

PBO ACT 2013 AND NGO ACT

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TYPES OF ORGANISATIONS

- Non Governmental Organisations/ Public Benefit Organisations(PBOs)
- Companies limited by Guarantee
- Societies and
- Trusts

RELEVANT LEGISLATION

- [The Constitution of Kenya](#) [2010]
- Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules [2006] [\[2\]](#)
- The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules [2013]
- [The Non-Governmental Organizations Coordination Act](#) [1990] [\[3\]](#)
- [The Non-Governmental Organizations Coordination Regulations](#) [1992]
- [The Non-Governmental Organizations Council Code of Conduct](#) [1995]
- [The Public Benefit Organizations Act](#) [2013]
- Miscellaneous Fees and Levies Act 2016
- The Companies Act [2015]
- The Insolvency Act [2015]
- The Value Added Tax Act 2013
- Tax Procedure Act 2015
- Tax Appeals Tribunal Act 2013
- Excise Duty Act 2015
- The East African Customs and Management Act
- [The Income Tax Act, Chapter 470 of the Laws of Kenya](#) [1989]
- The Employment Act, Chapter 226 of the Laws of Kenya [2007]
- The Education Act, Chapter 211 of the Laws of Kenya [1980]
- The HIV and AIDS Prevention and Control Act, Chapter 246A of the Laws of Kenya [2006]

PBO ACT AND THE NGO ACT

- PBO ACT 2013
- There was an attempt to operationalise the Act on 9 September 2016, it had been assented into law on 14 January 2013.
- High Court ordered on 31 October 2016 that the CS had 14 days to publish the gazette notice..where does that leave us ???.
- The PBO Act once operationalised will repeal the Non- Governmental Organizations Co-ordination Act, 1990, (the NGO Act)
- It was published in its current form, despite spirited attempts to amend some of its provisions, prior to its commencement.



DEFINITION

- Non-Governmental Organization (NGO) refers to entities are defined in Section 2 of the NGO Act, as a private voluntary grouping of individuals, not operated for profit or for other commercial purposes,
- but which have organized themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development charity or research in the areas inclusive of,
- but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services.

DEFINITIONS CONTD

- Trade unions, public bodies, religious organizations, societies, cooperative societies, saccos, micro-finance institutions and community based organizations whose objectives include the direct benefit of its members are not considered PBOs
- However, where such entities apply for registration under the PBO Act and are granted a certificate of registration, their previous registration under any other written law is immediately deemed invalid.

DEFINITION CONTD

- The PBO Act defines “public benefit organization” (PBO) in Section 5(1) as a voluntary membership or non-membership grouping of individuals or organizations, which is autonomous, non-partisan making, non-profit making and which is
 - organised and operated locally, nationally or internationally
 - engages in public benefit activities in any of the areas set out in the Sixth Schedule, and
 - registered as such by the Authority. Membership PBOs are those that recruit members while non-membership PBOs only have a Board and a Secretariat.

DEFINITION OF A PUBLIC BENEFIT ACTIVITY

- Defined in Section 2, as an activity that supports or promotes public benefit by enhancing or promoting economic, environmental, social or cultural development or protecting the environment or lobbying or advocating on issues of general public interest or the interest or well-being of the general public or a category of individuals or organizations.



ACTIVITIES OF A PBO

- The objectives that can be pursued by a PBO are listed under the Sixth Schedule of the PBO Act and include legal aid, agriculture, children, culture, disability, energy, education, environment and conservation, gender, governance, poverty eradication, health, housing and settlement, human rights, HIV/AIDS, information, informal sector, old age, peace building, population and reproductive health, refugees, disaster prevention, relief, pastoralism and marginalized communities, sports, water and sanitation, animal welfare and the youth

REGISTRATION

- The NGO Act contained vague grounds for denial of registration and the Government had discretion in setting terms and conditions on NGO registration. In addition, there was no fixed time period for the review of applications and the NGO Board was not legally required to provide reasons for its refusal to register an organization.
- Sections 6 to 13 of the PBO Act now provide clear and unambiguous guidelines for registration of PBOs.
- Section 8 outlines the documents and information that must accompany an application for registration, including a copy of the PBO's constitution, names and addresses of its founders, the public benefit purpose for which the PBO is organized, the postal and physical address of the PBO's principal place of business and the prescribed fee

REGISTRATION CONTD

- The PBO Act provides that the Authority may refuse to register an organization as a PBO if the application does not comply with the requirements of the Act, the objectives of the proposed PBO contravene any written law, the applicant committed a serious violation of the Act or has given false or misleading information, or if the name of the proposed PBO resembles that of another entity.

CONSTITUTION

- Dealt with Section 8 (4) of the PBO Act.
- A PBO must provide a statement to the effect that the organization's membership shall be voluntary and that its income and property shall not be distributable to any person except as reimbursement for reasonable expenses or payment of reasonable compensation for services rendered.
- The Constitution must also make provision for the organization to be a body corporate with an identity and existence distinct from its members or governing body and must provide for a governing body consisting of not less than five (5) persons, three (3) of whom shall not be related to each other.
- The advantage of being a corporate body is that no member of the PBO's governing body can be held personally liable for any act done in good faith, on behalf of the organization or by virtue of the office held in the governing body.
- However, where the liability is incurred outside the duties of the individual as a member of the governing body, the member would be held personally liable to the extent of such liability.

TIMELINES FOR REGISTRATION

- Section 9 states that the Authority shall consider applications and register an organization as a PBO within sixty (60) days after receiving the application.
- Where the Authority is not satisfied that the application complies with the requirements for registration, the Authority shall immediately notify the applicant, giving reasons, and provide the applicant up to thirty (30) days to comply.
- if the applicant complies within the notice period, the Authority shall register the organization within fourteen (14) days from receipt of the requested requirements.
- However, if the applicant fails to satisfy the requirements after being given an opportunity to comply, the Authority shall refuse to register the organization concerned and shall notify the applicant of its refusal within the number of days remaining in the original period of sixty (60) days.

TIMELINES FOR REG CONTD

- In the event that the Authority fails to make a decision or to communicate such decision to the applicant within sixty (60) days, the applicant may apply to the Public Benefit Organization Disputes Tribunal (the Tribunal) established under Section 50 of the PBO Act, for an order requiring the Authority to issue a certificate of registration or to advise the applicant of its refusal with reasons. An applicant aggrieved by the decision of the Authority can also appeal to the Authority for review of its decision within thirty (30) days from the date the impugned decision is received.
- Upon being registered by the Authority, the PBO is issued with a certificate of registration, which is conclusive proof that the organization has authority to operate throughout Kenya as specified in its constitution or in its certificate of registration.

REGISTRATION CONTD

- With the repeal of the NGO Act and pursuant to Section 5 of the Fifth Schedule of the PBO Act, every NGO registered under the repealed Act on the commencement date is deemed to be registered as a PBO under the PBO Act and shall have up to one (1) year from the commencement date to confirm its status as such through formal registration under the new Act.
- In the event that an NGO fails to apply for registration within the grace period, it shall cease to have PBO status thirty (30) days after the expiry of the regulatory notice requiring it to do so.
- This provision is likely to have a far-reaching effect in the near future and may prompt some organizations to adopt other organizational forms to pursue their objectives.

REGULATORY OVERSIGHT

- The Authority is established under Section 34 of the PBO Act and takes over the roles and powers of the NGO Coordination Board.
- It is a body corporate with perpetual succession and its functions include registering and deregistering PBOs, maintaining a register of registered PBOs and advising the government on the activities of PBOs and their role in development within Kenya.
- Section 43 of the PBO Act expressly provides that the Authority shall be independent in the performance of its functions and shall not act under the direction or control of any person.
- Section 42 (1) (h) provides that the Authority may institute inquiries to establish whether the activities of PBOs comply with the Act. The Authority can also require any officials of the organization to provide the Authority with an inventory and the whereabouts of assets of the PBO.
- The Authority has the power to cancel or suspend a certificate of registration, but this is limited to specific instances, for example, where the PBO has committed a violation of the Act or is carrying out its activities in a manner that is contrary to its constitution. The PBO Act also requires the suspended or cancelled. While cancellation terminates all of the PBO's benefits, it does not terminate its obligations.

SELF REGULATION

- PBOs are required to apply the principles of transparency and accountability to all their affairs and activities, whether with the Government, their beneficiaries, donors, other PBOs or other stakeholders.
- In furtherance of these objectives, the Act requires PBOs to submit annual reports to the Authority within six (6) months after the end of each financial year and that their activities be open and accessible to scrutiny by their stakeholders.
- The Act provides further that the governing body of the PBO must be distinct and separate from the administrative and day-to-day management body of the organization and that every person who serves on the governing body of a PBO must serve on a voluntary basis.
- The governing body is tasked with establishing clear and unambiguous guidelines relating to the operations of the organization. In our view, this governance structure greatly enhances transparency in the operations of the PBO.

SELF REGULATION CONTD

- In addition, the PBO Act establishes the National Federation of Public Benefit Organizations (the National Federation). This is the umbrella organization for all PBOs registered under the Act and the self-regulation forums recognized by the Authority. The National Federation replaces the Non-Governmental Organizations Council and its main objectives are to provide leadership on matters of interest to the sector for the promotion of the sector generally and enhancement of self-regulation. Every registered PBO is eligible for membership in the National Federation.

DISPUTE RESOLUTION

- The Tribunal is established under Section 50 of the PBO Act and has jurisdiction to hear disputes between members of the National Federation, between Members and between the National Federation and the Authority.
- The Tribunal is also empowered to hear and determine complaints arising out of a breach of the provisions of the Act and appeals made to it, pursuant to the Act.
- The Tribunal's jurisdiction does not, however, extend to criminal matters except contempt of court, disobedience of summons to appear before the Tribunal and refusal or failure to answer or produce records of accounts.
- It should also be noted that the Tribunal's decisions are final and binding on the parties except where judicial review is commenced within fourteen (14) days of the Tribunal's decision. Appeals from the Tribunal may be preferred to the High Court and the High Court's decision on the matter is final.

MISCELLANEOUS PROVISIONS

- A PBO may deregister, wind itself up or dissolve itself by filing with the Authority a resolution passed by 2/3 of the members, signed by the chairperson, to that effect.
- Upon dissolution, any asset remaining after all the liabilities have been paid shall be transferred to another PBO having similar objectives which shall be identified through a resolution of the governing body of the PBO, failing which the Authority shall make the decision **Section 61**

OFFENCES

- To forge or utter a false a document for purposes of procuring registration;
- Make a false statement in respect of an application for registration;
- Make any material false statement in any document submitted to the Authority;
- To fraudulently hold out any organisation as being registered under the Act;
- To fraudulently make use of a registration number, certificate or information contained in a certificate of registration;
- Penalty - Kshs. 300,000/= or imprisonment for a term not exceeding 2 years or both.

OTHER MISCELLANEOUS PROVISIONS

- Economic/income generating activities by PBOs allowed so long as the income is used for the declared public benefit purposes for which the PBO was established (**Section 65**).
- A PBO may own and manage real or personal property for its not-for-profit purposes (**Section 65(3)**).
- Participation in public policy and political activities permitted (**Section 66**). However, a PBO may not engage in fundraising or campaigning to support or oppose any political party or candidate for public office and cannot propose or register candidates for political office (**Section 66(3)**).
- Government involvement - the Government to involve PBOs in all matters of policy involving them especially at the local level (**Section 67**).
- Work Permit applications for PBOs' foreign staff to be made directly to the Principal
- Immigration Officer and to be determined in accordance with the provisions of the Immigration Act (**Section 68**).
- ***Comment: No longer necessary to seek letter of recommendation from the Authority as a precondition of obtaining a work permit.***
- NGO Co-ordination Act 1990 repealed

STATUTORY BENEFITS

- Outlined in the Second Schedule to the Act.
- PBOs are, by law, entitled to the benefits set out in this Schedule, namely:
 - (a) Exemption from
 - income tax received from membership subscription, donations and grants;
 - income tax from the PBOs income generating activities if the income is wholly used to support the purposes of which the PBO was established;
 - tax on interest and dividends earned on assets on the sale of assets:
 - stamp duty; and
 - court fees.
 - (b) Preferential treatment under the VAT and customs duties legislation in relation to the importation of goods and services.
 - (c) Incentives for donations by legal and natural persons.
 - (d) Employment tax preferences.
 - (e) Special tax incentives for donations to form endowments, prudent investment policies, etc.
 - (f) Indirect government financing e.g. budget subsidies, grants for specific purposes and contracts to perform certain work.
 - (g) Preferential treatment in public procurement procedures.
 - (h) Provision of information to PBOs.
 - (i) Access to training offered by Government institutions

TRANSITIONAL PROVISIONS

- Outlined in the 5th schedule
- All assets of the NGO Co-ordination Board vested in the Authority and all actions, suits or legal proceedings by or against the Board, taken over by the Authority.
- NGOs registered under the repealed law deemed to be registered under the new law and have up to 1 year to seek registration as a PBO under the new law.
- Former NGO Co-ordination Board transformed into PBO Authority and its officers to remain in office for the remainder of the 3 year term and to be eligible for re-election (**Paragraph 6**).
- An NGO registered under the repealed Act shall be bound by the provisions of the new Act (**Paragraph 7(1)**).
- NGOs exempted from registration under the repealed law must seek registration under the Act within **3 months** of the commencement of the Act (**Paragraph 7(2)**)

INTERNATIONAL NGOS

- An international NGO can register as a PBO under the PBO Act by submitting an application form with proof that it is a legal entity in another country and by providing its address in Kenya and a written statement from a representative of its headquarters, stating the purposes of the NGO, a general description of the activities it is planning to carry out in Kenya and the name and contact details of its authorized agent in Kenya. However, the international organization must have at least one third of its directors as Kenyan citizens resident in Kenya and having an office in Kenya.
- The Authority may also exempt an organization registered outside the country from registration, particularly where the international organization does not intend to engage in direct implementation of any activity, program or fundraising activities in Kenya.

CONCLUSION

- For many decades, local and international NGOs have played a prominent role in shaping the country and it can generally be said that the legal environment in Kenya has been reasonably supportive. However, there was lack of accountability for NGOs to effectively partner with the Government and other stakeholders.
- These concerns led to the enactment of the PBO Act, an interesting piece of legislation that is aligned to the Constitution of Kenya, 2010 and also goes a long way in striking a balance between enablement and regulation in the civil society sector.
- More importantly, the Act imposes an obligation on the Government to respect freedom of association and assembly and to provide an enabling environment in which PBOs can be established and perform their functions. The Government is also enjoined to involve PBOs in policy decision making on issues affecting them, particularly at the local level.
- The rules and regulations that will guide the implementation of the Act are still under review and once finalized, will make further provision for the registration, management and operation of PBOs.

AOBS

- NGOs in Kenya do not have to be registered under the PBO Act. There are in fact a number of other organizational forms to choose from which are not restricted to public benefit purposes, including companies limited by guarantee under the Companies Act, 2015, trusts under the Trustees (Perpetual Succession) Act, (Cap. 164) Laws of Kenya, societies under the Societies Act, (Cap. 108) Laws of Kenya, co-operative societies under the Co-operative Societies Act, (Cap. 490) Laws of Kenya and grassroots organizations such as harambee (self-help groups) and community-based organizations.
- Nevertheless, PBO status may be the preferred option, in view of the associated benefits, including indirect government support in the form of various tax exemptions and preferential treatment.



CURRENT STATUS

- PBO Act not operationalised.
- Concerns over the delay of the implementation
- NGO Board moved from Ministry to Ministry leading to uncertainty.
- Corruption and non accountability of the NGO Board Members
- Harassment of the NGOs and abuse of power by the NGO
- Reduced funding from international organisations

Questions



Thank You

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- Companies Limited by Guarantee;
- Societies; and
- Trusts.