Introduction

The ultra vires doctrine in company law, namely that a company is formed only to pursue the objects specified in its memorandum of association and if it acts outside those objects the transaction is ultra vires and void, has for a long time been one of the more intractable problems facing persons dealing with companies in common law jurisdictions. Under the ultra vires doctrine, companies could avoid liability under contracts with innocent third parties on the ground that the company never had the power to enter into the said contracts in the first place. A significant number of common law jurisdictions, including Australia, Canada, New Zealand and Hong Kong, and most recently England, have taken steps to abolish the doctrine of ultra vires.

This article considers the provisions of Kenya’s Companies Act (the Act) that provide for the doctrines of ultra vires and why there is need to review them. The discussion within this article is limited to the ultra vires doctrine as it relates to the objects clause and not to the general breach of directors duties in public listed companies.

The present law and its purpose

Section 5(1)(c) of the Act requires the memorandum of every company to state, inter alia, the objects of the company. Traditionally in English corporate law, the memorandum was a document which governed the external relationships of the company, specified its name, the names of its initial subscribers, its capital, the scope of liability of its members and its objects. The objects of the company were stated in the memorandum so that the shareholders and particularly potential investors such as creditors of the company would know the purposes for which their money and their credit facilities would be used by the company. The publicly stated objects were the only activities in which the company could legally engage.

Consequently, by reading the company’s memorandum, a prospective shareholder or creditor should be able to tell exactly what activities they are putting their money into by investing or contracting with the company. The Act goes on to provide that a company shall not alter the objects stated in the memorandum except “in the cases, in the mode and to the extent for which express provision is made in this Act.”

These cases, mode and extent are set out in s.8 of the Act, which states that:

8. (1) A company may, by special resolution, alter the provisions of its memorandum with respect to the objects of the company, so far as may be required to enable it --

(a) to carry on its business more economically or more efficiently; or

(b) to attain its main purpose by new or improved means; or

(c) to enlarge or change the local area of its operations; or

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the business of the company; or

(e) to restrict or abandon any of the objects specified in the memorandum; or
(f) to sell or dispose of the whole or any part of the undertaking of the company; or

(g) to amalgamate with any other company or body of persons:

Bearing in mind that the main purpose of having an objects clause is to protect shareholders and investors by restricting changes to a company's object except via special resolution, the author argues that such restriction in fact jeopardises the interests of shareholders and creditors in today's public listed companies. For this reason, Kenya should reconsider the necessity of the ultra vires doctrine as it relates to the objects clause.

**Why Kenya should review its law pertaining to a company's object**

Section 8(1) of the Act is the proverbial straw that breaks the camel's back. By stating that a special resolution is required to revise the objects clause when the company needs to do anything that is outside its objects, s.8(1) of the Act creates practical hurdles that impede the running of a business, thereby transforming Kenya's businesses into cumbersome dinosaurs unable to respond to rapidly changing market conditions.

Requiring that the company pass a special resolution to alter its objects creates practical difficulties as directors have to call a shareholder meeting which requires 21 days' notice and secure a 75 per cent majority whenever the board is presented with an opportunity that is in the company's interest but outside the company's objects.

The consequence of s.8(1) of the Act is that it stifles decision-making in the company, thereby circumventing the main cause for which s.8 of the Act was intended, that is, to protect investors. Shareholders and creditors may actually be better off when directors are given the flexibility to act outside the objects of the company where doing so is in the interest of the company. Nowadays, companies have diversified their portfolios and public listed companies in particular are not likely to serve the interests of their shareholders by constraining themselves to certain business activities even when such investments are no longer profitable. In support of this argument, Davies asserts that the value of the company might in fact be enhanced, to the benefit of both shareholders and creditors, by moving into new fields of operation, so that a prohibition on such a step would be too strong a rule.

Requiring directors to call a general meeting each time they want to carry on business economically or efficiently, use improved means, change the location of operations, take up convenient and advantageous business opportunities or restrict or abandon objects means that directors are often restricted from acting in the company's interest as they are unable to respond to market changes, take opportunities and make business decisions in a timely fashion. Forgoing opportunities because they are not stipulated in the objects clause as a result of s.8(1) jeopardises the interests of investors and shareholders in today's fast-paced world where time is of the essence as investment decisions hinge on a company's ability to act in a timely manner.

While it is understandable that shareholders may want to balance the power of directors by requiring that a special resolution be passed to sell off the whole or part of the undertaking of the company or merge with another entity, these issues are protected in other sections of the Act and therefore there is no need to include them in the objects clause. In particular, the sale of the whole or part of the company's undertaking is dealt with in s.207 of the Act which provides that a special resolution is required for the reorganisation of the share capital of the company. The procedure followed in the event of a **I.C.C.L.R. 303** merger is that in s.207 of the Act. Therefore, authorising the sale of assets through the objects only creates circularity in the Act.

In modern company law, the interests of creditors and shareholders are protected explicitly in other parts of companies' legislation; not through the objects clause. For instance, creditors in England are protected by being given superior rights in liquidation and shareholders are protected through the derivative action and unfair prejudice provisions rather than through the object clause. Since Kenya's Act has both insolvency provisions and derivative action provisions, the objects clause
does not add value; it only acts as an impediment to directors in the performance of their duties by unduly restricting their ability to act as agents of the company even where that is in the company’s interest.

The second purpose of the objects clause is to provide commercial certainty. By examining the objects clause in the company's memorandum, a prospective shareholder or creditor should be able to tell exactly what activities they are putting their money into by investing or contracting with the company. This is particularly important because companies in Kenya do not have full capacity and can only carry out the objects that are specified in their memorandum of association. In addition, the doctrine of constructive notice provides that a person transacting business with a company is taken to be aware of the contents of the company's public documents. As a result, owing to the possible alterations provided for in s.8(1), Kenya’s companies attempt to state every possible activity in which a company could be involved to avoid breach of the ultra vires doctrine, thereby blurring the object of the company. This creates contractual difficulties as any activities that the company engages in outside the objects are rendered ultra vires and therefore invalid, leaving third parties dealing with the company unprotected where they contract outside the objects. According to Maema:

“If the company purported to carry out any activity or business which is not provided for in the objects clause, the liability flowing from such activity or business can be easily avoided by the company on grounds that it did not have the power to incur such liability in the first place.”

With ever more detailed objects becoming the norm in order to avoid breach of the ultra vires doctrine, legal practitioners in Kenya have found the current statement of objects in Kenya's companies difficult to work with. Maema, in “Legal Considerations for Doing Business in Kenya”, states that the objects clause of Kenyan companies “is normally very broad and reading through it can be both tedious and hilarious depending on the mood of the reader and the time at his disposal”.

Owing to wide drafting, it is common practice for a significant number of the provisions contained in the objects clause to contain powers rather than activities in which the company can be involved. This is evident in Maema's paper, where he advises that:

“Although the Memorandum appears like a standard document (and to some extent it is), it is essential to ensure that the document is tailor-made for the specific needs and objectives of each company. It is a big mistake to reproduce the Memorandum of another company as quacks do and imagine that the cost saving is worthwhile. It is not uncommon to find Memoranda lacking in essential provisions e.g. power to borrow or even carry out the main business of the company. The first few paragraphs of Clause 3 in the Memorandum should at a glance give a clear indication of the main objectives for which the company is incorporated.”

This suggests that rather than the objects clause being limited to stating the activities in which the company is to be involved, most memoranda go on to include the powers of the company in carrying out those activities. This practice is partly responsible for the excessive length, *I.C.C.L.R. 304* broad nature and complexity of objects clauses of public listed companies in Kenya which has made them difficult to work with.

**Conclusion**

This article has argued that the law pertaining to object clauses within Kenyan corporate law should be reviewed as it no longer adds value to the company or anyone dealing with the company. First, the requirement to pass a special resolution to alter the objects clause is unjustifiable as it creates practical hurdles in the running of the company by preventing directors from making decisions in a timely fashion. By getting in the way of decision-making, the objects clause circumvents its main aim which is to protect shareholders and investors by creating unnecessary financial costs and opportunity cost for the company. Secondly, in its attempt to balance the power of directors and provide shareholder protection by requiring a special resolution for the sale of assets of the company and a merger with another entity, s.8(1) creates circularity as these issues are dealt with in other parts of the Act. Thirdly, owing to the wide drafting of objects clauses resulting from the provisions of s.8(1) of the Act, the objects clause fails in its aim to provide commercial certainty to shareholders and creditors in a bid to avoid breach of the ultra vires doctrine. Third parties contracting with the company are particularly vulnerable as s.8(1) of the Act has resulted in statements of objects which are long, complex and difficult to work with, thereby increasing the possibility of contracting outside a company’s objects. Finally, legal practitioners have found the current statement of objects difficult to
The legal term ultra vires means “beyond the powers”.


Kenya’s Companies Act 1948 is sometimes referred to as the Companies Act 1962. This mix-up in dating, with some sources citing 1948 as the date of the Act while others cite 1962, is because the official print-out of the Act was dated 1962. However, in an interview with the author, Prof. Eshiwani, one of the leading authorities on Kenya’s corporate law, pointed out that England’s Companies Act 1948 was adopted in Kenya almost in entirety in 1955, making 1948 the correct dating for reference to Kenya’s Companies Act. This article therefore refers to Kenya’s Companies Act as the Companies Act 1948. In practice, these dates do not make much of a difference as the copies of the Companies Act that are dated 1948 and 1962 are the same in entirety. Kenya’s Companies Act has not been reviewed since inception. Prof. Eshiwani, interviewed on January 8, 2009 at the University of Nairobi, School of Law.


Ryan, Company Directors: Liabilities, Rights and Duties, 1987, p. 1. The term investors in this article is used to refer to those people and groups who have interests in the company. This includes shareholders, creditors, employees and the local government amongst others. See generally A. Keay, “Ascertaining the Corporate Objective: An Entity Maximisation and Sustainability Model” (2008) 71(5) Modern Law Review 679.

Companies Act 1948 Cap 486, Laws of Kenya s.7. This section is a word-for-word copy of s.5 of England’s Companies Act 1948.

There are other purposes, for instance commercial certainty and a balance to directors’ powers.

Companies Act s.141(1).

Companies Act s.141(1).


Companies Act s.8(1)(a).

Companies Act s.8(1)(b).

Companies Act s.8(1)(c).

Companies Act s.8(1)(d).

Companies Act s.8(1)(e).

Companies Act s.8(1)(f).
20. Companies Act s.8(1)(g).

21. Companies Act s.207(2).


23. MDA Investment Management Ltd, Re [2004] 1 B.C.L.C. 217 Ch D at 245, per Park J.

24. See Companies Act 2006 s.260 and s.994 respectively. Although it is possible to argue that derivative actions are not considered a direct form of shareholder protection in the England as they are actions brought by shareholders on the company's behalf and therefore the right of action is vested in the company, and any relief is given to the company and not directly to the shareholders, the shareholder's option of bringing a derivative action still has a deterrent effect on miscreant management and therefore enhances the protection of shareholders. This is deterrent effect is reinforced through other provisions in the Companies Act 2006. For instance, where shareholders are unable to demonstrate that the company is directly suffering as a result of a director's actions a shareholder who has suffered directly as a result of a company's decision can also rely on the unfair prejudice provisions in s.994 of the Companies Act 2006. Though the application of s.994 is quite limited, it allows shareholders who have been unfairly prejudiced by directors' decisions to petition to the courts.

25. Following the passing of the Companies Act 2006, which is now fully in force, the objects of the company in England are dealt with in the articles and not the memorandum. Section 31(1) Companies Act 2006 provides that all companies have unrestricted objects unless a contrary statement appears in the articles. Therefore it is no longer necessary for a company to set out its objects, and unless it chooses otherwise, its objects will be unrestricted and therefore it will have unlimited capacity. See Davies, Gower and Davies' Principles of Modern Company Law, 2008, p.154.

26. Where it is proposed to wind up a company voluntarily, s.276(1) of the Kenyan Companies Act requires directors to make a declaration to the effect that they have made a full inquiry into the affairs of the company and having so done have found the company will be able to pay its debts in full within such period not exceeding one year after the commencement of the winding up as may be specified in the declaration. Such declaration suffices as a guarantee for the repayment of the creditors. If the directors are unable to make the declaration, then the creditors will take charge and bring winding up proceedings under s.221(1) of the Act following which a liquidator will be appointed. Section 241(1)(d) of the Act gives liquidators power to pay creditors in full in the case of winding up.

27. Companies Act s.211.


