Strathmore UNIVERSITY

SU+ @ Strathmore University Library

Electronic Theses and Dissertations

2021

The Promise and reality: winning ways for retail companies in Kenya through corporate governance.

Kitonga Noel Mwende
Strathmore Law School
Strathmore University

Recommended Citation

Kitonga, N. M. (2021). *The Promise and reality: Winning ways for retail companies in Kenya through corporate governance* [Thesis, Strathmore University]. http://hdl.handle.net/11071/12501

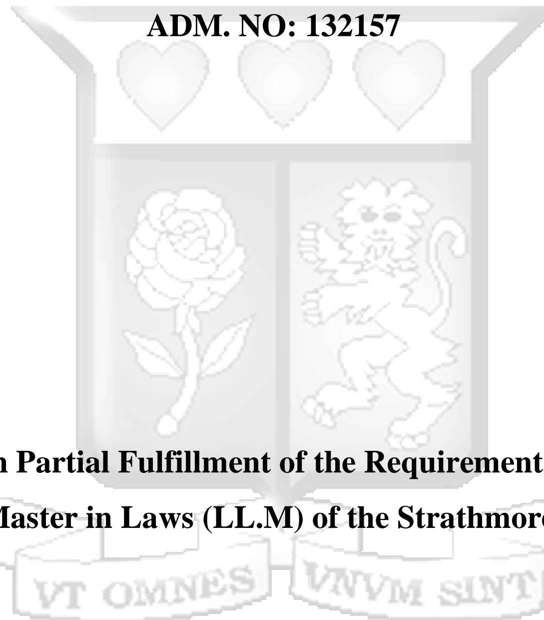
Follow this and additional works at: http://hdl.handle.net/11071/12501

This work is availed for free and open access by Strathmore University Library.
It has been accepted for digital distribution by an authorized administrator of SU+ @Strathmore University.
For more information, please contact library@strathmore.edu

THE PROMISE AND REALITY: WINNING WAYS FOR RETAIL COMPANIES IN KENYA THROUGH CORPORATE GOVERNANCE

NOEL MWENDE KITONGA

ADM. NO: 132157



A Thesis Submitted in Partial Fulfillment of the Requirements for the Award of the Degree of Master in Laws (LL.M) of the Strathmore University

Strathmore Law School

Strathmore University

Nairobi, Kenya

June, 2021

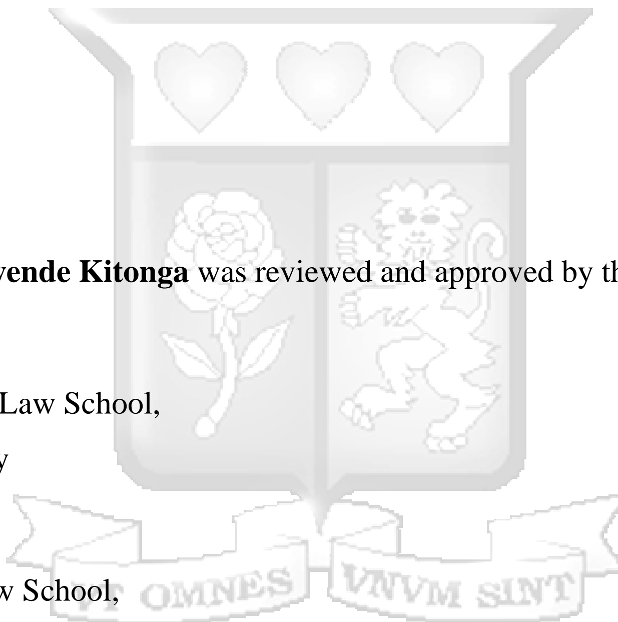
DECLARATION

I, **NOEL MWENDE KITONGA**, do hereby declare that this thesis titled 'The promise and reality: Winning ways for retail companies in Kenya through corporate governance' is my original work and it has not been previously submitted to any other institution for any qualification. To the best of my knowledge and belief, this thesis contains no material previously published or written by other authors except for where due reference is made.

....

Noel Mwende Kitonga **Date**

132157



Approval

The thesis of **Noel Mwende Kitonga** was reviewed and approved by the following: -

Dr Erick Komolo,
Lecturer, Strathmore Law School,
Strathmore University

Dr Peter Kwenjera,
Dean, Strathmore Law School,
Strathmore University

Dr Bernard Shibwabo,
Director, Office of Graduate Studies,
Strathmore University

DEDICATION

"The winds that sometimes take something we love, are the same that bring us something we learn to love. Therefore, we should not cry about something that was taken from us, but, yes, love what we have been given. Because what is really ours is never gone forever."

— Bob Nesta Marley —

I dedicate this work to Strathmore Law School and most importantly my supportive mother Christine Kitonga and my late father Philip Kitonga for instilling in me the value of education, supporting my academic ambitions and walking this academic journey with me.

ACKNOWLEDGEMENTS

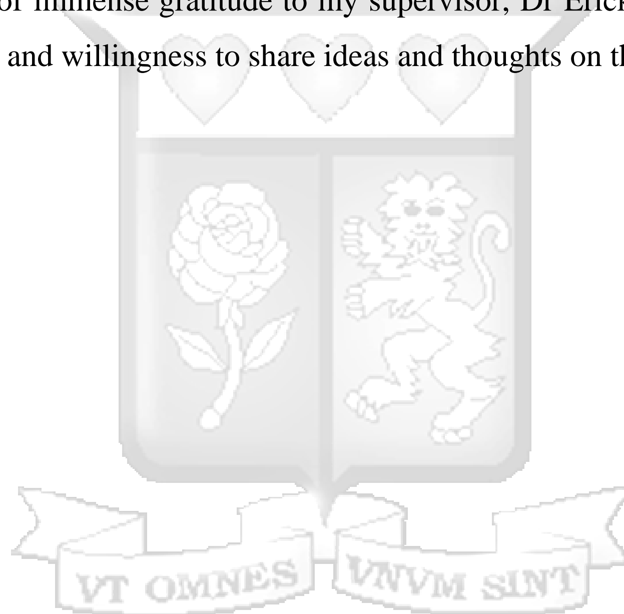
I am most grateful to the Almighty God for granting me the resilience, good health and wisdom to make it this far.

My sincere gratitude goes to Strathmore Law School for enabling me actualize this means to my end.

I would like to express my heartfelt appreciation to my family for their support, love and encouragement when I needed it most.

To my partner, I am grateful for offering me moral support when I felt like giving up and being a diligent reader.

Finally, I owe a debt of immense gratitude to my supervisor, Dr Erick Komolo PhD, for his patience, commitment and willingness to share ideas and thoughts on the topic.



ABSTRACT

Kenya's retail sector stands at the second-largest in Africa with 30 per cent formal retail penetration following South Africa's 60 per cent. As at 2013, the retail sector growth rate was at 8.4 per cent, the highest growth rate ever recorded in Kenya. However, the high growth rate was short-lived as from 2013 to 2017 there was a consistent decrease. Notably, there is a slight increase over the years since 2017, with a 3.9 per cent growth rate recorded in 2019. The retail sector is the 5th largest contributor to Kenya's gross domestic product with a contribution of about 5.7 per cent as at 2017. With the strong growth rate and major contribution to the GDP, there is no doubt as to why the retail sector is a major area of focus for the Kenya's Vision 2030 strategy. Unfortunately, a dark cloud of company collapses threatens the retail sector.

In corporate governance lies the key to keep corporate failure at bay. This is the promise companies in Kenya have been offered by the extant regulatory framework. However, the reality is a wave of retail company collapses has plagued the Kenyan retail sector. By conceptualizing, problematizing and theorizing retail companies' practices, the study was able to answer the research questions whether the legal and regulatory compliance framework on corporate governance for retail companies in Kenya is adequate, what is the government's role in corporate governance and does it influence the collapse of retail companies, what ties bind retail company collapses to regulatory compliance issues as a challenge facing the implementation and practice of corporate governance as drawn from the case studies, and whether there is need for review on corporate governance regulatory compliance by retail companies in Kenya.

The study was able to establish that the massive retail company collapses were due to mismanagement exacerbated by the regulatory compliance conundrum facing retail companies. Looking into Uchumi supermarket Plc, Ebrahim supermarket, Ukwala supermarket, Nakumatt Holdings Ltd and Tuskys supermarket there is need for retail companies to establish a proper governance structure as theorized by the stewardship and stakeholder theories, and adherence to the corporate governance principles. The findings of the study have informed the recommendations made herein that call for corporate governance regulatory compliance reforms.

VT OMNES VNVM SINT

TABLE OF CONTENTS

DECLARATION ... ii

DEDICATION ... iii

ACKNOWLEDGEMENTS ... iv

ABSTRACT ... v

TABLE OF CONTENTS ... vi

LIST OF CASES ... x

LIST OF STATUTES ... xi

Kenya ... xi

Regional Legal Framework ... xi

International Legal Framework ... xi

LIST OF ABBREVIATIONS ... xii

CHAPTER ONE: INTRODUCTION ... 1

1.1 BACKGROUND OF THE STUDY ... 1

1.2 STATEMENT OF THE PROBLEM ... 3

1.3 RESEARCH OBJECTIVES ... 3

1.4 RESEARCH QUESTIONS ... 4

1.5 JUSTIFICATION OF THE STUDY ... 4

1.6 HYPOTHESIS ... 5

1.7 THEORETICAL FRAMEWORK ... 5

1.7.1 Stewardship Theory ... 5

1.7.2 Stakeholder Theory ... 6

1.7.3 Relevance of the Theories ... 7

1.8 LITERATURE REVIEW ... 8

1.8.1 Principles of Corporate Governance ... 8

1.8.2 History and Theories of Corporate Governance ... 8

1.8.3 Corporate Governance and Public Sector Companies ... 9

1.8.4 Corporate Governance and Board of Directors ... 11

1.8.5 Corporate Governance and Family-owned Companies ... 12

1.8.6 Corporate Governance and Compliance ... 14

1.8.7 Knowledge Gap ... 16

1.9 RESEARCH METHODOLOGY ... 16

1.10 LIMITATIONS ... 17

UT OMNES VNVM SINT

1.11 CHAPTER BREAKDOWN 17
CHAPTER TWO: KENYA'S CORPORATE GOVERNANCE HISTORY AND LEGAL FRAMEWORK 19
2.1 INTRODUCTION 19
2.2 WHAT IS CORPORATE GOVERNANCE? 19
2.3 HISTORICAL BACKGROUND OF CORPORATE GOVERNANCE IN KENYA 20
2.3.1 Postcolonial Period (1964-1999) 20
2.3.2 Postcolonial Period (1999-2002) 21
2.3.3 Postcolonial Period (2002-2020) 22
2.4 CORPORATE GOVERNANCE LEGAL FRAMEWORK IN KENYA 22
2.4.1 Domestic Legal Framework 22
2.4.2 Regional Legal Framework 29
2.4.3 International Legal Framework 30
2.5 CONCLUSION 30
CHAPTER THREE: CASE STUDY ON WHY RETAIL COMPANIES IN KENYA ARE COLLAPSING 32
3.1 INTRODUCTION 32
3.2 UCHUMI SUPERMARKET PLC 32
3.2.1 Background 32
3.2.2 Factors Leading to the Collapse 33
3.3 UKWALA SUPERMARKET 36
3.3.1 Background 36
3.3.2 Factors Leading to the Collapse 37
3.4 EBRAHIM SUPERMARKET 38
3.4.1 Background 38
3.4.2 Factors Leading to the Collapse 38
3.5 NAKUMATT HOLDINGS LTD 39
3.5.1 Background 39
3.5.2 Factors Leading to the Collapse 40
3.6 TUSKYS SUPERMARKET 41
3.6.1 Background 41
3.6.2 Factors Leading to the Collapse 43
3.7 CONCLUSION 44

CHAPTER FOUR: TIES THAT BIND THE FACTORS LEADING TO RETAIL COMPANY COLLAPSES TO CORPORATE GOVERNANCE REGULATORY COMPLIANCE ISSUES 46

4.1 INTRODUCTION 46

4.2 THEORIES OF CORPORATE GOVERNANCE ON GOVERANCE STRUCTURE 46

4.2.1 Governance Structure 47

4.2.2 Board's Management and Oversight 47

4.3 PRINCIPLES OF CORPORATE GOVERNANCE 48

4.3.1 Accountability and Fairness 49

4.3.2 Transparency and Disclosure 51

4.4 REGULATORY COMPLIANCE BY THE COLLAPSED COMPANIES IN KENYA'S RETAIL SECTOR 54

4.5 CONCLUSION 55

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS 57

5.1 KEY FINDINGS 57

5.1.1 Key Finding I: Kenya's Corporate Governance Regulatory Framework and its Effectiveness 57

5.1.2 Key Finding II: Common Factors leading to Retail Companies Collapsing in Kenya 58

5.1.3 Key Finding III: Ties that Bind Retail Company Collapses in Kenya to Corporate Governance Regulatory Compliance Issues 59

5.2 CONCLUSION 59

5.3 RECOMMENDATIONS 60

5.3.1 Self-care Recommendations 60

5.3.2 Surveillance and Monitoring Regulatory Compliance Recommendations 61

5.3.3 Legislative Amendments to Harmonise Regulatory Compliance Recommendations 61

BIBLIOGRAPHY 63

Books 63

Chapter in Books 63

Journal Articles 63

Working Papers, Discussion Papers and Research Papers 65

Conference Papers 65

Self-published Articles 66

Newspapers 66

Reports 68

Institutional Authors 69

Dissertations and Theses 69

Magazine Article ... 69
Internet Resources ... 69
Dictionaries ... 70
APPENDICES ... 71
Appendix A – Ethical Clearance Report ... 71
Appendix B – Plagiarism Report ... 72

LIST OF CASES

1. *Aziz Ebrahim v Ramzan Ebrahim* (2020) eKLR.
2. *In re Uchumi Supermarkets PLC* (2020) eKLR.
3. *In re Ukwala Supermarket Limited* (2019) eKLR.
4. *In re Ukwala Supermarket (Eldoret) Limited* (2020) eKLR.
5. *Primrose Management Limited & 3 Others v Nakumatt Holdings & Another* (2018) eKLR.
6. *Republic v Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others* (2013) eKLR.

LIST OF STATUTES

Kenya

1. *Capital Markets Act* (CAP. 485A)
2. *Capital Markets (Demutualization of the Nairobi Securities Exchange Limited) Regulations* (L.N. 87 of 2012)
3. *Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations* (L.N. 36 of 2016)
4. *Companies Act* (Act No.17 of 2015)
5. *Companies Act* (CAP 486)
6. *Companies (General) (Amendment) Regulations* (L.N. 19 of 2017)
7. *Constitution of Kenya* (2010)
8. *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Gazette Notice No. 3362 of 2002)
9. *MWONGOZO: The Code of Governance for State Corporations* (Public Service Commission and State Corporations Advisory Committee 2015)
10. *Nairobi Securities Exchange (Market Participants) Rules* (2014)
11. Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance (2002)
12. *Prompt Payment Bill* (2020)
13. *Retail Trade Code of Practice to guide Prompt Payment in the Retail Sector* (2019)
14. *The Code of Corporate Governance Practices for Issuers of Securities to the Public* (Gazette Notice No. 1420 of 2015)

Regional Legal Framework

1. *CACG guidelines: Principles for corporate governance in the Commonwealth* (1999).

International Legal Framework

1. *Cadbury Report* (1992)
2. *G20/OECD principles of corporate governance* (2015)
3. *IAS 16 Property, Plant and Equipment* (2003)
4. *OECD Risk Management and Corporate Governance* (2014)
5. *Sarbanes-Oxley Act* (United States)

LIST OF ABBREVIATIONS

CACG	-	Commonwealth Association for Corporate Governance
CEO	-	Chief Executive Officer
CFO	-	Chief Financial Officer
CMA	-	Capital Markets Authority
GDP	-	Gross Domestic Product
IFC	-	International Finance Corporation
KCB	-	Kenya Commercial Bank
KIPPRA	-	Kenya Institute for Public Policy Research and Analysis
Ltd	-	Limited
NSE	-	Nairobi Securities Exchange
OECD	-	Organisation for Economic Co-operation and Development
Plc	-	Public limited company
PSCGT	-	Private Sector Corporate Governance Trust
PTA	-	Preferential Trade Area for Eastern and Southern Africa bank
UBA	-	United Bank for Africa

VT OMNES VNVM SINT

CHAPTER ONE: INTRODUCTION

1.1 BACKGROUND OF THE STUDY

Following Kenya's liberalization from her colonial shackles in 1963, the retail sector started to grow locally as foreign-owned businesses began to decline and a demand to replace them locally arose. The demand saw the establishment of the Nairobi-headquartered chain Chandarana in 1964 followed by Ebrahim supermarket in 1970 and Uchumi supermarket plc in 1975. The three, dominated the industry and over the years welcomed local rivals such as Ukwala supermarket, Nakumatt holdings ltd, Tuskys supermarket and Naivas supermarket until 2018 when international rivals like South Africa's Massmart Holdings' merchandise brand Game, Botswana's Choppies, France's Carrefour and South Africa's Shoprite entered the sector. These supermarkets are characterized as the retail giants in Kenya.[1] The retail sector is also characterized with small retail companies like Mulleys, GreenMart, QuickMart, Maathai, EastMatt and Cleanshelf supermarkets just to mention a few.[2]

Kenya's retail sector stands at the second-largest in Africa with 30 per cent formal retail penetration following South Africa's 60 per cent.[3] As at 2013, the retail sector growth rate was at 8.4 per cent, the highest growth rate ever recorded in Kenya.[4] However, the high growth rate was short-lived as from 2013 to 2017 there was a consistent decrease. Notably, there is a slight increase over the years since 2017, with a 3.9 per cent growth rate recorded in 2019. The retail sector is the 5th largest contributor to Kenya's Gross Domestic Product (GDP) with a contribution of about 5.7 per cent as at 2017.[5] With the strong growth rate and major contribution to the GDP, there is no doubt as to why the retail sector is a major area of focus for the Kenya's Vision 2030 strategy.[6]

---

[1] Oxford Business Group, *The Report: Kenya 2018,* 2018, chapter Industry and Retail — <https://oxfordbusinessgroup.com/overview/new-and-improved-optimism-grows-retailers-adapt-challenges> on 11 December 2020.

[2] 'Kenya ranked Africa's second biggest market for retail investors' Business Daily, 3 March 2015 — <https://www.businessdailyafrica.com/bd/corporate/companies/kenya-ranked-africa-s-second-biggest-market-for-retail-investors--2081402> on 11 December 2020.

[3] Nielsen, *Africa: How to navigate the retail distribution labyrinth*, 2015 — <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/africa-report-navigating-the-retail-dist-labyrinth-feb-2015.pdf> on 12 September 2020.

[4] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.

[5] Kenya National Bureau of Statistics, *Quarterly Gross Domestic Product Report*, 2017— <https://www.knbs.or.ke/?wpdmpro=quarterly-gross-domestic-product-report-third-quarter-2017> on 15 December 2020.

[6] *Kenya vision 2030: A globally competitive and prosperous Kenya*, 2007, chapter Economic Pillar— <https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf> on 11 August 2020.

The data provided in the Kenya Institute for Public Policy Research and Analysis (KIPPRA) survey[7] shows that there is need for immediate intervention. The decrease in growth rate has been attributed to a significant player in the retail sector, the supermarkets. The recent collapse of retail giants like Uchumi supermarket plc followed by Nakumatt holdings ltd, Ukwala supermarket, Ebrahim supermarket[8] and recently by Tuskys supermarket[9] is of concern. The collapses have been attributed to gross mismanagement by directors, abuse of power,[10] poor financial decisions, tax compliance issues and massive losses.[11] Evidently, these collapse factors can be summed up to one significant factor, that is poor corporate governance practices.

Corporate governance is a scheme that entails the measures that dictated how a company is directed and controlled.[12] The Organisation for Economic Co-operation and Development (OECD) argues that corporate governance is a system by which business corporations are directed and controlled. This is made possible by providing a strategic plan where the company's goals and objectives are set, providing a means of attaining those goals and objectives, and performance monitoring and evaluation.[13] These definitions on corporate governance diverge on the notion that a set of systems, processes and principles which ensure that a company is governed in the best interest of all stakeholders does amount to corporate governance; most importantly is corporate governance's concern with how power is exercised in decision making. The key elements that arise from the various definitions of corporate governance are accountability, fairness and, most importantly, transparency.

These key elements have been adopted in the Kenyan corporate atmosphere by enacting them in various legal frameworks such as the Constitution of Kenya 2010[14], Capital Markets Act[15]

[7] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.
[8] White L and Rees L, 'Retail: How the mighty have fallen in Kenya' Daily Maverick, 21 February 2019 — <https://www.dailymaverick.co.za/article/2019-02-21-retail-how-the-mighty-have-fallen-in-kenya/> on 25 April 2020.
[9] Kiruga M, 'Kenya's Tuskys on government watchlist after failing to pay suppliers' [2020] *The Africa Report.com* — <http://www.theafricareport.com/30456/kenyas-tuskys-on-government-watchlist-after-failing-to-pay-suppliers/> on 19 July 2020.
[10] Kahongeh J, 'The paradox of retail business in Kenya' Daily Nation, 21 December 2019 — <http://www.nation.africa/kenya/business/the-paradox-of-retail-business-in-kenya-234638> on 26 April 2020.
[11] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.
[12] Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the financial aspects of corporate governance,* 1992.
[13] OECD, *G20/OECD Principles of corporate governance,* OECD Publishing, Paris, 2015, 46.
[14] *Constitution of Kenya* (2010).
[15] *Capital Markets Act* (CAP. 485A).

and the *Mwongozo: The Code of Governance for State Corporations*[16] just to mention a few. An in-depth discussion on these frameworks and what amounts to good corporate governance practices shall follow in the study.

1.2 STATEMENT OF THE PROBLEM

In the recent years, Kenya has held several trainings and awareness campaigns on good corporate governance practices and enacted various corporate governance legal frameworks, with the aim of having all corporations win by embracing good corporate governance. The government's emphasis and influence on implementation of corporate governance has been marred by an emerging trend of company collapses in the retail sector.

The trend witnessed has been attributed to questionable corporate governance policies and unethical practices. Evidently, a query arises on whether the legal framework on best corporate governance practices in the Kenya, is enabling all companies to prosper as promised. This study will aim to establish whether the legal and regulatory compliance of the corporate governance framework in place, are the reasons as to why retail companies in Kenya are collapsing.

1.3 RESEARCH OBJECTIVES

The broad objective of the study will be to explore why retail companies in the Kenya are collapsing in spite of the recent emphasis by the government on best corporate governance practices through various legal frameworks, policies, rules and guidelines.

Specifically, the study will seek:

1. To assess the adequacy of Kenya's legal and regulatory compliance framework on corporate governance for retail companies.
2. To assess how the government's role in corporate governance is influencing the collapse of retail companies.
3. To utilize selected case studies to analyse the ties that bind retail company collapses to regulatory compliance issues as a challenge facing the implementation and practice of corporate governance.
4. To assess the need for review of corporate governance regulatory compliance in Kenya by retail companies.

[16] *MWONGOZO: The Code of Governance for State Corporations* (Public Service Commission and State Corporations Advisory Committee 2015).

1.4 RESEARCH QUESTIONS

The following questions will be answered in the study: -

1. What is the legal and regulatory compliance framework on corporate governance for retail companies in Kenya and is it adequate?
2. What is the government's role in corporate governance and does it in any way influence the collapse of retail companies?
3. What ties bind retail company collapses to regulatory compliance issues as a challenge facing the implementation and practice of corporate governance, as drawn from the case studies?
4. Is there need for review of corporate governance regulatory compliance by retail companies in Kenya?

1.5 JUSTIFICATION OF THE STUDY

As explained in the background, sixty per cent of companies in Kenya are companies in the retail sector; family-owned companies forming the bulk of retail companies. Unfortunately, researchers have confined their studies on the impact of corporate governance on state-owned companies, financial institutions and listed companies; blatantly disregarding retail companies. In addition, Kenya's economic environment has seen an increase of retail companies collapsing, some on the verge of collapse, and others being subjected to receivership. The retail company collapse surge has been attributed to questionable corporate governance policies and unethical practices. Therefore, the need to explore the impact of corporate governance on retail companies and the retail company collapse surge, necessitates this study.

This study will identify the legal and regulatory compliance gaps and examine why retail companies are collapsing. There is need to assess whether the rising number of collapsing retail companies could be as a result of regulatory compliance issues as a challenge facing the implementation and practice of the extant corporate governance regulatory framework by retail companies. The potential findings will clarify the regulatory gaps and empower the legislature to pass informed laws on corporate governance regulatory compliance for retail companies. The implication of the study will be that the case for corporate governance regulatory compliance by retail companies will have been established or disproved; hence creating an informed basis for future researchers.

1.6 HYPOTHESIS

This study hypothesizes that due to the legal and regulatory compliance inadequacies of the extant corporate governance framework, retail companies are collapsing as a result of the regulatory compliance issues as a challenge facing the implementation and practice of corporate governance, and the government's role in corporate governance.

1.7 THEORETICAL FRAMEWORK

Given the complexity of the human mind, various schools of thought have come up with theories to expound on the nature of corporate governance. They are, but not limited to, agency, stakeholder, stewardship, transaction cost, shareholder primary, resource dependence, class hegemony and managerial hegemony theories. It is futile to set out to examine only one or all the aforementioned theories in a bid to best describe corporate governance.[17] Nevertheless, a combination of various theories is highly accepted. Therefore, for the purposes of this study, a combination of two theories -namely stewardship theory and stakeholder theory - are going to be used to theorize corporate governance. Indubitably, the two highlighted theories are paramount in understanding the concept of corporate governance, as they are the baseline for the other theories.

1.7.1 Stewardship Theory

Stewardship theory is defined as "a steward protects and maximizes shareholders wealth through firm performance, because by so doing, the steward's utility functions are maximized."[18] In theory, the relationship entails the shareholders empowering trust upon the directors or managers – who are the stewards- and in return the stewards protect and maximize the shareholders' wealth. The assumption is that the stewards are motivated and fulfilled upon the company's success, therefore, reinforcing the notion that the performance of a company directly reflects on the stewards' performance.[19]

To cut costs arising from employing a chief executive officer (CEO) this theory advocates for the chairman of directors to hold the position of CEO so as to establish clear leadership.[20] The

[17] Abdullah H and Valentine B, 'Fundamental and Ethics Theories of Corporate Governance' (4) *Middle Eastern Finance and Economics*, 2009, 88.
[18] Davis J, Schoorman F and Donaldson L, 'Toward a stewardship theory of management' 22 (1) *The Academy of Management Review*, 1997, 20.
[19] Daily C, Dalton D and Cannella A, 'Corporate governance: Decades of dialogue and data' 28 (3) *The Academy of Management Review*, 2003, 371.
[20] Gakeri J, 'Enhancing Kenya's securities markets through corporate governance' 3 (6) *International Journal of Humanities and Social Science*, 2013, 94-117

rationale behind the advocacy is, directors as stewards share common goals with the shareholders.

Stewardship theory has been largely adopted by companies that use the Japanese model in incorporating corporate governance.[21] Companies under this model demand for the promotion of honour and dignity. As a result, the theory has faced its fair share of criticism. Directors are expected to act as selfless stewards; in the event the company is disgraced it is not uncommon to hear reports of voluntary resignation or suicide by the directors due to the cultural influence. Secondly, the directors are bound to make decisions that may conflict and endanger the interest of the shareholders due to the psychology of human nature that dictates that an individual stand is bound to change dependent of the extant environment and his interaction -either competitive or collaborative- with others.[22] The third critique is on the assumption to be a steward or agent is as a result of a rational process.[23] This assumption has baffled many schools of thought, as scholars, bearing in mind the intricacy of the psychology of human nature, find it hard to comprehend that an individual can rationally decide that it is in his nature to be a steward. The stewardship theory runs counter to the rational choice theory, where individuals are presumed to act only in ways that maximise their personal interests. Therefore, the assumption has been critiqued to work where the company's interests happen to coincide with the personal interests of the CEO.

1.7.2 Stakeholder Theory

Stakeholder theory, gradually developed by Freeman over the years since 1984 (2010)[24], incorporates the management's liability to a broad range of stakeholders. The theory argues a company is an interrelationship of stakeholders who influence it both internally and externally.[25] The theory assumes that shareholders are not the only group of individuals who have interests in the company. Rodriguez et al (2002)[26] adopted a stakeholder classification;

---

[21] Ungureanu M, 'Models and practices of corporate governance worldwide' Centre for European Studies, CES Working Paper Series 4 Paper Number 3(a), 2012, 625- 635— <http://ceswp.uaic.ro/articles/CESWP2012_IV3a_UNG.pdf> on 9 July 2020.

[22] Wearing A, 'Economic growth: Magnificent obsession' 45th Australian and New Zealand Association for the Advancement of Science Congress, Perth, August 1973.

[23] Pastoriza D and Ariño M, 'When agents become stewards: Introducing learning in the stewardship theory' Humanizing the Firm & Management Profession organised by the IESE Business School, Barcelona, 30 June - 2 July 2008.

[24] Freeman R, *Strategic Management: A Stakeholder Approach,* Cambridge University Press, Cambridge, 2010.

[25] Larson S, 'Stewardship theory, stakeholder theory and convergence' Wordpress, 2013 — <https://stephenlarsonessays.files.wordpress.com/2014/04/stewardship-theory-stakeholder-theory-and-convergence.pdf> on 2 July 2020.

[26] Rodriguez M, Ricart J and Sanchez P, 'Sustainable development and sustainability of competitive advantage: A dynamic and sustainable view of the firm' 11 (3) *Creativity and Innovation Management*, 2002, 135- 146.

namely consubstantial, contractual and contextual stakeholders. The consubstantial stakeholders are involved with the existence of the company; they are mainly the shareholders, investors and employees. The contractual stakeholders have a contractual relationship with the company; they mainly are suppliers, customers and financial institutions. Lastly, contextual stakeholders are the spokespersons of the social-economic environment the company operates in; they are the local communities, government, trade associations and political groups.

When it comes to the board of directors, the theory is interested more in its decision making. The theory in a bid to level the playing field for all stakeholders, rationalizes that all stakeholder interests have an intrinsic value[27] when making a decision. Evidently, directors as trustees, are obliged to balance the interests of all stakeholders in a socially responsible manner.[28][29] Ideally, the theory aims to achieve a company's goals and visions by merging ethics and economics together.

As seen above, stakeholders play a key role. However, that does not guarantee success. This theory has its fair share of criticisms due to its main gospel. The first critique revolves around the stakeholders' key role. Ironically, despite the stakeholders' contribution to the company's success as compared to shareholders, they are ignored as their influence on the company is minimal as they have no voting rights. Secondly, it is impossible to make decisions especially whilst taking into consideration everybody's interests. Ideally, this theory will best apply for small family-owned companies.

1.7.3 Relevance of the Theories

The two theories, as discussed herein above, play a key role in this study as they establish the fiduciary duties of the directors or managers, the key players to the success of a company and they all resonate with the current trends in corporate governance in Kenya especially by retail companies. Majority of the retail companies in Kenya are family-owned hence the stakeholder theory is applicable when it comes to corporate governance. As earlier alluded to, a blend of two or more theories is suitable for corporate governance to prosper. Therefore, I propose to apply the stakeholder theory and the servant-leadership advocated for in the stewardship theory as this is an apt blend for retail companies in Kenya.

[27] Donaldson T and Preston L, 'The stakeholder theory of the corporation: Concepts, evidence and implications' 20 (1) *The Academy of Management Review*, 1995, 65 - 91.
[28] Freeman R, 'A stakeholder theory of modern corporations' 3 *Perspectives in Business Ethics Sie*, 2001.
[29] Freeman R, 'A stakeholder theory of modern corporations' in Beauchamp T, Bowie N (eds) *Ethical Theory and Business,* 7th ed, Prentice Hall, Upper Saddle River, 2003, 56-65.

1.8 LITERATURE REVIEW

1.8.1 Principles of Corporate Governance

The principles, as per the understanding of the concept of corporate governance discussed earlier on, are fairness, accountability, disclosure and transparency. In the international sphere, this study will draw the observations made by two celebrated scholars; namely Solomon J and B Tricker. Solomon J in his book[30] establishes the principle of accountability by studying the role and responsibilities of the directors. B Tricker in his book[31] gives us a global view of corporate governance as he discusses the principles, codes and theories of corporate governance. Tricker stands out as one of the scholar researchers ought to pay attention to as he discusses the major aspects of corporate governance. Unfortunately, his work like many before and after him, use public and state-owned corporations as the case study to draw findings.

The OECD, published principles of corporate governance[32] as a guideline for countries to establish their own principles in the wake of globalization. These principles have been adopted globally and Kenya is no stranger to them. They entail rights of shareholder, equal dealings with shareholders, role and obligations of the board, stakeholders' interests, integrity, disclosure and transparency. The same is reflected in the Kenyan legal framework, case in point the Companies Act[33] as discussed herein below.

1.8.2 History and Theories of Corporate Governance

Solomon and Solomon[34] argue that the evolution of corporate governance can trace its roots to the 1980s, when stock market crashes were recorded in various parts of the world. The crashes were characterized by corporations failing due to poor governance practices. In the 1990s, two dominant corporate governance models were adopted globally, namely the insider model and the outsider model of corporate governance. The insider model of corporate governance, developed by countries that followed civil law, mainly focused on the interests of stakeholders. The outsider model, developed by countries that had and followed the traditions of common law, mainly focused on the shareholders' returns or interests.[35] Although the two models were different, they had a few similarities such as the shareholders power to appoint and delegate

---

[30] Solomon J, *Corporate Governance and Accountability,* 2nd ed, John Wiley & Sons, Hoboken, 2007.

[31] Tricker B, *Corporate Governance: Principles, Policies and Practices,* 2nd ed, Oxford University Press, New York, 2012.

[32] OECD, *G20/OECD Principles of Corporate Governance,* OECD Publishing, Paris, 2015.

[33] *Companies Act* (Act No.17 of 2015).

[34] Solomon J and Solomon A, *Corporate governance and accountability,* 1st ed, Wiley, New York, 2004.

[35] Corporate Law Economic Reform Program and Australia Treasury, *Directors' duties and corporate governance: Facilitating innovation and protecting investors,* Australian Government Publishing Service, 1997.

their authority to the management. Nevertheless, some countries adopted both models establishing a blended corporate governance structure.[36]

Ruparelia and Njuguna[37] give an in-depth glimpse into the evolution of corporate governance and the lengths the world leaders went to in promoting corporate governance. Corporate practices, policies and corporate law within Kenya have been heavily "borrowed" mainly from the United Kingdom. Various institutions have been established such as, the Private Sector Corporate Governance Trust (PSCGT) which in 2002 was renamed the Centre for Corporate Governance of Kenya,[38] the Pan African Consultative Forum for Corporate Governance, Kenya Shareholders Association, Institute of Directors and the Consultative Forum for Chairmen of State-owned Corporations in Kenya.[39] Although the institutions were established with a view to guiding all corporations in the best practice of corporate governance, they have alienated themselves from the private retail sector as they lay emphasis on establishing guidelines and policies for listed companies, state-owned corporations, the banking sector and universities in Kenya.

Corporate governance in Kenya rooted itself in the Constitution.[40] Over the years, through the enactment of the Companies Act 2015[41], Capital Markets Act[42] and *Mwongozo: The Code of Governance for State Corporations*[43] corporate governance has been established in Kenya's legal and regulatory framework.

1.8.3 Corporate Governance and Public Sector Companies

Public sector companies comprise both listed companies and state-owned companies. As seen from earlier discussions, the interaction of corporate governance and public sector companies has been over-researched. Some of the key scholars on corporate governance and Kenyan's

[36] Solomon J and Solomon A, *Corporate governance and accountability,* 1st ed, Wiley, New York, 2004.
[37] Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7 (5) *International Journal of Business and Social Science,* 2016, 153-163.
[38] 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.
[39] 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.
[40] *Constitution of Kenya* (2010).
[41] *Companies Act* (Act No.17 of 2015).
[42] *Capital Markets Act* (CAP. 485A).
[43] *MWONGOZO: The Code of Governance for State Corporations* (Public Service Commission and State Corporations Advisory Committee 2015).

public sector, for the purposes of this study, are Lois Musikali, Kiarie Mwaura, Benjamin Mulili, Eric Ernest[44] and Jacob Gakeri.

Both Lois Musikali[45] and Benjamin Mulili[46] agree with Solomon and Solomon (2004)[47] that a number of developing African countries have embraced corporate governance. However, the adoption of the corporate governance concepts has faced its fair share of challenges. The most dominant challenge is the unstable political atmosphere in African countries, including Kenya. The political regime has established weak market economies set apart by state-owned corporations, intertwining affiliations between governments and the financial sector, and weak legal frameworks. They both agree that Kenya is no stranger to the predicament that has befallen many African countries, hence indirectly insinuating that the lack of a tailor-made corporate governance legal framework has led to various companies collapsing. Lois Musikali studies the collapse of Uchumi supermarket plc while Benjamin Mulili studies the collapse of public universities in Kenya.

Kiarie Mwaura (2007) [48] explores the environment of state-owned corporations in Kenya. He does this by delving into the historical development of the said corporations, and investigates the challenges that prompted legal framework reforms towards best corporate governance practices. He highlights that the management of state-owned corporation is often challenged by overlapping laws. To address the challenge posed by the overlapping laws, his study recommends streamlining legislation governing state-owned corporations.

Jacob K Gakeri (2013) [49] investigates the challenges and identifies the prospects for enriching the securities market in Kenya by exploring and being conscious of the significance of corporate governance in the securities market. Kenya's securities market is mainly dominated by listed companies. Once a company is listed in the securities market it becomes a public company by default. He concludes that the weak corporate governance legal framework, the

[44] Mang'unyi E, 'Ownership structure and corporate governance and its effects on performance: A case of selected banks in Kenya' 2 (3) *International Journal of Business Administration*, 2011, 2-18.
[45] Musikali L, 'The law affecting corporate governance in Kenya: A need for review' 19 (7) *International Company and Commercial Law Review,* 2008, 213-227.
[46] Mulili B and Wong P, 'Corporate governance practices in developing countries: The case for Kenya' 2 (1) *International Journal of Business Administration*, 2011, 14-27.
[47] Solomon J and Solomon A, *Corporate governance and accountability,* 1st ed, Wiley, New York, 2004.
[48] Mwaura K, 'The failure of corporate governance in state owned enterprises and the need for restructured governance in fully and partially privatized enterprises: The case of Kenya' 31 (1) *Fordham International Law Journal*, 2007, 34-75.
[49] Gakeri J, 'Enhancing Kenya's securities markets through corporate governance' 3 (6) *International Journal of Humanities and Social Science*, 2013, 94-117.

Capital Markets Authority's failure to enforce guidelines for public listed companies, and the defiant corporate culture, have resulted in a weak corporate governance system in Kenya.

1.8.4 Corporate Governance and Board of Directors

The link between corporate governance and board of directors has been an area of interest for various scholars. For the purpose of this study, Monks & Minow, the Cadbury Committee, the Sarbanes-Oxley Act, Eric Ernest and Kiarie Mwaura, shall be relied on as they advocate for independency within the governance structure.

Monks & Minow (1996)[50] opine that one of the most prominent groundbreaking work done in the area was by the United Kingdom's Committee on Financial Aspects of Corporate Governance (1992) (the Cadbury Committee), chaired by Sir Adrian Cadbury. The Cadbury Committee published the Cadbury report endorsing the composition of company boards and accounting systems to reduce corporate governance risks and failures. The report encompassed four key aspects of corporate governance namely, accountability, responsibility, fairness and transparency.[51] By establishing a board of directors, whose responsibilities and roles were clear and different from those of the company's managers, the report fostered the principle of accountability. The establishment of checks and balances in the company's governance structure by ensuring that unlimited power is not bestowed on one person, fostered fairness. A harmonious board encompassing both executive and non-executive directors, fostered accountability, responsibility and independence. The principle of transparency was fostered through ensuring the board is always transparent in its governing of the company.

The authors of the Sarbanes-Oxley Act[52] with a view to protect shareholders, employees and the public from accounting errors and fraudulent financial practices, they made it mandatory for the board of directors in public companies to be dominated by independent directors. Their reasoning was that executive directors cannot be objective in the oversight of management since they form part of the management. In turn, the Act reinforced the principles of responsibility, accountability and transparency.

---

[50] Monks R and Minow N, *Watching the Watchers: Corporate Governance for the 21st Century,* 1st ed, Blackwell Publishers, Cambridge, 1996.
[51] Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the financial aspects of corporate governance,* 1992.
[52] *Sarbanes-Oxley Act* (United States).

Eric Ernest (2011)[53] argues that weak corporate governance practices, poor management and conflict of interests has resulted in poor governance of financial institutions, specifically banks. He highly recommends the adoption of independent boards, as he deduced from his study that banks with an independent board performed better. His study advocated for the principle of accountability and responsibility.

Kiarie Mwaura (2012)[54] makes a case that companies owe a duty of care to the community to protect them from the wrongs committed by the directors who escape liability by hiding behind the company's veil. He lays emphasis on the necessity to have legal reforms towards the enforcement of this duty. In his critique on reforming the duties of directors (2019)[55] he explores the protection of investors' interests by the codification of the fiduciary duties through the Companies Act and makes recommendation for reforms of the regulatory framework for directors. The Companies Act[56] codified the common law principles of care and skill. His case study insinuates that applying common law principles without modifying the same to suit the current market environment is a recipe for disaster. Nevertheless, he champions for the adherence of high standards of care and skill by the directors of a company.

1.8.5 Corporate Governance and Family-owned Companies

Sir Adrian Cadbury (2000)[57] highlights the peculiar advantages and challenges that face family-owned companies in a highly competitive global economy. Making use of case studies to demonstrate corporate governance structures within family-owned companies, his report establishes the distinction between family-owned companies and other forms of companies.

Jaffe D and Lane S (2004)[58] argue that good corporate governance practices are key to sustaining a family dynasty. They discuss the key challenges that a family must face in order to create an effective dynasty over generations and advocate for the establishment of proper corporate governance structures and succession plans.

---

[53] Mang'unyi E, 'Ownership structure and corporate governance and its effects on performance' 2 (3) *International Journal of Business Administration*, 2011, 2-18.

[54] Mwaura K, 'Internalization of costs to corporate groups: Part-whole relationships, human rights norms and the futility of the corporate veil' 11 (1) *Journal of International Business and Law*, 2012, 85-110.

[55] Mwaura K, 'Reforming the duties of directors under Kenyan company law: A critique' 30 (4) *European Business Law Review, 2019*, 617-631.

[56] Section 145, *Companies Act* (Act No.17 of 2015).

[57] Cadbury A, *Family Firms and Their Governance: Creating Tomorrow's Company from Today's,* Egon Zehnder International, London, 2000.

[58] Jaffe D and Lane S, 'Sustaining a family dynasty: Key issues facing complex multigenerational business and investment owning families' 17 (1) *Family Business Review,* 2004, 81-98.

Ward J (2007)[59] argues that renewing effective ownership agency at different stages in family business development is crucial to sustaining the family business advantage in performance. In creating a family business dynasty, the governance of the family-owned company evolves reflecting the various stages of growth in the family and the business. He alludes that governance in family-owned companies seeks to establish productive, procedural engagement across the system as opposed to establishing boundaries between ownership and control and elucidating decision-making powers. As a result, he advocates for family-owned companies as they concentrate control lowering the cost of governance and they tend to uphold the stakeholder theory.

Mandl (2008)[60] alludes that the inter-relationship between the family and the business to be the most crucial characteristic of a family-owned company. The overlap between family, business and ownership presents a challenge if not well-balanced. The overlap is often challenged by conflicts on future business plan and business transfer, choice of managers, unilateral decision making by a fraction of the family members, remuneration of the family members doubling as company employees and distribution of profits as opposed to channeling the funds back in the company as capital are bound to arise. Consequently, Mandl advocates for corporate governance to take into account the developments within both the company and the family by regulating the relationship during implementation.

International Finance Corporation (IFC) (2018)[61] in acknowledging the corporate governance challenges faced by family-owned companies elaborates the three stages of family-owned business: the founder stage, the sibling partnership stage and the family confederation stage also known as the cousin stage. As a business goes through the various stages, the interests in the business increase evolving the governance of the business from a simple governance structure to a more complex one. To mitigate the governance challenges, the IFC handbook identifies globally accepted best corporate governance practices in family-owned companies and suggests practical approaches to familiar family-owned companies' governance challenges.

[59] Ward J, 'How governing family business is different' in Steger U (ed), *Mastering global corporate governance,* 1st ed, John Wiley & Sons, Inc, Hoboken, 2007, 135-167.

[60] Mandl I, 'Overview of Family Business Relevant Issues' Austrian Institute for SME Research, Contract No. 30-CE-0164021/00-51, 2008 — <https://docplayer.net/5004871-Overview-of-family-business-relevant-issues.html> on 10 June 2020.

[61] Abouzaid S, *IFC family business governance handbook,* 4th ed, International Finance Corporation, Washington DC, 2018.

Stephen Moche (2014)[62] illuminates the dominance family-owned companies have in the Kenyan economy; whereby the NSE is largely dominated by family-owned listed companies. His study takes the empirical approach to focus on the financial performance of the listed family-owned companies based on their implementation of corporate governance. The study concludes that there is no relationship between corporate governance and firm performance of listed family-owned companies in Kenya. Consequently, the study advocates for the adoption of corporate governance practices to foster winning ways for family-owned companies.

Cynthia Kagiri (2019)[63] argues that there is need for the extant Kenyan corporate governance regulatory framework to recognise the influence family-owned companies have as a form of business essentially touching on shareholder agreements and family councils, by implementing good corporate governance in family-owned companies in codes of general application. The reasoning corroborating her recommendation was that family-owned companies form at least sixty per cent of companies registered in Kenya, and that they greatly influence various industries, markets and groups of stakeholders within the country. She studies family-owned companies that hold a massive share in the retail sector to investigate the link between corporate governance and family-owned companies by investigating the corporate governance challenges and structures within the said companies. Her study concludes that family-owned companies in the retail sector have been adversely impacted by poor corporate governance practices, hence justifying her recommendation.

1.8.6 Corporate Governance and Compliance

Bruno V and Claessens S (2007)[64] reiterates that regulation is key to good corporate governance practice. By looking into various corporations across the globe, the study was able to conclude that the corporate governance practices in a given company and its country's regulatory system greatly influence its valuation, hence the varying levels of corporate governance practices and regulation among the countries.

[62] Moche S, 'Corporate governance and firm performance of listed family-owned firms in Kenya' Published Msc Thesis, University of Nairobi, Nairobi, 2014.

[63] Kagiri C, 'The treatment of family-owned companies by the existing corporate governance framework in Kenya: A case for review' Published LL.M Thesis, University of Nairobi, Nairobi, 2019.

[64] Bruno V and Claessens S, 'Corporate governance and regulation: Can there be too much of a good thing?' World Bank, Policy Research Working Paper Number 4140, 2007 — <https://openknowledge.worldbank.org/handle/10986/7117> on 10 June 2020.

Cave J (2013)[65] argues that an appropriate corporate governance regulatory framework must be established along a spectrum of no-regulation, self-regulation, co-regulation and statutory regulation. The choice between either self-regulation -that is principle-based approach- or statutory regulation -that is rule-based approach- relies on a company's settings and environment.

Nakpodia F, Adegbite E, Amaeshi K and Owolabi A (2018)[66] admires rule-based regulations for being clear, concise and certain, eliminating ambiguities. However, this rule-based approach is marred with ever-increasing bureaucracies. Alternatively, the principle-based approach makes corporate governance compliance voluntary. Companies are required to either comply with the set regulations or explain in the event that compliance cannot be achieved. However, the principle-based compliance approach has its fair share of woes such as lack of uncertainty, accountability issues and a blurred distinction between minimum standards and best practice of corporate governance. The study points out that despite the rule-based approach being rigid, it enables the government to intervene, whereas the principle-based approach often faces challenges with issues of ethics and morality for its leniency. Nakpodia F *et al* advocate for an integrated regulatory approach to corporate governance supported by a multi-stakeholder co-regulation strategy for Sub-Saharan African companies to mitigate the shortcomings in both rule and principle-based regulations.

The Institute of directors in Southern Africa and the King Committee on Governance (2009)[67] in order to capture the peculiarities of the South African business environment made the move from the conventional 'comply or explain' to an integrated regulatory (apply or explain) approach. The 'apply or explain' approach advocated for by the King III Report, acknowledges that it is not whether a company complies or not, but rather how the principles on corporate governance can be applied. Therefore, principles have dominated this approach with the acknowledgement that some principles have been legislated compelling compliance with the letter of the law, thus distancing the legislated principles from subjective interpretations. Noteworthy, the King III Report integrates elements of rule-based and principle-based approaches into the 'apply or explain' approach advocated for Sub-Saharan Africa.

---

[65] Cave J, 'Policy and regulatory requirement for future internet' in Brown I (ed), *Research handbook on governance of the internet,* UK ed, Edward Elgar Publishing, 2013, 143-167.

[66] Nakpodia F, Adegbite E, Amaeshi K and Owolabi A, 'Neither principles nor rules: Making corporate governance work in Sub-Saharan Africa' 151 (2) *Journal of Business Ethics,* 2018, 391-408.

[67] The Institute of Directors in Southern Africa and King Committee on governance, *King report on governance for South Africa*, 2009.

Jacob K Gakeri (2013)[68] critiques the guidelines set out by the Capital Markets Authority to have taken a 'comply or explain' approach, hence creating an escape route for directors as well as their companies. He argues that for Kenya to foster a responsive culture of corporate governance, the 'comply or explain' enforcement matrix should be dispensed with, and the training of directors should be made a priority. This study will seek to explore whether since the enactment of the Companies Act 2015 there are significant changes to the corporate governance environment juxtaposed to Gakeri's article.

1.8.7 Knowledge Gap

In determining the relevance and impact of corporate governance in various corporations, researchers have found themselves confining their studies to exploring one or all aspects of corporate governance. Globally, majority of the researchers have channeled their energies to using public and state-owned companies as their case study. Kenyan case studies are no exception. Despite family-owned companies in the retail sector forming sixty per cent of companies in Kenya, researchers have largely confined their studies on the impact of corporate governance to state-owned companies, financial institutions and listed companies. This phenomenon has left companies in the retail sector unexplored. For this reason, this study seeks to bridge the gap and address the question, whether the rising number of collapsing retail companies in Kenya is as a result of legal and regulatory compliance issues in the implementation and practice of the extant corporate governance regulatory framework.

1.9 RESEARCH METHODOLOGY

In testing the hypothesis of the study, due to the nature of the study and factoring in the pandemic, the desk-view design was used to gather information. The study deployed a doctrinal approach that involved a qualitative analysis of the primary and secondary sources on corporate governance, and a critical analysis of the legal framework, case laws, policies and government reports on corporate governance. In carrying out the qualitative analysis of the case study, five collapsed companies in Kenya's retail sector, that is Uchumi supermarket plc, Ukwala supermarket, Ebrahim supermarket, Nakumatt holdings ltd and Tuskys supermarket, were also examined. News reports on the collapsed retail companies as reported in the dailies and news broadcasting stations was employed to investigate why the case study retail companies collapsed.

[68] Gakeri J, 'Enhancing Kenya's securities markets through corporate governance' 3 (6) International Journal of Humanities and Social Science, 2013, 94-117.

In addition, the research process involved visiting the library to access relevant text books, case law, journals, statutes, newspapers and other relevant resource materials on the topic. The study made the most of extensive internet browsing made reference to relevant blogs and websites for information on the topic. Browsing the internet gave access to online journals and sentiments of various authors and commentators on corporate governance internationally and in Kenya. The links and dates on which the said blogs, websites and online journals were accessed have been clearly stated for purposes of proper referencing.

1.10 LIMITATIONS

As earlier alluded, the 2020 pandemic posed a limitation to the study. With the restrictions put in place to mitigate the widespread of coronavirus, conducting in person interviews with both the owners and the management of the five study collapsed retail companies was a challenge.

Another limitation to the study was that due to the structure of the retail companies and secrecy on company dealings, gathering information about the collapses was a challenge. It was difficult to get in touch with the owners and the management willing to divulge information on why the retail companies collapsed. In addition, due to advocate-client confidentiality getting more information about the collapsed retail companies especially on the court proceedings, was a challenge.

To mitigate the limitations of the study, the use of the qualitative study approach as discussed in 1.9, was adequate to collect data on the collapses and the regulatory compliance issues facing retail companies.

VT OMNES VNVM SINT

1.11 CHAPTER BREAKDOWN

This study features five chapters as discussed herein below:

Chapter one: Introduction

This chapter acquaints one with the study by giving a broad overview and structure of the study. It sets the discussion in motion by briefly introducing the study, identifying the problem, outlining the objectives and the questions aiding the study in achieving the said objectives, justifying the study, hypothesizing the study, outlining the theoretical and conceptual framework, reviewing corporate governance literature and by giving a breakdown of the chapters in the study.

Chapter two: Kenya's corporate governance history and legal framework

This chapter explores the intricate rich corporate governance history and legal framework in Kenya; attention paid to corporate governance in Kenya's retail companies. The chapter further breaks down into three main parts: the first part defines corporate governance; the second part discusses Kenya's corporate governance historical background whereas the third examines the extant corporate governance legal framework in Kenya. In addition, the chapter seeks to demonstrate corporate governance, its backing legal framework and its implementation with respect to retail companies in Kenya.

Chapter three: Case study on why retail companies in Kenya are collapsing

This chapter analyses five collapsed companies in the retail sector, that is Uchumi supermarket plc, Ukwala supermarket, Ebrahim supermarket, Nakumatt holdings ltd and Tuskys supermarket, to investigate what led to their collapse. The chapter further argues that despite the government's interventions, retail companies are collapsing at a high rate.

Chapter four: Ties that bind the factors leading to retail company collapses to corporate governance regulatory compliance issues

This chapter by discussing the salient features of corporate governance and analysing the results of the case study, shall be able to establish the ties that bind the factors leading to retail company collapses to regulatory compliance issues as a challenge facing the implementation and practice of corporate governance by retail companies in Kenya. The chapter draws focus on the theories of corporate governance and the principles of corporate governance to establish the ties.

Chapter five: Finding, Conclusions and Recommendations

This chapter analyses the key findings drawn from the study and gives recommendations for reforms (if necessary). The chapter argues that to effectively address corporate failure as identified in chapters two, three and four of this study, the government should impose corporate governance regulatory framework compliance on retail companies via an integrated regulatory approach.

CHAPTER TWO: KENYA'S CORPORATE GOVERNANCE HISTORY AND LEGAL FRAMEWORK

2.1 INTRODUCTION

This chapter explores the intricate rich corporate governance history and legal framework in Kenya. Attention is paid to corporate governance in Kenya's retail companies. The chapter is broken down into three main parts: the first part defines corporate governance; the second part discusses Kenya's corporate governance historical background whereas the third examines the extant corporate governance legal framework in Kenya. In addition, the chapter seeks to demonstrate corporate governance, its backing legal framework and its implementation to retail companies in Kenya.

2.2 WHAT IS CORPORATE GOVERNANCE?

Governance is defined as "applying policies, proper implementation, and continuous monitoring. Typically done through or by an organization's governing body."[69] For this study, governance shall be concerned with the processes, systems, customs, procedures and best practices, either implied or expressed, that ensure the smooth running of a company in accordance with the company's founding laws and their implementation achieved, and the relationships between the company, management, shareholders and stakeholders determined or created by these rules and procedures.

As discussed in the earlier chapter, the definition of corporate governance has been re-written by several scholars emphasising different aspects. Some scholars based their definition on one aspect of corporate governance whereas others centre their definition on some of the aspects, if not all. In consideration of the theories this study is based on, corporate governance for the purposes of this study shall be the manner in which a company's power is exercised in stewardship of the company's total portfolio of assets and resources, with intent to maintain and increase shareholder value and satisfy stakeholders in the context of its corporate mission.[70] It shall be concerned with striking a balance between individual and communal goals, and between economic and social goals while fostering resources usage, power usage accountability and stewardship efficacy to align the company's, individuals' and society's interests.[71] In addition, corporate governance is about cultivating a conducive legal, economic

---

[69] Black's Law Dictionary, 11th ed.

[70] Khan H, 'A literature review of corporate governance' 25 *International Conference on E-business, Management and Economics IPEDR,* 2011.

[71] Farinha J, 'Corporate Governance: A Survey of the Literature' Universidade do Porto Economia, Discussion Paper Number 2003-06 — <http://ssrn.com/abstract=470801> on 25 April 2020.

and institutional milieu that allows a company to thrive while being mindful of stakeholders, the environment and the society at large in advancing its shareholder value.[72]

2.3 HISTORICAL BACKGROUND OF CORPORATE GOVERNANCE IN KENYA

Briefly discussed in the earlier chapter, corporate governance can trace its roots in the 1980s when stock market crashes occasioned by poor governance practices by companies were globally recorded.[73] The concept of corporate governance has existed for centuries as witnessed by the evolution of balance, power and decision making between key players in a company's management and ownership.[74][75] Despite the existence of the concept of corporate governance as evidenced over the centuries, it was formally actualized in the 1990s when the commonwealth government heads developed the International Corporate Network – the first globally accepted corporate governance institution- to promote and coordinate research and development in corporate governance. Later on, the commonwealth government heads established the Commonwealth Association for Corporate Governance (CACG); which developed the CACG guidelines. These guidelines were the base line for corporate governance principles in the Commonwealth. In 1999, the World Bank and the OECD held the Global Corporate Governance Forum, that birthed the OECD principles of corporate governance.

2.3.1 Postcolonial Period (1964-1999)

The history of Kenya includes several decades of colonization by the English settlers, characterized by continual conflict between the settlers and indigenous Kenyans. Unsurprisingly, after Kenya gained her independence in 1963 and consequently becoming a republic in 1964, the corporate landscape reflects that of her colonizers due to her obsolescent nature of being akin to transplanting a mature English oak in the virgin Kenyan soils without being mindful of the stark ecological differences. That notwithstanding, Kenya's evolution of corporate governance was fostered during the institutionalization of government corporations

---

[72] Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance,* Private Sector Corporate Governance Trust, Nairobi, 2002, 1.

[73] Solomon J and Solomon A, *Corporate governance and accountability,* 1st ed, Wiley, New York, 2004.

[74] Price N, 'What is the history of corporate governance and how has it changed?' Diligent Insights, 3 October 2018 — <https://insights.diligent.com/corporate-governance/what-is-the-history-of-corporate-governance-and-how-has-it-changed> on 19 September 2020.

[75] Price N, 'What is the history of corporate governance and how has it changed?' Diligent Insights, 3 October 2018 — <https://insights.diligent.com/corporate-governance/what-is-the-history-of-corporate-governance-and-how-has-it-changed> on 19 September 2020.

that led to the discovery of accountability deficiency trickling down from public sector to private sector companies.[76]

In the late 1990s when the globalization of corporate governance was taking place, Kenya between the months of November 1998 and March 1999 held several consultative corporate sector seminars with the aim of resolving and establishing a corporate governance initiative; the Private Sector Initiative for Corporate Governance.[77] The initiative's mandate was to formulate and develop a best corporate governance practices code and to explore ways of establishing a corporate governance national body that will coordinate developments in corporate governance in the country.

2.3.2 Postcolonial Period (1999-2002)

In 1999, the Private Sector Corporate Governance Trust (PSCGT), which was renamed to the Centre for Corporate Governance in 2002,[78] was established and mandated to foster the highest standards of corporate governance and excellence in all types of companies through training, education, research, monitoring, evaluation and advocacy.

In 2002, the Private Sector Initiative for Corporate Governance's code of best practices for corporate governance[79] was institutionalized by the promulgation of the *Guidelines on Principles of Corporate Governance for Public Listed Companies*[80] by the Capital Markets Authority.

Evidently, the Private Sector Initiative for Corporate Governance was successful in exercising its mandate as seen by the establishment of a corporate governance national body, the PSCGT and the development and adoption of a national code of best practices for corporate governance that guided corporate governance developments in the country. [81]

---

[76] Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7 (5) *International Journal of Business and Social Science,* 2016, 153-163.

[77] Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7 (5) *International Journal of Business and Social Science,* 2016, 153-163.

[78] 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.

[79] Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance,* Private Sector Corporate Governance Trust, Nairobi, 2002, 11-24.

[80] *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Gazette Notice No. 3362 of 2002).

[81] Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7 (5) *International Journal of Business and Social Science,* 2016, 153-163.

2.3.3 Postcolonial Period (2002-2020)

The Centre for Corporate Governance has played a key role in the establishment of the Pan African Consultative Forum for Corporate Governance, Kenya Shareholders Association, Institute of Directors and the Consultative Forum for Chairmen of State-owned Corporations in Kenya, all in a bid to foster the highest standards of corporate governance in all types of companies in the country.[82] As at July 2018, the Centre had trained over 14,308 public leaders, political leaders and senior managers from all types of organizations.[83].

Since 1964, the evolution of corporate governance in the country has been cemented by the promulgation of the 2010 Constitution,[84] the enactment of the 2015 Companies Act,[85] the establishment of the Capital Markets Authority by the Capital Markets Act[86] and by the codification of best practices of corporate governance by the *Mwongozo*[87] in 2015.

2.4 CORPORATE GOVERNANCE LEGAL FRAMEWORK IN KENYA

Corporate governance envisions corporate transparency, accountability and fairness, and its codification is of necessity as it unifies the several laws regulating corporate governance. The corporate governance legal landscape in Kenya encompasses the local, regional and international legal sphere.

2.4.1 Domestic Legal Framework

As mentioned in passing in point 2.3.3, the domestic legal framework seeking to foster corporate governance in the country is made up of the following: -

2.4.1.1 The Constitution

The Constitution of Kenya, 2010 is the supreme law of the country[88] and it embodies the sovereign and inalienable right of the people to determine the form of governance of the country. It contains provisions that promote corporate governance. The Constitution introduces us to good corporate governance practices under article 10 that provides for the national values

[82] 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.
[83] 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.
[84] *Constitution of Kenya* (2010).
[85] *Companies Act* (Act No.17 of 2015).
[86] Section 5, *Capital Markets Act* (CAP. 485A).
[87] MWONGOZO: The Code of Governance for State Corporations' (Public Service Commission and State Corporations Advisory Committee 2015).
[88] Article 2, *Constitution of Kenya* (2010).

and principles of governance that are binding on state-owned corporations, public officers and private entities as well; to be specific:

"10. (2) The national values and principles of governance include –

c) good governance, integrity, transparency and accountability; and
d) sustainable development."[89]

In interpreting this provision, it broadly implies that all personnel (including companies) need to adhere to good corporate governance and specifically, it implies that companies within the country ought to be managed in a responsible and accountable manner.

The bill of rights under the Constitution also promotes corporate governance specifically the principles of accountability and disclosure through the right to access of information;

"35. (1) Every citizen has the right to access to -

b) information held by another person and required for the exercise or protection of any right or fundamental freedom."[90]

Loosely interpreting the provision, shareholders as part of the general public are granted the right to crucial information about the company. The same is further stipulated in the Companies Act as shall be discussed herein.

Notably, the provisions discussed herein above are broad, as they impose the principles of good corporate governance onto all. One can argue that the provisions do not explicitly apply to retail companies. However, that is not the case. The Constitution being the supreme law of the country, it is of the people, by the people and for the people. Therefore, dictating that anybody within the country and any company registered in the country has to comply with it.

2.4.1.2 The Companies Act

The substantive law in the country that regulates companies is the Companies Act, 2015. It is not to be perceived that Kenya only began to regulate companies in 2015. To the contrary, companies were regulated by the Companies Act (Cap 486) prior to the Act. The predecessor was enacted in 1978 and revised in 2009. Cap 486 imposed certain statutory limitations that made it a challenge for companies to establish goodwill and practice. These limitations were but not limited to the age of a director, the number of directors a company should have, the obligation to have a registered company secretary, and restricting a company's business to its

[89] Article 10 (2) (c) - (d), *Constitution of Kenya* (2010).
[90] Article 35 (1) (b), *Constitution of Kenya* (2010).

formative objectives. To mitigate these shortcoming Cap 486 posed, the 2015 Act sets out to boost ease of doing business by taking into consideration developments in technology and procedures. Despite the Act being critiqued for being voluminous due to its comprehensive provisions and being heavily drawn from the UK Companies Act 2006, it recognises and codifies now generally accepted principles of corporate governance.

The Act ensures that a company is managed properly by providing various guidelines. The amendments introduced in the Act, codified the common law duties of directors; that is directors fiduciary duties. The duties to act within their powers, to act in the best interest of the company, to exercise reasonable skill, to avoid conflict of interest and to not accept gifts from third parties,[91] have made it possible to hold directors accountable.[92] The disqualification of directors for fraud, breach of duty, upon findings after an investigation or if they are convicted of an offence[93] has cemented the principle of accountability as directors are held liable for their actions.

The principle of transparency and disclosure is fostered under the Act by requiring directors to file financial reports with the Registrar of Companies.[94] The financial reports should reflect the true and fair financial status of a company in terms of assets, liabilities and loss or profits. Therefore, proper accounting is of essence. Proper accounting encompasses giving detailed account for transactions and complying with prescribed financial accounting guidelines.[95] The financial report is made up of: -

- A company's individual financial statement consisting of "a balance sheet as at the last day of the financial year, a profit and loss account, a cashflow statement and change in equity statement;"[96] and
- An auditor's report consisting of the audited accounts report, risk assessment report and procurement report.

Once the financial reports are filed at the Companies' Registry; they are public documents and can be accessed publicly. This enables companies to portray a transparent image.

---

[91] Sections 142–147, *Companies Act* (Act No.17 of 2015).
[92] Section 148, *Companies Act* (Act No.17 of 2015).
[93] Sections 214–218, *Companies Act* (Act No.17 of 2015).
[94] Sections 635–636, *Companies Act* (Act No.17 of 2015).
[95] Section 628, *Companies Act* (Act No.17 of 2015).
[96] Section 638, *Companies Act* (Act No.17 of 2015).

In addition to promoting transparency and disclosure, shareholders are granted the right to inspect the company records.[97] The principle of fairness features in the Act by granting shareholders the right to vote and participate in company meetings, the right to share in the profits of the company and the right to request for information.

In addition to the financial reports, directors are required to file directors' reports. The directors' reports are two: the directors' report[98] and the directors' remuneration report.[99] The directors' report divulges information on the board structure for the financial year[100] and the directors' business review of the company.[101] The directors are to disclose on the company's impact on stakeholders, and the extant and potential risks facing the company.

On the other hand, the contents of the directors' remuneration report as prescribed by the Companies (General) (Amendment) Regulations 2017[102] are disclosure on information not subject to audit and disclosure on information subject to audit. The information not subject to audit that needs to be disclosed in a directors' remuneration report include: -

- A statement of voting on directors' remuneration comprising of the resolution to approve the remuneration report and the resolution to approve the directors' remuneration policy, all reflecting the total number of votes withheld, cast for and against the reports; and
- A policy statement comprising of a summary of the individual directors' performance conditions for them to be entitled to share options or a long-term investment scheme, and details on the duration of directors' contracts, notice periods and termination payments under the contract of service.

At first glance, the information not subject to audit may seem unnecessary. On the contrary, the information seeks to inform the shareholders to make informed decisions with regards to remunerating the directors. The information subject to audit to be disclosed in a directors' remuneration report includes: -

[97] Section 96, *Companies Act* (Act No.17 of 2015).
[98] Section 653, *Companies Act* (Act No.17 of 2015).
[99] Section 659, *Companies Act* (Act No.17 of 2015).
[100] Section 654, *Companies Act* (Act No.17 of 2015).
[101] Section 655, *Companies Act* (Act No.17 of 2015).
[102] *Companies (General) (Amendment) Regulations* (L.N. 19 of 2017).

- Directors' benefits and compensation comprising of disclosure on total amount salary, bonuses, taxable expense allowances and compensation for loss of office paid to the director, and any benefits other than in cash received by the director;
- Information on directors' aggregated share options comprising of disclosure on the number of shares subject to share option at the start and end of the financial year, the number of shares awarded, the number of shares exercised, the number of expired shares and any variation to the rights;
- Information on schemes of interests awarded comprising of details on interests in assets receivable in respect of the qualifying services of a director, awarded to the director in the financial year as well as those due at the end of the financial year;
- Information on pension comprising of details on the pension arrangement and changes thereof if any, and the management of assets and financial affairs of the pension scheme;
- Information on past directors' compensation disclosing any awards made to a director who at the time of making the award was not a director; and
- Information on aggregated amount paid to third parties for availing services of a director.

Prior 2015, the directors would give an aggregated amount of their remuneration or worse not divulge on their remuneration. To further curb this, the regulations mandate each director to prepare an individual directors' remuneration report to enhance disclosure and transparency. came into effect to introduce disclosure requirements for the directors' remuneration report.

Notably, with the exception of listed companies, not all companies are required to file a directors' remuneration report. However, all companies are required to file a financial report and a directors' report.

2.4.1.3 Capital Markets Act

The Capital Markets Act establishes the Capital Markets Authority (CMA).[103] Principally, the CMA is meant to facilitate and maintain a conducive securities market that protects investors' interests and to prescribe rules, policies and guidelines on corporate governance for listed companies.[104] In 2002, CMA introduced the *Guidelines on Corporate Governance Practices*

[103] Section 5, *Capital Markets Act* (CAP. 485A).
[104] Section 11, *Capital Markets Act* (CAP. 485A).

by Public Listed Companies in Kenya[105] to enrich good governance in corporate performance, maximizing shareholders value and in protecting investors' rights.

2.4.1.4 The Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015

The *Code of Corporate Governance Practices for Issuers of Securities to the Public*[106] succeeds the *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya.*[107] The code was developed to respond to Kenya's changing business environment and the need to align the extant regulatory framework to the globally accepted best corporate governance practices. The code's compliance requirements move away from the 'comply or explain' approach to the 'apply or explain' approach which is an integrated regulatory approach that embraces both rule-based and principle-based compliance approaches. The move makes decision-making by the board of directors flexible and in the event the decision made does not meet the threshold standards of governance prescribed in the code, they are to explain as to why they failed to meet it. The code further spells out corporate governance principles for boards of directors by giving emphasis to the necessity of good corporate governance as it enhances accountability and performance of directors, and promotes efficacy of limited resources usage. In addition, the code outlines proficient leadership, corporate compliance, good communication with stakeholders, accountability to shareholders, proficient internal control procedures and adoption of technology as the primary obligations of the board of directors. These minimum standards companies must implement as made mandatory by the code have also been incorporated in the Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations, 2016.[108]

2.4.1.5 Nairobi Securities Exchange (Market Participants) Rules, 2014

The NSE, authorised by the CMA, offers a securities trading platform in Kenya and oversees trading companies.[109] The NSE introduced the Nairobi Securities Exchange (Market Participants) Rules[110] with the aim of promoting transparency and fairness within the capital

---

[105] *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Gazette Notice No. 3362 of 2002).

[106] *The Code of Corporate Governance Practices for Issuers of Securities to the Public* (Gazette Notice No. 1420 of 2015).

[107] *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Gazette Notice No. 3362 of 2002).

[108] *Capital Markets (Securities) (Public Offers, Listing and Disclosures) (Amendment) Regulations* (L.N. 36 of 2016).

[109] *Capital Markets (Demutualization of the Nairobi Securities Exchange Limited) Regulations* (L.N. 87 of 2012).

[110] *Nairobi Securities Exchange (Market Participants) Rules* (2014).

markets. Noteworthy, the rules are meant to serve as a complementary to the CMA *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya*.

The NSE requires listed companies to enforce the Nairobi Securities Exchange (Market Participants) Rules onto their employees in order to encourage fair market practices among market participants. Fair market practices include but are not limited to disclosure of information to shareholders and avoiding conflict of interest. These practices in turn nurture the corporate governance principles of fairness and integrity. The fair market practices are further prescribed as a general code of conduct for market participants by the rules.

In addition, the Nairobi Securities Exchange (Market Participants) Rules are self-regulatory. They obligate the board of directors of listed company to appoint a disciplinary committee to enforce the rules. This creates a two-tier system of regulation: enforcement of the rules on the employees of the listed company by the board of directors and enforcement of the rules on the board of directors by the NSE.

2.4.1.6 *Mwongozo: The Code of Governance for State Corporations*

The Presidential Taskforce on Parastatal Reforms was established to address the accountability deficiency discovered during the institutionalization of government corporations. In March 2015, the taskforce in conjunction with the State Corporations Advisory Committee and the Institute of Certified Public Secretaries of Kenya in consultation with the World Bank, succeeded in its mandate and presented the *Mwongozo*: *The Code of Governance for State Corporations*.[111][112]

As the name of the code suggests, the code aims to ensure that corporate governance excellence is paramount in state-owned companies. The code draws its inspiration from the Constitution and the OECD guidelines[113] among other corporate governance legal frameworks,[114] to give emphasis to the effectiveness of boards of directors, transparent disclosure, accountability, risk management, proficient internal controls and ethical leadership. *Mwongozo* fosters effective engagement with stakeholders by providing a platform for tackling shareholder rights and

---

[111] State Corporations Advisory Committee, 'Mwongozo' State Corporations Advisory Committee, 16 February 2015 — <https://www.scac.go.ke/2015-02-16-09-34-58/mwongozo> on 19 April 2020.

[112] *MWONGOZO: The Code of Governance for State Corporations* (Public Service Commission and State Corporations Advisory Committee 2015).

[113] OECD, *OECD guidelines on corporate governance of state-owned enterprises,* OECD Publishing, 2015.

[114] The *Mwongozo* also draws its inspirations from the State Corporations Act, CAP 446, the Public Officers and Ethics Act (2003), King III Report on Corporate Governance for South Africa (King III) (2009), the Malaysian Code of Corporate Governance (2012) and the State Corporations Advisory Committee Guidelines (2004).

obligations. From the foregoing, the code's aim is to enhance transparency and accountability in public service in a 'comply or explain' approach.

2.4.1.7 Retail Trade Code of Practice to guide Prompt Payment in the Retail Sector

Given the wake of the recent collapses of retail companies, the retailers, suppliers, manufactures and the government through the Ministry of Industrialization, Trade and Enterprises Development have made efforts to foster good corporate governance. This is seen through the adoption of the *Retail Trade Code of Practice to guide Prompt Payment in the Retail Sector* in 2019. The code, signed by the Kenya Association of Manufacturers, Association of Kenya Suppliers and the Retail Trade Association of Kenya, is meant to encourage self-regulation and harmonize retailer/supplier relationship through prompt payment in the retail sectors.[115]

Unfortunately, an in-depth look into the code shows that it is clear that it is a risk management tool as opposed to transparent disclosure, accountability and fairness tool. The code has also prompted the government to start the process of codifying prompt payment into the Prompt Payment Act;[116] the framework is yet to be passed into law. In addition, the Retail Prompt Payment Code, making use of the 'comply or explain' matrix, serves more as a tool benefiting the suppliers. Instead of looking at how to promote the prosperity of a company through corporate governance principles, it seeks to protect the shareholders of the company in the event of a collapse by ensuring prompt payment of suppliers

2.4.2 Regional Legal Framework

Kenya being a member state of the Commonwealth, has a responsibility to adopt and ratify any laws, rules, policies and guidelines collectively agreed upon, into her national laws. The regional legal framework on corporate governance available is the Commonwealth Association for Corporate Governance (CACG) Guidelines: Principles for Corporate Governance in the Commonwealth, 1999.

2.4.2.1 CACG Guidelines: Principles for Corporate Governance in the Commonwealth, 1999

The CACG Guidelines: Principle for Corporate Governance in the Commonwealth[117] were formulated by the Commonwealth in a bid to unify solutions to corporate governance issues

[115] 'Manufacturers, retailers and suppliers sign code of practice to guide prompt payment in the retail sector' Kenya Association of Manufacturers, 17 January 2019 — <http://kam.co.ke/manufacturers-retailers-and-suppliers-sign-code-of-practice-to-guide-prompt-payment-in-the-retail-sector/> on 19 April 2020.
[116] *Prompt Payment Bill* (2020).
[117] *CACG guidelines: Principles for corporate governance in the Commonwealth* (1999).

through its participation in the Global Corporate Governance Forum with the World Bank and the OECD. They are complementary to the OECD Principles of Corporate Governance. Therefore, they are neither mandatory nor prescriptive but rather flexible and responsive to new developments in corporate governance in the global market. In addition, the CACG guidelines advocate for best business practices and behaviour for all companies.

2.4.3 International Legal Framework

As discussed earlier, since codification and globalization of corporate governance, the Organisation for Economic Co-operation and Development (OECD) has been on the forefront of advocating for good corporate governance. The principles formulated by the OECD are meant to help policy makers assess and advance the corporate governance legal, regulatory and institutional framework, with a view to supporting economic efficiency, sustainable growth and financial stability.

2.4.3.1 OECD Principles of Corporate Governance

The OECD Principles of Corporate Governance[118] were first published in 1999 after the Global Corporate Governance Forum. Over the years, the principles have been ratified by the OECD member states with the recent publication being in 2015. The principles act as a guide for governments and private sector initiatives to assess the quality of the extant corporate governance regulatory framework and develop distinct provisions, either mandatory or voluntary, with reference to their own cultural socio-economic and legal differences

The sector of focus for the principles is on publicly listed companies with a large company portfolio. However, this is not to be seen as a deterrence by policy makers from ratifying the principles to govern smaller listed and unlisted companies.

2.5 CONCLUSION

This chapter illustrates the history of corporate governance and discusses the corporate governance legal framework for companies in Kenya. Based on the review above, corporate governance gained momentum during the institutionalization of government companies, causing the resultant policies and initiatives as evidenced by the Centre for Corporate Governance's data, to alienate retail companies as emphasis is placed on state-owned corporations, listed companies, the banking sector and universities in Kenya. A review on the extant legal framework in place reveal how good corporate governance practices have been

[118] OECD, *G20/OECD principles of corporate governance,* OECD Publishing, 2015.

embodied into Kenya's legal framework. Therefore, insinuating that the extant legal framework is adequate.

Enforceability is key since corporate governance rules primarily seek to ensure that a company is managed expertly, efficiently, transparently, fairly and accountably. Notably, despite having several laws regulating corporate governance in Kenya, there is no law in place mandatorily enforceable in retail companies. From the discussion, Kenya's corporate governance regulatory compliance is on rule-based and principle-based approach with a hint of co-regulation. The Constitution, the Companies Act and the Capital Markets Act all impose regulatory compliance on a rule-based approach. Notwithstanding, the government has also adopted the principle-based approach through the adoption and implementation of various codes, principles, guidelines and rules as discussed herein above.

Evidently, Kenya is akin to transplanting a mature English oak without considering the ecological environment Kenya features, in this case the 'comply or explain' approach to the implementation of corporate governance advocated for by UK. Therefore, posing a challenge that has plagued Kenya, as retail companies find themselves in a regulatory compliance quagmire. Therefore, further cementing the ideology advocated for by Nakpodia F *et al,*[119] that sub-Saharan African countries need to adopt a suitable regulatory compliance matrix that reflects the countries extant business environment.

In summary, the extant Kenyan legal framework on corporate governance has no inadequacies. However, the same cannot be said for regulatory compliance. The regulatory compliance gap exposed poses a conundrum.

VT OMNES VNVM SINT

[119] Nakpodia F, Adegbite E, Amaeshi K and Owolabi A, 'Neither principles nor rules: Making corporate governance work in Sub-Saharan Africa' 151 (2) *Journal of Business Ethics,* 2018, 391-408.

CHAPTER THREE: CASE STUDY ON WHY RETAIL COMPANIES IN KENYA ARE COLLAPSING

3.1 INTRODUCTION

This chapter looks into five collapsed companies in Kenya's retail sector, that is Uchumi supermarket plc, Ukwala supermarket, Ebrahim supermarket, Nakumatt holdings limited and Tuskys supermarket, to investigate what led to their collapse. Consequently, the chapter will answer why retail companies in the Kenya are collapsing in spite of the recent emphasis by the government on best corporate governance practices through various legal frameworks, policies, rules and guidelines.

3.2 UCHUMI SUPERMARKET PLC

3.2.1 Background

Uchumi supermarket plc (Uchumi) was founded in 1975 by Industrial and Commercial Development Corporation, Kenya Wine Agencies Limited and Kenya National Trading Corporation. In 1992, its shares were listed on the Nairobi Stock Exchange (NSE).[120] Value for money was paramount for Uchumi as evidenced by its logo -UCHUMI which loosely translated to English means economy- and its slogan "*Your home of value*". Over the years Uchumi kept true to its slogan and logo with vast expansion recorded in the country as well as Uganda and Tanzania with a total of thirty-seven stores as at 2015.

The first crisis for Uchumi was in 2006 when the retailer temporarily closed shop and was placed under receivership.[121] Consequently, it was de-listed on the NSE. The Kenyan government being its major shareholder provided Kes. 675 million as bailout and swayed Preferential Trade Area for Eastern and Southern Africa (PTA) bank and Kenya Commercial Bank (KCB)-Uchumi's top creditors- to consider a revival plan.[122] The revival plan was initiated with five stores in Nairobi reopened under administration and interim management in July, 2006. The revival plan was successful as Uchumi rose back to profitability and was approved to relist its shares on the NSE in 2011.

---

[120] White L and Rees L, 'Retail: How the mighty have fallen in Kenya' Daily Maverick, 21 February 2019 — <https://www.dailymaverick.co.za/article/2019-02-21-retail-how-the-mighty-have-fallen-in-kenya/> on 25 April 2020.

[121] 'Kenyan shop chain shuts its doors' BBC NEWS, 2 June 2006 — <http://news.bbc.co.uk/2/hi/business/5040700.stm> on 5 May 2020.

[122] Ng'ang'a G, 'End of era as retail giants fall' Nairobi Business Monthly, 6 October 2020 — <https://www.nairobibusinessmonthly.com/end-of-era-as-retail-giants-fall/> on 11 December 2020.

The second crisis for Uchumi was in 2015 when the retailer was made aware of its extant financial status prompting the firing of the then chief executive officer (CEO) and the chief financial officer (CFO).[123] Upon hiring a new CEO,[124] the retailer in October 2015 closed shop in Uganda and Tanzania after years of recording massive losses;[125] with thirty-seven stores still open in Kenya.

In 2018, creditors filed for insolvency seeking the liquidation of the retailer. The retailer got reprieve from a creditors' auction in July, 2020 when the court awarded them six months to implement its recovery plan under the company voluntary arrangement scheme.[126] Unfortunately, the six months passed without any positive progress, prompting United Bank for Africa (UBA) to repursue its auction plans.[127] Since 2015 to date, Uchumi's fate is unknown as only three stores remain open, down from thirty-seven and the retailer's debts still outweigh its assets.

3.2.2 Factors Leading to the Collapse

Looking into the retailer's background, some of the factors leading to its collapse are, but not limited to aggressive expansion, financial difficulties, theft by employees and poor management.

3.2.2.1 Aggressive expansion

Uchumi's aggressive expansion in the country and market penetration in Uganda and Tanzania, seemed like a good strategic growth plan. Aggressive expansion has its pros such as increasing market presence and brand loyalty as Uchumi became a household name across East Africa. For this strategy to work, companies need to be financially stable. In the case of Uchumi, despite the government being its major shareholder, it overstretched its financial muscle as the profit margins were slim, forcing the retailer to draw overdrafts in various banks in order to meet its expansion appetite.

---

[123] 'Uchumi sacks Ciano, CFO for "gross misconduct, negligence"' Business Daily, 15 June 2015 — <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/corporate/companies/uchumi-sacks-ciano-cfo-for-gross-misconduct-negligence--2089572> on 5 May 2020.

[124] Malalo H and Blair E, 'Kenya's Uchumi supermarkets picks new CEO after predecessor sacked' Reuters, 25 August 2015 — <https://www.reuters.com/article/kenya-uchumi-idUSL5N1103RC20150825> on 5 May 2020.

[125] Ngugi B, 'East Africa: Uchumi supermarkets shuts down regional operations' allAfrica, 14 October 2015 — <https://allafrica.com/stories/201510141703.html> on 5 May 2020.

[126] *In re Uchumi Supermarkets PLC* (2020) eKLR.

[127] Otieno B and Kiplagat S, 'UBA in fresh bid to sell Uchumi land' Business Daily, 11 February 2021 — <https://www.businessdailyafrica.com/bd/corporate/companies/uba-in-fresh-bid-sell-uchumi-land-3286750> on 11 March 2021.

3.2.2.2 Financial difficulties

The financial crisis that plagued the retailer in 2006 marked the start of its woes. The aggressive expansion discussed herein-above factored in to the crisis, as the retailer was unable to meet its liabilities of Kes 3.6 billion[128] that outweighed its assets. This led to several stores being shut down and the retailer put under administration.[129]

By 2011 the retailer's financial woes seemed to be a thing of the past when it successfully executed its revival plan that saw it being relisted on the NSE. Unfortunately, that was so far from the truth. The retailer as at 2015 had been registering losses disguised as profits as evidenced through a forensic audit report done after the management of the retailer was fired.[130] Once the new management came into office it first proposed the closure of the stores located in Uganda and Tanzania as they were not feasible to the retailer's turnaround plan due to their consecutive major losses.[131]

As at 2018 the retailer's financial woes had grown worse from the second financial crisis in 2015. Almost empty shelves, rent arrears, delayed utilities payment, delayed payment to suppliers and delayed dividends payment characterized the retailer's financial woes. Despite numerous bailouts, the retailer's financial woes have resulted in numerous court proceedings with creditors seeking to auction its remaining assets to settle their debts.[132]

3.2.2.3 Theft by employees

Due to its financial difficulties, the retailer has been unable to meet its salaries payment obligation. This forced employees both from the management level to the ordinary employees to swindle the retailer. As the retailer was contemplating the closure of the Uganda and Tanzania stores, theft of merchandise off the shelves and cash from tills was being recorded. This prompted investigations that confirmed the theft.[133]

---

[128] Ng'ang'a G, 'End of era as retail giants fall' Nairobi Business Monthly, 6 October 2020 — <https://www.nairobibusinessmonthly.com/end-of-era-as-retail-giants-fall/> on 11 December 2020.
[129] 'Kenyan shop chain shuts its doors' BBC NEWS, 2 June 2006 — <http://news.bbc.co.uk/2/hi/business/5040700.stm> on 5 May 2020.
[130] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.
[131] Muhumuza M and Semakula O, 'Why Uchumi painfully closed Uganda, Tanzania operations' Daily Monitor, 19 October 2015 — <https://www.monitor.co.ug/uganda/business/prosper/why-uchumi-painfully-closed-uganda-tanzania-operations--1627746> on 27 September 2020.
[132] *In re Uchumi Supermarkets PLC* (2020) eKLR.
[133] Muhumuza M and Semakula O, 'Why Uchumi painfully closed Uganda, Tanzania operations' Daily Monitor, 19 October 2015 — <https://www.monitor.co.ug/uganda/business/prosper/why-uchumi-painfully-closed-uganda-tanzania-operations--1627746> on 27 September 2020.

During the forensic audit of the retailer's financial books, a discovery was made that the previous management plundered resources meant for the stores located in Uganda and Tanzania and doubled up as suppliers.[134] Evidently, the outright theft by the management contributed to the retailer's decision to close the Uganda and Tanzania stores.

3.2.2.4 Poor management

The above discussed factors amount to poor management. Upon the appointment of a new chief executive officer and a forensic audit report presented to the retailer, several issues on poor management were evident. These issues were poor decision making, conflict of interest and internal financial inadequacies.

3.2.2.4.1 Poor decision making

Poor decision making was evident from the development and execution of the poor growth strategy plan. The management is expected to act in the best interest of the retailer. In exercising its power of decision making, they are expected to seek expert opinions and exercise independent decision making. However, for the retailer it is clear that the vast rapid expansion as per the strategic growth plan was ill conceived as it failed to accurately assess the retailer's financial muscle.

3.2.2.4.2 Conflict of interest

As the Uganda and Tanzania stores were being shut down, it was discovered that the management doubled as major suppliers and opened stores that were not feasible.[135] The retailer was a high-end supermarket therefore opening up shop in a location with no consumer traffic, was in itself not in the best interest of the retailer. One is left to think that the move was meant to enrich the management since at the time they doubled up as major suppliers. Evidently, the actions amounted to conflict of interest.

3.2.2.4.3 Internal financial inadequacies

The forensic audit report reflected the sad nature of the retailer's account books. The management failed to follow standard accounting principles, issued bad cheques and failed to

[134] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.

[135] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.

record cashflow.[136] The globally accepted standard accounting principles on gains made from revaluation of company properties, especially where the company's business is not dealing in fixed assets, is that the gains are not to be treated as ordinary revenue.[137] The management ignored this accounting standard and duped the retailer and its shareholders into thinking that it had reported Kes 364 million in net earnings for the year ending in June 2014 by factoring in the revaluation of property gains in the retailer's income statement.[138]

The empty shelves that we have come to associate with a collapsing retailer were not uncommon for Uchumi, especially during it crises era. The same was a result of the retailer failing to meet its financial obligation to its suppliers, forcing suppliers to withhold and/or take possession of their supplies. During the second crisis, it was discovered that this was made worse as the management issued bad cheques to the suppliers. They simply drew cheques in favour of the relevant suppliers and stashed them up under lock and key. The suppliers never received the cheques despite the retailer's account books reflecting that the cheques were issued. The forensic audit report unearthed this ill.[139] In addition to the simple accounting hat trick, the management failed to record cashflow. The forensic audit report could not identify where the Kes 900 million raised in 2014 after the rights issue closed went.

3.3 UKWALA SUPERMARKET

3.3.1 Background

Ukwala supermarket (Ukwala) opened shop in 1995 as a family-owned supermarket.[140] Accessibility and availability at ease was paramount to the retailer as exhibited by its slogan "*Get it on your way*". Over the years the retailer has been true to its slogan through strategic expansion throughout the country with five stores in Kisumu, three in Nairobi, two in Nakuru and one in Eldoret.

[136] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.
[137] *IAS 16 Property, Plant and Equipment* (2003).
[138] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.
[139] Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.
[140] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.

Just as any business faces financial booms and blasts, Ukwala had its fair share. In a bid to survive its financial woes, the retailer approached Tuskys supermarket in 2013 for a merger. Unfortunately, the merger was frowned upon by the Competition Authority of Kenya on grounds that it amounted to a restrictive trade practice and the takeover agreement terminated with a Kes 5.3 million fine imposed on both retailers.[141] In 2016, the retailer's financial fate changed as it was acquired by Botswana's retailer Choppies Enterprise through an asset purchase merger with Choppies paying Kes 102 million for Ukwala's eight stores.[142] This acquisition left Ukwala with one operational store located in Eldoret.[143]

In 2018, Ukwala with over five hundred creditors rushed to court to be declared insolvent and be placed under interim liquidation.[144] The court in 2019 declared the retailer insolvent and ordered a liquidation petition to be advertised. Later that year, Ukwala applied for liquidation[145] with approximately three hundred creditors claiming arrears of close to Kes 1 billion. In February 2020, the retailer's petition was approved and it was placed under interim liquidation.

3.3.2 Factors Leading to the Collapse

From the retailer's background, two factors leading to its collapse stand out: financial difficulties and the management structure.

3.3.2.1 Financial difficulties

Despite the fact that the retailer did not expand outside Kenya in its expansion plan, it was widely spread in the country, making it a household name. Empty shelves, unpaid suppliers, rent arrears and employee layoffs, followed by closures of some stores characterised the peak of the financial difficulties facing the retailer. The retailer's first attempted merger with Tuskys and its second successful merger with Choppies Enterprise, is seen as a desperate attempt to

[141] 'Why regulator stopped Tuskys bid to acquire rival Ukwala' Business Daily, 3 June 2014 — <https://www.businessdailyafrica.com/bd/economy/why-regulator-stopped-tuskys-bid-to-acquire-rival-ukwala-2059736> on 5 May 2020.

[142] 'Choppies enterprises acquires Ukwala supermarkets' Crunchbase, 31 May 2016 — <https://www.crunchbase.com/acquisition/choppies-enterprises-acquires-ukwala-supermarkets--1fda61e0> on 5 May 2020.

[143] Fayo G, 'Ukwala collapse under Sh1bn debt hits KRA hard' Business Daily, 6 February 2019 — <https://www.businessdailyafrica.com/bd/news/ukwala-collapse-under-sh1bn-debt-hits-kra-hard-2237724> on 5 September 2020.

[144] *In re Ukwala Supermarket Limited* (2019) eKLR.

[145] *In re Ukwala Supermarket (Eldoret) Limited* (2020) eKLR.

fend off its financial woes. Sadly, the merger did not save it from closure when it finally filed for liquidation with Kes 1 billion in debt in 2018.[146][147]

3.3.2.2 Management structure

The retailer is family-owned and from the court case *in re Ukwala Supermarket Limited*[148] the management of the retailer is under the owners of the retailer. The directors were in disagreement on liquidation, reflecting the discord amongst the family members in making decisions. Evidently, the management was unable to separate its interests from the ownership interests. This could have led to the poor management of the retailer.

3.4 EBRAHIM SUPERMARKET

3.4.1 Background

Ebrahim supermarket (Ebrahim) opened shop next to Sarova Stanley Hotel, Kenyatta Avenue, Nairobi in 1944 as a family-owned supermarket with an electronics and computer distribution unit. Over the years, it opened up stores along Kimathi Street Nairobi, Kisumu, Nakuru and Mombasa.

In 1995, the retailer's owner sought to sell his shares and have the business run as a going concern by the new shareholder.[149] This was a move to settle the financial woes that the retailer was facing at the time. Unfortunately, the sale was marred with uncertainties, forcing the parties to seek court's interpretation of the agreement in 1999. As court proceedings were ongoing, the retailer in 2019 closed its last store; that is the Moi Avenue Nairobi store.[150] The court finally delivered its interpretation of the 1995 contract in September 2020.[151] Inopportunely, the interpretation was too late to salvage the retailer.

3.4.2 Factors Leading to the Collapse

The retailer's fate is not that different from Ukwala's fate. The retailer's collapse was occasioned by financial strains and management structure.

[146] *In re Ukwala Supermarket Limited* (2019) eKLR.
[147] *In re Ukwala Supermarket (Eldoret) Limited* (2020) eKLR.
[148] (2019) eKLR.
[149] *Aziz Ebrahim v Ramzan Ebrahim* (2020) eKLR.
[150] Mutua J, '"It is finished", owner of iconic Ebrahim Supermarket lets go' Business Daily, 13 February 2019 — <https://www.businessdailyafrica.com/bd/corporate/companies/-it-is-finished-owner-of-iconic-ebrahim-supermarket-lets-go-2238634> on 5 May 2020.
[151] *Aziz Ebrahim v Ramzan Ebrahim* (2020) eKLR.

3.4.2.1 Financial strains

As per the historical reports on the retailer's collapse, the closure of its stores and an attempt to inject capital in 1995 can easily exhibit the retailer's financial woes. The retail landscape in Kenya is not the same as it used to be and for a retailer to survive, its financial muscle must be up to task. Unfortunately, the retailer's financial muscle could not stand the test and later in February 2019, it paid up its employees' terminal dues and closed shop.[152]

3.4.2.2 Management structure

The retailer being family-owned had no clear distinction between the management and the owners; as exhibited in *Aziz Ebrahim v Ramzan Ebrahim.*[153] They were one and the same. The family dispute concerning the ownership of the business as per the case, subsequently affected the governance of the retailer. Due to the poor management structure, some employees swindled the retailer[154] resulting in more losses.

3.5 NAKUMATT HOLDINGS LTD

3.5.1 Background

Nakumatt Holdings ltd (Nakumatt) was founded in Nakuru in 1980s as a small retail outlet in Nakuru.[155] Stability and reliability were paramount to the retailer as evidenced by its logo -the iconic elephant with a shopping bag- and its slogan "*Nakumatt: You need it, we've got it*". Over the years since the 1980s, Nakumatt had kept true to stability and reliability as witnessed by the vast expansions across East Africa with sixty known stores -that is forty-four in Kenya, eight in Uganda, five in Tanzania and three in Rwanda- as at 2017.

In early 2017, talks on Nakumatt's imminent collapse started. The government got involved in Nakumatt's business dealings through the Ministry of Trade.[156] The retailer's debts started to outweigh its assets. In no time, massive job losses and closures of many stores with only seven

---

[152] Mutua J, '"It is finished", owner of iconic Ebrahim Supermarket lets go' Business Daily, 13 February 2019 — <https://www.businessdailyafrica.com/bd/corporate/companies/-it-is-finished-owner-of-iconic-ebrahim-supermarket-lets-go-2238634> on 5 May 2020.

[153] (2020) eKLR.

[154] Mutua J, '"It is finished", owner of iconic Ebrahim Supermarket lets go' Business Daily, 13 February 2019 — <https://www.businessdailyafrica.com/bd/corporate/companies/-it-is-finished-owner-of-iconic-ebrahim-supermarket-lets-go-2238634> on 5 May 2020.

[155] Kiruga M, 'Supermarkets and their peculiar link with Nakuru' Nation Africa, 20 October 2013 — <https://nation.africa/kenya/life-and-style/dn2/supermarkets-and-their-peculiar-link-with-nakuru-906670> on 10 September 2020.

[156] Some K, 'Reasons behind slow death of supermarket chain Nakumatt | Nation' Nation Africa, 24 June 2017 — <https://nation.africa/kenya/news/reasons-behind-slow-death-of-supermarket-chain-nakumatt-415476> on 15 July 2020.

standing as at April 2018, were recorded by the company.[157] The retailer's incapacity to meet its liabilities forced its creditors to seek disbursement through court proceedings.[158] Nakumatt's chances of rising from the ashes draw slimmer by the day as its liquidation is imminent.[159]

3.5.2 Factors Leading to the Collapse

Nakumatt's collapse was characterised by unpaid salaries, unpaid suppliers, unpaid tax liabilities, rent arrears and unpaid utilities. The collapse is attributed to aggressive expansion, financial strains and poor management.

3.5.2.1 Aggressive expansion

The aggressive expansion in the country and market penetration in Uganda, Tanzania and Rwanda, was a good strategic growth plan as it increased the retailer's market presence and brand loyalty by making it a household name. Unfortunately, the strategic growth plan was unsustainable as the retailer overstretched its financial muscle and failed to meet its financial obligations evidenced by unpaid suppliers, unpaid employees, rent arrears and unpaid utilities.

3.5.2.2 Financial strains

The aggressive expansion spelt doom for the retailer. As discussed earlier, an aggressive expansion strategic plan is only feasible if the retailer is financially stable. In the event the retailer's financial muscle cannot take in more stretching, the plan needs to cease as continuation may lead to insolvency. In this case, the retailer relied on short-term loans and supplier financing to sustain its expansion appetite.[160] With time the financial obligations owed by the retailer outweighed its assets, forcing liquidation proceedings to be instituted against it.

3.5.2.3 Poor management

Poor management of the retailer can be attributed to poor management structure, poor decision making, unregulated insider lending and internal losses.

VT OMNES VNVM SINT

---

[157] Ng'ang'a G, 'End of era as retail giants fall' Nairobi Business Monthly, 6 October 2020 — <https://www.nairobibusinessmonthly.com/end-of-era-as-retail-giants-fall/> on 11 December 2020.
[158] *Primrose Management Limited & 3 Others v Nakumatt Holdings & Another* (2018) eKLR.
[159] Okoth J, 'Nakumatt liquidation pushed to February, 2021 due to pandemic' The Kenyan Wall Street, 10 November 2020 — <https://kenyanwallstreet.com/nakumatt-liquidation-pushed-to-february-2021/> on 11 February 2021.
[160] Mutegi M, 'Atul Shah: How debt took down my Nakumatt empire' Business Daily, 15 January 2018 — <https://www.businessdailyafrica.com/bd/corporate/companies/atul-shah-how-debt-took-down-my-nakumatt-empire--2185478> on 15 September 2020.

3.5.2.3.1 Poor management structure

The retailer trading as a family-owned business was unable to draw the line between ownership and management. This made it impossible to separate the interests of the management from those of the owners especially when the management is trying to act in the best interest of the retailer.

3.5.2.3.2 Poor decision making

As discussed earlier on, the strategic growth plan was ill-conceived as the management failed to assess the retailer's financial muscle. The aggressive expansion clearly strained the retailer financially as it relied on short-term loans and supplier financing.[161] Short-term loans are known to be expensive. The management doomed the retailer's cash flow by using expensive debt to sustain its expansion appetite.

3.5.2.3.3 Unregulated insider lending

An independent audit on the retailer's financial books revealed that the management was issued with interest free loans amounting to over Kes 1 billion.[162] This amounted to conflict of interest and poor decision making on the management's side as insider dealings are meant to be closely regulated. The lack of loan size limits and imposed interest rates, made recovering the advanced loans impossible financially straining the retailer.

3.5.2.3.4 Internal losses

The financial strains facing the retailer being its inability to pay salaries, occasioned stock theft.[163] The employees being in cahoots with the suppliers, swindled the retailer of its stock resulting in massive internal losses. Poor management made this possible due to poor execution of inventory management procedures.

3.6 TUSKYS SUPERMARKET

3.6.1 Background

The history of Tuskys supermarket (Tuskys) is that of grass to grace. The founder, a former employee of Nakumatt, upon retirement, established a self-service shop named Magic Super

[161] Mutegi M, 'Atul Shah: How debt took down my Nakumatt empire' Business Daily, 15 January 2018 — <https://www.businessdailyafrica.com/bd/corporate/companies/atul-shah-how-debt-took-down-my-nakumatt-empire--2185478> on 15 September 2020.

[162] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.

[163] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.

Store in the 1980s in Rongai, Nakuru.[164] The shop later morphed into Tusker Mattresses, set up a supermarket in Nakuru town and another on Mfangano Street, Nairobi in the 1990s. As it grew the retailer rebranded to Tuskys Supermarket.

Stability, reliability and affordability were paramount to the retailer as manifested by its logo - the letter "T" is shaped by a protruding white elephant tusk - and its slogan "*Pay less, get more, Everyday*". Over the years since the 1980s, Tuskys has kept true to stability, reliability and affordability as witnessed by the vast expansions across East Africa with sixty-four known stores -that is fifty-seven in Kenya and seven in Uganda- as at 2020.[165]

Tuskys' woes began when the founder died in 2002 leaving the business to his heirs. Disputes over who should run the retailer's affairs deepened in 2012, when some of the family members fought in public, sued each other,[166] sought a forensic audit and demanded for a management restructuring that introduced an independent director.[167] On 4th May, 2015 the retailer appointed the first ever non-family chief executive officer. However, the same was met with a lot of distrust as one of the rival family members fighting for control repudiated the appointment.[168] In February 2016 the rival family member succeeded and the independent chief executive officer was dismissed from the retailer's management.[169] In 2020, the retailer was finally put under the government's watchlist after cases of massive unpaid suppliers, unpaid salaries, rent arrears and unpaid utilities resulting to closures and job losses.[170] The feud amongst family members over the years, has thwarted any chances of saving the retailer from

VT OMNES VNVM SINT

[164] 'Ties that bind: Why Tuskys and Nakumatt are perfect marriage partners' Business Today, 19 September 2017 — <https://businesstoday.co.ke/tuskys-nakumatt-case-little-bro-aiding-big-bro/> on 5 November 2021.
[165] Muiruri K, 'From 64 branches to just 5: Retailer Tuskys nears its last breath' Citizentv.co.ke, 25 January 2021 — <https://citizentv.co.ke/business/from-64-branches-to-just-5-retailer-tuskys-nears-its-last-breath-4933965/> on 5 March 2021.
[166] *Republic v Chief Magistrate Milimani & another Ex-parte Tusker Mattresses Ltd & 3 others* (2013) eKLR.
[167] 'Trouble in the empire: An inside look at Tuskys Supermarkets family drama' The East African, 28 April 2012 — <https://www.theeastafrican.co.ke/tea/news/east-africa/trouble-in-the-empire-an-inside-look-at-tuskys-supermarkets-family-drama-1308490> on 5 November 2020.
[168] 'Tuskys war intensifies as one sibling disowns new manager' Business Daily, 6 May 2015 — <https://www.businessdailyafrica.com/bd/corporate/companies/tuskys-war-intensifies-as-one-sibling-disowns-new-manager--2086628> on 15 November 2020.
[169] Omondi D, 'Siblings "curse" that family businesses must overcome' The Standard, 13 March 2016 — <https://www.standardmedia.co.ke/business/business-news/article/2000194691/siblings-curse-that-family-businesses-must-overcome> on 15 November 2020.
[170] Kiruga M, 'Kenya's Tuskys on government watchlist after failing to pay suppliers' [2020] *The Africa Report.com* — <http://www.theafricareport.com/30456/kenyas-tuskys-on-government-watchlist-after-failing-to-pay-suppliers/> on 19 July 2020.

collapsing.[171] As at January 2021, the retailer had five stores standing[172] and recently in the month of May the retailer held sales to raise capital to save the remaining stores.[173]

3.6.2 Factors Leading to the Collapse

Noteworthy, Tuskys has not completely closed shop. However, a keen look into Tuskys' history suggests that its downfall can be attributed to poor management[174] as discussed herein.

3.6.2.1 Poor management

The poor management of the retailer is characterised by the poor management structure, rapid expansion and theft by employees.[175][176]

3.6.2.1.1 Poor management structure

Since the retailer is a family-owned business, the management of the retailer was solely by the family. As discussed earlier on, an attempt to introduce an outsider into the management was met with a lot of hostility. The poor management structure, where the management and ownership interests could not be differentiated, resulted in the mismanagement of the retailer.

The mismanagement is further manifested in the management's decision making. First, the appointment of the chief executive officer, whose appointment and consequent decisions were marred by conflict of interest. Secondly, its financial decisions saw some shareholders issued dividends at the demerit of the unpaid supplier issued with bad cheques. Lastly, the increase in debt showcased the management's inability to prioritise payments.

3.6.2.1.2 Rapid expansion plan

Since the exit of Nakumatt Holdings ltd from the retail market, Tuskys' customer base grew. This motivated the retailer to open up more stores to meet the demand left by Nakumatt

---

[171] Wafula P, 'Brother against brother: Tuskys sibling rivalry stalls plans for merger | Nation' Nation.Africa, 7 August 2020 — <https://nation.africa/kenya/business/brother-against-brother-tuskys-sibling-rivalry-stalls-plans-for-merger-1914220> on 5 November 2020.

[172] Muiruri K, 'From 64 branches to just 5: Retailer Tuskys nears its last breath' Citizentv.co.ke, 25 January 2021 — <https://citizentv.co.ke/business/from-64-branches-to-just-5-retailer-tuskys-nears-its-last-breath-4933965/> on 5 March 2021.

[173] Muiruri K, 'Tuskys sells off "dead stock" to save remnant operations' Citizentv.co.ke, 29 April 2021 — <https://citizentv.co.ke/business/tuskys-sells-off-dead-stock-save-remnant-operations-10810384/> on 1 May 2021.

[174] Anyanzwa J, 'Tuskys in the footsteps of collapsed Nakumatt and Uchumi' The East African, 10 September 2020 — <https://www.theeastafrican.co.ke/tea/business/tuskys-in-the-footsteps-of-collapsed-nakumatt-and-uchumi-1936046> on 9 November 2020.

[175] Kenya CitizenTV, *TRAGEDY OF TUSKYS | Late Joram Kamau started the supermarket 30 years ago [Part 1]* (2020) — <https://www.youtube.com/watch?v=We79HZKhfTc> on 16 January 2021.

[176] Kenya CitizenTV, *TRAGEDY OF TUSKYS | Directors blame COVID-19 disruption for the poor performance of Tuskys (Part 2)* (2020) — <https://www.youtube.com/watch?v=e9QcXgbE4h8> on 16 January 2021.

Holdings ltd. The appointment of the chief executive officer saw the retailer being proposed for listing on the NSE in 2020. The proposal never lived up to expectation. The rapid expansion marred by family wrangles, spelt doom for the retailer. The retailer was unable to meet it expenses. As its turnover rose from 2017, so did its payment to suppliers and administrative expenses, in the end rendering the rapid expansion plan futile and ill-conceived.

3.6.2.1.3 Theft by employees

According to the case *Republic v Chief Magistrate Milimani & another ex-parte Tusker mattresses Ltd & 3 others*[177] Stephen Mukuha Kamau, George Gachwe Kamau and Frank N Kamau had swindled Kes 1.6 billion from the retailer between May 2002 and January 2012. The money, which was being held in five of the retailer's bank accounts, was wired to third party companies' bank accounts allegedly owned by the two directors, Stephen Mukuha Kamau and George Gachwe Kamau, and other unknown individuals. The three refuted the accusation and sought orders to quash any criminal investigations with regard to the accusation. They claimed that the Companies Act had laid out how investigations to un-earth company fraud were to take place. Although the court ruled in their favour and directed the conflicting family members to resolve the issue amicably, the case of the 'missing' Kes. 1.6 billion still remains unsolved. The alleged theft has driven a wedge further amongst the family members, deepening their feud.

3.7 CONCLUSION

This case study looked into five companies who were household names dominating the retail sector. However, at the peak of their boom they stagnated before horribly collapsing. The study has attributed their collapses to poor management structure, poor decision making, financial difficulties, theft by employees and massive debt;[178] all amounting to one main factor - mismanagement. This chapter has established how mismanagement can destabilize a retailer's financial muscle leading up to its collapse.

In addition, the chapter has established how the government has intervened as a retailer is on the verge of collapse to bail it out. Unfortunately, the same is too late. The new *Code of Practice to Guide Prompt Payment in the Retail Sector*,[179] as discussed in the earlier chapter, was birthed

---

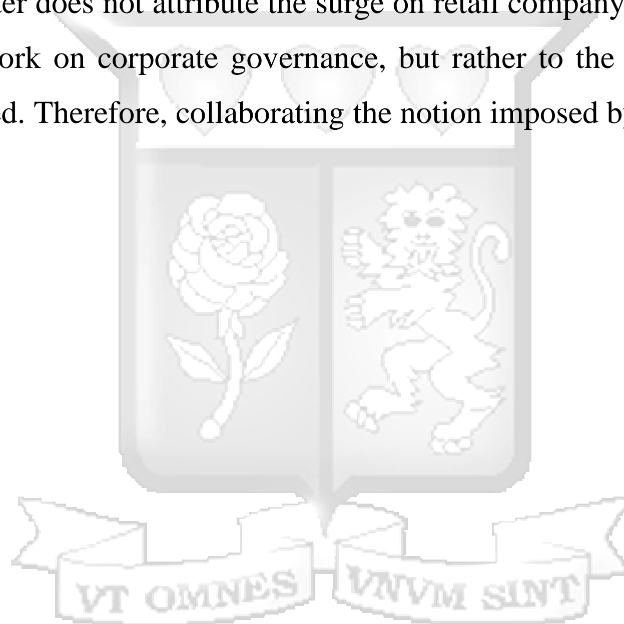
[177] (2013) eKLR.

[178] Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.

[179] 'Manufacturers, retailers and suppliers sign code of practice to guide prompt payment in the retail sector' Kenya Association of Manufacturers, 17 January 2019 — <http://kam.co.ke/manufacturers-retailers-and-suppliers-sign-code-of-practice-to-guide-prompt-payment-in-the-retail-sector/> on 19 April 2020.

after Nakumatt Holdings ltd collapsed. When Tuskys supermarket was put under the government's watchlist, the code was invoked to ensure suppliers were paid.[180] However, the same did not settle the retailer's financial woes. The code once more showcases the government's late intervention. Yes, the government is honouring the privacy owed to the retail companies in running their business and only intervening, when need be, mostly after reports of massive job losses and unpaid suppliers are recorded. However, the government needs to manifest itself in the business dealings of retail companies from the get go by imposing the corporate governance legal frameworks on an integrated regulatory approach. The government's presence in the retailer's business dealings will ensure that public policy is promoted at every step.

In summary, the chapter does not attribute the surge on retail company collapses to the extant Kenyan legal framework on corporate governance, but rather to the regulatory compliance inadequacies evidenced. Therefore, collaborating the notion imposed by the previous chapter.



180 Kiruga M, 'Kenya's Tuskys on government watchlist after failing to pay suppliers' [2020] *The Africa Report.com* — <http://www.theafricareport.com/30456/kenyas-tuskys-on-government-watchlist-after-failing-to-pay-suppliers/> on 19 July 2020.

CHAPTER FOUR: TIES THAT BIND THE FACTORS LEADING TO RETAIL COMPANY COLLAPSES TO CORPORATE GOVERNANCE REGULATORY COMPLIANCE ISSUES

4.1 INTRODUCTION

This chapter by discussing the salient features of corporate governance and analysing the results of the case study, shall be able to establish the ties that bind the factors leading to retail company collapses to regulatory compliance issues as a challenge facing the implementation and practice of corporate governance by retail companies in Kenya. The chapter shall focus on the theories of corporate governance and the principles of corporate governance to establish the ties that bind the factors leading to retail company collapses to corporate governance, to be specific corporate governance regulatory compliance issues.

4.2 THEORIES OF CORPORATE GOVERNANCE ON GOVERANCE STRUCTURE

As discussed earlier in chapter one, the study revolves around stewardship theory and stakeholder theory when making reference to the corporate governance of retail companies especially in Kenya. Corporate governance for the purpose of this chapter entails separation of ownership and control when it comes to the governance of a retail company. The blend of the theories ensures that a retail company's executives and managers working for the shareholders, protect and make profits for the shareholder,[181] while at the same time protecting the interests of stakeholders.[182]

Chapter three highlights that the governance structure from the case study is an issue since four out of five collapsed retailers failed to separate ownership and control, and the retailers failed to provide proper governance, resulting in their collapse. Notably Uchumi supermarket plc stands out from the case study retailers for three reasons. The differences are that it is not family-owned, it had government shareholding and that it fell within the ambit of securities regulation as it was listed. Despite the differences, Uchumi supermarket plc does fall under the ambit of retail companies in Kenya. As earlier alluded in chapter one, the retail sector is made up of both listed companies and a vast majority of family-owned companies. Some of the family-owned companies have shown intention to be listed, for instance Tuskys. Therefore, the investigation on Uchumi supermarket plc's collapse is of necessity to identify why retail companies in Kenya are collapsing.

---

181 Part II, *Companies Act* (Act No.17 of 2015).

182 Freeman R, 'A stakeholder theory of modern corporations' in Beauchamp T, Bowie N (eds) *Ethical Theory and Business,* 7th ed, Prentice Hall, Upper Saddle River, 2003, 56-65.

4.2.1 Governance Structure

Once a separation of the ownership and management of a company has been established, the shareholders -who are the owners- empower trust unto the directors and managers. The governance structure is further divided from directors and managers to non-executive directors and executive directors. The executive directors mainly comprise of some of the shareholders while the non-executive directors are mainly outsiders; non-owners. The inclusion of executive and non-executive directors ensures that the retailer's owners take part in the decision-making of the retailer while at the same time protecting the interests of other stakeholders, and generally protecting the retailer's interests.[183]

From the case study, establishing a proper governance structure as discussed above was a challenge. The case study retailer Tuskys Supermarket faced this challenge as the founder's heirs fought over the appointment of the first ever outsider into management.[184] The numerous court proceedings involving Ukwala supermarket, Ebrahim supermarket and Nakumatt Holdings ltd evinced that the case study retailers had a poor governance structure. This realisation advocates for family-owned retailers ought to be more rigour invested in separating ownership from management. The substantive legal framework as discussed in chapter two, does obligate companies to have non-executive directors in the retailer's board in order to enhance independence. However, the same has not been adhered to as evidenced in the collapsed case study retailers. Consequently, exposing the regulatory compliance challenge facing the implementation and practice of the extant corporate governance legal framework.

4.2.2 Board's Management and Oversight

A company's performance reflects on the stewards' performance.[185] Taking into account the duties of a director as stipulated in the Companies Act[186] directors as stewards for the purpose of this study are to provide strategic guidance for the retailer and effective oversight of management, elucidate their respective roles and responsibilities to facilitate accountability to both the retailer and the shareholders and to balance authority so no single individual has unfettered powers.

---

[183] Donaldson T and Preston L, 'The stakeholder theory of the corporation: Concepts, evidence and implications' 20 (1) *The Academy of Management Review*, 1995, 65 - 91.

[184] 'Tuskys war intensifies as one sibling disowns new manager' Business Daily, 6 May 2015 — <https://www.businessdailyafrica.com/bd/corporate/companies/tuskys-war-intensifies-as-one-sibling-disowns-new-manager--2086628> on 15 November 2020.

[185] Daily C, Dalton D and Cannella A, 'Corporate governance: Decades of dialogue and data' 28 (3) *The Academy of Management Review*, 2003, 371.

[186] Part II, *Companies Act* (Act No.17 of 2015).

From the case study, the retailers' directors failed to provide strategic guidance especially when establishing and implementing the retailers' expansion plan. The aggressive expansion plan by the retailers challenged their financial capability contributing to their imminent collapse. Since the retailers were family-owned, distributing authority equitably and clarifying the roles and responsibilities of each director, were of importance to promote accountability. The retailers in the case study lacked these as evidenced by the numerous court cases and the news reports on their mistrust and rivalry for some. The discord amongst the directors resulted in poor decisions, leading to the retailers' collapse.

The inability to create a clear distinction between ownership and management, consequently resulted in poor board management and oversight. The discord amongst the directors reflected that there were individuals who had unfettered power. The inclusion of executive and non-executive directors[187] as advocated for by the extant legal framework, was not evident. The board of the family-owned retailers could not make decisions independent of their interests. This was occasioned by the mere fact that the owners solely formed the retailer's management. The independence and objectivity non-executives offer would have protected the interests of other stakeholders, and generally protected the retailer's interests. The lack thereof, resulted in the family-owned retailers' board to perform poorly in its management and oversight.

Notably, despite Uchumi supermarket plc having a proper governance structure made up of both executive and non-executive directors, its board failed in its management and oversight role. This could be attributed to the fact that the directors acted as agents. As earlier discussed in chapter one, the distrust-based governance mechanisms in line with the agency theory recommendations have been futile to avoid managerial misconduct. Therefore, advocating for the use of stewards in retail companies in Kenya as opposed to agents.

4.3 PRINCIPLES OF CORPORATE GOVERNANCE

The corporate governance principles entail accountability, fairness, transparency and disclosure.[188] These principles are encapsulated in the roles and responsibilities of the directors and managers. As seen from the case study, those in charge of the retailers' management failed in executing their roles and responsibilities as evidenced by retailers' collapse.

---

[187] Donaldson T and Preston L, 'The stakeholder theory of the corporation: Concepts, evidence and implications' 20 (1) *The Academy of Management Review*, 1995, 65 - 91.

[188] OECD, *G20/OECD Principles of corporate governance,* OECD Publishing, Paris, 2015.

Chapter three has identified the factors implicated in the collapse of retail companies in Kenya as poor decision making, financial difficulties, theft by employees and massive debts, which all fall under the ambit of the roles and responsibilities of the managers and directors of the retailers.

4.3.1 Accountability and Fairness

Accountability denotes the obligation to report the actions and take responsibility for them.[189] Fairness denotes even-handedness used to dispense what is just when rights both legal and contractual become due.[190] From the definition and earlier discussion in chapter one, the directors and managers are responsible for determining the nature and extent of the significant risks they are willing to take. They should maintain clear internal control systems and communicate at regular intervals with stakeholders, presenting a balanced, fair and comprehensible assessment of the retailer's prospects for achieving its business purpose. [191] Therefore, the principles of accountability and fairness revolve around the duties of directors, encompassing internal control systems, and ethical and responsible decision making.

4.3.1.1 Internal Control Systems

All company policies and procedures used by those in control to achieve the company's purpose are what define its internal control systems.[192] As discussed earlier on, once a proper governance structure is established, it is of importance to elucidate the roles and responsibilities of the managers and directors (the management) of the retailer. The clarification is normally codified in the retailer's policies and procedures. The adherence to the internal control system by the management of the retailer promotes accountability, hence highly advocated for. In addition, the internal control system features checks and balances in the governance structure that foster fairness by ensuring that unlimited power is not bestowed unto one person.[193] An internal control system with a proper governance structure made up of both independent and executive directors is known to verify and safeguard the integrity of company's financial reporting. The lack of such as seen in the case of Uchumi supermarket plc where bad cheques

---

[189] Black's Law Dictionary, 11th ed.

[190] Black's Law Dictionary, 11th ed.

[191] Solomon J, *Corporate Governance and Accountability,* 2nd ed, John Wiley & Sons, Hoboken, 2007, 150-152.

[192] Mihaela D and Iulian S, 'Internal control and the impact on corporate governance, in Romanian listed companies' 2012 *Journal of Eastern Europe Research in Business & Economics,* 2012, 1-10.

[193] Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the financial aspects of corporate governance,* 1992.

were issued and financial accounts books were manipulated to reflect financial soundness, affected the integrity of the retailer's financial status in turn resulting in its collapse.

In addition, the case study established that the collapsed family-owned retailers lacked an internal control system as those in control were in constant disagreement on who was in charge and how the retailer was to be run; in essence, disagreements on the management of the retailer. In the long run, this affected their decision making resulting in poor financial decisions contributing to their collapse.

4.3.1.2 Ethical and Responsible Decision-Making

A proper governance structure featuring both executive and non-executive directors is crucial for ethical and responsible decisions to be made.[194] The reasoning behind this, as discussed earlier on, is that mostly the executive directors are owners of the retailer therefore they cannot be objective in the oversight of the management since their interests intertwine. Having "outsiders" as non-executive directors brings about an element of independence as they are best placed to be good stewards.

Chapter three exposed the collapsed retailers, apart from Uchumi supermarket plc, to have lacked non-executive directors as part of the management. Those in control were not objective as Nakumatt's board issued unregulated insider loans, while Tuskys' board swindled the retailer. Agreeably, the most dominant unethical and irresponsible decision made by the family-owned retailers was the ill-conceived decision on aggressive expansion. If the collapsed retailers made ethical decisions, reports of conflict of interests, unfair dealings and misuse of retailers' assets would not have been recorded. In addition, the reports on conflict of interests and misuse of Uchumi supermarket plc's assets by the management, was as a result of the management acting as agents as opposed to stewards.

A company is not an island; its affairs affect not only its shareholders but also a broad range of stakeholders.[195] Therefore, those that are interested in the affairs of a retailer are shareholders, employees, suppliers, customers, financial institutions and the general public. Those in control of the retailer are required to balance the interests of all its stakeholders by making ethically

[194] Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the financial aspects of corporate governance,* 1992.
[195] Rodriguez M, Ricart J and Sanchez P, 'Sustainable development and sustainability of competitive advantage: A dynamic and sustainable view of the firm' 11 (3) *Creativity and Innovation Management*, 2002, 135- 146.

responsible decisions.[196] From the case study, a majority of the retailers in Kenya are family owned. Therefore, using the stakeholder theory to shape their corporate governance structure is ideal. Evidently, the management of the collapsed retailers failed to promote public policy. The stakeholder interests were ignored as evidenced by employees and suppliers going unpaid for months, customers faced with empty shelves and loan advancements going unpaid. The poor decisions rocked the retailers' financial stability resulting in their collapse.

4.3.1.3 Risk management

Corporate governance ensures that risks are identified, managed and communicated in a timely manner.[197] The management is obligated to set the retail company's risk appetite with regard to each individual identified risk.[198] Once the risk appetite is set, as good stewards the management has to maintain a sound risk management and internal control system to ensure that the risks do not threaten the retail company's future performance, solvency and most importantly, the retail company's business model is not threatened.

When risks are not managed, corporate failure is imminent; as was the case with the collapsed retailers in the study. The most notable risk that essentially negatively impacted on stakeholders shared by all the collapsed retailers was the rapid aggressive expansion plan. The managers and directors of the collapsed retail companies failed to factor in the retailers' capital adequacy when taking on the rapid aggressive expansion plan risk. The lack of proper risk management and internal control systems saw rapid aggressive expansion plan cripple the retail companies financially. In addition, the extant legal framework is adequate as it does endorse proper risk management by obliging directors to file the directors' report.[199] Therefore, one is left to conclude that the cause of the poor risk management evidenced in the collapsed case study retailers, was not as a result of the inadequacies of the extant legal framework, but rather its regulatory compliance.

4.3.2 Transparency and Disclosure

Transparency and disclosure entail openness and willingness to disclose accurate material information concerning the performance and activities of a company in a timely manner to ensure that stakeholders have access to concise, factual information that reflects the true

---

[196] Freeman R, 'A stakeholder theory of modern corporations' in Beauchamp T, Bowie N (eds) *Ethical Theory and Business,* 7th ed, Prentice Hall, Upper Saddle River, 2003, 56-65.
[197] OECD, *Risk Management and Corporate Governance,* OECD Publishing, 2014.
[198] OECD, *Risk Management and Corporate Governance,* OECD Publishing, 2014.
[199] Section 653, *Companies Act* (Act No.17 of 2015).

financial, social and environmental position of the company.[200] Evidently, transparency and disclosure seek to recognise and protect the stakeholders' right to information. Transparency and disclosure therefore provide stakeholders with a base for making informed decisions.

Transparency and disclosure entail financial reporting, risk assessments reporting, board performance and remuneration structure, reporting and procurement reporting.[201] The same has been adopted by the Companies Act 2015 and manifested in the 2017 regulations.[202] The management of a company have a duty to keep proper accounting records,[203] prepare individual financial statements,[204] prepare directors' report,[205] prepare directors' remuneration report,[206] and provide financial statements to all entitled[207] in observation of transparency and disclosure. Therefore, transparency and disclosure mainly involve two aspects of information; that is information on the financial status of a company and secondly information by directors on their own performance and their remuneration.

4.3.2.1 Financial reports

Chapter three depicted that the case study retail companies collapsed due to financial difficulties contributed by various factors as discussed therein. As earlier discussed in chapter two, the financial reports of a company should reflect the true and fair financial status of the company in terms of assets, liabilities, and loss or profits. Therefore, proper accounting is of essence.

When investigating whether a company is facing financial difficulties, a look into its financial reports shall reflect the true and fair nature of its finances. During the investigation on Uchumi supermarket plc, transparency and disclosure were evidently a façade. The management disclosed the financial status of the retail company by presenting financial statements when due. However, the disclosure was not transparent as they failed to comply with standard accounting principles, issued bad cheques and failed to record cashflow. Proper accounting dictates giving detailed account for transactions and complying with prescribed financial

[200] Tricker B, *Corporate Governance: Principles, Policies and Practices,* 2nd ed, Oxford University Press, New York, 2012.
[201] *MWONGOZO: The Code of Governance for State Corporations* (Public Service Commission and State Corporations Advisory Committee 2015).
[202] *Companies (General) (Amendment) Regulations* (L.N. 19 of 2017).
[203] Section 628, *Companies Act* (Act No.17 of 2015).
[204] Section 635, *Companies Act* (Act No.17 of 2015).
[205] Section 653, *Companies Act* (Act No.17 of 2015).
[206] Section 659, *Companies Act* (Act No.17 of 2015).
[207] Section 666, *Companies Act* (Act No.17 of 2015).

accounting guidelines.[208] Therefore, proper accounting proved to be a challenge for Uchumi supermarket plc contributing to its collapse.

The independent audit on Nakumatt Holdings ltd's financials drew attention to the fact that a risk assessment report was wanting. The retailer's management failed to identify and manage the rapid aggressive expansion plan funded by expensive debt and the unregulated internal lending as risks. Consequently, the two contributed to the retailer's collapse as discussed therein. The same can be said for Tuskys supermarket, as the retailer plunged into massive debts in a bid to fill the void Nakumatt Holdings ltd had left when it collapsed.

Evidently, the case study retail companies lacked a risk assessment report as they all failed to identify and manage the rapid aggressive expansion plan as a risk. Providing substandard financial reports that sold a façade of a prospering retail company disregarded transparency and disclosure, eventually stakeholders losing confidence in the retail companies. Without a doubt, the legal and regulatory compliance on financial reporting was adequate. Thus, the challenges facing the financial reporting by the retailers were issues of ethics and morals.

4.3.2.2 Directors' reports

In addition to filing financial reports, directors are required to file directors' reports in a bid to enhance transparency and disclosure. As discussed in chapter two, the directors' reports are two: the directors' report[209] and the directors' remuneration report.[210] The directors' report divulges information on the board structure for the financial year[211] and the directors' business review of the company.[212] The directors are to disclose on the company's impact on stakeholders, and the extant and potential risks facing the company. The directors' remuneration report as the name denotes, discloses information on the directors' remuneration individually. Notably, only listed companies need to file the directors' remuneration report.

Were directors' reports filed by the case study collapsed retail companies? Yes and no. Yes, the directors' reports were submitted to the shareholders of the collapsed retail companies. However, the reports were not comprehensive as they did not fully comply with what was prescribed by the law. This was clearly exhibited by the lack of factoring in and mitigating the risks discussed herein above that consequently led to their untimely collapse. From the forensic

[208] Section 628, *Companies Act* (Act No.17 of 2015).
[209] Section 653, *Companies Act* (Act No.17 of 2015).
[210] Section 659, *Companies Act* (Act No.17 of 2015).
[211] Section 654, *Companies Act* (Act No.17 of 2015).
[212] Section 655, *Companies Act* (Act No.17 of 2015).

audit done on Uchumi supermarket plc, Nakumatt holdings ltd and Tuskys supermarket, it was evident that transparency and disclosure was a façade as the financial reports and the directors' reports did not provide the stakeholders with true and fair information with regards to the retail companies' financial status. Most of the retail companies in the study are family owned, the wrangles amongst them evinced by the numerous court proceedings, was self-evident that transparency and disclosure were below par.

As earlier alluded, listed companies ought to file directors' remuneration reports. Uchumi supermarket plc falling in the ambit of list companies, ought to have filed a directors' remuneration report. The forensic audit does reflect the same was filed by the retailer's management. However, the same could not reflect what each director was being remunerated. In 2017, the legal framework[213] was amended to mandate that the report does reflect what each individual director was being remunerated, in order to enhance full disclosure and transparency.

4.4 REGULATORY COMPLIANCE BY THE COLLAPSED COMPANIES IN KENYA'S RETAIL SECTOR

As discussed in chapter one, corporate governance regulatory compliance can be established along no-regulation, self-regulation, co-regulation and statutory regulation approaches. Kenya's corporate governance regulatory compliance as discussed in chapter two above, has been established along the self-regulation and statutory regulation matrix with a hint of co-regulation. With the statutory regulation matrix, the government has been hands-on with companies especially state-owned corporations, listed companies, banking institutions and universities. The approach has been stringently applied with emphasis paid to public entities. The self-regulation approach has embodied the government's assurance to honour the privacy of private entities in conducting their business dealings. The approach has been lenient as compliance is not stringently applied. Consequently, retail companies which are largely family-owned private companies, have adopted the self-regulation approach. In addition, the government's involvement in the collapsed case study retail companies as a going concern is self-evident that corporate governance for retail companies has been established along the self-regulation matrix. Notably, there are retail companies that fall under the ambit of list companies, for instance Uchumi supermarket plc. Therefore, the listed retail companies have

[213] *Companies (General) (Amendment) Regulations* (L.N. 19 of 2017).

adopted the statutory-regulation approach in addition to the self-regulatory approach established by the guidelines. [214]

The demerits associated with self- regulation, namely issues of ethics and morality characterised by lack of uncertainty, accountability issues and a blurred distinction between minimum standards and best practice of corporate governance,[215] are no stranger to Kenya's corporate governance regulatory compliance. In chapter three while identifying the factors leading to retail company collapses, the characteristics of the issues of ethics and morality associated with self-regulation were present. The directors and managers of the collapsed retail companies failed to pay up the retailers' debts ranging from salaries, loan obligations and supply obligations. In addition, some doubled as suppliers and opened shell stores, some swindled the retailers, some issued unregulated insider loans, some misused the retailer's assets, and the directors and managers saw through the implementation of the ill-conceived decision on aggressive expansion. Despite some of the retailers complying with the extant corporate governance regulatory framework, they were unethical as they gave false reports about the financial status of the said retailers; as was the case in Uchumi supermarket plc where the bad cheques and ignorance of basic accounting standards were ignored to hoodwink the shareholders and various stakeholders that the retailer was financially sound.

As argued in the previous chapters, the extant corporate governance legal framework in Kenya is adequate. However, the challenge facing the framework as evidenced in chapter three is compliance. Due to Kenya's attribute of heavily borrowing foreign frameworks without considering its landscape, retail companies have found themselves in a compliance quagmire. The rule-based approach borrowed from the US and the principle-based approach borrowed from the UK, have influenced the said collapses. The stringent approach by rule-based, and the ethical and moral issues associated with the principle-based approach, has seen enforceability of the extant legal framework challenged.

4.5 CONCLUSION

This chapter has analysed the theories of corporate governance and corporate governance principles to corroborate the ties that bind the factors leading to the collapse of the case study retail companies to regulatory compliance issues challenge facing the implementation and

---

[214] *Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya* (Gazette Notice No. 3362 of 2002).

[215] Nakpodia F, Adegbite E, Amaeshi K and Owolabi A, 'Neither principles nor rules: Making corporate governance work in Sub-Saharan Africa' 151 (2) *Journal of Business Ethics,* 2018, 391-408.

practice of corporate governance in Kenya. The analysis has established that a retail company's financial stability is threatened by corporate governance inadequacies occasioned by regulatory compliance inadequacies. Consequently, affecting the retail company's good will and, in the end, leading to its untimely collapse. What stands out from the discussion is governance structure, accountability, balance of powers, internal control system, management of corporate risk, financial sustainability, communication, and recognition and protection of stakeholders' rights. Adoption of the same ensures that a company has good corporate governance reflecting it to be financially sound.

Noteworthy, risk management has been largely adopted by financial institutions.[216] However, the chapter has emphasized the importance of retail companies to factor in risks that potentially negatively impact on stakeholders; for instance, the rapid aggressive expansion plan that was not factored in and mitigated as a risk by all the collapsed retail companies. Compliance with the stewardship and stakeholder theories, and the principles of accountability, fairness, transparency and disclosure, have proven to aid the management of a company to maximize shareholder value in the best interest of the society and environment. In turn, the compliance will build faith in the retail company attracting support to finance further growth. Therefore, since the Kenyan retail sector is largely comprised of family-owned retail companies, compliance with the theories and the principles of corporate governance can aid to prevent corporate failures as discussed above. In addition, the absence of the aspects of corporate governance as discussed herein above in 4.2. and 4.3, is a clear indication that extant legal framework is adequate. However, its regulatory compliance by retail companies is a challenge facing its implementation and practice in Kenya.

[216] OECD, *Risk Management and Corporate Governance,* OECD Publishing, 2014.

CHAPTER FIVE: FINDINGS, CONCLUSION AND RECOMMENDATIONS

5.1 KEY FINDINGS

This study analysed and sought to respond to the question whether retail companies is Kenya are truly winning through corporate governance. The study is premised on the problem that over the years Kenya has been faced with a phenomenon of massive company collapses in the retail sector. Therefore, this study sought to investigate its broad objective which was to explore why retail companies in the Kenya are collapsing in spite of the recent emphasis by the government on best corporate governance practices through various legal frameworks, policies, rules and guidelines. The investigation took place by formulating four research questions in chapter one which were subsequently answered in each chapter.

During the investigation of the problem, this study hypothesized that due to the legal and regulatory compliance inadequacies of the extant corporate governance framework, retail companies are collapsing as a result of the regulatory compliance issues as a challenge facing the implementation and practice of corporate governance, and the government's role in corporate governance. This study proved the hypothesis as seen below.

5.1.1 Key Finding I: Kenya's Corporate Governance Regulatory Framework and its Effectiveness

Chapter two explores the intricate rich corporate governance history and legal framework in Kenya with interest towards corporate governance in Kenya's retail sector. The chapter proves that governance institutions in their pursuit to advance good corporate governance have developed rules, codes, guidelines, policies and standards on good corporate governance practices. These regulatory frameworks have formed an imperative objective of enhancing shareholder value and protecting a company's interest through corporate performance and accountability. The chapter concludes that both international and domestic corporate governance legal framework is adequate.

If the legal framework is adequate, one is left to question why are retail companies collapsing? A look into the extant legal framework reveals that its compliance is on a rule-based approach and on a principle-based approach with a hint of co-regulation. The regulatory compliance quagmire created by the government, has seen retail companies fully implementing and practicing good corporate governance as necessitated by the extant legal framework. inclined more towards public listed companies leaving private companies in an abyss of corporate governance uncertainties exhibited by the self-regulation compliance matrix.

Noteworthy, the regulatory compliance quagmire that retail companies find themselves in has not gone unnoticed. The phenomenon of massive company collapses in the retail sector has prompted the government to formulate a code of practice for key players in the retail sector. Unfortunately, the code falls short once more as its compliance is on self-regulation. Consequently, proving that the government's blatant replication of foreign framework without considering Kenya's business environment, is resulting to retail company collapses.

In addition, the 'apply or explain' approach to enforce compliance advocated for by Dr Jacob K Gakeri[217] would be logical considering the extant settings and business environment of companies within the country. If the 'apply or explain' approach would be applied on retail companies, the retail company has to have a proven self-regulatory track record. The study has proven that corporate governance compliance is an issue of concern for retail companies as the collapsed retail companies exhibited the demerits of the principle-based regulatory approach, that is issues of ethics and morality. However, since corporate governance regulatory compliance for retail companies is based on statutory regulation and self-regulation blend with co-regulation, harmonizing compliance through an integrated regulatory approach to enforce compliance is of necessity.

From the investigation, all companies can be winning through corporate governance as the regulatory framework in place is adequate. The only challenge facing this promise is the regulatory compliance conundrum posed by the government's role in enforcing compliance.

5.1.2 Key Finding II: Common Factors leading to Retail Companies Collapsing in Kenya

Chapter three, by studying five recently collapsed companies in the retail sector, investigates why retail companies in Kenya are collapsing at an alarming rate in spite of the recent emphasis by the government on best corporate governance practices through various legal frameworks, policies, rules and guidelines. The chapter identifies the common factors leading to retail companies collapsing in Kenya as poor management structure, poor decision making - especially on aggressive expansion plans-, financial difficulties, theft by employees and massive debt. These cases of questionable ethical practices and weak internal controls have evidently besmirched the retail companies' reputations, risk management, challenges in accounting and reporting. Broadly, the common factor attributed to retail companies collapsing in Kenya is mismanagement.

[217] Gakeri J, 'Enhancing Kenya's securities markets through corporate governance' 3 (6) *International Journal of Humanities and Social Science*, 2013, 94-117.

In addition, the case study has revealed that the government does acknowledge the privacy of retail companies in running their business and only intervene when need be; mostly when the retail company is distressed as reports of massive job losses and unpaid suppliers manifest. This reiterates the earlier notion that the government need to manifest itself in the business dealings of retail companies from the get go by imposing compliance of the extant corporate governance regulatory framework on an integrated regulatory approach.

5.1.3 Key Finding III: Ties that Bind Retail Company Collapses in Kenya to Corporate Governance Regulatory Compliance Issues

Chapter four by discussing the salient features of corporate governance was able to establish the ties that bind retail company collapses in Kenya to corporate governance. The chapter has proved that corporate governance inadequacies threaten a retail company's financial stability consequently affecting its good will and, in the end, leading to its untimely collapse.

Analysing the factors leading to collapse as established in chapter three juxtaposed to corporate governance, it is clear that retail companies in Kenya have embraced corporate governance. Unfortunately, the regulatory compliance quagmire retail companies find themselves in has contributed to the collapses. The challenges facing both statutory regulation and self-regulation have plagued companies in Kenya's retail sector. Therefore, once more giving emphasis to the need to enforce compliance on an integrated regulatory approach in order to harmonise compliance in the retail sector.

5.2 CONCLUSION

From the investigations, family-owned retail companies dominate the retail sector. Therefore, it will be prudent that a well-structured governance team, in accordance to the theories of corporate governance and principles of corporate governance adopted by the study, is in place in order to achieve the retail company's financial and expansion goals while utilising the best available resources in the market.

Corporate governance is vital for companies to survive and thrive. Corporate governance compliance provides the appropriate checks and balances required to foster corporate success. Compliance issues with the corporate governance regulatory framework instigates corporate failure. This has been adequately captured in the extant corporate governance legal framework in Kenya. Indeed, corporate governance can ensure that retail companies in Kenya are winning. However, the reality is that retail companies in Kenya are losing due to the regulatory compliance conundrum posed by the numerous regulation matrices establishing the extant

corporate governance regulatory framework. This has subsequently affected the implementation and practice of the extant corporate governance framework. Consequently, leading to corporate failures in the retail sector.

5.3 RECOMMENDATIONS

Preferably, based on the findings and conclusion made in this study, Kenya's corporate governance regulatory framework is adequate. However, its regulatory compliance approach by companies in the retail sector is due for review. This study makes several recommendations that Kenya should adopt to effectively curb collapses in the retail sector. The recommendations are categorized into self-care, surveillance and monitoring regulatory compliance, and legislative amendments to harmonise regulatory compliance as discussed below.

5.3.1 Self-care Recommendations

As discussed in chapter three and chapter four the needs that require immediate attention by retail companies are the governance structure, accountability and disclosure. This calls for self-care. As discussed, family-owned companies dominate the retail sector. Inference drawn from the case study is that the collapsed retail companies had an issue with their governance structure. Surviving retail companies should learn from the mistakes of their collapsed counterparts and introduce independent directors to their governance structure. Independent directors offer the adequate checks and balances required to run a business ensuring that there is a balance between the company's and stakeholders' interests.

Once a proper governance structure is in place, the most logical recourse to curb corporate failure will be to uphold the principles of corporate governance; most importantly accountability and disclose. The retail company's management should ensure effective, accurate, timely and transparent disclosure of pertinent information on the company's business dealings and overall performance is delivered. The demerits of the 'comply or explain' regulatory compliance matrix has been proven to exacerbate and encourage corporate failure in retail companies. Therefore, the retail companies are called to be true to the spirit of corporate governance.

In addition, the retail company management in embracing corporate governance should hold and attend training as prescribed the Centre for Corporate Governance. On top of the corporate governance trainings, the management should adopt the sample corporate governance code prescribed by the Private Sector Initiative for Corporate Governance. These measures will enable them to implement good corporate governance in the retail company. Therefore, the

recommendations made herein above are self-regulatory encouraging corporate responsibility among the retail companies management and achievable within a month.

5.3.2 Surveillance and Monitoring Regulatory Compliance Recommendations

As discussed in chapter two, various institutions have been mandated to monitor corporate governance regulatory compliance. They are the Capital Markets Authority, the Nairobi Stock Exchange, the Competition Authority of Kenya and the Company Registry. From the discussion, the Capital Markets Authority and the Nairobi Stock Exchange mainly exercise their mandate over listed companies. Therefore, any retail company listed has to comply with the regulations set by the institutions. Chapter three clarified the Competition Authority of Kenya's mandate to only extend to companies with regards to promoting fair competition. Since the three institutions clearly have limited mandate, surveillance and monitoring regulatory compliance can be exercised fully by the Companies Registry.

The Registrar of Companies can exercise this surveillance and monitoring regulatory compliance mandate fully by ensuring that all companies file their reports; that is the financial statements and directors reports as discussed in chapter four. The Registrar of Companies is better placed to enforce the 'apply or explain' regulatory compliance matrix. The rationale behind this is that all companies must registered with the Companies Registry to be operational. Therefore, the Registrar will require the registered companies to apply the principles of corporate governance. While monitoring compliance by the companies, the Registrar will not be concerned with whether a company complies or not, but rather how the principles on corporate governance were applied by a given company. Enforcing an integrated regulatory compliance matrix and ensuring compliance with these regulatory requirements shall promote accountability and disclose which in turn shall reflect the true fair nature of the company in question.

5.3.3 Legislative Amendments to Harmonise Regulatory Compliance Recommendations

In order to achieve the ultimate goal, which is corporate governance regulatory compliance by retail companies, an integrated regulatory approach as proposed should be embraced and emphasized by the government. Therefore, these recommendations target the government with special consideration given to the legislator to harmonise the corporate governance regulatory compliance matrices.

The investigations concluded that the government has been lenient with private companies and only intervenes when a company becomes a going concern as evidenced in chapter three. The

holistic approach is not unwarranted. As discussed earlier on, no one company can be the same hence Kenya's slight divergence from rule-based regulatory approach which simply implies one size fits all, to 'comply or explain' approach to corporate governance compliance mimicking United Kingdom's approach. Consequently, offering retail companies an array of regulatory compliance matrices. However, the government should impose the integrated regulatory approach given the extant settings and business environment of Kenyan retail companies as advocated by Nakpodia F et al[218] for Sub-Saharan African countries to harmonise regulatory compliance.

To achieve this harmonisation, the government through the legislator should amend the necessary corporate governance regulatory framework and ensure that compliance on an 'apply or explain' basis is imposed on all companies. The amendment should integrate both rule-based and principle-based matrices to birth the 'apply or explain' regulatory compliance matrix. The regulatory compliance matrix shall be characterised by principles dominating it, with the acknowledgement that some principles have been legislated compelling compliance with the letter of the law distancing the legislated principles from subjective interpretations.

The harmonisation will ensure that the government shall no longer intervene when a company becomes a going concern but rather be involved with the company's business dealing at the onset. This will in turn promote public policy as the government in its mandate as a watchdog, will ensure retail companies' business dealings promote corporate responsibility. In addition, the move to 'apply or explain' regulatory compliance matrix is commendable as by being concerned with how the company applied the principles as opposed to whether the company complied or not, mitigates the ethics and morality issues plaguing retail companies. The regulations imposing 'apply or explain' regulatory compliance matrix will empower the monitoring and supervisory institutions making both the reforms previously discussed achievable. In the end, retail companies shall actualize the promise 'winning ways through corporate governance'.

[218] Nakpodia F et al, 'Neither principles nor rules'.

BIBLIOGRAPHY

Books

1. Freeman R, *Strategic Management: A Stakeholder Approach,* Cambridge University Press, Cambridge, 2010.
2. Solomon J, *Corporate Governance and Accountability,* 2nd ed, John Wiley & Sons, Hoboken, 2007.
3. Tricker B, *Corporate Governance: Principles, Policies and Practices,* 2nd ed, Oxford University Press, New York, 2012.
4. Solomon J and Solomon A, *Corporate governance and accountability,* 1st ed, Wiley, New York, 2004.
5. Monks R and Minow N, *Watching the Watchers: Corporate Governance for the 21st Century,* 1st ed, Blackwell Publishers, Cambridge, 1996.
6. Cadbury A, *Family firms and their governance: Creating tomorrow's company from today's,* Egon Zehnder International, London, 2000.
7. Abouzaid S, *IFC family business governance handbook,* 4th ed, International Finance Corporation, Washington DC, 2018.
8. Private Sector Initiative for Corporate Governance, *Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance,* Private Sector Corporate Governance Trust, Nairobi, 2002.
9. Solomon J, *Corporate Governance and Accountability,* 2nd ed, John Wiley & Sons, Hoboken, 2007, 150-152

Chapter in Books

1. Freeman R, 'A stakeholder theory of modern corporations' in Beauchamp T, Bowie N (eds) *Ethical Theory and Business,* 7th ed, Prentice Hall, Upper Saddle River, 2003, 56-65.
2. Ward J, 'How governing family business is different' in Steger U (ed), *Mastering global corporate governance,* 1st ed, John Wiley & Sons, Inc, Hoboken, 2007, 135-167.
3. Cave J, 'Policy and regulatory requirement for future internet' in Brown I (ed), *Research handbook on governance of the internet,* UK ed, Edward Elgar Publishing, 2013, 143-167.

Journal Articles

1. Abdullah H and Valentine B, 'Fundamental and Ethics Theories of Corporate Governance' (4) *Middle Eastern Finance and Economics*, 2009, 88
2. Davis J, Schoorman F and Donaldson L, 'Toward a stewardship theory of management' 22 (1) *The Academy of Management Review*, 1997, 20.

VT OMNES VNVM SINT

3. Daily C, Dalton D and Cannella A, 'Corporate governance: Decades of dialogue and data' 28 (3) *The Academy of Management Review*, 2003, 371.
4. Gakeri J, 'Enhancing Kenya's securities markets through corporate governance: Challenges and opportunities' 3 (6) *International Journal of Humanities and Social Science*, 2013, 94-117.
5. Rodriguez M, Ricart J and Sanchez P, 'Sustainable development and sustainability of competitive advantage: A dynamic and sustainable view of the firm' 11 (3) *Creativity and Innovation Management*, 2002, 135- 146.
6. Donaldson T and Preston L, 'The stakeholder theory of the corporation: Concepts, evidence and implications' 20 (1) *The Academy of Management Review*, 1995, 65 - 91.
7. Freeman R, 'A stakeholder theory of modern corporations' 3 *Perspectives in Business Ethics Sie*, 2001.
8. Clarke A, 'The models of the corporation and the development of corporate governance' 1 (1) *Enterprise Governance eJournal,* 2005, 6901
9. Ruparelia R and Njuguna A, 'The Evolution of Corporate Governance and Consequent Domestication in Kenya' 7 (5) *International Journal of Business and Social Science,* 2016, 153-163.
10. Musikali L, 'The law affecting corporate governance in Kenya: A need for review' 19 (7) *International Company and Commercial Law Review,* 2008, 213-227.
11. Mwaura K, 'The failure of corporate governance in state owned enterprises and the need for restructured governance in fully and partially privatized enterprises: The case of Kenya' 31 (1) *Fordham International Law Journal*, 2007, 34-75.
12. Mulili B and Wong P, 'Corporate governance practices in developing countries: The case for Kenya' 2 (1) *International Journal of Business Administration*, 2011, 14-27.
13. Mang'unyi E, 'Ownership structure and corporate governance and its effects on performance: A case of selected banks in Kenya' 2 (3) *International Journal of Business Administration*, 2011, 2-18.
14. Mwaura K, 'Internalization of costs to corporate groups: Part-whole relationships, human rights norms and the futility of the corporate veil' 11 (1) *Journal of International Business and Law*, 2012, 85-110.
15. Mwaura K, 'Reforming the duties of directors under Kenyan company law: A critique' 30 (4) *European Business Law Review, 2019*, 617-631.

16. Jaffe D and Lane S, 'Sustaining a family dynasty: Key issues facing complex multigenerational business and investment owning families' 17 (1) *Family Business Review,* 2004, 81-98.
17. Nakpodia F, Adegbite E, Amaeshi K and Owolabi A, 'Neither principles nor rules: Making corporate governance work in Sub-Saharan Africa' 151 (2) *Journal of Business Ethics,* 2018, 391-408.
18. Khan H, 'A literature review of corporate governance' 25 *International Conference on E-business, Management and Economics IPEDR,* 2011.
19. Mihaela D and Iulian S, 'Internal control and the impact on corporate governance, in Romanian listed companies' 2012 *Journal of Eastern Europe Research in Business & Economics,* 2012, 1-10.

Working Papers, Discussion Papers and Research Papers

1. Ungureanu M, 'Models and practices of corporate governance worldwide' Centre for European Studies, CES Working Paper Series 4 Paper Number 3(a), 2012, 625- 635— <http://ceswp.uaic.ro/articles/CESWP2012_IV3a_UNG.pdf> on 9 July 2020.
2. Aoki M, 'Institutional complementarities between organizational architecture and corporate governance' Research Institute of Economy, Trade and Industry (RIETI), Paper Number 03005, 2003 — <https://www.rieti.go.jp/en/events/03010801/pdf/Aoki.pdf> on 2 July 2020.
3. Farinha J, 'Corporate Governance: A Survey of the Literature' Universidade do Porto Economia, Discussion Paper Number 2003-06 — <http://ssrn.com/abstract=470801> on 25 April 2020.
4. Mandl I, 'Overview of Family Business Relevant Issues' Austrian Institute for SME Research, Contract No. 30-CE-0164021/00-51, 2008 — <https://docplayer.net/5004871-Overview-of-family-business-relevant-issues.html> on 10 June 2020.
5. Bruno V and Claessens S, 'Corporate governance and regulation: Can there be too much of a good thing?' World Bank, Policy Research Working Paper Number 4140, 2007 — <https://openknowledge.worldbank.org/handle/10986/7117> on 10 June 2020.

Conference Papers

1. Wearing A, 'Economic growth: Magnificent obsession' 45th Australian and New Zealand Association for the Advancement of Science Congress, Perth, August 1973.

VT OMNES VNVM SINT

2. Pastoriza D and Ariño M, 'When agents become stewards: Introducing learning in the stewardship theory' Humanizing the Firm & Management Profession organised by the IESE Business School, Barcelona, 30 June - 2 July 2008.

Self-published Articles

1. Larson S, 'Stewardship theory, stakeholder theory and convergence' Wordpress, 2013 — <https://stephenlarsonessays.files.wordpress.com/2014/04/stewardship-theory-stakeholder-theory-and-convergence.pdf> on 2 July 2020.

Newspapers

1. 'Kenya ranked Africa's second biggest market for retail investors' Business Daily, 3 March 2015 — <https://www.businessdailyafrica.com/bd/corporate/companies/kenya-ranked-africa-s-second-biggest-market-for-retail-investors--2081402> on 11 December 2020.
2. White L and Rees L, 'Retail: How the mighty have fallen in Kenya' Daily Maverick, 21 February 2019 — <https://www.dailymaverick.co.za/article/2019-02-21-retail-how-the-mighty-have-fallen-in-kenya/> on 25 April 2020.
3. Kahongeh J, 'The paradox of retail business in Kenya' Daily Nation, 21 December 2019 —<http://www.nation.africa/kenya/business/the-paradox-of-retail-business-in-kenya-234638> on 26 April 2020.
4. Ng'ang'a G, 'End of era as retail giants fall' Nairobi Business Monthly, 6 October 2020 — <https://www.nairobibusinessmonthly.com/end-of-era-as-retail-giants-fall/> on 11 December 2020.
5. 'Uchumi sacks Ciano, CFO for "gross misconduct, negligence"' Business Daily, 15 June 2015 — <https://www.businessdailyafrica.comhttps://www.businessdailyafrica.com/bd/corporate/companies/uchumi-sacks-ciano-cfo-for-gross-misconduct-negligence--2089572> on 5 May 2020.
6. Malalo H and Blair E, 'Kenya's Uchumi supermarkets picks new CEO after predecessor sacked' Reuters, 25 August 2015 — <https://www.reuters.com/article/kenya-uchumi-idUSL5N1103RC20150825> on 5 May 2020.
7. Ngugi B, 'East Africa: Uchumi supermarkets shuts down regional operations' allAfrica, 14 October 2015 — <https://allafrica.com/stories/201510141703.html> on 5 May 2020.
8. Otieno B and Kiplagat S, 'UBA in fresh bid to sell Uchumi land' Business Daily, 11 February 2021 — <https://www.businessdailyafrica.com/bd/corporate/companies/uba-in-fresh-bid-sell-uchumi-land-3286750> on 11 March 2021.

VT OMNES VNVM SINT

9. Michira M, 'When things began to fall apart at Uchumi' The Standard, 26 January 2016 — <https://www.standardmedia.co.ke/financial-standard/article/2000189375/when-things-began-to-fall-apart-at-uchumi> on 26 September 2020.
10. Muhumuza M and Semakula O, 'Why Uchumi painfully closed Uganda, Tanzania operations' Daily Monitor, 19 October 2015 — <https://www.monitor.co.ug/uganda/business/prosper/why-uchumi-painfully-closed-uganda-tanzania-operations--1627746> on 27 September 2020.
11. 'Why regulator stopped Tuskys bid to acquire rival Ukwala' Business Daily, 3 June 2014 — <https://www.businessdailyafrica.com/bd/economy/why-regulator-stopped-tuskys-bid-to-acquire-rival-ukwala-2059736> on 5 May 2020.
12. Fayo G, 'Ukwala collapse under Sh1bn debt hits KRA hard' Business Daily, 6 February 2019 — <https://www.businessdailyafrica.com/bd/news/ukwala-collapse-under-sh1bn-debt-hits-kra-hard-2237724> on 5 September 2020.
13. Mutua J, '"It is finished", owner of iconic Ebrahim Supermarket lets go' Business Daily, 13 February 2019 — <https://www.businessdailyafrica.com/bd/corporate/companies/-it-is-finished-owner-of-iconic-ebrahim-supermarket-lets-go-2238634> on 5 May 2020.
14. Kiruga M, 'Supermarkets and their peculiar link with Nakuru' Nation Africa, 20 October 2013 — <https://nation.africa/kenya/life-and-style/dn2/supermarkets-and-their-peculiar-link-with-nakuru-906670> on 10 September 2020.
15. Some K, 'Reasons behind slow death of supermarket chain Nakumatt | Nation' Nation Africa, 24 June 2017 — <https://nation.africa/kenya/news/reasons-behind-slow-death-of-supermarket-chain-nakumatt-415476> on 15 July 2020.
16. Okoth J, 'Nakumatt liquidation pushed to February, 2021 due to pandemic' The Kenyan Wall Street, 10 November 2020 — <https://kenyanwallstreet.com/nakumatt-liquidation-pushed-to-february-2021/> on 11 February 2021.
17. Mutegi M, 'Atul Shah: How debt took down my Nakumatt empire' Business Daily, 15 January 2018 — <https://www.businessdailyafrica.com/bd/corporate/companies/atul-shah-how-debt-took-down-my-nakumatt-empire--2185478> on 15 September 2020.
18. 'Ties that bind: Why Tuskys and Nakumatt are perfect marriage partners' Business Today, 19 September 2017 — <https://businesstoday.co.ke/tuskys-nakumatt-case-little-bro-aiding-big-bro/> on 5 November 2021.
19. 'Trouble in the empire: An inside look at Tuskys Supermarkets family drama' The East African, 28 April 2012 — <https://www.theeastafrican.co.ke/tea/news/east-africa/trouble-

in-the-empire-an-inside-look-at-tuskys-supermarkets-family-drama-1308490> on 5 November 2020.

20. 'Tuskys war intensifies as one sibling disowns new manager' Business Daily, 6 May 2015 — <https://www.businessdailyafrica.com/bd/corporate/companies/tuskys-war-intensifies-as-one-sibling-disowns-new-manager--2086628> on 15 November 2020.
21. Omondi D, 'Siblings "curse" that family businesses must overcome' The Standard, 13 March 2016 — <https://www.standardmedia.co.ke/business/business-news/article/2000194691/siblings-curse-that-family-businesses-must-overcome> on 15 November 2020.
22. Wafula P, 'Brother against brother: Tuskys sibling rivalry stalls plans for merger | Nation' Nation.Africa, 7 August 2020 — <https://nation.africa/kenya/business/brother-against-brother-tuskys-sibling-rivalry-stalls-plans-for-merger-1914220> on 5 November 2020.
23. Muiruri K, 'Tuskys sells off "dead stock" to save remnant operations' Citizentv.co.ke, 29 April 2021 — <https://citizentv.co.ke/business/tuskys-sells-off-dead-stock-save-remnant-operations-10810384/> on 1 May 2021.
24. Anyanzwa J, 'Tuskys in the footsteps of collapsed Nakumatt and Uchumi' The East African, 10 September 2020 — <https://www.theeastafrican.co.ke/tea/business/tuskys-in-the-footsteps-of-collapsed-nakumatt-and-uchumi-1936046> on 9 November 2020.

<u>Reports</u>

1. Oxford Business Group, *The Report: Kenya 2018,* 2018, chapter Industry and Retail — <https://oxfordbusinessgroup.com/overview/new-and-improved-optimism-grows-retailers-adapt-challenges> on 11 December 2020.
2. Nielsen, *Africa: How to navigate the retail distribution labyrinth*, 2015 — <https://www.nielsen.com/wp-content/uploads/sites/3/2019/04/africa-report-navigating-the-retail-dist-labyrinth-feb-2015.pdf> on 12 September 2020.
3. Kenya National Bureau of Statistics, *Quarterly Gross Domestic Product Report*, 2017 — <https://www.knbs.or.ke/?wpdmpro=quarterly-gross-domestic-product-report-third-quarter-2017> on 15 December 2020.
4. *Kenya vision 2030: A globally competitive and prosperous Kenya*, 2007, chapter Economic Pillar — <https://www.researchictafrica.net/countries/kenya/Kenya_Vision_2030_-_2007.pdf> on 11 August 2020.
5. Committee on the Financial Aspects of Corporate Governance, *Report of the Committee on the financial aspects of corporate governance,* 1992.

6. The Institute of Directors in Southern Africa and King Committee on governance, *King report on governance for South Africa*, 2009.

Institutional Authors

1. Corporate Law Economic Reform Program and Australia Treasury, *Directors' duties and corporate governance: Facilitating innovation and protecting investors,* 1997.

Dissertations and Theses

1. Moche S, 'Corporate governance and firm performance of listed family-owned firms in Kenya' Published Msc Thesis, University of Nairobi, Nairobi, 2014.
2. Kagiri C, 'The treatment of family-owned companies by the existing corporate governance framework in Kenya: A case for review' Published LL.M Thesis, University of Nairobi, Nairobi, 2019.

Magazine Article

1. Kiruga M, 'Kenya's Tuskys on government watchlist after failing to pay suppliers' [2020] *The Africa Report.com* — <http://www.theafricareport.com/30456/kenyas-tuskys-on-government-watchlist-after-failing-to-pay-suppliers/> on 19 July 2020

Internet Resources

1. Capital Markets Authority website — <https://www.cma.or.ke> on 21 January 2020.
2. Nairobi Securities Exchange website — <http://www.nse.co.ke> on 21 January 2020.
3. Kenya Law Reports website — <http://www.kenyalaw.org> on 21 January 2020.
4. Mbatia C and Wanjiku A, 'The collapse of retail chain giants in Kenya: Evidence and lessons for retailers' KIPPRA, 31 August 2020 — <https://kippra.or.ke/evidence-and-lessons-for-retailers/> on 11 December 2020.
5. 'Centre for Corporate Governance -Our history'— <https://ccg.or.ke/about-us/our-history.html> on 25 July 2020.
6. Price N, 'What is the history of corporate governance and how has it changed?' Diligent Insights, 3 October 2018 — <https://insights.diligent.com/corporate-governance/what-is-the-history-of-corporate-governance-and-how-has-it-changed> on 19 September 2020.
7. State Corporations Advisory Committee, 'Mwongozo' State Corporations Advisory Committee, 16 February 2015 — <https://www.scac.go.ke/2015-02-16-09-34-58/mwongozo> on 19 April 2020.
8. 'Manufacturers, retailers and suppliers sign code of practice to guide prompt payment in the retail sector' Kenya Association of Manufacturers, 17 January 2019 —

<http://kam.co.ke/manufacturers-retailers-and-suppliers-sign-code-of-practice-to-guide-prompt-payment-in-the-retail-sector/> on 19 April 2020.

9. 'Kenyan shop chain shuts its doors' BBC NEWS, 2 June 2006 — <http://news.bbc.co.uk/2/hi/business/5040700.stm> on 5 May 2020.
10. 'Choppies enterprises acquires Ukwala supermarkets' Crunchbase, 31 May 2016 — <https://www.crunchbase.com/acquisition/choppies-enterprises-acquires-ukwala-supermarkets--1fda61e0> on 5 May 2020.
11. Muiruri K, 'From 64 branches to just 5: Retailer Tuskys nears its last breath' Citizentv.co.ke, 25 January 2021 — <https://citizentv.co.ke/business/from-64-branches-to-just-5-retailer-tuskys-nears-its-last-breath-4933965/> on 5 March 2021.
12. Kenya CitizenTV, *TRAGEDY OF TUSKYS | Late Joram Kamau started the supermarket 30 years ago [Part 1]* (2020) — <https://www.youtube.com/watch?v=We79HZKhfTc> on 16 January 2021.
13. Kenya CitizenTV, *TRAGEDY OF TUSKYS | Directors blame COVID-19 disruption for the poor performance of Tuskys (Part 2)* (2020) — <https://www.youtube.com/watch?v=e9QcXgbE4h8> on 16 January 2021.

<u>Dictionaries</u>

1. Black's Law Dictionary, 11th ed.

APPENDICES

Appendix A – Ethical Clearance Report

18th October 2021

Ms Kitonga Noel,
noel.kitonga@strathmore.edu

Dear Ms Kitonga,

RE: The Promise and Reality: Winning Ways for Retail Companies in Kenya Through Corporate Governance

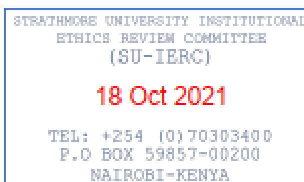
This is to inform you that SU-IERC has reviewed and **approved** your above **SU- master's** research proposal. Your application reference number is **SU-IERC1159/21**. The approval period is **18th October 2021 to 17th October 2022.**

This approval is subject to compliance with the following requirements:

i. Only approved documents including (informed consents, study instruments, MTA) will be used
ii. All changes including (amendments, deviations, and violations) are submitted for review and approval by SU-IERC.
iii. Death and life-threatening problems and serious adverse events or unexpected adverse events whether related or unrelated to the study must be reported to SU-IERC within 48 hours of notification
iv. Any changes, anticipated or otherwise that may increase the risks or affected safety or welfare of study participants and others or affect the integrity of the research must be reported to SU-IERC within 48 hours
v. Clearance for export of biological specimens must be obtained from relevant institutions.
vi. Submission of a request for renewal of approval at least 60 days prior to expiry of the approval period. Attach a comprehensive progress report to support the renewal.
vii. Submission of an executive summary report within 90 days upon completion of the study to SU-IERC.

Prior to commencing your study, you will be expected to obtain a research license from National Commission for Science, Technology and Innovation (NACOSTI) https://research-portal.nacosti.go.ke/ and also obtain other clearances needed

Yours sincerely,



for: Prof Fred Were,
Chairperson; SU-IERC

Ole Sangale Rd, Madaraka Estate. PO Box 59857-00200, Nairobi, Kenya. Tel +254 (0)703 034000
Email admissions@strathmore.edu www.strathmore.edu

Appendix B – Plagiarism Report

Document Information

Analyzed document	The promise and reality; Winning ways for retail companies in Kenya through corporate governance.docx (D115736235)
Submitted	2021-10-19 14:50:00
Submitted by	
Submitter email	Noel.Kitonga@strathmore.edu
Similarity	10%
Analysis address	library.strath@analysis.urkund.com

Sources included in the report

SA	**Dissertation-- Harsh Gulia-- 20LLM24 (2).doc** Document Dissertation-- Harsh Gulia-- 20LLM24 (2).doc (D111327423)	1
SA	**Andrew Proposal 13.09.2015.doc** Document Andrew Proposal 13.09.2015.doc (D15268377)	7
W	URL: http://erepository.uonbi.ac.ke/handle/11295/99526 Fetched: 2021-10-19 15:39:00	1
SA	**Full Project-Orenge-2017.doc** Document Full Project-Orenge-2017.doc (D28909559)	9
SA	**llm_dissertation.PDF** Document llm_dissertation.PDF (D54219782)	2
SA	**phd_final_.pdf** Document phd_final_.pdf (D34689557)	5
SA	**STEPHEN MUTHOKA PROJECT OCT 2015.docx** Document STEPHEN MUTHOKA PROJECT OCT 2015.docx (D15543144)	16
SA	**Elsie - Corporate Governance - Academic Thesis.docx** Document Elsie - Corporate Governance - Academic Thesis.docx (D24292745)	1
W	URL: https://ecgi.global/download/file/fid/9177 Fetched: 2021-10-19 15:39:00	12
W	URL: http://erepository.uonbi.ac.ke/bitstream/handle/11295/22893/Ng'eno%20Linner_Corporate%20Governance%20Practices%20and%20Challenges-%20a%20Study%20of%20International%20NGOs%20in%20Kenya.pdf?sequence=3&isAllowed=y Fetched: 2021-10-19 15:39:00	1
W	URL: https://ccg.or.ke/about-us/our-history.html Fetched: 2021-10-19 15:40:00	4
W	URL: https://www.kengen.co.ke/index.php/about-us/corporate-governance.html Fetched: 2021-10-19 15:39:00	2

1/87