

Reforms in The Ease of Doing Business in Kenya By Kenneth Gathuma and Shigadi Mwakio

In the Ease of Doing Business Report 2016 and the Doing Business Reforms Report 2016 by the World Bank, Kenya was ranked No 2 after Costa Rica as being among the top ten countries that were noted as having registered significant improvement in having 39 regulatory reforms in place to enhance the business process. Sub-Saharan Africa alone accounted for about 30% of the regulatory reforms making it easier to do business in 2014/15, followed closely by Europe and Central Asia.

Part of the reforms aimed at enhancing and promoting the ease of doing business in Kenya realized it was important to make Kenya's business sector as competitive by streamlining and automating the business registration process. This would facilitate the reduction of the cost of doing business by adopting simplified processes to enhance access to services and open new channels of revenue collection. The government identified enterprise development and investment through modern corporate laws as vital for the country's socio-economic growth leading to the enactment of the Business Registration Service Act, 2015.

The Act established the Business Registration Service (BRS) a state corporation whose core function is the implementation of policies, laws and other matters relating to the registration of companies, partnerships and firms, individuals and corporations carrying on business under a business name, bankruptcy, hire purchase and security rights.

The Business Registration Service Act, 2015 introduced a completely new regime aimed at the creation of an ideal environment for **ease of doing business** in Kenya. Towards this end, the government introduced E-Business an online platform through which the stakeholders are able to seek and receive services. It is now possible for one to register business names, companies, and partnerships and make changes through the online platform. Status Reports of companies (infamously referred to as CR12) can also be accessed through the online platform.



The front office at the Company Registry at Sheria House.

It is also possible to file returns as well as cease a business through the online platform. This has reduced the need for persons to travel to Nairobi to seek services at the Companies Registry.

The e-business platform has also increased the efficiency with which services are rendered. Currently it takes an average of 3-5 days from date of submission to register a business.

Movable Property Security Rights (MPSR) are also registered through the online platform. The public is now in a position to conduct searches and find out whether a particular property being offered as security has already been used to secure another credit. The MPSR has the potential of securing property to the value of Kshs. 800 billion, a significant transformation leading financial institutions to rethink their lending systems.

Although the issue of double registration of companies has been a thorny issue in the past, there have been deliberate efforts made to resolve this issue. Firstly, all companies registered under the previous regimes of registration have been loaded on the online platform. They are expected to verify their businesses through the *link a business* option on the online platform. This has helped ease the process of conducting name searches and greatly reduced the occurrences of double registration. Secondly, through a data clean-up process, all companies that are a result of double registration have been called upon to change names or risk being struck off the register.

There are also efforts underway to retrieve lost/ misplaced files; this was actualized in a recent exercise conducted by the National Youth Service where various files have been retrieved.

Company registry with old files.



The BRS has also made efforts to sensitize the public on the new laws and on its functions. This sensitization has been through print media and public forums such as continuous development programs for professional bodies. Efforts are underway to organize workshops for the public. Advocates and company secretaries are in a position to open agency accounts for their firms where they can seek services on behalf of their clients. They are also able to share rights on access to the accounts with such other persons as they may authorize.

In an aim to encourage efficient and transparent service delivery, BRS has introduced an online system on which the stakeholders can also channel their comments, compliments and complaints. All stakeholders are encouraged to communicate their urgent issues through the email address cr@ag.go.ke. The queries raised are responded to within 24 hours.

Although the BRS continues to face challenges in performing its functions and implementing reforms within the business sector, it remains hopeful and optimistic that it will achieve its goals. All stakeholders are invited to support the parastatal that albeit in its baby stages has achieved key milestones towards creating a friendly and conducive business environment in Kenya.

Legal Reforms: The Companies Act, 2015

The Company law regime that existed a few years ago in Kenya was based on the 1948 UK Act. Since its enactment in 1962, the Companies Act (Chapter 486) was not updated to be in tandem with modern ways of doing business. This led to the enactment of the Companies Act 2015 as a way of improving the way of



doing business in Kenya while signaling to the world that Kenya was indeed, an international financial and investment destination of choice. Indeed, an effective framework of company law and corporate governance promotes enterprise and stimulates investment.

There have been several salient concerns and highlights about the Companies Act 2015 that the Government has identified as critical to the transformation in the Ease of doing business.

A. Progress and Challenges on implementation and enforcement of the Companies Act

1. Progress

The implementation of the Companies Act 2015 was done in two phases. Phase one involved implementation of the regulations to the Act that are now in force. The Regulations comprise of The Companies (General) Regulations, 2015 which contains the Model Articles of Association for the various types of companies, permitted characters, symbols, signs and punctuation that can be used in a company name, and Registrar of Companies (Companies Forms) Rules 2015 which contains the various forms to be used when transacting business.

Phase 2 involved the amendment of the 2015 Regulations and Rules to include aspects on compliance. This phase has been ongoing. In order to materialize Section 612 of the Act which relates to ‘sell out and squeeze in’ form CR49 (Notice to Non Assenting Shareholders) has been introduced. The Rules have been amended to include **Forms Cr 29 to 48** for Companies registered in Kenya. These forms are not present in the current Rules.

There has been significant transformation in the registration process with the adoption of digital technology to streamline the process. This has seen a shift from manual registration and lodgment of documents to an online registration system on the e-citizen platform. It is expected that the online registration process will make registration of business easier and that one does not have to travel to Nairobi to register his business or lodge a document. There are however some challenges with the online registration process that are constantly being worked to improve the system and ensure efficient service delivery. As part of improvement of the system, e-business a new system that is more user friendly to both the practitioners and the ordinary citizen has been introduced.

Starting a Business- Reduced the Number of Steps it takes to register a Company from 11 to 3

Old Process:



New Process:



An extensive audit of all registered businesses is being conducted, with the aim of retrieving the lost/misplaced files, identifying non-compliant and taking legal action against companies and identifying cases of double registration/registration of companies with similar names. It is expected that once the process is completed, all the records will be regularized and that the Registrar of Companies will be better placed to focus on her core mandate, compliance.

The controversial section 975(2)(b) which made it mandatory for a foreign company seeking to do business in Kenya to have 30% of its shares held by Kenyan citizens has since been repealed by Finance Act of 2016 thus making it easier to register foreign companies.

BRS recognizes the need to enforce good governance practices and standards to competitively compete with its peers in other nations and more so foster the ease of doing business.

2. THE CHALLENGES IN THE IMPLEMENTATION OF THE ACT

The Challenges faced are numerous taking into account that the Act introduces a completely new regime with distinct features from the Old regime. In addition, the voluminous nature of the Act means that there is need to constantly study and seek interpretation on the Act. Some of these challenges are highlighted below.

a. Double Registration/Registration of Companies with Similar names

BRS is currently faced with a serious challenge of registration of companies with similar names. This has at times led to fraudulent activities causing some companies serious financial losses. Double Registration has also caused losses to the office of the Registrar General in terms of resources spent on court cases and damages paid where the Registrar is found culpable.

Double Registration is mainly a result of the three regimes of registration of companies, the C. files (manual) files, the RG-BPMS files (registered under the Business Process Management System) and the files registered under the new digital online platform.



Old companies which fail to update their records and file returns contribute to the challenge of double registration.

Election of Church leaders in Meru County

In an effort to curb the issue it is expected that the new E-business system will integrate all the regimes of business registration into one system hence reducing the chances of making a name already registered available to another party for registration. Clerical staffs have been trained and continue to receive training on how to conduct a name search and registration of business names. BRS is conducting a comprehensive audit of the Companies Registry with a view of retrieving lost/misplaced files, checking compliance of companies especially in terms of filing annual returns and to identify the companies with similar names.

b. Sensitization of the Professionals and General Public on the New Act and procedures

It would appear that the public and even the professionals are not well sensitized on the online registration system. This is apparent on the errors made while filling in the forms. Other persons submit their documents without signing or without attaching the required documents. On the part of the professionals, we have lawyers and company secretaries who attach Articles of Association based on the repealed Act. Some also sign documents on behalf of the directors and shareholders when they ought not to. BRS has seen situations where people cut out signatures from elsewhere and stick them on the forms before submitting the forms. Instead of attaching photos of the directors, other people attach photographs such as rose flowers, pet animals and other irrelevant items. Other people attach faint documents and as a result BRS is forced to reject these documents so that proper documents are lodged. BRS is to sensitize the public of the procedure for online registration and lodgment of documents through the media and consultative workshops.

c. Online Registration System

Although the online registration system is a blessing in that one can conduct business from home or the office and at one's convenience, there is a challenge where some citizens cannot access the system because they are not connected to the electricity grid or they do not have access to the internet. The government has mooted the idea of putting up centres of promoting access to all its services to the remote areas in the country.

B. COMPLIANCE AND STATUTORY RETURNS

1. COMPLIANCE

The Companies Act 2015 has made compliance with the Act itself and its regulations less tedious. A number of requirements for compliance have now been removed. There are also stiffer penalties for companies and directors who fail to comply. Some of the salient features in terms of compliance are:

a. Introduction of one person companies

Previously in order to comply with the provisions of the Companies Act repealed, persons would be added to a company as directors as a matter of formalities. A number of times this addition was done without the consent of the said persons. The introduction of one-man companies therefore means that a person is not compelled to enter into business with others when it is not his wish to do so.

b. Consent of the directors and shareholders to register company

Directly related to (a) above is the requirement of a company registration form signed by all directors and the memorandum form signed by all directors and shareholders

respectively. This ensures that the persons included in a company are aware of such inclusion and give their consent to such inclusion.

c. No obligation to have Company Secretary for Private Companies

Where a private company has a paid up capital of less than 5,000,000 Kenya shillings, it has no obligation to have a company secretary. BRS is aware of the concerns of the Company Secretaries in relation to this section but it cannot overlook the spirit of the Act, that every common person is able to do business with ease. There is however, a proposed amendment to this provision and the Board of Directors of BRS are actively pushing for this amendment.

d. Minimum age Limit for Directors reduced to 18

The minimum age of a director has now been reduced from 21 years to 18 years thus giving young people more opportunity to do business.

e. No Restrictions on the objects of the Company

A company has no limit as to the type of business it can do subject to its own limitations. There are however regulated business sectors such as security agencies; banks, mortgage and other financial institution, gambling agencies. Other businesses are in the realm of other registrars. For example, sporting institutions are under the registrar of sports.

f. General Meetings not compulsory for Private Companies

The procedure for written resolutions is provided for under **Part XIII of the Companies Act**. Hence, Private companies do not always have to hold general meetings and may pass written resolutions. However, where the resolution to be passed involves the removal of a director or secretary from office then the company has to conduct a general meeting.

g. Valid Execution of documents

In addition, the requirement for valid execution of a document especially the annual returns has been changed to signing by at least one director in the presence of an attesting witness.

2. ENFORCEMENT

Stiff Penalties where a company fails to comply

A company is expected to file its resolutions, written memorandum and agreements affecting the Company's constitution within 14 days of passing of such a resolution. There are penalties ranging from Kshs. 200,000 to Kshs. 15,000,000 for companies that fail to comply. For instance, **Section 873 of the Act** provides that where a company

fails to comply with its lodgment obligations, the Registrar or any member or creditor may give notice to the company requiring it to comply with the obligation and if the company fails to comply within 14 days after service of the notice, the registrar, member or creditor of the company may apply to the court for an order directing the company and any specified officer of the company to comply within a specified time. The court may also order that all costs of or incidental to the application are to be borne by the company or by any officers of it responsible for the default.

Disqualification of a Director or Company Secretary

Further, an application may be made to court for disqualification of a director or company secretary on the grounds of gross misconduct and that he/she is unfit to hold office. Where such an order is made the same shall be in force for a duration of 2-15 years.

Indeed the act has put in place proper modalities to not only to ease the process of compliance and to deal with companies and directors who are non-compliant.

The Insolvency Act 2015

The Insolvency Act was assented into law on 11 September 2015. It consolidates procedures relating to bankruptcy of natural persons and corporate insolvency matters. The two are now under one Act, the Insolvency Act. The Bankruptcy Act chapter 53 of laws of Kenya (Formerly the English Bankruptcy Act 1930) previously governed bankruptcy while the Companies Act chapter 486 laws of Kenya (formerly the English Companies Act of 1948) governed the liquidation of companies. The Acts largely reflected the English position of the time as they had not been repealed and were rarely ever amended. For purposes of the Insolvency Act, the recognized professional bodies are the Law Society of Kenya and the Institute of Certified Public Accountants.

Objectives of Repealing the Bankruptcy Act and the Companies Act Part VI

Repealing the Act was deemed necessary to secure an equitable distribution of the property of the debtor/ Company among his/its creditors according to their respective rights against him/it. There was need to relieve the debtor/company of his/its liability to his/its creditors and to enable him/it to make a fresh start in life/business free from the burden of his/its debts and obligations. Further to this, it was important to protect the interests of the creditors in his/its affairs and for the imposition of punishment where there has been fraud or other misconduct on his part. In any dispute especially of a commercial nature, it is necessary to offer suitable

alternatives other than declaring bankruptcy or liquidation companies. By so doing, the focus shifts from debt recovery to restructuring mechanisms that will enable the business to recover while creating better safeguards for investors business tends to grow.

Impact of the Insolvency Laws on Insolvency Practice in Kenya

The new Insolvency Act 2015 has impact on commercial legal practice. Unlike the previous Companies Act Cap 486, that was subjecting companies to liquidation; the new Insolvency Act seeks to redeem insolvent companies through administration (work out). The Act focuses more on assisting insolvent natural persons, unincorporated entities and insolvent corporate bodies whose financial position is redeemable, so that they may continue to operate as a going concern and meet their financial obligations to the satisfaction of their creditors. This means that there will be more business for lawyers operating in the commercial law.

Secondly, the new concept of Insolvency Practitioners under Part II of the Insolvency Act allows members of two professional bodies' that is, ICPAK and LSK to be the licensed Insolvency Practitioners. The Insolvency Act does not allow automatically members of these bodies to be Insolvency Practitioners; they have to apply to the Official Receiver. In the previous Acts, lawyers were not obligated to apply to the Official Receiver for them to handle bankruptcy and winding up matters.

Thirdly, the Insolvency Act 2015 introduces the concept of cross border insolvency; however, we do not have regulations on cross-border yet. This is a challenge as commercial lawyers would be in a very difficult predicament on how to handle cross-border insolvency, as there are no regulations. However, the United Nations Commission on International Trade Law (UNCITRAL) working group V (Insolvency) is currently developing regulations on cross-border insolvency; Kenya is a member of the working group. Once the UNCITRAL regulations are developed, Kenya will adopt and domesticate the same. This will enable Kenyan lawyers to practice in other jurisdictions.

Fourthly, it is relatively expensive to apply to be an Insolvency Practitioner, as one is required to: pay a Kshs. 50,000 fee to the Official Receiver; obtain a professional indemnity cover; obtain security in the form of an enacting bond. Many upcoming lawyers interested in Insolvency practice may find this difficult for them.

The complexity of insolvency matters further complicate as it may require rigorous training for both the bench and commercial lawyers to get a sound grasp of

the insolvency law. It is noted for good measure that the proper functioning and development of the judicial insolvency system is dependent upon the quality of the people who are in charge of the running of the courts and those who use it to advance their clients' interests. **Finally**, the Act has no regulations for part VI-XIII, hence there is dire need to review and amend the Insolvency Act, which the Official Receiver is currently working on.

The Act has only been in force for a year, time in which the Official Receiver has identified the need to amend some parts. However, this can only be done once the Act is tried and tested. Pertinent to the anticipated changes, it is clear there is urgent need for sensitization resulting from the bulkiness of the Act that also contains complex issues relating to insolvency. There is also need to develop regulations to fully operationalize the Act and train practitioners on the technical aspects of the Act considering that several aspects of the Act are not practicable within the Kenyan environment. Latest trends in insolvency such as Cross collateralization, bankruptcy restriction orders or undertakings as well as post commencement financing are all new concepts that practitioners must appreciate.

Q&A One on One with the Acting Director General of the Business Registration Services on the Ease of Doing Business.



Acting DG of BRS Kenneth Gathuma says the public should expect an end to the malpractice of missing files and demand for bribes to push files. Mr. Gathuma spoke to *Mwanasheria Mkuu* on the ongoing transformation of this critical Semi-Autonomous Government Agency in the Office of the Attorney General and Department of Justice, whose efficiency is partly linked to the overall

competitiveness of Kenya's economy. Here are the excerpts:

What Does The Digitisation Of Company Registration Entail?

It starts with the very basics. It means applications for registration of a business can now be done on the digital platform. We started this journey in 2015 when the government launched the e-Citizen platform, and after that, an Act constituting our organisation, the Business Registration Service (BRS) Act of 2015, was passed. We are meant to implement the new company laws under the Company Act 2015,

Insolvency Act 2015 and the Business Registration Service Act. In 2015, we started registration of business names and issuing name searches digitally, and significantly, on November 1 last year we started registering companies online.

We did it on a pilot basis for a month and on December 1 2016; we went live fully, on e-citizen. Thereafter, we also set up a digital platform for daily interactions between businesses and the registry, and since April, we have had stability in the system. That has cut to a maximum of three days the time it takes to register a company without any external influence. We will be locking down the manual processes on October 15 2017. The issue of missing files and wrong information is now outdated.

What Can I Do On The Portal?

You can register a business name, limited liability partnerships, limited liability companies and public companies. You can do searches on the portal, meaning you do not have to come here and queue for official search.

For businesses registered after December 1 2016, their data is already clean and is on the portal. However, for those registered previously using paper files, the owners need to access the “link a business” function on the portal and key in the firm’s particulars. We have somebody on our end who goes and verifies the data from the physical file. Once we ascertain the information is in order, we make the company verified, and all its information goes digital. We have already scanned and archived all the paper files for future reference. On the e-citizen platform, you pay using digital platforms such as mobile money, credit cards, bank transfers or cash deposit. You do not need to interact at all with the cashiers here.

We Have Had the Long Standing Issue of Shadowy Companies in Kenya, Does This Portal Resolve That?

This is exactly what it is supposed to resolve, because going forward if your company is not verified within a set timeframe, of say the next three months, then we are going to deem you to be in non-compliance. In that case, we plan to send out a notice that everybody who is running a business must make it known to the companies’ registry that you are in operation, and make annual returns. Therefore, once we get to 2018, and note that certain companies on the index have no activity, and then the Companies Act does empower the registrar to take certain actions. This includes asking them to show cause why they are not in business, and if they are not, they are stricken off the register. However, a vast majority of the companies in Kenya were registered after 2010. They do have their data on other platforms, so we are trying to

do a data merge. Once we do that, we will have a sense of which company is alive and which one is not.

People Have Been Asked For Bribes In Order To Do A Search, Files Have Gone Missing Among Other Issues At The Registry. Is This Now in the Past?

We are making systems that are smarter than the bad elements. We are aware that sometimes we have had such issues, and this is frowned upon as a matter of policy. Nevertheless, we are saying that by virtue of going on a digital platform and making every interaction with a member of the public subject to an audit trail, the issue of missing files and wrong information is outdated.

Once we stop the manual processes, everybody who comes into the fold will be channeled through the digital platform, that way we will know who is interacting with a client, and can track how long it takes for a transaction to take place, and if there is a spike in deliverables we put them to task. Our biggest challenge is the official search, which is where we have made the biggest effort to reform the process as we go around tying down the other elements.

What Safeguards Are In Place To Protect The Privacy And Integrity Of Companies' Data?

As far as privacy is concerned, we must keep in mind that company files are public files, and anybody can come and peruse one. They just need to pay a fee of Sh200. The law covers this. On integrity, we are having the registry and the business owner both verify that the data is correct. When we have that meeting of minds, it is then that we tick on that file as verified, and it goes green on the portal.

When Do You Expect To Have Migrated Everyone To The New System?

This is something that is in process. We are giving ourselves three months to do a complete data cleanup for the active companies. We could be talking of a quarter to a third of all registered companies being dormant. Through this exercise, we are going to be aware of the number of companies that are not active, and come up with a way of keeping them off the register. We are empowered by the Companies Act to deregister dormant companies. However, we will do a lot of stakeholder engagement and public awareness before we go down that path. We have 20,000 companies verified on the system so far.

How Much Has Been Spent On The Automation?

Development partners have funded most of this process, largely the World Bank that has given us ICT system support. The government has also provided funding to BRS to achieve this objective. It is hard to say the exact amount because the contracts signed by the World Bank and its development partners are confidential.

How Far Are You On The Movable Securities Register?

It has been live since June of this year. We have been doing sensitization with the lending institutions, through the Kenya Bankers Association and some individual banks, especially the larger lenders. We have also interacted with microfinance institutions.

The Movable Property Security Act, 2017: Transforming Credit Services in Kenya

The Movable Property Security Rights Act, 2017 (the “Act”) was assented to by H.E. the President on 10 May 2017 and subsequently came into operation on 16 May 2017. They were published in the Kenya Gazette on 24 May 2017.

The main objective of the reform is in line with the spirit of the Ease of Doing Business to increase access to credit to firms especially micro, small and medium enterprises (MSMEs) by developing the appropriate legal and institutional frameworks to allow and facilitate the use of movable assets as collateral for loans. A diagnostic study showed that the previous legal framework that governed interests in different securities was fragmented, out of date, and cumbersome to use by both lenders and borrowers. The laws that were analysed in the study were the Chattels Transfer Act (Cap 28), Hire Purchase Act (Cap 507), and the Companies Act (the then Cap 486) amongst other laws.

The MPSR Regulations provide for the proper conduct of the business of the collateral Registry. The regulations create the electronic registry that is aimed at enhancing the confidence of lending institutions and create an enabling environment to lend against movable assets as collateral or security. In May 2017, the Board of BRS, appointed Mr. Joseph Onyango the head of the Securities Registry pending the competitive recruitment and appointment of a substantive Registrar as provided under Section 19 (3) of the Act.

Development of a functional and technically sound collateral registry: The Electronic Movable Collateral Registry (EMCR) is now a fully developed and functional registry that runs on the government’s service single sign-on platform of e-Citizen where BRS is one of the service providers. To date, the registry has

over 10,000 Notices of Initial Registration lodged by various lenders who have used movable property as collateral including financial institutions.

Training and capacity of stakeholders implementing the reforms, awareness and communication

BRS has made concerted efforts to reach out to the key stakeholders in the MPSR ecosystem, primarily the Kenya Bankers Association that is the umbrella body for banks in Kenya. In line with this, BRS has conducted two well-attended sensitization workshops with the Kenya Bankers Association on 31 May and 4 July 2017.



Capacity building for officers implementing reforms on the Movable Property Security Rights Act 2017.

BRS conducted individualized training on the use of the electronic registry to specific banks that have made requests and are keen to come on board. Some of these are Barclays Bank of Kenya, Standard Chartered Bank, Equity Bank, Commercial Bank of Africa, NIC Bank and Diamond Trust Bank. BRS continues to conduct these individualized training on request. It has also developed an MPSR user manual and conveyed the same to KBA for onward transmission to its members.

The department of the Registrar General was identified as a major actor in this reform since the Chattels Registry, the Companies registry and the Hire Purchase registry fall within the mandate of the Registrar General in the Attorney General's office.
