# "Kampuni Yangu:" Complexity of the Kenyan Single Shareholder Company in the Life and Death of the Owner

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## 1. Introduction

The single shareholder company was introduced into Kenya by the Companies Act, 2015.[353] The reality was that, even before the enactment of the Companies Act 2015, many Kenyan companies were *de facto* single member companies.[354] The Companies Act 2015 therefore gave *de jure* support to the *de facto* position. Many of the incorporated companies in Kenya were in reality single person entities, which Justice Luka Kimaru in the case of *Jane Gathoni Muraya-Kanyotu v Mary Wanjiku Kanyotu & 9 others* described as *"Kampuni Yangu"*.[355] The judge, describing how the deceased in a succession dispute had conducted his affairs, noted:

> *...it was evident that the deceased owned a substantial part of his properties through limited liabilities companies. From the structure of the shareholding, it was apparent that the deceased, for all intent and purposes, was the only shareholder of the said companies. The shareholding of the said companies were such*

353. * Lecturer University of Nairobi School of Law ** Senior Lecturer University of Nairobi School of Law The Companies Act, 2015.

354. Using devices such as holding of shares in trust and having nominee shareholders, persons intent on having full control of private companies were still able to do so.

355. *Jane Gathoni Muraya-Kanyotu v Mary Wanjiku Kanyotu & 9others* [2013] eKLR *"Kampuni Yangu"* is Kiswahili for "My Company".

> *that one limited liability company where the deceased was a majority shareholder, owned a single share in another company where the deceased was also a majority shareholder. A case in point is Kawakanja Ltd where the deceased owned 999 shares while a company known as Tropical Registrars Limited owned 1 share. The total share capital of the company was 1,000 shares. This court would not be off the mark if it holds that the companies that the deceased incorporated were in fact alter-egos of the deceased. The companies qualified to be referred to in the Kenyan speak as* **"Kampuni yangu"** *i.e. the companies could not be separated or be considered as distinct entities from the incorporators. In this regard, Kawakanja Ltd and Kangaita Coffee Estate Ltd were* **"Kampuni yangu"** *of the deceased. This does not mean that this court is unaware of the separate legal personalities of the companies and their incorporators. Far from it.*[356]

The deceased running *Kampuni Yangu* in the case Justice Kimaru was dealing with, was much more sophisticated than the average single member company owner. Given the complexity of the Companies Act, 2015, does the unsophisticated *Kampuni Yangu* owner know the extent of her/his obligations under the Act and is there a need to rethink the structure of the Act in order to accommodate the reality of the average *Kampuni Yangu* owner? What are the corporate governance issues that arise in respect of the running of *Kampuni Yangu*? Does the *Kampuni Yangu* owner give thought to what happens in the immediate aftermath of the owner's death?

356. *Jane Gathoni Muraya-Kanyotu v Mary Wanjiku Kanyotu & 9others* [2013] eKLR.

These questions are important due to the role played by the small business organization in Kenya. The small and medium enterprises are very significant in Kenya's national development.[357] The importance of the informal sector, so called "jua kali" in Kenya, cannot be ignored. Rwandese scholar, David Himbara, argued in the 1990s that the so called African entrepreneurs who emerged during the Africanization-Kenyanization programs of the 1960s and 70s and who occupy centre stage in writing about Kenyan enterprises owe their 'success' to their special relationship with the state and "…remain, at best, a bourgeoisie-in-formation, with the informal sector, or *jua kali*, serving as the real training ground for potential African industrialists."[358]

The Government of Kenya has recognized the significance of the informal SME sector. This is evidenced from the policy position, for example, in the 1986 Sessional Paper on Economic Management for Renewed Growth,[359] the 1989 Strategy for Small Enterprise Development in Kenya: Towards the Year 2000[360] and culminating in the Sessional Paper No 2 of 1992 on Small Enterprise and Jua Kali Development[361] and its 2005 revision.[362] Yet despite the policy position, until about the turn of the millennium, the growth of the Kenyan informal sector has been out of its own initiative and momentum and the growth has been in total defiance of the legal regime.[363]

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357. See Sessional Paper No 2 of 2005 on Development of Small and Medium Enterprises for Wealth and Employment Creation for Poverty Reduction; and Sessional Paper No 2 of 1992 on Small Enterprises and Jua Kali Development in Kenya.

358. Himbara, David. "Domestic Capitalists and the State in Kenya" in Berman, B.J. & Leys. C. (ed) African Capitalists in African Development. London, Lynne Rienner Publishers, 1994. p69-91 at p. 69 .

359. Sessional Paper on Economic Management for Renewed Growth 1986.

360. Strategy for Small Enterprise Development in Kenya: Towards the Year 2000, 1989.

361. Sessional Paper No 2 of 1992 on Small Enterprises and Jua Kali Development in Kenya .

362. Sessional Paper No 2 of 2005 on Development of Small and Medium Enterprises for Wealth and Employment Creation for Poverty Reduction.

363. "Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" Chaired by J.N. King'arui Presented to Hon S. Amos Wako AG of Kenya 2 December 1999 p. 94.

Over the last decade, reforms in the area of business organization law have, in some respects, been targeted at changing the position from where the law was not deliberately designed to assist the small enterprises to a more facilitative law. The changes include the enactment of the Companies Act, 2015 which makes provision for the single shareholder company, the revision of the Partnership Act[364] and the enactment of the Limited Liability Partnership Act.[365] The Companies Act, 2015 enacted legislation permitting, for the first time in Kenya, the single shareholder company. However, including the provisions within the wider Companies Act may have some drawbacks during the running of the company and at the demise of the shareholder.

Despite or because of the novelty of the single member company, there has been little focused attention in Kenya on the legal issues in respect of this business form. One has therefore to look elsewhere in Africa to find review of this business form. The available writing can be divided into consideration of single member company *ex post* and *ex ante* enactment of legislation. Assamen Mekonen Tessema considers single member companies in England, France and Germany and whether Ethiopia should adopt the single member company.[366] He finds that including the single member company in Ethiopia would give a wider choice to traders, avoid sham companies and sleeping shareholders and promote small and medium enterprises. Although he can be faulted for making comparisons with western industrialised countries in order to draw his conclusions, the conclusions appear sound. Chewaks, Jetu Edesa also considers the single member company for Ethiopia.[367] Edesa in his book, having analysed the history of single member companies and their business environment in Ethiopia, concludes that the introduction of the

364. Partnership Act No 16 of 2012.

365. Limited Liability Partnership Act No 42 of 2011.

366. Assumna Mekonnen Tesseman "Comparative Single-member Companies of Germany, France and England: A Recommendation for Ethiopia" 2012.

367. Chewaka, Jeta Edesa *Introducing Single Member Companies in Ethiopia: Major Theoretical and Legal Considerations.* Hamburg Anchor Academic Publishing 2016.

single member company would serve as an attractive business vehicle for business people in Ethiopia. Nigerian, Peresewi Subai, considers ex post the adoption of the single member company form in Nigeria. He argues the single member company reflects the reality of the Nigerian corporate form. He proposes that a state-based single member regime be adopted devoid of burdensome and unnecessary formalities.[368] Makey Robert writes an *ex post* analysis of the single member company in Tanzania.[369] He considers the effect of the 2012 amendments to Tanzanian law that introduced the single member companies in Tanzania.[370] He argues that the legislation was a monumental change and suggests that advertising the legislation and giving it more publicity would have enhanced the effects. Malaysian researcher, Salah Mohammed Ahmasher, and his colleagues undertook a survey of single member companies in selected countries in Africa, America and Australia.[371] They find generally that that there are a number of benefits of the single shareholder company, including simpler procedures and potential to help small businesses grow. They note that there is a difference in practice in the countries surveyed, some with significant drawbacks including high capital requirements, restrictions on transfer of shares, inability in some countries for the shareholder to incorporate more than one company and the universal problem of the possibility of the business failing on the death of the shareholder. These studies indicate that there are a number of areas that require consideration at the national level and it would be useful to consider some of these from a Kenyan perspective.

This paper proposes to explore three areas: obligations of the single member company to penal sanction, corporate governance of the single member company and the problems of transmission of shares on the

368. Subai, Pereswei "Towards Single Member Companies"

369. Mecky, Robert " The companies Act & Single Member Shareholders Company: An Appraisal" 5 Tum Law Rev 136 (2018).

370. Business Law (Miscellaneous Amendment) Act No 3 of 2012 Tanzania.

371. Ahmasher, Salah Mohammed. "Single Shareholder Company in Africa, America and Australia: A Comparative Analysis" Sirwajya Law Review Vol 7 Issue 1 2023.

death of the sole shareholder/director. The paper is not intended to deal exhaustively with such an important and wide subject as small business formation and running, but will only touch on a few areas and suggest possible areas for reflection.

In order to achieve this, we have divided the paper into six brief sections. Part II deals with the evolution of the corporate form to introduce the single shareholder company. In part III of the paper examines the obligations that have been placed on the single shareholder company. Part IV considers if the principles of corporate governance can apply to the Kenyan single shareholder company Part V considers the conundrum created by the transmission of shares on the death of a single shareholder when there is no person authorized to effect the transmission on behalf of the company as the sole shareholder director has died. In part VI we draw conclusions.

## 2. Evolution Of Coporate Form To The Singe Shareholder Company

Ever since the English court decision in *Aron Salomon v A. Salomon and Company Limited,*[372] it has been clear in common law countries that a company is, in law, a separate entity distinct from its members. This legal personality has been acclaimed the "law's greatest contribution to business and commerce".[373] The separation of a company from its owners has enabled the company to become a relatively risk-free revenue raising device. The company is clearly the most effective vehicle yet discovered to manage and control modern business enterprises. It permits, with

372. Aron Salomon v A. Salomon and Sons Limited (1897) AC 22.

373. Pickering M.A. 31 M.L.R. 481, 511 as quoted in Eshiwani, Artur A. "The Legal Personality and the World of Fact: A Myth or Reality" The Scottish Law Gazette Vol. 52, No. 4 December 1984 p. 119-225 at 119; The Company has numerous advantages it is not susceptible to "the thousand natural shocks that flesh is heir to" Gower p 44; In the words of Greer L.J. in Stepney Corporation v Osofsky [1937] 3 All Er 289 at 291, CA a corporate body has "no soul to be saved or body to be kicked" Pope Innocent the IV forbade excommunication of corporations because having neither mind nor soul they could not sin.

a minimum of risk of loss to investors, the combination of capital and skill for vast business operations. No other method has been found by which such large amounts of capital are so easily assembled for huge business control within the private sector, making the company among the most influential of social groupings.[374] The advantage of separate legal personality of companies is exemplified by past Initial Public Share Offerings and listings at the Nairobi Stock Exchange that exceeded all expectations.[375]The obvious advantages of the company and the recent interest in the company as a capital raising device place company law at a very important position.

The advantages of incorporation should ideally also be available for informal sector business. Unfortunately, the complexity of company law and the difficulties associated with formation of companies would put off a "*jua kali*" entrepreneur. It may be noted that early African attempts at company formation were beset with difficulties. After the Second World War, returning soldiers had available relatively large sums of money by pre-war standards and pooling of some of these resources resulted in a boom on trade and company formation.[376] By 1949, it was reported that there were 17 African public companies with a combined nominal share capital of KES 4,270,000 and 53 African private companies with a combined nominal share capital of KES 2,706,000. The performance of the management of some of these African companies was less than perfect. The report of the Registrar of Companies in 1950 reported that:

> *"I have looked into the files of all these companies and do not think there is a single one whose affairs I can honestly describe as satisfactory....I cannot help feeling that legislation is necessary to control the formation of companies by Africans. I fully realize the political dangers in that the cry of discrimination would*

374. Cooke, CA."*Corporation Trust & Company: An Essay in Legal History*" Manchester. Manchester University Press. 1950. p.7.

375. Equity Bank listing, Kengen IPO, Scanad IPO which were extremely successful.

376. Himbara, David op cit p. 70.

> *at once be raised, but the fact remains that the companies already incorporated by Africans during the last five years have collected from a vast number of African individuals a sum certainly in excess of 1 ¼ million shillings, of which by far the greater part is now hopelessly lost."*[377]

An earlier 1945 report had warned that African managers and promoters were essentially "defrauding shareholders of the funds of companies which they are running".[378]

The problem cannot, however, be attributed to Kenya alone for in England the Jenkins Committee was concerned with the irresponsible proliferation of companies particularly "one man" companies and the dangers of abuse through the incorporation with limited liability of very small under-capitalised business and noted that:

> *"In this connection, a sample analysis made by the Board at our request indicated that 20 per cent, of all private companies registered in 1954 had by mid-1961, gone into liquidation or had been struck off the register or were seriously in default in filing returns. We are satisfied that this proliferation of very small companies can and does lead to abuse and gives rise to ever-increasing administrative difficulties, and should, if possible, be checked without making it unduly difficult for genuine small businesses to incorporate with limited liability. We make a number of proposals below which we think might achieve this purpose."*[379]

The problem persisted in England because, although there were numerous changes to the 1948 English company legislation, the UK government, in the 2005 White Paper on company law reform, noted

377. Registrar of Companies 1950 Report cited in Himbara op.cit.
378. Registrar of Companies 1945 Report as quoted in Himbara. op.cit.
379. Jenkins Committee op.cit para 20.

that the vast majority of UK companies are small yet company law has been traditionally written with large companies in mind and provisions that apply to small or private companies are frequently expressed as a tail piece to the provisions applying to public companies.[380]

In Kenya, the 1999 Company Law Task Force recommended that a number of "facilitating steps" should be taken in order to create an enabling environment for small business companies.[381] The proposals included first, the elimination of the Memorandum and Articles of Association, and instead introduce the use of standard forms such as the type used in the registration of co-operative societies. Those incorporating the small business company would then fill in the major details, such as particulars of directors of the company. Second, only residents would be allowed to incorporate a small business company. Residence would be defined widely to include any person resident in Kenya on some permanent basis.[382]

A third proposal was that only a small nominal capital and fixed stamp duty fee should be paid on incorporation and a registration fee that is not *ad valorem* should be levied.

The small business company, it was recommended, should be exempt for the requirement to have a company secretary and should be allowed to file simplified annual returns stating the minimum and excluding financial reporting would be filed. It would be exempt from audit and minimum wage requirements. The report also recommended that the post-incorporation consequences, such as the holding of statutory

380. Company Law Reform Bill White Paper 2005 p. 29 hhtp;//www.dti.gov.uk/files/file25408.pdf

381. "Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" Chaired by J.N. King'arui Presented to Hon S. Amos Wako AG of Kenya 2 December 1999.

382. Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" Chaired by J.N. King'arui Presented to Hon S. Amos Wako AG of Kenya2 December 1999.

meetings and the delivery of statutory reports and the requirement as to commencement of business, would be reviewed with a view to exempting the small business company.

Indeed, the position is that many of the incorporated companies in Kenya were actually single person entities which Justice Luka Kimaru in the case of *Jane Gathoni Muraya-Kanyotu v Mary Wanjiku Kanyotu & 9 others* described as "Kampuni Yangu".[383]

In acknowledging this, the drafters of the Companies Act 2015 accepted the position of a single shareholder company thus legislating for *kampuni yangu*.[384] This is borrowed from the English Companies Act 2006.[385] However, the single member company is alien to the common law tradition. It found its way into English Law via the European Community Council Directive on Single Member Private Limited liability companies.[386]

A number of other countries have also accepted the single member company and have enacted legislation permitting single member companies. These include: India,[387] Australia,[388] China, Hong Kong,[389] Germany, South Africa[390] and member states of the Organization for Harmonisaiton of Business Law in Africa.[391] In Uganda, the single shareholder company was introduced in 2012 through the Companies Act 2012 and the companies are regulated by Companies (Single

383. *Jane Gathoni Muraya-Kanyotu v Mary Wanjiku Kanyotu & 9others* [2013] eKLR op cit.

384. The Companies Act 2015 section 102.

385. S. 123 English Companies Act 2006 https://www.legislation.gov.uk/ukpga/2006/46/section/123

386. European Council Directive No 89/667 on single-member private limited liability companies [1989] OJL 395, December 12, 1989.

387. See s. 2(62) The Companies Act. 2013 India which terms it a "one-person company" https://www.mca.gov.in/Ministry/pdf/CompaniesAct2013.pdf

388. See s. 198E Cooperation Act 2001 Australia which terms it a "single director/shareholder proprietary company" https://www.legislation.gov.au/Details/C2018C00031.

389. See s. 67 Companies Ordinance (Cap 622) Hong Kong "any person or persons may form a company…" https://www.elegislation.gov.hk/hk/cap622?xpid=ID_1438403540805_001

390. See s. 13(1) Companies Act No 71 of 2008 "one or more persons may incorporate profit company" https://www.gov.za/sites/default/files/gcis_document/201409/321214210.pdf

391. See Art 5 Uniform Act Relating to Commercial Companies and Economic Interest Groups, Organization for the Harmonisation of Business Laws in Africa (OHADA)

Member) Regulations of 2016.[392] The single shareholder company was also introduced in Tanzania in 2012 through an amendment to the Companies Act of 2002.[393]

Over the years, there had been numerous recommendations from scholars and students of Kenyan company law about the various amendments that should be made to the law.[394] This notwithstanding, the Kenyan Companies Act had remained generally static in its original form with a few *ad hoc* amendments being made to it. This changed with the enactment of the Companies Act No 17 of 2015. One key feature of the Act which is of interest of this paper is the inclusion in the Act of the single member company. Section 102 of the Act allows for the formation of a company with a single member.[395]

Business ventures in Kenya vary a great deal and therefore, before starting a business, one is first confronted with the task of selecting the form of business enterprise that would be most suitable. One may choose either a Business Name, Partnership, Cooperative or a Company.[396] The company is the most complex form of business entity to establish and to run, but because of its numerous advantages over the other business ventures it is still a common form of business entity.

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392. S. 4 Companies Act Act No 1 of 2012 Uganda https://www.ulii.org/akn/ug/act/2012/1/eng%402015-07-01#part_II__sec_4 Companies (Single Member) Regulations of 2016 the companies must indicate their names as "SMC Ltd " or "Single Member Company Limited"

393. See s. 26A Companies Act Tanzania introduced by s. 23 Business Laws (Miscellaneous Amendments) Act of 2012 http://repository.businessinsightz.org/bitstream/handle/20.500.12018/286/The%20Business%20Laws%20%28Miscellaneous%20Amendments%29%20Act%2C%202012.pdf?sequence=1&isAllowed=y

394. See Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" Chaired by J.N. King'arui Presented to Hon S. Amos Wako AG of Kenya2 December 1999.

395. S. 102 provides that ïf a company is formed under the Act with only one member, the Registrar shall enter I the register of members of the company, the name and address of that member and a statement that the company has only one member". S. 102(2) provides covers situations where a company's membership falls to one,

396. For the previous law regarding these entities in Kenya see generally Ogola, J.J. Business Law. Focus Books. Nairobi, 1999. see also Brownwood, David O. The Law of Business Associations in Kenya. Prepared for Use in Courses at the Kenya Institute of Administration, 1968. (Unpublished); the author is not aware of any published text on the law of business associations as it currently stands in Kenya.

Company law consists partly of ordinary rules of common law and equity and partly of statutory rules. In Kenya, the statutory law governing companies is the Company Act of 2015[397]. This statute which came into force on 15th September 2015 is, in many ways, similar to the English Companies Act, 2006 with modifications. The repealed Companies Act was a replica of the English Companies Act of 1948. Earlier company law legislation had been derived from India and earlier English Acts.[398] It will be noted that little effort was ever made to enact legislation fitting local needs, but instead there was a blanket adoption of English law.[399]

The English Companies Act 2006 was not a codifying statute, but only lays down the core features of company law and, as a result, a lot of the company law was not covered under the statute.[400] The Act was to be read against the backdrop of the common law and equity.[401]The Kenyan Companies Act has therefore to be read together with the common law and as further developed by Kenyan case law derived from interpretation of the repealed Act. As such, Kenyan company law is a complex mix of statute and Kenyan and English case law.

The 2006 English Companies Act is drafted with complex European companies as its concern.[402] Few Kenyan companies can be classified as fitting the same sort of criteria. The Companies Act is a voluminous and complex piece of legislation with formidable and embarrassingly

397. The Companies Act No 17 of 2015 Laws Of Kenya. Government Printer Nairobi see also http://www.kenyalaw.org

398. The Indian Companies Act, 1882 was applied in Kenya. The UK. Companies Consolidation Act 1908, was enacted in Kenya in 1926 and the 1929 UK Act was re-enacted in Kenya in 1948.

399. Acting Solicitor General of Kenya E. Webb in 1959 Legislative Council debate to introduce the Companies Act stated "Company Law in Kenya has always, for obvious and cogent reasons, followed English law" 1959 Kenya Legislative Council Debate 1959 (Vol 81 p. 20) as quoted in Katende, J.W et al. "*The Law of Business Organizations in East and Central Africa*" East African Literature Bureau. Nairobi 1976 p. 13.

400. Davies, P.L. & S. Worthington. Gower & Davis Principles of Modern Company Law. 9th ed Sweet & Maxwell London 2012 p. 62. On the 1948 Act see Gower, L. Modern Principles of Company Law. 2nd ed. London, Stevens and Sons. 1957 p.8.

401. ibid.

402. Ibid Davies 2012 Chapter 3 on Sources of Company Law and Gower 1957 Chapter 2-3 in particular see p. 53-54 on Twentieth century reforms in company law.

long 1026 sections, 6 schedules and additional subsidiary legislation.[403] A complex piece of legislation such as this being imposed on a relatively simple economy such as Kenya, it can be argued, is not ideal.

However, given the vast area that is company law ranging from formation, to liquidation, rights of directors, to protection of investors, it is difficult to see how the drafters of the statute would be able to further simplify it. Indeed, the 1962 Report of the English Company Law Committee chaired by The Right Honorable Lord Jenkins to review the 1948 UK Companies Act concluded that:

> *This elaboration of the law can generally speaking be justified as having been found necessary in order to keep effective control over the growing and changing uses of the company system as an instrument of business and finance and the possibilities of abuse inherent in that system. It would be wrong in principle to disturb in any important respect long-standing provisions designed to serve these ends unless they have clearly outlived their usefulness or are demonstrably objectionable on other grounds.*[404]

Companies in Kenya range from the sophisticated multinational companies listed on the Nairobi stock exchange to the less sophisticated family company down to the one-man so called "brief case" *kampuni yangu* type company. The Jenkins' Committee conclusions may be sound for the former, but not necessarily so for the latter.

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403. The Repealed Act was less formidable but no less complex with 406 sections and 10 schedules.

404. "Report of the Company Law Committee" Presented to Parliament by the President of the Board of Trade June 1962. Her Majesty's Stationery Office, London, 1962. para 6 (available at http://www.takeovers.gov.au/content/543/Downloads/jenkin.rtf)

It has been widely agreed that the 1948 Companies Act improved the Company legislation and had generally worked well.[405] As the Jenkins Committee noted, however, company law is not a field of legislation in which finality is to be expected. The law here falls to be applied to a growing and changing subject matter.[406]

Many years have passed since the Jenkins Report and, in addition, the application of the repealed Companies Act in Kenya come with its peculiar challenges. The Jenkins Report had recommended many changes to the 1948 UK Companies Act including a recommendation that the minimum membership of all public and private companies should be two.[407] It further recommended allowing companies to issue shares of no-per value since the per value has become an artificial figure.[408] It also recommended that there should be no distinction in the Companies Act in the treatment of public and private companies except that private companies should be allowed to restrict transfer of shares.[409] It recommended changes to the *ulta vires* rule so that a party should not be deprived of his right to enforce a contract on grounds that he had actual knowledge of the contents of the memorandum and articles of association at the time of entering into the contract if he honesty and reasonably failed to appreciate that they had the effect of precluding the company from entering into the contract in question.[410]

In Kenya, the 1999 "Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" made many recommendations similar to those made earlier by the Jenkins committee. [411]

405. ibid para 7.
406. Ibid para 9.
407. ibid para 31.
408. Ibid.
409. ibid para 67.
410. Ibid para 42.
411. ."Report of the Task Force Appointed to Review the Law Relating to Companies, Investments, Partnerships and Insolvency" Chaired by J.N. King'arui Presented to Hon S. Amos Wako AG of Kenya2 December 1999.

The framework and general principles upon which English company law is based were questioned in England and the review of the core company law has resulted in the publication of the final report of the Company Law Review Steering Group in July 2002 and subsequent publication of the Companies Bill which was passed the house of commons in 2005.[412] This became the English Companies Act of 2006.

In Kenya, the single member company is provided for under section 102 of the Companies Act 2015. The section provides that a limited liability company may be formed with only one member. In such a case, the Registrar shall enter the details in the register and also state that the company has only one member.[413] Where the membership of a company falls to one then the company is required to enter in the register of members the fact that the membership has so fallen and indicate the date on which this occurred.[414] Where the membership increases part one, the company is also required to indicate this fact in the register. Significant fines can be imposed for failure to adhere to these provisions.[415]

The formation of the single member company involves completing a number of simple electronic forms available through the Business Registration Services web site.[416]

The formation of business entities was one of the points of focus of the legal reforms as it is one of the key indicators in the ease of the World Bank's doing business reports.[417] The time taken for starting a business that looks at the procedures, time, cost and paid in capital to start a limited company was part of the criteria used to measure ease of starting a business. The social pressure exerted by these reports on global policy

412. http://www.publications.parliamnet.uk/pa/pabills/200506/companies.htm
413. S. 102(1) Companies Act 2015.
414. S. 102(2) Companies Act 2015.
415. S. 102(4) Companies Act 2015 a company which fails to comply with the requirements commits and offence and on conviction is liable to a fine not exceeding Kshs 500,000.
416. https://brs.go.ke/#
417. https://www.doingbusiness.org/en/reports/global-reports/doing-business-2020

makers was immense.[418] The Kenyan government and policy makers, like their peers elsewhere, paid a lot of attention to these reports[419]. In the last report on business environment, Kenya was ranked third in Africa and 56th in the World.[420] In ease of starting a business, Kenya ranked 25th in Africa and 129th in the world.[421] By focusing on the key indicators, Kenya rose 80 places since 2014 and aimed at being among the top 20 countries by 2022.[422]

The ease of formation of the company is one of the criteria used in the ease of doing business reports. It was not the only criteria, but it was a significant one. However, the ease of doing business measurements on formation of companies do not tell one how complex it is to legally run the company once it has been formed and also does not consider complexities in areas such as business succession. As such, the complexity of the law goes unmeasured. Little attention is given to the obligations of the shareholder members of the companies under the law. The lack of measurement of important aspects is not the only criticism of the doing business reports. The critics also argued that governments keen on improving rakings will begin gaming the system; rewriting laws with an eye on the rankings. Rankings are also not a substitute for sound economic strategy.[423]

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418. Doshi, R et al. "The Power of Ranking: The Ease of Doing Business Indicators and Global Regulatory Behavior." International Organization. https://oconnell.fas.harvard.edu/files/bsimmons/files/doshikelleysimmons_edb_penultimate.pdf

419. Republic of Kenya Ease of Doing Business Milestones 2014-2020 November 2020 https://www.innovationagency.go.ke/uploads/Ease_of_Doing_Business.pdf

420. World Bank. Doing Business 2020: Sub Saharan Africa p. 4 file:///C:/Users/Admin/Downloads/SSA.pdf

421. World Bank. Doing Business 2020: Sub Saharan Africa p. 7 file:///C:/Users/Admin/Downloads/SSA.pdf

422. Forward by then President of Kenya Uhuru Kenyatta in Republic of Kenya Ease of Doing Business Milestones 2014-2020 November 2020. Indicating "the Government has pushed through several reforms supporting the ease of doing business" https://www.innovationagency.go.ke/uploads/Ease_of_Doing_Business.pdf

423. For one of the early critics see Acemoglu, Daron et al "A Review of Doing Business" May 2013 file:///C:/Users/Admin/Downloads/Open-Letter-Review-of-the-Arguments-on-DB%20(1).pdf For summary of arguments see Bek, Torsten "The Demise of Doing Business: Good hart's Law in Action" https://cepr.org/voxeu/columns/demise-doing-business-goodharts-law-action

The proponents, however, argued that it was precisely because of their great influence that the reports attracted critics. However, significant problems with the doing business data was found in the years 2018-2020.[424] After an external review, the reports were discontinued. [425]

There had, however, been a single-minded aim at improving rankings at the expense of reviewing other areas such as operation of the business, particularly for small and medium enterprises.[426] This may include a failure to examine if the operation environment of the companies was conducive to conducting business. Kenya may have been affected by this type of focus and left other areas unattended to.

In the next part of the paper we summarize some of the obligations that a single member shareholder has under the Act and suggest that they are too numerous and obscured by the sheer volume of the Companies Act. In the succeeding part we consider the problem of the death of the single shareholder in Kenya.

The Business Registration Services does not include the number of single member companies in its reports. As at 2021, the number of business entitles were:[427] Business Names 1 269, 797, Private Companies 614,543, Public Companies 4,284, Foreign Companies 5,064, Companies Limited by Guarantee 1,709, and Limited Liability Partnerships 2,278.

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424. Statement of World Bank Group on Discontinuing Doing Business Reports https://archive.doingbusiness.org/en/doingbusiness

425. Afaro, Laura and Alan Aurback "Doing Business: External Panel Review: Final Report Sept 1 2021" https://www.worldbank.org/content/dam/doingBusiness/pdf/db-2021/Final-Report-EPR-Doing-Business.pdf https://archive.doingbusiness.org/en/doingbusiness for supporters of reports see for example Chuin, Curtis and A Sedharam "Op-ed: It's time for the World Bank to get back to the business of doing business" https://www.cnbc.com/2022/05/03/op-ed-world-bank-must-bring-back-ease-of-doing-business-report.html

426. Afaro, Laura and Alan Aurback "Doing Business: External Panel Review: Final Report Sept 1 2021" https://www.worldbank.org/content/dam/doingBusiness/pdf/db-2021/Final-Report-EPR-Doing-Business.pdf site lack of relevance to SMEs in some measurements as a criticism of the ease of Doing Business Reports.

427. Business Registration Service Annual Report 2020/2021 p. 10 https://brs.go.ke/annual-report/

The same Act that governs the private companies and within them the single member company is the same Act that regulates the publicly listed company. Unfortunately, the Companies Act is an unmanageable monstrosity. It has 1026 sections and 6 schedules of subsidiary provisions. It is intimidating to lawyers and laymen alike. Amending company law in this way to take care of the SME sector was, in the writers view, perhaps too complicated as the same law applicable to the SMEs is expected to meet the legitimate needs of the large and sophisticated enterprises as well.

As an American writer put it:

> *Every lawyer who holds himself out as a legislative draftsman dreams of one perfect job....The draftsman of bills will be ready to pronounce his nunc diittis the day he sees enacted into law a statute of his devising that leaves no contingency unprovided for and that is clear and unambiguous in its direction as to each and every conceivable fact situation which may take place in the world of affairs.*

Unhappily, the gap between aspiration and accomplishment stretches as wide in legislative craftsmanship as in any other professional field. The draftsman can narrow the area of statutory uncertainty by painstaking fact-gathering and intensive study of every facet of existing case and statute law bearing on the matter at hand. He can reduce the incidence of statutory ambiguity by conjuring up hundreds of hypothetical fact-situations which may arise in the future for decision under the statute. But, when the job is done and the bill added to the statute books, there will still be cases for which the statute affords no certain guide[428]

428. "Some Causes of Uncertainty in Statutes" 36 American Bar Association Journal 321 (1950)

To illustrate the point, we have extracted the offences/infractions under the Act that the single member owner of *Kampuni Yangu* is likely to be liable. It is unlikely that many owners of *Kampuni Yangu* know just how exposed they are. We later consider corporate governance of the single member company and the problem of the death of the single shareholder and the problem caused during the interval between the death of the single shareholder and the transmission of shares to a new shareholder(s).

## 3. Criminal Officences And The Single Member Company

Below in tabulated form are a few of the offences that the shareholder in single member company could violate and the penalties that accompany conviction for the offences.

### A few offences that the single member shareholder may be liable for

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **102-**Single member companies. | Failure to comply with subsection (2) or (3) filings to be made when number of shareholders reduces to one or increases beyond one. | Kshs 500,000/= | Kshs 50,000/= |

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **193-** Contract with sole member who is also director. | A contract complies with this subsection if the terms are either-<br>(a) set out in a written memorandum; or<br>(b) Recorded in the minutes of the first meeting of the directors of the company following the making of the contract. | Kshs 200,000/= | N/A |
| **372-** Copy of the report to be lodged with the Registrar. | Failure of a company to which a report is made under section 368 as to the value of any consideration for which, or partly for which, it proposes to allot shares to lodge a copy of the report to the Registrar for registration at the same time as it lodges the return of the allotment of those shares under section 333. | Kshs 200,000/= | Kshs 20,000/= |

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **420-** What is a solvency statement? | If the directors make a solvency statement without having reasonable grounds for the opinions expressed in it, and the statement is lodged with the Registrar, each of the directors who are in default commits an offence. | Kshs 1,000,000/= | N/A |
| **424-** General rule against limited company acquiring its own shares. | A limited company shall not acquire its own limited company shares, whether by purchase, subscription or otherwise, acquiring its own shares except in accordance with this Part. | Contravention by the company -Kshs 1,000,000/=<br><br>Contravention by the officers- Kshs 500,000/= | N/A |
| **460-** Enforcement of right to inspect copy or memorandum**.** | If a company fails to comply with a requirement of section 459 (Copy of contract or memorandum to be available for inspection, the company, and each officer of the company who is in default, commit an offence. | Kshs 200,000/= | Kshs 20,000/= |

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **473-** Directors' statement: Offence if no reasonable grounds for opinion. | If the directors make a statement under sections 468 to 471 without having reasonable grounds for the opinion expressed in it, each of the directors who are in default commits an offence. | Kshs 500,000/= or to<br><br>Imprisonment for a term not exceeding twelve months, or to both. | N/A |
| **629-** Offence for company to fail to keep proper accounting records. | Failure of company to comply with section 628 (Duty of company to keep proper accounting records). | A natural person- Kshs 1,000,000/= or imprisonment for a term not exceeding two years or both.<br><br>A body corporate- Kshs 2,000,000/= | N/A |
| **636-** Financial statements to give fair and true view. | Failure of directors of a company to approve financial statements for the purposes of this Division only if they are satisfied that the statement gives a true and fair view of the assets… | Kshs 500,000/= | N/A |

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **654-** General requirements for contents of directors' report. | Failure to include in the report:<br>- the names of the persons who, at any time during the financial year, were directors of the company; and<br>- the principal activities of the company during the course of the year<br><br>Failure by the directors to specify in the report amount (if any) that the directors recommend should be paid as a dividend. | Kshs 500,000/= | N/A |
| **686-** Lodgement requirements for companies subject to small companies regime. | Failure of directors to comply with the requirements of the section. | Kshs 500,000/= | N/A |
| **708-** Offence for company to not lodge annual return on time. | Failure to comply with section 705 (1) and (3). | Kshs 200,000/= | Kshs 20,000/= |

| SECTION | OFFENCE | PENALTY CAP | NON-COMPLIANCE POST CONVICTION PENALTY (For each such offence) |
|---|---|---|---|
| **819-** Offence to provide false information. | A person providing false information knowingly or recklessly providing information that is false in a material particular. | Kshs 500,000/= or imprisonment for a term not exceeding two years or both | N/A |
| **890-** Companies to keep copies of documents creating charges. | Failure to keep a copy of every document creating a charge that is required to be registered under this Part. | Kshs 500,000/= | Kshs 50,000/= |
| **1006-** Form of company records. | Failure to comply with the requirements of the section | Kshs 200,000/= | Kshs 20,000/= |

A reading of the table of offences above suggests that the single member shareholder may pay numerous fines if the provisions of the Act were strictly enforced. These provisions are hidden within the 1026 sections of the Companies Act, 2015 and it is highly unlikely that the *Kampuni Yangu* owner would be able to determine their obligations by reading such a complicated statute. There is need to educate the shareholders of the single member companies about the potential liabilities and need for them to comply with the provisions of the Act.

In the next part of the paper we consider aspects of corporate governance and the single member company as it relates to the Kenyan company.

## 4. Corporate Governance And Kampuni Yangu

Corporate governance deals with how a company is managed and controlled.[429] Corporate governance has gained worldwide importance with the efficiency and accountability of the corporation being a matter of both public and private interest. The corporation has gained a vital role in the promotion of economic development and social progress through its main quality of being "the engine of growth internationally, and is increasingly responsible for providing employment, public and private services, goods and infrastructure."[430] Issues in corporate governance have tended to be debated around the way in which the legal, institutional, and regulatory problems that arise from the separation of management and ownership can be managed. The OECD Principles of Corporate Governance 2004 provide that good corporate governance entails provision of proper incentives for the board and management to pursue objectives that are in the interests of the company and its shareholders, and should facilitate effective monitoring.[431] The aim of the debate is to try and align the interests of the shareholder and management which necessitate understanding of the dynamics between both factions.

The theoretical approach to corporate governance is premised on the agency theory and shareholder theory that provide differing views on the relationship between shareholders and management of the company. The agency theory developed initially by Adam Smith argues that the managers of other people's money take care of it in a different way from how the owners themselves would have managed it,[432] fostering the fundamental idea of the principal-agent theory. Berle and Means, in

429. Cadbury, A., 1992. Report of the Committee on the Financial Aspects of Corporate Governance. London: Gee.

430. International Finance Corporation, Global Corporate Governance Forum: Better Companies, Better Societies (IFC 2010).

431. The Organization for Economic Cooperation and Development, OECD Principles of Corporate Governance (OECD 2004) 11.

432. Smith, A. (1776), An Inquiry into the Nature and Causes of the Wealth of Nations, reprinted in K. Sutherland (ed.) (1993), World's Classics, Oxford: Oxford University Press.

their analysis of the theory of separation of ownership and control,[433] a crucial ingredient of the principal-agent model, developed this further by arguing that there exists a clear division of labour within a firm catalysed by the premise that, as firms grow, ownership eventually separates from control. On one hand, the managers have the requisite expertise to run the firm but lack the required funds to finance their operations. On the other hand, shareholders have the required funds, but are often not qualified to run the firm. *De facto* control is therefore vested in the managers who remain responsible for the day-to-day operation of the firm whilst the firm is owned by the shareholders who finance its operations and enjoy the profits thereof. With such separation of roles between the financier and controller arises the so-called principal-agent problem, first formalised by Jensen and Meckling:[434] Whilst the agent has been tasked by the principal with carrying out a specific duty, the agent may take advantage of the opportunity and not act in the best interests of the firm or shareholder and, instead, choose to pursue his own interests and proclivities. This danger, or "moral hazard", results in agency costs that are a summation of three components: monitoring expenses incurred by the principal to oversee an agent's conduct, keep a record of the agent's behaviour, and implement safeguards and curtailments to minimize losses in the event of such unwanted conduct; bonding costs incurred by the agent to signal credibility to the principal that he/she will act in the interests of the agent, such as investment in the latter's firm, or taking up a corporate ethics course; and residual loss which is incurred by the principal where an agent does not make decisions that maximize the value of the firm.[435]

433. Berle, A. and G. Means (1932), The Modern Corporation and Private Property, New York: Macmillan.

434. Jensen, M. and W. Meckling (1976), 'Theory of the firm. Managerial behavior, agency costs and capital structure', Journal of Financial Economics 3, 305–360.

435. Goergen M, "Chapter 1: Defining Corporate Governance and Key Theoretical Models," *International Corporate Governance* (Pearson 2012) 9.

Viewed this way, corporate governance would have no relevance to the small single member company as in most likelihood the single shareholder is also the manager and the interests of the shareholder and manager would, in this case, be aligned. As qualified by Berle and Gardiner in their posited growth pathway for small enterprises to large corporations,[436] a firm, whilst starting off as a small business fully owned by the founder, conflicts of interest would be virtually non-existent owing to the entrepreneur's role of both the owner and controller of the firm. To further buttress the point, in line with the entrepreneur's bi-dimensional role, incentives to work hard for the success of the firm arise as the entrepreneur stands to solely accrue the profits of the firm's achievement.

Of more relevance may be the shareholder or stockholder theory that has its foundation in the book Capital and Freedom by Milton Friedman. The theory postulates that there is only one social responsibility of companies: to use resources in the development of activities that increase profit but within the rules of free enterprise.[437] Companies do not have moral obligations or social responsibility with others that are not the shareholders, it is sought to maximize profits in them. The shareholder is the only one entitled to benefit from the company and the value is based on how much they receive a true manifestation of the principle of shareholder primacy. The member in the single member company is perfectly incentivised to pursue success of the company, being the sole shareholder. Where the member moves to work harder, all additional revenue generated by the increase in effort will accrue to the member alone for the subsistence of the company's retaining of single member status.[438] Owing to the indivisibility of management and ownership in

436. Berle, A. and G. Means, (n 85) supra.
437. Friedman M, Capitalism and Freedom (University of Chicago Press 2002) 133
438. Goergen M, (n 87 supra at 8.

such an instance, the member's decision, beneficial or detrimental to the company, is a manifestation of the will of the shareholders of the company, hence incorporation of corporate governance is difficult.

In 1984, Edward Freeman put forward the stakeholder theory that argued that the organization should be developed taking into account all interest groups, including employees, clients, suppliers and creditors.[439] Vide this way, corporate governance will be targeted at safeguarding the value for all stakeholders in the company. The company is viewed as a nexus of contracts between different people including suppliers, employees, creditors, and management.[440] Thus, the control organ of the company ought to be cognizant of the operations of the firm, and the impact thereof, on the stakeholders of the firm, and lead the firm towards value creation in the interest of both shareholders and stakeholders. Application of the theory has resulted in the Input-Output Model.[441] In this model, investors, employees and suppliers contribute input that is transformed by the "black box" of the firm into outputs for the benefit of the customers. Each contributor is reimbursed for his/her contribution at market rate with little to no additional benefits.

The Stakeholder Model[442] also arises, the point of variance being that benefits accrue to all contributors at the same time with no prima facie priority to a particular set of interests. The common denominator is that stakeholders are entitled to benefits arising from the operations of the firm. However, the theory has been criticized for undermining the capitalist market based economy[443] and has been termed as a "vampire in the field…feed[ing] on any living body or idea that crosses its path."[444]

439. Freeman RE, Strategic Management: A Stakeholder Approach (Pitman 1984).

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441. Donaldson, T. and Preston, L.E., "The Stakeholder Theory of the Corporation: Concepts, Evidence and Implications" (1995) 20 The Academy of Management Review 68.

442. Ibid.

443. Mansell, S., Capitalism, Corporations and the Social Contract: A Critique of Stakeholder Theory (Cambridge University Press 2013).

444. Orts, E. and Strudler, A., "Putting a Stake in Stakeholder Theory" (2009) 88 Journal of Business Ethics 605-615.

Mansell, in his reinvigoration of the "contractual and commercial conception of corporations," views stakeholders as commercial entities that trade with the firm in a competitive market,[445] emphasis being placed on the adversarial nature of the market rather than the collaborative nature incorporation of stakeholders' interests in the firm's operation posits. However, a broader look into the interests in play reveals the importance of safeguarding stakeholders' interests, being maintenance and improvement of the very ecosystem in which the firm exists and operates.

Interestingly, both King Reports I and II note the complexity of modern corporations due to the inclusion of various interest groups into the scope of corporate governance. The simplistic pattern of companies that existed post the industrial revolution is no longer descriptive of the current position of the typical modern company.[446] Directors, whose responsibility largely dwells in fundamental policy, now delegate the mundane management of day-to-day activities to professional managers whilst taking a more nuanced role in decision-making and leadership. The weight of cash flow of major financial institutions has quashed family control of companies, replacing it with identifiable institution control. Employees are also becoming more involved in the decision making process and the interests of customers, suppliers and the community are now far more relevant to corporate decision making than before.[447] Thus a departure from the Anglo-American approach towards the Euro-Japanese approach is observable.

Vide this way there is a place for corporate governance of the single member company. Shelving the initial perception of a single member company being an alter ego of the member, the company is now seen as an entity serving multiple interest groups, that is the director-shareholder, and other stakeholders that depend on the success of the company. As

445. Mansell, S., (n 107) supra at 109.
446. King ME I, (n 76) supra at 1.
447. King Report I, Chapter 12; Chapter 20 para 9, 11; cf. King Report II at pp. 5 para 4.

such, following the stakeholder approach, their opinion in terms of the operations of the company ought to be put into mind by the single member. Therefore, limitation on the power and control of the single member arises insofar as the stakeholders' interests are concerned.

Looking at the practical approach towards corporate governance, the Kenyan position is one that begins with the introduction of corporate governance into the private sector by the Private Sector Initiative for Corporate Governance in 1999 when it issued the Principles of for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance.[448] This initiative was stimulated by the call for corporate governance in South Africa as a crucial attribute of national economic development through the King Report I, the positive steps that were taken by Zimbabwe, Ghana, Uganda and South Africa at the time in putting in place national institutional mechanisms to promote good corporate governance,[449] the overall lack of accountability in the public sector pre-liberalization of Kenya's economy and privatization of government corporations in the 1990s and the absence of a corporate governance framework.[450] Uganda stood out through its establishment of the Institute of Corporate Governance of Uganda and the formulation and adoption of a national code of best practice for corporate governance, being the first State in the East African region to establish a formal working framework for corporate governance.[451] Since then, efforts have been made to reinforce the importance of corporate governance in Kenya through the work of, among other actors, the Capital Markets Authority

448. Private Sector Corporate Governance Trust, Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance (Private Sector Corporate Governance Trust 1999).

449. Ibid., at 5.

450. Ruparelia, R. and Njuguna A., "The Evolution of Corporate Governance and Consequent Domestication in Kenya", 7 *International Journal of Business and Social Science* 5, 2016 at 159.

451. Private Sector Corporate Governance Trust, (n 77).

in the adoption of the Capital Markets (Securities) (Public Offers, Listing and Disclosures), Regulations, 2002 that sets out obligations regarding corporate governance on companies.[452]

The Kenyan regulatory framework aims at promoting corporate governance in registered companies through oversight on the relationship between shareholders, stakeholders and management of companies. The Capital Markets Authority Code of Corporate Governance Practices for Issuers of Securities to the Public 2015 reiterates the position initially conceptualized by the Cadbury and King committees in terms of regulation of the relationship between the shareholders and directors of the company. Shareholders are more involved in the board composition process,[453] inclusion of independent board members as an in-house oversight body has been introduced,[454] and appreciation of shareholders' rights of transparent, effective and accurate communication with the board,[455] and equitable treatment[456] has been emphasised. Further, the Code takes into account stakeholder interests in requiring the board to maintain a stakeholder-inclusive approach in its communication, decision-making and resolution of disputes.[457] Within the stakeholder framework, is the country's society, communities and environment which all require consideration in the board's operation so as to promote and protect the well-being of the economy, society and the environment.[458] The "Mwongozo" Code of Governance for State Corporations takes a similar approach, but with focus on state corporations and state-owned entities.

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452. Capital Markets (Securities) (Public Offers, Listing and Disclosures), Regulations 2002, Fifth Schedule at CO.F.00.

453. Kenya Capital Markets Authority Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, Section 2.1.

454. Ibid. Section 2.4.

455. Ibid. Section 3.1.

456. Ibid. Section 3.2.

457. Ibid. Section 4.

458. Ibid. Section 5.3 - 5.4.

More specifically on the interplay between corporate governance and single member companies, the 1999 Principles and Sample Code envisaged companies being constitutive of multiple members with a clear distinction between shareholders and directors, unlike single member companies that effectively fuse the two factions into one. Such a concept of single member limited liability companies was foreign to the Kenyan legal framework, with the Companies Act Cap 486 operational at the time confining such entrepreneurs to operating under the remits of sole proprietorship. The concept has since been incorporated into Kenyan law in the Companies Act 2015, but with no amendments to the corporate governance framework to reflect such an introduction to the Kenyan corporate structure. Nonetheless, the 2015 Act retains regulatory measures synonymous with corporate governance guidelines in provisions relating to the relationship between the director, shareholder, and the company. For instance, contracts not entered into in the ordinary course of the company's business between the sole entrepreneur and the single owner company that he/she owns are required to either be in writing, set out in a written memorandum or recorded in the minutes of the first meeting of the directors after the making of the contract, despite the company being viewed as the entrepreneur's alter ego.[459] Moreover, decisions taken by the sole member that are ordinarily taken at a general meeting are also required to be in writing, either in the form of a written resolution or details provided by the sole member.[460] These provisions are mandatory and their contravention attracts fines on the sole member.

Considering the South African context, the Committee in King Report I recognized the disconnect between the management of listed companies and their constituent shareholders in South Africa, hence emphasised on how imperative a good system of governance is, especially in the context of corporations in which the owners of capital were dependent on directors to control the business, or the directors are dependent on other persons

459. The Kenyan Companies Act 2015, Section 193.
460. Ibid, Section 319.

to finance the company.[461] It thus pursued examining the responsibilities of executive and non-executive directors, and the frequency, substance and form of information to shareholders and other stakeholders in the respective corporations, given the South African philosophy of regulation of companies was by means of disclosure in keeping with the Anglo-American tradition.[462] In the context of "Kampuni Yangu" or the single member company, however, the King Committee terms the company as an "independent" one where the owner of the equity and the directors are effectively merged, thus the importance of corporate governance would not be relevant in such a scenario. The fundamental point of divergence is whether there is indeed a division between the owners of the equity and managers of the company.

The King Report II reiterated the importance of corporate governance in the protection of shareholders' and stakeholders' interests in listed companies, financial institutions and public sector enterprises and departments, with emphasis on the curtailment of conflicts of interest that may exist by providing guidelines on the composition of the board, appointments and committees on the board, and inclusion of external parties such as auditors.[463] Such conflicts of interest include dominance by a strong chief executive or large shareholder. Further, it has clarified the fiduciary duties directors have to the company, and appreciated the application of the Business Judgement Rule which had been used in the fore to justify directors' business decisions, however unwise at the time. The Report recommends, aside from the examination of whether the rule would be applicable in South Africa, separate analysis of whether or not the duty of care was complied with by the director in question, thus safeguarding against decisions not in the interest of the company

461. King ME, The King Report on Corporate Governance (Institute of Directors in Southern Africa 1994) 5.

462. Ibid. at pp. 3.

463. King ME, King Report on Corporate Governance for South Africa - 2002 (Institute of Directors in Southern Africa 2002) 10 at 18.3.

nor shareholders.[464] Despite building on the principles first espoused in the King Report I, the position on single member companies remains unchanged; corporate governance is still irrelevant as long as ownership and control are unified in one personality.

The King Report III[465] is also based on the previous principles espoused in King Report II, but with a widened scope covering all entities regardless of the manner and form of incorporation or establishment.[466] In addition, it emphasizes the need for inclusion of stakeholders in the board of directors being expected to consider the legitimate interests and expectations of stakeholders other than shareholders. This may be seen as the first implicit step towards the inclusion of single member companies into the corporate governance discourse given that they are private companies. The stakeholder approach is also relevant in that the Report departs from the conventional assumption that management and shareholders are separate bodies and the relationship between the company and its stakeholders is brought into focus. Stakeholders are included in risk disclosure reports,[467] constructive engagement with the company,[468] and establishment of formal dispute resolution processes.[469] These were new requirements introduced in the Report that are applicable to single owner companies, which are a manifestation of corporate governance in such companies despite the lack of an express framework tailored to them.

The King Report IV[470] is based on the underlying principles of the pervious King Reports and draws more emphasis to stakeholder inclusion, IT governance and disclosure. It replaces the "apply or explain" regime

464. Ibid. at pp. 73.

465. King Report on Governance for South Africa 2009 (Institute of Directors of Southern Africa 2009).

466. PWC, King's Counsel: Similarities and Differences Between King II and King III (PricewaterhouseCoopers 2009) 5.

467. King Report III, (n 109) at Chapter 4.

468. Ibid., Chapter 8.

469. Ibid., Chapter 11.

470. King ME, King IV Report on Corporate Governance for South Africa 2016 (Institute of Directors in Southern Africa 2016).

under King Report III with an "apply and explain" approach for the recommended practices adopted, requiring explanations as to how they have been adopted and measures taken to adopt pending practices in the subsequent financial year. The Report tailors its recommendations to various sectors[471] including small and medium enterprises in which the majority of single member companies fall. It notes the complexity in imposing corporate governance involvement and structures in companies whose founders serve as shareholder, director and manager, and suggests formalization and separation of such roles from the outset even where such roles are borne by the same individual.[472] This may be through conclusion of an agreement between the virtual shareholder and board stipulating the roles to be undertaken by each, and the agreement's subsequent incorporation of a board charter, a management charter and delegation of authority into the agreement.[473] This move by the King IV Committee evidences the need for corporate governance even in single member companies, albeit with the expectation that such companies will eventually grow into sizes and scopes that will compel the founder to take more relaxed roles of shareholder-director and eventually shareholder. Therefore, compliance with the King IV Principles is progressive depending on the level of development of the company in question.

In the United Kingdom, the highly influential and widely acclaimed Cadbury Report set the fundamental principles of management-shareholder relations for every listed company in the United Kingdom, and initiated a revolution in corporate governance thinking adopted by countries and institutions across the world.[474] These fundamental principles include openness, integrity and accountability[475]: openness with regards to management's disclosure of information to those who

471. Ibid., p. 75.

472. Ibid., p. 106.

473. Ibid.

474. Jordan CE, "Cadbury Twenty Years On" (2013) 58 Villanova Law Review 1 <https://heinonline.org/HOL/P?h=hein.journals/vllalr58&i=1> accessed May 5, 2023

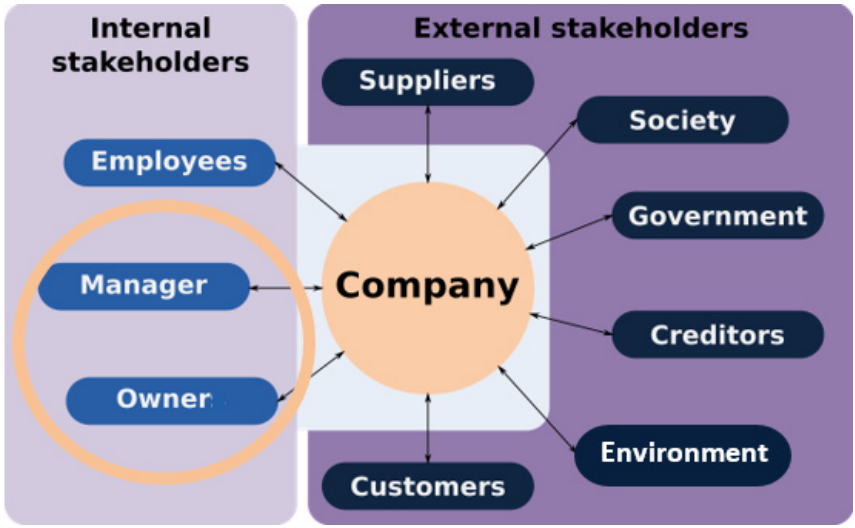
475. Cadbury, A., (n 81) supra at para. 3.2.

have a stake in the corporation thus bolstering efficiency and shareholder scrutiny; integrity in terms of accurate and honest financial reporting that presents a balanced picture of the state of the company's affairs; and accountability on the part of directors in disclosure and on shareholders in the exercise of their responsibilities. Cadbury goes on to provide a rationale for such compliance[476] in that there would be a boost in the efficiency of capital markets and general confidence in business in the United Kingdom especially at the height of a "shrinking" global market and shifts in investment to Europe and the Far East.[477]

It is of note that the entirety of the report is based on the presumption that there is a separation of the owners from management in the company, hence the notion of single member companies is foreign to the report. The Cadbury Code of Best Practice,[478] for instance, delineates a separation of roles between the Chief Executive Officer and Board Chairperson to curtail concentration of power,[479] inclusion of non-executive directors to provide an independent voice of approval or otherwise of the running and performance of the company,[480] and emphasis on accountability and transparency in financial reporting.[481] Conversely, single member companies have their innate quality being concentration of power and control over the company on a single director, who also owns the company. Thus, the member is accountable to himself/herself, and is guaranteed to act in the best interests of the company owing to present incentives of the success of the company being directly beneficial to the single member.

476. Ibid. at para. 3.5.
477. King ME I, (n 76) supra at 1.
478. Cadbury A (n 81) supra at pp. 58.
479. Ibid. at para 1.
480. Ibid. at para 2.
481. Ibid. at para 4.

Nonetheless, the United Kingdom Companies (Single Member Private Limited Companies) Regulations 1992 still require single member companies to comply with provisions applicable to private limited companies unless expressly provided in the contrary.[482] Safeguards with respect to transparency and accountability in the control of operations of the company do exist. For instance, decisions made by the sole member and adopted and accepted by the company shall be in writing, either in a written record of details of the decision or written resolution,[483] a provision whose non-compliance attracts a fine. Contracts between the sole member and the company that are not in the ordinary course of the company's business are also required to be in writing, even though the company is, in effect, the member's alter ego.[484] Corporate governance is therefore seen to be alive and active in its application.




482. United Kingdom Companies (Single Member Private Limited Companies) Regulations 1992, Section 2.

483. United Kingdom Companies Act 2006, section 357.

484. Ibid. Section 231.

The table above based on the stakeholder theory of corporate governance can summarise the discussion on corporate governance of the single member company. In many single member companies, the stakeholders on the left may be the same individual. The larger single member companies the manager and owner will be the same person, but separate from employees. The stakeholders on the right will exist even in single shareholder companies.

Having considered single member companies and corporate governance, we can consider the problems that may occur with the single member company following the death of the single shareholder. These problems are considered in the next part of the paper.

## 5. Death Of *Kampuni Yangu* Shareholder

Death and taxes are inevitable. In the unfortunate event of the death of the single shareholder director of a company, the company may be exposed to a number of risks. The death of the single shareholder/director results in a situation where there is no person with authority to act on behalf of the company. This creates a quagmire for the company for two reasons. First, upon the death of the sole shareholder/director, no one is available to continue the business and affairs of the company. Second, this is compounded by the fact that there is also no one left with authority to appoint alternative individuals to carry on the business and affairs of the company.

The deceased's shareholder's personal representative appointed over his/her estate will be able to solve these two problems once they are appointed. Once they are appointed, they will need to be registered as shareholder in place of the deceased and thereafter make appointments of directors. The director(s) may either be themselves or any other

person. The problem that arises is how is the company to be run during the interregnum between the time of the demise of the sole shareholder/director and the time when the personal representative is appointed?

Grant of representation or letters of administration, where the deceased died intestate or grant of probate where the deceased left a will can be a lengthy process.[485] It is also to be noted that the Family Division Courts do not have jurisdiction to deal with issues relating to company law. In the case of *Estate of Wagiko Ndibaru (Deceased)*[486] for example, Justice W. Musyoka in the High Court stated:

> *Regarding the second application, I find that Nyakio Investments Ltd is a separate legal entity from its shareholders, therefore it has a separate legal existence from the deceased and consequently this court is not the appropriate court to deal with issue affecting it. The only matter of interest to the probate court is the distribution of the shares held by the deceased in that company. All other matters concerning the company ought to be place before the commercial courts.*

The Court of Appeal in the case of the case of *Pacific Frontier Seas Ltd v Kyengo & another*[487] re-empathized that where there is no dispute as to distribution of shares, the court can attend to this. It can also prevent intermeddling and interference with the deceased's estate including and property including shares. It cannot, however, veer into contestations relating to the company which are to be resolved by the legal framework provided for by the Companies Act.

The solution in Kenya may lie in amendment of the Companies Act to require that every private company which has a sole shareholder/director shall appoint a reserve director who will be capable of stepping in during

485. Law of Succession Act (Cap 160) Laws of Kenya.
486. *Estate of Wagiko Ndibaru (Deceased)* [2014] eKLR.
487. *Pacific Frontier Seas Ltd v Kyengo & another* [2022] KECA 396.

the period of the interregnum before the grant of probate or the letters of administration is completed. Such reserve director would automatically take the position of director upon the death of the sole director thus preserving the continuity of the company. The reserve director could also to be a reserve director if the company appoints an additional director.[488]

## 6. Conclusion

This paper has explored three areas of interest regarding the single member company- obligations of the single member company to penal sanction, corporate governance of the single member company and the problems of transmission of shares on the death of the sole shareholder/ director

It has been noted that despite the simplicity of the single member company form, the company and the shareholder may be unwittingly exposed to various criminal sanctions. It would be useful to simplify these and educate the business owners about these. The single shareholder company, as we have seen still has corporate governance responsibilities. These are particularly clear when one considers the external shareholders of the company. At the death of the single shareholder, there is a gap in the law in the period before the process of probate starts. This is a period of particular venerability for the company. Consideration should be given to requiring companies to specifically provide for alternate directors to represent the company during this interim period.

It is admitted that the proposals made in these areas are made without surveying the current experiences of owners and stakeholders of the *kampuni yangu*. It is, therefore, proposed that a survey of the experiences of the *kampuni yangu* be undertaken and data collected. Current efforts

488. For example, s. 455 Hong Kong Companies Ordinance.

and data have been focused on the speed of setting up of companies and not on the survival of the companies once they have been set up.