# THE LINK BETWEEN CORPORATE GOVERNANCE FAILURE AND THE COLLAPSE OF MAJOR PRIVATE COMPANIES IN KENYA

**UNIVERSITY OF NAIROBI**

**WAIRANGE LOISE RUGURU**

**G62/11307/2018**

*A Research Project submitted to the University of Nairobi Law School in partial fulfillment of the requirements for the Master of Laws (LL.M) Degree Program.*

November, 2019

## DECLARATION

I, **WAIRANGE LOISE RUGURU**, declare that this is my original work and that the same has not been presented to any institution of higher learning for the award of a diploma, degree or post-graduate qualifications.

Signature……………………………………………………….Date………………………….

**WAIRANGE LOISE RUGURU**

This project has been presented for examination with my authority as the university supervisor.

**DR. NKATHA KABIRA**

Signature…………………………………………………………… Date……………………….

## DEDICATION

I dedicate this work to my parents who have been there for me through this academic journey.

## ACKNOWLEDGMENTS

I am most grateful to God for granting me the strength and guidance to make it this far.

I would like to thank my Parents Mr. and Mrs. Wairange for their undying emotional support all through the process.

I would also like to appreciate my two brothers Samuel and Abel for their encouragement when I needed it.

A debt of gratitude is also owed to my supervisor Dr.Nkatha Kabira for her guidance, directives, invaluable assistance and patience in putting this work together.

## LIST OF CASES

*Aberdeen Railway Company v Blaikie brothers (1854) 1MACQ 461 UKHL*

*Dodge v. Ford Motor Company, 170 NW 668 (Mich 1919).*

*African Cotton Limited versus Nakumatt Holdings Limited, Insolvency Petition number 10 of 2017 (2018) eKLR*

*Shlensky v. Wrigley, 237 N.E. 2d. 776 (Ill. App. 1968)*

## LIST OF STATUTES

The constitution of Kenya 2010

The Companies Act No 17 of 2015

Capital Markets Act cap 485 A

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015

Nairobi securities Exchange (NSE) Regulation

CACG Guidelines Principles for Corporate Governance in the Commonwealth 1999

Organisation for Economic Co-operation and Development Principles (Amended 2019)

## ABBREVIATIONS

| | |
|---|---|
| ALI | American Law Institute |
| AGM | Annual General Meeting |
| CACG | Commonwealth Association for Corporate Governance |
| CEO | Chief Executive Officer |
| CG | Corporate Governance |
| CMC | Commercial Metals Company |
| EGM | Extra-Ordinary General Meeting |
| GDP | Gross Domestic Product I |
| NED | Non-Executive Directors |
| OECD | The Organisation for Economic Co-operation and Development |
| SEC | Securities and Exchange Commission |
| UK | United Kingdom |
| US | United States of America |

## ABSTRACT

This study investigates the link between corporate governance failure and the collapse of major private companies. The study argues that, although the government has held trainings and several campaigns aimed at having major organizations embrace the concept of corporate governance, nevertheless major companies in the private sector are still collapsing because implementation and practice of corporate governance is much emphasized on state corporations and public listed companies and rarely in the private sector. Researchers have paid great attention to the impact of corporate governance on state corporations and public companies and have left very little to no knowledge about the relationship between corporate governance and the collapse of major private companies as well as the absence of knowledge about how the collapse is related to corporate governance failure. This study aims to conceptualize, problematize and theorise private companies practices and establish whether the massive collapse of the major private companies is due to lack of elements of corporate governance. The study utilizes a mixed method approach and relies on doctrinal, historical and case study methods in order to test the hypothesis. The theories relied on include the Stewardship theory, Stakeholder theory and the Agency Theory as they demonstrate that a company's leadership is largely affected by the governance structure of the company. The behaviour informs the outcome of any corporation. The study concludes that the collapse of private companies is due to corporate governance failure in the day to day running of the company.

**TABLE OF CONTENT**

DECLARATION .......... II

DEDICATION .......... III

ACKNOWLEDGMENTS .......... IV

LIST OF CASES .......... V

LIST OF STATUTES .......... VI

ABBREVIATIONS .......... VII

ABSTRACT .......... VIII

TABLE OF CONTENT .......... IX

CHAPTER ONE: INTRODUCTION .......... 1

1.0 INTRODUCTION .......... 1

1.1 PROBLEM STATEMENT .......... 4

1.2 RESEARCH QUESTIONS .......... 4

1.3 RESEARCH OBJECTIVES .......... 5

1.4 HYPOTHESIS .......... 5

**1.5 THEORETICAL AND CONCEPTUAL FRAMEWORK ........................................................ 5**

1.5.1 Agency Theory ........................................................................................................ 6

1.5.2 Stakeholder Theory .................................................................................................. 9

1.5.3 Stewardship Theory ................................................................................................ 11

**1.6 CONCEPTUAL FRAMEWORK ............................................................................ 13**

**1.7 LITERATURE REVIEW ......................................................................................... 15**

1.7.1 Corporate Governance and the Banking Sector ..................................................... 15

1.7.2 Corporate Governance and Board of Directors ....................................................... 16

1.7.3 Corporate Governance and Public Companies ........................................................ 17

1.7.4 Corporate Governance and State owned Corporations ........................................... 18

1.7.5 Corporate Governance and Appointment and Dismissal of Directors ..................... 19

1.7.6 Principles of Corporate governance ........................................................................ 19

1.7.8 History and Theories of Corporate Governance ..................................................... 20

**1.8 JUSTIFICATION OF THE STUDY .......................................................................... 22**

**1.9 METHODOLOGY ...................................................................................................... 23**

**1.10 CHAPTER BREAKDOWN ........................................................................................ 23**

**CHAPTER TWO: HISTORICALBACKGROUND OF CORPORATE GOVERNANCE 25**

**2.0 Introduction: .............................................................................................................. 25**

**2.1 Definition of Governance and Corporate Governance ............................................ 25**

**2.2 What is Corporate Governance?** ..... **26**

**2.3 Historical Background of Corporate Governance Globally.** ..... **26**

2.3.1 Cold War ..... 27

2.3.2 Contemporary Period ..... 28

**2.4 Historical Background of Corporate Governance in Africa** ..... **28**

**2.5 Historical Background of Corporate Governance in Kenya** ..... **31**

2.5.1 Postcolonial Period (1998-1999) ..... 31

2.5.1 Postcolonial period (1999-2002) ..... 31

2.5.2 Postcolonial Period (2002-2018) ..... 32

**2.6 Conclusion** ..... **32**

**CHAPTER THREE: THE LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN KENYA** ..... **33**

**3.0 Introduction** ..... **33**

**3.1 Local Legal Framework** ..... **33**

3.1.1 The Constitution ..... 33

3.1.2 The Companies Act ..... 34

3.1.3 Capital Markets Act ..... 36

3.1.4 The code of corporate governance practices for issuers of securities to the public 2015 36

3.1.5 Nairobi Securities Exchange (NSE) Regulations ..... 37

**3.2 Regional Legal Framework** ..... **38**

3.2.1 CACG Guidelines Principles for Corporate Governance in the Commonwealth 1999 ... 38

**3.3 International Legal Framework ... 39**

3.3.1Organisation for Economic Co-operation and Development Principles ... 39

**3.4 Conclusion ... 43**

**CHAPTER FOUR: THE LINK BETWEEN CORPORATE GOVERNANCE AND CORPORATE FAILURE ... 44**

**4.0 Introduction: ... 44**

**4.1 Accountability ... 44**

**4.2 Internal Controls ... 45**

**4.3 Transparency and Disclosure ... 45**

**4.4 Chase Bank ... 46**

4.4.1 Background ... 46

4.4.2 Factors leading to the Collapse ... 47

4.4.2.2 Failure to incorporate good internal control measures and lack of ... 48

**4.5 Analysis ... 50**

**4.6 Imperial Bank of Kenya ... 50**

4.6.1 Background ... 50

4.6.2 Factors leading to the Collapse ... 51

**4.7 Analysis ... 56**

**4.8 Nakumatt Holdings Limited** .......... **57**

4.8.1 Background .......... 57

4.8.2 Factors leading to the Collapse .......... 58

**4.9 Conclusion** .......... **58**

**CHAPTER FIVE: KEY FINDINGS, CONCLUSION AND RECOMMENDATIONS** .......... **60**

**5.0 Key Findings** .......... **60**

**5.1 Key Finding I: Focus of Codes of corporate governance and Governance Structure** .......... **60**

**5.2 Key Finding II: Effectiveness of regulatory framework.** .......... **61**

**5.3 Key Finding III: Link between Corporate Failure and Corporate Governance.** .......... **61**

**5.4 Key Finding IV: Corporate Governance and Company Culture.** .......... **61**

**5.5 Recommendations** .......... **62**

5.5.1 Short Term Recommendations .......... 62

5.5.2 Midterm Recommendations .......... 63

5.5.3 Long Term Recommendations .......... 64

**BIBLIOGRAPHY** .......... **66**

**BOOKS** .......... **66**

**ARTICLES** .......... **68**

**DISSERTATIONS** .......... **81**

## CHAPTER ONE: INTRODUCTION

### 1.0 INTRODUCTION

In the recent years, Kenya has witnessed the collapse of several private companies. As of August 2019, the country's Registrar of Companies had listed 388 companies as having been dissolved between March and August.[1]In September alone, the Standard reported that 95 companies were dissolved, five less than the 100 dissolved in July and five more than those that were affected in May.[2]This attrition is reflected in the data by the Kenya National Bureau of Statistics (KNBS) where job creation fell sharply from 910,000 to 841,000 between 2017 and 2018.[3]

Among the companies that have either shut down completely or scaled down are highlighted below, we shall note that the companies potential and stability was weakened by corporate governance failure causing the collapse. These companies include Dubai Bank Kenya Limited, Chase bank, Imperial bank, Midland Energy Limited and Karuturi Limited.

In the case of Dubai Bank Kenya which was established in 1982, the bank's total assets were valued at about US$34.4 million (KES 2.92 billion) as at As of December 2013. In August 2015, the bank was placed under receivership by the Central Bank of Kenya (BK) which appointed Kenya Deposit Insurance Cooperation (KDIC) as the receiver of Dubai bank. As reported by the CBK, the main contributory factors leading to the collapse of the Dubai bank was capital deficiencies and liquidity. The bank had been breaching its daily cash reserve ratio (CRR) requirement of 5.25 per cent. It had failed to honor some of its financial obligations, such as paying off KES 48 million which it owed to the Bank of Africa Kenya. Despite the troubled bank

[1] Hakeena Njenga, More Kenyan Companies to close shop by end year, Heralding BleakFuture,Business Today(Nairobi,24 September 2019)
[2] ibid
[3] ibid

being penalized by the CBK for non- compliance, the situation was not corrected. KDIC made a report to the CBK on August 24, 2015 concerning the financial conditions of Dubai bank. The report indicated that the bank couldn't be salvaged and went on to recommend the bank's liquidation. According to KDIC's report, liquidation was the only feasible option due to the Dubai Bank Kenya Limited's magnitude of weaknesses of (CBK, 2016)[4]

Similarly, in 1995, several businesses came together and acquired a 60% stake in United Bank (Kenya). At that time, United Bank (Kenya) was in receivership and was under statutory administration by the Central Bank of Kenya. In 1996, the bank had been rebranded to Chase bank and it opened its doors once again.[5]

As of December 2015, Chase Bank had an estimated asset valuation of approximately US$1.428 billion (KES 142 billion). At the same time, the shareholders' equity was valued at US$119.7 million (KES 11.9 billion) The CBK placed the bank under receivership on April 7, 2016. The major causes for placement were associated with failure to meet the statutory banking ratios and under-reporting of insider loans. Chase bank was unable to meet it financial obligation on April 2016 and was put under receivership of CBK. The insider loans stood at 13.62 billion Kenya shillings compared to the 5.72 billion Kenya shillings it reported. The main issue at chase bank was governance problem. The bank made large amount of loans to its directors of about 13.62 billion Kenya shillings. Auditors concluded that the collapse was related to issues such as fiduciary responsibility and lack of corporate governance of the bank directors.[6]

Likewise, on 13th October 2015 the Central Bank of Kenya placed Imperial Bank Limited under

---

[4] Robert Gathaiya, Analysis of issues affecting collapsed banks in Kenya.september (2017)
[5] ibid
[6] ibid

statutory management citing unsafe and unsound business conditions to transact business that existed in the bank. The board of directors of Imperial Bank brought to the attention of the CBK, inappropriate banking practices that warranted the immediate remedial action in order to safeguard the interest of both depositors and creditors.[7]

Moreover, Midland Energy Limited a liquefied petroleum gas dealer was placed under Administration of the consultancy firm Ernst and Young for failing to meet its obligations. The company was placed under Administration after a long struggle with financial troubles. It was established that the company was deeply rooted in perpetual corruption and had adopted unfavorable business culture of poor corporate governance.[8]

Further, in a similar scenario Karuturi Limited which was one of Kenya's main flower farms was placed under receivership in February 2014 over debts owed to lenders including over 400 Million loan owed to CFC Stanbic Bank. The fate of more than 3000 workers remained unclear as the company had failed to pay them for several months. The company's assets were eventually auctioned to recover the debts. Upon investigation to the failure, it was established that there was no clear board set aside to establish clear roles and responsibilities in discharging its fiduciary and leadership function. There was no reasonable exercise of degree of care and their personal interests conflicted with those of the company.[9]

This study investigates the link between corporate governance and the collapse of major private companies. The study demonstrates that although the government has held trainings and several campaigns such as the Joint commitment between the government of the republic of Kenya and the government of the United states of America to promote good governance and Anticorruption

---

[7] The Daily Nation. 'Central Bank of Kenya puts Imperial Bank under statutory management' 13 October 2015. <https://www.nation.co.ke/business/Imperial-Bank-placed-under-receivership/-/996/2911156/-/wqjv20/-/index.html> (accessed 30 March 2019)

[8] Korir Isacc, 9companies put under management as economy struggles (2018)28,November 2018.

[9]ibid

efforts in Kenya, the baseline survey report on the status of corporate governance in Kenya and the mwongozo code of corporate governance policy document by the government that seeks to incorporate the principles of corporate governance in the management and governance of state corporations aimed at having major organizations embrace the concept of corporate governance, nevertheless major companies in the private sector are still collapsing because implementation and practice of corporate governance is much emphasized on state corporations and public listed companies and rarely in the private sector.

## 1.1 PROBLEM STATEMENT

Although the government has held several campaigns aimed at having major organizations embrace the concept of corporate governance, nevertheless major companies in the private sector are still collapsing. This study will demonstrate that the implementation and practice of corporate governance is much emphasized on state corporations and the public sector and rarely on the private sector and as a result lead to their collapse.

## 1.2 RESEARCH QUESTIONS

This study will seek to answer the following questions;

1. Why are major private companies collapsing and how is this linked to corporate governance failure?
2. What is the history of Corporate Governance in Kenya?
3. What is the legal framework on Corporate Governance in Kenya?
4. How has the lack of implementation of corporate governance and/or corporate failure in the private sector led to the collapse of major private companies?

5. What are the findings, conclusions and recommendations made from the study?

## 1.3 RESEARCH OBJECTIVES

The following are the objectives of this study

1. To investigate the link between corporate governance failure and collapse of major private companies.

2. To explore the history of corporate governance in Kenya's private companies.

3. To examine the legal framework on Corporate Governance in Kenya

4. To find out how the lack of implementation of corporate governance principles or corporate failure has led to the collapse of major private companies.

5. To analyze the findings, conclude and make recommendations.

## 1.4 HYPOTHESIS

This study hypothesizes that although the government has held several campaigns aimed at having major organizations embrace the concept of corporate governance nevertheless major companies in the private sector are still collapsing because implementation and practice of corporate governance is much emphasized on state corporations and the public sector and rarely on the private sector.

## 1.5 THEORETICAL AND CONCEPTUAL FRAMEWORK

Several theories have been used to explain corporate governance in general. These theories include, shareholder primacy theory, stakeholder theory, agency theory, stewardship theory, transaction cost theory, resource dependence theory, managerial hegemony theory and class

hegemony theory. However, it is acknowledged that it is a challenge to set out and examine all the theories applied in this research.[10] .Nevertheless, for the purpose of this study only, Agency, stakeholder and stewardship theories are going to be discussed. These theories have been central in promoting the understanding of the concept of corporate governance generally.

**1.5.1 Agency Theory**

This theory describes the nature of the relationship between the principal and the agent in a company. The principal-agent relationship allows specialization between shareholders, risk bearers and management of a company and hence benefits the organization.[11] The theory looks at the differing goals and attitudes between the agent and the principle and focuses on their relationship as they are engaged in a cooperative effort yet they have differing goals and attitudes towards risks.[12]When an agent pursues risky projects, although they may lead to an increased value of the asset, such a move threatens the job security of the agent.[13] He is therefore not interested in such projects because they are seen as risk since the agent's preferences or goals differ from the principal's, the agent has an incentive to deviate from the principal's interests. It is usually assumed that the interest of the principal is to maximize wealth. The agent, on the other hand, is interested in a variety of issues such as career goals, large salary, corporate jets, plush offices, and expense account meals. Given this conflict of interests, the agent, if left alone, will pursue his own interests to the detriment of the principal's. Therefore, the monitoring solutions by shareholders, especially major ones, constitute an important mechanism for

---

[10]J.W Harris, *Legal Philosophies* (2[nd]edn, LexisNexis, Butterworth's) 1.

[11]B. Tricker, *Corporate Governance-Principles, Policies and Practices* (2[nd]edn, Oxford University Press 2009) 60; M. C Jensen and W. H Meckling, 'Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure' (1976) 3(4) Journal of Financial Economics 305, 310.

[12] ibid

[13] Denise, K.D. (2001). Twenty-five years of Corporate Governance research and Counting. Review of Financial Economics, 10, 191-212.

encouraging managers not to deviate from shareholder interests.[14]

Agency problems may arise between shareholders and top management, between majority and minority shareholders[15]and between shareholders and creditors.[16]The sources of these conflicts are externalities arising from asymmetries of information, differences in risk appetite and difference in decision making rights.[17]Agency theory studies this relationship and the dilemma that it presents. As earlier stated, the principal and agent may not always share the same interests.[18]'How to ensure that the agent acts solely in the interest of the principal is the challenge.[19]

Mitnick[20]identified the problems of agency as, the principal's problem[21], the agent's problem[22]and the policing mechanisms and incentives[23]. The problem with policing and incentives is that they create costs[24]for the principal; this creates a potential paradox in that it is only rational to implement policing and incentive mechanisms if the increased return to the principal's objective outweighs the cost of policing and incentives. The nature of problems that may arise between the principal and the agent include moral hazard with hidden action, moral

---

[14] ibid

[15]U. C Braendle, 'Theories of the firm'

[16] M. Z Islam, *et al*, 'Agency Problem and the Role of Audit Committee: Implications for Corporate Sector in Bangladesh' (2010) 2(3) International Journal of Economics and Finance 177, 179.

[17] ibid

[18]E. F Fama, and M. C Jensen, 'Agency Problems and Residual Claims' (1983) 26 Journal of Law and Economics 6.

[19]B. Tricker, *Corporate Governance- Principles, Policies and Practices* (2nd edn Oxford University Press, 2009) 59.

[20]B. M Mitnik, *Fiduciary Rationality and Public Policy: The Theory of Agency and Some Consequences*, Paper presented at the 1973 Annual Meeting of the American Political Science Association, New Orleans, LA.

[21]ibid

[22]ibid

[23]ibid

[24] ibid

hazard with hidden information, adverse selection and signaling models.

Adam Smith in his book *the Wealth of Nations* criticized the *joint-stock company* corporate form because the separation of ownership and management could lead to inefficient management. He argued that The directors of*[joint-stock]companies*,however,being the managers rather of other people's money than of their own, it cannot well be expected, that they should watch over it with the same anxious vigilance with which the partners in a private (partnership) frequently watch over their own. Like the stewards of a rich man, they are apt to consider attention to small matters as not for their master's honour, and very easily give themselves a dispensation from having it. Negligence and profusion, therefore, must always prevail, more or less, in the management of the affairs of such a company."[25]

From this quote, Adam Smith recognized a dilemma that bedevils the corporation concept. It is as much a problem today. He characterized the formidable puzzle as "other people's money", that managers are using other people's money, rather than their own. He warned that "negligence and profusion" - profusion meaning extravagance - were an inevitable result.

He believed that joint stock companies could never prosper because the managers had no incentive to take care of the interests of the widely dispersed shareholders. He predicted that a company controlled by a person or group of people other than the owners; the objectives of the owners are more likely to be diluted than ideally fulfilled. What is the solution? According to him, there should not be separation of ownership from management.[26]That, where the owner of a company exercises full control over its operations, like in a sole proprietorship with few or no

---

[25]A. Smith*, An Inquiry into the Nature and Causes of the Wealth of Nations, The Electronic Classics Series'* (Pennsylvania State University,2005)

[26]Adam Smith, *Corporate Governace- Principles, Policies and Practices* (2ndedn Oxford University Press, 2009)

employees, there is no agency problem: the manager (owner) can be trusted to make whatever decisions that will maximize his profit and will even make appropriate tradeoffs between the short term and the long term.

In the real world, that is not practical. Nevertheless, there are several devices for mitigating agency problem[27] by a vigilant and effectively structured board of directors, "concentrated ownership holdings that lead to active monitoring of executives"[28], by timely, accurate and sufficient disclosure of financial information[29], by transparency in the ownership structure, by incentives that align managerial behavior with the interests of shareholders for example compensation contracts that encourage a shareholder orientation and by take over devices.[30]

### 1.5.2 Stakeholder Theory

The stakeholder theory was first propounded in 1984 by R. Edward Freeman.[31]This theory denotes that performance of firms is largely influenced by stakeholders and hence organizations should consider the interest of all stakeholders. They argue that based on the direct and indirect involvement of stakeholders in a company, they all bear risks. They believe that a firm is an interrelationship of various stakeholders who influence the organization both externally and internally.[32] A stakeholder is defined as a person or group of people with an interest in the company. A stakeholder could also be a group of people who are affected by the actions or

[27]J. P Walsh and J. K Seward, 'On the efficiency of internal and external corporate control mechanisms' (1990) 15 Academy of Management Review 421.

[28]C. M Daily et al, 'Corporate Governance: Decades of Dialogue and Data' (2003) 28(3) Academy of Management Review 372.

[29]B. Tricker, *Corporate Governance - Principles, Policies and Practices* (2nd edn Oxford University Press, 2009) P.59

[30]S. G Marks, *The Separation of Ownership and Control*, in Boudewijn Bouckaert & Gerrit De Geest (eds.). Encyclopedia of Law and Economics (Cheltenham: Edward Elgar Publishing, 1999p.696).

[31] Stephen L Larson, 'Stewardship Theory, Stakeholder Theory and Convergence'(2013)

[32] ibid

policies of a company. Usually, stakeholders comprise of suppliers, unions, government, and environment among others. Stakeholders are separate from the primary shareholders with monetary investment in the company. Milton Friedman states that directors of any company should be cognizant of the stakeholders concerned.[33]

The genesis of the stakeholder theory is from the debate between Berle and Dodd. Dodd believed that directors are the trustees of corporations. Therefore, the directors are obliged to balance the interests of all its constituents and act in a manner that is socially responsible.[34]Courts have recognized that directors could serve constituencies other than shareholders. In *Shlensky v Wrigley*[35]the directors of National League Ball Club Incorporated considered that, night games would have serious influence on the neighborhood. As such they rejected to install the lights at Wrigley Field Stadium, thereby the stadium failed to hold any night games. The shareholders of the club sued the directors as their interests were harmed by that decision. However, the directors' decision was upheld by the court, reasoning that directors have the discretion to give up shareholders' benefits to advance other profits.

Though stakeholders contribute to the success of the corporation, in law, compared to shareholders, stakeholders' interests in corporations, to a certain extent have been ignored. Even though they are affected by the actions of the corporation, their influence on the corporation is minimal. For instance, stakeholders do not have voting rights and they do not have the rights to trigger derivative actions against directors where they have breached their duties. This doctrine therefore seeks to address these perceived injustices.

There are three approaches of the theory namely instrumental power, descriptive accuracy and

---

[33]Andrea Corfield, 'The Stakeholder Theory and Its Future in Australian Corporate Governance' (1998) 10 Bond Law Review Article 5.

[34] R. E Freeman, *A Stakeholder Theory of Modern Corporations*, *Ethical Theory and Business*, (7th edn 2004).

[35]95 Ill. App. 2d 173, 237 N.E.2d 776 (App. Ct. 1968).

normative validity.[36] Instrumental power creates a framework for checking the connections between the practice of stakeholder management and the success of a corporation's performance.[37] The descriptive accuracy is used to describe particular corporations' behaviors. The normative validity is used to interpret the purpose of corporations. The normative validity is the core of the theory.[38]

According to the stakeholder theory, managers are agents of all stakeholders and have two responsibilities: to ensure that no ethical rights of stakeholder are violated and to balance the legitimate interests of the stakeholders when making decisions. Ideally, the theory attempts to keep ethics and economics together with view to achieve a successful goal of corporations. The objective is to balance profit maximization with the long- term ability of the corporation to remain a going concern.[39] Moreover, according to Berle the law allows directors some discretion to consider stakeholders other than a corporation's shareholders.[40]

### 1.5.3 Stewardship Theory

This theory was developed by Donald and Davis in 1991.[41] The stewardship theory brings into play the notion of a company's governance based on the applicable company law. Those who conform to this theory believe that the directors or any other stakeholder to whom authority is delegated shall exercise stewardship. The theory predicates on the belief in the just and honest

---

[36] T. Donaldson, and L.E Preston, 'The Stakeholder Theory of Corporation: Concepts, Evidence and Implication' (1995) 20(1) Academy of Management Review 65; C. Fontaine, et *al*, 'The Stakeholder Theory [2006] 14.
[37] T. Donaldson, and L. E Preston, 'The Stakeholder Theory of Corporation: Concepts, Evidence and Implication' (1995) 20(1) Academy of Management Review 65.
[38] C. Fontaine, *et al*, 'The Stakeholder Theory [2006] 14.
[39] Smith, H. J, 'The Shareholders vs. Stakeholders Debate' [2003] MITSloan Management Review <http://sloanreview.mit.edu/article/the-shareholders-vs-stakeholders-debate/> accessed 19th October 2019.

[40] ibid
[41] McWilliams, Abagail, Siegel D, and Patrick M, 'Corporate social responsibility: Strategic implications' 43.1
*Journal of management studies*, (2006),1-18.

man who acts for the good of others.[42] Stewardship theory appears to be appropriate for explaining Corporate Governance within the communitarian paradigm. This theory is also applied in the liberalist sense for its promise to better service the interests of shareholder.[43]

Regarding the board, superior corporate performance will be linked to a majority of inside directors and that the position of Chairman and CEO should be held by the same person since this provides clear leadership.[44] The key assumption made under this theory is that the behavior of the directors mirrors the shareholders' interests, placing primacy on the meeting of objectives by both the directors and the shareholders.[45]

The stewardship theory entails a physiological element on the part of the directors. The commitment and use of personal power as a basis of influence is subjective.[46] It is influenced by his/her cultural background. Additionally, the *problem arises when there are conflicting forces between the psychological and the situational factors the director faces*. There may arise a mismatch between the management philosophy of the company which may be more inclined towards the agency theory and the psychological characteristics of the manager remain rather unexplored under current stewardship theory.

Third, the assumption made in becoming a steward has been an area of critique.[47]*The assumption is that becoming a steward or an agent is the result of a purely rational process.*[48]The questions

---

[42] . Tricker, R. I. (1994).Corporate Governance: An international review. Oxford: Blackwel U.N. Conf. On Trade &Dev. (2001), World Investment Report 2001: Promoting Linkages.

[43] ibid

[44] Gakeri J, 'Enhancing Kenya's Securities Markets through Corporate Governance: Challenges and Opportunities' 3.6 *International Journal of Humanities and Social Science*, (2013)

[45]Slyke, David M. 'Agents or stewards: Using theory to understand the government-nonprofit social service contracting relationship' 17.2 *Journal of Public Administration Research and Theory*,(2007),157-187.

[46] Pastoriza D and Arino M, "When Agents Become Stewards: Introducing learning in the stewardship theory",1st IESE Conference,Barcelona,https://papers.ssrn.com/sol3/Papers.cfm?abstract_id=1295320 3,(2008)

[47] ibid

[48] Pastoriza D and Arino M, "When Agents Become Stewards: Introducing learning in the stewardship theory",1st IESE Conference,Barcelona,4, (2008)

that then arise are; how can an individual rationally decide whether his nature is that of a steward or an agent? And what role does motivation play in this picture?

### 1.6 CONCEPTUAL FRAMEWORK

The concept of corporate governance has been explained using various theories as seen in the theoretical framework .According to the agency theory, the purpose of corporate governance is to reduce potential conflicts between managers and the interests of the shareholders.[49] The stakeholder theory also plays an essential role in explaining governance structures because companies are made aware of all stakeholders rather than only the shareholders.[50] Donaldson and Preston have argued that the stakeholder theory can help to maximize firm performance and the combined benefits of all stakeholders by considering the interests of all stakeholders.[51] Research studies on corporate governance are limited to studying what occurs in public companies or state corporations. It seems, therefore, that private companies are very much under-investigated in the literature. Therefore, this study fills this gap by looking at the corporate governance principles, the internal corporate governance mechanisms and their impact on firm performance

In the framework, corporate governance principles are represented by: disclosure, transparency, Accountability and the responsibilities of the board. As seen above, Corporate Governance is largely understood as the relationship among various participants in determining the performance and direction of corporations.[52] In understanding the concept of corporate governance and due to the fact that the primary participants are the management, Board of Directors and the

---

[49]Jesen & Meckling, Theory of the firm:Managerial behaviour,agency cost aand ownership structure 1976(pg 305-360)

[50] Freemaan R, A stakeholder approach to strategic management (2001)

[51] T Donaldson & Lee Preston, The Stakeholder theory off the corporation:Concepts,evidence and implications.

[52] Omid Nodoushani and Patricia A. Nodoushani, 'The Debate on Corporate Governance: An Historical Analysis of Berle and Means Contributions', https://scholar.google.com/scholar?q=The+Debate+on+Corporate+Governance:+An+Historical+Analysis+of+Berle+and+Means+Contributions%E2%80%99,&hl=en&as_sdt=0&as_vis=1&oi=scholart accessed on 20th June 2019

shareholders, the inevitable question then becomes who has corporate control, and to whose interest is this control exercised.

While broadly, the company may be viewed either as shareholder-focused entity or as an entity with a wider array of interests to be met,[53] there has been a debate whether corporate governance ought to be structured either in the sole interest of investor or for a broader range of objectives including without limitation other stakeholders' interest.[54] These are the two divergent models that scholars build their arguments on when looking at the aim of a corporation. Simply put, one fraction views the corporation as existing solely for the purpose of ensuring shareholder profit or wealth maximization, while the other fraction views the corporation from a broader perspective, taking into account the interests of other stakeholders such as its employees and the wider community. Aoki posits that regardless of whose interests corporate governance structures are employed to cater for, corporate governance seeks to govern a corporation which is an organization far complicated than viewing it as a mere partnership of investors or a simple principal-agent relationship between the investor and the manager.[55]

Good corporate governance is based on a number of fundamental principles; these include transparency, accountability and responsibility. In addition, the board of directors and the owners of an entity have moral and ethical obligations toward their stakeholders.[56]

The corporate governance structure specifies the distribution of rights and responsibilities among different participants in the corporation such as, the board, managers, shareholders and other

---

[53] Andrew Clarke, 'The Model of the Corporation and the Development of Corporate Governance', [2005] http://classic.austlii.edu.au/au/journals/BondCGeJ/2005/2.pdf accessed as at 21st June 2019ibid

[54] Masahiko Aoki, 'Institutional Complementarities between Organizational Architecture and Corporate Governance,' RIETI Conference on Corporate Governance, [2003], http://www.rieti.go.jp/em/events/03010801/report.html1 accessed on 21st June 2019

[55] Aoki ibid

[56]Walid, Abdul, Leila, "Corporate ethics, governance and social responsibility in MENA countries", <https://www.emeraldinsight.com/doi/pdfplus/10.1108/MD-03-2017-0287> Accessed on 22nd June 2019

stakeholders and spells out the rules and procedures for making decisions in corporate affairs. From this definition, it is clear that corporate governance includes the relationship of a company to its shareholders and other stakeholders; it also denotes the promotion of fairness, transparency and accountability.

## 1.7 LITERATURE REVIEW

The relevance and impact of corporate governance in different firms has been assessed by many researchers, they have done so by examining relationships using different indicators, some focus on one aspect of corporate governance while others have concentrated on various if not all aspects. Generally the researchers can be grouped to those who have analyzed the effect of single component of corporate governance and those that have considered all or more than one factor of corporate governance on different firms. The researchers have laid emphasis on state corporations, financial institutions, pension schemes, Trade unions and public companies. Much has been left out with regards to the private companies; this study addresses the question on the collapse of major private companies and whether the issue is actuated by lack of corporate governance.

### 1.7.1 Corporate Governance and the Banking Sector

Several scholars have explored the link between corporate governance failure and the banking industry; these include Ernest Mang'unyi, Eric Earnest and Eaton Sarah.[57]

For Instance Ernest argues that there is a significant difference between corporate governance and financial performance of banks. He says that foreign-owned banks have slightly better

[57]Eaton, Sarah. "Crisis and the Consolidation of International Accounting Standards:Etiron, The IASB, and America." *Business and Politics* 7, no. 3 (2005).

performance than domestically-owned banks. His study recommends that corporate entities should promote corporate governance to send a positive signal to potential investors. The Central Bank of Kenya (CBK) should continue enforcing and encouraging firms to adhere to good corporate governance for financial institutions for efficiency and effectiveness. Finally he recommends that regulatory agencies including the government should promote and socialize corporate governance and its relationship to firm performance across industries.[58]

Eric Ernest investigates the banking sector. He appreciates that the corporate governance movement has gained momentum due to the progress made in sustainable development. He attributes poor governance of banks on poor corporate governance practices, poor management and conflict of interest; he however recognizes banks with an independent board noting that such perform better. This emphasizes the importance of that particular aspect of corporate governance and the company's performance. This shall be mirrored in the research to show whether the same investigation will relate greatly with the private companies.

### 1.7.2 Corporate Governance and Board of Directors

Various scholars have sought to investigate the relationship between Corporate Governance failure and board of directors, these scholars include, Berghe A,[59] VO, Keay Andrew[60] Kiarie

---

[58] Ernest Mang'unyi :Ownership structure and corporate governance and its effect on performance : A case of selected banks in Kenya(2001)2 international journal of business Administration

[59]Berghe, A. (2012). International Standardization of Good Corporate Governance: Best Practices for the Board of Directors. 2nd ed. Dordrecht, Springer Science, p. 6

[60] Keay, Andrew. "Company Directors Behaving Poorly: Disciplinary Options for Shareholders." ***Journal* o/** Business Lux› (September 2007): 656-682.

Mwaura [61] and Nguyen. VO and Nguyen, state that major concerns of corporate governance are related to "the structures and processes for the business directions and management of firms". Thus, they claim the relation concentrates on the relationships between company's controlling system, shareholders, stakeholders and functions of the board of directors. They conclude that the board of directors is seen as the most important factor in corporate governance, which affects the whole business and owners' interests.[62] Their article however fails to state whether the structures and processes for the business directions and management of firms are applied in the private sector, their article majorly addresses the financial institutions.

Kiarie Mwaura discusses the abuse of the veil of incorporation by the directors and how they use the same to escape liability, he further states that the economies in the world through globalization demand for directors with higher skills and standard care. The study aims to find out whether the practice as described by Kiarie Mwaura is an issue in the private sector and whether the same has led to their collapse. [63]

### 1.7.3 Corporate Governance and Public Companies

We have had several scholars explore the link between corporate governance and public companies. Key among them include, Freedman Judith,[64] Karugor Gatumah,[65] Kojo Appiah

---

[61] Kiarie Mwaura: company directors duty of skill and care,a need for reform (2003)24 company Lawyer 283

[62] Nmehielle, V.O. and Nwauche, E.S. (2004), "External-internal standards in corporate governance in Nigeria", Paper presented Conference on Corporate Governance and Accountability in SubSaharan Africa, Working Paper No. 115, October 29, The Africa Project of the Institute for International Corporate Governance and Accountability-George Washington University Law School, Washington, DC.

[63] Kiarie Mwaura: company directors duty of skill and care,a need for reform (2003)24 company Lawyer 283

[64] Freedman Judith, 'Limited Liability: Large Company Theory and Small Firms' (2000) 63 *Moderrn* Let terteit , pp. 317-354.

[65] Karugor Gatamah Strengthening Corporate Governance The Kenyan Experience Organisation for Economic Co-operation and Development (2002

Kiibi[66] and Litvak Kate.[67] Lois Musikali has addressed the issue of poor corporate governance structure in Kenya and has blamed it on poor regulatory framework and political influence. She has used uchumi supermarket as an example whereby she notes that shareholder activism plays an important role in perusing the government to step in and resuscitate the business. She notes that the legislative framework should be tailored to the environment within which it operates. She opines that Kenya is unable to establish a good corporate governance enforcement mechanism. She blames the state of affairs on a legislative system in the performance. She has however not addressed whether the lack of implementation of corporate governance led to the collapse.[68]

### 1.7.4 Corporate Governance and State owned Corporations

Kornhauser Lewis,[69] Kiarie Mwaura, Mccorquodale R and Simons P,[70] Miles L and Zhang[71] have addressed the issue of corporate governance and state owned corporations.

According to Kiarie Mwaura in his article, "The failure of corporate governance in state owned enterprises and the need for restructured governance in fully and partially privatized enterprises the case of Kenya". He outlines the history in development of state owned enterprises and the

---

[66] Kojo Appiah-Kiibi, 'State-Owned Enterprlses and Privatisation in Ghana,' (2001) 39*Journal of Modern African* Studies, pp. 197-229

[67] Litvak, Kate. "The effect of the Sarbanes-Oxley act on non-US compaifies cross-listed in the US." *Journal of Corporate Finance* 13, no. 2-3 (lune 200Z): 195-228.

[68] Lois M Musikali The Law affecting corporate governance in Kenya: A need for review (19) 7 international company and commercial law review 213.

[69] Kornhauser, Lewis. "The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel." *Columbia* L«tti *Review* 89, no. 7 (1989): 1449-1460.

[70] McCorquodale R and Simons P, 'Responsibility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) Modern Law Review 598 - 625.

[71] Miles L and Zhang Z, 'improving Corporate Governance in State Owned Corporations in China: Which Way Forward? [2006] 6 *journal of Corporate Lan› Studies* 213.

challenges that influenced good corporate governance practices. He advocates for the streamlining of legislation governing state owned enterprises, he however has not addressed the issue for private owned companies.[72]

### 1.7.5 Corporate Governance and Appointment and Dismissal of Directors

Aguilera Ruth V,[73] Keay Andrew,[74] Kiarie Mwaura[75] and Kamau have discussed Corporate Governance and Appointment and dismissal of directors.

Kamau in his study addresses the issue of corporate governance within Kenya's laying emphasis on appointment and dismissal of directors. He has stated that the appointments are in most instances on non-objective factors such as political interest. His study majorly concentrates on that particular aspect of corporate governance in state corporations. Appointment of directors in any sector including the private sector is very crucial to the performance of the sector.[76]

### 1.7.6 Principles of Corporate governance

Solomon J,[77] Ribstein Laffty, [78]B Tricjer and Karugor Gatamah have addressed the principles of Corporate Governance. According to B Tricker he looks at the major aspects of corporate governance, lays emphasis on the principles, codes and theories of corporate governance. In his

---

[72] Kiarie Mwaura The failure of corporate governance in state owned enterprises and the need for restructured governance in fully and partially privatized enterprises: The case of Kenya(2007)Fordham international law journal.
[73] Achtenhagen, L., Naldi, L., Melin (2010). Business Growth – Do Practitioners and Scholars Really Talk About the Same Thing? Entrepreneurship Theory and Practice, Vol. 34, No. 2, p. 289–316.
[74] Keay, Andrew. "Company Dlrectors Behaving Poorly: Disciplinary Options for Shareholders." ***Journal* o/** Business Lux› (September 2007): 656-682.
[75] Kiarie Mwaura: company directors duty of skill and care,a need for reform (2003)24 company Lawyer 283
[76] AGN Kamau, 'Corporate Governance in Kenya' S State Corporations: A Critique on the Appointment and Dismissal of Directors of Boards of State Corporations' (Study, University Of Nairobi 2013) accessed 6 February 2015. Master's Study.

[77] Solomon, J. 2007. *Corporate Governance and Accountability.* (2nd ed) Chichester: John Wiley & Sons.

[78] Ribstein, La££y. "Accountability and Responsibility in Corporate Governance." *Notre*Dame Lac› derteiu 81, no. 4 (2006): 1431-1493.

book he has discussed corporate governance around the world by comparing and contrasting. He has however not recognized whether the principles are applied by the private sector as are applied in state corporations.[79]

OECD principles are corporate governance guidelines that Kenya subscribes. The principles published by OECD are designed in such a way that countries are able to come up with their own to be able to deal with business globalization. Rights of shareholders; equitable treatment of shareholders; role of stakeholders; disclosure and transparency; and responsibilities of the board are set out as principles of corporate governance in the report.[80] The study finds out whether the private sector has be able to adopt what the country came up with to be able to deal with business globalization and running of their business.

Karugor Gatamah in his article highlights problems faced by Kenyans in the promotion of good governance. In his article he states that international principles need to be adopted in order to suit different needs in different economies, organizations and sectors. This is addressed in the study as a comparative study as to whether whatever is discussed in their article on promotion of good governance has been applied by the major private companies[81]

### 1.7.8 History and Theories of Corporate Governance

Among the scholars who have explored the history and theories of corporate Governance

---

[79] Bob Tricker Corporate Governance: Principles, Policies, and Practices Oxford University Press (2012)
[80] OECD, OECD Principles of Corporate Governance (Organisation for Economic Co-operation and Development 19Bob Tricker Corporate Governance: Principles, Policies, and Practices Oxford University Press (2012)99) accessed 12 March 2015.
[81] Karugor Gatamah Strenthening Corporate Governance The Kenyan Experience Organisation for Economic Co-operation and Development (2002)

include, Hansmann Henry,[82]Mccolgan Patrick,[83] B Mwanzia and Sundaram Anant.[84] According to B Mwanzia, he discusses the history of corporate governance as well as the theories that affect corporate governance. His book has failed to discuss the need to have the principles applied in organizations and especially in the private sector for achieving effective corporate governance and reducing the number of corporate failures around the world and in Kenya.[85]

Jermias in his article states that one of the main functions of the boards of directors is to monitor management on behalf of shareholders, effective monitoring of which will reduce agency costs leading to better performance.[86] This view of corporate governance forms the basis of Agency Theory, which proposes that boards of directors are put in place to protect shareholders' interest against the agency problem.[87] Whenever there is a role divide between ownership and control of a company and when managers tend to behave opportunistically to maximize their own interest at the expense of the shareholders, Jermias refers to this as the agency problem. Jermias has not addressed a situation where the shareholders are also the board of directors in a company, an arrangement that is most rampant in private companies[88]

Researchers have paid great attention to the impact of corporate governance on state corporations and have left very little to no knowledge about the relationship between corporate governance

---

[82] Hansmann, Henry, and Reiriier H. Kraakman. "The End OF History for Corporate Law." *Georgetown Law Journal* 89 (2001): 439.

[83] McColgan, Patrick. "Agency Theory and Corporate Governance: a Review of the Literature from a UK Perspective" Working Paper Serles. University of Strath clyde,, May 22, 2001. http://accfinweb.account.strath.ac.uk/wps/journal.pdf.

[84] Sundaram, Anant K., and Andrew C. Inkpen. "Stakeholder Theory and "The Corporate Objective Revisited". A Reply." *Organization Science* 15, no. 3 (May I, 2004): 370-371.

[85] Benjamin Mwanzia Mulili Corporate Governance Practices in Developing Countries: The Case for Kenya international Journal of Business Administration Vol. 2, No. 1; February 2011

[86] Jermia ,j (2008,December 15) Board Capital,Board Characteristics and managerial share ownership:impact on firm erformance

[87] ibid

[88] ibid.

and the collapse of major private companies as well as the absence of knowledge about how the collapse is related to corporate governance.

Zahra and Pearce discuss the functions of the board of directors on company performance which is a key ingredient in corporate governance, they state as follows: "agency approach is among the most recognized in research on contribution of boards". In most instances, it is argued that when shareholders lose their effective control in a company when the company grows, professional managers who are knowledgeable and specialized with regard to the company's operations take over the control. [89]

They also state that agency perspective refers to the conflicting interests occurring between the principal as owners and the agent as managers. The scholars point out that, while the agents run firms for their self-interests, the principal has the intention of maximizing the shareholders' interests in the long term. Moreover, due to the separation of corporate ownership, managers have significant freedom and powers to pursue their own objectives.[90]

## 1.8 JUSTIFICATION OF THE STUDY

Concept of corporate governance has gradually gained prominence, it is now an international topic due to the globalisation of businesses, It is acknowledged that corporate governance plays a major role in the management of all types of organizations in both developed and developing countries,[91]

This research informs entrepreneurs and legal officers who wish to ensure that corporate

---

[89] Zahra, S. A., Pearce, J. A. (1989). Boards of Directors and Corporate Financial Performance: A Review and Integrative Model. Journal of Management, Vol. 15, No. 2, p. 291–334
[90] Ibid

[91] Guido.P Businesses in globalized world(27th April 2011)

governance is well implemented in private companies. Currently, there is a lot of research that has been done, but until now, scholarly literature has failed to extensively deal with the problem of collapse of major private companies in relation to corporate governance in Kenya and thus this research is aims at providing insights and to advance knowledge that has been created in the past on corporate governance.

## 1.9 METHODOLOGY

The study is qualitative and utilizes a mixed method approach as it relies on both doctrinal, historical and case study methods in order to test the hypothesis.

The research will be largely doctrinal focusing on literature that focuses on corporate governance, its importance and how the lack of it in private companies jeopardizes the companies leading to their collapse.

## 1.10 CHAPTER BREAKDOWN

### Chapter 1: Introduction

This chapter introduces us to the study; it identifies the problem, outlines the objectives of the study together with the questions that assist in achieving the objectives, hypothesizes the study, outlines the theoretical and conceptual framework and justifies the study.

### Chapter2: Historical Background

This chapter explores the history of corporate governance in Kenya's private companies

### Chapter 3: Review of the legal framework on corporate governance in Kenya

This chapter examines the legal framework and the governance of private companies in Kenya

### Chapter 4: Case study of corporate failure in Kenya. How the failure has led to collapse of companies.

This chapter analyses three companies to illustrate how corporate failure has led to the collapse

of private companies

**Chapter 5: Key Findings, Conclusion and recommendations.**

This chapter sums up the study by analyzing the key findings and gives recommendations for reforms

# CHAPTER TWO: HISTORICALBACKGROUND OF CORPORATE GOVERNANCE

## 2.0 Introduction:

This chapter explores the history of corporate governance in Kenya. The chapter is divided into two main parts; the first part defines governance and corporate governance whereas the second part discusses the historical background of corporate governance in Kenya. The chapter seeks to demonstrate that historically emphasis of corporate governance have been laid on public companies and state corporations and infrequently on private companies.

## 2.1 Definition of Governance and Corporate Governance

According to the Oxford Dictionary, governance it is defined as the manner of exercising the management of resource be it economic or in some part social with the aim of ensuring that there is sustainability of development with the aim of ensuring that there is eminent political pluralism in the process. It is essential in ensuring there is a structural and functional balance between the purposes of maintaining a particular order while in the same ensuring that there is equity and equality in the society which is very dynamic.[92]

Essentially for the purposes of this study, Governance is concerned with the processes, systems, best practices, common custom and procedures, be it express or of an implied nature, that ensure the smooth administration of institutions, the manner in which the memorandum of understanding and the articles of association of a company are formed and their implementation achieved, the relationships that these rules and regulations determine or create between the shareholders, the relevant stakeholders and in the same the relevant authorities concerned with the regulation and licensing of the companies. Governance addresses the leadership role in the institutional framework and the ways that enforcement can be achieved without any difficulty of

---

[92]The ***Oxford English Dictionary*** (***3rd edition*** )August 2010

implementation.

## 2.2 What is Corporate Governance?

The definition of corporate governance as indicated in the previous chapter has been re-written by several researchers, many of these researchers have defined corporate governance using different indicators. Some define it based on one aspect of corporate governance while others have concentrated on some if not all.

Corporate Governance, therefore, refers to the manner in which the power of a corporation is exercised in the stewardship of the corporation's total portfolio of assets and resources with the objective of maintaining and increasing shareholder value and satisfaction of other stakeholders in the context of its corporate mission.[93] It is concerned with creating a balance between economic and social goals and between individual and communal goals while encouraging efficient use of resources, accountability in the use of power and stewardship and as far as possible to align the interests of individuals, corporations and society.[94] It is about promoting: an appropriate legal, economic and institutional environment that allows companies to thrive as institutions for advancing long-term shareholder value and maximum human-centered development while remaining conscious of their other responsibilities to stakeholders, the environment and the society in general.[95]

## 2.3 Historical Background of Corporate Governance Globally.

Governance began with the beginning of corporations dating back to the east India Company, The Hudsons Bay Company, Levanrt Company and other major chartered companies during the

[93] Humera K2011 internationalconfrence of e-business,management and economicsIPEDR 2011 (vol 25)
[94] Farinha,corporate governance,asurvey of the literature JEL classification(2003)
[95] Private Sector Corporate Governance Trust, Sample code of best practice for corporate governance.

16th and 17th centuries.[96]

It is important to note that the concept of corporate governance has existed for centuries however the term came to be used in the 1990's as it was a term only used in the United States. It is said that the concept has existed for centuries because the balance, power and decision making between directors , board, executives and shareholders has evolved for centuries.97

### 2.3.1 Cold War

Things however changed in the 1970's when the Securities and Exchange Commission brought the issue of corporate governance to the fore front under a stance official corporate governance reforms. This was the first time to have the term corporate governance appear in a federal register (official journal of the federal government).[98]SEC noted widespread payments by corporations to foreign officials over falsifying corporate records, where corporations had started to appoint outside directors, it is at this point where SEC prompted the New York stock exchange to require each listed corporation to have an audit committee composed of independent board of directors. To get the governance right, they came up with audit committees, compensation committees and one managerial appointee.[99]

In 1980, there was a different twist due to a political shift, at this point, the debates focused on a new project called the principles of Corporate Governance by the American Law Institute (ALI). The ALI report was highly criticized as the Advocates for corporations and businesses were concerned about some of the issues in the 1st draft of the principles of corporate governance. The principles had recommended that boards appoint a majority of independent directors and establish audit and nominating committees, they felt that if companies did this, it would increase

[96] Nicholas J Prince, Governance best practices-What is the history of corporate governance and how has itchanged?)October 3, 2018.
[97] ibid
[98] ibid
[99] Private Sector Corporate Governance Trust, Sample code of best practice for corporate governance.

liability risks for board of directors. It was also noted that the proposal did not account for the pressures of the market forces and didn't consider empirical evidence.[100]

### 2.3.2 Contemporary Period

ALI amended their principles but at the time of its approval it had little impact by the time it was published in 1994. By 2009 it was established that banks were taking excessive risks and there was growing concern about a possible collapse of the world financial system. As much as the government offered massive bailout to prevent fall out, collapse of Lehman brothers' bank developed into a major international banking crisis.[101]

Strong economic growth was experienced by the USA after World War II. The growth had such a strong impact on the history of corporate governance as there was rapid growth and thrives in corporations, at this point, managers called the shots and the board of directors and shareholders were expected to follow which they did in most cases. It was quite interesting as managers highly influenced the selection of board of directors.[102]

The fall out placed a heavier focus of best practices for corporate governance principles. Strong governance principles were introduced and corporations encouraged having a majority of independent directors to encourage well composed diverse boards.103

## 2.4 Historical Background of Corporate Governance in Africa

In Africa, Corporate governance was led by the King Report on Corporate Governance issued in South Africa in 1994; the report not only embraced the conventional issues surrounding corporate governance but delved into a number of social and transformation issues extremely

---

[100] ibid
[101] ibid
[102]Nicholas J Prince, Governance best practices-What is the history of corporate governance and how has it changed?)October 3, 2018.
[103] ibid

relevant in the African context.[104]

Corporate governance initiatives across the African continent notably continued to be initiated and eventually led to the rise of the Commonwealth Association for Corporate Governance ("CACG") in African countries affiliated to the Commonwealth but also other agencies concerned with the promotion of good corporate governance practices such as the African Capital Markets Forum ("ACMF"). [105]

With the advent of the global economy, investors sought more diverse investment opportunities with concomitant levels of internationally-acceptable profitability and business conduct. Accompanying this was also the increasing mobility of business enterprise to trade and operate across national boundaries and thus encountering daunting variety of legislation, regulation and economic systems governing their conduct.[106] In order to meet these challenges, corporations had to be flexible and responsive to the competitive environment in which they operated in order to survive and thrive.[107]

A consultative meeting on corporate governance in Africa was held in Nairobi, Kenya on Monday 30 October 2000. This meeting brought together specialists in corporate governance from 14 countries in Central, East, South and West Africa and Pan-African organizations such as the UN Economic Commission for Africa ("UNECA") and the ACMF with the purpose of reviewing progress in corporate governance in all parts of Africa and of promoting greater links amongst all countries and regions of the continent.[108]

The meeting addressed, inter alia, the following issues: What international, regional or national

---

[104] Wolfensohn D, Pan African Consultative Forum, Statement given by the World Bank President

[105] Ibid 7

[106] Nicholas J Prince,Governane best practices-What is the history of corporate governance and how has it changed?(October,3,2018)

[107] ibid

[108] ibid

initiatives were underway to access and address corporate governance in Africa, what principles, standards and practices developed and accepted internationally should be adopted and/or modified to guide corporate governance in Africa, how the experiences compared between the various regions in Africa that had adopted the different corporate governance practices and what possibilities existed for harmonizing implementation of good corporate governance in the various regions of Africa.[109]

At the meeting, the main conclusions were that: There was a need for enhanced co-operation within Africa in the promotion of good corporate governance practices and standards, African countries were to consider a harmonized development of corporate governance on the continent, there was a need to build national and regional capacities for corporate governance with the involvement and co-operation of regional organizations such as COMESA (Common Market for Eastern and Southern Africa), EAC (East African Community), ECOWAS (Economic Community of West African States) and SADC (Southern African Development Community). The promotion of good corporate governance needed to be advanced to reflect an African "ownership" and direction, taking into consideration the needs of the continent and as appropriate to the prevailing circumstances of the individual countries while maintaining and upholding international standards.[110]

Following on the initiatives taken by the World Bank/OECD in holding "Roundtable" discussions to promote corporate governance in Asia, and Latin America, it was considered appropriate to institute a similar initiative in the form of a Pan-African Consultative Forum on Corporate Governance to be held in Johannesburg, South Africa. UNECA, ACMF, PSCGT and

[109] ibid
[110] ibid

the CACG were encouraged to work together to promote good corporate governance in Africa.[111]

## 2.5 Historical Background of Corporate Governance in Kenya

In Kenya corporate governance got a boost when Government Corporation was institutionalized, this was when it was discovered that there was lack of accountability in the public sector which had trickled down to the private sectors.[112]

### 2.5.1 Postcolonial Period (1998-1999)

Between November 1998 and March 1999 consultative corporate sector seminars were held with the aim of resolving and establishing an initiative sector for corporate governance, the sector's mandate would be to formulate and develop a code for best practices for corporate governance in the country and exploring ways of establishing a national body for corporate governance which would concentrate on coordinating developments in corporate governance in Kenya with other initiatives in East Africa, Africa and globally.[113]

### 2.5.1 Postcolonial period (1999-2002)

In 1999, the Centre for Corporate Governance (CCG), the Premier and Pioneer Corporate Governance Training Institution in Africa, a company limited by guarantee, was established by the private sector initiative for corporate governance to foster the highest standards of corporate governance and excellence in all types of corporations. At inception, the Centre was registered as the Private Sector Corporate Governance Trust (PSCGT), which was renamed to the Centre for Corporate Governance in 2002. The Centre achieves its mandate through training, education, research, monitoring, evaluation and advocacy. It is also in 2002 where the desire to institutionalize principles of corporate governance in Kenya led to the promulgation of the

[111] ibid
[112] Rita Rupareila,Amos Njuguna, international journal of business and social science vol 7(2016)
[113] Ibid 5

Guidelines on principles of Corporate Governance for public listed companies in 2002 by the Capital market Authority.[114]

### 2.5.2 Postcolonial Period (2002-2018)

By July 27 2018, the Centre had conducted trainings in corporate governance, governance, leadership and management for over 14,308 Public Leaders, Political Leaders, Board Members, Chief Executives, County Governors and Deputies, MCAs, County Assembly Members, County Public Service Council members and Senior Managers from all types of organizations, including NGO's and banks, throughout.[115]

## 2.6 Conclusion

This chapter has explored the history of corporate governance and as noted from the history, corporate governance in Kenya only got a boost when government corporations were institutionalized. Since then the focus has hardly changed, it would be true to conclude that corporate governance has since time immemorial gained momentum and more focus has being put on listed companies, public companies and state corporations.

[114] Corporate Governance, Leadership and excellence, centre for corporate governance.
[115] Ibid 16

# CHAPTER THREE: THE LEGAL FRAMEWORK OF CORPORATE GOVERNANCE IN KENYA

## 3.0 Introduction

This chapter examines the legal framework of corporate governance. The chapter argues that although Kenya has several laws regulating corporate governance, the laws are not mandatorily enforceable in private companies whereas enforceability is of great importance since, corporate governance rules primarily aim at ensuring that a company is managed in a transparent, accountable and sustainable manner.

This chapter is divided into three main parts the local, regional and international legal framework. The Kenyan laws that seeks to promote corporate governance include the Constitution of Kenya 2010, The Companies Act, 2015, The Capital Markets Act Cap 485, the code of corporate governance practices for issuers of securities to the public 2015 and the Nairobi Securities Exchange (NSE) Regulation

## 3.1 Local Legal Framework

### 3.1.1 The Constitution

The Kenyan constitution is the supreme law of the country and it has included various provisions that support corporate governance in the management of firms and entities. First, good corporate practices are encapsulated in the article 10 of the constitution of Kenya that provides for the national values and principles of governance that are binding to the state corporations and also private entities. The Constitution of Kenya under article 10(2) (c) provides inter alia that "The national values and principles of governance which include; (c) good governance, integrity,

transparency and accountability; and (d) sustainable development."[116] These provisions clearly stipulate that entities in Kenya ought to be managed in responsible and accountable manner. Also, interpreting the issue broadly it implies that all persons (including companies) need to ensure that they adhere to good corporate practices.

The Constitution of Kenya also supports accountability through the right to access of information. Information is an important aspect that ensures the investors or the public are aware of the financial health of the company. It ensures that the shareholders or the public are informed about the important decisions of the company such as financial status, the meetings and other important facts. In this regards, the Constitution of Kenya under article 1 state to the effect that every citizen has the right of access to; (b) information held by another person and required for the exercise or protection of any right or fundamental freedom. "[117] This fact is supported by section 96 of the Companies Act which gives the members the right to inspect the company records. Section 96 of the Act provides for various penalties for companies that would refuse to avail the public records.

### 3.1.2 The Companies Act

The Companies Act, 2015 is the substantive law that regulates companies it provides various mechanisms that ensure that the company is managed in a proper manner by providing various guidelines. First the directors ought to operate in a transparent, accountable and responsible manner. [118] The directors have a duty to act within power, promote the success of the business, exercise reasonable care, avoid conflict of interest and accepting gifts from the third parties and declaring conflict of interest on certain transaction which must be approved by the members

[116] The Constitution of Kenya, 2010, Article 10(2)
[117] The Constitution of Kenya, 2010, Article 35(b)
[118]ibid

before the company undertakes in their transactions. These provisions are aimed at ensuring that the directors are accountable to the stakeholders for any transaction they do on behalf of shareholders.

The pillars of corporate governance as entrenched in the Constitution 2010 through the national values form part of the Companies Act 2015.

The principle of the rule of law states that nobody is above the law. One of the significant amendments introduced by the Act is the codification of directors' common law duties. Directors are mandated to act within their power as a director, to act within the best interests of the company, to act independently while making decisions in regards to the company, to manage company affairs with reasonable skill, to avoid conflict of interest and not to accept gifts from third parties.[119]This made it possible for directors to be held accountable for breach of their general duties.[120]A director may also be disqualified from acting as a director of a company. A director may be disqualified for fraud, breach of duty, upon findings after an investigation or if they are convicted of an offence. A disqualification order bars a person from forming or managing a company in any capacity.[121]Further, directors are required to comply with the law. A company will not be exempted from provisions of the law without just cause. These provisions ensure that directors are not seen to be above the law and that they can be held liable for their actions. Companies are under a duty to file with the Registrar of Companies their financial reports for every financial year. The financial reports should reflect a true statement of account for the company.[122]

All documents filed at the Companies' Registry are public documents and the public can access

[119] Sections 142-147
[120] Section 148
[121]Sections 214-218
[122]Section 635,636

them. This inherently promotes accountability in companies. Another aspect of accountability is the requirement for companies to file with the Registrar of Companies a director's remuneration report and the contents of the report as a general rule, shareholders in companies are to be treated equitably depending on the class of shares they hold in order to promote the fairness principle. Shareholders should be given the opportunity to exercise their rights in the company. They have the right to share in the profits of the company, to participate in company meetings and to request for information on the company.

### 3.1.3 Capital Markets Act[123]

The main objectives of the Capital Markets Authority include facilitating and maintaining an efficient and effective securities market that protects investor interests. In that regard, the Authority is empowered, among other things, to prescribe rules or guidelines on corporate governance for listed companies in Kenya.[124] The Authority introduced Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya in 2002 to enhance good governance in corporate performance, maximize shareholders value and protect investors' rights.[125] Public listed companies are required to disclose in their annual reports the extent of compliance with the guidelines and to explain the reasons for non-compliance.[126]

### 3.1.4 The code of corporate governance practices for issuers of securities to the public 2015

The code enumerates the principles of corporate governance for boards of directors for purposes of ensuring proper management. It reiterates that good corporate governance is necessary in order to enhance accountability and performance of those entrusted to manage corporations and

[123] Cap 485A Laws of Kenya
[124] Ibid, s. 11.
[125] *Code of Corporate Governance Practices for Public Listed Companies in Kenya*.
[126] Ibid.

to promote efficient and effective use of limited resources.[127] The Code acknowledges that the country needs well governed and managed business enterprises to attract investments, create jobs and wealth and remain viable, sustainable and competitive in the global market place.[128] The Code outlines the obligations of the board of directors, which are to provide and ensure effective leadership, ensure corporate compliance, effective communication with stakeholders, and accountability to shareholders, effective internal control procedures, and adoption of technology.[129]

### 3.1.5 Nairobi Securities Exchange (NSE) Regulations

The NSE was first registered as the Nairobi Stock Exchange under the Societies Act (1954) and later changed its name to Nairobi Securities Exchange. The NSE is authorized by CMA to give a trading platform for securities. It is also required to oversee the trading companies.[75]Even after companies meet the qualifications for listing on the NSE; they are still required to observe some rules and regulations such as the NSE Market Participants (Business Conduct and Enforcement) Rules, 2014.

These Rules are aimed at promoting transparency and fairness in the capital markets. Listed companies are expected to enforce these rules on their employees. They are binding and are intended to complement the guidelines issued by the CMA. The rules are founded on the principles of integrity among company official to promote fair market practices. Market participants are expected to practice fair market practices that involve disclosing important information to shareholders and avoid conflict of interest. Further, compliance with the statutory law is paramount to their being listed to trade. As far as being listed is concerned, market

[127] The *Capital Markets Act Cap 486A*: Guidelines on Corporate Governance Practices by Public Listed Companies in Kenya. Gazette Notice No. 3362.
[128] Ibid.
[129] Ibid.

participants owe a duty of care to their customers and are expected to carry out their due diligence at all times. The Rules promote good governance practices as recommended by the CMA

Chapters 3 of the Rules require that the Board of Directors appoint a disciplinary committee to enforce the Rules enacted by the NSE. Chapter 4 of the Rules prescribes a general code of conduct for market participants that are guided by the aforementioned principles.[130]

## 3.2 Regional Legal Framework

### 3.2.1 CACG Guidelines Principles for Corporate Governance in the Commonwealth 1999

The CACG Guidelines facilitate best business practice and behaviour, whether of a private sector or state-owned enterprise. These guidelines are neither mandatory nor prescriptive and have been designed as evolutionary in concept. In other words, the CACG Guidelines are seen as a "continuum", remaining flexible and responsive to further developments in corporate governance in the global economy. The Commonwealth, through its participation in the Global Corporate Governance Forum with the World Bank and OECD, is committed to a uniform approach on corporate governance issues internationally. Consequently, the CACG Guidelines have been structured on a basis complementary to the OECD Principles of Corporate Governance, with particular focus on the emerging and transition economies in the global market which comprise a substantial number of Commonwealth countries.[131]

---

[130] Nairobi Securities Exchange Market Participants (Business Conduct and Enforcement) Rules

[131] Commonwealth Association for Corporate Governance, principles for corporate governance in the commonwealth 1999

## 3.3 International Legal Framework

### 3.3.1Organisation for Economic Co-operation and Development Principles

The OECD Principles of Corporate Governance help policy makers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to supporting economic efficiency, sustainable growth and financial stability. First published in 1999, the Principles have since become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide. They have also been adopted as one of the Financial Stability Board's Key Standards for Sound Financial Systems and form the basis for the World Bank Reports on the Observance of Standards and Codes (ROSC) in the area of corporate governance.[132]

The Principles are intended to help policymakers evaluate and improve the legal, regulatory, and institutional framework for corporate governance, with a view to support economic efficiency, sustainable growth and financial stability. This is primarily achieved by providing shareholders, board members and executives as well as financial intermediaries and service providers with the right incentives to perform their roles within a framework of checks and balances. The Principles are intended to be concise, understandable and accessible to the international community. On the basis of the Principles, it is the role of government, semi-government or private sector initiatives to assess the quality of the corporate governance framework and develop more detailed mandatory or voluntary provisions that can take into account country-specific economic, legal, and cultural differences. The Principles focus on publicly traded companies, both financial and non-financial. To the extent they are deemed applicable, they might also be a useful tool to

---

[132] OECD (2015), G20/OECD Principles of Corporate Governance, OECD Publishing, Paris.

improve corporate governance in companies whose shares are not publicly traded. While some of the Principles may be more appropriate for larger than for smaller companies, policymakers may wish to raise awareness of good corporate governance for all companies, including smaller and unlisted companies.[133]

**Analyzing Compliance -Good Corporate Governance Practices.**

The cases discussed below illustrate the powers of the directors in the conduct of the business of the corporation and how far they can go in decision making with regards to the company. They demonstrate the consequences of not acting or acting within the law and how the courts may or may not have the power to quash the decisions of the directors.

These cases are important to the study because Chapter four discusses various case studies that demonstrate the factors leading to the collapse of the companies and how the board and or the directors have contributed to the collapse.

The cases demonstrate the Absolute powers of the leadership of a corporation and how far the leaders in a corporation can go in their decision making.

They also demonstrate the divide between self interest and that of the corporation.

**Shlensky v. Wrigley, 237 N.E. 2d. 776 (ill. app. 1968)**

The case Shlensky Wrigley establishes that In a purely business corporation the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law, and the court is without authority to substitute its judgment for that of the directors.

The facts of the case were: The plaintiff William Shlensky, was a minority stockholder of the defendant corporation, Chicago National League Ball Club (Inc.). The defendant corporation owned and operated the major league professional baseball team known as the Chicago Cubs.

[133] ibid

The individual defendants were directors of the Cubs and who had served for varying periods of years.

Defendant Philip K. Wrigley was the president of the corporation and the owner of approximately 80% of the stock therein. Shlensky alleged that every member of the major leagues, other than the Cubs, scheduled substantially all of its home games in 1966 at night, exclusive of opening days, Saturdays, Sundays, holidays and days prohibited by league rules.

Allegedly this had been done for the specific purpose of maximizing attendance and thereby maximizing revenue and income. According to Shlensky, in the years 1961-1965, Chicago National League Ball Club sustained operating losses from its direct baseball operations. Shlensky attributed those losses to inadequate attendance at Cubs' home games. He concluded that if the directors continued to refuse to install lights at Wrigley Field and schedule night baseball games, the Cubs would continue to sustain comparable losses and its financial condition would continue to deteriorate.

Shlensky further alleged that defendant Wrigley had refused to install lights, not because of interest in the welfare of the corporation but because of his personal opinions that baseball was a daytime sport and that the installation of lights and night baseball games would have a deteriorating effect upon the surrounding neighborhood. The Plaintiff further alleged that the other defendant directors, with full knowledge of the foregoing matters, had acquiesced in the policy laid down by Wrigley and had permitted him to dominate the board of directors in matters involving the installation of lights and scheduling of night games, even though they knew he was not motivated by good faith and the best interests of defendant corporation, but solely by his personal views.

Because of these concerns, Shlensky filed a stockholders' derivative suit against the directors for

negligence and mismanagement. According to Shlensky, fraud, illegality and conflict of interest were not the only bases for a stockholder's derivative action against the directors. On the other hand, defendants argued that the courts should not step in and interfere with honest business judgment of the directors unless there is a showing of fraud, illegality or conflict of interest. The lower court ruled in favor of the defendants and held that Shlensky's complaint did not state a cause of action. Shlensky thereafter appealed the judgment.

The Court held that Shlensky's complaint did not state a cause of action. The Court maintained that courts should not interfere in a corporation's management unless fraud or a breach of faith existed. In the case at bar, the decision at issue was one properly before the corporation's directors, and the motives alleged in the complaint showed no fraud, illegality, or conflict of interest in their making of that decision. According to the Court, the allegations in Shlensky's complaint were mere conclusions, which were insufficient to except the directors from the business judgment rule.[134]

**Dodge V. Ford Motor Co. - 204 Mich. 459, 170 N.W. 668 (1919)**

This case establishes that courts do not interfere in the management of directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds, or refuse to declare a dividend when the corporation has a surplus of net profits which it can, without detriment to its business, divide among its stockholders, and when a refusal to do so would amount to such an abuse of discretion as would constitute a fraud.

The facts of the case were: The Defendant corporation's directors decided to exercise their discretion and hold back part of the company's capital earnings for reinvestment, thereby

[134] 170 NW 668 (Mich 1919). See also *AP Smith Manufacturing Co v. Barlow* 39 ALR 2d 1179 (1953) or *Shlensky v. Wrigley*, 237 N.E. 2d. 776(Ill. App. 1968).

denying certain expected dividend payments to plaintiffs. The Plaintiffs contended that the reason defendant corporation was holding back dividends, partially to reinvest in the company and bring down the ultimate cost of buying a car, was semi-humanitarian and was not authorized by the company's charter. The trial court held that defendant corporation was entitled to reinvest surplus capital gains at their discretion and did not order further dividends paid out. The appellate court reversed that decision.

The issue was whether the trial court erred in its failure to order that further dividends should be paid out

The court held that the accumulation of so large a surplus established that there was an arbitrary refusal to distribute funds to stockholders as dividends and ordered that such dividends, plus interest, should be paid by Defendant Corporation. [135]

### 3.4 Conclusion

This chapter illustrates the basis of corporate governance and discusses the corporate governance regulatory framework of public companies and private companies in Kenya. It reviews the ability of the legislation in ensuring compliance with good corporate governance practices. From the discussion, the regulatory framework governing listed companies has more effective enforcement mechanism compared to that of unlisted companies. The mechanisms in place include regulations backed with sanctions and an oversight authority that has the discretion to impose uncodified sanctions upon miscreant companies.

---

[135]Gordon Smith, The Shareholder Primacy Norm, (2004) <http://heinonline.org>accessed 17 October 2019.The author quotes *Dodge v. Ford Motor Co.* 170 N.W. 668, 684 (Mich. 1919) as offering the most accurate modern definition*:*

# CHAPTER FOUR: THE LINK BETWEEN CORPORATE GOVERNANCE AND CORPORATE FAILURE

## 4.0 Introduction:

This chapter uses the example of three private companies to illustrate how corporate governance failure has led to the collapse of private companies. This chapter illustrates that although the government has held several campaigns aimed at having major organizations embrace the concept of corporate governance nevertheless major companies in the private sector are still collapsing because implementation and practice of corporate governance is much emphasized on state corporations and the public sector and rarely on the private sector.

This Chapter shall address how a company's potential and financial stability can be weakened by poor corporate governance by discussing the salient features of corporate Governance and how the companies failed to implement the principles hence their collapse. The Chapter shall focus on Accountability, Transparency and Disclosure and Internal Controls.

## 4.1 Accountability

Accountability refers to the obligation and responsibility to give an explanation or reason for the company's actions and conduct.[136]

This is to say that the board is responsible for determining the nature and extent of the significant risks it is willing to take, it should maintain sound risk management and internal control systems and communicate with stakeholders at regular intervals, a fair, balanced and understandable assessment of how the company is achieving its business purpose.[137]

[136] Ibid
[137] Ibid

### 4.2 Internal Controls

Mihaela and Iulian define internal control system as all the approved policies and procedures used by the management in order to achieve an effective management of business.[138] The Board has a duty to regularly review systems, processes and procedures to ensure the effectiveness of its internal systems of control so that its decision-making capability and the accuracy of its reporting and financial results are maintained at the highest level at all times.[139]

### 4.3 Transparency and Disclosure

Transparency is a principle of good corporate governance that stakeholders should be informed about the company's activities, what it plans to do in the future and any risks involved in its business strategies. It means openness, a willingness by the company to provide clear information to shareholders and other stakeholders, that is, the openness and willingness to disclose financial performance figures which are truthful and accurate.[140]

Business organizations should disclose their financial and operating results, ensuring that their shareholders and other stakeholders understand the nature of the organization's operations, current state of affairs and future direction in terms of developments. Disclosure of material matters concerning the organization's performance and activities should be timely and accurate to ensure that all investors have access to clear, factual information which accurately reflects the financial, social and environmental position of the organisation.[141]

Failure by a company's board of directors to apply the above principles of accountability, internal control, transparency and disclosure may eventually lead to corporate failure. Below we

[138] DumitrascuMihaela and Savulescu Iulian, "Internal Control and the Impact on Corporate Governance, in Romanian Listed Companies," Journal of Eastern Europe Research in Business & Economics, Vol. 2012 (2012) accessed from https://ibimapublishing.com/articles/JEERBE/2012/676810/676810.pdf

[139] Private Sector Initiative (note 17)

[140] Pearce Trust (note 18)

[141] Compliance Online, "Transparency and Disclosure" accessed from https://www.complianceonline.com/dictionary/Disclosure_and_Transparency.html

shall discuss several corporate failures in Kenya and analyse whether these failures can be attributed to the absence of the features of Corporate Governance.

### 4.4 Chase Bank

#### 4.4.1 Background

As at 2015, the Global Credit Rating categorized chase bank under tier 2 meaning that, it had an asset base of 6-24.9 billion shillings.[142]Starting out Chase Bank placed itself as the reliable one-stop SME bank of choice.[143]Banks in general have experienced a lot of challenges that have led them to be subjected to receivership aiming to rescue them to stability and Chase bank unfortunately was not exempted from the same. Chase bank was incorporated in 1996 as a commercial bank in Kenya and prior to that it was recognized as a small bank in Kisumu by the name United Bank Kenya. The same was under receivership at that time under the Central Bank of Kenya.[144]

Since 1996 the bank had been in constant growth gaining a lot of popularity amongst its consumers and investors and as at 2015, the shareholder's equity value was Kshs: 11.9 billion. In the same year 2015, Chase Bank reported a loss of and was unable to pay out its debts which led CBK to placing it under receivership as CBK is responsible for regulating commercial banks activities in Kenya.[145]

---

[142] Global Credit Ratings <https://globalratings.net>Accessed 28 March 2019

[143] Dennis, ' An illicit Affair-The case of Chase Bank' Burnley 22 Mar 2019<https://www.burnley.co.ke/2018/03/22/an-illicit-affair-the-case-of-chase-bank-kenya-limited/> Accessed 28 March 2019

[144] Chase bank(Kenya) Limited, information memorandum, March 2015

[145] Chase bank(Kenya) Limited Reports and financial statements 28th February 2015

### 4.4.2 Factors leading to the Collapse

#### 4.4.2.1 Transparency and Disclosure

After Chase Bank went into receivership, Deloitte conducted and audit on the bank and according to the audit report, it highlighted that 16 months before the collapse of the bank the bank's former chairman Zafrullah Khan had awarded himself three-year consultancy contract for unspecified projects in the bank. Mr. Khan also helped the other management officials to loot money from the bank amounting to 15 billion.[146]

While conducting the audit, Deloitte reported that the financial books of the Bank had falsified figures compromising their full disclosure and transparency ability. This is so as the bank operated two accounts and the managers responsible for the same stated in their accounting records that Sh7.5 billion was used to buy 12 properties for the bank by related entities however the forensic audit showed that some of the managers owned shares in the five companies of the said purchased properties. [147]The accounting records stated that Musharaka agreements given to auditors as supporting documents to show that the entities were of holding investments for the bank were signed a month before the bank was put under receivership when most of the properties listed were bought in 2010.[148] However, Delloite reported that they did not obtain any evidence of the Shariah Board approval for the Musharaka agreements as required under Section 10 of the bank's Islamic banking policy. The report also emphasised that the internal auditor responsible for Shariah compliance was not aware of the existence of these agreements this acting as proof the bank owned none of those properties.[149]

---

[146] ibid

[147] Chase bank(Kenya) Limited Reports and financial statements 28th February 2016

[148]Dennis, ' An illicit Affair-The case of Chase Bank' Burnley 22 Mar 2019<https://www.burnley.co.ke/2018/03/22/an-illicit-affair-the-case-of-chase-bank-kenya-limited/> Accessed 28 March 2019

[149]Chase bank(Kenya) Limited Reports and financial statements 28th February 2015

The report further indicated that the banks accounting books as at December 2015, reflected overdue interests on loans and advances at Sh5.6 billion but the audit, however, shows the loan book was overstated by Sh3.245 billion contrary to Section 3.6 (b) of CBK's regulations. This report clearly shows that there was lack of proper transparency and disclosure in the accounting books inhibiting good corporate governance and leading to the fall of the institution.[150]

**4.4.2.2 Failure to incorporate good internal control measures and lack of** Accountability.

The CBK Prudential Guidelines allows a bank to lend internally to staff and directors a maximum of 25% of core capital.[151] In the case of Chase Bank, the core capital was Kshs 11 Billion whereas the insider loans amounted to Kshs 13 Billion inferring that internal borrowing had skyrocketed to 118% of core capital.[152] This goes to show that there was a lot of unregulated insider lending to senior management and directors leading to an increase in non-performing loans from KSh 3 billion to KSh 11 billion.

The report further revealed that irregular loans had been disbursed to entities owned by the bank's top management. For example in 2015 December, a day to closing its books for the financial year, the bank disbursed KSh 1,023,900,000 to Camelia Investment, Coinbrook Holdings, Cleaopatra Holdings and Golden Azure Investment without adequate documentation or securities. However, the loans were not disclosed as being insider despite knowledge of the fact that the former chairman owned the above listed firms.[153] There were other instances where the insider dealing was done by the directors. The forged loan facilities were then posted into CBK Settlement account, therefore reducing the outstanding balance by a similar amount. Not

[150] ibid
[151] CBK prudential guidelines on lending centralbank.go.ke
[152] Ibid77

[153] Ibid 77

only was there insider lending, but also irregular withdrawals by both shareholders and senior management. These activities exposed the bank to money laundering. The institution failed to incorporate good internal control measures.

These revelations led to the exit of two directors, Zafrullah Khan and Duncan Kabui and widespread news on social media caused capital flight and liquidity problems as customers withdrew their funds in large sums via various platforms.

In April 2017 The Central Bank of Kenya (CBK) placed Chase Bank Limited in receivership and the KDIC subsequently appointed Kenya Commercial Bank (KCB) as the receiver manager.[154]KDIC and CBK invited investors to take an equity interest in CBLR through an expression of interest on March 30, 2017 and on 5 January 2018; the two institutions announced the receipt and acceptance of a binding offer from SBM Holdings.[155]Through a gazette notice No. 6833 of July 2018 Central Bank of Kenya's (CBK) approved the transfer of selected assets and liabilities of CBLR to SBM Bank Kenya Limited facilitating depositors' access of up to KShs.1 million of their funds and enabling more than 97 per cent of the customers to receive their funds in full.[156]

In 2018 the Mauritius State lender, SMB Holdings took over Chase Bank taking its assets and liabilities as well as several branches of Chase Bank. SMB took over 825 staff to their institution and ensured that the 180,000 new customers who deposited money in Chase Bank after it was placed under receivership would be able to have full access to their money.[157]

---

[154]Edwin Mutai,' Judiciary faces sh 216 m loss from chase bank bonds' Business Daily 28 March 2019 <https://www.businessdailyafrica.com/economy/Judiciary-faces-Sh216m-loss-from-Chase-Bank/3946234-5045796-13rf9sbz/index.html>Accessed 28 March 2019

[155] ibid

[156] Kenya Commercial Bank ,' KCB Bank completes Chase Bank(IR) Assignment ,Hands Lender Bank to the Central Bank' https://ke.kcbgroup.com/about/media/126-news/638-kcb-bank-kenya-completes-chase-bank-ir-assignment-hands-lender-back-to-the-central-bank>Accessed 29 March 2019

[157] chase bank (kenya) limited (in receivership) and sbm bank (kenya) limited Central Bank Press release August

### 4.5 Analysis

Taking note of the events that led to the fall of Chase Bank, it is my argument that the same was attributed by failure and lack of good principles of corporate governance practice.

### 4.6 Imperial Bank of Kenya

#### 4.6.1 Background

Imperial Bank of Kenya Limited is a commercial bank that was initially established as a Finance and Securities Company in 1992.[158] In 1996, the bank commenced commercial banking services, after it was issued with a banking license by the Central Bank of Kenya. The bank's stock was privately held.[159] The bank was a medium-sized retail bank that catered for both individuals as well as corporate clients. As of December 2013, its total asset base was valued at about US$498 million (KES 43 billion), with shareholders' equity of approximately US$66.2 million (KES 5.719 billion). At that time, the bank was ranked the 19th largest Kenyan commercial bank, by assets, out of forty-three licensed banks in the country.[160]

On 13th October 2015 the Central Bank of Kenya placed Imperial Bank Limited under statutory management citing unsafe and unsound business conditions to transact business that existed in the bank. The board of the directors of Imperial Bank brought to the attention of the CBK inappropriate banking practices that warranted the immediate remedial action in order to safeguard the interest of both depositors and creditors.[161]

---

20,2018

[158158]Central Bank of Kenya, (2016),"Prudential guidelines for institutions licensed under the Banking Act", Central Bank of Kenya. pp. 27-48. [Online] Available: http://www.centralbank.go.ke Central Bank of Kenya (CBK) (accessed on 29 March 2019)

[159] ibid

[160]ibid

[161] The Daily Nation. 'Central Bank of Kenya puts Imperial Bank under statutory management' 13 October 2015. <https://www.nation.co.ke/business/Imperial-Bank-placed-under-receivership/-/996/2911156/-/wqjv20/-

The CBK placed Imperial Bank Limited under receivership and subsequently, appointed the Kenya Deposit Insurance Corporation (KDIC) as the Receiver for a period of 12 months which was later extended by court order. Normal operations of the Bank were suspended except for collection of loan re-payments or any other payments into the bank. Debtors were required to continue servicing their obligations. KDIC, in its capacity as Receiver, kept all the branches of the Bank open for such transactions.[162]

As a consequence of Imperial Bank being placed under receivership, depositors were unable to access their lifetime deposits. The depositors filed a suit against the Central Bank of Kenya, KDIC and Imperial Bank Limited arguing that by closing the bank without information, justification or notice of the proposed administrative action to the Petitioners, the CBK and KDIC violated Article 47 that guarantees the right to fair administrative action.[163]

On 21 June 2016, NIC Bank was appointed as asset and liabilities consultant for Imperial Bank (in receivership) by the Central Bank of Kenya.[164] As such, NIC Bank became responsible for returning funds to the failed bank's deposit customers. NIC was also allowed to acquire some of the assets, deposits, and liabilities of Imperial Bank as soon as its receiver manager the Kenya Deposit Insurance Corporation started liquidating the bank.[165]

### 4.6.2 Factors leading to the Collapse

#### 4.6.2.1Lack of Accountability

One of the main reasons that led to the collapse of Imperial Bank is mismanagement and embezzlement by the directors in collusion with officials of the Central Bank of Kenya and a

---

/index.html> (accessed 30 March 2019)

[162] *Ibid*

[163] Business Today. 'Imperial Bank depositors demand for their money'. 18 December 2017. <https://businesstoday.co.ke/imperial-bank-depositors-demand-money/> (accessed 30 March 2019)

[164] ibid

[165] Supra, n 2

loose credit policy that resulted in ballooning of bad loans that affected its financial standing.[166]
The late Abdulmalek Janmohamed had been the General Managing Director (GMD) of Imperial Bank from 1992 to 15 September 2015 when he died of cardiac arrest. The extents of irregular disbursements initiated by him were revealed to the bank's board five days after his death. After his death, the board of directors appointed the then head of credit Naeem Shah and chief finance officer James Kaburu as the acting managing director and deputy managing director respectively. Five days later on September 21, Shah and Kaburu revealed to the board that the late GMD had been disbursing loans amounting to billions of shillings fraudulently, to his friends and business associates. These disbursements had been hidden from the board of directors.[167]
The two senior bank managers alleged that the late MD had over a number of years instructed and/or forced the head of credit Naeem Shah to advance funds to certain clients without going through formal credit processes in line with prudential guidelines and the bank's internal lending procedures and policies. The bank’s CFO stated that the late group managing director unilaterally forced, intimidated and threatened the CFO to use 'creative accounting' to hide what was effectively theft from the bank.[168]

On 25 September 2015, Imperial Bank chairman Alnashir Popat called an emergency board meeting to discuss the revelations during which the board's audit committee chairman OmurembeIyadi was asked to lead an investigation into the allegations of impropriety. It was then agreed that the directors would seek a meeting with the Central Bank of Kenya governor to

---

[166] Robert N Gathaiya. ‘Analysis of Issues Affecting Collapsed Banks in Kenya From Year 2015 to 2016’ <www.ijmbs.com/Vol7/73/1-robert-n-gathaiya.pdf> (accessed 31 March 2019)
[167]The Star. How Imperial Bank Fraud was discovered. 15 February 2016. <https://www.the-star.co.ke/business/2016-02-15-how-imperial-bank-fraud-was-discovered/> (accessed 30 March 2019)

[168] Ibid 93

upraise him on the discovery once the investigations had been finalized. However due to the slow pace of the investigations caused by the audit committee's chairperson's unsuccessful attempts at getting relevant information from Shah, Kaburu and the senior management of the bank on the allegations of the fraudulent and illegal disbursements ordered by the them GMD, the board hired an independent London based auditing firm called FTI Consulting LLC.

FTI Consulting LLC in their report revealed that there were significant differences on loans, overdrafts, investments and deposits from what had previously been reports to the bank's board. Further, the late General Managing Director had been running a scheme of fraudulent and illegal disbursements with certain accomplices within and outside the bank.[169]

It was also revealed that deposits made by the bank's customers and which were supposed to yield returns and income for the bank were instead being fraudulently transferred to various accounts of W.E Tilley (Muthaiga) Ltd on the former GMD's instructions, assisted by other senior bank officials and then withdrawn or transferred.

Following the presentation of the FTI Consulting report, Imperial Bank's directors, in their quest to protect the bank's clients reported the findings to CBK on October 12 2015 in a letter signed by the board's chairperson.[170]

#### 4.6.2.2 Flouting of internal control credit process

FTI Consulting Report showed that although Imperial Bank had a clear credit approval process and documentation, this process was circumvented in the award of loans amounting to more than Sh20 billion. The report show that while a loan worth more than Sh50 million was supposed to be approved by the bank's Board Executive Committee (BEC) comprising the chairman, the group managing director and three non-executive directors, this was not the case in numerous

[169]"unsafe and unsound business conditions to transact business FTI audit report on imperial banks books
[170]ibid

cases.[171]

The bank's then GMD authorised loan disbursements in instances where loan applications were rejected by the BEC or where such applications were never presented to the BEC. The report says the bank's defined credit process was circumvented by the then GMD with the assistance of some senior management staff.[172]

#### 4.6.2.3 Lack of transparency and disclosure

FTI Consulting also revealed that there lacked adequate internal and external audit at Imperial Bank in the duration of the said fraud. All throughout this period the bank's board received annual audited accounts authored by Imperial Bank's management.[173] The accounts were duly audited by a certified public accounts firm PKF, a CBK approved auditor.

The accounts were also approved by CBK who would carry out annual on-site inspections to verify the said financial statements.[174]

FTI Consulting LLC report revealed that insider fraud was enabled by collusion of senior executives coupled with doctored and false financial reporting systems led to the loss of more than 20 billion Kenya Shillings of depositor funds at the collapsed Imperial Bank.[175]

To conceal the fraudulent and illegal transactions, the former GMD and some senior managers would use a software reporting programme which ensured that the fictitious, unlawful and fraudulently created accounts were not reflected in the bank's financial statements therefore understating the bank's true financial position. In order to balance the books, deposits held by the

---

[171] ibid
[172] *Ibid*
[173] ibid
[174] *Ibid*
[175] SDE.'Imperial fraud: how Kshs. 20 billion was fried' <https://www.sde.co.ke/thenairobian/article/2001231542/imperial-fraud-how-sh20-billion-was-fried>(accessed 31 March 2019)

bank were suppressed to match the amount defrauded through transactions made in various accounts thus reducing the amounts in the financial statements and falsely representing the bank's financial status.[176]

The general ledger is the backbone of any accounting system which holds financial and non-financial data. Additionally, fraudulent journal entries were passed within the general ledger to transfer funds between accounts and re-classify assets, a development that the investigators say was perpetuated through circumventing good banking practice and accounting standards.[177]

Owing to the requirements under the Banking Act and the Prudential Guidelines, CBK is deemed to have known the activities in the banks even before the collapse.**[178]**It is unclear why these illicit financial activities went on at the bank for more than 10 years without the bank's internal and external auditors or the Central Bank of Kenya (CBK) inspection and supervisory staff raising a red flag.[179] Claims have been made that CBK was complicit in the fraud and misappropriation of funds. An affidavit filed in court claims some officers of CBK, the Imperial Bank statutory manager's appointing authority  have been involved in the cover-up of some suspect transactions at the bank.[180]

FTI Consulting LLC's report revealed that as early as 2012, a whistle-blower had raised a red flag about possible money-laundering and tax evasion through an email to the Kenya Anti-Corruption Commission (KACC), The Treasury and the CBK among other government agencies. [181]Documents show that a Richard Cheres of CBK shared this information with James Kaburu, the then Chief Financial Officer (CFO) at Imperial Bank and demanded for more details on the

---

[176]ibid

[177]ibid

[178] Business Today. 'Imperial Bank depositors demand for their money'. 18 December 2017. <https://businesstoday.co.ke/imperial-bank-depositors-demand-money/> (accessed 30 March 2019)

[179]"unsafe and unsound business conditions to transact business FTI audit report on imperial banks books

[180] ibid

[181] ibid

bank's top 50 largest borrowers. However, Kaburu in his response to Cheres denied any money-laundering or tax evasion being perpetuated at the bank. Cheres demanded info on the said biggest borrowers but it's not clear how CBK utilized the info it received from Imperial Bank on the suspect accounts way back in 2012 before the bank was later placed under receivership in 2015.[182]

In an affidavit filed in court in December by one of the bank's former directors, Mukesh Kumar Patel, eight directors accused CBK of being involved in the manipulation of the bank's schedules. The directors claim that the late GMD had an inappropriate relationship with former CBK Governor Njuguna Ndung'u. The nature of the relationship was one of collusion and corruption and there were emails confirming that the former Governor of the CBK was compromised by the former Group Managing Director through improper gifts such as holiday trip to a Thailand Spa & Resort and financed his travel to Dubai.[183]

Imperial Bank Limited, Kenya Deposit Insurance Corporation and Central Bank of Kenya moved to court early December seeking to recover Ksh42 billion from the directors, who they accused of awarding themselves Ksh2.7 billion in dividends despite knowing the bank's true financial standing. Imperial Bank sought orders to freeze the shares that directors own in 42 companies linked to them, which would effectively lock up funds for the directors in case a recapitalization formula was reached.[184]

### 4.7 Analysis

The collapse of Imperial Bank of Kenya Limited was occasioned by poor corporate governance

---

[182]Business today,imperial bank fraud a CBK conspiracy 21 Dcember 2016.<https://businesstoday.co.ke/imperial-bank-depositors-demand-money/> (accessed 30 March 2019)

[183] ibid

[184] Business Today. 'Imperial Bank Fraud a CBK Conspiracy' 21 December 2016. <https://businesstoday.co.ke/imperial-bank-fraud-cbk-conspiracy/> (accessed 31 March 2019)

practices which led to heavy loses to the shareholders and depositors losing access to their funds as the bank has been under receivership.

Currently, the Kenya Commercial Bank Group is targeting a complete takeover of Imperial Bank. This raises depositors' hope after their accounts were locked since the bank went into receivership in October 2015. The Central Bank of Kenya (CBK) has reached a deal with KCB Group to carve out part of assets and liabilities from under-receivership Imperial Bank of Kenya (IBLR) that will send total deposits recovery to about Sh20.3 billion.[185]

### 4.8 Nakumatt Holdings Limited

#### 4.8.1 Background

The collapse of Nakumatt is attributed to the failure of corporate governance mechanisms. It was founded as small retail outlet operating in Nakuru town in the 1980s[186]. The iconic log of the elephant with a shopping bag symbolized stability and reliability. In fact its slogan was: ***Nakumatt: You need it, we've got it***". Its growth was so steady such that by December 2015 it had opened stores across the East African countries. Unfortunately, the stores started crumbling down and resulted to many job losses and closure of many stores regionally due to the weight of mounting debts, that were estimated to be upwards of Kshs 36 Billion,[187]to the extent that the then Principal Secretary for Industry, Trade and Cooperatives Chris Kiptoo, expressed the government's concerns about the closure of some of the retailer's branches[188].

---

[185] Daily Nation. 'Imperial Bank clients to get Sh20.3bn more in KCB deal' 12 December 2018.<https://www.nation.co.ke/business/Imperial-Bank-clients-to-get-Sh20-3bn-more-in-KCB-deal/996-4891688-sc71b9z/index.html> (accessed 31 March 2019)

[186] Morris Kiruga, "Supermarkets and their Peculiar Link with Nakuru" (20 October, 2013, Daily Nation)

[187] Insolvency Petition number 10 of 2017,African Cotton Limited versus Nakumatt Holdings Limited

[188]www.nation.co.ke/news/Why-Nakumatt-is-on-its-knees

### 4.8.2 Factors leading to the Collapse

#### 4.8.2.1 Weak internal controls and Lack of transparency and disclosure.

Nakumatt company directors worked so hard to keep a facade of a profitable company while knowing that the opposite was true while at the same time, largely compounded by a weak management structure that exposed it to unnecessary losses. In fact Nakumatt had no operating board and was a purely ran family business.[189]. Its rapid expansion also contributed to its collapse but the rapid expansion was the only strategy that kept the business for long as was the case for WorldCom. Had it been listed on the Nairobi Stock Exchange, it would have been opened to greater financial scrutiny by shareholders. Unfortunately, as large as the chain was, it was operated as if it was still that small supermarket that opened its doors in the 1980s in Nakuru. It presents an awkward position of family business on the arena of corporate governance.

Presently, the company is under a court appointed Administrator. The company was placed under Administration on 22nd January 2018 for a period of 12 months. The orders were later extended for a further period of twelve (12) months which will now expire in January 2020.[190]

### 4.9 Conclusion

This chapter has analyzed principles of corporate governance and used examples of three companies to show the effect of corporate governance failure in private companies. It has been established that a company's potential and financial stability can be weakened by poor corporate governance which cause long-term damage to a company's reputation and even lead to the its collapse. It further indicates that good corporate governance prescribes that the Board of

---

[189]Nakumatt Holdings Limited(Reports and financial statement) Feb 2001-feb 2014 independent auditor's report for every financial year

[190] ibid

Directors should govern a corporation in a way that maximizes shareholder value and in the best interest of society.[191] It is a key factor in underpinning the integrity and efficiency of a company. A company's potential and financial stability can be weakened by poor corporate governance and in some cases can cause long-term damage to a company's reputation.[192] A company which applies the core principles of good corporate governance; such as accountability, internal control, transparency, and disclosure will usually outperforms other companies and will be able to attract investors, whose support can help to finance further growth.[193]

[191]Private Sector Initiative for Corporate Governance, "Principles for Corporate Governance in Kenya and a Sample Code of Best Practice for Corporate Governance," Private Sector Corporate Governance Trust accessed from http://www.ecgi.org/codes/documents/principles_2.pdf
[192] Pearce Trust," The Core Principles Of Good Corporate Governance," 2014 accessed from https://www.pearse-trust.ie/blog/bid/108866/the-core-principles-of-good-corporate-governance
[193] Ibid

# CHAPTER FIVE: KEY FINDINGS, CONCLUSION AND RECOMMENDATIONS

## 5.0 Key Findings

This study examined and sought to respond to the question on the link between corporate governance and major private companies. The main objective of this study was to interrogate why major private companies are collapsing and how this is linked to corporate governance. The study is premised on the problem that private companies are massively collapsing.

In investigating this problem, this study hypothesized that although the government has held several campaigns aimed at having organizations embrace the concept of corporate governance, nevertheless major companies in the private sector are still collapsing because implementation and practice of corporate governance is much emphasized on state corporations and the public sector and rarely in the private sector. This study proved the hypothesis as seen below.

In examining the problem, the study formulated three research questions in chapter one which were sequentially answered in each chapter.

## 5.1 Key Finding I: Focus of Codes of corporate governance and Governance Structure.

Chapter two explores the history of corporate governance and proves that it's a commonplace fact that codes of corporate governance both locally and globally, are strongly focused on publicly listed companies, thereby neglecting the private sector.

Whether it's a kitchen-table start-up, family-controlled business private company or a publicly listed company, there has to be a well-functioning governance structure aiming to reach the company's financial and expansion goals, using the best resources available in the market- in full accordance with the principles of corporate governance and appropriate checks-and-balances.

## 5.2 Key Finding II: Effectiveness of regulatory framework.

Chapter Three illustrates the basis of corporate governance and discusses the corporate governance regulatory framework of public companies and private companies in Kenya. The chapter focuses on the ability of the legislation to ensure compliance with good corporate governance practices. From the discussion, it notes that the regulatory framework governing listed companies has more effective enforcement mechanism compared to that of unlisted companies and private companies.

From the cases discussed, the study establishes that in a purely business corporation, the authority of the directors in the conduct of the business of the corporation must be regarded as absolute when they act within the law and the court is without authority to substitute its judgment for that of the directors.

The study also establishes that courts do not interfere in the management of the directors unless it is clearly made to appear that they are guilty of fraud or misappropriation of the corporate funds.

## 5.3 Key Finding III: Link between Corporate Failure and Corporate Governance.

From Chapter 4 of this study, it is clear from the scenarios analyzed that corporate governance is half-heartedly embraced by private companies. Certain measures should be taken to ensure that avenues of non compliance are blocked. Corporate governance ensures compliance with the law for instance, compliance with the provisions of the Constitution and the Companies Act.

## 5.4 Key Finding IV: Corporate Governance and Company Culture.

Compliance with corporate governance also ensures that there is balance of power in board with diversity and proper mix of skills and expertise. The principles of corporate culture in the companies discussed have been flouted at the expense of expediency and short financial gains. As a result, this has caused serious social and economic losses to the stakeholders.

Inference drawn from the study is that. Corporate governance is very vital for businesses to survive and to thrive in any given environment. As seen, if corporates ignore the implementation of corporate governance, they will in all circumstances take the stance which is most business friendly to their own agenda and may in most instances not look at their business consequences in general and as such this may hinder or affect various stakeholders as a whole.

Indeed, the current corporate governance implementing mechanisms in Kenya are inadequate, leading to insufficient accountability by directors when fulfilling their duty of promoting the success of the company as a whole.

## 5.5 Recommendations

### 5.5.1 Short Term Recommendations

Following the recommendations of the King's report, companies should conduct external audits to ensure that directors implement their duty of ensuring that the company remains a going concern. Material changes in a company's financial statements should be explained. The audit committee should review the accuracy and reliability of financial reports.[194]This is borrowed from the Johannesburg Stock Exchange whereby it is required that companies should have a statement in their financial reports on how they have complied with the provisions of the King II report.[195] This should be implemented by the board of directors of the company.

The report further recommends that the code of corporate governance should be enforced through legislation for it to co-exist with a number of laws that apply to companies and directors including the Companies Act. In addition further enforcement should be in place with the

[194] ibid

[195]King Report on Corporate Governance in SA : Institute of Directors in Southern Africa (IoDSA)' (n 131).

existing regulations.[196]The code of corporate governance should be applicable to all companies as is the case in South Africa. The code should be flexible for companies to comply. The Legislature should come up with laws on corporate governance that binds all corporations whether public or private. This way, it shall be possible to enforce the codes which shall be laws and hence mandatory.

**5.5.2 Midterm Recommendations**

Further, there should be a declaration of secret profits by directors. Where a director makes secret profits to the detriment of the shareholders, the director in question should be required to compensate shareholders for the loss. Disclosure in corporate governance should go beyond disclosure by directors only.[197] The board of directors, Chief Executive officers and the chairpersons of the company should ensure that the declaration is done if any.

The report further recommends that Consideration should be given to require certain categories of private companies to file their annual financial statements with the Registrar of Companies, thus making them available for public inspection.[198] This legislature should come up with laws to this effect.

There should be disclosure of the remuneration of each individual director and senior executives, in fact there should be a remuneration policy to be put to the shareholders for a non-binding advisory vote and that the board and / the shareholders should determine the remuneration of the

[196] *"King Report on Corporate Governance for South Africa 2002" (PDF). Institute of Directors in Southern Africa. 2002. Retrieved 4 April 2012*
[197] ibid
[198] ibid

executive directors in line with the policy.[199] The board of directors in a company should ensure that such a policy exists.

### 5.5.3 Long Term Recommendations

Government regulation should be exercised with a holistic approach with all the business actors in mind. Regulation if well exercised within the main pillars of corporate governance discussed can act as a good backing for the business environment. The government should ensure to set up regulations that govern both public and private companies by vigorously involving them when coming up with the regulations.

Companies should introduce ethical practices that seek to promote good corporate governance including ethical leadership in the management and establish core values to ensure that they align to the principals of corporate governance. The board and the management of private companies should conduct trainings and create a culture where by the management is trained and adopts good ethical practices.

There is need to ensure the principle of transparency in corporate governance is adhered to. Transparency fosters credibility and trust. Impartiality and fairness is important and in applying ***The case of Aberdeen Railway Company v Blaikie brothers*** it should be a basic rule that if a director had an interest in a corporate transaction, then the transaction is voidable at the company's will, and it's the duty of the directors to avoid any possibility of a conflict of interest.
In conformity with the principle of governance, there is need for accountability to both the Directors and the stakeholders. Corporates management should ensure effective, accurate, timely

[199] ibid

and transparent disclosure of pertinent information on the company's operations and performance. It is the duty of the directors to avoid any possibility of a conflict of interest

As regards risk management, companies should establish a set of internal controls to mitigate risks through its board. A risk management system is important to help identify new opportunities for the company and to protect shareholders. The auditors can either be internal or external auditors as the audit is to evaluate internal controls such as risk management. These audits be conducted annually or more often in larger companies. The management and the board should ensure that both internal and external auditors exist to occasionally evaluate internal controls.

Further research should be carried out on major private companies without an operating board and how the lack of a board affects the companies in achieving their objectives.

Further research on corporate culture in Private companies should be investigated to find out how the culture affects the performance of the company and how the culture contributes to achieving the objectives.

## BIBLIOGRAPHY

### BOOKS


1. Achtenhagen, L., Naldi, L., Melin (2010). Business Growth – Do Practitioners and Scholars Really Talk About the Same Thing? Entrepreneurship Theory and Practice, Vol. 34, No. 2, p. 289–316.
2. Akbar, S., Poletti-Hughes, J., El-Faitouri, R., Shah, S. Z. A. (2016). More on the Relationship between Corporate Governance and Firm Performance in the UK: Evidence from the Application of Generalized Method of Moment's Estimation. Research in International Business and Finance, Vol. 38, p. 417–429.
3. Bainbridge, S. M. (2016). Corporate Governance after the Financial Crisis. Oxford: Oxford University Press
4. Berghe, A. (2012). International Standardization of Good Corporate Governance: Best Practices for the Board of Directors. 2nd ed. Dodrecht, Springer Science, p. 6
5. Clarke, Thomas. "The Stakeholder Corporation: A Business Philosophy for the information Age." In *Theories of Corporate Governance,* edited by Thomas Clarke, 189-201. Abingdon: Routledge, 2004.
6. *Coffee,* John. *Gatekeepers.' The Professions and Corporate Governance.* Oxford: Oxford University Press, 2006.
7. Cutler, Tony. "The Wages of Capital: the Rise and Rise of 'Corporate Governance'."*Competition U Change 8,* no. 1 (March 2004): 65-83.
8. Dallas, Lynn. "Two Models of Corporate Governance: Beyond Berle and Means."*VniveTsi OfMichigan Journal of Law Reform* 22, no. 1 (1988): 19-116.

9. Denise, K.D. (2001). Twenty-five years of Corporate Governance research and Counting. Review of Financial Economics, 10, 191-212.

10. Dubrñck, Melvin. "Sarbanes-Oxley and the Search for Accountable Corporate Governance Dynamics *Capital Market Regulation,* edited by Justin O'Brien. London: Imperial College Press, 2007.

11. Eaton, Sarah. "Crisis and the Consolidation of International Accounting Standards: Etiron, the IASB, and America." *Business and Politics* 7, no. 3 (2005).

*12.* Fama, Eugene F. "Agency Problems and the Theory of the Firm." be *Journal of Political* Economy g8, no. 2 (April 1980): 288-307.

13. Gordon, Jeffrey. "What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Rejections." In *Theories of Hiporate* Governance, edited by Thomas Clarke, 322-332. Abingdon: Routledge, 2004.

*14.* MacNeil, Iain. "Enforcement of Capital Markets Regulation: The United Kingdom and its International Markets." In *Private* Equity, *Corporate Governance and the* Dynamics o/ *Capital Market Regulation,* edited by Justin O'Brien. London: Imperial College Press, 2007.

*15.* McBarnet, Doreen. "Corporate Social Responsibility beyond Law, Through Law, For Law: the New Corporate Accountability." In *The New Corporate Accountability: Corporate Social Responsibility and the Law,* edited by Doreen McBarnet, Aurora Voiculescu, and Tom Campbell, 350. Cambridge University Press, 200a.

16. McBarnet, Doreen. *Crime, Compliance and Control.* Aldershot: Ashgate, 2004.

*17.* Pettet, Ben. “The Stirring of CO£/Orate social Conscience: From Cakes and Ale to Community Programmes.” In Current *Legal Problems: Law and Opinion* si ffi *End of the Tu›entieth* Cexlry, edited by Michael Freeman, 50:279. Current Legal Problems. Oxford: Oxford University Press,1997

18. Solomon, J. 2007. *Corporate Governance and Accountability.* (2nd ed) Chichester: John Wiley &Sons.

19. Thomas Riise Johansen and Kim Pettersson, The Impact of Board Interlocks on Auditor Choice and Audit Fees, *Corporate Governance: An International Review*, **21**, 3, (287-310), (2013). B

20. Wheeler, Sally. *Corporations and the third* way. oxford: Hart, 2002.

**ARTICLES**

1. Aguilera, Ruth V. “Corporate Governance and Director Accountability: an Institutional Comparative Perspective.” *British Journal of Management* 16, no. st (2005): 539-553.

2. Armour, John, Sinton Deakin, and Suzanne J Konzelrnann. “Shareholder Primacy and the Trajectory of UK Corporate Governance.“ *British Journal of Industrial Relations 41,* no. 3 (2003): 531-555.

3. Barnett, Michael L. “Stakeholder Influence Capacity and theVariability of Financial ReturnstoCorporateSocialResponsibility.”Academy*ofManagement*Series3

2,no.3 (July 2007):794-816.

4. Bauer, R., Gunster, N., Otten, R. (2004). Empirical Evidence on Corporate Governance in Europe: The Effect on Stock Returns, Firm Value, and Performance. Journal of Asset Management, Vol. 5, p. 91–104.
5. Beecher-Monas, Erica. “Corporate Governance in the Wake of Enron: An Examination of the Audit Committee Solution to Corporate Fraud.” *Administrative* Law *Rerieui E$, no*. 2 (2003):357-392.
6. Berle, Adolf. “The Impact of the Corporation on Classical Economic Theory.”In *Heories of Horate Governance,* edited by Thomas Clarke. Abingdon: Routledge, 2004.
7. Bhagat, S., Bolton, B. (2007). Corporate Governance and Firm Pperformance. University of Colorado, 57 p. Retrieved August 22, 2016 from http://www.econ.upf.edu/docs/seminars/bhagat.pdf. Bhagat, S., Bolton, B. (2008). Corporate Governance and firm Performance. Journal of Corporate Finance, Vol. 14, p. 257–273.
8. Bies, Robert J., Jean M. Bartunek, Timothy L. Fort, and Mayer N. Zald. “Corporations as Social Change Agents: Individual, Interpersonal, Institutional and Environmental Dynamics” (July 2007):788-793.
9. Blue Ribbon Committee 1999. Report and Recommendations of Blue Ribbon Committee on Improving the Effectiveness of Corporate Audit Committee.
10. Blumberg, Phillip, The Corporate Personality in American Law: A Summary Review’ (1990) 38 *The American Jo0ranl of Comparative* Lac, pp. 49-69.
11. Borckman, P., Lee, H. S., Salas, J. M. (2016). Determinants of CEO Compensation: Generalist–Specialist versus Insider–Outsider Attributes. Journal of Corporate Finance,

Vol. 39, p. 53–77.

12. Bottomley, Stephen, ”The Birds, the Beasts, and the Bat: Developing a Constitutionalist Theory of Corporate Regulation.” *Federal Law Review* 27, no. 2 (1999): 243-264.

13. Bottomley, Stephen, and Anthony Forsyth. “The New Corporate Law.” Working Paper Series. Monash University Department of Business Law & Taxation, June 2006.

14. Bradley, Michael, Cindy A. Schipani, Anant K. Sundaram, and James P. Walsh. “The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at aCrossroads.”*Law and Contemporary P r o b l e m s* 62,no.3(Summer1999):

15. Branson, Douglas. ”Enron When All Systems Fail: Creative Destruction or Roadmap to Corporate Governance Reform.” *Villanova Law Reveiw* 48, no. 4 (2003): 989-1021.

*16.* Bratton, William. “Enron and the Dark Side of Shareholder Value.” *Tulene LasRelies*76 (2002): 1275-1361.

17. Bucy, Pamela. “"Carrots and Sticks": Post Enron Regulatory Initiatives.”*Criminal Law› Review 8* (2004): 277-322.

18. Buxbaum, Richard. “Corporate Legitimacy, Economic Theory, and Legal Doctrlne.”*Ohio State* Lea *fournal* 45, no. 3 (1984): 515-544.

19. Cahill, Sandra,andPhilip Cahill“ScarletLetters:PunishingtheCorporate Citizen.”*International Journal* in *the* Sociology of Law 27 (1999): 153-165.

20. Campbell, John L. “Why Would Corporations Behave in Socially Responsible Ways?An

Institutional Theory of Corporate Social Responsibility" (July 2007): 946-967.

21. Cardilll,' Camilla M. "Regulation Without Borders: The Impact of Sarbanes-OxIey on European Companies." *Pordham Internal:tonal Law Journal* 27 (january 2004): 785.

22. Cerioni, Luca, and Andrew Keay. "Corporate Governance and the Corporate Objective in the European Community: Proposing a Re-Definition in Light of EC Law." European *Business Law review* 19, no. 3 (May 2008): 405-445.

23. Chaney, Paul K, and Kirk L Philipich. "Shredded Reputation: The Cost of Audit Failure." *Journal of Accounhng Research* 40, no. 4 (2002): 1221-1245.

24. Cheffins, Brian. "Current Trends in Corporate Governance: Going mom London tn MilanVlaToronto."Det*journalofComparativeandInternationalLain*10, no.1 (1999):5- 42.

25. Cheffirts, Brian. "Current Trends in Corporate Governance: Going from London to MilanviaToronto."Duke journal of*Comparativeand International*law 10,no.1(1999):5- 42.

26. Cheffirts, Brian. "Current Trends in Corporate Governance: Going from London to Milanvia Toronto. *and International*Lsm10,no.1(1999):5- 42.

27. Clarkson, M.E. "A Stakeholder Framework for Analyzing and Evaluating Corporate Social Performance." Academy *of Management* desire 20, no. 1 (1995):92-11.

*28.* Committee on the Financial Aspects of Corporate Governance. report of *the Committee* on the *Financial Aspects of Corporate* Governance *The Hdbu* ry *Report).* London:

Gee& co 1992

29. Committee on the Financial Aspects of Corporate Governance. *Report of the Committee on the Financial Aspects of Corporate governance Cadbury Report).* London: Gee & Co., 1992.

30. Committee on the Financial Aspects of Corporate Governance. *Report of the Committee on the Financial Aspects of Corporate Governance Cadbury Report).* London: Gee & Co., 1992.

31. Dallas, Lynn. "Two Models of Corporate Governance: Beyond Berle andMeans."*University* of *Michigan Journal of Law Reform* 22, no. 1 (1988): 19-116.

32. Deakin, Simon. "The Coming Transformation of shareholder Value." Corporate *Governance* 13, no. 1 (2005): 11-18.

33. den Hond, Frank, and Frank G. A. de Bakker. "Ideologicaly Motivated Activism: HowActivist Groups Influence Corporate Social Change Activities" (July 2007): 901-924.

34. Dewing, Ian, and Peter Russell. "Accounting, Auditing and Corporate Governance of European Listed Countries: EU Policy Developments Before and After Enron. " Journey *of* C*ommon Market Siudies* 42, no. 2 (2004):289-319.

35. Dharwadkar R, 'Privatization in Emerging Economies: An Agency Theory Perspective,' (2000) 25 *The Academy of Management Revieu,* pp. 650-669.

36. Dobson Juan, 'Lifting the Veil" in Four Countries: The Law of Argentina, England, France and the United States"(1986)35 international *and Comparative*

*Law Quarterly*pp. 839-863.

37. Donaldson, Thomas, and Lee E. Preston. “The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications.” The *Academy of Management* Review› 20, no. (January 1995): 65-91.
38. Eric Mang’unyi :Ownership structure and corporate governance and its effect on performance : A case of selected banks in Kenya(2001)2 international journal of business Administration
39. Fairfax, Lisa M. “Shareholder Democracy on Trial: International Perspectives on the Effectiveness of Increased shareholder Power.”*Virginia Law and Business Review*3,no. 1 (2008):1-33.
40. Freedman Judith, ‘Limited Liability: Large Company Theory and Small Firms’ (2000) 63 *Moderrn* Let terteit , pp.317-354.
41. Freeman, R. Edward, Andrew C. Wicks, and Bidhan Parmar. “Stakeholder Theory and "The Corporate Objective Revisited".” *Organizai:ion Science* 15, no. 3 (May I, 2004): 364- 369.
42. Friedman, Milton. “The Social Responsibility of Business Is to Increase Its Profits.” *New York Times*, September 13,1970.
43. Frydman n et al, When Does Privatization Work? The Impact of **Private** Ownership or Corporate Performance in the Transition Economies (1999) 114 Quarferly *Jonrnal of Economics,* pp. 1153-1191.
44. Gamble, Andrew, and Gavin Kelly. “Shareholder Value and the Stakeholder Debate in theUK.”*CorporateGovernance.’AnInternational review*

9,no.2(April2001):110.

45. Gamble, Andrew, and Gavin Kelly. “Shareholder Value and the Stakeholder Debate in theUK.”*CorporateGovernance.’AnInternational review* 9,no.2(April2001):110.

46. Garriga, Elisabet, and Doménec Melé. “Corporate social Responsibility Theories: Mapping the Territory.” *Journal of Business Ethics* 53, no. 1-2 (2004):51-71.

47. Giovanni DF., Efficiency and Privatisation in Imperfectly Competitlve Industries (1991) 39 Journal of Indusoial Economics, pp. 311-321

48. Green, Ronald. ”Shareholders as Stakeholders: Changing Metaphors of Corporate Governance.” *Washington and Lee* Law *Review* 50, no. 4 (1993): 1409-1423.

49. Greenfield, Kent. ”Proposition: Saving the World with Corporate Law.” *Emo*ry *Law Journal* 57, no. 4 (2008): 948-984.

50. Greenwood, Daniel J”fictional Shareholders: ’For Whom is the Corporation Managed,' Revisited.” *Southern California Law ReviewVol. 69, pp. 1021-1104, 1996*69,no. 3 (1996): 1021-1104.

51. Hansmann, Henry,and Reiriier H. Kraakman. “The End OF History For Corporate Law.” *Georgetown Law Journal* 89 (2001): 439.

52. Hendry, John. “Beyond Self-Interest: Agency Theory and the Board in a Satisficing World.” *British Journal of Management* 16, no. st (2005): S55-S63.

53. Hill, Jennifer G. ”Visions and Revisions of the Shareholder.” American *Journal of Comparative Law›* 48, no. 1 (2000): 39.

54. Hill, Jennifer G. ”Visions and Revisions of the Shareholder.” *American Journal of Comparative Law* 48, no. 1 (2000):39.

55. Husted, Bryan W, and Jose de Jesus Salazar. “Taking Friedman Seriously: Maximizing Profits and Social Performance.“ *journal of Management* Studies 43, no. 1 (2006): 75-91.

*56.* Ireland, Paddy. “Company Law and the Myth of Shareholder Ownership.”*Modern*Los› Sertes 62, no. 1 (1999): 32-57.

57. Ireland, Paddy. “Corporate Governance, Stakeholding, and the Company: Towards aLess Degenerate Capitalism?.” *Journal of Law* and *Society* 23, no. 3 (1996): 287-320.

58. Ireland, Paddy. “Shareholder Primacy and the Distribution of Wealth.” *Modern Law Review* 68, no. 1 (2005): 49-81.

59. Jerbi Scott, 'Business and Human Rights at the UN: What Might Happen Next? (2009)31, *Human Rights Querterly*299-320.

60. Karugor Gatamah Strenthening Corporate Governance The Kenyan Experience Organisation for Economic Co-operation and Development (2002

61. Keay, Andrew. “Company Directors Behaving Poorly: Disciplinary Options for Shareholders.“ *journal of Business law* (September 2007): 656-682.

62. Keay, Andrew. “Company Dlrectors Behaving Poorly: Disciplinary Optionsfor Shareholders.” ***Journal* o/** Business Lux› (September 2007): 656-682.

63. Keay, Andrew. “Section 172(1) of the Companies Act 2006: an Interpretation and Assessment.” *Company Lawyer* 28, no. 4 (2007): 106-110.

64. Kershaw, David. “Waiting for Enron: The Unstable Equilibrium of Auditor

Independence Regulation." *Journal of Law and Society* 33, no. 3 (2006):388-420.

65. Kiarie Mwaura: company directors duty of skill and care,a need for reform (2003)24 company Lawyer 283

66. Kojo Appiah-Kiibi, 'State-Owned Enterprlses and Privatisation in Ghana,' (2001) 39*Journal of Modern African* Studies, pp. 197-229

67. Kornhauser, Lewis. "The Nexus of Contracts Approach to Corporations: A Comment on Easterbrook and Fischel." *Columbia* L«tti *Review* 89, no. 7 (1989): 1449-1460.

68. Langevoort, Donald. "Managing the "Expectations Gap" in Investor Protection: The SECandthePost-EnronReformAgenda."*Villenora*L«mXerietti48,no.4(2003):1139- 1165. "The Social Construction of Sarbanes-Oxley." Michigan Lea Rates 105 (lune 200a: 1817-1855.

69. Lazonik, William, and Mary O'Sullivan. "Maximizing Shareholder Value: a New Ideology for Corporate Governance." Economy *and Society* 29, no. 1 (2000):13-35.

70. Lee Ian, "Is there a Cure for Corporate Psychopathy?" (2005) 42 *American Business lawJournal* (2005) 65.

71. Litvak, Kate. "The effect of the Sarbanes-Oxley act on non-US compaifies cross-listed in the US." *Journal of Corporate Finance* 13, no. 2-3 (lune 200Z): 195-228.

72. Lockett, Andy, Jeremy Moon, and Wayne Visser. "Corporate Social Responsibility in Management Research: Focus, Nature, Salience and Sources of Influence." Journal *of management studies* 43, no. 1 (2006): 115-136.

73. Loughrey, Joan , Andrew Keay, and Luca Cerioni. “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance.” *Journal of Corporate lawStudies,8* no. 1 (2008): 79-111.

74. Loughrey, Joan , Andrew Keay, and Luca Cerioni. “Legal Practitioners, Enlightened Shareholder Value and the Shaping of Corporate Governance.” *journal of Corporate Law Studies 8,* no. 1 (2008): 79-111.

75. Macey, Jonathan R., and Geoffrey P. Miller. “Corporate Stakeholders: A ContractualPerspective.” *T!ie University of Toronto law Journal* 43, no. 3 (Summer 1993): 401-424.

76. Macey, Jonathan. “Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties.” *S letson* Luis *Rerieit›* 21, no. 1 (1991):23-44.

77. Mackey, Alison, Tyson B. Mackey, and Jay B. Barney. “Corporate Social Responsibility and Firm Performance: Investory Preferences and Corporate Strategies” (July 2007): 817-835.

78. Macleans A. Geo-Jaja, ‘Decentralisation and Privatisation of Education in Africa: Which Option for Nigeria?' (2004) 50 international *Revieu of Education,* pp.307-323.

79. Maier Pauline, “The Revolutionary Origins of the American Corporation’ (1993) 50*William and Nic*ky Qu«zierly, pp. 51-84

80. Marquis, Christopher, Mary Ann Glynn, and Gerald F. Davis. “Community Isomorphism and Corporate Social Action.” *Academyof Management Review* 32,

no. 3 (July 2007):925-945.

81. McColgan, Patrick. “Agency Theory and Corporate Governance: a Review of the Literature from a UK Perspective” Working Paper Serles. University of Strathclyde,, May 22, 2001. http://accfinweb.account.strath.ac.uk/wps/journal.pdf.

82. McCorquodale R and Simons P, ’Responslbility Beyond Borders: State Responsibility for Extraterritorial Violations by Corporations of International Human Rights Law' (2007) 70(4) Modern Law Review 598 -625.

83. Miles L and Zhang Z, ‘Irrrprovlng Corporate Governance in State Owned Corporations in China: Which Way Forward? [2006] 6 *journal of Corporate Lan› Studies* 213.

84. Mwaura K, “Horizontality and the Bill of Rights: Defining Parameters of CorporateComplicity in Human Rights Violations” (2011) 7 *Law Society of Kenya Journal* 1.

85. Mwaura K, “Internalization of Costs to Corporate Groups: Part-whole Relationships, Human Rights Norms and the Futility of the Corporate Veil” (2012) 11 *journal of International Business end Law 1.*

86. Mwaura K., “Constitutional Resoucturing of Corporate Governance in State Owned Enterprises: Dynamism or Distraction?” (2012) 1 *tlniversity Journal of Mount Kenya Law School* 1.

87. Mwaura K., “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case *of* Kenya” (2007) 31 *Yordham Internahonal*

Lee› *Journal,*34.

*88.* Ouko A., “Management of Parastatals in Kenya: A Critique in Light of the New Constitution” (2011) *7* Lunn *Sociefi of Kenya Journal 47.*

89. Oviatt, Benjamin M. “Agency and Transaction Cost Perspectives on the Manager- Shareholder Relationship: Incentives for Congruent Interests.”Academy oJ *Manageitient Revieui* 13, no. 2 (April 1988):214-225.

90. Pearson, Ruth, and Gill Seyfang. “New Hope or False Dawn?: Voluntary Codes of Conduct, Labour Regulation and Social policy in a Globalizing World” (2001): 49-78.

91. RanjaTimothy,*Privai:izal:ioninEastAfrica.’*Gaps*end*Omissions*intheTechniques,*ESRF Study on Globalisation and the East African Economies,2004.

*92.* Ribstein, La££y. “Accountability and Responsibility in Corporate Governance.” *Notre*Dame Lac› derteiu 81, no. 4 (2006): 1431-1493.

93. Roach, Lee. ”The Paradox of the Traditional Justifications for Exclusive Shareholder Governance Protection: Expanding the Pluralist Approach.” *Company Lau›yer* 22, no. 1 (2001): 9-15.

94. Schmidt K., ‘The Costs and Benefits of Privatization: An Incomplete Contracts Approach (1996) 12 *Journal of law,* Economics, *Organizahon,* pp.1-24

95. Smith, Craig. “The New Corporate Philanthropy.” *Harvard* Business *levies* 72, no. 3(May 1994): 105-116.

96. Smith, D. Gordon. “Response: The Dystopian Potential of Corporate Law.”

*Emory Law Journal* 57, no. 4 (2008). 985-1010.

97. Sparkes, Russell, and Christopher Cowton. “The Maturing of Socially Responsible Investment: A Review of the Developing Link with Corporate SocialResponsibility.”*Journal of Business Ethics* 52, no. 1 (June 23, 2004): 45-57.

98. Sundaram, Anant K., and Andrew C. Inkpen. “The Corporate ObjectiveRevisited.”*Organization Science* 15, no. 3 (May 1, 2004): 350-363.

99. Sundaram, Anant K., and Andrew C. Inkpen. ”Stakeholder Theory and "The Corporate Objective Revisited". A Reply.” *Organization Science* 15, no. 3 (May I, 2004): 370-371.

100. Swift, Tracey. “Trust, reputation and corporate accountability to stakeholders.” *Business Ethics a European review* 10, no. 1 (January 1, 2001): 16-26.

101. Tricker, R. I. (1994).Corporate Governance: An international review. Oxford: Blackwel U.N. Conf. On Trade &Dev. (2001), World Investment Report 2001: Promoting Linkages.

102. Warren, Richard. “Company Legitimacy in the New Millienium.” *Business Ethics.a European Review 8*, no. 4 (1999): 214-224.

103. Wheeler, “Fraser and the Politics of Corporate Governance.” *Journal of Law and society* 26, no. 2 (1999): 240-251.

104. Wilson, Gary. “Business, State, and Community: ‘Responsible Risk Takers', New Labour, and the Governance of Corporate Business.” *Journal of Law and Society)* 27, no. 1 (March 2000): 151-177.

105. Wilson, Gary. "Business, State, and Community: 'Responsible Risk Takers', New Labour, and the Governance of Corporate Business." Journal *of Law and society* 27, no. 1 (March 2000):151-177.

106. Young, B. (2003). Corporate governance & firm performance: is there a relationship? Ivey Business Journal Online, p. 1–4.

107. Zahra, S. A., Pearce, J. A. (1989). Boards of Directors and Corporate Financial Performance: A Review and Integrative Model. Journal of Management, Vol. 15, No. 2, p. 291–3

**DISSERTATIONS**

1. Nag, A. (2007). "Corporate governance and performance of manufacturing firms listed in the Nairobi Stock Exchange". (*Unpublished MBA study*). University of Nairobi, Kenya

2. Onyango, L. (2009). "Governance structures of SNV in implementing its projects".(*Unpublished MBA study*). University of South Africa, South Africa.