The Face Behind the Mask

Identifying beneficial ownership in company law

In company law, the concept of the corporate veil means that a company exists as a separate legal person, distinct from its shareholders and directors; a principle established in the famous English case of ***Salomon v Salomon.*** This veil grants companies limited liability .

However, the veil can be used to hide the true individuals who control or profit from companies, creating an opaque corporate environment ripe for fraudulent activities.

To address this, the concept of beneficial ownership emerged on the global corporate stage as a regulatory and policy tool. Beneficial ownership refers to the natural persons who ultimately own, control, or benefit from a legal entity, even if they are not listed as shareholders or directors. In essence, it seeks to look behind the corporate veil and identify the real persons '*pulling the strings*'.

In Kenya, the idea of beneficial ownership was formally introduced in 2019 through an amendment to the Companies Act, 2015, leading to the inclusion of Section 93A that require all companies except public listed ones companies to disclose their beneficial owners to the Registrar of Companies. This requirement is very important such that failure to do so may lead the Registrar to reasonably believe that the company is not in operation, forming a legal basis to initiate dissolution under section 897 of the Companies Act.

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What the law says

Section 3 of the Companies Act 2015, defines a benficial owner 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.

During the registration of a company, Section 13 of the Companies Act, 2015 provides that certain key documents must be submitted. These include, in the case of a company that is to have a share capital, a statement of capital and initial shareholding, in the case of a company that is to be limited by guarantee, a statement of guarantee, a statement of the company's proposed officers, and finally, a **statement of the particulars in respect of each beneficial owner of the proposed company.**

The importance of having particulars in respect to beneficial owners cannot be gainsaid since it also applies to foreign companies being registered in Kenya other than the local companies.

Identifying the beneficial owner of a company.

According to the The Companies (Beneficial Ownership Information) Regulations, 2022, the following are the criteria for identifying beneficial owners of companies.

For Companies with Share Capital (Ordinary Companies):

- Own 10% or more of the company's shares, directly or indirectly.
- Hold 10% or more of the company's voting rights, directly or indirectly.
- Have the right to appoint or remove the majority of the board of directors.
- Have significant influence or control over the company even without formal ownership or voting rights.

For Companies Limited by Guarantee (No Share Capital):

A person is a beneficial owner if they, individually or jointly:

- Control at least 10% of the voting rights.
- Have the right or actual ability to influence the company's operations or decision-making.
- Can appoint or remove directors.
- Can direct or veto financial decisions, such as how funds or assets are distributed or invested.
- Have the power to wind up or dissolve the company.

It is important to note that if two or more people share ownership or rights jointly, or have a joint agreement over shares or company decisions, each person is treated as a beneficial owner.

As earlier discussed, a company is required to take reasonable steps to identify and verify the particulars of its beneficial owners and to maintain an accurate and up-to-date record in its register of members.

This record must include key personal and ownership details about each beneficial owner.

These details include the person's full name, national identity card number, passport number, or birth certificate number, as applicable, along with their personal identification number (PIN) and nationality.

The company must also record the beneficial owner's date of birth, postal address, business address, and residential address, as well as their telephone number, email address, and occupation or profession.

Additionally, the register must specify the nature of the person's ownership or control in the company, the date on which the individual became a beneficial owner, and, if applicable, the date on which they ceased to be one.

The Registrar may also require the company to include any other relevant details from time to time to ensure full transparency.

Conclusion

The requirement to disclose beneficial ownership marks a critical shift in not only Kenya's corporate regulatory framework but globally.

It can be described as a shift from a system that historically prioritized legal formality, to one that now insists on substantive transparency and accountability.

By mandating the identification of the natural persons who ultimately control or benefit from companies, the law seeks to pierce the corporate veil where necessary, and ensure that companies are not used as vehicles for fraud.