Director and Shareholding Interlocks in Kenya's Plcs: How to Address the Nominee Question? A Cultural Perspective

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Introduction

A nominee director is a person appointed as a director of a company on the understanding that he will represent the interest of another person/group of persons.[1] The issue of nominee directors is closely linked to that of companies operating within a group where usually an employee is nominated to sit on the board of a subsidiary. A significant number of Kenya's public listed companies (Plcs) are foreign-controlled multinationals and therefore operate as part of a group. Examples include Barclays, Standard Chartered, A. Baumann Co, East African Breweries, British American Investments, British American Tobacco, Brooke Bond and CMC Holdings. Interlocking shareholdings and directorships are also common within Kenya's Plcs. An examination of the 2010 annual reports of 11 Plcs (approximately one-fifth of the companies listing on the NSE) shows that a significant number of the top 10 shareholders in Kenya's Plcs register their shares in the name of a nominee and are top 10 shareholders of other Plcs within the 11 companies sampled.[2] Nominee shareholdings are usually used to build up voting control in companies. An example is the case of Centum Plc, where a former Uchumi Plc chairman—Chris Kirubi—is the second largest shareholder, owning a 17.52 per cent stake in his name and an extra 9.34 per cent through his proxy companies Kiruma International (5.15 per cent) and International House Ltd (4.19 per cent). Kirubi also sits on the board of Centum as NED director.[3] Multiple directorships are common in the Kenyan context and allowed for in s.216 Capital Markets Act (2002) Guidelines.[4] Research has shown the extent of interlocking shareholdings and directorships to be indicators of social relations.[5] However, specific research on the extent and effect of director and shareholding interlocks on corporate governance in the Kenyan context is lacking. This article will focus on the effects of interlocks in relation to a nominee director's role in Kenya's medium power distance and uncertainty avoidance culture, and make suggestions on the direction that the regulation of nominee directors should take. This article will draw on England and Australia's experience in the regulation of nominee directors.

Kenya's cultural profile

Hofstede defines culture as the "the collective programming of the mind which distinguishes the members of one group or society to another".[6] Power distance and uncertainty avoidance are two of Hofstede's five culture dimensions.[7] Hofstede's power distance dimension deals with the extent to which unequal distribution of power in institutions is accepted as legitimate or illegitimate. In Hofstede's study, Kenya is classified as having medium power distance.[8] Therefore one would expect that unequal distribution of power is accepted as legitimate in Kenya. Acceptance of unequal distribution of power results in significant emotional distance between bosses and subordinates, with the result that the subordinate will avoid contradicting their boss's views.[9] Consequently, decision-making in organisations

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[1] P. Redmond, "Nominee Directors" (1987) 10 *University of New South Wales Law Journal* 194.

[2] For example, Kenya Commercial Bank Nominees Ltd A/C 769G is the 8th largest shareholder at NIC Bank Ltd owning 1.43%, the 7th largest shareholder at Nation Media Group owning 0.54% and the 9th largest shareholder at Bamburi Cement owning 0.29%. Stanbic Nominees Kenya Ltd A/C R48703 is the 8th largest shareholder at East African Cables owning 0.40% and the 8th largest shareholder in Centum owning 0.51%. Standard Chartered Nominees Ltd A/C 9230 is the 7th largest shareholder in Bamburi Cement and the 7th largest shareholder in Kenya Commercial Bank owning 1.15%. Stanbic Nominees Kenya Ltd A/C R48701 is the 4th largest shareholder at the Kenya Commercial Bank owning 1.87% and the 3rd largest shareholder at Centum owning 5.34%. Kenya Commercial Bank, Bamburi Cement and Standard Chartered are companies listing on the NSE. Stanbic Nominees is affiliated to CFC Stanbic Holdings Ltd a company listing on the NSE. See *NIC Bank Ltd Annual Report & Financial Statements* 2010; *Nation Media Group Annual Report & Financial Statements* 2010; *East African Cables 2010 Annual Report and Accounts*; Centum, *Introduction Memorandum: Listing by Introduction on the Uganda Securities Exchange* 2010; *Kenya Commercial Bank 2010 Annual Report and Financial Statements*.

[3] Centum, *Introduction Memorandum: Listing by Introduction on the Uganda Securities Exchange* 2010.

[4] The general position in common law regarding multiple directorships is that a director should only take up as many positions as he can properly discharge. As such, the courts are generally unwilling to accept that a person can be a professional nominee director acting for hundreds, if not thousands, of companies in return for an annual fee. See *Official Receiver v Vass* [1999] B.C.C. 516 Ch. D.; *Re Kaytech International Plc; Secretary of State for Trade and Industry v Kaczer* [1999] B.C.L.C. 351 CA (Civ Div) at 426.

[5] M.S. Mizruchi, "What do Interlocks do? An Analysis, 'Critique and Assessment of Research on Interlocking Directorates'" (1996) 22 *Annual Review of Sociology* 271; K. Au, M.W. Reng and D. Wang, "Interlocking Directors, Firm Strategies and Firm Performance in Hong Kong: Towards a Research Agenda" (2000) 17 *Asia Pacific Journal of Management* 29; B. Cronin, "Networks of Corporate Power Revisited" (2011) 10 *Procedia — Social and Behavioural Sciences* 43.

[6] G. Hofstede, "Cultural Dimensions in Management and Planning" (January 1984) Asia Pacific Journal of Management 82.

[7] Hofstede's five culture dimensions are individualism/collectivism, power distance, uncertainty avoidance, masculinity/femininity and long-term time orientation. See Hofstede et al., *Culture and Organizations: Software of the Mind* (The McGraw Hill Companies, 2005).

[8] A limitation of relying on Hofstede's cultural model is that Hofstede's findings on Africa were published as the results for one country and two regions: that is, South Africa, West Africa (Ghana, Nigeria and Sierra Leone) and East Africa (Kenya, Ethiopia, Tanzania and Zambia). Therefore an exclusive picture of Kenya's cultural classification is not depicted.

[9] See J.E. Kuada, *Managerial Behaviour in Ghana and Kenya: A Cultural Perspective* (Denmark: Aalborg University Press, 1994).

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in the Kenyan context is concentrated at the top.[10] Hence nominee directors in a board meeting will already be *culturally aware* that they are there to act in the interests of their nominator as opposed to the interests of the company. Hofstede's study also classifies Kenya as having medium uncertainty avoidance. Members of societies with strong uncertainty avoidance tend to feel uncomfortable with unfamiliar situations.[11] Therefore one would expect Kenya's directors and shareholders to prefer laws that give clear-cut instructions on who a director is and what the director's role is. Kenya's culture is also collective in nature,[12] the essence of which is captured in the African philosophy of "*ubuntu*".[13]*Ubuntu*, to put it simply, is the "African way", the collective consciousness of the African people manifested in their behaviour patterns in which values such as sharing, mutual support and responsibility, respect, interdependence and unity are concretised.[14] Hofstede points out that in collective cultures ties between individuals are tight as everyone from birth is integrated into strong cohesive in-groups which continue to protect them throughout their lifetime in exchange for unquestioning loyalty. Therefore nominators will not only expect unquestioning loyalty from their nominees in exchange for protection, but nominees will also expect to share mutual responsibility for their actions in the company with their nominator.

Regulating nominee directors: The three approaches

Director interlocks raise the issue of whether a director should take into account the interests of other companies within a group when there is a conflict of interests between the company in which a nominee sits and the appointing company.[15] The general rule in common law as stated by Roskill L.J. in *The Albazero* is that, "each company in a group of companies … is a separate entity possessed of separate legal rights and liabilities",[16] thereby reaffirming the principle laid down in *Salomon v Salomon*.[17] As such, nominee directors in performing their duties as directors of the company must act in the best interests of the company in which they sit as nominee directors. This is the traditional common law approach to the regulation of nominee directors. The traditional common law approach (requiring nominees to avoid situations of actual or possible conflict), the Australian approach (that the duties of nominees can be adjusted by shareholders) and the current English approach (that the duties of nominees can be adjusted by directors if allowed by shareholders) are the three main approaches to dealing with this issue.[18]

The traditional common law approach

The common law traditionally took a strict approach to the regulation of nominee directors, linking their duties to the no-conflict rule as demonstrated in Lord Denning's statement in *Boulting v Association of Cinematograph Television and Allied Technicians*:

> "It seems to me that *no one who has duties of a fiduciary nature to discharge can be allowed to enter into an engagement by which he binds himself to disregard those duties or to act inconsistently with them* … take the nominee director … There is nothing wrong in it … so long as the director is left free to exercise his best judgment in the interests of the company which he serves. But *if he is put upon terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful*."[19]

Traditionally in the common law, appointers were not liable for the acts of nominees as nominee directors were bound owing to their fiduciary duties to the company to ignore the wishes of their employer. An argument that nominees are agents of their appointers was rejected in *Kuwait Bank v National Mutual Life*, where the court held that they were agents of the company.[20] This traditional approach is reflected in England's Companies Act 2006 (CA 2006) to the extent that nominee directors are regulated under the "conflict of interests" rule.

[10] See, generally, R. Gustavson, N.N. Kimani, D.A. Ouma, "Perceptions of the Anglo-American Model of Corporate Governance in Sub-Saharan Africa: A Pilot Study", presented at the Workshop on Corporate Governance, Regulation and Development, University of Manchester (November 17, 2006), pp.26 and 12.
[11] Kuada, *Managerial Behaviour in Ghana and Kenya* (1994), p.130.
[12] Hofstede et al., *Culture and Organizations: Software of the Mind* (2005).
[13] Translated as "*utu*" in Kiswahili. See D.W. Lutz, "African Ubuntu Philosophy and Global Management" (2009) 84 *Journal of Business Ethics* 315.
[14] See, generally, R. Khoza, R. (1994), "Ubuntu as African Humanism", Conference Paper presented at Ekhaya Promotions, Diepkloof Extension, 1994, Unpublished (cited in E.D. Prinsloo, "Ubuntu Culture and Participatory Management" in P.H. Coetzee and A.P.J. Roux (eds), *The African Philosophy Reader* (London: Routledge, 1998), p.41); Institute of Directors (IoD), *King Code of Governance For South Africa* (2009), p.61.
[15] M.R. Salim and T.Y. Teh, "Market Freedom of Shareholder's Protection? A Comparative Analysis of the Duties of Nominee Directors" (2008) 50 *International Journal of Law and Management* 168, 3.2; P. Lee, "Serving Two Masters: The Dual Loyalties of the Nominee Director in Corporate Groups" [2003] J.B.L. 449.
[16] *The Albazero* [1977] A.C. 774 HL at 807.
[17] *Salomon v Salomon* [1897] A.C. 22 HL. However, see the ruling in *DHN Food Distributors Ltd v Tower Hamlets LBC* [1976] 1 W.L.R. 852 CA (Civ Div) at 860 where Lord Denning held that subsidiaries are "bound hand and foot" and that "[t]he group is virtually the same as a partnership where all three companies are partners" brings uncertainty in this area. This ruling has been much criticised, in particular the fact that Lord Denning stated that the subsidiary was bound hand and foot to DHN and must do what the parent company says, but then went on to describe them as partners. It is unlikely that a subsidiary that has to follow the instructions of its parent can realistically be regarded as a partner. See the HL decision in *Woolfson v Strathclyde Regional Council* [1979] J.P.L. 169 and the CA decision in *Adams v Cape Industries Plc* [1990] B.C.C. 786. Therefore, while the ruling in DHN has not been overruled, subsequent cases show preference for the *Albazero* position, although there are still instances of uncertainty, for example the ruling in *Beckett Investment Management Group Ltd v Hall* [2007] I.C.R. 1539 CA (Civ Div), where Maurice Kay L.J. stated that the Court of Appeal might be willing to disregard separate corporate personalities of a corporate group and treat them as one enterprise.
[18] The approaches of other common law jurisdictions such as Ghana, New Zealand and Singapore broadly fall within these three approaches. See E. Boros, "The Duties of Nominee and Multiple Directors: Part 1" (1989) 10 *Company Lawyer* 211; Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168.
[19] *Boulting v Association of Cinematograph Television and Allied Technicians* [1963] 2 Q.B. 606 CA at 626 (emphasis added).
[20] *Kuwait Bank v National Mutual Life* [1904] 3 All E.R. 404 PC (New Zealand).

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England's approach

England's CA 2006 does not address the issue of nominee directors specifically. Instead, the regulation of nominee directors falls under the duty to avoid conflict of interests in s.175. Owing to the flexible approach taken to the regulation of conflicts of interests in s.175, nominee directors in the United Kingdom may act in the interests of the nominator instead of the company if this has been authorised by the board of directors.[21] This is a departure from the traditional position which did not permit a nominee to act in the interests of his nominator at all. Now a nominee may do so if the board approves. The CA, however, puts some safeguards in place to protect minority shareholders. First, the company's constitution must allow for such authorisation to be given by the board.[22] Secondly, interested directors are not counted for the purposes of quorum[23] and their voting will be excluded.[24] The general assumption is that the board will approve what is in the interests of the company as directors are already bound to act in a way that promotes that success of the company in s.172 of the CA 2006. Thus a nominee director who may consider acting in the interests of his nominator without approval from the board of directors is likely to be personally liable for any losses accruing to the company as a result of his actions. Australia takes a much more liberal approach to the regulation of nominees.

The Australian approach

While traditional common law acknowledges the commercial reality of nominee directors on boards and allows for them provided there is no conflict of interests,[25] Australian courts seem to be very supportive of the position of nominee director, so much so that Jacobs J. in *Levin v Clark*[26] stated that:

> *"It may be in the interests of the company that there be upon its board of directors one who* will represent … other interests and who *will be acting solely in the interests of ... a third party* and who may in that way be properly regarded as acting in the interests of the company as a whole."

Jacobs J.'s position is in complete contrast to Lord Denning's approach in *Scottish Co-operative v Meyer*[27] and *Boulting*, which does not allow for conflicts at all, but closer to England's CA 2006 position in s.175 which presents a more flexible approach to conflicts arising from the nominee's position.

In *Levin v Clark*, the articles of the company in question had been amended so that the powers of the governing directors who acted primarily to protect the interests of the mortgagee (the defendant and another) were exercisable only if Levin defaulted under the mortgage agreement; which he did. Although neither the articles nor the shareholder agreement stated that the defendants were nominees of the mortgagee, Jacobs J. found that they acted primarily to protect the interests of the nominee. In their defence Jacobs J. stated that:

> "To argue that a director particularly appointed for the purpose of representing the interests of a third party cannot lawfully act solely in the interests of that third party, is in my view to apply the broad principle governing the fiduciary duty of directors, *to a particular situation, where the breath of the fiduciary duty has been narrowed, by agreement amongst the body of shareholders*. The fiduciary duties of directors spring from the general principles developed, in courts of equity governing the duties of all fiduciaries… and it must be always borne in mind that in such situations *the extent and degree of the fiduciary duty depends not only on the particular relationships, but also on the particular circumstances*. Amongst the most important of these circumstances are the terms of the instrument governing the exercise by the fiduciary of his powers and duties and the wishes, expressed directly or indirectly, by direction, request, assent or waiver, of all those to whom the fiduciary duty is owed."[28]

Jacobs J.'s treatment of the extent of the fiduciary duty in *Levin v Clark* finds support in English common law on the treatment of fiduciary duties. Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd* states that there are some differences in the content of fiduciary duties for different fiduciary relationships. Where there is both a contractual and fiduciary relationship, the contract determines the extent and nature of the fiduciary duties owed.[29] Therefore, in determining the nature of directorships and the extent of duties owed by the defendants in *Levin v Clark* by referring to the articles, Jacobs J. did not contravene the common law position. Jacobs J. lends further support to the nominee director in the performance of his duties in *Re Broadcasting Station 2 GB Pty Ltd*,[30]where he states that:

> "It is my view that conduct of the kind which I have related [where nominees acted in accordance with their appointer's interests] is not reprehensible unless it can also be inferred that *the directors, so*

[21] CA 2006 s.175(4)(b); Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168, 6.3.
[22] CA 2006 s.175(5)(b).
[23] CA 2006 s.175(6)(a) CA.
[24] CA 2006 s.175(6)(b).
[25] Lord Denning in *Scottish Co-operative v Meyer* [1959] A.C. 324 HL.
[26] *Levin v Clark* [1962] N.S.W.R. 686 (emphasis added).
[27] *Scottish Co-operative v Meyer* [1959] A.C. 324.
[28] *Levin v Clark* [1962] N.S.W.R. 686
[29] *Henderson v Merrett Syndicates Ltd* [1995] 2 A.C. 145 HL at 206; Also see Mason J.'s ruling in *Hospital Products Ltd v United States Surgical Corp* (1984) 156 C.L.R. 41 at 97.
[30] *Re Broadcasting Station 2 GB Pty Ltd* [1964–1965] N.S.W.R.R. 1648 (emphasis added).

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nominated, would so act even if they were of the view that their acts were not in the best interests of the company …"

Like England's CA 2006, Australia's Corporations Act 2001 has no provisions specifically dealing with the nominee director. The relevant law is s.187 Corporations Act 2001, dealing with directors in groups of companies. Section 187 Corporations Act 2001 to a large extent codifies Australia's pragmatic approach to nominees by providing that a director of a corporation that is a wholly owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company; and if the director acts in good faith in the best interests of the holding company; and the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act. Australia's and England's approaches to the regulation of nominee directors are similar to the extent that a nominee director's actions must be allowed for in the company's constitution.

Kenya's position on nominee directors

Although nominee[31] and multiple directors[32] are widely used in Kenya, as in the cases of England and Australia, there is no specific legislation dealing with nominee directors in the Kenyan context. Justice Khamoni in *Housing Finance Company of Kenya Ltd v Palm Homes Ltd*[33] states that "the Companies Act does not make provisions for the concept of nominee directors and … *the concept is not known to Kenyan jurisprudence*".

Nominee director cases in Kenya often involve fraud in parastatals,[34] with the nominee director representing well-connected/powerful politicians. A case in point is *National Social Security Fund Board of Trustees v Ankhan Holding Ltd*,[35] which involved the illegal sale of public land to the National Social Security Fund (NSSF). The defendants were listed as the directors of the company. However, information arising from the case identifies the real owner of the company as a son of former President Moi. The defendants contended that they "merely acted" for a disclosed principal in the transaction and were therefore not liable. In delivering his ruling, Justice Fred Ochieng held that individuals who incorporate companies to acquire benefits will not be allowed to allege later when liability arises that they cannot be sued because they are nominee directors. According to Justice Ochieng, once a person is named as a director of a company, his rights and obligations are defined in the memorandum and articles of association. A director cannot purpose to diminish his legal responsibilities by "a side contract" between himself and the company especially when the said director is dealing with third parties. Applying the principles established by the House of Lords in *Standard Chartered Bank v Pakistan National Shipping Corp*[36] and the dictum of Lord Hoffmann, Justice Ochieng stated that no person can escape liability by saying, "I wish to make it clear that I am not committing this fraud on behalf of someone else, and I am not personally liable."[37]

Kenya's approach as represented in Justice Ochieng's ruling in *NSSF v Ankhan* differs from those of Australia and England in a number of respects: first, the liability of nominee directors is linked to the benefits accrued from their positions in the company. Secondly, no distinction is made between a "nominee director" and a director, and as such nominee directors in Kenya are bound by the same duties that bind directors. Thirdly, the notion that companies can alter their articles to allow a different standard of loyalty for nominee directors is totally rejected on public interest grounds. In sum, Kenya takes the traditional common law approach to the concept of the nominee director, which gives the nominee director freedom to be a nominee director but also personal responsibility where he blindly acts in the interests of his appointer, ignoring the interests of the company, as demonstrated in the English decisions of *Scottish Co-operative v Meyer*[38] and *Selangor United Rubber Co Ltd v Cradock (No.3)*.[39] In *Scottish Cooperative v Meyer*, Lord Denning held that:

> "[T]he duty of the [nominee] directors to the company was to do their best to *promote its business* and to act in complete *good faith* towards it; and, in consequence, *not to ... operate to the disadvantage of the company* … they did nothing to defend the interests of the company against the conduct of the [appointer]. They probably thought that, 'as nominees'… their first duty was to the [appointer]. In this they were wrong."[40]

[31] See *Housing Finance Company of Kenya Ltd v Palm Homes Ltd* , Civil Case No.918 of 1999; *National Social Security Fund Board of Trustees v Ankhan Holding Ltd* , HCCC No.268 of 2004; *Ahmed Rashid Jibril v East African Television Network Ltd* [2006] eK.L.R.
[32] Section 2.1.6 of the CMA Guidelines 2002 allows for multiple directorships. As many as five directorships can be held.
[33] *Housing Finance Company of Kenya Ltd v Palm Homes Ltd* , Civil Case No.918 of 1999
[34] Parastatals are statutory authorised corporate entities which earn their revenue from the sale of goods and services in which the Government holds a majority of shares. State Corporations Act 1986 (Cap.446) s.2.
[35] *National Social Security Fund Board of Trustees v Ankhan Holding Ltd* , HCCC No.268 of 2004. This ruling is no longer publicly accessible.
[36] *Standard Chartered Bank v Pakistan National Shipping Corp* [2002] 3 W.L.R. 1547 CA (Civ Div).
[37] *NSSF v Ankhan*. The ruling is reported in N. Nyamboga, "Nominee Directors Can't Run Away from Company Liability", The Standard, May 16, 2006.
[38] *Scottish Co-operative v Meyer* [1959] A.C. 324.
[39] *Selangor United Rubber Co Ltd v Cradock (No.3)* [1968] 1 W.L.R. 1555 Ch D.
[40] *Scottish Co-operative v Meyer* [1959] A.C. 324 at 367.

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This strict approach is justifiable in Kenyan society where fraud is commonplace[41] and directors often act to the disadvantage of the company, as demonstrated in the Uchumi,[42] AccessKenya[43] and CMC scandals.[44] Similarly, the English decision in *Selangor* supports Justice Ochieng's decision in *NSSF v Ankhan* to hold the nominee directors liable for allowing themselves to be mere puppets of their appointer and doing nothing to protect the interests of NSSF. In *Selangor*, two nominee directors were involved in causing the company to provide funds to Cradock to enable him to purchase shares of the company contrary to s.151 of the Companies Act 1985.[45] Ungoed-Thomas J. held the nominee directors liable for the misapplication of company funds:

> "It seems to me, however that both L and J were nominated as directors … *to do exactly what they were told by Cradock*, and that is in fact what they did. They exercised no discretion or volition of their own and *they behaved in utter disregard of their duties as directors* … They put themselves in [Cradock's] hands… as their controller."[46]

Among the advantages of Kenya's strict approach to the regulation of nominee directors are that it holds nominee directors to a high threshold of accountability in a context where fraud is commonplace. The disadvantages of Kenya's regulation of nominees are that, first, it is common law based and largely inaccessible to directors, shareholders and stakeholders and therefore sits uncomfortably with Kenya's uncertainty avoidance culture which prefers clarity of rules. Secondly, it does not reflect commercial reality. Not allowing nominees to put themselves in a position of conflict[47]and requiring them to exercise independent judgment[48] puts nominee directors in a very complicated position. As a nominee director is primarily appointed to represent the interests of another—other than the company—on the board, allowing them to sit on company boards to represent other interests as opposed to the interests of the company and possibly share confidential information on the company with the appointer seems contradictory in itself. Crutchfield points out that:

> "It may have been thought that *strict fiduciary principles would disentitle the nominee from being appointed to his position at all*, since a director, being a fiduciary, should be required to approach all questions concerning the company without being distracted by an extraneous loyalty."[49]

Thirdly, the strict common law position ignores Kenya's business culture where social capital[50] plays a vital role and the role that power distance plays in Kenya's Plcs.[51] Owing to Kenya's medium power distance culture, subordinates are significantly dependent on bosses, with a general preference for an autocratic or paternalistic boss.[52] A nominee director is therefore likely to blindly follow their appointer's instructions. In such a context, is it justifiable to hold a nominee director liable for doing what he is culturally "programmed" to do: that is, to obey his appointer without asking questions? Shouldn't the law deal with the appointer rather than the nominee? Or both?

Conclusion

To increase the levels of certainty on nominee directors in Kenya, the author suggests codification as is the case in Australia.[53] The Australian approach is suitable for a high fraud context such as Kenya as it expressly states that the acts of a nominee should not make the company insolvent.[54] Additionally, it acknowledges the commercial reality that it may sometimes be in the interest of the company for an appointer's interests to be represented on the board, thereby allowing market freedom.[55] The current position in England also supports this approach to an extent by allowing shareholders to provide for nominees in the company's constitution and for the board to approve transactions in which there is a conflict. The Australian approach makes room for Kenya's power distance culture and the importance of business relations

[41] "Kenya Ranked Top in World's Fraud Incidences", Business Daily, November 30, 2011. For the actual report, see PWC, "A Step Ahead: Economic Crime in Kenya", Global Economic Crime Survey (2011).
[42] See A. Eshiwani, "Director Liability in the Wake of Uchumi (Collapse)", Institute of Directors (Kenya) (July 14, 2006).
[43] See P. Bowry, "Taming Corporate Criminal Activities", The Standard, December 6, 2011 (Advocate Opinion); K. Mwanza, "Somen leaves AccessKenya board after 10 years in chair", Business Daily, July 9, 2010.
[44] E. Ombok, "CMC Holdings of Kenya Suspended from Trading for Seven Days", Bloomberg Businessweek, November 4, 2011; W. Kagwe, "CMC Barred From the NSE for Another 3 Months", Nairobi Star, September 28, 2011.
[45] This prohibition now only extends to Plcs.
[46] *Selangor* [1968] 1 W.L.R. 1555 at 1613 (emphasis added).
[47] *Aberdeen Railway Co v Blaikie Bros* (1854) 1 Macc. 461.
[48] *Kregor v Hollins* (1913) 109 L.T. 225
[49] P. Crutchfield, "Nominee Directors: The Law and Commercial Reality" (1991) 12 *Company Lawyer* 136, 137. Also see Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168, 1.
[50] Bourdieu defines social capital as the aggregate of the actual or potential resources which are linked to the possession of a durable network or to membership in a group. See P. Bourdieu, "The Forms of Capital" in N.W. Biggart (ed.), *Readings in Economic Sociology* (Oxford: Blackwell Publishers Ltd, 2008), pp.51–52.
[51] Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168, 1 make a similar argument in relation to Malaysia.
[52] Gustavson et al., "Perceptions of the Anglo-American Model of Corporate Governance in Sub-Saharan Africa" (November 17, 2006), p.12.
[53] New Zealand has also codified the fiduciary duties of nominees in its Companies Act 1993 embracing a more liberal approach than that of Australia. Malaysia has also codified nominee duties but embraced the traditional position in Malaysia's s.132(1E) of the Companies Act 1965. In support of codification, see P. Koh, "The Nominee Director's Tangled Lot" (July 2007) Singapore Journal of Legal Studies 148, 155.
[54] Corporations Act 2001 s.187.
[55] Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168; Lee, "Serving Two Masters" [2003] J.B.L. 449.

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in the Kenyan context while providing directors, shareholders and stakeholders in a high fraud context with certainty on the extent and nature of the duties of the nominee. Owing to the high incidences of fraud in Kenya's concentrated ownership context, as well as its weak regulatory and enforcement capability,[56] shareholders in Plcs should not be allowed to adjust the fiduciary duties of nominees on public interest grounds.[57] This provision should only be available to private companies. Disclosure of a company's information should also only be allowed on approval by the board.[58]

Under *ubuntu*, responsibility is collective in nature. This suggests that both the appointer and the nominator should be held jointly liable where they act against the interests of the company, as ensuring the success of the company is in the interests of *ubuntu*. The reason for this is that under *ubuntu* the appointer would be expected to care about the interests of his appointee. Traditionally this was how the household operated: the patriarch owed a duty of care to his family to manage its wealth in their best interest while the family reciprocated with unquestioning loyalty. An advantage of this system is that people naturally took care of their kin. Therefore the appointer will be expected to naturally take care of the interests of the appointee or at least be seen to do so. In the case of a group of companies, under *ubuntu* the parent company is expected to care and as such act in the best interests of the subsidiary. Such a position is in line with common law decisions where a parent company controls a subsidiary.[59]

[56] See generally S. Mensah, "Corporate Governance in Africa: The Role of Capital Market Regulation", Paper presented at the 2nd Pan-African Consultative Forum on Corporate Governance, Nairobi, Kenya (2003).
[57] Justice Ochieng in *NSSF v Ankhan* , HCCC No.268 of 2004; Salim and Teh, "Market Freedom of Shareholder's Protection?" (2008) 50 *International Journal of Law and Management* 168, 7 take a similar position on Malaysia on grounds of concentrated ownership.
[58] This approach is taken by New Zealand in s.145(2)(a) of the Companies Act 1993 and acknowledges that nominees will often disclose information on the company to their appointer. See the New Zealand court decision in *Berlei Hestia (NZ) Ltd v Fernyhough* [1980] 2 N.Z.L.R. 150.
[59] *DHN* [1976] 1 W.L.R. 852 at 860; *Adams v Cape Industries* [1990] B.C.C. 786.

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