

# CLIENT ALERT: BUSINESS LAWS (AMENDMENT) ACT, 2020.

## INTRODUCTION

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Simba & Simba Advocates is one of Kenya's leading full-service law firms, with a rich professional history built over a period of over twenty-five (25) years.

The Business Laws (Amendment) Act, 2020 (the "**Act**") was assented into law on 18<sup>th</sup> March 2020. The Act introduced amendments to several laws with the aim of simplifying the process of carrying out business in Kenya.

These amendments are a step forward in embracing technology while undertaking business in Kenya. They signify an embrace of the advancement of technology and a shift from the manual way of carrying out business to a digital one hence making the idea of the world as a "global village" more of a reality.

In this publication, we highlight the amendments which include the following:

## LAW OF CONTRACT ACT, CAP 23

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The definition of a signature has been amended to allow for electronic signatures when executing agreements. This amendment shall not only facilitate but also expedite carrying out of business in Kenya especially for persons who are not within the country as they can execute documents via electronic means.

## REGISTRATION OF DOCUMENTS ACT, CAP 285 (the "RDA")

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The RDA has been amended to provide for an advanced electronic signature and electronic signature.

An advanced electronic signature is a signature that is:

- i. uniquely linked to the signatory;

- ii. capable of identifying the signatory;
- iii. created using means that the signatory may maintain under his or her sole control; and
- iv. linked to the data to which it relates in such a manner that any subsequent change to the data may be detectable.

An electronic signature, on the other hand, refers to data in electronic form affixed to or logically associated with other electronic data which may be used to identify the signatory in relation to the data message and indicate the signatory's approval of the information contained in the data message.

The RDA has further been amended to allow the Principal Registrar to maintain the Principal and Coast Registries in both manual and electronic forms.

Additionally, persons are allowed to register the documents by filing them in either physical or electronic forms. These documents include: composition deeds, documents relating to shares in a joint stock company, debentures that do not assign an interest or right on immovable property, lease or licence on land for a term exceeding one year among others.

### **INCOME TAX ACT, CAP 470 (the "ITA")**

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Capital expenditure of at least Five Billion Kenyan shillings incurred on the construction of bulk storage and handling facilities for supporting the Standard Gauge Railway (SGR) operations of a minimum storage of one hundred thousand metric tonnes of supplies shall qualify for investment deduction at the rate of one hundred and fifty percent (150%) for the first year of income in which the storage facilities were first commenced or used.

This is an incentive by the government that is meant to encourage persons to invest in this line of business.

### **STAMP DUTY ACT, CAP 480 (the “SDA”)**

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The definition of the word stamp has been amended to include a mark impressed or embossed by electronic means. The Cabinet Secretary for National Treasury has been permitted to formulate regulations in order to give effect to this new provision.

### **KENYA INFORMATION AND COMMUNICATIONS ACT, 1998 (the “KICA”)**

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The KICA contained a prohibition of electronic signatures in documents of title. This prohibition has however been lifted by the Act.

### **OCCUPATIONAL SAFETY AND HEALTH ACT, 2007 (the “OSHA”)**

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Persons with less than one hundred employees are exempt from the provisions of registration of the workplace for the first twelve months from the date of registering the business.

The Cabinet Secretary may further exempt some premises from the above provision through regulations.

This amendment lessens the burden of setting up office on small and medium enterprises with less than one hundred employees.

### **LAND REGISTRATION ACT, 2012 (the “LRA”)**

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The LRA has been amended to allow for both physical and electronic instruments. This is evinced by the adoption of the definitions of electronic signature and advanced electronic signature as stipulated in the RDA.

The LRA further provides for both physical and electronic seals as opposed to just the physical seal as it previously was.

Further, it is no longer a requirement to produce rates and rents clearance certificates prior to registration of a transfer or vesting of property.

The LRA has been amended to provide that instruments that are processed and executed electronically by consenting parties either by way of advanced electronic signatures or electronic signatures shall be deemed to be validly executed. The Lands Registrar may dispense with the requirement of verifying these documents.

Persons claiming indemnity due to any rectification of the register or on any other grounds provided under the LRA shall apply to the Chief Land Registrar in the prescribed manner for investigation and consideration.

An applicant aggrieved by the Chief Land Registrar's decision may appeal the decision to a court in the prescribed manner.

### **COMPANIES ACT, 2015 (the "Companies Act")**

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The Companies Act has been amended to do away with the requirement of a company affixing its seal on a contract. A contract will therefore be considered to be validly executed by a company if it is signed on behalf of the company by two authorized signatories or by a director of the company in the presence of a witness. The contract however has to be made in writing and adhere to the requirements provided under the Law of Contract Act.

Companies are no longer required to have company seals for use within or outside Kenya. It is no longer a requirement for companies to affix their seals on securities issued as well as documents creating or evidencing securities so issued. Share certificates shall be proof of a member's title to shares in a company if they are duly executed. Previously, share certificates had to bear the company seal in order to be valid.

Companies with bearer shares are required to convert them into registered shares within nine (9) months from 18<sup>th</sup> March 2020. Companies shall be required to inform the Registrar of Companies of this conversion within thirty (30) days post conversion. Holders of bearer shares shall not be able to exercise the rights attached to such shares before they are converted into registered shares.

Companies that fail to adhere to the conversion within nine (9) months shall commit an offence which upon conviction shall attract a fine of not more than Five Hundred Thousand (Kshs. 500,000/=)

Finally, the threshold for undertaking a takeover has been reverted to ninety percent (90%) from fifty percent (50%). This is a welcome amendment that seeks to protect the rights of minority shareholders by raising the bar that qualifies an offeror to buy them out.

### **INSOLVENCY ACT, 2015 (the “Insolvency Act”)**

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Considerations on whether to lift a moratorium have been increased to include:

- i. Whether the moveable property that is the subject of the application is perishable or may cease to exist if the application is not granted; and
- ii. Whether the moveable property that is the subject of the application is used to maintain the company as a going concern

These amendments are key in ensuring that perishable goods or moveable goods that have the potential of maintaining a company that is party to insolvency proceedings as a going concern are not allowed to waste away. This is of particular importance because insolvency proceedings are not meant to further harm the debtor but to manage its activities for the benefit of its creditors.

In case of any questions in relation to this client alert, please contact Monica Wairagu ([monica@simba-advocates.com](mailto:monica@simba-advocates.com)) or write an email to [info@simba-advocates.com](mailto:info@simba-advocates.com)



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