

16. Separate Legal Entity

Companies Act provides for a separate legal existence from its shareholders. From the date of incorporation as mentioned in the certificate of incorporation, a body corporate by the name contained in the memorandum is formed. Such a body corporate is capable of having perpetual succession, power to hold land, has a common seal with liabilities of its members limited as per the provisions of the Act.

17. Capacity to Sue and be Sued

The suits of the company are suits of the company, and not of the shareholders. Therefore in case of suits for the company, the company is the proper plaintiff and where the company is sued, it is the proper defendant.

CLASSIFICATION OF COMPANIES

The various types of companies that the law recognizes in Kenya are covered under the Companies Act which allows the formation of the three types companies. These are;-

A company formed and registered under the companies Act Cap 486. These are referred to as registered Companies.

A company formed under any other Act of parliament that is called Statutory Company.

A company formed by the grant of letters patent or a charter. These are called Chartered Companies.

It means that the companies may be classified as under:

1. Corporations aggregate.
2. Corporations sole
3. Statutory corporation
4. Registered company or incorporated companies
5. Unregistered company
6. Chartered companies
7. Private companies
8. Public companies
9. Foreign companies
10. Subsidiary company
11. Holding company

Companies are classified into the following categories

1. Corporations Aggregate

Corporations aggregate consist of two or more persons united in a society, which is preserved by a succession of members, either forever or till the corporation is dissolved by the power that formed it. Corporation aggregate can be dissolved by the death of all its members, by surrender of its charter or franchises, or by forfeiture. Such corporations are the mayor and aldermen of

(iv) Statement of the Nominal Share Capital

This statement is delivered for taxation purposes pursuant to Section 39 of the Stamp Duty Act.

(v) Declaration of Compliance (Form No 208)

Form No 208, when duly completed and signed, constitutes the statutory declaration by the advocate engaged in the formation of the proposed company, or by the person named in the articles as a director or secretary of the company, that all the requirements of the Companies Act in respect of matters precedent to the registration of the company and incidental thereto have been complied with.

(vi) Registration

If the aforesaid documents are correctly prepared in accordance with the provisions of the Companies Act they are registered. The registrar then grants a certificate of incorporation and the company is formed from the date of incorporation written in the certificate.

Private Company

In order to secure the registration of a private company the procedure described above is followed except that:

- a) The memorandum of association will be signed by at least two of the company's promoters.
- b) Form No 209 and 210 are not delivered for registration because Sec.182(5) of the Act exempts promoters of a private company from the obligation to deliver them for registration.
- c) If articles of association are not delivered for registration the provisions of Part I of Table A will become the company's articles, as modified by Part II thereof.

CONSTITUTIVE DOCUMENTS

The constitution of a company consists of its memorandum of association and its articles of association.

MEMORANDUM OF ASSOCIATION

In relation to companies registered under the Companies Act, a Memorandum of Association was judicially defined by Lord Cairns in **Ashbury Railway Carriage Co Ltd v Riche** as "the charter" which "defines the limitation of the powers of a company to be established under the Act".

The memorandum of association is a document which contains the fundamental rules regarding the constitution and activities of a company. It is the basic document which lays down how the company is to be constituted and what work it shall undertake.

The purpose of the memorandum of Association is to enable the members of the company, its creditors and the public to know what its powers are and what is the range of its activities. The memorandum contains rules regarding the capital structure, the liability of the members, the

The case of **Burns v Siemens Bros Dynamo Works Ltd** shows that the circumstances set out in Section 118(1), above, are not the only ones in which the court can order rectification. It may also do so where a name stands on the register without sufficient cause.

In this case, the plaintiffs, Burns and Hambro, were the joint owners of shares in the defendant company. The shares were entered in the company's register in the joint names of Burns and Hambro. The company's articles provided that, where there were joint holders, the person whose name appeared first in the register of members, and no other, should be entitled to vote in respect of the shares. This meant that Hambro had no voting rights. Burns and Hambro sued for a rectification of the register so that it may show that the plaintiffs owned roughly half of the joint shareholding.

The court had jurisdiction to make such an order and the company was required to rectify the register, showing shares numbered 1 to 1,000 in the names of Burns and Hambro, and shares numbered 10,0001 to 19993 in the names of Hambro and Burns.

The court may also order rectification of the register by deleting a reference to some only of the registered shareholder's shares. It need not delete his name entirely. This is illustrated by **Transatlantic Life Assurance Co Ltd (1979)** case in which the court deleted an additional number of shares, which had been issued to the applicant in breach of the prevailing Exchange Control Regulations but left the register intact as regards his previous shareholding.

By Sec.118(4), if an order is made in the case of a company required to send a list of its members to the registrar, the court, when making an order for rectification of the register, shall by its order direct notice of the rectification to be given to the registrar.

Branch Register

A company having a share capital may, if so authorized by its articles keep a branch register in any part of the commonwealth.

The company shall give notice to the registrar of the location of the branch office and the register shall be deemed to be part of the company's register of members.

A branch register shall be kept in the same manner in which the principal register is kept.

In the event of closure of branch register notice shall be placed in that area

RIGHTS AND LIABILITIES OF MEMBERS

Rights of Members

The members of a company have the following rights:

1. Right to alter memorandum or articles of association of the company.
 2. Rights to obtain copies of certain documents i.e memorandum of association, articles of association, balance sheet and profit and loss account, minutes of proceedings of general meetings.
 3. Right to inspect certain books viz
 - i) Register of members and the index thereof;
 - ii) Register of debenture holders and the index thereof, copies of all annual returns, register of charges, minute books of general meetings etc.
 4. Right to receive share certificate and transfer shares as per articles.
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