

**CERTIFIED SECRETARIES (CS)**

**PART II**

**SECTION 4**

**CORPORATE SECRETARIAL PRACTICE**

**STUDY NOTES**

## **Business names and Company names**

The promoters of a proposed company have freedom to choose a name by which the company is to be called. The registrar of companies may on written application reserve the name pending registration of the company.

According to the Companies Act, no name shall be reserved if it consists of abbreviations or initials which in the registrar's opinion is undesirable.

The registrar has not specified the criteria he uses when deciding whether a proposed name is undesirable. The registrar of companies will deem a name undesirable if:

- i) It is too much like the name of an existing company
- ii) It suggests criminal or immoral intent or purpose
- iii) It is misleading e.g. if the name of a company likely to have small resources suggests that it is going to trade on a greater scale over a wide area.
- iv) It suggests some connection with the crown or members of the royal family including certain words such as President, King, Queen Prince, crown
- v) It suggests connection with a government department or any municipality or other local authority or any body incorporated by a Royal charter or by the statute or by the government.
- vi) Contains a person's trademark without his consent.
- vii) Does not have the word limited as the last word.
- viii) If it consists of the proper name of a person who is not a director.

### **Reservation of a name**

To avoid the risk of choosing a name that ultimately turns out to be undesirable, promoters should enquire from the registrar whether the name the promoters intent to give a company is too much like the name of a company already in the register.

After obtaining confirmation that the name is not a registered one, they should lodge an application for its reservation. Any such reservation remains in force for within 30 days or such longer period not exceeding 60 days or as the registrar may allow. No other company will be entitled to register with the reservation name. Reservation is done by a paying reservation fee of 100 shillings. The reservation exist pending incorporation of the company.

### **Name to end with the word "limited"**

The Act, provides that the word "limited" must be last word of the name of the company which is to be limited by shares or guarantee.

Generally, it is included in company name by way of description and not identification.

### **Power to dispense with the word "limited"**

Although the Act provides that the last word of the name of a limited company must be "limited", the Attorney General has power to allow a company to dispense with it by licence if he is satisfied that an association about to be formed as a limited company was to be formed for promoting comment, art science, religion, charity or any other useful object and it intends to apply profits if any or other income promoting its object and prohibits the payment of any dividend to the company members was prohibited.

An existing registered company may obtain a licence to make by special resolution a change in its name so as to omit the word "limited" as its last word.

## **Change of name**

The company name may be changed voluntarily or compulsory

### **(a) Voluntarily**

- (i) The company can by special resolution change its name with the sanction of the registrar
- (ii) If a company was mistakenly registered by a name which in opinion of the Registrar is too much like the name of a company already in existence.

### **(b) Compulsorily**

The Act provides that within 6 months of registration with a particular name. Registrar may direct a change of name if in his opinion the name is too much like that of an existing company. The change shall be made within a period of 6 weeks from the date of direction or such longer period as he may allow.

## **Publication of name**

The Act requires every company:

- (i) To paint or affix its name in a conspicuous position on the outside of every office or place in which its business is carried.
- (ii) To mention its name on all letters, notices, bills of exchange ordinary cheques, invoices, receipts and letters of the company.
- (iii) To engrave its name on its seal which shall be in the form of a embossed metal dye.

If a company does not paint or affix its name as prescribed, the company and every officer in default are liable to a fine not exceeding ksh.100 and the officer may be made personally liable to any creditor who has relied on the document if the company failed to pay.

## **BUSINESS NAMES**

If a company has a place of business in Kenya and carries on business, under a business name which does not consist of its corporate name without any addition, the company must within 28 days after commencing business under the business name submit to the registrar of business names submit a statement of particulars which contains:

- (a) The business name
- (b) The full address of the principal place of business and postal address of the company
- (c) The general nature of the business
- (d) Full address of every other place of business

However, the Registration of Business Names Act provides that a company using a business name distinct from its corporate name must disclose its corporate name in all trade circulars and business letters or other publications issued by the company.

## **MEMORANDUM OF ASSOCIATION (MOA)**

Section 2 of the Act defines the MOA “Memorandum of Association of the Company as originally registered or altered from time to time”. The Memorandum of Association is a fundamental document

of the Company because it contains basic condition upon which the Company is authorized to be formed. It is the charter / constitution of Company and defines the scope of business of the Company.

### **Form of Memorandum of Association**

Section 14 provides the form in which the Memorandum of Association of a Company should be framed. It is usually in the forms set out in Tables B, C, D& E of the 1<sup>st</sup> schedule to the Act.

**Table B**-gives a specimen Memorandum of Association of a Company limited by shares

**Table C**-gives specimen memorandum of Association of a Company limited by guarantee without a share capital

**Table D**-gives a specimen Memorandum of Association of a Company limited guarantee and having a share capital.

**Table E**-gives a specimen Memorandum of Association unlimited Companies having a share capital

### **CONTENTS OF MEMORANDUM OF ASSOCIATION**

#### **The Name Clause**

- ✓ The clause states that name of the Company shall end with the word limited as the last word of the name in case of a Company limited by shares or guarantee.
- ✓ The name of a Company symbolizes the identity of a Company and its existence.
- ✓ The name should be painted or affixed outside every office or place in which the business of the Company is carried on in a conspicuous and easily legible roman character.
- ✓ Every Company shall also have its name engraved on its seal and shall have the name mentioned in all business letters of the Company and official publications.
- ✓ Incase of default in affixing the name as aforesaid, the Company and every officer cognizant of the fact shall be liable to a fine not exceeding sh100 every day during existence of the default.

#### **Dispensing With the Use of the Word Limited**

Where it is proved by the Attorney General that an association to be formed has a limited Company is to be formed for promoting commerce, art, science, religion or charity and it intends to apply its profit if any to the promotion of the objects for which it was formed and prohibits payment of dividends, he may allow it to dispense with use of the word “limited”.

#### **Restriction on the Choice of Name**

Although there is freedom of choice of name of the company, the registrar shall not register a company by a name which in his opinion is deemed undesirable

The name shall be deemed undesirable in following circumstances

- a) When name is too much the name of an existing Company. Every Company must have its own name. This is meant to protect the Company from other people taking advantage of its goodwill. It also protects the public from confusing the Company with another Company.
- b) Misleading name-A Company will not be allowed to be registered with a name which in the opinion of the registrar is misleading to the public e.g. a bakery operating under the name “Wananchi Auto Spares”
- c) A name cannot be ordinarily allowed if it suggests some connection with the government or royal patronage e.g. including such names as queen president etc
- d) No name will be registered if it suggests criminal tendencies or propensity towards immoral activities e.g. Magaidi Limited or Malaya Limited
- e) No name will be allowed if it includes the proper name of a person who is not a director of Company unless for proper reasons
- f) The name will not be registered if it includes such words as co-operative, building society etc unless the circumstances justify
- g) No name will ordinarily be allowed if it suggests some connection with National flag or National names or names prohibited under the National flag and emblems Act.

### **Change of Name**

A Company may change its name under the following circumstance

- 1) Voluntary- a Company may be special resolution voluntarily alter its name with sanction of registrar.
- 2) If through in adverting (by mistakes)- the name of Company on its first registration is found to be similar to name of another Company already in existence registrar may order the newly registered Company to change its name within 6 months.
- 3) Through a passing off action:-passing off involves imitating the use of another Company’s name thereby confusing the public. Where another Company succeeds in bringing a passing off action against a newly formed Company, the new Company brought may be compelled by the court to change its name.
- 4) Under section 70 where the court permits a reduction of capital of Company it may direct Company to add to its name as the last word the words “and reduced” for a specific period of time to serve as a warning to creditors. (Any change in the Company name shall be notified to the registrar within 14 days and the registrar shall enter the new name on the register in place of the former name and shall issue the Company with a certificate of change of name and shall notify the change in Kenya Gazette. Any change in Company name shall not have any effect on right /obligations of Company or invalidate any legal proceedings by or against the Company which may have commenced during use of the former name.

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## **2. THE REGISTERED OFFICE CLAUSE**

Section 5 of Act provides that every Company Memorandum of Association shall state that the registered office is situated in Kenya. The office fixes the nationality of the Company and its physical address. Under Section 107, a Company from day on which it commences business or the 14<sup>th</sup> day after the date of incorporation whichever is the earlier shall have a registered office and a postal address to which all communication and notice to the company will be addressed.

Documents usually kept of registered office include:

- Register of members
- Register of debenture holders
- Register of directors and secretaries
- Register of directors interests in the shares and debentures of Company
- Register of charges and instruments creating them
- Minute books of annual general meetings and directors meetings
- Accounting records of the Company
- Copies of directors service contracts setting out the terms of their contracts
- Certificate of incorporation

### **Changes of Registered Office**

Under Section 25, a Company may change its registered office within Kenya. Such change requires a special resolution by the members in a general meeting. Notice of such change must be given to the registrar within 14 days of the change.

## **3. THE OBJECTIVES CLAUSE**

Section 5 of the Act provides that every Company shall state its objects. A Company is not legally entitled to do any business which is outside the objects for which it was formed otherwise the transaction shall be declared ultra vires and void.

Ultra vires is used to refer to the principle that a Company shall not enter into any transaction that exceeds its powers.

### **Alteration of the Objects**

A Company may by special resolution alter the provisions of its memorandum of association with respect to its objects so far as it may be required to enable it:

- To obtain its main purpose by new and improved means
- To carry out its business more economically /more efficiently
- To enlarge / change its local area of operation
- To carry on some business which may be conveniently combined with the business of the Company
- To restrict / abandon any of the objects specified in the Memorandum of Association
- To sell the whole / any part of the undertaking of the Company
- To amalgamate with any other Company

### **PROCEDURE FOR ALTERATION**

If any of the above objects can be achieved only by alteration of Memorandum of Association the Company must adopt the following procedure

- i. Convening an extraordinary general meeting- if the change is urgent and cannot wait for the next annual general meetings the Company must convene an EGM for the purpose of placing the agenda before the meeting.
  - ✓ This requires at least 21 days notice
- ii. Special resolution –at the meeting the Company must pass a special resolution supported by  $\frac{3}{4}$  of members entitled to attend and vote at the meeting
- iii. Court sanction –a petition must be brought to the court for confirmation of alteration but before confirmation the court must be satisfied that:
  - Sufficient notice has been given to every debenture holder, creditor and any other person whose interests would be affected by the alteration
  - Every objecting creditor has been paid in full or his consent has been obtained
  - That the alteration is fair and equitable considering the interests of members and creditors
- iv. The Company shall then proceed to alter the objects as required
- v. The Company must file copy of resolution and court order with the registrar within 14 days.

### **Objection to the Alteration of Objects**

An application may be made by any member/ creditor of the Company for the order altering the objects to be cancelled. If such application is made the order to alter shall not have effect unless confirmed by the court. An application for cancellation of the order may be made by:

- a) Holders of not less than 15% of the nominal value of the issued capital of the Company
  - b) If Company is not limited by shares then by not less than 15% of members of the Company.
  - c) Holders of not less than 15% of Company debentures entitling such holders to object
- ✓ Such an application shall not be made by any person who consented or voted in favour of application.
  - ✓ This is known as nominal/registered capital
  - ✓ If the capital into different classes it must also state denomination into which the capital is divided
  - ✓ It must also state that members or subscribers shall not take less than one share.
  - ✓ The application must be made within 30 days after date on which the resolution was passed

### **Failure of the Objects**

The main and distinct purpose of the Company is called its substratum. Where the substratum (objects) fails, the heart of the Company fails and the body cannot function without the heart. Thus if the main object of Company fails, the Company may be wound up. However if the Company can still carry on incidental objects then it would not be wound up

### **THE LIABILITY CLAUSE**

- ✓ Section 5 of the Act provides that the Memorandum of Association of every Company limited by shares or guarantee shall state that liability of its members is limited. The Memorandum of Association of a Company limited by guarantee shall further state that each member undertakes to contribute to the assets of Company, a certain amount during winding up while he is a member or within one year after he ceases to be a member.

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The liability clause serves as a general notice to members of the public intending to deal with the Company that liability of member is limited to such an extent as is stipulated in the Memorandum of Association. Any provision in memorandum of association compelling a member to take more liability than agreed by him is void

However, in the following exceptional case, a member may be liable in excess of his initial liability:

- a) If a member agrees in writing either before or after alteration is made in the memorandum of association increasing his liability. In this case he is bound by alteration
- b) If every member agrees in writing to conversion of a limited Company to an unlimited Company pursuant to section 18 of the Act
- c) If to the knowledge of members number of members has fallen below statutory minimum and the Company has carried on business for more than 6 months when the number is so reduced. In such case, the remaining members are liable to an unlimited extent for debt of the Company contracted during that period.
- d) If subscribers to the memorandum of association include a nominee who fails to pay up his liability within 21 days from being requested to do so, the other subscribers are liable to contribute towards that liability.
- e) Where the Company has made an unlawful distribution of profit (dividend) out of capital, any member who at the time of distribution knew or had reasonable grounds of believing that distribution was unlawful will be liable to pay back what he received.
- f) If a member undertakes to subscribe or acquire more shares in the Company beyond his initial liability he is bound to pay this liability in addition to the initial liability

### **Alteration of Liability Clause**

Section 24 provides “notwithstanding any thing in the Memorandum of Association or Articles of Association of the Company no member of the Company shall be bound by any alteration made to the Memorandum of Association or Article of Association after the date on which he became a member, so far as the alteration requires him to take or subscribe for more shares than the number held by him at date on which the alteration was made.

Shareholders of an unlimited Company can make their liability limited by passing a special resolution and obtaining the sanction of registrar

Similarly a limited Company can be converted into an unlimited but this requires the support of all members of the Company

In spite of the conversion, the liability of the Company and the members in respect of any debt or obligations incurred before the conversion remains unaffected.

### **CAPITAL CLAUSE**

In case of a Company limited by guarantee and having a share capital it must state the capital with which the Company is proposed to be registered.

- ✓ This is known as nominal/registered capital
- ✓ If the capital into different classes it must also state denomination into which capital is divided
- ✓ It must also state that members or subscribers shall not take less than 1 share



### Alteration of Capital Clause

Under section 63, a Company may if authorized by its articles alter its share capital in the following ways:

- a) **Increase share capital:** under 44 of **Table A** this may be done by an ordinary resolution in a general meeting of the Company. Notice of the increase and a copy of the resolution must be filed with the registrar. Where the articles do not give power to increase the capital, then a special resolution must be passed to alter the articles in order to empower the Company to increase its capital
- b) **Consolidations of shares:** a Company may by ordinary resolution and if authorized by its articles consolidate its Capital by amalgamating shares of small amounts to share of large amounts e.g. a consolidation of 100 shares of shs 18 each to 50 shares of shs36 each.
- c) **Subdivision of shares:** a Company may by ordinary resolution subdivide its shares into shares of smaller amounts but the proportion of the amounts paid and unpaid must remain the same.
- d) **Conversion of shares into stock:** a Company may if authorized by its articles convert its shares into or vice versa
- e) **Cancellation of unissued capital:** a Company can reduce the amount of share capital available for issue but this does not amount to a reduction of capital because shares have not been issued.

### Association Clause

Under this clause subscribers to memorandum of association agree to be associated and formed into a Company and to take the shares placed opposite their names

#### ARTICLES OF ASSOCIATION

‘Articles ‘means articles of association of a Company as originally formed or as altered from time to time pursuant to the provisions of the Act

They include regulations contained in Table A in the first schedule of the Act so far as they apply to the Company. It contains regulations meant for the internal management of the Company affair.

They prescribe the rules and by-laws meant to govern the Company and for achieving the objectives specified in the Memorandum of Association.

Under section 9, a Company limited by shares may register its Articles of Association while a Company limited by guarantee or unlimited Companies shall register the Article of Association together with the Memorandum of Association at the time of registration.

A Company limited by shares which does not register its own articles shall adopt **Table A** specimen Articles as its Articles

### Form of Articles

The Act provides that a Company shall provide its articles in any of forms laid down for different types of Companies in the respective schedules.

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Table A in the 1<sup>st</sup> schedule provides specimen form of Articles part I of which may be adopted in whole or in part by a public limited and part II by a private limited company under section 12 if special Article are registered they must be:

- Printed in English language
- Divided into paragraphs and numbered consecutively
- Dated
- Signed by each subscriber to the memorandum of association in the presence at least one witness

#### **CONTENTS OF THE ARTICLES**

- It is common for the articles to contain the following regulations or provisions:
- Extent to which Table A of the first schedule is applicable
- Different classes of shares and rights attached to them
- Procedure of making calls and forfeiture of shares
- Transfer and transmission of shares
- Methods of issuing shares
- Conversion of shares into stock and vice versa
- ❖ calling and conduct of general meetings
- ❖ Voting rights of members
- ❖ Qualification and qualification shares of directors
- ❖ Appointment and removal of directors
- ❖ Appointment and removal of auditors
- ❖ Borrowing powers of the Company
- ❖ Declaration of dividends
- ❖ Capitalization of profits
- ❖ Winding up procedures

#### **Alteration of Articles**

- The articles of a Company may be altered freely by passing a special resolution.
- The power of the Company to alter its articles is provided under section 13 of the Act and this right cannot be taken away from the Company
- Any alteration or addition so made shall subject to the provisions of the Act be as valid as if originally contained there in.
- The altered articles must be filed with the registrar for registration within 30 days after passing of the resolution to alter them.

#### **Restrictions to Alteration of Articles**

1. Alteration must not be inconsistent with the express provisions of the Act such as to:
  - ❖ Restrict a member's right to petition for winding up
  - ❖ Authorize a Company to purchase its own shares
  - ❖ Authorize payment of dividends out of capital
2. The alteration must not produce conflict between articles and the memorandum and in case of conflict the memorandum of association will prevail
3. The alteration must not sanction anything illegal
4. Alteration must not be inconsistent with the order of the court. Thus where court has made an order to prevent oppression of minority, Company may not alter articles in a manner that will be inconsistent with the court order

5. Alteration must be made in good faith and in best interest of Company as a whole and if this is the case it does not matter if it inflicts hardship on the minority.
6. An alteration to increase members' liability will only bind those who consent to it. Thus under section 24, no member is bound by an alteration to alter the Memorandum of Association or Article of Association, which requires him to increase his shareholding or increase his liability to pay money to the Company unless:
  - ❖ the alteration was made before he became a member
  - ❖ he agrees in writing to be bound by such alteration
7. The alteration must not constitute fraud on the minority. The alteration to the articles would be declared invalid if it amounts to fraud on minority of members.
8. Where the alteration effect class right of member. Then class variation procedure must be followed in which 15% or more of the dissentients (opposes) must be given right to petition to the court against the alteration
9. An alteration may not be made to have a retrospective (backdating effect) so as to take away right of a member acquired when forming the contract
10. A private Company which intends to continue enjoying the privileges of a private Company shall not alter the provisions of its articles to conflict with section 30 of the Act which defines a private Company

### **Conversion or re-conversion (re-registration)**

This is the process of converting a private company into a public company and vice versa. The process of conversion of a company has to be done through the board of director's resolution and must be approved by the shareholders at a general meeting. For the company to be converted either from private to public or vice versa consent of the registrar of company must be obtained.

### **Procedure of conversion**

- A director's meeting has to be called by giving the necessary notice after which the directors will recommend to convert the company either into private or public.
- For the name of the company to be converted the shareholders must at Annual General Meeting approve or reject the conversion of the name as recommended by the directors.
- The Memorandum of Association & Articles of Association have to be amended to reflect the position of the new company.
- Kenya Revenue Authority has to be informed of the changes affecting the company.

### **Types of Corporations**

#### **a) Chartered Companies**

Are companies registered by a charter granted by the King or Queen in exercise of an ancient prerogative or power vested on the crown? Most companies in the United Kingdom were crowned being such powers in were granted charters for the purpose of operation. In Kenya

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formation of a company by charter is restricted to educational institutions of higher learning e.g Universities.

### **b) Statutory Corporations**

It is a corporation formed by a specific Act of parliament which carefully deprives its powers from Parent Act. A statutory company has no shareholders and its initial capital is provided by the Treasury, corporations such as AFC, Kenya Wheat Board Kenya Sugar Board are company's statutory corporations.

### **c) Registered companies**

These are formed under the companies Act Cap 486. These are registered by submitting certain documents to the Registrar of companies such documents can be summarized as MOA, & AOA, statement of nominal capital, forms 201, 203 and 208. Such companies name come into existence once the Registrar issue a certificate of incorporation. A registered company may either be a private or public company.

#### **(i) Private company**

Section 30 of the Companies Act Cap 486 defines a private company as one which by its articles:

- Restricts the right to transfer its shares.
- Limits the number of members to 50 excluding present and past employees who acquired the shares while working for the company and have since retained them.
- Prohibits any invitation to the public to subscribe its shares or debentures.

#### **(a) Public company**

It is one that is not private. The public company has a minimum membership of 7 members and no maximum, there is no statutory restriction on members' right to transfer its shares and it can invite the public to subscribe in its shares or debentures.

A public company listed at Nairobi Securities Exchange must prepare a prospectus which has to be filed with the Registrar.

A public company not listed or quoted has to prepare a statement showing that all the requirements of the Act have been complied with. A public company must hold a statutory meeting.

#### **Advantages of a private company**

- (i) Only 2 signatories to the Memorandum of Association are sufficient to form a private company and only 1 director is required – section 177 cap 486
- (ii) Can commence business immediately after incorporation and allot shares as the provisions relating to minimum subscription don't apply to it.
- (iii) A private company need not hold a statutory meeting or send a statutory report to its members.
- (iv) Since it cannot issue a prospectus inviting the public to buy shares, it needs not to prepare a prospectus.
- (v) While the Articles of Association appoint directors, they do not have to file with the Registrar a consent to act or an undertaking to take qualifications shares.

- (vi) Directors can be appointed by a single resolution and they can obtain loans from the company.

### **Partnerships**

They are governed by the Partnership Act Cap 29. This Act defines a partnership as a relationship which subsists between persons carrying on a business in common with a view of profit. It may be formed orally or by written agreement. It is governed by the Partnership deed which can be signed by all the partners.

### **Partnership deed**

It is a document that details the terms and conditions under which the partnership is operated

The contents of the partnership deed include:

- (i) Name of the firm and names of the partners and their addresses
- (ii) Nature of the business and place where business will be carried on
- (iii) Date of commencement and duration of partnership
- (iv) Amount of capital to be contributed by each partner
- (v) The ratios of sharing profits and losses
- (vi) Interest on capital, partners loan and interest on drawings
- (vii) Salaries, commissions payable to each partner
- (viii) Procedure to be followed in case of retirement, death and admission of new partners
- (ix) Duties, powers and obligations of each partner
- (x) Arbitration clause in case of disputes among the partners.

### **Characteristics of a Partnership**

- (i) It has no legal existence separate from its members
- (ii) It cannot generally sue or be sued in its own name
- (iii) It cannot consist of more than 20 persons unless authorized by written law
- (iv) Easy to form by written agreement or orally
- (v) May engage in a variety of businesses subject to the mutual consent of the partners
- (vi) Easy to alter its capital
- (vii) Every partner is an agent of the firm and of other partners
- (viii) It is sometimes difficult to distinguish between a partner's property from that of the partnership
- (ix) Shares (capital) can only be transferred with the consent of other partner.

### **Limited Partnership**

It is formed by limitation of the limited provisions of limited Partnerships Act Cap 30. They are not common in Kenya. Cap 30 allows for the limitation of the liability of some partners to the capital contributed by them whereas other partners are liable for all the debts of the firm (General Partners).

A limited partner cannot take part in the management of the firm cannot bind the firm, is not entitled to dissolve the partnership by notice and his death does not affect the continuity of the partners unless specifically provided in the partnership agreement.

Sole proprietorship

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This is where a business is run by one person. The process of registering a sole proprietorship is the same as that of a partnership.

### **Conversion of a partnership & sole proprietorship into Limited Liability Company**

The process of converting a partnership into Limited Liability Company will follow the following procedure:

- Written request to the registrar of the companies to reserve the name intended for registration
- Completion of Form BN4 and submission to the Registrar of company attach original certificate of registration
- Once the firm has been approved, follow the same procedure as registration of a company.

Registration of foreign companies carrying on business in Kenya: section 366 (1) cap 486 allows foreign company outside Kenya to establish business within Kenya. On submission of the necessary documentation, the registrar will issue certificates of compliance bearing the company number starting with "F" e.g. f23/2000.

For foreign company to be registered in Kenya, the Registrar will require the following documents:

- (i) Certificate copy of incorporation issued by the country of origin.
- (ii) Certified copy of Memorandum of Association & Articles of Association or a charter written in English and duly translated if written in a different language.
- (iii) A list of and the full names of directors and secretary of the parent company.
- (iv) Full names and postal addresses of persons resident in Kenya authorized to accept on behalf of the company service of process and any other notices required to be served on the company.
- (v) Details of outstanding charges registered by the company excluding charges solely on property outside Kenya
- (vi) Full addresses of the registered principal office of the company.

Returns of a foreign company to be submitted to the Registrar

- (i) The annual financial statements of the parent company duly written in English
- (ii) Returns on any alterations made on the following:
  - The charter, statutes or Memorandum of Association or Articles of Association of the company
  - The directors or secretary of the foreign company or parent company
  - Names and postal addresses of persons authorized to accept service on behalf of the company
  - Addresses of the registered or principal office of the foreign company.

### **Procedure of striking off company from the Register of companies**

If a company is not trading and has no assets or liabilities, the directors of such a dormant company may request the Registrar to strike the company off the Register. Under section 339 (3) cap 486, a company may also be wound up by the receiver manager giving notification to the Registrar of companies that the assets of the company have been realized, all creditors paid and nothing remains to be done.

1. The directors and shareholders have to make a declaration in accordance with the section 339 (3) that the company has no assets, is dormant, has no liabilities and it is desirable to strike off the company.
2. The shareholders at an Annual General Meeting will pass a resolution, striking off the company.
3. All outstanding annual returns for the year must be filed with the Registrar.
4. The Registrar will then publish in the Kenya Gazette the intention for dissolution giving 3 months within which any objection can be raised.
5. If no objection is raised within 3 months period given in the Gazette the final notice striking off the company will be issued by the Registrar and the company shall stand dissolved.

### **Striking off a foreign company from the Registrar's record**

The procedure to be followed is:

1. Completion of Form 249 and submitting to the Registrar of companies for the company to be struck off. Form 249 is called cessation form.
2. The Registrar will publish in the Gazette the dissolution of the company.
3. However, if the company has not filed financial statements of the parent company the Registrar will insist on updating the records.

### **Listing of shares**

Refers to the process whereby the company's shares are admitted on the list of stocks or shares that are being traded on the securities exchange for the purposes of trading at the securities exchange floor.

Normally, the issuing company is the one that applies for listing through Nairobi Securities Exchange and CMA. CMA and NSE after verification of the documentation presented by the issuing company may reject or approve the listing of shares of the issuing company.

There are 3 investment market segments at the Nairobi Securities Exchange namely:

- Main investment market segment (MIMS)
- Alternative investment market segment (AIMS)
- Fixed income securities market segment(FISMS)

To list securities on any of these market segments the following eligibility criteria must be satisfied:

- (i) Incorporation status – the issuer must be a public company limited by shares and registered under cap 486.
- (ii) Share capital – the minimum authorized, issued and fully paid up capital may be ksh.50 million i.e. MIMS, FISMS, and ksh.20 million for AIMS.
- (iii) Net assets should not be less than ksh.100 million immediately before the public offer i.e for MIMS, FISMS and ksh.20 million for AIMS.
- (iv) Transferability of shares – shares to be listed must be freely transferable.
- (v) Financial records – the audited financial statements of the issuer for 5 previous years must be availed (MIMS), 3 years for AIMS and FIMS.
- (vi) Directors and management – the directors and the senior management of the issuer must be competent persons without any legal encumbrances.
- (vii) Dividend policy – have a clear future dividend policy.
- (viii) Solvency – issuer should be solvent and have adequate working capital.

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- (ix) If the issuer should be is licensed to operate as a bank or insurance company, the issuer must obtain a certificate of no objection from the relevant regulator.

### **Procedure for admission to listing**

An issuer shall submit an information memorandum or prospectus to the – CMA for approval and a copy to the exchange for comments through the sponsoring broker.

An issuer shall submit its information memorandum approved by the authority to the exchange.

### **The admission procedure**

The issuer submits its application and prospectus for approval by the authority through the sponsoring broker.

The exchange submits its comment if any to the authority working within 10 days of the receipt of the copy of the information.

The authority shall consider as appropriate the comments of the exchange while granting approval to listing.

On receipt of the letter of approval, for listing from the authority in compliance with the Act, the exchange shall approve the listing without any other condition save for the attainment of the prescribed minimum shareholders; following public offering or the attainment of minimum subscription.

The sponsoring stock broker shall ensure the issuer complies with documentation required by these rules.

In case of introductions and additional listings approved by the authority the exchange shall admit securities for listing on payment of additional fees by the issuer without any further condition.

### **De-listing of shares**

This means removal of a security of a company from the list of the securities exchange.

### **Reasons for de-listing**

- Voluntary suspension – the issuer requests in writing the authority to suspend the company in the event of significant restructuring involving a list of securities from the trading floor.
- Failure to comply with NSE & CMA rules and regulations.
- When the number of shares held by local shareholders goes below 80%.
- The the issuer fails to honour its financial obligations to the stakeholders.
- The issuer engages in fraudulent activities i.e. money laundering or colluding authorities to have the market price per share increased in the market.
- If a company converts into a private company.

## **CAPITAL MARKET AUTHORITY**



The Capital Market Authority (CMA) was established under the CMA Act Cap 485 A. It has established to take up the role played by the stock exchange commission which then was under the Ministry of Finance & Planning.

The Act came into force on 15<sup>th</sup> December 1989 through a legal notice by the Minister of Finance.

The authority was established for the purpose of promoting and facilitating the development of an orderly, fair and efficient market in Kenya.

### **Principal objectives of the authority**

- (a) The development of all aspects of the capital markets with particular function on removal of impediments to and the provision of incentives for longer investment in productive enterprises.
- (b) To facilitate the existence of a nationwide securities exchange and broker services to enable wider participation of the general public in the securities.
- (c) Protection of investors.
- (d) The operation of a compensation fund to protect investors from financial loss arising from the failure of a licensed broker or dealer to his contractual obligations.
- (e) The establishment maintenance and regulation of a market in which securities can be issued or traded in an orderly, fair and efficient manner through the implementation of a market in which the participants are self regulated.
- (f) The development of a framework to facilitate the use of electronic commerce for the development of capital markets in Kenya.

### **Shortfalls of Capital Market Authority**

The Capital Market Authority and Nairobi Stock Exchange have made several efforts to have many companies listed on the securities stock exchange. However, this has not been successful. The authority suggests the following limitations:

- Ignorance among Kenyans about the securities available and necessary education may not help as a number of Kenyans may not be conversant with the financial years.
- Most multinationals opting in Kenya are foreign owned and have being listed in their countries.
- Majority of Kenyans are falling in the low income brackets and not therefore have sufficient income which they can save or credit investments.
- Capital Market Authority has put in place stringent rules for companies seeking listing or quotation therefore most of them shy away.
- The cost of having a company listed is time consuming and expensive in preparation of prospectus, application forms, marketing of shares to be floating etc.
- Kenya has a limited market for goods and services therefore expansion of financing services will call for expansion of consumer market which is not easy.
- A number of companies are family owned therefore they do not wish public to know more about their secrets.

### **NAIROBI STOCK EXCHANGE**

Stock exchange is where debentures, shares, stocks are sold.

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It can be defined as an organized market where securities such as share debentures and stock are bought and sold through brokers who act as middlemen between the buyers and sellers. In Kenya securities are traded through the Nairobi Stock Exchange based at Nation Centre 1<sup>st</sup> floor. Nairobi Stock Exchange comprises of 2 subsidiary markets, primary market (for new shares to new shareholders) and secondary market (a market for shares already listed or quoted and changing hands at the Nairobi Stock Exchange).

NSE was initiated in 1953 by the former colonial administrator who was meant to serve colonial interest and only colonial owned companies were allowed to trade in shares.

Africans were not allowed to participate in the NSE and even to bear shareholders in such companies.

In 1954, the stock exchange went through a major reorganization and the first time Africans were allowed to own shares and transact business at Nairobi stock Exchange. The company owned by Africans were also allowed to have their shares traded at Nairobi Stock Exchange.

Members of Nairobi Stock Exchange are stakeholders are licenced financial institutions or banks. The following are members of Nairobi stock exchange:

- Dyer and Blair
- Francis Thuo & Partners (put \*\*\*statutory management)
- Kingdom securities limited – Cooperative Bank
- Equity stock brokers
- Apex stock brokers
- Ngenye Kariuki stock brokers
- Suntra stock brokers
- CFC Financial Services etc.

### **Functions of Nairobi Stock Exchange**

The Nairobi Stock Exchange performs the following functions:

- It serves as a market for securities. It facilitates the transfer of securities between buyers and sellers with help of stockbrokers.
- Provides ready market in which buyers and sellers of securities \*\*\*\*their deals and this provides a medium through which securities are liquidated.
- Acts as a channel through which savings are turned into investments form of shares and other securities.
- Enables other investors into the country as most foreigners prefer investing through the stock exchange.
- Provides medium through which government can absorb excess liquidity in economy by issuing its securities at favorable interest rates in curbing inflationary tendencies. The government usually maps excess by issuing treasury bonds to the public.
- Stock exchange index acts as a good measure of economic activities a country as such it will indicate whether the economy is growing stagnant or declining.
- Collects information from quoted company regarding their financial performance a publishers such information in the medial thus enabling potential investors \*\*\*\*makes decisions on which company to invest in.
- Enacts rules and regulations which are meant to protect the interest of investors in shares and debentures.

## **Limitations of Nairobi Stock Exchange**

1. The stock exchange has not been able to convince more companies more to be listed at the NSE to enable a wider participation by the public in securities.
2. It has not been able to turn rogue stockbrokers who at the end have disappeared with millions of people's investors e.g. Nyaga Stock Brokers, Francis Thuo which was put \*\*\*\*statutory management.
3. Rules and regulations imposed by stock exchange for potential company seeking listings are very elaborate and expensive i.e preparation of prospectus, application forms and number of issued shares which a company must have before the author to list can be given.
4. It has failed to conduct mass education with regard to benefits occurring for company being listed.
5. It has not endeavored to give education to the directors of most companies therefore the management of such company end up mismanaging them at the expense of shareholders.

## **The Central Deposit system**

The central deposit system was created in 2000 under the CDS Act. It is meant to provide the legal framework for the establishment and operation of a central depository and settlement corporation limited (CDSC).

The object of the Act is to provide the establishment, operation and regulation of central deposit to provide for immobilization and eventual dematerialization of \*\*\*and dealing in securities deposited thereon.

## **Objectives of CDS**

The purpose of CDS is to facilitate dealing in securities electronically through the book entry system without the use of physical share certificates or transfers.

Any person willing to trade in shares will be required to open a CDS through any of the stockbrokers. The buying and selling of securities is conducted by the CDSC which is subsidiary of the Nairobi Stock exchange.

CDS rules and any amendment to the rules must be approved by the Capital Market Authority. It operates under the regulatory oversight of the Capital Market Authority.

## **Duties of Central Deposit System**

A central depository shall provide or cause to be provided all such facilities as may be necessary for the effective transaction in securities.

Central depository system performs the following duties:

- (a) Facilitate the immobilization of securities.
- (b) Facilitate the deposit and withdrawal of certificates in respect of immobilized securities.
- (c) Facilitate the dematerialization of securities. Dematerialization means an entry of securities whereby the underlying physical certificates is no \*\*\*recognized as prima facie evidence of ownership under the company Act after the dematerialization date.
- (d) To open, maintain close securities accounts.
- (e) To ensure the efficient transfer of book entry of securities.
- (f) Facilitate the efficient process of cash payment in exchange of securities.

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- (g) Ensure the safe custody of certificates and other documents representing immobilization securities.
- (h) Guard against falsification of any records or accounts required to be kept maintained under the Act.
- (i) \*\*\*\*\*securities accounts for the handling of book entry securities and if any.
- (j) Establish a proper and efficient system for verification, inspection, identification and recording all book entry securities with the central depository.
- (k) To facilitate religion of dealings in book entry of securities.

### **Benefits of Central Depository System**

1. It facilitates mobilization of domestic savings
2. Use of physical share certificates and transfer is eliminated
3. It reduces the settlement of period i.e. transaction in securities is instant
4. The cost of buying and selling securities is reduced
5. Risk is fraud is minimized
6. The system enhances competition and innovation
7. It improves liquidity
8. It attracts foreign investors.

### **IMMOBILIZATION**

This is the process by which the share certificates of a listed security currently in the hands of investors are deposited in electronic investors' accounts under the central depository system. The investor opens an account with the central depository system which \*\*\*like a bank account.

Additional deposits into clients central depository system account like a credit and sales of deposited shares in a clients central depository system account treated like a debt. The client is then issued with a statement of account showing the debits and credits.

### **Disadvantages**

- (i) Fraud – a number of investors have in the past lost their investment through fraudulent dealing by the stock brokers.
- (ii) Lack of the physical share certificate which an investor can use as a collateral for the purposes of securing a loan.
- (iii) The process of achieving corporate actions e.g. payment of dividend, issue bonus is very time consuming since the 2 registers have to be uploaded (combined)
- (iv) The process is complicated particularly for those in the rural areas because of lack of education.
- (v) It can be subject to abuse.
- (vi) There may be delay in transacting securities in the event computer failure.

### **MEMBERSHIP**

A person is a member of a Company if he subscribes to the Memorandum of Association of the Company and upon registration of the Company, his name shall be entered in the register of members. Otherwise a person becomes a member of the Company if he agrees to become a member and his name is entered in the register of members.

The term shareholder refers to a person who holds shares in a Company while a member is a person whose name appears in the register of members. Although the terms shareholder and member are used

interchangeably, there are exceptional cases where a person may become a member without being a shareholder and vice versa.

- a) Companies limited by guarantee and having no share capital will only have members but not shareholders
- b) A holder of a share warrant is a shareholder and not a member as his name is removed from the register of members immediately on the issue of a share warrant.
- c) A transferee or legal representative of a deceased member may be a shareholder but he may not be a member until his name is entered in the register of members
- d) A deceased person is a member as long as his name remains in the register of members
- e) A person who has forfeited his shares ceases to be a shareholder but may remain to be a member until his name is removed from register.

### **MODES OF BECOMING A MEMBER**

- 1) **By Allotment** Normally a person becomes a member of a Company by applying for shares and being allotted shares directly by the Company.
- 2) **By Subscription to the Memorandum.** The Act provides that the subscribers to memorandum of association shall be deemed to have agreed to become members of the Company and on its registration shall be entered as members in the register of members.  
In the case of subscribers to the memorandum of association neither allotment nor entry in the register of members is necessary to constitute membership.
- 3) **Agreement to Become a Member and Entry on the Register** In case of membership other than subscription to the memorandum of association two conditions must be satisfied.
  - ❖ agreement to become a member
  - ❖ entry on the register

Unless the two conditions are both satisfied the person in question does not acquire the status of membership. A person who is improperly registered without his consent is not bound there by and may have his name removed from the register.

- 4) **Agreement to Take Qualification Shares** Under section 183 of the Act, persons who have signed an undertaking to take and pay for any qualification shares for acting as directors of the Company are in same position as subscribers to memorandum and are deemed to become members immediately the Company is registered.
- 5) **By Transfer (Purchase of Shares)** a person gets registered as a member and shareholder if he buys shares from another person in the open market or if shares are transferred to him as a gift.
- 6) **Transmission** A person will become a member by transmission through the death, lunacy or insolvency of a member. It takes place by operation of law to a person entitled under the law to succeed to the shares of the deceased automatically and does not require an instrument of transfer. In this case the Company can only place the name of such a person in the register with his consent.
- 7) **By Estoppel** If a person's name is wrongly placed on the register and he knows and assents to it, after a Company meeting has taken place, he shall be deemed to be a member. In

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this case a person holds himself out as if he is a member in which case he will be stopped from denying the fact that he is a member.

### **Capacity to Become Members**

All persons who are competent to contract may in general become members of a Company. There are however some special considerations to the following:-

- i. **A Company as a Member of Another Company-** A Company may become a member of another Company if authorized by its memorandum or Articles. However a Company cannot become a member of its own holding Company
- ii. **A firm-** A partnership firm cannot become a member of the Company as it is not a legal person with a separate legal entity from that of the partners. Partners may only be registered as joint holders in which case each of them becomes a member. A Company however may be a partner of a firm.
- iii. **Minor / Infant** – A minor may become a member of a Company unless prohibited by the Articles. A minor has a right to repudiate any liability on partly paid shares either when he attains the majority age or within a reasonable time thereafter. However, if after attaining the majority age he receives a dividend and raises no objection to his name being included in the register he cannot deny that he is a member on the ground of estoppel.
- iv. **Bankrupt-**A bankrupt may be a member of a Company as long as his name is in the register of members.
- v. **Foreigner-** He can still be a member but in time of war where he becomes an enemy, his powers of voting and to receive notice will be suspended.

### **Cessation of Membership**

A person ceases to be a member of a Company when his name is removed from the register of members for any sufficient cause or reason. A person whose name is removed from the register without any justification remains being a member and retains all rights and liabilities in respect of the shares.

Such a person may apply for the rectification of the register. Generally a person ceases to be a member by:

- ❖ Act of parties
- ❖ Operation of law

### **ACT OF PARTIES**

- a) **If a member voluntarily transfers-** his shares to another and this is approved by the board of directors.
- b) **By forfeiture-**for non- payment of a call. If the articles provide that a member who does not pay the call money shall forfeit his shares then upon default such shares shall be forfeited and membership shall cease.

- c) **If the Company sells a members shares in execution of a court order**-or in exercise of the power of lien over the shares such person ceases to be a member once his name is removed from the register.
- d) **Rescission of the contract**-a person ceases to be a member if he rescinds (avoids) the contract to take the shares on the ground of misrepresentation in the prospectus or on the ground of irregular allotment. This does not apply to shares subscribed in the memorandum.
- e) **By a valid surrender of shares** – subject to the provisions of the articles
- f) **By redemption**- of preference shares
- g) **By conversion**- of share certificate into a share warrant

### **BY OPERATION OF LAW**

- a) **Insolvency**- the shares of an insolvent vest in the official receiver/trustee. When such person transfers his shares to another person the insolvent ceases to be a member upon the registration of the transferee as a member. The insolvent remains a member as long as his name is not removed from the register of members.
- b) **Death**- a deceased member ceases to be a member when his shares are registered in the name of his legal representatives
- c) **By Mortgage of Shares**- sometimes the condition of a mortgage loan may be that shares, may be transferred to a creditor (lender) and in such a case the lender shall be deemed to be a member of the Company and the borrower ceases to be a member
- d) **Upon winding up of the Company** all existing members cease to be members and become contributories.

### **REGISTER OF MEMBERS**

Every Company is required under section 112 to keep a register of its members. The register may be in one or more bound books or it may be kept in any other manner provided adequate precautions are taken against falsification and effects of forgery.

### **CONTENTS OF THE REGISTER**

- a) Name and address of each member
- b) Date on which each person was entered in the register as a member
- c) Date on which each person ceased to be a member
- d) In case of a Company having share capital, shares held by each member distinguishing each share by its number and the extent to which the shares have been paid up

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- e) Where the Company has converted some of its shares into stock, the register shall show the amount of stock held by each member concerned.

### **LOCATION OF THE REGISTER**

The register must be kept at the registered office of the Company. It may however be kept at any other place if the work of making it is done at another office of the Company or by another person e.g. advocate or a Company secretarial firm.

The Company must send a notice within 14 days to the registrar informing him of the place where register of members is kept and any change in that place.

### **Index of Members**

Section 113 requires that every Company having more than 50 members must keep an index of members alongside the register unless the register is kept in the form of an index. It may be kept in the form of a card in which case it must have sufficient indication to enable entries relating to that member in the register to be readily found. Any alteration in the register must be noted in the index within 14 days of such alteration.

### **Inspection of the Register**

The register and index of members must be open for inspection except when closed under the provisions of the Act. It shall be open for inspection to members for at least 2 hrs a day without charge and in case of any other person upon payment of a fee. The Company is also bound to supply a copy of the register to members upon payment of a nominal fee.

### **Closure of the Register**

Under section 117 a Company may after giving not less than 7 days notice by advertisement in a local daily close the register for a period not exceeding 30 days per year

Closure is necessary:

- ❖ In order to hold an Annual General Meeting
- ❖ To declare a dividend
- ❖ To make a call
- ❖ To pay a dividend

During the said period of closure no transfer of shares shall take place through the register

### **Rectification of the Register**

Register of members may be rectified if:

- ✓ The name of any person is without sufficient cause entered in or omitted from the register.
- ✓ A default in or unnecessary delay takes place in entering or removing from the register the fact of any person having ceased to be a member.

### **Branch Register**



A Company having a share capital may if authorized keep a branch register in any part of the commonwealth.

The Company shall give notice to the registrar concerning location of the branch register and register shall be deemed to be part of the Company register of members.

The register shall be kept in the same manner as the principal register and in the event of closure of the branch register notice shall be placed in that area.

### **Register and Notice of Trust**

Section 119 states that no notice of any trust express or implied shall be entered on the register of members e.g. if 'A' is acting as a trustee on behalf of 'B', the Company must not take any notice of the fact that 'A' is a trustee. In the register only the name of 'A' is to be entered and no mention that he is a trustee on behalf of 'B' and only 'A' will be put on the list of contributories during winding up.

### **Annual Return**

Section 125 states that every Company having a share capital must file an annual return with the register once every year "it consists of the information required to be given to the registrar at the end of the year. The return must be prepared and filed with the registrar within 42 days after the Annual General Meeting.

### **Contents of the Annual Return**

Particulars to be included in the return include

- i. Address of the registered office
- ii. The place where the register of members or debentures holders are kept if not at the registered office
- iii. Total amount of indebtedness in respect of all registrable charges
- iv. A summary distinguishing between shares issued for cash and shares issued for a consideration other than cash specifying:
  - Amount of share capital and the number of shares
  - Number of shares taken as at the date of the return
  - Total number of shares forfeited
  - Commission and discount in respect of shares and debentures
  - Shares represented by share warrants
- v) A List Containing the;
  - ✓ Names and addresses of those who were members 14 days after the annual general meeting and those who ceased to be members since the date of the last return
  - ✓ Number of shares held by each member stating the shares transferred since the date of the last return
  - ✓ Particulars of directors and secretaries

For Companies not having a share capital the return will include

- a) Address of the registered office

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- b) the place where the register of members and debenture holders are kept if not at the registered office
- c) Particulars of the total amount of indebtedness of the Company in respect of all registrable charges
- d) Particulars relating to directors and secretaries of the Companies

### **Documents to be annexed to the Annual Return**

- A copy of the balance sheet including a copy of the profit and loss account and every document required by law to be annexed to the balance sheet duly certified by directors and secretary of the Company.
- A copy of the auditors' report duly certified

### **SHARES**

Section 2 (1) of the Act, defines a share as “a share in the share capital of the company and includes stock except where there is a distinction between shares and stock.”

A share in a Company is one of the units into which the capital of the Company is divided. It is the interest of the shareholder in the Company measured by a sum of money for purpose of liability or to earn interest in the Company.

Stock is a bundle of fully paid shares put together for convenience and it may be divided into any amount or transferred in any fraction or denomination.

### **Distinction between Shares and Stock**

- 1) A Company can issue shares directly but it cannot issue stock directly as stock results from the conversion of shares.
- 2) Shares may be fully or partly paid but stock must be fully paid up
- 3) Shares are always of a fixed denomination whereas stock can be sold in any fraction or denomination.
- 4) A share has a distinct number with which it is distinguished from other shares whereas stock does not have a number and it is not required by law to have numbers.
- 5) A share can be issued by both PVC and PLC whereas stock can only be issued by Public limited Company.
- 6) A share entitles a share holder to a number of rights e.g. participation in meetings of the Company whereas stockholders do not have such rights.

### **Classes of Shares**

- a) **Preference Shares-** They carry preferential rights in relation to other classes of shares. The rights relate to dividend and right to receive proportionate parts of capital during winding up.

The rights on preference shares may be stated in the Articles of association. As regards their priority entitlement, the following features must be observed:

- i. The right to receive a dividend at a specified rate usually fixed by the terms of issue or the articles.
- ii. The right to receive dividends before any other class but not a right to compel the Company to pay dividends if it fails to do so.
- iii. The right to receive dividends is assumed to be cumulative unless otherwise stated.
- iv. If a Company which has arrears of unpaid dividends goes into liquidation, a preference shareholder ceases to be entitled to the arrears of the dividends unless the dividend had been declared and not paid or the articles provide for payment for such arrears.
- v. Holders of preference shares are not entitled to participate in any surplus dividend over and above the specified rates.

#### **b) Redeemable Preference Shares**

Section 60 provides that a Company may issue preference shares which are liable to be redeemed. This is only possible under the following conditions:

- i. The Company must have shares which are not redeemable e.g. Ordinary shares
- ii. Issue of redeemable preference shares must be authorized by the articles
- iii. The shares must be fully paid at the time of redemption
- iv. Money required for redemption must be from either the proceeds from a fresh issue of shares made for that purpose or out of accumulated profit
- v. Any premium on redemption must be provided out of profits available for distribution or out of the share premium account.
- vi. Redemption of preference shares should not be taken as a reduction of the Company's authorized share capital.
- vii. Within one month of redemption notice of the number of shares redeemed must be given to the registrar.

#### **c) Ordinary Shares**

They are also referred to as equity capital. The holders of ordinary shares usually carry the main risk of business as they invest their money without assurance that they will be paid interest on their investment. Holders receive dividends out of profit as determined by directors and declared by members in the Annual General Meeting.

Ordinary shareholders are entitled to the following rights which are not available in respect of other shares:

- i. After providing for any other dividend which is payable on preference shares, the whole of the remaining profits can be available to them by way of dividend if they so wish.
- ii. They are entitled to control the company by use of voting rights at the Annual General Meeting.

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- iii. During winding up ordinary shareholders are entitled to the entire residue after payment of the company's liability.
- iv. They receive dividend at variable rates based on the discretion of directors and availability of profits.

#### **D) Deferred (Founders) Shares.**

They are usually issued to the founders or promoters as a reward for their services. They are entitled to dividends only after other classes of shares

Although their rights depend on the articles, these shares normally take a larger share of surplus assets during winding up than ordinary shares and they also carry greater voting rights.

#### **E) Bonus (Scrip) Shares**

These result from payment of dividends in terms of shares instead of cash. It results in capitalizations of profits which then proportionately increases the shares held by each shareholder.

#### **F) Employee Shares**

A company may have shares issued to employees to encourage them to have a direct interest in the company. This is done through an employee shares scheme managed and administered by a trustee for the benefit of deserving employees and those that have rendered exemplary service to the company. Usually employees make no payment for these shares and the shares have no voting rights at company's Annual General Meeting. They serve as a retirement benefit for employees as they will be able to enjoy dividends and other benefits.

#### **Factors to be taken in account in establishing ESS**

The first step in choosing an ESS is to decide objective for introducing such a scheme. It is important to choose a scheme that will help an organization to achieve its objectives.

Employees can be given shares that are to be held in attractive receive share options or purchase shares on attractive terms

The following need to be taken into account:

- (i) How much to spend on the plan i.e. the cost of establishing a \*\*\*
- (ii) Details of the plan i.e. employee eligibility. ESS in most cases is meant for employees who are at a lower grade.
- (iii) What is to happen if the scheme needs to be wound up
- (iv) Regulatory requirements i.e. rules and regulations governing the trust
- (v) Explain to the employees share ownership scheme needs and benefits to the staff and also they need to be aware of the risks associated with scheme
- (vi) Distribution of shares must abide by certain rules, company constitution (account and relevant legislation e.g. Companies Act and Capital Market Authority rules and regulations.

#### **Disadvantages of ESS**

- (i) The effect on morale and retention reduces if the share price falls.
- (ii) Administration costs – short term cost of drawing up and getting scheme apparent and long term cost managing scheme and keeping records shares are to be issued.
  - Not less than 1 year as at the date of issue elapsed since the date on which the company is entitled to commence business.
  - Shares must be issued within one month of the sanction by the company or within such extended time as the courts may allow.

Dilution of share ownership – as more shares are issued, each share an employee owns become smaller in percentage with regard to payment of dividend and the market value.

Risk of arousing unrealistic expectations among employees of the financial rewards.

If employees eventually wish to sell their shares in unlisted capital company may need to run an internal market for the shares perhaps setting up an employee benefit trust.

## **SHARE CERTIFICATE**

Every person whose name is entered in the register of members has a right to receive a share certificate in respect of those shares he owns in the Company. Thus every Company must issue a share certificate within 60 days of allotment or lodgment of transfer. In case of default then every director, secretary or any officer who is party to the default is liable to a fine of Kshs100 every day the default continues

### **Contents of Share Certificate**

- ❖ Name and address of shareholder
- ❖ Name and address of the Company
- ❖ Number of shares held and extent to which they have been paid up
- ❖ Common seal of the Company affixed to it
- ❖ Signature of one or more directors

### **Legal Effects of a Share Certificate**

A share certificate under seal of Company is prima facie evidence of the title of the member to the shares specified there in.

The issue of a share certificate makes the Company liable in two ways:

#### **a) Estoppel as to Title**

If a Company authorizes the issue of a share certificate stating that the person named there in is the registered holder of certain shares it cannot afterwards allege that the person is not entitled to those shares

<sup>N/B</sup> A Company is not liable / bound by a certificate issued without the authority of the Board of Directors or where the certificate was a forgery

#### **b) Estoppel as to Payment**

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If the share certificate states that the shares are fully paid, the Company is estopped as against a bona fide purchaser from alleging that the amount stated in the share certificate as having been paid has not been paid

### **Transfer of Shares**

- ✓ The shares or other interests of a member in the Company are movable assets and are transferable in the manner prescribed under the Act and the Articles
- ✓ The articles of a public limited Company may and those of a PVC must restrict the right of transfer. Thus a member cannot be prohibited from transferring his shares as this is a statutory right which cannot be taken away by the articles
- ✓ The directors may however decline to register the transfer of shares to a person of whom they shall not approve or shares on which the Company has a lien.

### **Contract of Transfer**

This is a contract by which a shareholder undertakes to transfer his shares or a contract in which the transferor agrees to sell while the transferee agrees to buy the shares. The following terms are implied in a contract of transfer:

- a) The transferee will pay the price and that the transferor will hand over to him genuine instruments of transfer and the share certificate
- b) The transferor will do nothing to prevent or delay the transferee from having the transfer registered
- c) That the transferee will indemnify the transferor from any loss or liability which may arise in respect of the shares
- d) That the share certificate carries the rights and interests which it purports to convey.

Once the contract has been entered into the transferee has an equitable title to the shares and the transferee holds them until registration as a trustee for the transferee

### **Procedure of Transfer of Shares**

1. When a share warrant to bearer is issued in respect of fully paid shares the ownership is transferred by mere delivery without any instrument of transfer
2. Where a person wishes to transfer all his shares (other than a share warrant) this is effected by a written instrument of transfer executed by the transferor and transferee duly stamped specifying the name address and occupation of the transferee
  - ✓ The instrument must then be delivered to the Company for registration together with the share certificate, in which case the directors have to register the transferee as the owner of the shares and enter the name of the transferee in the register in place of that the transferor
3. When a shareholder sells only part of the shares named in the share certificate he does not deliver the share certificate to the buyer but the selling broker produces it along with the transfer instrument to an officer of the Company who certifies the transfer by writing in its margin the words “certificate lodged” and mentions the number of shares for which the

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