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Execution of documents by corporates: Enhancements to the law needed

Introduction

Execution of documents by corporate entities can sometimes be plagued by administrative inefficiencies. This is mainly due to over-reliance on directors to perform this role. In this alert, we highlight what the law provides on execution of documents by companies.

What does the law provide?

The 2015 Companies Act provides a company may only validly execute a document through two authorised signatories, or a director in the presence of a witness. As such, one man director companies only require the sole director to sign in the presence of a witness. The law of Contract Act recognises valid execution of contracts on the part of companies to either be through:

- a. an attorney duly appointed by a registered power of attorney; or
- b. execution in accordance with provisions of the Companies Act.

Additionally, the 2020 Business Laws (Amendment) Act removed the requirement for a company to execute documents under common seal, and recognized electronic signing. We have discussed what constitutes valid electronic signing in Kenya, in an article published last year (which can be accessed [here](#)) and those rules apply to corporate entities. The changes reduced the cumbersome formalities associated with corporate execution of documents.

Who is an authorised signatory?

The Companies Act defines an authorised signatory as a director or a secretary or joint secretaries of a company. This definition is quite specific and persons who are not directors or the appointed company secretary do not qualify as authorised signatories. However, a scrutiny of the Act shows that it was envisaged that a company may appoint other persons

as authorised signatories. These persons, if appointed, at incorporation would be included in the statement of proposed officers submitted to the Registrar on incorporation with the Company required to notify the Registrar of Companies of any subsequent appointments or changes in the Company's authorised signatories. Companies are also required to maintain a register of authorized signatories and the Company's annual return should include any persons appointed as authorised signatories.

Does execution by other officers of the company invalidate the document?

Just because company officers execute a document on the company's behalf without being authorised signatories or having valid powers of attorney, does not mean the document is not binding. This is because of the *indoor management* rule which protects an innocent party from needing to inquire into the internal affairs of other companies.

The indoor management rule provides that where a company in good faith enters into a contract it is entitled to presume the contract was lawfully and properly executed by the other party. Therefore, a company cannot rely on execution technicalities to avoid its contractual duties. In addition, if the officer held himself out as having authority to bind the company whether actual or implied the company is bound unless bad faith is shown on the part of any party involved.

Expansion of the definition in the Act

The Act contemplates that the details of an authorised signatory, if any should be contained in the Company's Statement of proposed officers at incorporation and their details disclosed in the company's annual returns. The form of the annual return and statement of

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incorporation prescribed by the Companies Regulations, however does not provide for this.

This presents a case for expanding the limited definition in the Act to other persons who are not directors or secretaries. Determining who that is a matter of customisation. As such to provide corporates with the needed latitude a simple addition that, 'any other person authorised by the board of directors' can execute as an authorised signatory would be sufficient. This is premised on the understanding that the authorisation would, in essence, be a delegation of the directors' authority. Such a change would then allow the taking advantage of the framework on authorised signatories in the Act.

We envisage such a framework would be documented in a signatory policy or a delegation of authority framework. This policy would provide an internal guideline on the limits and exercise of authorised signatory powers. The policy should clearly set out which documents an authorised signatory can sign without board approval. This is key because the appointment of an authorised signatory would naturally come with some risks, such as fraud and exceeding of one's limit of authority.

Challenges of signing through authorized signatories if the definition is expanded

The key challenge relates to documents dealing with land. The 2012 Land Registration Act requires documents dealing with land in respect of a corporate body to be executed in accordance with the relevant law. The forms provided under the Regulations have however not been updated to do away with execution under seal for companies in line with amendments to the Companies Act doing.

Therefore, only the directors or the company secretary or persons appointed through a registered power of attorney can execute documents relating to

immovable property. Notably, powers of attorney in relation to land transactions must be registered at the land registry where the land is situated in addition to registration under the Registration of Documents Act.

Currently financial institutions like banks prefer to use registered attorneys with specific limits of authority allowing them to quickly and easily process large numbers of land transactions. The biggest challenge remains registration in each relevant land registry which is administratively cumbersome. This can be done away with if the framework in the Companies Act, is enhanced as proposed. If the definition in the companies act is expanded, such a framework can be deployed so that the details of the Company's Authorised Signatories are contained in its Official Search. Also, the regulations governing land registration updated to reflect the changes.

Conclusion

Using authorised signatories who are not directors or company secretaries can be quite helpful where the documents being executed are operational and do not require prior board approval. It simplifies corporate execution of documents by reducing administrative inefficiencies. Small companies can still use their directors and even where they use authorised signatories, we do not think complex rules and policies are necessary.

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