property of the company has vested in the State, the Court may direct that the claimant meets the costs of the Attorney General in dealing with the property during the period of dissolution or in connection with the proceedings. The Court may also direct that the claimant meets the registrar's costs in connection with the proceedings for the restoration.

The company must normally pay any statutory penalties for late filing of accounts delivered to the registrar outside the period allowed for filing. The penalties that may be due are:

- unpaid penalties outstanding on accounts delivered late before the company was dissolved;
- penalties due for accounts delivered on restoration, if the accounts were overdue at the date the company was dissolved.

## **8. What happens when the Court makes an order for restoration?**

The applicant must deliver a copy of the Court Order to the registrar to restore the company. The company is then restored thereafter.

## **9. What happens when the company has been restored?**

Under Section 919, when the company has been restored, the general effect is that a company is deemed to have continued in existence as if it had not been dissolved or struck off the register. The Court may give directions or make provision to put the company and all other persons in the same position as they were before the company was dissolved and struck off. A notice will also be placed in the Kenya Gazette.

## **Chapter 4: Administrative Restoration**

### **1. What is Administrative Restoration?**

Under certain conditions, where a company was dissolved because it appeared to be no longer carrying on business or in operation, a former director or member may apply to the registrar to have the company restored. This is called 'administrative restoration'. If the registrar restores the company, it is deemed to have continued in existence as if it had not been dissolved and struck off the register. Section 913 of the Companies Act, 2015 gives details of the requirements relating to administrative restoration.

Administrative restoration is available where the company was struck off under either Section 894 or 897 of the Companies Act, 2015.

### **2. Who can apply to have a company restored to the register?**

- the Attorney General
- any former director, member, creditor or liquidator
- any person who had a contractual relationship with the company or who had a potential legal claim against the company
- any person who had an interest in land or property in which the company also had an interest, right or obligation
- any manager or trustee of the company's former employees' pension fund
- any other person who appears to the Court to have an interest in the matter
- A former liquidator of the company.
- A person with a potential legal claim against the company.
- A former member of the company, or the executor, or the administrator of such a person.
- A person who was a creditor of the company at the time of it being struck off the Register or dissolved.

### **3. Can an application for administrative restoration be made in respect of any company?**

No. To be eligible for administrative restoration, the company must have been:

- struck off the register Section 894 or 897 of the Companies Act, 2015
- dissolved for no more than six years at the date the registrar receives your application for restoration

If a company meets the above criteria, an application for restoration may be made if it meets the following conditions:

- it must have been carrying on business or in operation at the time it was struck off.
- if any property belonging to the company became vested in the State, the applicant must provide the registrar with a statement in writing from the Attorney General giving consent to the company's restoration.
- it has delivered all documents necessary to bring the company up to date and paid any outstanding late filing penalties.

#### **4. How do I apply for administrative restoration?**

You must deliver Form CR 48 to the registrar of companies together with the prescribed fee.

#### **5. What are the other costs or penalties involved in making an application for administrative restoration?**

The applicant must meet the Attorney General's costs or expenses (if demanded).

The company must pay any statutory penalties for late filing of accounts delivered to the registrar outside the period allowed for filing. The penalties that may be due are:

- unpaid penalties outstanding on accounts delivered late before the company was dissolved;
- penalties due for accounts delivered on restoration, if the accounts were overdue at the date the company was dissolved.

You must pay the appropriate filing fee on submission of any outstanding documents.

#### **6. What happens next?**

The registrar will give notice to the person who has applied for restoration of their decision. If the registrar decides that he will restore the company to the register the restoration will take effect from the date they send the notice. The notice will include the company's registered number and the name of the company. If the company is restored to the register under a different name or with the company number as its name, that name and its former name will appear on the notice.

If the registrar decides not to restore the company to the register, the applicant may apply to the Court for restoration within 28 days even if the period for restoration has expired.

## 7. Why would a company be restored with a different company name?

If at the date of restoration the company's former name is likely to give the impression that the company is connected with a state organ, county government or any prescribed public authority, it will need to choose an alternative name. The application for restoration may state another name by which the company is to be restored. On restoration, we will issue a change of name certificate as if the company had changed its name.

Alternatively, the Registry may restore the company to the register as if its registered number is also its name. The company then has 14 days from the date of restoration in which to change the name of the company. Alternatively, the directors can pass a resolution to change the company name. You must lodge a '*Notice of Change of Name (Form CR 15) together with a resolution (Form CR19)*' on the e-Citizen portal and pay the prescribed fee. A Certificate of Change of Name will then be issued.

It is an offence if the company does not change its name within 14 days of the company being restored with the company number as its name.

Please note that the change of name does not take effect until we have issued the certificate of change of name.

## 8. What happens when the company has been restored?

When it has been restored, the general effect is that a company is deemed to have continued in existence as if it had not been dissolved or struck off the register. An application can be made to the Court for directions or provision required to put the company and all other persons in the same position as they were before the company was dissolved and struck off. Any such application to the Court must be made within three years of the company being restored.

## 9. Review of this Practice Note.

This Practice Note shall be reviewed at least once every two years by the JLC at its discretion and subject to any change in the Companies Act.

## 10. Effective Date.

This Practice Note shall come into effect from 16th June 2020.

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