



DIRECTORS' STATUTORY DUTIES IN KENYA

A Practical Guide to Directors' Duties, Board Governance, Shareholder Remedies, Financial Distress, Fraud Risk and Personal Liability Under the Companies Act, 2015

19th June 2026

EXECUTIVE SUMMARY

The role of directors in Kenya has undergone a profound transformation. Historically, directors were often viewed primarily as representatives of shareholders charged with overseeing corporate affairs and pursuing commercial objectives. Today, however, directors operate within a significantly more demanding governance environment shaped by statutory obligations, heightened regulatory expectations, increased shareholder activism, evolving environmental, social and governance (ESG) standards, and growing judicial scrutiny of board conduct.

The Companies Act, 2015 codifies many of the fiduciary principles that historically existed under common law and establishes a comprehensive framework governing the exercise of directorial powers. The legislation places directors at the centre of corporate accountability and requires

them to act not only with honesty and integrity but also with competence, independence, diligence and sound judgment.

Recent judicial developments, including the Court of Appeal decision in *Raindrops Limited & 3 Others v Joseph Munyoki Nzioka [2025] KECA 1570 (KLR)*, demonstrate an increasing willingness by Kenyan courts to scrutinise governance failures, facilitate shareholder remedies and hold directors accountable where corporate power is exercised improperly or in a manner inconsistent with the interests of the company.

For directors, investors, lenders, family businesses, private equity sponsors, multinational corporations and state-owned enterprises, the implications are significant. Directorship is no longer merely a position of authority; it is a position of stewardship carrying substantial legal, fiduciary and personal responsibilities.



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Directors today operate in an environment characterised by heightened regulatory scrutiny, increased shareholder activism, growing ESG expectations, sophisticated financial crime risks and expanding personal accountability. In this environment, effective governance is no longer viewed merely as a matter of legal compliance. It has become a strategic imperative that directly influences enterprise value, investor confidence, regulatory relationships and organisational resilience.

WHY DIRECTORS' DUTIES MATTER MORE THAN EVER

Corporate governance has become one of the most important components of enterprise risk management.

Boards are now expected to oversee a broad range of issues extending far beyond financial performance. Directors are increasingly responsible for supervising regulatory compliance, cyber security, anti-money laundering controls, sanctions compliance, environmental and social risks, workplace culture, financial crime prevention, stakeholder engagement, data governance and corporate reputation.

This evolution reflects a broader global trend. Investors, lenders, regulators and courts increasingly expect directors to demonstrate active oversight of the companies they serve. Passive directorship is rapidly becoming incompatible with modern governance expectations.

The legal consequences of governance failures are also becoming more significant. Directors may face derivative proceedings, shareholder actions, regulatory investigations, insolvency-related claims, asset recovery actions, director disqualification proceedings and, in certain circumstances, personal liability.

Increasingly, governance failures are not viewed solely as internal corporate matters. They are increasingly regarded as issues affecting market confidence, investor protection, financial stability and corporate sustainability.

THE EVOLVING NATURE OF DIRECTORSHIP

The role of a director has evolved considerably from its traditional conception as a supervisory function focused principally on financial performance and shareholder returns.

The increasing complexity of modern business means that directors are expected to exercise oversight over risks that were rarely considered board-level matters a decade ago. Cybersecurity, artificial intelligence, data privacy, anti-money laundering controls, sanctions compliance, environmental sustainability, workplace culture, stakeholder engagement and supply chain governance are increasingly viewed as strategic governance issues requiring active board oversight.

Modern boards are therefore expected to combine commercial leadership with governance stewardship. Directors must balance the pursuit of growth and profitability with the management of risk, compliance obligations, stakeholder expectations and long-term sustainability.

This expanded role has inevitably increased the potential exposure of directors. The modern director operates within an environment where board decisions and the processes by which they are reached may be scrutinised by regulators, shareholders, creditors, auditors, insolvency practitioners, courts, investigators and the media.

TO WHOM ARE DIRECTORS' DUTIES OWED?

One of the most fundamental principles under the Companies Act, 2015 is that directors owe their duties to the company itself.

This principle underpins the statutory framework governing directors' duties and serves as the foundation of fiduciary accountability. Directors are expected to exercise their powers for the benefit of the company as a separate legal person and not solely for the benefit of individual shareholders, founders or other stakeholders.

Importantly, Kenyan courts increasingly look beyond formal titles and examine the practical realities of corporate decision-making. Liability may therefore arise not only for formally appointed directors but also for individuals who effectively direct or control corporate affairs behind the scenes. This is particularly relevant



in the Kenyan context, where founder-led businesses, family enterprises and closely held companies frequently operate with informal governance arrangements.

Consequently, founders, controlling shareholders, shadow directors, de facto directors and other influential individuals may, in appropriate circumstances, be subjected to the same standards of accountability as formally appointed board members.

This reflects a broader international trend whereby courts focus on substance rather than form when determining responsibility for corporate conduct.

THE CORE DUTIES OF DIRECTORS UNDER THE COMPANIES ACT, 2015

The Companies Act establishes a framework of interrelated duties that collectively define the standard of conduct expected from directors.

The starting point is the duty to act within powers under Section 142. Directors must exercise their powers in accordance with the company's constitution and only for the purposes for which those powers were conferred. This obligation serves as a constitutional safeguard against misuse of corporate powers and abuse of authority.

Section 143 imposes the duty to promote the success of the company. Directors must act in good faith and in a manner they consider most likely to promote the success of the company for the benefit of its members as a whole. In discharging this duty, directors are required to consider the long-term consequences of decisions, employee interests, relationships with suppliers, customers and creditors, the impact of operations on communities and the environment, the maintenance of the company's reputation and the need to uphold high standards of business conduct.

In many respects, this provision incorporates principles that are now commonly associated with ESG governance and stakeholder capitalism. It recognises that sustainable value creation depends upon balancing a broad range of interests and risks.

Section 144 requires directors to exercise independent judgment. This obligation is particularly important in founder-led businesses, family-owned enterprises, private equity-backed companies, joint ventures and state corporations. Directors cannot simply follow instructions from majority shareholders, financiers, sponsors or political actors. Even nominee directors owe their primary loyalty to the company rather than the person who nominated them.

Section 145 establishes the duty to exercise reasonable care, skill and diligence. The standard combines both objective and subjective elements. Directors are expected to demonstrate the care and competence that would reasonably be expected of a person performing similar functions while also taking into account any specialist expertise they possess. Consequently, lawyers, accountants, engineers, bankers, investment professionals and other specialists serving as directors may be held to a higher standard than non-specialist directors.

The Act further requires directors to avoid conflicts of interest under Section 146 and prohibits acceptance of benefits from third parties under Section 147 where such benefits may compromise independence or create a conflict with the interests of the company.

Taken together, these statutory duties establish a governance framework that requires directors to exercise informed judgment, maintain independence, manage conflicts appropriately and act as responsible stewards of corporate value. The duties should not be viewed in isolation. Rather, they operate collectively to promote transparency, accountability and sustainable decision-making within corporate structures.

ENFORCEMENT OF DIRECTORS' DUTIES AND SHAREHOLDER REMEDIES

The significance of directors' duties lies not merely in their existence but in the mechanisms available to enforce them.

Section 148 confirms that breach of directors' duties attracts the same consequences that would ordinarily apply under common law and equitable principles. Depending on the circumstances, directors may face claims for damages, restitution, account of profits, rescission of transactions, injunctions and other remedies



designed to restore the company to the position it would have occupied absent the breach.

The Companies Act also provides shareholders with powerful tools to enforce corporate accountability. Among the most important are derivative actions under Sections 238 to 242. These provisions allow shareholders to bring proceedings on behalf of the company where those controlling it refuse or fail to pursue legitimate claims.

Derivative proceedings have become one of the most important mechanisms through which minority shareholders may protect company interests and challenge governance failures. Such claims may arise in cases involving negligence, breach of fiduciary duty, breach of trust, misappropriation of assets, diversion of corporate opportunities and other forms of corporate misconduct.

The increasing use of derivative proceedings globally reflects a broader trend towards enhanced board accountability. Shareholders, institutional investors and minority stakeholders are increasingly prepared to challenge governance failures where they believe directors have failed to protect company interests. Consequently, directors should assume that significant decisions may be subject to judicial scrutiny and should ensure that decision-making processes are properly documented and capable of withstanding review.

The Court of Appeal's decision in *Raindrops Limited & 3 Others v Joseph Munyoki Nzioka* provides an important illustration of this trend. The Court adopted a practical and purposive approach that facilitates access to derivative remedies where company interests are threatened by governance failures or abuse of power. The decision reflects an increasingly clear judicial policy that procedural technicalities should not shield directors or controlling shareholders from accountability where legitimate corporate grievances exist.

PROTECTION AGAINST OPPRESSIVE CONDUCT AND UNFAIR PREJUDICE

Modern corporate governance increasingly recognises that shareholders require effective

remedies where company affairs are conducted in an oppressive or unfairly prejudicial manner.

Sections 780 to 784 of the Companies Act provide important safeguards in this regard. These provisions empower courts to intervene where the conduct of company affairs unfairly prejudices the interests of members or where the affairs of a company are conducted in a manner that is oppressive.

These remedies are particularly important in family businesses, joint ventures, closely held companies, private investment structures and founder-led enterprises where disputes frequently arise concerning management participation, access to information, related-party transactions, succession planning and strategic direction.

The courts possess broad remedial powers and may fashion solutions that preserve the business while addressing underlying governance concerns. In many cases, these remedies provide a practical alternative to the destruction of corporate value that may result from prolonged disputes or liquidation proceedings.

DIRECTORS' DUTIES DURING FINANCIAL DISTRESS

A particularly important shift occurs when a company enters financial difficulty.

Ordinarily, directors owe duties primarily to the company and its members. However, once insolvency becomes probable, directors must increasingly consider the interests of creditors. This transition represents one of the most significant sources of personal exposure for directors.

Decisions involving asset transfers, related-party transactions, debt restructuring, refinancing arrangements, security creation, creditor payments and business continuity strategies become subject to heightened scrutiny. Directors who continue trading irresponsibly or permit the dissipation of corporate assets may face personal liability under both the Companies Act and the Insolvency Act.

Many of the most significant claims against directors arise not during periods of corporate success but during periods of financial difficulty. Economic downturns, liquidity constraints and



operational challenges often place boards under considerable pressure. During such periods, directors should ensure that decisions are carefully documented, professional advice is obtained where necessary and creditor interests are appropriately considered. Early intervention frequently represents the most effective means of reducing potential personal exposure.

For this reason, boards should treat emerging financial distress as a governance issue requiring careful oversight, independent advice and proactive management.

FRAUDULENT TRADING AND PERSONAL LIABILITY

One of the most serious risks facing directors arises under Section 1002 of the Companies Act, which addresses fraudulent trading.

The provision reflects the principle that the corporate veil cannot be used as a shield for dishonest conduct. Where business is carried on with intent to defraud creditors or for a fraudulent purpose, directors and other persons knowingly involved may face significant consequences, including civil liability, regulatory sanctions and criminal prosecution.

The provision is particularly relevant during periods of financial distress, where pressures on management may create incentives to conceal liabilities, dissipate assets, engage in sham transactions or otherwise undermine the legitimate interests of creditors and stakeholders.

Courts have consistently demonstrated a willingness to look beyond corporate structures where evidence suggests that the company has been used as an instrument of fraud, abuse or improper conduct. Directors should therefore approach financial distress situations with heightened caution and transparency.

DIRECTOR LIABILITY, ASSET RECOVERY AND CORPORATE INVESTIGATIONS

Governance failures increasingly intersect with investigations, asset recovery proceedings and financial crime enforcement.

From the perspective of our Civil Fraud, Asset Recovery & Tracing (CFAR) Practice, disputes involving directors frequently evolve beyond ordinary corporate disagreements into complex recovery actions involving allegations of asset diversion, breach of fiduciary duty, unlawful transfers, concealment of assets, misuse of corporate opportunities and other forms of corporate misconduct.

Increasingly, regulatory investigations, insolvency proceedings, shareholder disputes and asset recovery actions are interconnected. Information disclosed in one process may subsequently be relied upon in another. Directors should therefore approach governance, record-keeping and decision-making with the expectation that their actions may ultimately be reviewed by regulators, courts, insolvency practitioners, investigators or shareholders.

As regulatory scrutiny increases and shareholder activism becomes more sophisticated, directors should assume that significant transactions may be subjected to forensic review long after they occur.

Good governance therefore serves not only a compliance function but also an important protective function.

LOOKING AHEAD

The combined effect of the Companies Act, 2015, evolving governance expectations and recent judicial developments is unmistakable.

Kenyan courts are increasingly prepared to enforce directors' duties, facilitate shareholder remedies, protect minority interests and impose liability where governance failures result in loss, prejudice or abuse of corporate power.

The Court of Appeal's decision in *Raindrops Limited & 3 Others v Joseph Munyoki Nzioka* reflects a broader evolution in Kenyan corporate governance jurisprudence. The decision underscores the increasing willingness of courts to facilitate shareholder remedies, scrutinise board conduct and enforce fiduciary accountability where corporate power is exercised contrary to the interests of the company.

For directors, investors, lenders, founders, family businesses and corporate advisers, the



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implications are clear. Directors' duties are no longer viewed merely as technical legal obligations. They represent the foundation of modern corporate governance and play a critical role in protecting corporate value, promoting stakeholder confidence and ensuring organisational sustainability.

In an increasingly complex regulatory and commercial environment, effective governance remains the most reliable safeguard against legal, financial, regulatory and reputational risk. Boards that embrace transparency, independence, accountability and proactive risk management will be best positioned to navigate emerging challenges and deliver sustainable long-term value.

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