

## **CHOICE OF BUSINESS ENTITY**

After ascertaining the commercial viability of a prospective business and coming up with a business plan the following are basic matters that need to be taken into consideration regarding choice of business entity by any person commencing a business.

### **Selection of a Business name.**

In coming up with the plan to set up a business one also needs to figure out a name for the intended business entity. The process of selecting a name usually involves coming up with several distinct names and conducting a names search with the Registrar of Business Names over the chosen names to ascertain their availability. Upon getting the results of a search and selecting a name out of the available names the selected name can upon application be registered as a business name for the exclusive use of the applicant within Kenya. The chosen name may also be used to incorporate a company.

Apart from offering exclusive rights to the use of a name, the registration of a name also enables the performance of other operational tasks such as application for various business permits and licenses which are issued in the registered name of the business. Opening of a bank account for the business also requires the production of a Certificate evidencing the existence of the business as a duly registered business entity.

### **Selection of the Entity to use in Operating a Business**

Principally, businesses tend to operate under any one of three types of entities namely sole proprietorship, partnership or limited liability companies. The choice of the entity to be used is governed mainly by various aspects of the business to be conducted.

#### **Sole Proprietorship**

Sole proprietorships tend to suit businesses that are relatively small in terms of operations and whose proprietorship is in the hands of a single person. Owing to the limited range of the operations of such businesses they normally commence operations upon registration as a business name and obtaining the requisite municipal licenses.

It is important to note that legally a sole proprietorship business does not have a distinct legal personality from its proprietor. This means, *inter alia* that the proprietor is personally liable for matters arising out of the conduct of the business hence legal action can be commenced against the proprietor in person for matters arising from conduct of the business and in turn the proprietor can sue on matters of the business in his personal capacity.

#### **Partnerships**

A partnership is a business entity conducted by several persons in common. Under Kenyan law a partnership cannot consist of more than 20 persons unless authorized by law. Individuals who get together to engage in professions such as medicine i.e. doctors and law i.e. lawyers tend to be

registered as partnerships. One reason for that being that the nature of their operations does not allow them to limit their liability as would be the case for a limited liability company.

Although a partnership may be formed either orally or even inferred from the conduct of parties it is prudent to prepare a written agreement also referred to as a Partnership Deed which serves to govern the relationship between the partners.

The following are salient provisions of the law that are worth bearing in mind about the operations of a partnership

- a) Every partner in a firm is liable jointly with the other partners for all debts and obligations of the firm incurred while he is a partner. A partner under the age of 18 years may be admitted to the benefits of partnership but he cannot be made personally liable for the obligations of a partnership although his share in the property of the partnership is liable for the obligations of the partnership.
- b) Every partner is an agent of the firm for the purpose of the business of the partnership. This means any act done by a partner in his capacity as a partner in relation to the partnership business and in carrying on the business of the partnership in the usual way binds the other partners.
- c) A partnership is not a legal person and hence cannot sue or be sued in its own name.

### **Company**

The company as an business entity has achieved widespread use in the conduct of business owing to the numerous advantages that accrue from its use. Companies may be divided into two categories namely

#### Companies Limited By shares.

In a company limited by share capital the liability of shareholders of the company in the event of its winding up is limited to the nominal value of the shares held by them in the company.

#### Companies Limited By Guarantee

In a company limited by Guarantee the liability of subscribers of the company in the event of its winding up is limited to a sum each of them guarantees to pay in the event of winding up.

The company as an entity for the conduct of business has a number of advantages over the aforesaid business entities the principal one being the fact that it has a legal personality distinct from its members. This and other advantages borne by the company as a business entity mean that

- a) It can sue or be sued in its own name,

- b) It can own property in its own name
- c) Its shareholders liability is limited hence the company's debts are distinct from those of its shareholders/members.
- d) It has perpetual succession hence it outlives its shareholders even in the event of the death of all its shareholders.

After selection and reservation of the name of the entity as described above the process of incorporation of a company involves preparation of the Memorandum and Articles of Association and other statutory forms for which stamp duty is paid depending on the share capital of the company and thereafter the document are lodged for registration at the Companies registry upon the payment of a prescribed fee.