



Abdullahi Gitari & Odhiambo
Advocates, LLP
Fortis Suites, 4th Floor, Hospital Road,
P.O. Box 29346 - 00100, Nairobi, Kenya

Tel: +254 020 221 1122 / 0777 211 122
Email: info@agoadvocates.com
Website: agoadvocates.com
PIN/VAT: P051631243T

Service beyond the call of duty

NEWS ALERT

ANALYSIS OF THE BUSINESS LAWS (AMENDMENT) ACT NO. 1 OF 2020

Introduction

The Government has through the recently enacted Business Laws (Amendment) Act, Number 1 of 2020 amended various Statutes to facilitate the ease of doing business in Kenya. The Amendment Act that came into force on the 18th of March 2020 amended sixteen (16) pieces of legislation. The Act has digitalized different processes of transacting including expanding the use of electronic signatures, and removing certain legal requirements that usually delay some transactions.

Although the Government had introduced e-Government services in most of its departments and ministries, it had not comprehensively provided for the use of electronic signatures. The amendment Act has broadened the use of electronic signatures as captured under the different amended statutes, and digitalized legal processes in the Country. The use of advanced electronic signature and electronic signature had been provided for under the *Kenya Information and Communication Act, No.1 of 1998 (hereinafter KICA)*. The definitions of advanced electronic signature and electronic signature are adopted as provided for under the *KICA* as follows:

"**advanced electronic signature**" means an electronic signature which is:

- a. uniquely linked to the signatory;
- b. capable of identifying the signatory;
- c. created using means that the signatory may maintain under his or her sole control; and linked to the data to which it relates in such a manner that any subsequent change to the data may be detectable.

"**electronic signature**" means data in electronic form affixed to or logically associated with other electronic data which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message.

We have summarized the major changes to the specific statutes as below:

1. The Law of Contract Act (Cap23 Laws of Kenya)

- Section 3(6) of the law of Contract Act has been amended in the definition of the word “sign”, to incorporate advanced electronic signature. The definition section of the Act now includes the definition of advanced electronic signature.

2. The Registration of Documents Act (Cap 285 Laws of Kenya)

- The definitions of “signature” and “signed” have been expanded under the Act to include advanced electronic signature and electronic signature. This is a departure from the previous ways of execution which involved physically appending a mark on the document.
- The definition of “book” now includes an electronic book.
- The Act provides for the Registrar to establish and maintain principal registries at Nairobi and coastal registries at Mombasa in electronic form for ease of online transactions.
- Parties to transactions can now file their documents in physical or electronic form.

3. The Survey Act (Cap 299 Laws of Kenya)

- Advanced electronic signature and electronic signature are defined under the definition section of the Act.
- The definition of “signature” under the Act now includes advanced electronic signature and electronic signature.
- Surveyors can now process a document or plan electronically. Such electronically processed document or plan that bears prescribed security feature is deemed to bear the imprint of the seal of the Survey of Kenya. This therefore means that :
 - The seal of the Survey of Kenya can now be processed electronically and bear the prescribed security feature.
 - Surveyors now have an option to execute documents digitally, and the Director can now authenticate same documents electronically.
 - Survey process can now be done electronically by parties that require such services.

4. The Stamp duty Act (Cap 280 Laws of Kenya)

- Section 2 of the Stamp Duty Act is amended by deleting the definition of "stamp" and substituting with a definition that includes a mark embossed or impressed by an electronic means.
- Section 119 of the Act is amended to provide for electronic stamping.

The electronic stamping will greatly ease the stamping process and save time for transacting parties.

5. The Land Registration Act, No. 3 of 2012

- The definition of Instrument has been expanded to include both physical and electronic form.
- The definitions of advanced electronic signature and electronic signature have now been adopted under the Land Registration Act as defined under *KICA*.
- The definition of “signature” now includes electronic signature.
- Sections 38 and 39 of the Land Registration Act have been repealed. It is therefore no longer a requirement to produce land rates clearance certificates and land rent clearance certificates to effect registration of an instrument purporting to transfer or create an interest in land. The requirement to obtain consent from the County Land Management Board provided for under section 39(2) of the Act before the registration of any transaction has also been abolished. This however is only applicable to leasehold properties and not freeholds.
- Section 44 (3) (A) is introduced to provide that a document processed and executed by a way of an advance electronic signature or electronic signature by a party consenting to it, is deemed to be a validly executed document.
- Section 45(3) of the Act is amended to provide for electronic processing and execution of documents, provided the parties to the transaction consented to such processing and execution.
- Section 83 of the Act has been amended to give an avenue to persons claiming indemnity to make an application to the Chief Land Registrar for investigation and consideration, and appeal to the high court if aggrieved by the decision of the Chief Land Registrar.

6. The Companies Act, No. 17 of 2015

- The requirement of affixing company seal in execution of company documents, contracts and deeds has been removed. These documents are deemed validly executed by a company if it is executed by two (2) authorized signatories or a director of the company in presence of a witness who attests the signature.
- Bearer shares are no longer to be used. These are unregistered equity securities owned by the possessor of physical share documents. Their use had been abolished under the companies Act 2015 due to the increased cost and insecurity associated with it. The bearer shares issued under the previous law will be converted into registered shares within nine (9) months of law coming into effect.
- It is now hard to kick out the minority shareholders following the amendment to section 611 of Companies Act, 2015. The amendment seeks to adopt 90% ‘squeeze-out’

and 'squeeze-in' threshold relating to compulsory acquisition of minority stakes in the companies rather than the former 50%. The Former 50% made it easy for the majority shareholders who can easily account for the threshold to force out any minority shareholder(s) who decline to sell their shares, by enforcing *squeeze in* rights. Through the amendment, Kenya has followed the global practice of holding the threshold at 90% thereby protecting the minority shareholders. This is also in tandem with The Capital Markets (Take-Overs and Mergers) Regulations, 2002, which pursuant to an offer to acquire all shares in a target, an offeror who acquires 90% of the shares and voting rights to which the offer relates, may exercise its statutory rights to acquire compulsorily the remaining shareholders, effectively compelling such shareholders, who may not have accepted the offer to sell their shares to it.

7. The Insolvency Act, No.18 of 2015

- The creditors are given the right to request for information regarding a company that has been placed under administration from a relevant Insolvency practitioner. The Insolvency Practitioner shall provide the requested information within five (5) working days or such longer period as agreed between the creditor and the Insolvency practitioner. Extension of the period can only be done upon issuing a written notice to the creditor. Such a notice shall specify the period within which the information can be provided and the reasons for the extension.
- Section 560A of the Act is amended to provide for additional considerations that the court or administrator may take into account on application for approval to lift a moratorium. The additional considerations include:
 - i. Whether the value of the secured creditor's claim exceeds the value of the encumbered asset;
 - ii. Whether the secured creditor is not receiving protection for the diminution in the value of the encumbered asset;
 - iii. Whether the provision of the protection is feasible or cumbersome on the estate;
 - iv. Whether the encumbered asset is not needed in reorganization or sale of the company as a going concern.

8. The Kenya Information and Communications Act, No. 2 of 1998

This Act has been amended at section 83B (1) by deleting paragraph c that restricted the use of electronic signatures to sign documents of title. The restriction however still applies to wills and negotiable instruments.

Conclusion

The amendments are forward looking especially because the world has moved towards the digitalization of transactions, which has been very effective in different parts of the world. Transactions can now be done easily, faster and cost effectively. Also, transactions have been made less bulky due to limited paperwork involved. Further, the changes as captured under the Companies Act and Insolvency Act protect the rights of minority shareholders and unsecured creditors, respectively.

Our Corporate and Commercial law team is available to provide more insight to the provisions of this Act. Should you have any queries or need clarifications on the contents of this alert, please contact Ms. Hanifa Galgallo or Mr. Silas Gitari.



Hanifa Galgallo

Associate

hanifa@agoadvocates.com



Silas Gitari

Managing Partner

sgitari@agoadvocates.com

The contents of this alert are intended to be of general use only and should not be relied on without seeking specific legal advice from the contacts above.