



Guidance on the validity of using electronic signatures in Kenya

The minimum provisions of a contract is 'evidence of formal acceptance between the parties to a contract. Formal acceptance is usually evidenced by a signature on behalf of each party. It is an established practice in Kenya that formal acceptance is signified through a signature.

This document provides guidance on the validity of using electronic signatures in Kenya and specifically on signing financial statements during the current COVID-19 environment where it is a challenge to physically get directors to sign the financial statements. Below are the signing requirements in the Companies Act, 2015.

Financial statements

The Companies Act, 2015 section 652.(1) provides that ***As soon as practicable after a company's annual financial statement has been prepared, the directors shall approve the statement and arrange for one or more of them to sign it. (2) The directors shall sign their names on the company's balance sheet.***

Directors' report

The Companies Act, 2015 Section 658.(1) provides that ***As soon as practicable after the directors have finished preparing their annual report for the company, they shall approve the report and arrange for one of them or the secretary of the company to sign it.***

Directors' remuneration report

The Companies Act, 2015 Section 661.(1) provides that ***As soon as practicable after the directors have finished preparing the directors' remuneration report, the directors shall approve the report and shall arrange for one of them or the secretary of the 'company to sign it.***

Auditor to sign and date the auditor's report

The Companies Act, 2015 Section 735.(1) provides that ***An auditor shall .(a) sign and date the auditor's report; and (b) ensure that the auditor's name is prominently displayed in the report. (2) If the auditor is a firm, the senior statutory auditor of the firm shall sign the report on behalf of the firm.***

Sign

The Companies Act, 2015, **PART 1–PRELIMINARY, sub-section 3** *Interpretation of provisions of this Act*, states that: **'sign' includes sign by means of an electronic Signature**

Other laws governing electronic signatures

Electronic signatures are not a new concept to Kenyan law, as they are already provided for under the Kenya Information and Communication Act No. 2 of 1998, as amended (the **KICA**).

Section 83J of the Kenya Information and Communications Act, recognizes electronic contracts. It says, “In the context of contract formation, unless otherwise agreed by the parties, an offer and acceptance of an offer may be expressed by means of **electronic messages** [;] thus where an electronic message is used in the formation of a contract, the contract shall not be denied validity or enforceability solely on the ground that an electronic message was used for the purpose.”

Section 83G of the Kenya Information and Communications Act, provides that any matter that is required to be “in writing” is also satisfied if the matter is made available in an **electronic form**, and remains accessible so as to be usable for a subsequent reference. Notably, such a document must remain retrievable or accessible in the system for future reference.

In addition, section 83H of the Kenya Information and Communications Act, provides that for electronic documents to satisfy the requirement for valid retention of documents the record must be retained in the format in which it was originally generated, sent or received and it must contain details which will facilitate identification of the original destination, date and time of dispatch or receipt of such an electronic record.

The KICA (provided below) defines an electronic signature as follows:

- an **electronic signature** is “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”
- an **advanced electronic signature** is an electronic signature that is: uniquely linked to the signatory; capable of identifying the signatory; created using means that the signatory can maintain under his sole control; and linked to the data to which it relates in such a manner that any subsequent change to the data is detectable.

Exceptions

Sec. 83B.(1) of the Kenya Information Communication Act, stipulates that Electronic Transaction shall not apply to any rule or law requiring writing or signatures in any of the following matters:

- (a) The creation or execution of a will
- (b) Negotiable instruments
- (c) Documents of title

The provisions of KICA require certificates (issued by duly licensed or recognized certification service providers) to support such signatures. There are no details provided on who is to give the certificate.

While applying this guideline members are expected to apply the risk management policies applicable to their practice to provide safeguards on the use of electronic signatures. This may include but not limited to the following:

- Specific authority need to be sought and documented when electronic signature is applied to sign a document especially where this is performed by a person other than the signatory to the document or a report;
- Members should maintain a record of documents signed using electronic signature;
- Where in doubt on the legal applicability of the electronic signature, it is advisable to consult a legal expert.

This guide is not intended as a legal advice and should not serve as a substitute for professional legal advice. You should consult an attorney regarding any specific legal concerns.