

Corporate Ownership: A Critique of the Companies (Beneficial Ownership Information) Amendment Regulations 2022

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“Unveiling the beneficial owners who control companies and other legal entities is necessary to determine where illicit funds are moving and who is moving them”.²

Abstract

Corruption is a Kenyan problem just as it is a world problem. Company rooted corruption and money laundering have been an on-going debate warranting transparency and accountability in the public and private sector as well.³ Beneficial ownership transparency is an emerging jurisprudence that has highlighted the importance of corporate ownership in company law. While scholars continue to argue on the relevance or redundancy of the concept of ownership in the corporation,⁴ the requirement of disclosure of beneficial owners incorporated into Kenyan legislation has come in to augment the concept of corporate ownership. This paper argues that demystifying corporate ownership is in fact vital for the recognition of beneficial owners of a company. In support of this argument, the paper will critically examine the new legislation, the Companies (Beneficial

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² ‘Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa’, *African Union Commission and United Nations Economic Commission for Africa*, page 81. See also Rachel Etter-Phoya, Eva Danzi and Riva Jalipa, ‘Beneficial ownership transparency in Africa The state of play in 2020’ (Tax Justice Network Africa, 2020), 8.

³ Ken Mutuma, ‘Addressing a National Crisis of Ethics: Starting with the Private Sector’ (2020) 1 *Governance Journal* 1, 55.

⁴ Virgile Chassagnon, Xavier Hollandts, ‘Who are the owners of the firm: shareholders, employees or no one?’ (2014) 10 *JIE* 1, 47.

Ownership Information) (Amendment) Regulations 2022 in order to assess the importance of beneficial ownership transparency. Lastly, the paper will interrogate the existing implementation mechanism and draws conclusions as to the way forward for better implementation.

1. Introduction

The dynamics of law have stimulated a recent development in Kenya's company law. The discussions around the relevance of corporate ownership are now of much greater significance following the introduction of beneficial ownership transparency. As the ultimate question remained; who really owns a company, the government eventually saw the need to publicly trace the 'natural person(s)' behind the activities of a company.⁵ Through an amendment of the Companies Act no. 17 of 2015 by the Statute Law (Miscellaneous Amendment Act) 2019, the Companies (Beneficial Ownership Information) Regulations, 2020 (hereafter, the 2020 Regulations) was introduced.⁶ Additional requirements were then made to the 2020 Regulations thereby facilitating the enactment of the Companies (Beneficial Ownership Information) (Amendment) Regulations, 2022 (hereafter, the 2022 Regulations).⁷ The 2022 Regulations give effect to section 93A of the Companies Act which stipulates the mandatory requirement of every company to keep a register of its beneficial owners.⁸

It should be appreciated that, in line with global standards, Kenya is making an effort to strengthen transparency in its corporate world by the introduction of these regulations. Again, this step was motivated by the commitment towards Vision 2030 with specific emphasis on transparency, accountability, public participation and the much needed transformation

⁵ Edwin Baru, Aleem Tharani, 'Kenya: Beneficial Ownership Disclosure Requirements Expanded And Extended To Public Procurements And PPPs', (Bowmans law, 30 March 2022) <<https://www.bowmanslaw.com/insights/infrastructure/kenya-beneficial-ownership-disclosure-requirements-expanded-and-extended-to-public-procurements-and-ppps/>> Accessed 5 August 2022.

⁶ Kenya Subsidiary Legislation, Legal Notice No. 12 of 2020, Companies (Beneficial Ownership Information) Regulations 2020 <[https://brs.go.ke/assets/downloads/The%20Companies%20\(Beneficial%20Ownership%20Information\)%20Regulation%202020.pdf](https://brs.go.ke/assets/downloads/The%20Companies%20(Beneficial%20Ownership%20Information)%20Regulation%202020.pdf)> Accessed 5 August 2022.

⁷ Ibid.

⁸ Companies Act No. 17 of 2015, s 93A.

of public procurement in Kenya.⁹ It is not lost that beneficial ownership is a long established concept in company law.¹⁰ Yet its disclosure is a rather recent global trend widely being probed by literature and its judicial developments gradually surfacing.¹¹

As these regulations surrounding beneficial transparency are quite new to the Kenyan legal system, it is yet to unfold how they will shape case law, bearing in mind that disputes regarding compliance and related matters will inevitably emerge. Notably, identifying the beneficial owners of a company will assist in establishing the corrupt routes of companies by unveiling their anonymity. As a result, the enactment of 2022 Regulations is a remarkable step towards combating corruption and money laundering in the midst of increasing illicit financial flows in Kenya.¹²

The paper begins by briefly discussing corporate ownership as a relevant concept in company law and further elaborating the term the beneficial owner by drawing inferences from recent foreign judicial developments. This discussion then culminates in establishing the importance of beneficial ownership transparency and exploring the principles that guide it. The bulk of the paper is dealt with by the next section which outlines the salient provisions of the Regulations 2022. The paper then delves into the examination of the implementation mechanisms in place and the implications of the 2022 Regulations on individual rights. The conclusion sums up the discussion and proposes the way forward for effective implementation of the regulations.

⁹ Explanatory Memorandum to the Companies (Beneficial Ownership Information) (Amendment) Regulations 2022 <<http://www.parliament.go.ke/sites/default/files/2022-03/The%20Companies%20%28Beneficial%20ownership%20information%29%2C%20amendment%20regulations%2C%202022.pdf>> Accessed 5 August 2022.

¹⁰ Pablo Porporatto, 'Who is all behind this? - The beneficial owner' (*Inter-American Centre of Tax Administration*) <<https://www.ciat.org/who-is-behind-all-this-the-beneficial-owner/?lang=en>> Accessed 5 August 2022.

¹¹ Bajpai Rajni, Myers C. Bernard, 'Enhancing Government Effectiveness and Transparency: The Fight Against Corruption - Alexandra Habershon, Solvej Krause and Zosia Szytkowski, Chapter 9: Beneficial Ownership Transparency' (The World Bank, 2010) page 249.

¹² Transparency International Kenya, 'Illicit financial flows in Kenya', (Global Financial Integrity, 2021) <<https://gfiintegrity.org/report/illicit-financial-flows-in-kenya/>> Accessed 7 August 2022.

2. Corporate Ownership: A Concept Relevant to Beneficial Ownership Transparency

This paper does not intend to dig into the heart of the corporate ownership debate. However, it is noteworthy that the concept is crucially relevant in light of transparency and accountability in the corporate world. Therefore, the proceeding discussion mainly explores the concept of corporate ownership in relation to the beneficial owner.

The concept of corporate ownership is varied and corporate governance literature has argued for decades on the issue as to who actually owns the firm.¹³ Ownership has been defined differently by various scholars. Consequently, the split in definitions has created the impression that corporate ownership is viewed differently.¹⁴ For a long time, the contractarian theory had dominated the discussion on corporate ownership advancing the shareholder approach that suggests that shareholders are the ultimate owners of the company for the plain reason that they own shares.¹⁵ This approach has been rejected as unrealistic and can arguably be stated to have plunged the concept of ownership into the relevant versus redundant rhetoric.

For instance, Fama expressively rejects the concept of ownership stating that, *“the firm is just the set of contracts covering the way inputs are joined to create outputs and the way receipts from outputs are shared among inputs. In this ‘nexus of contracts’ perspective, ownership of the firm is an irrelevant concept.”*¹⁶ In contrast, Milgrom, Roberts and MacPherson acknowledge the notion of corporate ownership in terms a “bundle of exclusive individual rights” with specific reference to the right to property.¹⁷ More specifically, there are in place six attributes of ownership engraved in literature that help define ownership:

¹³Virgile Chassagnon, Xavier Hollandts, ‘Who are the owners of the firm: shareholders, employees or no one?’ (2014) 10 (1) Journal of Institutional Economics, 47-69.

¹⁴Ibid.

¹⁵Ibid.

¹⁶Simon Learmount, John Roberts, ‘Meanings of Ownerships of the Firm’, (ESRC Centre for Business Research, University of Cambridge Working Paper No. 238, 2002) , 4.

¹⁷Ibid.

*“The right to possess, implying exclusive physical control that is allowed by the resource, in addition to the right to non-interference;
The right to use, entailing exclusive use and a duty on the part of others not to use without permission;
The right to the capital, implying the power to dispose of and transfer title of the resource, which can be sub-divided into the right to alienation, consumption and modification;
The right to manage, which includes the power to contract with others concerning control over uses of the resource;
The right to security, including the right against expropriation, which qualifies the previous four attributes;
The right to the income, that is the increased benefit accruing to the resource as a result of trade.”¹⁸*

Admittedly, the concept of corporate ownership cannot completely be discarded simply because of the argument that shareholders are not the true owners of the company. Rejecting the notion of ownership would equally mean rejecting liability or accountability of the illicit actions of corporate business. While the above rights confer certain individuals the power to ‘own’ a company, the rights alternatively pose a duty to be held accountable for the illicit use of the company.¹⁹ The Organization for Economic Co-operation and Development (OECD) Corporate Governance Working Paper No. 7 illuminatingly reports that apart from the protection of the interest of minority shareholders, corporate governance also aims at protecting the interest of other stakeholders of a company and the interest of the public in general.²⁰ This is where the interplay of disclosure of the owners of the business sets in in order to understand the complexity of corporate ownership structures.²¹ The question therefore is not whether

¹⁸Ibid, 7.

¹⁹Eric Vermeulen, ‘Beneficial Ownership and Control: A Comparative Study - Disclosure, Information and Enforcement’ (OECD Corporate Governance Working Papers No. 7, 2013) <[Beneficial Ownership and Control : A Comparative Study - Disclosure, Information and Enforcement | OECD Corporate Governance Working Papers | OECD iLibrary \(oecd-ilibrary.org\)](#)> Accessed 17 August 2022.

²⁰Ibid.

²¹Ibid.

the concept of corporate ownership is redundant (because it is not) rather the question becomes, who is the ultimate owner of the corporate firm?

2.1 The Beneficial Owner

As earlier stated, beneficial ownership is a long established concept, arguably tracing its origin in trust law and the era of the Crusades around the 12th Century.²² During the Crusades, combatants would entrust their lands to certain individuals who would then cultivate these lands and pay taxes on their behalf until the land owners return from the war.²³ A two fold ownership concept emerged from this practice; the beneficial owner (the land owner) and the legal owner (the trustee; the assigned caretaker of the land).²⁴ However, the concept of beneficial ownership experienced an evolutionary change in early 1970s where it instituted its application in international tax law and, corruption and anti-money laundering laws.²⁵ Following this development, the concept of ownership is not only well known but greater focus is now accorded towards its transparency to fortify the fight against corruption and money laundering.²⁶

In Kenya, the beneficial owner is defined by the Companies Act 2015 as the, 'natural person who ultimately owns or controls a legal person or arrangements or the natural person on whose behalf a transaction is conducted, and includes those persons who exercise ultimate effective control over a legal person or arrangement.'²⁷ Following the amendment of regulation 3 of the 2020 Regulations by the 2022 Regulations, the Regulations further give insight on the threshold of a beneficial owner

²²TPablo Porporatto, 'Who is all behind this? - The beneficial owner' (*Inter-American Centre of Tax Administration*) <<https://www.ciat.org/who-is-behind-all-this-the-beneficial-owner/?lang=en>> Accessed 17 August 2022.

²³Ibid.

²⁴Ibid.

²⁵Tim Davies, Stephen B. Walker, Mor Rubinstein, Fernando Perini, *The State of open Data: History and Horizons* (African Minds, 2019), 55.

²⁶Ibid.

²⁷Companies Act No. 17 of 2015, s 3.

in stipulating that, 'it is a natural person who individually or jointly; (a) directly or indirectly holds at least ten percent of the issued shares in a company, (b) directly or indirectly exercises at least ten percent of the voting rights, (c) directly or indirectly holds the power to appoint or remove a director of the company and lastly, (d) directly or indirectly exercises significant influence or control over the company.'²⁸

In determining who is the beneficial owner, the Canadian Tax Court in *Velcro Canada Inc. v Canada and Prévost Car Inc. v Canada*,²⁹ observed that the beneficial ownership concept reveals four attributes: possession, use, control and risk. Presumably, the attributes serve as a test of beneficial ownership,³⁰ in addition to the threshold listed in the 2022 Regulation. More importantly, the Court of Justice of the European Union also described the meaning of a beneficial owner in *N Luxembourg 1 v Skatteministeriet*,³¹ with regards to relief from withholding tax on interest and royalties. The Court stated that a beneficial owner is one an entity which economically benefits from the interest received and has the power freely to determine its use.³² Simply put, the beneficial owner is therefore the natural person who enjoys the use and assumes the risks and control of the assets of a corporate vehicle.³³

2.2 Disclosure of the Beneficial Owner

It has been established that the beneficial owners are the individual or individuals that actually economically benefit from the activities of the company. So the disclosure of the beneficial owner of the company means that the law now requires company to keep a register of the

²⁸Companies (Beneficial Ownership Information) (Amendment) Regulations 2022, regulation 3.

²⁹*Velcro Canada Inc. v Canada* (2012) CA: Tax CC/CCI, *Prévost Car Inc. v Canada* (2008) TCC;231 further affirmed in *Prévost Car Inc. v Canada* (2009) FCA 57.

³⁰Brian Arnold, 'Chapter 3: The Concept of Beneficial Ownership under Canadian Tax Treaties', page 46.

³¹*N Luxembourg 1 v Skatteministeriet* (2019) Case C-115/16.

³²*Ibid.*

³³Brian Arnold, 'Chapter 3: The Concept of Beneficial Ownership under Canadian Tax Treaties', <https://www.ibfd.org/sites/default/files/2021-06/Beneficial%20Ownership_Samplechapter.pdf> Accessed 17 August 2022.

beneficial owners of the company to enhance transparency and accountability in the corporate sector. Why the need for transparency? Anonymity of the beneficial owners allows companies to hide the master minds behind illicit transactions of the companies without having an appropriate mechanism for tracing these perpetrators.³⁴ It should be noted that the growing urge of disclosure beneficial ownership was triggered by the release of the Panama Papers in 2016, a staggering 11 million plus documents, whistleblowing illicit financial flows by several individuals as the anonymous beneficial owners of offshore entities registered as shell companies.³⁵

The Kenya Power and Lighting Company (KPLC) scandal involving former CEO of the company, Samuel Gichuru, is illustrative.³⁶ As the beneficial owner of the Windward Trading Limited, a company registered in Jersey, Gichuru was able to obtain and hide proceeds of money laundering activities.³⁷ Although KPLC tendered contracts in Kenya to engineering and energy companies worldwide, payments for such contracts were instead made to the Jersey company, Windward Trading Limited.³⁸ What followed the incidences was a decade old investigation process and a series of litigation commencing at the Chief Magistrates Court, the first court of call on extradition matters. The legal tussle concerned the main issue as to whether the Attorney General or the Director of Public prosecution had the authority to proceed with the extradition; a clear manifestation of how law enforcement and the ends of justice can be delayed by a procedural technicality.³⁹ Finally, the

³⁴The Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes, 'A Beneficial Ownership Implementation Toolkit', (Inter-American Development Bank, OECD 2019) page 14.

³⁵Molli Ferrarello, 'One year after the Panama Papers leak, starting a shell corporation in the US may be easier than getting a library card' (*Brookings Now*, 7 April 2017) <<https://www.brookings.edu/blog/brookings-now/2017/04/07/one-year-after-the-panama-papers-leak-starting-a-shell-corporation-in-the-us-may-be-easier-than-getting-a-library-card/>> Accessed 18 August 2022.

³⁶'Jersey confiscates £3.6 million proceeds of corruption', (Government of Jersey, 25 February 2016) <<https://www.gov.je/News/2016/pages/jersey-confiscates-proceeds-of-corruption.aspx>> Accessed 18 August 2022.

³⁷Ibid.

³⁸Ibid.

³⁹*Director of Public Prosecutions v Okemo & 4 others* (Petition 14 of 2020) [2021] KESC 13 (KLR) (Crim) (5 November 2021) (Judgment) (with dissent - W Ouko, SCJ).

Supreme Court in *Director of Public Prosecutions v Okemo & 4 others* allowed the DPP to proceed with the extradition of Gichuru to Jersey for prosecution.⁴⁰

Evidently, an open register of the beneficial owners of a company is important to identify the source of such illicit activities especially by the owners of shell companies.⁴¹ These companies are characterized by zero operations and are sometimes registered as offshore companies in states that are preferred for their low corporate tax environment. The same goes for phantom firms which are secret companies operating to disguise the corrupt activities thereby siphoning money from the public domain.⁴² The infamous 2003 Anglo Leasing case is a classic example of the involvement of a phantom firms in a major graft scandal.⁴³ Thus, the focal point in the disclosure of the beneficial ownership is to pave way for the following:

- a) To increase financial transparency, integrity and accountability in the corporate sector, whether public or private
- b) To combat corruption, money laundering, tax evasion and terrorism financing
- c) To deter registration of shelf companies and phantom firms
- d) To protect public interest
- e) To promote the right of access to information
- f) To facilitate ease of enforcement and implementation of the law

Although Kenya is not part of the Group of 20 countries (G20), equally noteworthy are their G20 High Level Principles on beneficial ownership transparency which states should endeavor to adopt in their beneficial ownership transparency legal framework.⁴⁴ These principles

⁴⁰Ibid.

⁴¹King Carl Tornam Duho, Daniel Ninsin Quansah, Duke Ayim Agbozo, Gabriel Yonmearu, 'Beneficial Ownership as a Tool for Transparency in Corporate Ghana: An Introductory Piece', (Dataking Policy Brief 003, 2022), 1.

⁴²Transparency International Kenya, '*Illicit financial flows in Kenya*', (Global Financial Integrity, 2021) <<https://gfintegrity.org/report/illicit-financial-flows-in-kenya/>> Accessed 21 August 2022.

⁴³Ibid.

⁴⁴G20 High-Level Principles on Beneficial Ownership Transparency, 2014 <<https://www.mofa.go.jp/files/000059869.pdf>> Accessed 21 August 2022

underscore the essential elements of beneficial ownership in order to enhance implementation of beneficial ownership disclosure. The principles enshrine that countries should:⁴⁵

- a) Define beneficial owner as the natural person(s) who ultimately owns or controls the legal person or legal arrangement.
- b) Assess the existing and emerging risks associated with different types of legal persons and arrangement addressed domestically and internationally.
- c) Ensure onshore maintenance of beneficial ownership information that is adequate, accurate and current.
- d) Ensure that competent authorities have timely access to adequate, accurate and current information regarding the beneficial ownership of legal persons.
- e) Ensure that trustee information is maintained accurately, adequately and the information is current.
- f) Require financial institutions to identify and take reasonable measures to verify the beneficial ownership of their customers.
- g) Ensure that their national authorities cooperate effectively domestically and internationally.
- h) Support the efforts to combat tax evasion by ensuring that beneficial ownership information is accessible to their tax authorities.
- i) Address the misuse of legal persons and legal arrangements which may obstruct transparency.⁴⁶

3. Salient provisions of the Companies (Beneficial Ownership Information)(Amendment) Regulations 2022

The Explanatory Memorandum to the 2022 Regulations envisages that the Regulations will enhance the “*proper conduct of business in the registration and disclosure of beneficial ownership information*”.⁴⁷ In

⁴⁵Ibid.

⁴⁶Ibid.

⁴⁷Explanatory Memorandum to the Companies (Beneficial Ownership Information) (Amendment) Regulations 2022 <<http://www.parliament.go.ke/sites/default/files/2022-03/The%20Companies%20%28Beneficial%20ownership%20information%29%2C%20amendment%20regulations%2C%202022.pdf>> Accessed 21 August 2022.

amending the 2020 Regulations, the 2022 Regulations have introduced some key changes that aim at strengthening the beneficial ownership transparency framework in Kenya.

3.1 Defining the Beneficial Owner

The 2022 Regulations adopt the definition of a beneficial owner under the Companies Act 2015 and the 2020 Regulations verbatim.⁴⁸ It goes without saying that the definition is almost globally accepted and has been adopted by various jurisdictions in their legislations such as the G20 nations; a requirement provided by the G20 High Level Principles on beneficial ownership transparency.⁴⁹ Emphatically, the definition makes reference to a 'natural person' rather than a legal person. It can therefore be argued that the legislative intent behind the inclusion of natural person(s) as beneficial owners links the rights, duties and risks of such ownership to an identifiable human being rather than a legal person. Through this definition, ownership of a corporate firm can be traced to a single or set of individuals to ultimately economically benefit from activities of the company. The significance of transparency is therefore upheld right from the legislative definition of a beneficial owner.

In addition, by clearly describing a beneficial owner, the Act and the Regulations acknowledge and add relevance to the concept of corporate ownership. Corporate ownership in this regard is tied to the beneficial ownership notion thereby shutting down the controversy as to whether ownership in the corporation is redundant because it in fact is of substance. Through this definition ownership of a corporate firm can be traced to a single or set of individuals to ultimately economically benefit from activities of the company.

⁴⁸Companies Act No. 17 of 2015, s 3.

⁴⁹Legal Notice No. 12 of 2020, Companies (Beneficial Ownership Information) Regulations 2020. G20 High-Level Principles on Beneficial Ownership Transparency, 2014 <<https://www.mofa.go.jp/files/000059869.pdf>> Accessed 21 August 2022.

3.2 Threshold of a Beneficial Owner

Regulation 3(1) gives effect to section 93A of the Companies Act providing that every company shall keep a register of their beneficial owners.⁵⁰ The threshold of a beneficial owner are spelt out in terms of holder of: issued shares, voting rights, right to appoint or remove a director and finally, significant influence or control of a company. These elements form the criteria for determining a beneficial owner. The 2022 Regulations particularly amends regulation 3(2) which lists down the criteria for determining a beneficial owner expressively pointing out that such ownership can be held individually or jointly. The 2020 Regulations did not have the phrase 'individually or jointly' in its description of the beneficial ownership threshold for notification.⁵¹ This change allows joint beneficial owners to be held equally accountable.

Further, both 2020 and 2022 pieces of legislation provide for the direct and indirect beneficial ownership. Indirect beneficial ownership therefore means that the natural person ownership is held through either a legal person, trust or even another individual.⁵² The legislation is therefore alive to the fact that some companies may have a complex chain or structure of ownership. Regardless of this complexity, it appears that the legislation intended to pierce through the anonymity veil and identify the indirect beneficial owner.

3.3 Particulars Required for Disclosure

The 2022 Regulations provide that a company should enter in its register the particulars of a beneficial owner inter alia name, national identity number or passport number, nationality, phone number etc.⁵³ These particulars ought to be lodged at the Registrar of Companies vide Form BOFI.⁵⁴ Where there is a change these particulars, the company

⁵⁰Companies (Beneficial Ownership Information) (Amendment) Regulations 2022, regulation 3(1).

⁵¹Companies (Beneficial Ownership Information) Regulations 2020, regulation 3(2).

⁵²The Secretariat of the Global Forum on Transparency and Exchange of Information for Tax Purposes, 'A Beneficial Ownership Implementation Toolkit', (Inter-American Development Bank, OECD 2019) page 14.

⁵³Companies (Beneficial Ownership Information) (Amendment) Regulations 2022, regulation 3(3).

⁵⁴Ibid, regulation 3(5).

ought to lodge the change of particulars with the Registrar vide form BOF2.⁵⁵ Additionally, where a person ceases to serve as a beneficial owner, the company should file a notice to the Registrar on form BOF3.⁵⁶ The requirement for disclosure of particulars indicates the need to identify the beneficial owners and to be constantly updated of changes on the same, hence improving transparency as to beneficial owners' information. Disclosure of particulars further deters illicit financial flows and tax evasion since the personal details of the beneficial owner are known.

3.4 Duties of the Company

Remarkably, the Regulations relay the obligation to disclose upon the company, therefore instilling the spirit of transparency and accountability. Apart from the duty to keep and maintain a register of beneficial owners at the Registrar, the Regulations assign companies with additional rules on the duty to investigate, issuing a warning notice on non-compliance, restriction of interest of a person on non-compliance and notification of unidentified beneficial owners. Concerning the duty to investigate, the Regulations provide that a company, through a notice to the beneficial owners, should investigate and obtain particulars from any person it reasonably believes to be the beneficial owner(s) of the company.⁵⁷ Response to the notice should be made within twenty one days after which the company should issue a second notice, the warning notice to such persons.⁵⁸ Following lapse of fourteen days after non-compliance of the warning notice, a company shall then have the power to restrict such persons from the relevant interests they hold and further notify the Registrar of such restriction.⁵⁹ The effect of the restriction is that the individual(s) cannot exercise their rights as to the interests, transfer of interest is not permitted, no shares may be issued to the individuals nor payments in respect of the

⁵⁵Ibid, regulation 3(6).

⁵⁶Ibid, regulation 3(7).

⁵⁷Ibid, regulation 4(1).

⁵⁸Ibid, regulation 5.

⁵⁹Ibid, regulation 7.

interest held.⁶⁰ Once the notice is complied with after the specified, the company can withdraw the restrictions within fourteen days of compliance.⁶¹ In the event the company has not been able to identify its beneficial owners following the above procedure, the company then has an obligation to note in its register stating the same.⁶²

3.5 Disclosure of Beneficial Ownership Information

The 2022 Regulations makes an outstanding change in the disclosure of beneficial ownership information through the amendment of regulation 13 of the 2020 Regulations. Regulation 13(1) provides that companies were not permitted to disclose information regarding beneficial ownership except when communicating with the beneficial owner concerned or for regulations compliance purposes or court order compliance.⁶³ Initially, public disclosure of such information was also prohibited.⁶⁴ Thus, disclosure of beneficial ownership information was only to be made to a competent authority upon a written request by that authority to the Registrar.⁶⁵

The amended regulation has now created room for greater transparency by including a new sub-regulation 2A notwithstanding the provisions of regulation 13(1) above.⁶⁶ The new regulation stipulates that a company can now disclose its beneficial ownership information to procuring entities and contracting authorities when participating in public procurement and asset disposal, and public private partnership arrangements respectively.⁶⁷ Alternatively, the procuring entity or contracting authority may make a request to the Registrar to obtain

⁶⁰Ibid, regulation 9.

⁶¹Ibid, regulation 10.

⁶²Ibid, regulation 11.

⁶³Companies (Beneficial Ownership Information) Regulations 2020, regulation 13 (now amended).

⁶⁴Ibid.

⁶⁵Ibid.

⁶⁶Companies (Beneficial Ownership Information) (Amendment) Regulations 2022, regulation 13(2A).

⁶⁷Ibid.

beneficial ownership information of the said company.⁶⁸ Further, in the event a company is awarded a tender by a procuring entity, that company now ought to publish its beneficial ownership information and make it publicly available.⁶⁹ Lastly, in line with article 35 of the Constitution of Kenya on the right to access of information, the 2022 Regulations now makes disclosure of such information public, whereby the government has an expanded power to publish any beneficial ownership information relating to any company if such information affects the country.⁷⁰

4. Hope for implementation

A history of graft scandals that had ensured a minority yet privileged set of individuals would benefit from public tenders has led to the need for enhanced transparency and fiscal integrity in Kenya.⁷¹ The 2022 Regulations evidently tailors the current legal framework on beneficial ownership information towards global standards of transparency. While the intervention is being hailed for its developmental change in the corporate world for buttressing the concept of corporate ownership, the bone of contention lies in its effective implementation against the backdrop of conflicting rights and other compliance issues.⁷²

At the outset, it cannot be gainsaid that the Regulations do make a commendable attempt to incorporate a self-compliance mechanism for companies to adhere to transparency requirements. The step by step notification process cutting across regulation 4 to regulation 11 demonstrate a self-compliance mechanism that is undeniably realistic and applicable in Kenya. The process ensures companies take the initiative to be transparent in their dealings. To further bolster enforcement of the

⁶⁸Ibid.

⁶⁹Ibid.

⁷⁰Ibid.

⁷¹Transparency International Kenya, *'Illicit financial flows in Kenya'*, (Global Financial Integrity, 2021) <<https://gfintegrity.org/report/illicit-financial-flows-in-kenya/>> Accessed 21 August 2022.

⁷²'Kenya publishes additional regulations on beneficial ownership' (*Global tax news*, 27 April 2022) <<https://globaltaxnews.ey.com/news/2022-5432-kenya-publishes-additional-regulations-on-beneficial-ownership>> Accessed 27 August 2022.

provisions, the new legislation imposes a, “*Kenya Shillings Five Hundred Thousand fine for non-compliance and Kenya Shillings Fifty Thousand for each day of non-compliance.*”⁷³ Furthermore, the disclosure can assist in ascertaining the ultimate beneficiaries of multi-million shillings tenders and whether such public tenders are rotating amongst a few unscrupulous entrepreneurs.

Nevertheless, when matters relating to the duty to disclose arise, the opposite right as to privacy similarly demands attention. The Regulations require disclosure of a beneficial owner’s personal information.⁷⁴ Undoubtedly, the individual whose information is publicized may invoke his or her right to privacy under article 31 of the Constitution.⁷⁵ While the Regulations aims at promoting the right of access to information, the Government is simultaneously required to protect the privacy rights of individuals. The Constitution does contemplate limitation of the rights and fundamental freedoms under article 24 and sometimes the greater public interest and security concerns far outweigh individual rights.⁷⁶ It is with this in mind that the Government, in the Explanatory Memorandum to the 2022 Regulations, undertakes to ensure that the data processed with respect to beneficial owners is protected under the Data Protection Act 2019.⁷⁷

5. Conclusion

In light of the foregoing, beneficial ownership has emerged as a crucial concept in unravelling the ownership structure of a company. Its disclosure therefore should continue to remain a priority in every business registration to promote open and accountable management of

⁷³Ibid.

⁷⁴Companies (Beneficial Ownership Information) (Amendment) Regulations 2022, regulation 3(3).

⁷⁵Constitution of Kenya, 2010, article 31.

⁷⁶*Nubian Rights Forum & 2 others v Attorney General & 6 others; Child Welfare Society & 9 others* (Interested Parties) [2020] eKLR.

⁷⁷Explanatory Memorandum to the Companies (Beneficial Ownership Information) (Amendment) Regulations 2022 <<http://www.parliament.go.ke/sites/default/files/2022-03/The%20Companies%20%28Beneficial%20ownership%20information%29%2C%20amendment%20regulations%2C%202022.pdf>> Accessed 27 August 2022.

financial flow in the country. In response to the concerns raised regarding implementation and protection of rights, the beneficial ownership regime evidently has scope for improvement to better facilitate its objectives without compromising other vitally equal interests.

Firstly, as disclosure involves a corresponding activity of collection of data, this paper proposes that the Government should be guided by the principles of data protection under section 25 of the Data Protection Act and the rights of the beneficial owners of a company as data subjects pursuant to section 26 of the Act.⁷⁸ Secondly, it is a general rule that for every rule, there is an exception. However, in the case of the 2022 Regulations, the legislation at no point provides an exception to the publication of beneficial ownership information. This is not to say that the exceptions ought to be broad and all-encompassing but a circumscribed exception to the general rule on disclosure will permit limited instances where beneficial owners can raise the ground of serious violation of right to privacy. Through effective implementation of the rule of law, the Government may strive harder to strike a balance between the conflicting interests for want of transparency. Finally, beneficial ownership information transparency can support good corporate governance by curtailing illicit financial flows that has contributed to corrupt and poor corporate governance.

⁷⁸Data Protection Act No. 24 of 2019.