

Assessing whether codification of directors' fiduciary duties will facilitate at least partly improved corporate governance in Kenya: A critical analysis of the duty to promote the success of the company

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DEDICATION

To the Almighty God for his Grace and my parents for their constant inspiration, sacrifice and prayers throughout this period.

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DECLARATION

I, KOSGEI BRENDA CHEMUTAI, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not been previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

Signed:

Dr. Joy Malala

ABSTRACT

Kenya has in the past witnessed numerous collapses of banks, insurance companies, stockbrokers as well as state corporations. These failures have highly been attributed by numerous authors to the weak regulatory framework governing directors' duties. The new Companies Act which was assented to on September 2015, proposed to introduced a written statutory statement of directors' duties, and this was seen as a positive change within the realm of Kenya's corporate governance, at least on the face of things. However, these duties, particularly that set out in section 143 (1) (a-f), are coupled with uncertainties and it begs the question as to whether these uncertainties will curtail the achievement of that which was intended by the codified duties.

This research paper therefore attempts to analyse the duty set out in section 143 (1) (a-f) which obligates directors to promote the success of the company for the benefit of its members as a whole with due regard to a list of factors set therein. This analysis shall seek to identify the advantages of codification as well as the uncertainties associated with the duty. It shall endeavour to explore a comparative analysis of the corporate law in the United Kingdom and attempts to analyse the manner in which the identified uncertainties in the new Act have been resolved.

LIST OF ABBREVIATION

CBK: Central Bank of Kenya

CCG: Centre for Corporate Governance

CMA: Capital Markets Authority

ESV: Enlightened shareholder value

ICPAK: Institute of Certified Public Accountants Kenya

IOD-K: Institute of Directors, Kenya

PSGT: Private Sector Corporate Governance Trust

LIST OF STATUTES AND SUBSIDIARY LEGISLATIONS

Constitution of Kenya (2010).

Companies Act (No.17 of 2015).

Capital Markets Act (Cap 485A).

Corporate Governance Guidelines for Public Listed Companies in Kenya.

LIST OF CASES

Charterbridge Corp Ltd v Lloyds Bank Ltd (1970), The High Court of England (Chancery Division).

Dodge v Ford (1919), The Supreme Court of Michigan.

Howard Smith Ltd. v Ampol Petroleum Ltd (1974), The United Kingdom Privy Council

JSK (Cargo) Ltd v Kenya Airways Ltd (2008) eKLR.

Nyali Ltd v Attorney General of Kenya (1955), The United Kingdom Court of Appeal.

Regal (Hastings) Ltd v Gulliver (1967), The United Kingdom Court of Appeal.

Regentcrest plc. v Cohen (2002), The High Court of England (Chancery Division).

Whitehouse v Carlton Hotel Pty Ltd (1987), The High Court of Australia

CHAPTER ONE: INTRODUCTION

1.1. Background of the study

Corporate governance is defined as a system or a set of mechanisms by which an organization is directed and controlled in order to achieve its purpose.¹ Corporate governance seeks to ensure that the governing actors otherwise referred to as directors act in the best interest of the firm. This means that it seeks to ensure that the powers conferred upon these actors is used in a manner that facilitates independence, responsibility, efficiency, fairness, accountability and discipline.² It is therefore trite to say that the role played by directors in promoting the best interest of the firm as a whole is central to any consideration of improved corporate governance or otherwise.³

Generally, the legal framework regulating corporate governance in Kenya include the Constitution,⁴ Companies Act,⁵ State Corporations Act,⁶ Capital Markets Act⁷ and Common law. Under Kenyan law, a director is defined to include any person occupying the position of a director by whatever name called.⁸ This definition, however, fails to identify the director and his relationship with the company. A company being an artificial person, it cannot act on its own behalf, but rather through human beings who act as its agents, that is directors.⁹ Courts have sought to widely articulate the true legal position of directors and therefore the relationship between directors and a company. In *Regal (Hastings) Ltd v Gulliver* Lord Porter stated that “directors occupy a fiduciary position towards the company whose board they form.” This fiduciary relationship that exists between the company and directors is based on trust, confidence and good faith which imposes upon directors various fiduciary or equitable duties often referred to as the

¹ Labie M, Mersland R, *Corporate governance challenges in microfinance; The Handbook of Microfinance*, World Scientific Publishing Company, 2011, 283-300.

² Murtishaw S, Sathaye J, *Quantifying the Effect of the Principal-Agent Problem on US Residential Energy Use*, LBNL-59773. Berkeley, California: Lawrence Berkeley National Laboratory, 2006 <<http://ies.lbl.gov/iespubs/59773Rev.pdf>> on 14 January 2016.

³ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

⁴ *Constitution of Kenya* (2010).

⁵ *Companies Act* (No. 17 of 2015).

⁶ Cap 446 Laws of Kenya. The State Corporations Act is the main Act that establishes and regulates parastatals in Kenya.

⁷ Cap 485A Laws of Kenya. The Act establishes the Capital Markets Authority which is the regulatory body for Capital Markets in Kenya.

⁸ Section 3, *Companies Act*.

⁹ <http://www.kenyalawresourcecenter.org/2011/07/company-directors.html> on 21 January 2016.

duties of loyalty and good faith.¹⁰ Additionally, section 177 and Table A, article 80 of the ‘old’ companies Act cap 486, provides that the affairs of the company shall be managed by directors.¹¹ From the aforementioned provisions, a director may therefore be defined as a person having overall control over the management, conduct and direction of the company’s affairs.

For so many years, the position as far as corporate governance in Kenya and in particular directors’ duties is concerned, is that the duties were provided by common law rules as well as equitable principles. This system of law is generally not codified and largely inaccessible and directors in Kenya were obligated to search through a web of cases in order to understand their fiduciary duties.¹² These rules are not only inherently subjective, that is to say, highly influenced by an adversarial system, judges’ attitudes, beliefs, biases and circumstances of each case, but it is also persuasive rather than mandatory and largely flexible due to the *stare decisis* principle thus making common law undesirable in regulating directors.¹³ Absence of codified duties further connotes that there are no commensurate penalties prescribed by statute and this evidently prompts malfeasance by company directors.

It is in light of the above mentioned statutory lacuna that the Companies Bill which was assented to on September 11, 2015 was proposed. The Companies Bill proposed to resolve the existing gaps in corporate governance and develop a modern legal framework on corporate governance. As far as the position of corporate governance in Kenya is concerned, is that the legal framework on corporate governance had been partly improved to reflect the views of today’s corporate firms. At 1,026 sections running to over 1,600 pages (without schedules) the new act proposes to address the above mentioned problem by codifying directors’ fiduciary duties. The new companies act has sought to replace and codify these principles and equitable duties thus providing more clarity on corporate governance.¹⁴ While the new act does not usher in a whole new code for corporate

¹⁰ *Regal (Hastings) Ltd v Gulliver* (1967), The United Kingdom Court of Appeal.

¹¹ *Companies Act* (cap 486) 2009.

¹² Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya’ Unpublished LLM Thesis, University of Nairobi, November 2014, 9.

¹³ Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya’.

¹⁴ <http://www.coulsonharney.com/new-legislation/the-companies-act-2015> on 24 November 2015.

governance that revolutionises Kenya's company law, what it does is introduce a much more comprehensive regime that requires substantial compliance.¹⁵

These duties are set out in section 140-150 of the Act and they include, “the duty to act within powers, duty to promote the success of the company, duty to exercise independent judgment, duty to exercise reasonable care, skill and diligence, duty to avoid conflict of interest and the duty not to accept benefits from third parties.”¹⁶ The duty upon which this research paper focuses on is that contained in section 143 of the Act. This particular duty which is the “duty to promote the success of the company” is by far the most wide-ranging duty and probably the most difficult to interpret. This duty imposes upon directors an obligation to have regard to a range of other stakeholder interests while in pursuit of their general duty, which is to ultimately promote the success of the firm in whose board they sit. It is against this backdrop that this paper advances to assess the aforementioned duty and the extent to which this duty will achieve the intended purpose for which it was enacted, assuming it was designed to facilitate, at least partly improved corporate governance in Kenya.

1.2.Statement of problem

In order to gain a rich understanding of the research subject, this part of the paper will set out section 143 (1) of the new Companies Act (No. 17 of 2015) in full. It provides that “a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to —

- a) the long term consequences of any decision of the directors;
- b) the interests of the employees of the company;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the operations of the company on the community and the environment;
- e) the desirability of the company to maintain a reputation for high standards of business conduct; and

¹⁵ <http://www.coulsonharney.com/new-legislation/the-companies-act-2015> on 24 November 2015.

¹⁶ *Companies Act* (No. 17 of 2015).

f) the need to act fairly as between the directors and the members of the company.”¹⁷

A quick analysis of the above section will proceed as follows. First, it is apparent from the drafting of the above stated duty, with particular emphasis on the first part of the section, that the duty set out in section 143 (1) is subjective. This means that the duty heavily relies on what the director considers in good faith to be appropriate to facilitate the success of the company for the benefit of its members as a whole. Secondly, the list of matters to which the director must take into consideration before finalising any decision-making process is not exhaustive and there could be other matters to be regarded by the directors.¹⁸ Thirdly, the listed matters (a-f) are auxiliary to the primary duty which is “to promote the success of the company” and are not separate duties to be pursued independently by the director, nor should they supersede the primary duty. What this means is that, if the directors of a company decide to shut down a factory, they must do so if this closure would best promote the success of the company even if the interests of its employees or suppliers are adversely affected.¹⁹

The above stated duty, read together with the other fiduciary duties set out in the Act are anticipated to resolve the deficiency in the law governing directors and thus ultimately facilitate partly improved corporate governance in Kenya. However, a number of uncertainties which shall form the basis of this research remain. These would include: the meaning of the words ‘good faith’ and ‘success’. Both terms are quite slippery, and may thus be subjected to different interpretation by different directors thus problematic in the long run.²⁰ Secondly, the basis on which directors should evaluate the respective weighting of each matter set out in section 143 (1) (a-f) to which they must have regard remains uncertain. Certain matters are without doubt aligned with the best interests of the company, but others, such as impact on the environment and the community, may not be, and to some extent may seem anomalous as an expression of a director’s fiduciary duty towards his company. Notably, it is extremely improbable to find company shareholders who are willing to bring such expensive, time-consuming and often exceptionally difficult to establish claims, in

¹⁷ Section 143, *Companies Act* (No. 17 2015).

¹⁸ –< <http://capitaregistrars.co.ke/duties-of-the-board-of-directors-in-the-kenyan-companies-act-2015/>> on January 15 2016

¹⁹ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

²⁰ Hadjimarkou A, ‘Section 172 of the Companies Act 2006 - A critical examination’ LexisNexis, 4 March < http://www.jordanpublishing.co.uk/practice-areas/company/news_and_comment/part-1-section-172-of-the-companies-act-2006-a-critical-examination#.WICVNv19600> on January 15 2016.

order to support an environmental or communal cause without having a personal interest in that claim. This therefore means that one of the biggest problems of section 143 (1) (a-f) is the lack of enforcement by stakeholders of the company who are non-shareholders.²¹ Consequently, it is reasonable to state that “a right without a remedy is worthless” and as result section 143 (1) fails to effectively safeguard the interests of stakeholders. This therefore means the anticipated ultimate emphasis on corporate social responsibility is pointless. Thirdly, it is worth noting that there are other factors that contribute to the realisation of good corporate governance in a country. It is therefore not a guarantee that with the enactment of section 143 of the Act all problems associated with corporate governance in the past will be resolved. This paper shall therefore seek to assess the above listed uncertainties and establish the extent to which codification will achieve the purpose for which it was enacted, assuming that its purpose was to facilitate at least partly improved corporate governance in Kenya.

1.3. Justification of study

Corporate governance is considered to have significant implication for the development of a country’s economy.²² This is because good corporate governance practices are regarded as important in reducing risks for investor, which ultimately attracts investment capital thus having a positive impact on the economy of a country.²³ Corporate governance is therefore, a matter of vital concern for all corporations, be it, large or small, publicly traded or privately owned corporations.²⁴ Kenya has in the past witnessed numerous collapses of banks, insurance companies, stockbrokers as well as state corporations.²⁵ These implications has therefore brought about the need to bring corporate governance issues closer to center stage.

A number of writers have written on the need to reform the laws on corporate governance in Kenya and this would include codifying directors’ fiduciary duties in order to improve corporate governance thus promoting investor confidence, global competitiveness and competency in

²¹ Gopal P, A Critical Examination of the Impact of Section 172 of the Companies Act 2006”, 1 (4) *The Student Journal of Law*, 2012, 4.

²² Kumudini Heenetigala, ‘Corporate governance practices and firm performance of listed companies in Sri Lanka’ Unpublished DBA Thesis, Victoria University, April 2011

²³ Kumudini Heenetigala, ‘Corporate governance practices and firm performance of listed companies in Sri Lanka’.

²⁴ Abrams F. W, ‘Management’s Responsibilities in a Complex World,’ *Harvard Business Review*, No 29, (1951), 54-64.

²⁵ Examples include Kenya National Insurance Company, Kenya Creameries Commission (KCC), Uchumi supermarket, Invesco Insurance Company, Blueshield Insurance, United Insurance Company, Discount Securities Limited, NgenyeKariuki Stockbrokers.

management of public and private companies.²⁶ The Companies Bill which was assented to on September 11, 2015 proposed to resolve the existing gaps in corporate governance and develop a modern legal framework on corporate governance. A research gap therefore exists as to whether the codified duties and in particular the duty “to promote the success of the company” serve the purpose for which they were enacted, which is to facilitate, at least partly, improved corporate governance in Kenya.

1.4.Statement of objectives

The general objective of this study is to examine the directors’ “duty to promote the success of the company” as set out in the new Companies Act (No. 17 of 2015) and determine whether codification of this duty would facilitate partly improved corporate governance in Kenya. From this general objective, specific objectives have been derived as follows:-

- i. To assess Kenya’s corporate governance regulatory framework.
- ii. To outline the advantages anticipated to accrue from codification of directors fiduciary duties.
- iii. To assess the challenges that could potentially prevent the attainment of the anticipated advantages. This would include an evaluation of the uncertainties associated with the duty “to promote the success of a company”.
- iv. To assess other factors contributing to good corporate governance in Kenya.
- v. To analyse the approach taken by the United Kingdom to reconcile the uncertainties associated with the aforementioned duty.

1.5.Research questions

The research questions for the study are:-

- i. What is the relationship between corporate governance and a country’s legal framework?
- ii. What are the advantages of codification?
- iii. Assess section 143 (1) (a-f) of the new Companies Act of Kenya and determine whether the uncertainties associated with the provision is likely to curtail the benefits anticipated by the country which is partly improved corporate governance?

²⁶ Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya’.

- iv. What are the other factors that contribute to good corporate governance or otherwise in Kenya?
- v. To what extent can Kenya draw comparative parallel from best practice in the United Kingdom since the enactment of the Companies Act in 2006?

1.6.Literature review

This part of the paper shall seek to summarize information gathered from other researchers who have carried out their research in the same field of study. It shall be divided into three broad parts namely theoretical literature review and empirical literature review.

1.6.1. Theoretical framework

This study shall be anchored on the following theories:-

i. Stakeholder theory

Pioneering work in stakeholder management was provided by Freeman in the year 1984, who outlined the basic features of the stakeholder theory. He stated that “corporations have stakeholders, that is, a group of individuals who benefit from or are harmed by and whose rights are respected by or violated by corporation actions.”²⁷ Central theme in this theory is on the issues concerning stakeholders in an organisation. The theory stipulates that a corporate entity on every occasion seeks to strike a balance between the interests of its diverse stakeholders such as employees, suppliers and the community in order to ensure that their wide ranging interests receive some degree of consideration.²⁸ This model not only recognises the fiduciary duty owed by the firm to its shareholders but also to other relevant constituencies likely to be affected by the manner in which the organisation is run. In view of this, the firm therefore has a duty based on confidence, good faith and trust to maximize the returns of the mentioned stakeholders and have due regard to their needs.²⁹

²⁷ Freeman R, Harrison J, Wicks A and Parmar B, ‘Stakeholder Theory and The Corporate Objective Revisited’ 15 (3) *Organization Science*, 2004, 364-369.

²⁸ Abrams F. W, ‘Management’s Responsibilities in a Complex World,’ 1 (29) *Harvard Business Review*, 1951, 54-64.

²⁹ Freeman R, Harrison J, Wicks A and Parmar B, ‘Stakeholder Theory and the Corporate Objective Revisited’ 15 (3) *Organization Science*, 2004, 364-369.

ii. Stewardship theory

Stewardship theory presents a different perspective towards corporate management, where company directors are deemed to be good stewards who will act in the best interests of the company as a whole.³⁰ A good steward seeks to protect and maximise the wealth of company shareholders through firm performance, because by doing so the steward's utility functions is maximised.³¹ This approach to management recognises corporate directors as good stewards working towards protecting and making profits for the firm's shareholders. This theory therefore suggests that good stewards, herein referred to as directors, are satisfied and motivated when corporate success is attained.³² Other stewardship theorists assert that directors are predisposed to operate the organisation in such a manner as to ensure maximum profit realisation thus improved corporate governance, in order to protect their reputation as decision makers of the firm.³³ Stewardship theory therefore sees a strong interconnection between company directors and the success of an organisation. This theory shall therefore form a basis on which this study shall articulate the importance of management and the duties of directors as far as good corporate governance is concerned.

iii. Legitimacy theory

Legitimacy theory is defined as "a generalized perception that the actions of an entity are desirable, proper or appropriate with some socially construed system of norms, values or beliefs."³⁴ The legitimacy theory is centred on a social contract between the corporation and the community in which it operates. This social contract is based on the assumption that the society in which a corporate firm operates in grants the firm permission to own and use natural resources an act which ultimately facilitates the operation of the firm. For this simple reason the firm remains accountable to the society for how it operates and what it does.³⁵ This theory suggests that an organization must

³⁰ Donaldson L and Davis J, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' 20 (1) *Academy Of Management Review*, 1991, 65.

³¹ Davis J.H, Schoorman F.D, and Donaldson L, 'Toward a Stewardship Theory of Management' 22 (1) *Academy of Management Review*, 1997, 20-47.

³² Donaldson L and Davis J, 'Stewardship Theory or Agency Theory: CEO Governance and Shareholder Returns' 20 (1) *Academy Of Management Review*, 1991, 65.

³³ Daily C.M, Dalton D.R. and Canella A.A, 'Corporate Governance: Decades of Dialogue and Data' 28 (3) *Academy of Management Review*, 2003, 371-382.

³⁴ Suchman M. C, 'Managing Legitimacy: Strategic and Institutional Approaches' 20 (3) *Academy of Management Review*, 1995, 571-610.

³⁵ Fauziah W and Adamu I, 'Insight of Corporate Governance Theories' 1 (1) *Journal of Business and Management*, 2012, 52-63.

consider the interests of the public at large and not merely those of the shareholders. Failure of the corporation to take into consideration the interests of the community may result in sanctions being imposed in the form of restrictions on the firm's operations and resources.³⁶ This theory shall form the basis on which the duty of directors to have regard to the interests of the community as set out in section 143 (1) (e) shall be analysed.

1.6.2. Empirical framework

This paper will be augmented by a number of articles on corporate governance and duties of directors in Kenya. There are several authors who have reviewed the position of corporate governance in Kenya. Premised on the works of these authors, this research paper shall identify several evident gaps which shall form the basis of this paper.

Andrew Keay, in one of his works titled “The duty to promote the success of the company: is it fit for purpose” posits that there are numerous reasons that have been given as regards the financial crisis that hit much of the global in the year 2007-2008.³⁷ One evident cause appears to be leaning towards poor corporate governance in corporate institutions and in particular financial institutions. Central to any consideration of corporate governance is the accountability of directors imposed on them by the duties set out in the law. The paper examines the duty imposed on directors to promote the success of the company provided by section 172 of the United Kingdom Companies Act 2006. The aforementioned duty was subject to a number of remarkable number of academic comment and debate prior to its final enactment. In light of the events of the financial crisis, Andrew Keay attempts to assess whether the duty provided under section 172 is fit for purpose. ‘Fit for purpose’ in this context is understood to mean “that the duty in question is likely to fulfil its purpose, as determined by the legislature, and it will prove effective in dealing with the aftermath of the financial crisis and provide the necessary potency in regulating how directors act for the future, so that the chances of another financial meltdown does not occur.” In examining this particular duty, Keay argues that it is not fit for purpose. He submitted that the duty does not fulfil its intended purpose and he further contends that the U.K should not have firm conviction that section 172 is likely to address the problems associated with corporate governance that came to light in the wake of the financial crisis. Section 143 of the Companies Act Kenya 2015 is a replica of the duty set

³⁶Fauziah W and Adamu I, ‘Insight of Corporate Governance theories’.

³⁷ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

out in section 172 of the U.K Companies Act. The codification of the aforementioned duty alongside other duties set out in section 140-150 was seen as a step towards partly improving corporate governance in Kenya. Following Andrew Keay's argument, this paper advances to analyse section 143 (1) (a-f) and assess whether Kenya is likely to face similar challenges faced by the U.K with respect to the duty.

Katarzyna Chalaczkiewicz-Ladna in his thesis titled "The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: a critical evaluation" attempts to analyse 'long-termism' and the extent to which statute obligates company directors to take into consideration the long term consequences of their actions as decision makers.³⁸ According to this paper short term interest has been listed as one of the contributing factors to the financial crisis in 2007-2008 as this appeared to have detrimental effects to companies. The writer in this paper sought to give an understanding on whether the directors' duty to have regard to long term consequences is converging or not. Having due regard to the long term consequences of decisions made by directors in Kenya is directly relevant owing to the provisions of section 143 (1) (a) which obligates directors to take into consideration the long term consequences of their decision. The definition of long termism was however not introduced in the Act and according to Katarzyna Chalaczkiewicz-Ladna this has left directors with little to no guidance about how to perform in practice. He further posits that managing for the long term is often directly opposed to the interests of company directors. Nevertheless, the writer attempts to identify the factors that constitutes short-termism and long-termism using the shareholder theory and stakeholder theory. Short-termism according to the paper was defined to mean "foregoing economically worthwhile investments with longer-term benefits in order to increase reported earnings for the current period". Whereas long-termism was defined to mean "the likely consequences of any decision on the continuous acceptance, over time, of the company's activity within society".

Lois M. Musikali in a journal titled "*The Law Affecting Corporate Governance in Kenya: A need for review*" posits that poor corporate governance in Kenya is highly attributed to the weak legal

³⁸Chalaczkiewicz-Ladna K, 'The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: a critical evaluation' Unpublished LLM Thesis University of Edinburgh, the United Kingdom, 2012, 71-78.

framework governing corporate governance.³⁹. The author proposes that the current legal framework on corporate governance is inadequate for achieving good corporate governance in Kenya as they have been directly lifted from developed countries and as such, they do not necessarily reflect the situation in Kenya. She further posits that as far as these legislations continue to be used, then the efforts to improve corporate governance in Kenya will fail. She contends that the relationship between corporate governance and the law needs to be recognised and appreciated and therefore advocates for further reform. It is imperative to note that her research is majorly informed by cap 486, CMA Guidelines and Corporate Governance Code and focuses on the general provisions therein that affect corporate governance in Kenya.

Paul Musili Wambua, *Corporate Governance and Corruption in Kenya*,⁴⁰ looks at the reasons for poor corporate governance in Kenya. He majorly analyses public corporations and concludes that poor corporate governance is attributable to political patronage, corruption, lack of transparency and accountability. He concludes that good corporate governance in the public sector can be enhanced through separation between governance of state entities and political control so as to insulate the operations of corporations from political patronage.

1.7.Hypothesis

The research study will be premised on the following hypothesis:-

- i. Good corporate governance is highly dependent on a country's legal framework.
- ii. The uncertainties associated with section 143 (1) (a-f) is likely to curtail the realisation of good corporate governance in Kenya.
- iii. Other factors such as corruption, behavioural ethics and information asymmetry will determine the extent to which directors will comply with requirements of the law such as the provisions of section 143 (1) (a-f).
- iv. Kenya can draw incomparable practice from the United Kingdom since the enactment of the Companies Act 2006.

³⁹ Musikali L, 'The Law Affecting Corporate Governance in Kenya: A need for review '19 (7) *International Company and Commercial Law Review*, 2008, 213-227.

⁴⁰ Wambua P.M, *Corporate Governance and Corruption in Kenya*, Claripress Nairobi, 2008.

1.8. Research Methodology

This research will be developed through analysis of cases applicable to the subject and evaluation of relevant statutes as well as law reports. In addition, the research paper will adopt a review of secondary sources. This would include relevant books, journals and articles, thesis, local and international newspaper articles and internet sources. The aforementioned research materials shall be accessed from Strathmore University library, the National Council for Law Reporting website and relevant internet search engines.

The research will also be developed through a comparative analysis of the United Kingdom with an aim of identifying the steps taken to reconcile the uncertainties associated with the directors' "duty to promote the success of the company"

1.9. Chapter Breakdown

This research study shall be divided into five parts. *Chapter one* shall serve to introduce the problem and the purpose of the study. This chapter shall deeply be entrenched with corporate governance theories as well as works from other researchers on which this work shall be premised on. *Chapter two* shall assess corporate governance and duties of directors and further review Kenya's corporate governance regulatory framework. In light of the aforementioned, the chapter shall assess the Constitution of Kenya, the Capital Markets Act, the Corporate Governance Guidelines for Public Listed Companies in Kenya and lastly the Companies Act (No. 17 of 2015). *Chapter three* shall assess topics relating to the research questions. The chapter shall therefore outline the anticipated benefits of codification and analyse the uncertainties associated with section 143 (1) (a-f) of the Companies Act 2015 and the extent to which these uncertainties will curtail the realisation of improved corporate governance. *Chapter four* shall study the approach taken by the United Kingdom to reconcile the uncertainties associated with the "duty to promote the success of the company". Lastly, *chapter five* shall present in a concise form the main findings of the research and the implications of this for the topic and discipline. Consequently, the paper shall provide recommendations.

CHAPTER TWO: CORPORATE GOVERNANCE AND DUTIES OF DIRECTORS IN KENYA: A REVIEW OF THE REGULATORY FRAMEWORK

2.1.Introduction

Corporate scandals in both developing and developed countries have aroused a keen interest in matters pertaining to corporate governance globally.⁴¹ This is evidenced by the increasing number of countries globally, voluntarily adopting codes of corporate governance in an effort to reduce corporate failures, protect investors and improve economic efficiency.⁴²

Corporate governance as defined by Sir Adrian Cadbury “is the system by which companies are directed and controlled”.⁴³ He further recognises that directors of a company are responsible for the corporate governance of their companies. For this reason, company directors have a responsibility to set the company’s strategic aims, supervise and monitor the day to day activities of the business, while meeting the appropriate interests of the shareholders and stakeholders. This definition is further reiterated by the Private Sector Corporate Governance Trust (PSCGT) which refers to corporate governance as “the manner in which the power of a corporation is exercised in the stewardship of the corporation’s total portfolio of assets and resources with the ultimate objective of maintaining and increasing shareholder value and satisfaction of the interests of other stakeholders in the context of its corporate mission”.⁴⁴ Corporate governance, therefore, seeks to ensure that the governing actors otherwise referred to as directors act in the best interest of the firm. This means that it seeks to ensure that the powers conferred upon these actors is used in a manner that facilitates independence, responsibility, efficiency, fairness, accountability and discipline.⁴⁵

⁴¹Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya,’ 39.

⁴² Such countries include the United Kingdom, Brazil, China, Germany, Malaysia, South Africa and Kenya.

⁴³ Committee on the Financial Aspects of Corporate Governance, Report of the Committee on the Financial Aspects of Corporate Governance (London: Gee & Co 1992) <<http://www.ecgi.org/codes/documents/cadbury.pdf> > on 10 January 2016

⁴⁴ Private Sector Initiative for Corporate Governance, Principles for Corporate Governance in Kenya and a Sample Code of Best Practices for Corporate Governance (Centre for Corporate Governance Kenya, 1999) 1.

⁴⁵ Murtishaw S, Sathaye J, *Quantifying the Effect of the Principal-Agent Problem on US Residential Energy Use*, LBNL-59773. Berkeley, California: Lawrence Berkeley National Laboratory, 2006 <<http://ies.lbl.gov/iespubs/59773Rev.pdf>> on 14 January 2016.

The board of directors in Kenya is an evident creature of statute and the ‘old’ Companies Act cap 486 recognises that the board is mandated to manage the affairs of the company.⁴⁶ Kenya recognises the board of directors as a spur prompting, implementing, evaluating and monitoring strategic corporate decisions and actions of management within a corporate firm.⁴⁷ This demonstrates that central to any consideration of corporate governance is the role played by the board of directors. It is therefore essential that the underlying legal framework governing the manner in which directors discharge their duties is supportive, facilitative as well as enabling.

Notably, there is an increasing evidence that a country’s legal framework plays a remarkable role in ensuring the success of that particular country’s corporate governance. Research indicates that good corporate governance is most likely associated with countries with a strong regulatory framework on corporate governance.⁴⁸ It is against this backdrop that this chapter seeks to assess Kenya’s corporate governance regulatory framework.

In general the legal framework regulating corporate governance and directors’ duties in Kenya include the Constitution, Companies Act (No.17 of 2015), Capital Markets Act, Capital Markets Authority guidelines on corporate governance practices by public listed companies in Kenya and the principles for corporate governance in Kenya.

This chapter shall therefore analyse the regulatory framework of corporate governance in Kenya and it shall make an inquiry into the appropriateness or otherwise of the law in promoting corporate governance with specific regard to the duty of directors.

2.2. Constitution of Kenya

According to Article 2, the Constitution of Kenya is the supreme law of the land and it binds all ‘persons’ and all state organs at both levels of government.⁴⁹ This means that the Constitution should be duly regarded whenever the aforementioned ‘persons’ enact, apply or interpret any law or implement any public policy decision. It is therefore imperative that any enactments or

⁴⁶ Article 80 of Table A, *Companies Act* (cap 486) 2009.

⁴⁷ Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya’ Unpublished LLM Thesis, University of Nairobi, November 2014, 39.

⁴⁸ Musikali L, *The Law Affecting Corporate Governance in Kenya: A need for review*, 19(7) *International Company and Commercial Law Review*, 2008, 213-227.

⁴⁹ Article 2, *Constitution of Kenya* (2010).

amendments to any law including laws on corporate governance adhere to the provisions of the Constitution of Kenya.

The Constitution further obligates every ‘person’ to respect and uphold the constitution⁵⁰ and it interprets a “person” under Article 260 to include a company, association or other body of persons whether incorporated or unincorporated. As such, the governance of corporations should therefore be consistent with the spirit and letter of the Constitution. With this regard, the board of directors is therefore required to observe the provisions of the constitution in their actions or inactions, lest they be held liable under the Constitution of Kenya.

The Constitution of Kenya further embraces various national values and principles of governance under Article 10 such as integrity, openness, transparency and accountability.⁵¹ These values and principles recognised under the Constitution are essential and central to corporate governance and they are widely acknowledged as core principles of good corporate governance.⁵² From the aforementioned, it can be inferred that the Constitution of Kenya seeks to promote good corporate governance by dictating directors to govern corporations in such a manner as to maximise shareholder long-term value while taking into account the best interests of society and other stakeholders such as employees and suppliers by observing the core principles of good governance which includes transparency, accountability, integrity and responsibility.

2.3. Capital Markets Act and Corporate Governance Guidelines for Public Listed Companies in Kenya

The Capital Markets Act Kenya seeks to regulate Kenya’s securities market.⁵³ The purpose of the Act according to its preamble is primarily to establish the Capital Markets Authority (CMA) for the purpose of promoting, regulating and facilitating the development of an orderly, fair and efficient Capital Markets in Kenya and for connected purpose.⁵⁴

⁵⁰ Article 3, Constitution of Kenya (2010).

⁵¹ Article 10 (2) (c), Constitution of Kenya (2010).

⁵² Organisation for Economic Co-operation and Development, OECD Principles of Corporate Governance (OECD France, 2004, 11).

⁵³ *Capital Markets Act* (Cap 485A).

⁵⁴ Preamble, *Capital Markets Act* (Cap 485A).

The objectives of the Capital Markets Authority as per section 11 are to facilitate and maintain an efficient and effective securities markets that seeks to protect the interests of investors.⁵⁵ In this regard the authority exercises the powers conferred to it by sections 11(3) (v) and 12 of the Capital Markets Act to issue guidelines on corporate governance for observance by public listed companies in Kenya, for purposes of ultimately promoting good corporate governance in Kenya.⁵⁶ Accordingly, the CMA introduced corporate governance guidelines in the year 2002 in a move to enhance corporate performance in Kenya. These guidelines were anticipated to promote the level of self-regulation so as to ultimately bring the level of corporate governance in line with international standards.⁵⁷ The guidelines adopt both a prescriptive and a non-prescriptive approach to allow for flexibility in governance of listed companies.⁵⁸

According to paragraph 2.1 of the guidelines the key to good corporate governance is an effective board of directors to lead and effectively control the company, offer strategic guidance and to be accountable to the shareholders.⁵⁹ Paragraph 3.1.1 which is of particular importance to this research study provides for the duty and responsibility of company directors. It states that directors have a duty to foster the long-term business of the corporation consistent with their fiduciary responsibility to the shareholders. The board of directors should therefore accord sufficient time to their statutory obligations towards the company as a whole and act on a fully informed basis in the discharge of any of the following responsibilities, among others: define the company's mission, strategy, goals and risk policies, oversee the corporate management and operations, develop an appropriate staffing and remuneration policy, review the company's internal control, establish and implement a communication policy, monitor the effectiveness of the company's corporate governance practices and take into account shareholder's interests.⁶⁰

2.4. Companies Act 2015

⁵⁵ Section 11, Capital Markets Act Kenya (cap 485A).

⁵⁶ Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya, 2002. These guidelines were issued vide Gazette Notice No. 3362 and were developed by the Capital Markets Authority primarily for public listed companies <<https://www.nse.co.ke/regulatory-framework/category/27-capital-markets-authoritycma.html?download=475%3Acorporate-governance-guidelines-2002>> on 4 April 2016.

⁵⁷ para 1.4

⁵⁸ para 1.5

⁵⁹ para 2.1

⁶⁰ para 3.1.1

The Companies Act Kenya is the primary statute that regulates the incorporation, regulation and winding up of companies and other business associations in Kenya. The Companies Bill of Kenya which was assented to on 11 September 2015 proposed to resolve the existing gaps in corporate governance and develop a modern legal framework on corporate governance. Statutory control of directors' duties rather than a self-regulatory system presented by the corporate governance code has for a long time been seen as a means towards achieving good corporate governance in Kenya.⁶¹ This therefore suggests that the approval of the Companies Act 2015 was seen as a step towards achieving good corporate governance.

According to section 3 of the Act, a director in relation to a body corporate includes any person occupying the position of a director of the body by whatever name called.⁶² There is therefore no distinction between executive (management) and non-executive (supervisory) directors, and all directors of the company according to the Act have the same duties and liabilities to the company.⁶³ In the case of *J.S.K (cargo) Ltd v. Kenya Airways Ltd* the court held that a director is the principal officer of a corporation who may speak on behalf of the corporation.⁶⁴ This means that the relationship that exists between the company and the director is one that is based on trust, confidence and good faith which imposes upon directors various fiduciary or equitable duties often referred to as the duties of loyalty and good faith.⁶⁵ This therefore shows that directors occupy a very core position in the corporation and their action or inaction determines the success or failure of the company.

Part IX of the Act provides extensively on company directors and the provisions set out in section 140-150 are of particular significance to this research paper. Unlike cap 486, the Act has adopted the common law duties into its statutory provisions under the aforementioned sections. The act therefore prescribes directors' duties as follows "duty to promote the success of the company, duty to exercise independent judgment, duty to exercise reasonable care, skill and diligence". It is worth noting that the duties of directors are owed to the company. Nevertheless, in exercising their duties,

⁶¹ Mwaura K, Regulation of Directors in Kenya: An empirical study, 13 (12) International Company and Commercial Law Review, 2002, 465.

⁶² Section 3, Companies Act (No. 17 of 2015).

⁶³ —< <http://hkm.co.ke/wp-content/uploads/2015/10/HHM-NEWS-ALERT-03-OCT-2015.pdf> > on 4 April 2016.

⁶⁴ JSK (Cargo) Ltd v Kenya Airways Ltd (2008) eKLR.

⁶⁵ Regal (Hastings) Ltd v Gulliver (1967), The United Kingdom Court of Appeal.

the director must have regard to, among others the interests of the shareholders, employees, creditors and the general public.⁶⁶

⁶⁶ Section 143, Companies Act (No. 17 of 2015).

CHAPTER THREE: ASSESSING WHETHER CODIFICATION OF DIRECTORS' DUTIES WAS DESIGNED TO FACILITATE AT LEAST PARTLY IMPROVED CORPORATE GOVERNANCE IN KENYA

3.1.Introduction

There is an increasing evidence that a country's legal framework plays a remarkable role in ensuring good corporate governance in a country.⁶⁷ This simply means that a good corporate governance system is assumed to ensure that the actions of directors and managers of corporation are carried out within a legal framework of independence, responsibility, efficiency, fairness, accountability, discipline and transparency.⁶⁸ Kenya has in the past witnessed numerous collapses of banks, insurance companies, stockbrokers as well as state corporations, and this has heavily been attributed to the country's weak regulatory framework on directors' duties which has for a long time been characterised by reliance on common law and equitable principles.⁶⁹ In the year 2015, the Companies Bill which proposed to modernise Kenya's legal framework on corporate governance was assented to. This new law has sought to replace and codify the common law principles and equitable duties, and it is thus anticipated to provide more clarity on corporate governance.

Given the critical role played by directors of companies in the functioning of a company and their role generally in ensuring good corporate governance, one may argue that codification of directors' duties was a necessary step towards achieving at least partly improved corporate governance in Kenya. However, the debate on whether or not codification of directors' fiduciary duties will result in partly improved corporate governance oscillates between two extreme positions. On the one hand it could be argued that indeed codifying directors' duties will provide directors with a degree of clarity, certainty and predictability as regards their duties towards the company, shareholders as well as stakeholders, and this would ultimately facilitate at least partly improved corporate governance in Kenya.⁷⁰ On the other hand, it could be argued that codification of directors'

⁶⁷ Ileri E, 'Appointment of Board of directors to state owned enterprises in Kenya: Towards a stricter regulatory framework' Unpublished LLM Thesis, University of Nairobi, Nairobi, 2013, 46.

⁶⁸ Keay A, 'The Duty to promote the Success of a Company: Is it fit for purpose?' University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

⁶⁹ Examples include Kenya National Insurance Company, Kenya Creameries Commission (KCC), Uchumi supermarket, Invesco Insurance Company, Blueshield Insurance, United Insurance Company, Discount Securities Limited, NgenyeKariuki Stockbrokers.

⁷⁰ - <<http://www.coulsonharney.com/new-legislation/the-companies-act-2015>> on 14 December 2016.

fiduciary duties does not always lead to predictability, as judges will often be obligated to interpret the law. Additionally, a broad statement of principles as set out in sections 143-148 of the new Companies Act, may not necessarily assist directors of companies to ascertain the extent of their duties nor would the codified duties assist directors to determine the manner in which they should act in any given set of circumstances.⁷¹ It was against this backdrop that this research paper sought to analyse, with a particular emphasis on the duty set out in section 143 (1) (a-f), whether codification of directors' fiduciary duties was designed to facilitate at least partly improved corporate governance.

This part of the paper shall therefore be divided into four main parts. Part I shall briefly review the advantages anticipated to accrue from codifying directors' fiduciary duties. Part II discusses the challenges posed by the codified duties, with particular emphasis on section 143 (1) (a-f) on the duty of directors "to promote the success of the company". Part III analyses other factors other than codification that may contribute to partly improved corporate governance or otherwise in Kenya and lastly part IV shall set out the conclusion of the chapter.

3.2. Advantages of codification of directors' fiduciary duties

3.2.1. Clarity, Certainty and predictability

One of the arguments brought forth in favor of introducing the statutory statement of directors' fiduciary duties is that it will provide directors with a degree of certainty and accessibility.⁷² For so many years the duties of directors were provided for by common law rules. These rules are generally not codified and largely inaccessible and directors in Kenya were obligated to search through a web of cases to understand their fiduciary duties.⁷³ In a nutshell, it could be stated that the law on directors' duties was becoming seemingly unclear both for the directors themselves as well as the members of the company in whose interests the directors ought to be acting.

⁷¹ Where the company's purposes consist of or include purposes other than the benefit of its members, the director must act in the way he considers, in good faith, would be most likely to achieve those purposes.

⁷² Coetzee L and Tonder J, 'Advantages and disadvantages of partial codification of directors' duties in the South African Companies Act 71 of 2008' *Journal for juridical science*, 2016, 3—
<http://scholar.ufs.ac.za:8080/xmlui/bitstream/handle/11660/5161/juridic_v41_n2_a1.pdf?sequence=1> on 16 December 2016.

⁷³ Kinyua M, 'A case for the statutory codification of directors' duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya' Unpublished LLM Thesis, University of Nairobi, November 2014, 9.

Codification of directors' fiduciary duties is therefore anticipated to set out clearly the standard against which actions of directors will be measured. It is further anticipated to improve the general understanding of the duties owed by directors to the company as a whole. This would therefore make the law easier to understand by non-experts and thereby help reduce unnecessary legal costs incurred particularly for smaller companies.⁷⁴

3.2.2. Enlightened shareholder value approach to corporate objective

The codified fiduciary duties are anticipated to revolutionise the legal position of corporations within the wider business and social environment. According to the case of *Dodge v Ford* the court held that any policy pursued by a director that is not in the best interest of the company's shareholders is improper.⁷⁵ This therefore means that traditionally, it has been generally recognised that the main objective of any corporation is to maximise shareholders' economic value, having other missions of the corporation supplementary to the above mentioned core purpose.⁷⁶

However, it has been argued that the activities of corporations could possibly have a wide effect on other elements in the society.⁷⁷ This therefore implies that corporations should not operate single-mindedly in the economic interests of their shareholders but should also take into consideration how their actions or inactions affect other elements in the society. Section 143 (1) (a-f) of the new Companies Act, which is the primary focus of this research paper, advances to appreciate the other elements in the society likely to be affected by the actions of directors, and it imposes upon directors the duty to take into account certain factors such as the impact of their operations on the community and the environment.⁷⁸ This approach as far as the ultimate objective of corporations is concerned is often referred to as the enlightened shareholder value (ESV) approach. The ESV approach has eschewed an exclusive focus on the short-term financial goal and it therefore seeks a more inclusive approach, one that is based on building a long-term

⁷⁴ -< <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/tech-tp-cdd.pdf>> on 16 December 2016.

⁷⁵ *Dodge v Ford* (1919), The Supreme Court of Michigan.

⁷⁶ -< <http://www.accaglobal.com/content/dam/acca/global/PDF-technical/business-law/tech-tp-cdd.pdf>> on 16 December 2016.

⁷⁷ Keay A, 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's Enlightened Shareholder Value' 29 (577) *Sydney Law Review*, 2007, 578.

⁷⁸ Section 143 (1) (a-f), *Companies Act* (No. 17 of 2015).

relationship.⁷⁹ It therefore emphasises on the duty of directors to provide a balance between competing interests of different stakeholders and the corporation's shareholders.⁸⁰

From the aforementioned, it is worth noting that codification of directors' duties and in particular the duty envisaged in section 143 (1) (a-f) necessitates company directors to take into consideration the listed factors set therein before making a corporate decision.⁸¹ This involves as per the Act "taking a proper balanced view of the short and long-term consequences; the need to sustain an effective ongoing relationship with suppliers, employees, customers and others as well as take into account the impact of their operations on the community and the environment."⁸² The list of considerations set out in the section is not exhaustive, but highlights areas of particular importance which reflect a wider expectation of responsible corporate behaviour. The ESV approach is therefore an upheaval from the previous shareholder approach that was strictly based on maximizing shareholder value without due regard for the interest of other elements in the society that are likely to be affected by the actions or inactions of directors.

3.2.3. A director's guide to decision making

The discipline of dissecting issues, considering potential alternatives and reviewing contrary evidence is widely known to best equip decision makers, in this case directors of companies to make well informed decisions. The steps enumerated in section 143 (1) (a-f) of the Act, mirror, in many respect, best practice and are stated in a manner that retains director discretion in implementation. This approach, provides directors of companies, particularly boards of smaller companies with less capacity for outside advisors, with a roadmap to follow in making critical managerial decisions.⁸³ The section does not dictate a particular decision-making strategy neither does it prescribe a pre-determined outcome. It simply strives to improve the process of decision making in order to help facilitate better decisions. Those decisions may not always be correct, but they are likely to be more thorough and leave the company better prepared and aware of the array

⁷⁹ Key A, 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's Enlightened Shareholder Value' 29 (577) *Sydney Law Review*, 2007, 578.

⁸⁰ Armour J, Deakin S and Konzelmann S, 'Shareholder Primacy and the Trajectory of UK Corporate Governance' 41 *British Journal of Industrial Relations*, 2003, 531

⁸¹ Key A, 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's Enlightened Shareholder Value' 29 (577) *Sydney Law Review*, 2007, 578.

⁸² Section 143 (1) (a-f), *Companies Act* (No. 17 of 2015).

⁸³ Harner M, 'A more realistic approach to directors' duties' *The Tennessee Journal of Business Law* 15 (1), 2013, 15.

of possible outcomes. This provision, therefore suggests that a disciplined process that makes an individual stop and think before making a decision, can mitigate groupthink dynamics and the risk associated with rush decisions, thus improving corporate governance.

3.3. Challenges posed by the codified fiduciary duties

3.3.1. Challenges associated with ‘Legal transplants’

In the 1970’s, Alan Watson devised the term ‘legal transplant’ to mean ‘*the moving of a rule or a system of law from one country to another*’.⁸⁴ Taking a look at the Companies Act No. 17 of 2015 it is quite obvious that it is a legal transplant that is based on a simple copy-paste of the United Kingdom Companies Act of 2006. This basically means that Kenya imported rules from the United Kingdom completely as an act that is to say it blindly copied and pasted.⁸⁵ This sought of legal transplant is often associated with the receptor society, in this case Kenya, anticipating modernisation through the adoption of ‘trends’ designed elsewhere and perceived to have a potentially positive implication on its society if adopted. While it may seem desirable to aim for modernisation, this act of legal transplant by the state is often coupled with numerous challenges.

In the case of *Nyali Ltd v Attorney General of Kenya*, in which instance Lord Denning with reference to common law stated that, “one can take an oak tree from English soil and plant it on Kenyan soil, but one cannot guarantee that it will do equally well as it did in England.”⁸⁶ He further emphasised this point by stating that, “this wise provision should, I think, be liberally construed. It is a recognition that the common law cannot be applied in a foreign land without considerable qualification... It has many principles of manifest justice and good sense which can be applied with advantages to people of every race and colour all the world over. But it also has many refinements, subtleties and technicalities which are not suited to other folk. These offshoots must be cut away. In these far off lands the people must have a law which they understand and which they will respect. The common law cannot fulfill this role except with considerable qualifications. The task of making these qualifications is entrusted to the judges of these lands. It is a great task. I trust that they will not fail therein.”

⁸⁴ Watson A, *Legal Transplants: An approach to comparative law*, 2nd Ed, University of Georgia Press, Edinburgh, 1993, 3.

⁸⁵ Reyes Gaitan P, ‘The challenges of legal transplants in a globalised context: A case study on ‘working’ examples’, Unpublished LLM Thesis, University of Warwick, Coventry, 2014, 12

⁸⁶ *Nyali Ltd v Attorney General of Kenya* (1955), All England Law Reports.

Although Lord Denning's quote refers to common law as opposed to legislation which is the primary focus of this paper, it surely summarises the difficulties that are associated with transplanting rules from foreign jurisdictions to another without reviewing them to reflect the economic as well as the political conditions of the receptor society.⁸⁷ It is without question that Kenya's Companies Act No 17 of 2015 was directly transplanted from the United Kingdom without due regard for the current economic and political needs of Kenya. At 1,026 sections running to over 1,600 pages (without schedules) the new Act will require a great deal of adjustments in the country, and if these adjustments are not done promptly and properly, this new law may ultimately fail at the implementation stage.⁸⁸

3.3.2. The use of elusive concepts such as 'good faith' and 'success'

Section 143 (1) of the Companies Act No 17 of 2015 provides that "a director of a company shall act in the way in which the director considers, in **good faith**, would promote the **success** of the company for the benefit of its members as a whole." The use of these elusive concepts means that the application of this section, to a degree, is uncertain.

In *Regentcrest plc. v Cohen* Jonathan Parker J on the question of bona fide action, stated that when directors of a company give unequivocal evidence that they honestly believed that their actions was geared towards the best interest of the company, and if that evidence was accepted, then there had been no breach of duty.⁸⁹ Owing to the fact that the above stated duty is a predecessor of the new duty set out in section 143 (1), it would seem that the new duty would take a similar approach. This means that it is essential for any weight given to any factor in decision making to be a matter for the director's good faith judgment. It is however challenging in most cases to impugn the actions of a director who is able to clearly assert that he or she strongly believed that what was done was for the company's best interest.⁹⁰ More often than not, directors will assert that their actions were pure and this position as regards the purity of their actions according to the opinion of Paul Davies would prove difficult to counteract in the long run.

⁸⁷ Lois M. Musikali, 'The Law Affecting Corporate Governance in Kenya: A need for review' 19 (7) *International Company and Commercial Law Review*, 2008, 213-227.

⁸⁸ <http://www.coulsonharney.com/new-legislation/the-companies-act-2015> on 16 December 2016.

⁸⁹ *Regentcrest plc. v Cohen* (2002), Chancery Division of the High Court of the United Kingdom.

⁹⁰ Keay A, 'Tackling the issue of the corporate objective: An analysis of the United Kingdom's Enlightened Shareholder Value' 29 (577) *Sydney Law Review*, 2007, 592.

The term ‘success’ on the other hand is quite evidently a slippery term and this might well be as vague as ‘best interests’ under the previous common law duty.⁹¹ The Act does not define what constitutes ‘success’ and concerns have been raised about the grounds on which it shall be measured. According to the Oxford dictionary, the term ‘success’ is defined to mean the accomplishment of an aim or purpose. This definition within the context of company law would therefore mean, the achievement of the business objective that the company has laid down for itself, and this objective could either be financial, strategic or any other reasonable business objective.⁹² Section 143 (1) therefore intends to have the decision as to what will promote the success of the company, and what constitutes such success dependent on the director’s good faith judgment. This position as stated earlier is problematic in instances where the director asserts that the objective in question was pursued in good faith to facilitate the success of the company.

3.3.3. The weighting of the factors set out in section 143 (1) (a-f)

Section 143 (1) (a-f) provides that, “a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to —

- a) the long term consequences of any decision of the directors;
- b) the interests of the employees of the company;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the operations of the company on the community and the environment;
- e) the desirability of the company to maintain a reputation for high standards of business conduct; and
- f) the need to act fairly as between the directors and the members of the company.”⁹³

One of the novel things that this particular section has introduced is the obligation placed on directors to take into consideration a list of factors set therein in the course of discharging their

⁹¹ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

⁹² Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’

⁹³ Section 143, *Companies Act* (No. 17 2015).

duty.⁹⁴ It must be noted that this obligation imposed on company directors does not introduce an entirely separate duty being owed by directors to the named constituencies referred to in section 143 (1) (a-f) of the Act. What this therefore means is that company directors will not be obligated to have regard to any of the factors set therein beyond the point at which to do so will compromise the primary duty in favour of the company.

Taking a closer look into the factors set therein, it is quite obvious that certain matters are clearly aligned with the best interests of the company, but others, such as impact on the environment and the community, may not be.⁹⁵ Concerns have also been raised as regards the weight that should be accorded to each factor. For instance should a company purchase new technology that might have positive impact on the environment at the expense of the employees who might lose their jobs? It is clear from the aforementioned scenario that any legal recognition of the importance of multiple interests in corporate decision-making as envisaged in section 143 (1) (a-f) is likely to confuse directors of a company. With directors having greater discretion in deciding what interests to take into account as they pursue this duty. This position therefore undermines the legitimacy of the law governing directors, owing to the fact that directors may resist claims of breach on the basis that their decision was solely based on their consideration of one of the listed constituencies in the Act.⁹⁶

3.3.4. Challenges with the long term approach to decision making

Section 143 (1) (a) of the Companies Act No. 17 of 2015 states that one of the factors that directors have to take into consideration as they endeavor “to promote the success of the company” is the long term consequences of their decisions.⁹⁷ On the face of things, this provision may seem beneficial to the country’s corporate governance in the long run. This is however not the case when you take into account the antithetical nature of the provision to the interests of company directors.⁹⁸ Directors of a company could potentially favour the short term consequences of their actions as opposed to the proposed long term consequences, because, they only have a temporary interests in

⁹⁴ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

⁹⁵ Gopal P, ‘A Critical Examination of the Impact of Section 172 of the Companies Act 2006’, 1 (4) *The Student Journal of Law*, 2012, 4.

⁹⁶ Lois M. Musikali, ‘The Law Affecting Corporate Governance in Kenya: A need for review.

⁹⁷ Section 143 (1) (a), *Companies Act* (No. 17 of 2015).

⁹⁸ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’ University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

the company, primarily limited to their time in the job.⁹⁹ Directors get little or no benefit from planning for the long term as it is likely to be their successors who will benefit from rents that come to the company under that approach. As a matter of fact, planning for the long term could potentially result in the performance of directors being undecidedly average, owing to the fact that the share price of the company might not increase and higher dividends would not be paid as quickly as if short term plans were implemented.¹⁰⁰

Moreover, this approach is anticipated to be problematic owing to the fact that the Act fails to define ‘long-term’ leaving directors with little guidance about how to perform in practice.¹⁰¹ The concept of ‘long-term’ is not precise and no measure has been put in place to ascertain that the actions of directors are in line with the long term requirement. A concern has therefore been raised as to how far in the future directors of a company are required to provide for in their decision. For some businesses which are established for one or more specific purposes, accounting for the next year could potentially be compliance with the long term approach and yet for more traditional businesses the long term will be much further into the future.

3.4. Conclusion

Expectations for what fiduciary duties can achieve in the corporate context have been overemphasized by numerous authors.¹⁰² Risk among other factors is, however, intrinsic in any commercial corporation, and human beings are not perfect. Laws on fiduciary duties cannot change these basic facts. To the extent that we continue to potentially think it can, we will continue to be frustrated and disappointed. This is not to suggest that we let directors of companies unregulated. It is true that nobody benefits from uncertainty and at the very least, the codified fiduciary duties have punctuated the importance of directors’ duties and have thus clarified that which was uncertain before. However, these duties are coupled with uncertainties and it begs the question as to whether these uncertainties will curtail the achievement of that which was intended by the codified duties. The subsequent chapter shall therefore proceed to identify the approach taken, if

⁹⁹ Keay A, ‘The Duty to promote the Success of a Company: Is it fit for purpose?’

¹⁰⁰ Chalaczkiewicz-Ladna K, ‘The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: a critical evaluation’ Unpublished LLM Thesis University of Edinburgh, the United Kingdom, 2012, 71-78.

¹⁰¹ Chalaczkiewicz-Ladna K, ‘The relevance of the long-term interests in the decision making processes of company directors in the UK, Delaware and Germany: a critical evaluation,’ 71-78.

¹⁰² Kinyua M, ‘A case for the statutory codification of directors’ duties in enhancing good corporate governance in Kenya: A case study of the National Bank of Kenya’

any, by the United Kingdom towards reconciling the above mentioned uncertainties as regards the duty set out in section 143 (1) of the Companies Act No 17 of 2015

CHAPTER FOUR: A STUDY OF THE APPROACH TAKEN BY THE UNITED KINGDOM TO RECONCILE THE UNCERTAINTIES ASSOCIATED WITH THE DUTY TO PROMOTE THE SUCCESS OF THE COMPANY

4.1. The law in the United Kingdom on directors' fiduciary duties

4.1.1. Position prior to the 2006 Companies Act

Traditionally, the law governing directors' fiduciary duties in the UK was regulated by the common law rules and equitable principles. This means the body of rules construed through progressive decision-making taken in similar cases over a long period of time by the judiciary in the United Kingdom through the doctrine known as *stare decisis*.¹⁰³ The law governing the duties of directors was further sculpted by the judiciary over the course of the 1800s and 1900s by transplanting and adopting the existing laws regulating the duties of trustees.¹⁰⁴ To that extent, directors of a company were equated with trustees and their duties towards the company as a whole were developed by comparison with the duties of trustees towards their settlor. Development of directors duties based on this analogy may not have been a perfect one, owing to the fact that the primary duty of trustees is to preserve and conserve the assets of the settlor for the benefit of named beneficiaries, whereas in the case of a director of a company it is the primary role of the director to engage in risk-taking activities with the assets of the company for the ultimate benefit of the company as a whole.¹⁰⁵

In terms of the common law rules and equitable principles regulating directors' fiduciary duties, the general duties of directors were broadly divided into the duty of loyalty and the duty of care, skill and diligence. The former was a representation of a directors' fiduciary duty towards the company, whereas the latter was not, since it was primarily concerned with the competence or negligence of directors. One of the main advantages that accrued from reliance on common law rules and equitable principles to regulate directors' duties was that, the rules and principles could be adopted and modernised in light of the evolving economic and commercial condition in the United Kingdom. This is to say, that the law would not stand still and was inherently flexible,

¹⁰³ Sealy L.S, 'The director as trustee' 25 (1) *Cambridge Law Journal*, 1967, 83-103.

¹⁰⁴ Sealy L.S, 'The director as trustee, 83-103.

¹⁰⁵ Cabrelli D, Presentation for the Università Bocconi on the reform of the law of directors' duties in UK company law, University of Edinburgh - http://www.research.ed.ac.uk/portal/files/13215836/CABRELLI_D_PRESENTATION_FOR_UNIVERSITA_BOCCONI_ON_THE_REFORM_OF_THE_LAW_OF_THE_DIRECTORS_DUTIES_IN_UK_COMPANY_LAW.pdf > on 2 January 2017.

permitting the judiciary to sculpt the law by a process of retrenchment and expansion of the categories of duties as requirements demanded.¹⁰⁶ These fiduciary duties were expressed at a high level of generality, ensuring that the development of the common law rules and equitable principles was intrinsically progressive in nature. However, this system was coupled with difficulties in that the duties were inaccessible to those to whom it was addressed.¹⁰⁷ Other than obtaining legal advice from practicing lawyers in the United Kingdom, directors of companies had no way of knowing what their duties were in law and in most cases they were obligated to search through a web of cases to understand these duties. For this principal reason of a lack of clarity, the Government of the United Kingdom agreed with Company law Review Steering Group¹⁰⁸, the Law Commission¹⁰⁹ and the Scottish Law Commission¹¹⁰, that the common law rules and equitable principles should be replaced by a written statutory statement of the legal duties of company directors in a new Companies Act.

4.1.2. Directors' duties in terms of the 2006 Companies Act

The United Kingdom Companies Act 2006 herein referred to as the 'Act' received Royal assent in the UK on 8 November 2006. At 1300 sections running to over 700 pages with 16 schedules, this Act was considered to be the largest act ever passed by the parliament of the United Kingdom. At the heart of the newly enacted law as stated by Lord Goldsmith, is a new approach to directors' fiduciary duties. For the first time the Act introduced a written statutory statement of directors' duties, that enshrines in statute the duty of directors to have regard to a wide range of factors, including the interest of employees and the environment, otherwise referred to as the enlightened shareholder value.¹¹¹ In reality, the concept of enlightened shareholder value was not remotely new: it has been long argued that companies should carry out their day to day activities in such a

¹⁰⁶ Cabrelli D, Presentation for the Università Bocconi on the reform of the law of directors' duties in UK company law, University of Edinburgh - http://www.research.ed.ac.uk/portal/files/13215836/CABRELLI_D_PRESENTATION_FOR_UNIVERSITA_BOCCONI_ON_THE_REFORM_OF_THE_LAW_OF_THE_DIRECTORS_DUTIES_IN_UK_COMPANY_LAW.pdf > on 2 January 2017.

¹⁰⁷ Gakeri J, 'Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities' 3 (6) International Journal of Humanities and Social Science, 2013, 4.

¹⁰⁸ A body which was specifically set up by the Government to review company law and report on its reform.

¹⁰⁹ The Law Commission is a statutory body whose role is to keep English law up to date and advise Government on necessary reforms.

¹¹⁰ The Scottish Law Commission is a statutory body whose role it is to keep Scott's law up to date and advise Government on its reform.

¹¹¹ Gakeri J, 'Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities' 3 (6) International Journal of Humanities and Social Science, 2013, 16.

way as to maintain an equitable and working balance among the claims of the various groups directly affected by the activities of the company. This therefore begs the question as to whether the Act actually changed anything by codifying these duties and setting out the ESV concept in statute.

These duties are set out in section 170-177 of the Act. These duties as was the case before are owed to the company.¹¹² Although the Act, subject to the provision of section 170 (3) replaces the previous common law rules and equitable principles, section 170 (4) emphasises that it is to be interpreted and applied in the same way as the existing common law rules and equitable principles. The duty upon which this research paper is premised on is that contained in section 172 (1) of the Act. This duty, as is the case with other duties, owes its origin to the pre-existing common law rules and equitable principles, but its expression proved the most controversial in Parliament. The section provides that “a director of a company shall act in the way in which the director considers, in good faith, would promote the success of the company for the benefit of its members as a whole, and in so doing the director shall have regard to —

- a) the long term consequences of any decision of the directors;
- b) the interests of the employees of the company;
- c) the need to foster the company's business relationships with suppliers, customers and others;
- d) the impact of the operations of the company on the community and the environment;
- e) the desirability of the company to maintain a reputation for high standards of business conduct; and
- f) the need to act fairly as between the directors and the members of the company.”¹¹³

The first part of the section seems to advocate for shareholder supremacy whereby directors are obligated to promote the success of the company for the benefit of its members, however, the second part states that in doing so, directors should have regard to the matters listed in paragraphs (a-f). Paragraph (a) is purely a question of commercial good judgment; paragraphs (b), (c) and (e)

¹¹² Section 170 (1), *Companies Act UK* (2006).

¹¹³ Section 172, *Companies Act UK* (2006).

sits fairly well within the concept of enlightened commercial self-interest; paragraph (d) is effectively an expression of social policy, not a development of company law as such. Whether it is desirable as a matter of social policy is a matter of good faith judgment; but it seems anomalous as an expression of a directors' fiduciary duty towards his company. The subsequent section shall therefore attempt to analyse the approach taken, if any, by the United Kingdom to reconcile the uncertainties associated with the above stated duty.

4.2. Approach taken by the United Kingdom to reconcile the uncertainties associated with the duty to promote the success of the company

4.2.1. Defining 'good faith' judgment

The 'good faith' duty introduced in the Act is undoubtedly derived from the common law duty of directors to act *bona fide*, in the best interests of the company. Section 170 (3) and 170 (4) makes it clear that the duties set out in section 172 of the Act are to be interpreted and applied in the same manner as the corresponding common law rules and equitable principles.¹¹⁴ This therefore means that common law will be the primary source of guidance in determining the meaning of the word 'good faith' judgment. In *Whitehouse v Carlton Hotel Pty Ltd* it was established that the primary common law test to establish whether the director acted *bona fide* is generally seen to be a subjective one. Meaning, the presence or absence of good faith depends on the circumstances that are present in each case.¹¹⁵ The court further stated that it would be wrong, particularly in commercial decisions, to substitute their opinion with that of the managing body of the company, or indeed question the correctness of the management decision if it was arrived at in good faith.¹¹⁶ This common law position has been preserved by section 172 (1) of the Act which states that "a director of a company must act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole."¹¹⁷ On the face of these words, as long as the director acts in good faith, the courts are not in a position to substitute their own judgment with that of the managing board, save in cases of really bad managerial behaviour.¹¹⁸ In the case of *Charterbridge Corp Ltd v Lloyds Bank Ltd* Pennycuik J stated that in

¹¹⁴ Companies Act U.K (2006).

¹¹⁵ *Whitehouse v Carlton Hotel Pty Ltd* (1987), The High Court of Australia.

¹¹⁶ *Howard Smith Ltd. v Ampol Petroleum Ltd* (1974), The United Kingdom Privy Council.

¹¹⁷ Companies Act U.K (2006).

¹¹⁸ Keay A, 'The Duty to promote the Success of a Company: Is it fit for purpose?' University of Leeds School of Law, Centre for Business Law and Practice Working Paper, 4, 2011.

cases where the director has not thought whether an action or inaction is in the best interests of the company an objective test should be applied: “whether an intelligent and honest man in his position of directorship could... have reasonably believed that the transactions was entered in good faith for the benefit of the company.”¹¹⁹ Secondly, even if the director firmly asserts that he honestly believed he was acting in good faith in the best interest of the company, the court is not obliged to accept this line of argument if the evidence or other objective elements such as reasonableness provide otherwise. This provision therefore, provides a significant amount of freedom to the directors of a company, once they can prove that their action was honestly geared towards promoting the best interests of the company.

4.2.2. Defining ‘success’

What is success? According to Lord Goldsmith in an address to the parliament in the year 2006, he considered what success would entail and he stated that: “...for a commercial company, success will normally mean long-term increase in value, but the company's constitution and decisions made under it may also lay down the appropriate success model for the company.... it is essentially for the members of a company to define the objectives they wish to achieve. The normal way for that to be done—the traditional way—is that the members do it at the time the company is established. In the old style, it would have been set down in the company's memorandum. That is changing ... but the principle does not change that those who establish the company will start off by setting out what they hope to achieve. For most people who invest in companies, there is never any doubt about it—money. That is what they want. They want a long-term increase in the company. It is not a snap poll to be taken at any point in time.”¹²⁰ This therefore means that it is for the directors, by reference to the ultimate objective collectively agreed upon by the members of the company, to judge and form a good faith judgment about what is to be regarded as success for the members of the company as a whole. This includes taking into account the constitution of the company, decisions made by shareholders and anything they would consider relevant in reaching that judgment.¹²¹

¹¹⁹ *Charterbridge Corp Ltd v Lloyds Bank Ltd* (1970), The High Court of England (Chancery Division).

¹²⁰ Lord Goldsmith, Lords Grand Committee, 6th February 2006, column 256– <
<http://www.articles.scopulus.co.uk/Duties%20of%20company%20directors%20%20Companies%20Act%202006.htm>> on 2 January 2017

¹²¹ Section 17 of the Act defines a company's constitution to mean (i) the company's articles of association and (ii) any resolutions and agreements to which Chapter 3 of Part 3 of the Act applies.

The statement by Lord Goldsmith which seems to suggest that “success means what the members of the company collectively want the company to achieve” would indicate that that it is down to the members of the company to determine what constitutes success and the directors are obligated to promote that which has collectively been decided upon by the members. Such an outlook raises concerns as regards instances where members of the company desire short term benefits and choose to disregard the interests of stakeholders such as employees.¹²² There is also no mention by Lord Goldsmith that any of the listed stakeholders in the section have a say regarding what is to constitute success. Success is therefore very much defined in terms of the members of the company whereas the means of achieving this success is a matter of the directors’ good faith judgment.

4.2.3. The weighting of the factors set out in section 172 (1) (a-f)

Margaret Hodge stated that the Government of the United Kingdom strongly believes that the enlightened shareholder value approach introduced by the new Act will be mutually beneficial to business as well as the society in which it operates in. She was of the opinion that enterprises that have constant regard to a wider range of constituencies likely to be affected by their operations, more often than not, perform better, and are sustainable in the long-term. She refers to this form of approach as a “common-sense approach.” These would include interactions with customers and suppliers, making sure the employees of the enterprise are constantly motivated and properly rewarded and also taking necessary steps to impact the community and the environment positively. This, according to Margaret Hodge is good business sense. The Government did not, however, claim that the interests of the company and the other mentioned constituencies say, its employees or the environment, will always be identical. Regrettably, it will sometimes be necessary, for example to lay off staff, in order to uphold the interests of the company.¹²³ The weight given to the listed factors is a matter for the good faith judgment of the company’s directors.

Secondly, the use of the word ‘have regard to’ according to Margaret Hodge with regards to the listed factors simply means ‘think about’ and ‘to give proper consideration to.’ She was of the opinion that the obligation imposed upon directors to ‘think about’ the named constituencies is absolutely not about just ticking the boxes. The most comprehensive interpretation of this section

¹²² Gower D, Davies, *Principles of Modern Company Law*, 8th edition, Sweet and Maxwell, London, 2003, 511

¹²³ -< <http://webarchive.nationalarchives.gov.uk/20070603164510/http://www.dti.gov.uk/files/file40139.pdf>> on 2 January 2017.

is set out in the explanatory notes which states that “it will not be sufficient to pay lip service to the listed factors, and in many cases the directors of a company will need to take action to comply with this aspect of their duty. At the same time the duty does not require a director to do more than good faith.”¹²⁴

4.3.Conclusion

Director’s good faith judgment seems to form an integral part in resolving the uncertainties anticipated to curtail the achievement of the anticipated benefits of codification. This means that the provisions of section 172 grants directors a completely unfettered discretion as to what actions they take provided they do so in a way that they would consider is most likely to promote the success of the company for the benefit of its members as a whole. Andrew Keay points out that, “while the duty set out in section 172 might be educational, it is vague and provides directors with minimal guidance. It might well be seen as a general statement of principle hopefully encouraging directors of a company to aim for the long-term success of the company and to demonstrate enlightenment while pursuing a corporate decision.” Additionally, Margaret Hodge also stated that, the statutory statement of directors’ fiduciary duties will have no impact on directors who have consistently discharged their duties in the best interests of the firm as a whole. This therefore means that the inauguration of the new Companies Act as it is, and in particular the duty to promote the success of the company set out in section 143 (1) (a-f) will not fundamentally alter the corporate governance landscape in Kenya.

¹²⁴ -<<http://www.legislation.gov.uk/ukpga/2006/46/notes/division/6/2> > on 2 January 2017.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATION

5.1.Introduction

This chapter outlines the findings, recommendations and conclusion of the study. The study was undertaken with the intention of assessing whether codification of directors' fiduciary duties will facilitate at least partly improved corporate governance, with a particular emphasis on the duty to promote the success of the company.

5.2.Summary of research study

Chapter one outlined the background, objective and importance of the study by laying out the scope of the study and its significance which was to assess whether codification of directors' fiduciary duties will facilitate at least partly improved corporate governance in Kenya.

While it is true that a country's legal framework will not eradicate human flaws as well as risks inherent in business activities, it is also true that nobody benefits from uncertainties. The legal framework of a country therefore plays a significant role in facilitating at least partly improved corporate governance through ascertainment provisions guiding directors on what is expected of them. It was against this backdrop that Chapter two sought to analyse the legal framework governing corporate governance in Kenya with particular emphasis on directors' duties. The aim of the chapter was to illuminate the current provisions in statute governing directors' duties as well as the new provisions in the new Companies Act (No. 17 of 2015). Codification of directors' duties in the new Act was seen as an upheaval at least on the face of things and this study therefore sought to assess whether codification and in particular the duty to promote the success of the company , will facilitate at least partly improved corporate governance in Kenya.

In Chapter three, the study sought to assess whether the duty set out in section 143 (1) (a-f) will partly facilitate at least partly improved corporate governance in Kenya. This assessment was broadly divided into two. The first part of the chapter outlined the advantages anticipated to accrue from codification. With respect to directors' fiduciary duties, it was identified that companies work best where the respective roles and responsibilities of directors and shareholders are clearly understood. This therefore means that, one of the main arguments brought forth in favor of introducing the statutory statement of directors' fiduciary duties is that it will provide directors with a degree of certainty and accessibility. Secondly, owing to the provisions of section 143 (1) (a-f), the paper identified that codification of the duty to promote the success of the company and

the subsequent factors to be taken into consideration not only provides the directors with a guide to decision making but also attempts to advocate for an enlightened shareholder value (ESV) approach to decision making. This approach has been identified to guide directors to ‘have regard’ to a number of listed constituencies, otherwise referred to as stakeholders, when engaging in a decision making process. The second part of the chapter established that indeed, the duty to promote the success of the company is coupled with uncertainties. This part of the paper identified numerous concerns that have been raised as to the Acts failure in determining definition of terms such as ‘good faith’, ‘success’ and ‘long-term’. The chapter proposed that the extent to which these elusive concepts remain uncertain, the anticipated advantages of codification will be curtailed. The subsequent chapter, therefore, proposed to analyse the approach taken by the United Kingdom, if any, to reconcile the aforementioned uncertainties with an attempt to assess the extent to which Kenya can draw comparative parallel from best practices with respect to the duty in question.

As stated, Chapter four was a comparative study aimed at drawing lessons from the United Kingdom. It examined the United Kingdom’s approach towards reconciling the above mentioned uncertainties. This study identified that central to any consideration of the duty to promote the success of the company is the director’s good faith judgment. This therefore means that the duty set out in section 143 (1) (a-f) grants directors of companies’ unfettered discretion as to what actions they take provided they do so in a way that they would consider is most likely to promote the success of the company for the benefit of its members as a whole. So, will the duty alter the manner in which directors’ discharge their duties and ultimately result in partly improved corporate governance? The chapter identified that while the duty set out in section 143 (1) (a-f) might be educational, it is vague and provides directors with minimal guidance. It might well be seen as a general statement of principle hopefully encouraging directors of a company to aim for the long-term success of the company and to demonstrate enlightenment while pursuing a corporate decision.

The last chapter makes appropriate recommendations towards enhancing the effectiveness of the codified duties with a particular emphasis on the duty to promote the success of the company.

5.3.Recommendation

This research proposes the following recommendations to enhance good corporate governance in Kenya.

The need to create provisions in the Act safeguarding the rights conferred to stakeholders by section 143 (1) (a-f)

One of the major flaws carried by section 143 (1) (a-f) relates to its enforceability. Besides having a challenging task proving the non-existence of good faith judgment, only company shareholders are allowed to bring an action against directors. The Act should therefore be amended to create a remedy for the listed constituencies in cases where company directors' fail to have regard to their interests.

Compulsory and continuous training and education of directors

The need to enhance the knowledge and skills of company directors cannot be overemphasized. While it is true that codification will provide directors with a degree of certainty and accessibility, there is still a need to enhance directors' understanding of the legal and business environment in which their companies operate. Although some company directors are professionals in specific fields, compulsory and continuous training would go a long way in ensuring that these directors appreciate their responsibilities as company directors and ultimately optimise their contribution in the running of the company's affairs. Owing to the fact that the provisions of section 143 (1) (a-f) confers upon directors unfettered discretion, the Act should therefore be amended to provide for mandatory induction of directors as well as continuous training and enhancement of capacity to ensure that they understand their role and responsibilities as company directors as they exercise this power. This will go a long way towards raising the standards of skill, competence and integrity required of directors.

The need to strengthen regulatory agencies

Whereas directors and managers of corporations are responsible for the collapse or otherwise of a company, the role played by third parties should not be downplayed. Failure of corporate institutions equally means failure by market regulators. Weak regulatory agencies that lack the capacity to make appropriate follow-ups into the business of corporations creates a potential avenue for graft.

There are several institutions that are involved with corporate governance regulation in Kenya and they include the Institute of Directors, Kenya (IOD- K), the Centre for Corporate Governance (CCG), the Central Bank of Kenya (CBK), the Capital Market Authority (CMA) and the Institute

of Certified Public Accountants Kenya (ICPAK). With regards to the above mentioned institutions, the Act should be amended to empower and mandate these institutions to regulate the conduct and ethics of company directors. This would go a long way in supplementing the efforts of the Office of the Registrar of Companies in enforcing ethics as well as corporate compliance.

5.4.Conclusion

The changes introduced through the Act and particularly that set out in section 143 (1) (a-f) appear to be perceived as a piece of good house-keeping, enabling somewhat archaic provisions to be either removed or reformed, thus bringing Kenya's company law up to par with international standards rather than radically changing it. The Companies Act 2015 as it is, is primarily an enabling statute. It is therefore for a company, through its directors, to decide whether to take advantage of the measures provided by the Act.

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