

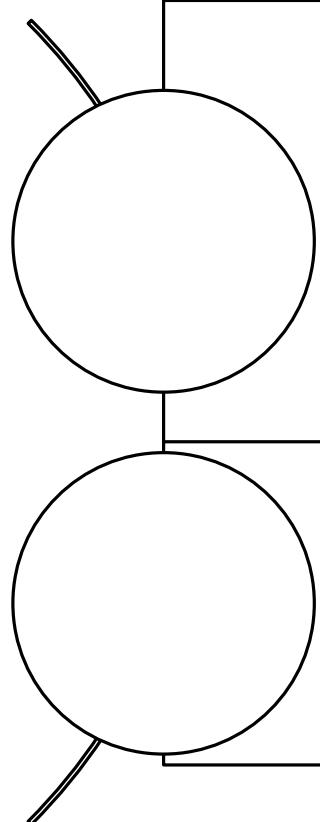
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**END OF CHAPTER FIVE**

**WELCOME TO CHAPTER SIX**

**LAW OF AGENCY**

# Nature of agency



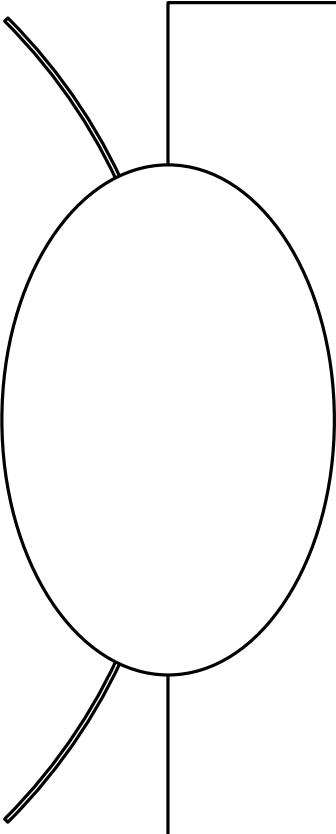
An agent is a person who has authority or power expressly or impliedly to act for or represent another (known as the principal) in dealing with third parties.

The law assumes that one who does an act through another does it himself.  
The relationship between the agent and the principal is known as agency.

The Insurance Act defines an agent as a person who is not being a salaried employee of an insurer, but who in consideration of a commission, solicits or procures insurance business on behalf of an insurer or broker.

# Cont'd

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**Note that once the agent brings the principal and the third party into contractual relations, he has no further interest in the agreement, and therefore drops out.**

**It is important to understand that when an agent is employed to buy or sell, or arrange some other contract between the principal and third person, the agent is not usually a party to the contract arranged.**

**For this reason, it is not necessary for the agent to have full contractual capacity, provided the principal and third party have such capacity.**

**The principal can sue or be sued under the contract.**

**The agent is therefore said to be a connecting link, a mechanism, an intermediary and a middleman. Examples of agents include estate agents, travel agents, employment agencies, insurance intermediaries and advocates among others.**

**It is important to note that where an agency relationship exists, the scope of the agent's authority must be clearly defined.**

# Creation of agency relationship

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Agreement/consent

Implication/conduct

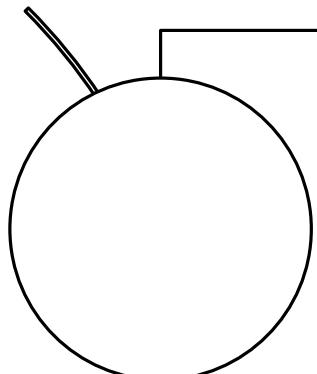
Necessity

Ratification

Apparent authority

# 1. Agreement/consent

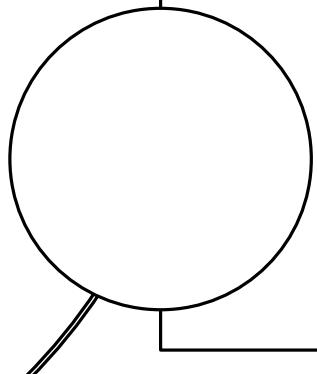
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**Creation of agency relationship through agreement can be in writing, verbal or evidenced in writing.**

**Where one is appointed to execute a deed by the principal, the appointment must be by deed. This is known as power of attorney.**

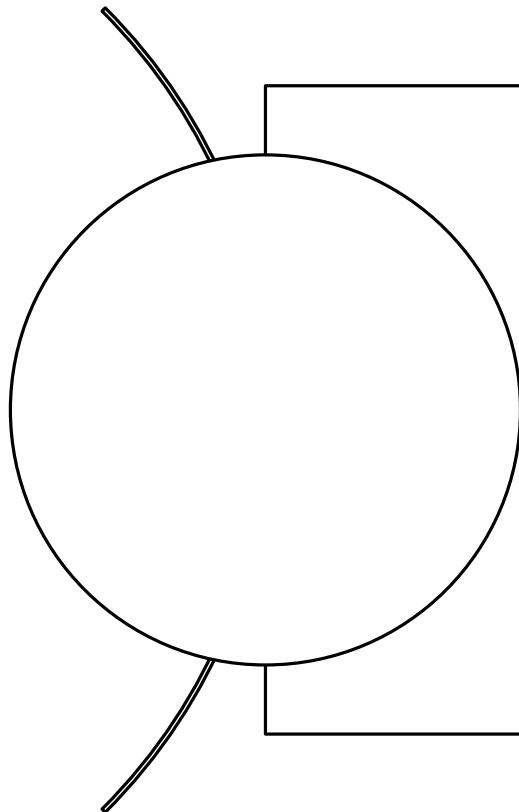
**There will be no agency contract where the agent receives no commission, fee or other payment for his work.**



**An agency contract will have to clearly stipulate the duties and the rights of the parties, the extent of nature and of authority of the agent, the form of remuneration of the agent and the duration of the contract.**

## **2. Implication/conduct**

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**This is where courts infer an agency relationship based on the conduct or relation of the parties especially where payment is made**

# Cont'd

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## **Agency by Estoppel:**

This is where one is made to believe they are agents especially where the undertake acts on behalf of another and payment for their services is made.

The principal will be estopped from denying that an agency relationship exists.

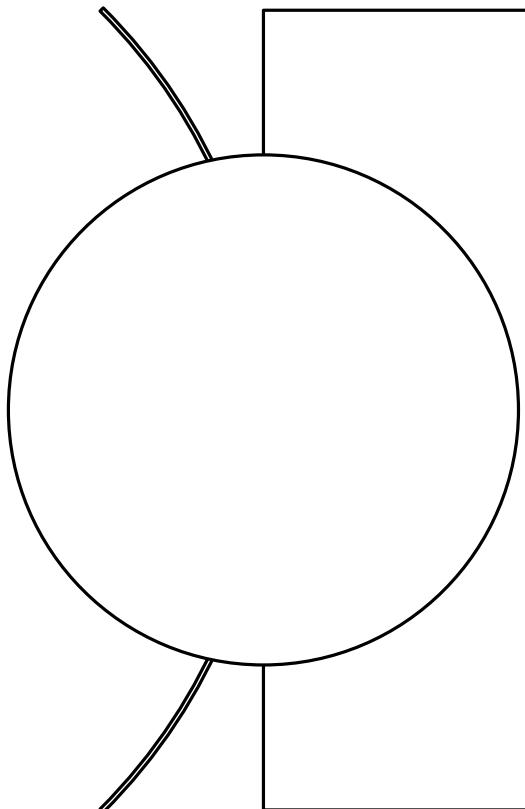
## **Implied by Cohabitation:**

This will be inferred or assumed for a husband and wife where the wife pledges the husband's credit for purchase of necessaries.

The husband can however rebut this presumption by proving that he had sufficiently provided for necessities and that he had forbidden the wife to pledge his credit.

### 3. By necessity

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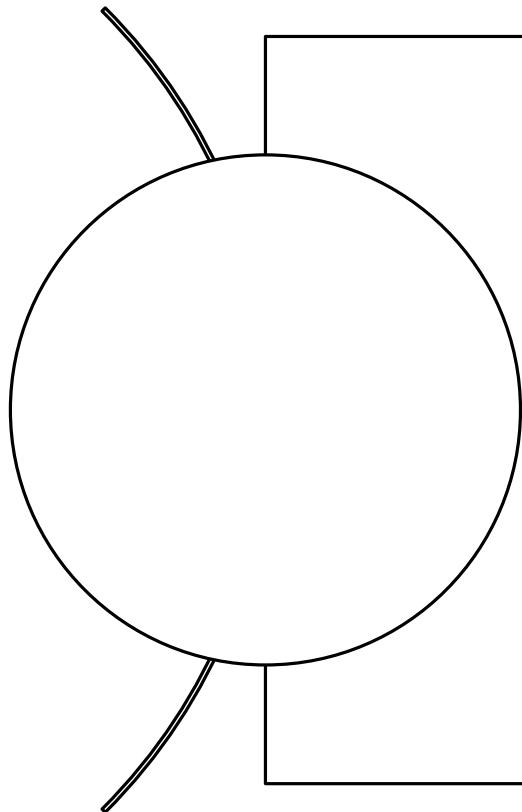
This arises where one is entrusted with goods/property belonging to another and by reason of genuine emergency acts with the intention of protecting the principal's property from deteriorating. The action must, however, be done in good faith and in circumstances where it is impossible to obtain the owner's instructions in time.

The agent should not act for his own benefit.

Examples are consignments on high seas, cargos carried by railway companies which can be sold by the carrier when further transport becomes impossible and the cargo is in danger of going bad.

## 4. By ratification

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**This is where the agent acts without prior authority or exceeds the authority given.**

**The principal may choose to decline responsibility for the act or ratify the same.**

**Ratification means the principal accepts the act as having been done properly on his behalf.**

**Agency by ratification is created retrospectively that is, after the agent has undertaken the act.**

# Conditions necessary for valid ratification

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- The agent must purport to act on behalf of the principal and not on his own behalf;
- The principal must be in existence at the material time with full contractual rights;
- The principal must at the time of ratification have full knowledge of all the material facts regarding the agent's act;
- Ratification must be of the whole contract and not part of it;
- Ratification must be within a reasonable time;
- The principal must be the person the agent had in mind at the time of the act; and
- A void or illegal contract cannot be ratified.

# **Classes of agents**

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## **1. Universal Agents**

These agents have full powers to act for the principal. Examples of such agents a branch manager in an overseas branch of a company and an agent appointed by way of deed/seal.

## **2. General Agent**

A general agent is appointed to do anything within the authority/specify capacities given. A shop manager or employees of companies are appointed and their limits of authority are in most cases specified.

# Cont'd

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## **3. Special Agent**

These are agents appointed to do specified act or acts for example insurance agents are appointed to procure business and collect premiums on behalf of the principal but do not have authority to admit claims. Motor assessors are authorised to assess the extent of damage following an accident but cannot authorize the garage to carry out repairs on vehicles that they assess.

## **4. Del Credere Agent**

These agents guarantee to pay the principal where the third party fails to pay and as a result, their commissions are higher.

# Cont'd

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**5. Merchantile/Factor Agent;** These agents have actual possession of the property and can sell the property in their name; obtain insurable interest and possess lien on the principal's goods.

**6. Brokers;** These agents buy and sell goods on behalf of the principal at a commission. An example is stockbrokers and they bind the principal to the extent of their authority.

**7. Auctioneers;** They sell property by public auction, they are agents for the seller. They however must act professionally as they undertake their duties and required to take professional indemnity insurance in case of negligent acts in the course of their duties.

# Cont'd

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**8. Bankers;** They undertake certain duties on behalf of their clients for instance effecting standing orders on request thereby acting as agents.

**9. Commercial Agents;** These are self employed intermediaries who have continuing authority to negotiate the sale of or purchase of goods on behalf of another person (principal). The agent must be paid commission on 'repeat orders' where the agent was responsible for the subsequent order. The agent must also receive commission after termination of the agency contract where the transaction is mainly

# Duties of agents

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## 1. Obedience

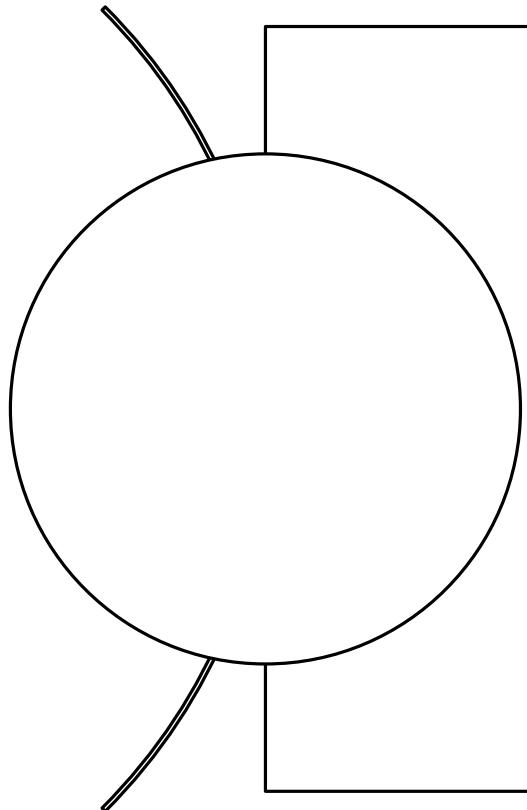
The agent is required to carry out the principal's work in accordance with the instructions given. The instructions, however, must be lawful and reasonable.

The agent may be held liable for damages for failure to adhere to the instructions as disobedience will lead to breach.

Where an insurance intermediary has no instructions on a particular point, he may follow market usage where such practice is clear.

## 2. Care and skill

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**An agent must exercise reasonable care, diligence and skill while carrying out the principal's work least he becomes liable for professional negligence.**

**An insurance intermediary must exercise a level of care and skill that is appropriate for the class of agent he represents.**

**A higher level of skill will usually be expected of an insurance broker than an agent. This is because the broker holds himself out to be an insurance expert.**

## Insurance intermediaries

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- The duty to exercise reasonable care and skill includes a duty to **act in a timely manner** and the intermediary will be liable for loss caused by his failure to act with appropriate speed, for example, in the placing of cover or the notification of claims.
- Where the insured suffers **loss as a result of the broker's negligence** in the exercise of their professional duty, the general measure of damages is that which will place the insured in the position that he would have been in were it not for the negligence.

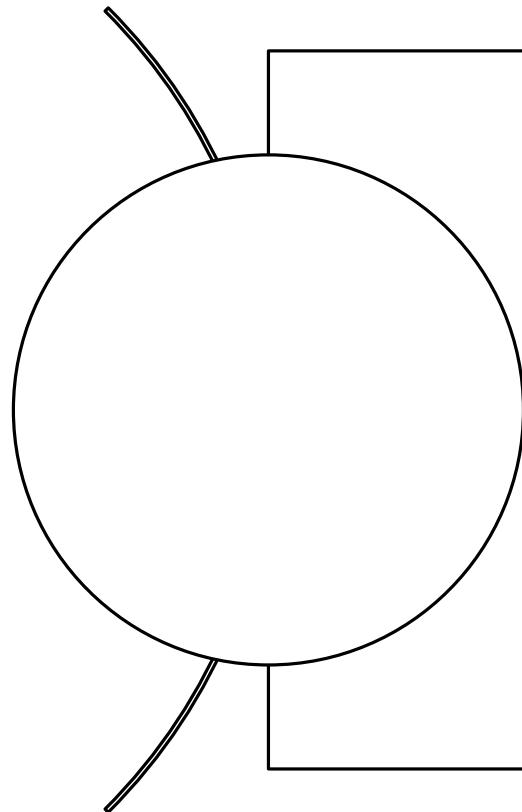
## Cont'd

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- Where there is negligent **failure to renew** and the insured suffers a loss that would have been covered by the policy, the broker will be liable in damages for the amount which would have been payable under the policy.
- Similarly, if a **broker fails to disclose material facts** on behalf of his insured, and the insurers discover this when investigating a claim, and they avoid the policy, the broker will be liable to the insured for the amount that would have been payable had the policy not been avoided.

### **3. Good faith**

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**The relationship between the agent and the principal is a fiduciary one based on good faith.**

**Where the agent fails to exercise good faith, he will be held liable.**

## Duties owed under good faith

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- ❑ Not conceal any relevant information from the principal;
- ❑ Maintain confidentiality;
- ❑ Not accept bribes;
- ❑ Not act for both parties;
- ❑ Not engage in acts that may amount to conflict of interest by letting personal interest to conflict with duties;
- ❑ Not accept secret commissions; and
- ❑ Generally act in the principal's best interest and not his own at all times.

## **4. Personal performance**

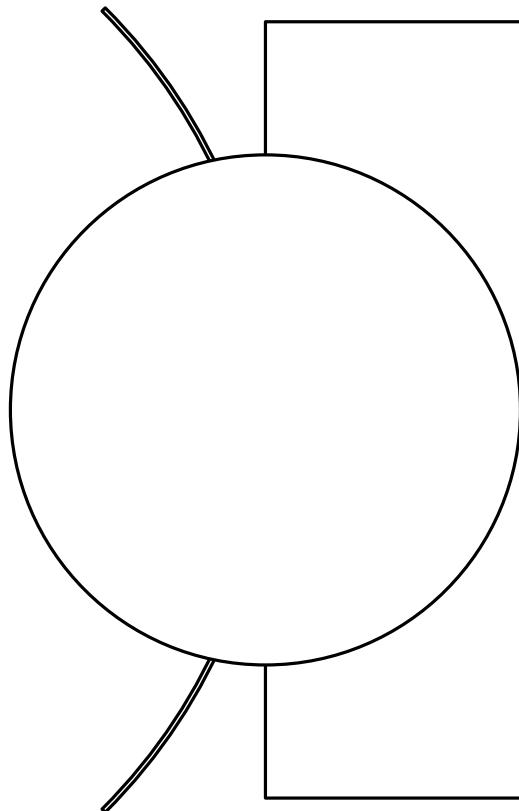
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**The agent should do the work personally and not delegate except in the following circumstances:**

- ❑ where delegation has been expressly permitted by the principal;**
- ❑ Where custom or trade allows delegation;**
- ❑ Where there is an unforeseen emergency;**
- ❑ Where it is necessary to finish the work properly and professionally; and**
- ❑ Administrative purposes.**

## **5. Accounting for money received**

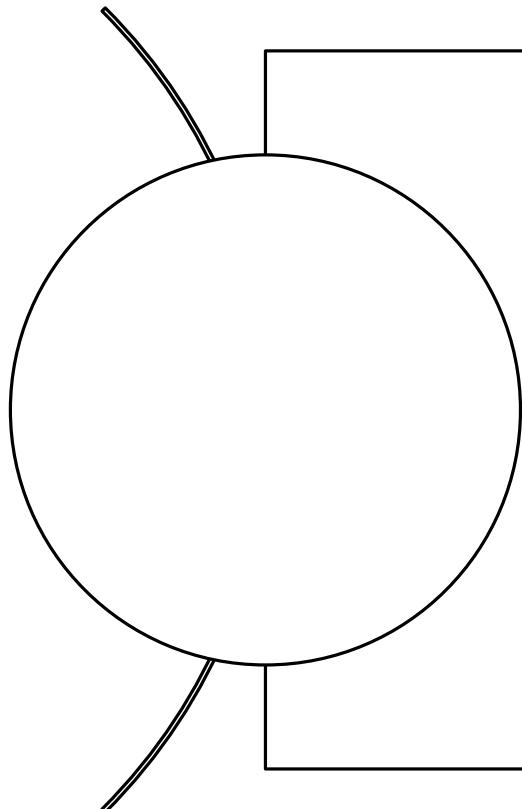
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**An agent should keep proper accounts and produce them to the principal when required; account for all monies received and also keep separate accounts that is, for himself and the principal.**

**This only applies where the agent collects money on behalf of the principal.**

## 6. Keep the principal updated



**An agent must keep the principal informed on all matters and developments with regard to the transaction they are engaged in on behalf of the principal.**

## Remedies available to principal for breach of duty by agent

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- Sue the agent for damages for breach of contract;
- In certain circumstances, sue the agent in tort. This may occur when the agent has refused to return the principal's property;
- Sue the agent to recover any secret money/bribe received by the agent;
- Sue for an account if the agent fails to keep proper accounts of the agency transaction; and
- Dismiss the agent without compensation.

# Rights of an agent

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**1. Indemnity;** An agent has a right to indemnity against all expenses and liabilities properly and lawfully incurred in the execution of his duties.

For example, if a broker pays premiums on behalf of his clients which is a common practice in insurance, he has the right to be repaid.

An agent may, however, lose this right if:

- His act is not authorized or ratified by the principal;
- He acts in breach of his duties;
- The act upon which they are claiming indemnity is illegal; and
- Where they incur liability out of their own fault or mistake.

## 2. Lien

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- ❑ This is where an agent retains the principal's goods as security for a debt (commission or any moneys owed) for example stockbrokers, bankers, advocates.
- ❑ There are two types of lien that is particular and general.
- ❑ An agent exercises particular lien when they retain the particular goods for which the payment is due.
- ❑ General lien is exercised when the agent retains as security any property.

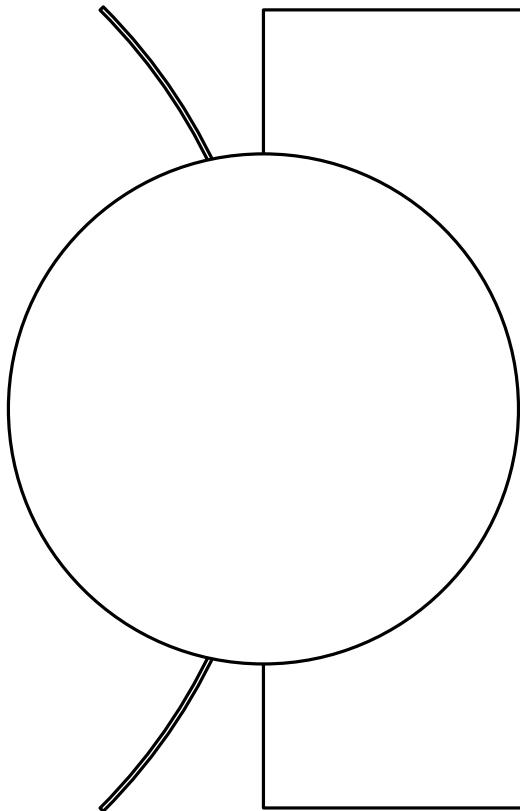
## Cont'd

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- The agent can retain the goods but cannot sell them unless they obtain a court order.
- The right of lien ends when the principal pays or makes a promise to pay.
- In marine insurance, for example, an insurance broker can exercise a lien over the policy and can retain it as security for payment of the premium by the insured.

### 3. Remuneration

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**This is normally in the form of commission or any reward agreed on.**

**The amount to be paid may be expressly stated in the contract, may be based on the trade usage or a court may award what is reasonable.**

**Work must be done or event happens prior to payment being made.**

**The level of commission for various lines of business will normally be set out in the agency agreement.**

# Authority of an agent - types

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Express

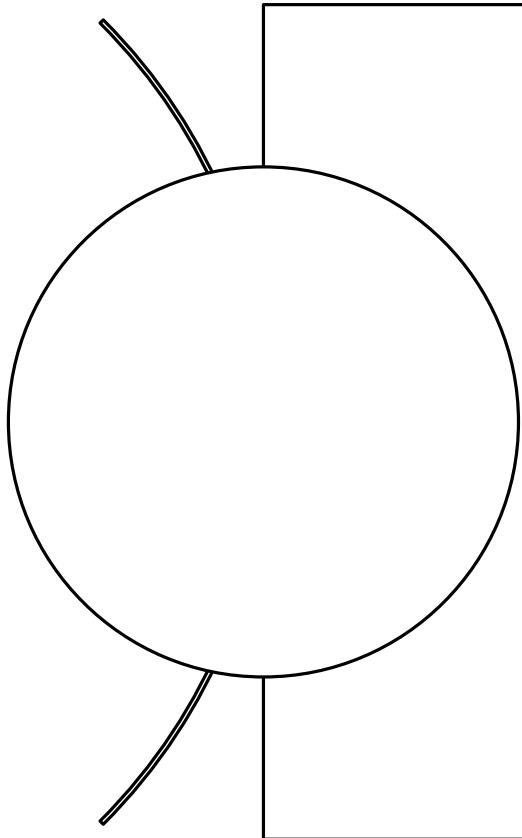
Implied

Usual

Apparent/ostensible

# **1. Express**

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**This is also known as real or actual authority.**

**This can either be in writing, orally or under seal.**

**Express authority arises from the instructions which have been given to the agent, stating what is required and what is allowed.**

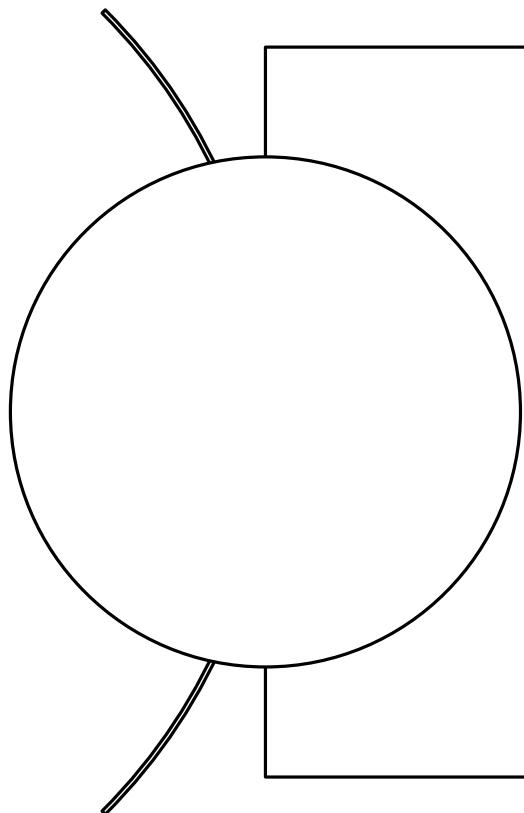
**These instructions form part of the agency agreement and may be oral or in writing.**

**If the instructions are ambiguous the agent should seek clarification from the principal.**

**However, if the principal cannot be contacted no liability will fall on the agent provided that the agent acted in good faith**

## **2. Implied**

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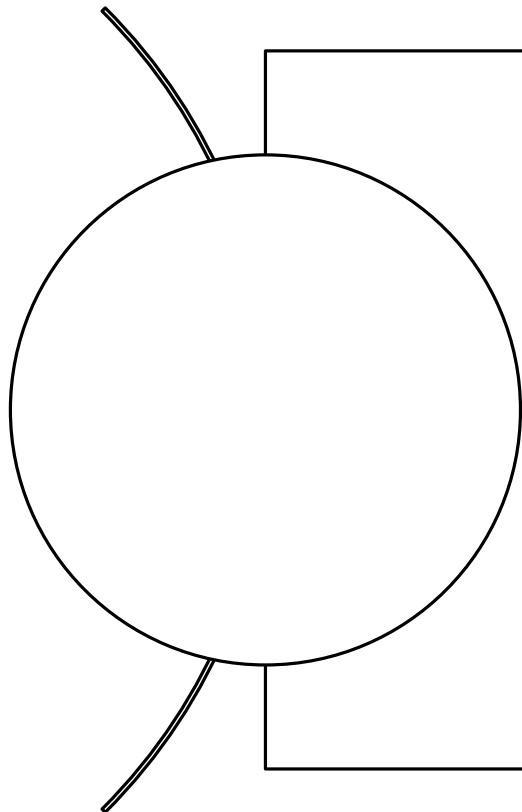
**This is authority to do anything necessary or incidental to carrying out of the express authority.**

**An investigator appointed by an insurer usually receives express instructions.**

**However, he may incur other expenses in the cause of executing their duties like mileage and telephone cost.**

### **3. Usual**

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**This is where an agent may have implied authority to perform those acts which are usually performed by persons in the agent's position or usual in a particular trade or profession.**

**This is known as usual authority or customary authority**

## 4. Apparent/ostensible

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- ❑ An employee placed in a position of responsibility may be assumed by third parties to have authority that matches with the position. Third parties will not know the exact limits.
- ❑ This authority is not real authority but one that appears in the eyes of third parties.
- ❑ The law recognises this by what is termed as apparent authority.
- ❑ However, the principal must make some presentation by words or conduct to the third party and the third party relies on the presentation.
- ❑ The principal therefore gives the agent appearance of authority.

# Where apparent authority may arise

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1. Where the principal has restricted the authority of a validly appointed agent;
2. Where an agent has never been appointed: a person may 'hold out' another person as being their agent when the latter has no authority at all, with the result that the third party is deceived. This is sometimes known as an agency 'by estoppel'; and
3. Unknown to the third party, the agent's authority has been terminated. When an agency is terminated, the actual authority of the agent will also end. However, third parties who deal with the agent may be unaware that their authority has ceased and continue to deal with them. For this reason a principal who terminates an agency should inform third parties who have dealt with the agent in the past.

# Relationship between the principal, agent and third party

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## DISCLOSED PRINCIPAL

- A disclosed principal is one whose existence is known to the third party at the time the contract is made.
- The principal's name may be known or not known.
- The third party will be aware that the person they are dealing with is an agent.
- The general rule is that the agent simply 'drops out' once the contract is made. The principal and third party can enforce the contract against each other but the agent can neither sue nor be sued on it.

## UNDISCLOSED PRINCIPAL

- This is where the identity or existence of the principal is not known.
- The agent acts without disclosing the principal but discloses that he is acting in the capacity as an agent and not as principal.
- The undisclosed principal will, however, be liable for the acts of the agent.
- Where the agent acts in a manner that third parties are not aware that they are dealing with an agent, the undisclosed principal and the third party will have rights against the agent.

## Circumstances where undisclosed principal may not enforce the contract against the third party

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- They did not exist or lacked capacity;
- They cannot ratify the contract;
- They cannot sue where there is a provision that the person making it is the sole principal; and
- The principal cannot sue if the third party can prove that they had a good reason for dealing with the agent personally.

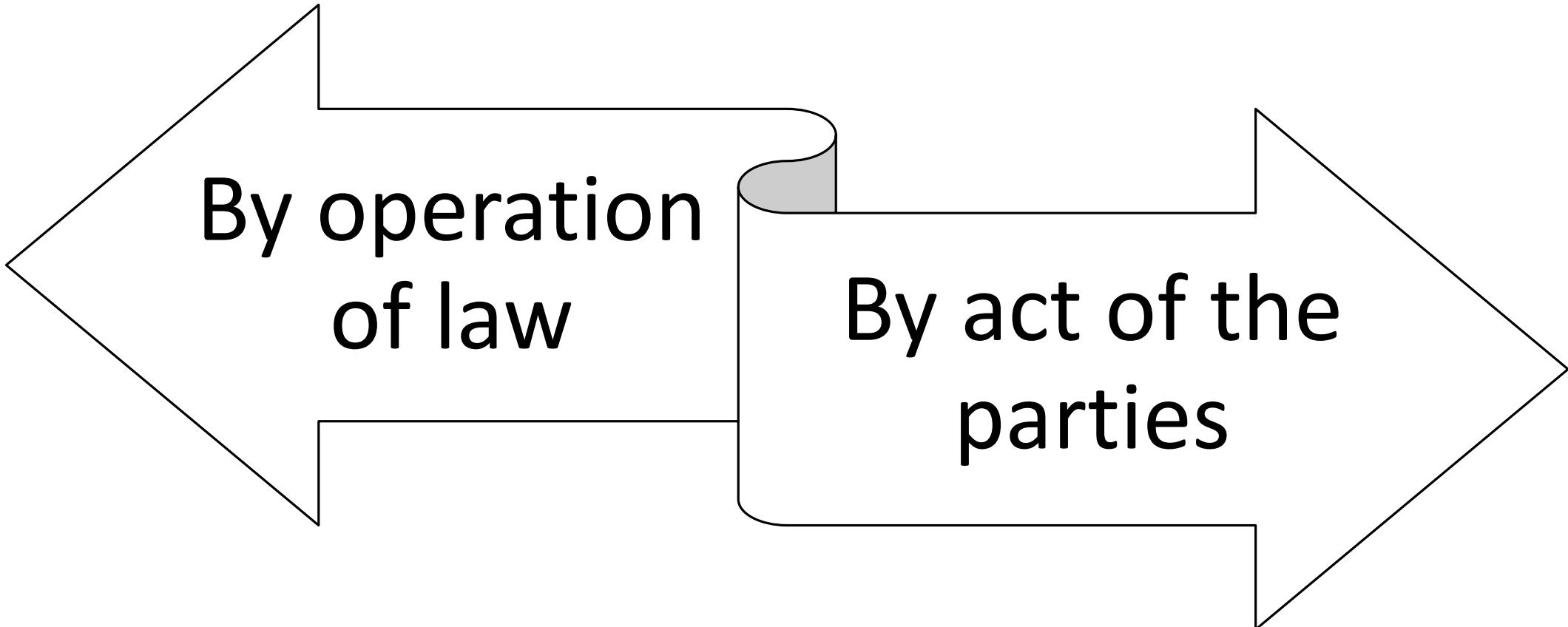
## **When an agent becomes personally liable**

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- If the agent expressly assumes personal liability;
- By trade or custom;
- Where the agent signs a negotiable instrument in his name;
- If he executes a deed in his name;
- If he acts for a concealed principal;
- If he acts without or in excess of his authority; and
- Where they are acting in dual capacity.

# Termination of agency relationship

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## Termination cont'd

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- Performance
  - Agreement
- Frustration
  - Subsequent illegality
- Bankruptcy
  - Death
  - Expiry of time

# Termination cont'd

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## **Renunciation**

**where the agent renounces the contract after giving notice to do so.**

**Where no notice is given, the agent may be sued by the principal for breach;**

## **Revocation:**

The principal may revoke or withdraw instructions and this may lead to breach of the contract if no notice is given.

The agent may lose the right to sue if he incurs personal liability.

The principal may also not revoke where he has given authority coupled with interest (where he borrows money from an agent and gives the agent property to sell on his behalf);

and secondly where he has given the power of attorney, he cannot revoke without the agent's consent

## Effects of termination

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- ❑ The agent will still have the right to commission/indeemny earned prior to termination;
- ❑ If the agent had been dismissed for breach or was in breach of his duties during the agency relationship, the right of action by the principal will remain; and
- ❑ If a third party has not been notified of the termination, the ostensible authority of the agent will remain and the principal will be liable for the actions of the agent.

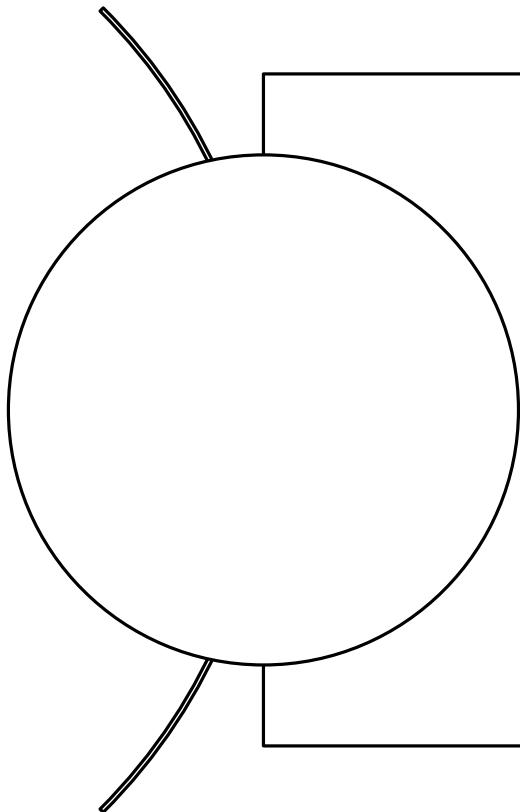
# AGENCY ROLES OF INSURANCE INTERMEDIARIES

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INSURANCE AGENTS AND BROKERS REGULATION

# Introduction

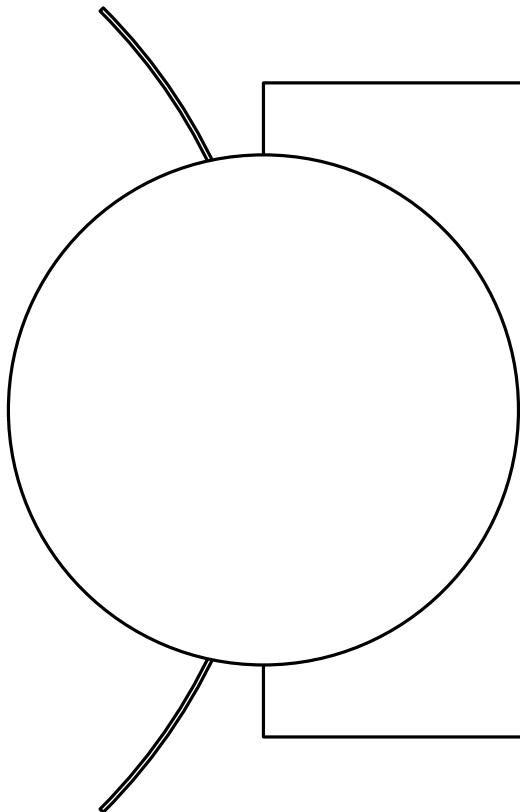
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**Generally an insurance agent operates as an agent of the insurance company while an insurance broker acts on behalf of the insured.**

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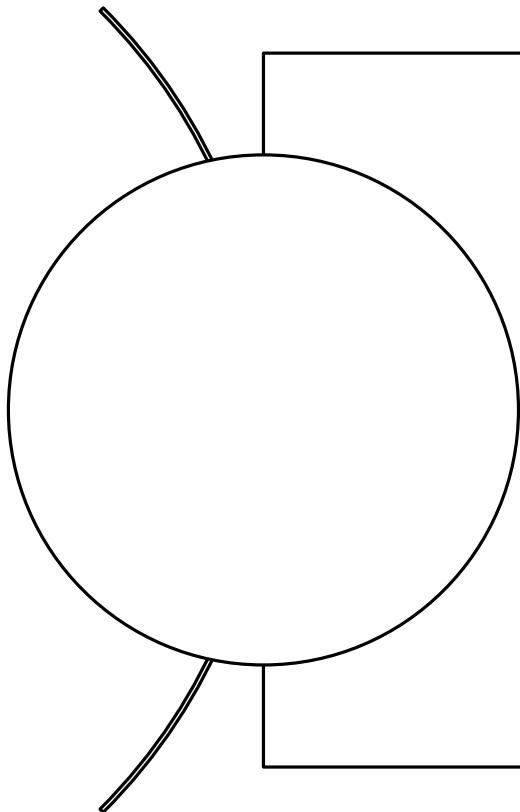
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**The agency relationship is governed by the maxim, 'qui facit per alium facit per se' means that what is done by an agent is deemed to have been done by the principal.**

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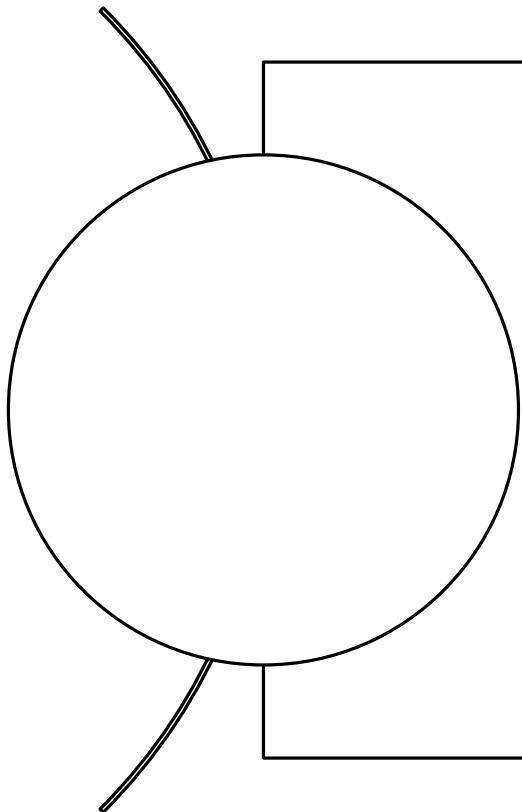
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**Any knowledge which the agent possesses is therefore imputed to the principal meaning, what is known to the agent is deemed to be known by the principal (imputed knowledge).**

Cont'd

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**Insurance brokers are required by law to maintain a professional indemnity cover with a minimum limit of indemnity of Kes. 10 million.**

## Cont'd

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An intermediary may at different times act on behalf of both the insured and the insurer.

- They may be negligent by exceeding their authority when granting cover,
- fail to record information given accurately,
- omit to record information that was supplied or
- fail to supply extra information that he knows or ought to know.

# Circumstances in which an insurance agent acts for the proposer

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- ❖ When they give **general advice** regarding the cover required by the insured and recommends the type of policy;
- ❖ If the agent completes the proposal form and the form and incorporates a wording to the effect that the person filling is not the proposer, the person will be deemed to be an agent of the proposer;
- ❖ Where he fills a proposal form on behalf of the proposer, alters information on the form or supplies extra information and the proposer knew or ought to have known;

## Cont'd

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- ❖ When the agent and the insured collude to defraud the insurer;
- ❖ When the agent advises the insured on how to formulate a claim; and
- ❖ If he acts on behalf of the insurer and he has no authority, he will be deemed to be acting for the proposer.

## An insurance agent acting for the insurer

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- ❖ Where he has express authority to receive and handle proposal forms;
- ❖ Where he acts without express authority, the third party assumes he has apparent authority and the principal ratifies the act as was in the case *Murfitt vs. Royal* (1922), where insurers had ratified the agent's ultra vires actions on two previous occasions and the insured assumed the agent had authority. It was held that the insurers were liable;

# Cont'd

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- ❖ Where the agent has express or implied authority to collect premiums on behalf of the insurer.

## Case: Wing vs. Harvey (1854)

Facts: The agent collected premiums from a client for a risk which he knew the client was in breach of a policy condition. The agent's action amounted to principal waiving their rights to reject the claim and the court estopped them from denying liability

- ❖ Where the agent has been authorized by the insurer to ask the insured questions and fill the proposal forms; and
- ❖ Where the agent acts as a risk surveyor and gives a description of the property to be insured on the insurer's behalf.

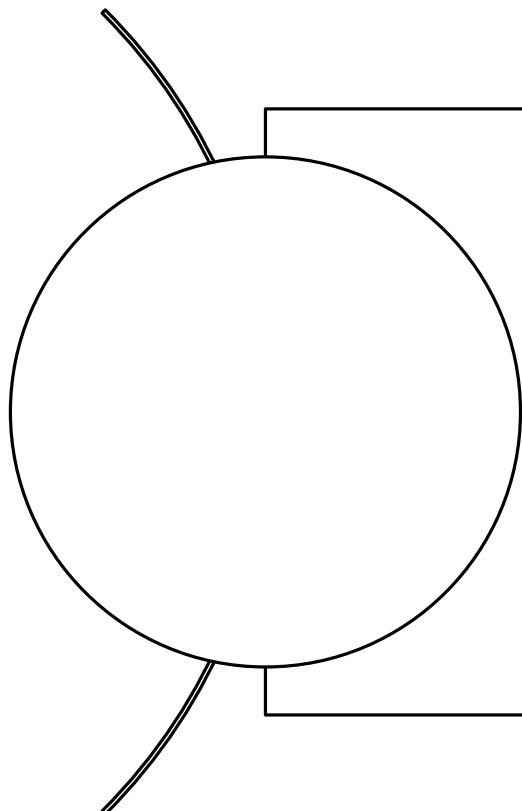
# A broker as an agent of the insurer

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- ❖ Product development
- ❖ Negotiation of claims
- ❖ Risk management
- ❖ Premium collection
- ❖ Risk survey

# Registration requirements for insurance intermediaries

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## **Registration requirements for insurance brokers and medical insurance providers**

**Before being registered as a broker or medical insurance provider, an applicant should meet certain requirements as provided for in the Insurance Act.**

## **Brokers and medical insurance providers**

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- ❖ Submit an application in the prescribed format;
- ❖ Pay the appropriate registration fee;
- ❖ Be a company incorporated under the Companies Act;
- ❖ Obtain a minimum security of KES.5,000,000 through the purchase of a two year bond from the Central Bank of Kenya (CBK);

## Cont'd

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- ❖ Have at least 60 per cent of its shares held by citizens of EAC member states;
- ❖ Have a minimum paid up capital of KES1,000,000;
- ❖ Have a fit and proper Principal officer; and
- ❖ Have a Professional Indemnity policy with a minimum limit of KES.10,000,000.

# Registration requirements for insurance agents

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- ❖ Complete an application form which is in a prescribed format;
- ❖ Pay the applicable registration fee;
- ❖ Submit copies of identification documents;
- ❖ Be a citizen of a EAC Member state;

Cont'd

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- ❖ Pass or be exempted from Certificate of Proficiency(COP) examination or Executive Certificate of Proficiency (ECOP);
- ❖ Submit a certificate of registration of business name for agents using a business name which, name must reflect the kind of business done; and
- ❖ Submit annual audited accounts in case of corporate agents.

## Reasons for denying an agent registration

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- ❖ They are persons of unsound mind;
- ❖ They have been adjudged bankrupt; and
- ❖ Where one has been convicted of an offence related to fraud, dishonesty within the preceding five years.

# Reasons for cancellation of an agent's licence

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- ❖ Failure to comply with or engaging in acts that are in contravention of the Insurance Act;
- ❖ Conducting business contrary to sound business practice;
- ❖ If the agent is declared bankrupt;
- ❖ Where the Cabinet Secretary in the ministry of Finance determines that it is not in public interest for the agent to continue operating;

## Cont'd

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- ❖ If an agent engages in unethical behavior or other malpractices and either has been found guilty or warned in writing by the commissioner; and
- ❖ Where the knowledge and experience of the agent is unable to satisfy the Commissioner that the business will be conducted in a satisfactory and efficient manner.

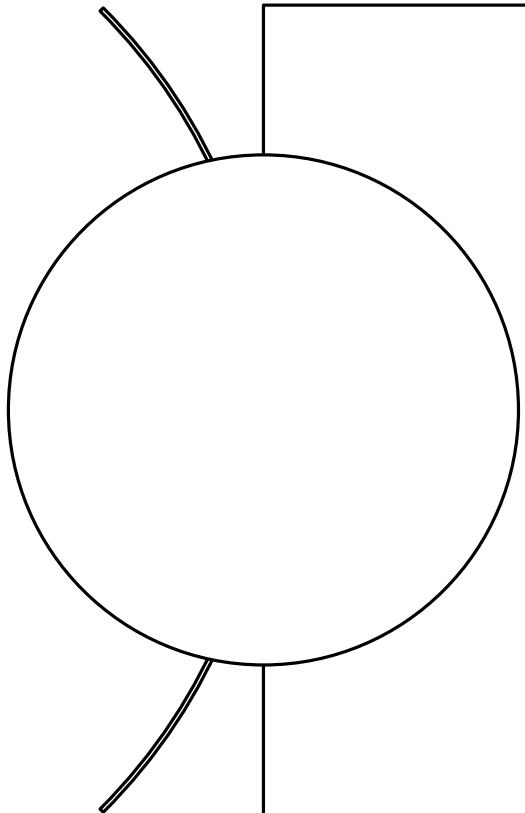
**END OF CHAPTER SIX**

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**WELCOME TO CHAPTER SEVEN**  
**COMPANY LAW**

# Introduction

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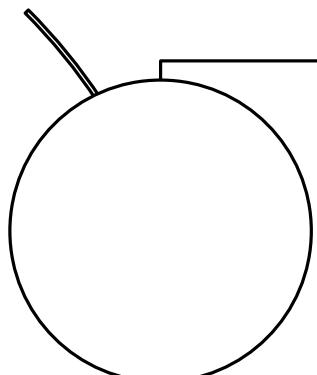


**In legal theory, the term company implies an association of a number of people for a common object/purpose.**

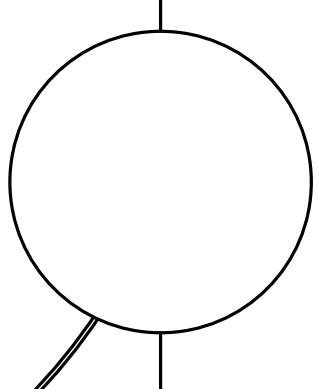
**Company law, on the other hand, is the field of law concerning companies and other business organisations which include corporations, partnerships and other associations which usually carry on some form of economic, social or charitable activity.**

# Relevant statutes

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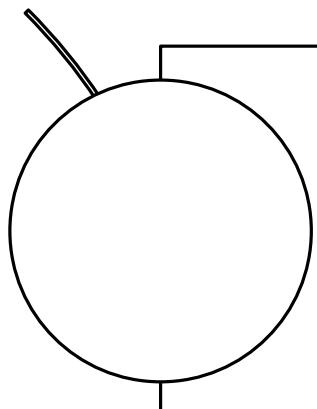
**The statutory provisions which govern formation, conduct, management and winding up of companies are contained in the respective companies Acts.**



**Company's Act No. 17 of 2015 which repeals the Company's Act Cap. 486 of the laws of Kenya.**

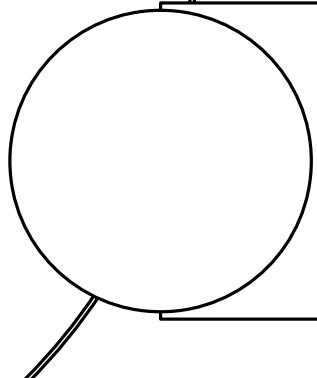
**Winding up (liquidation) of companies is governed by the Insolvency Act 18 of 2015.**

# Legal personality



A legal person is one who the law recognises as having certain rights and duties which the courts can enforce.

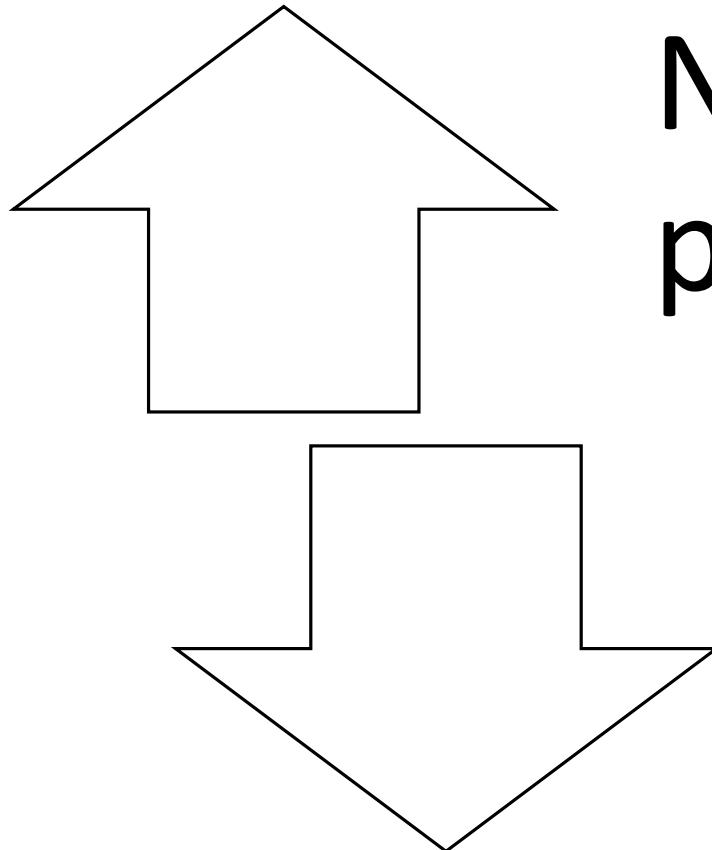
Generally all persons are subject to legal rules, which protect, give rights and impose duties on them.



However, the law does not affect everybody in exactly the same way for example, some organisations, minors, persons of unsound mind, bankrupts and other special categories have their own particular rights and duties.

## Categories of legal persons

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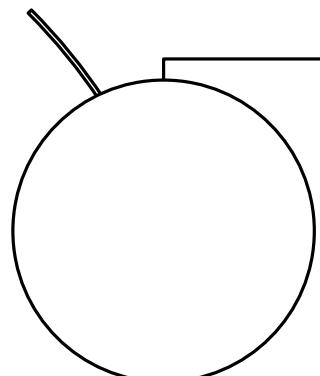


Natural legal  
persons

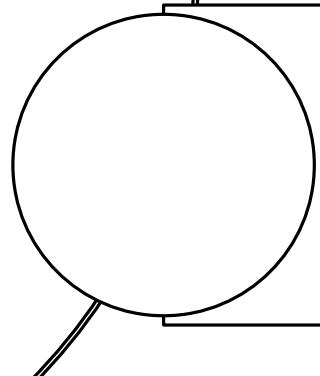
Juristic/artificial  
legal persons

# Natural legal persons

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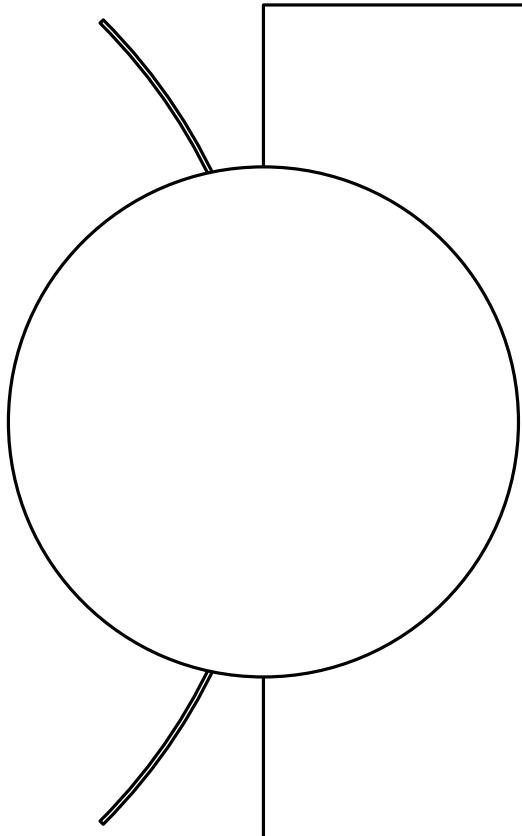
**All human beings are referred to as natural legal persons. Generally the legal personality starts at birth and ends at death.**



**Article 26 (2) of the Kenyan Constitution provides that life begins at conception.**

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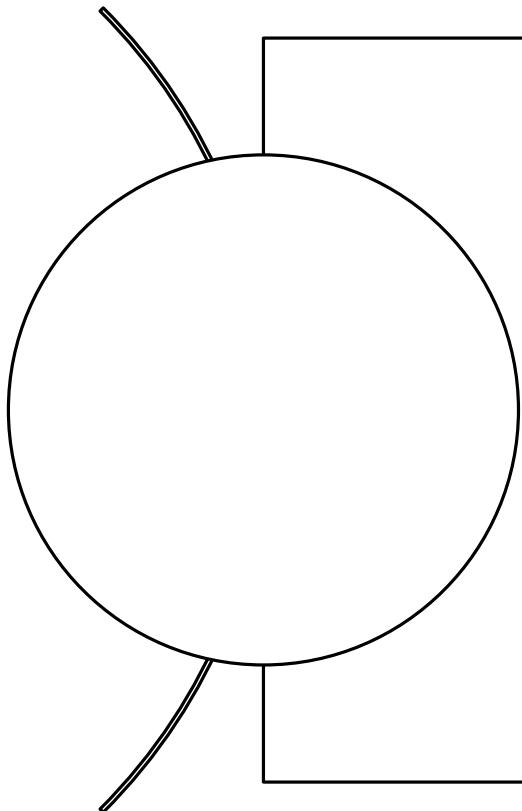
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**There are instances where one can sue for injuries sustained before birth and legal actions commenced before death can be continued after death.**

**The law also allows actions to be commenced on behalf of a deceased person after death.**

# Juristic legal persons



**Juristic persons, or corporations, are non-human legal entities and are sometimes known as artificial legal persons.**

**They are formed by people who wish to combine their resources for a common purpose.**

**Corporations vary in size and complexity from vast multi-national firms to small clubs and societies.**

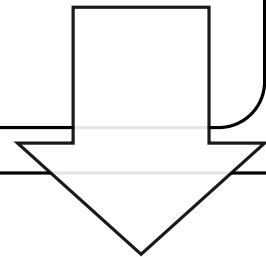
**Corporations may be classified as incorporated or unincorporated**

# Cont'd

**Corporations are subject to the law in much the same way as natural legal persons except where their very nature demands a different kind of treatment.**

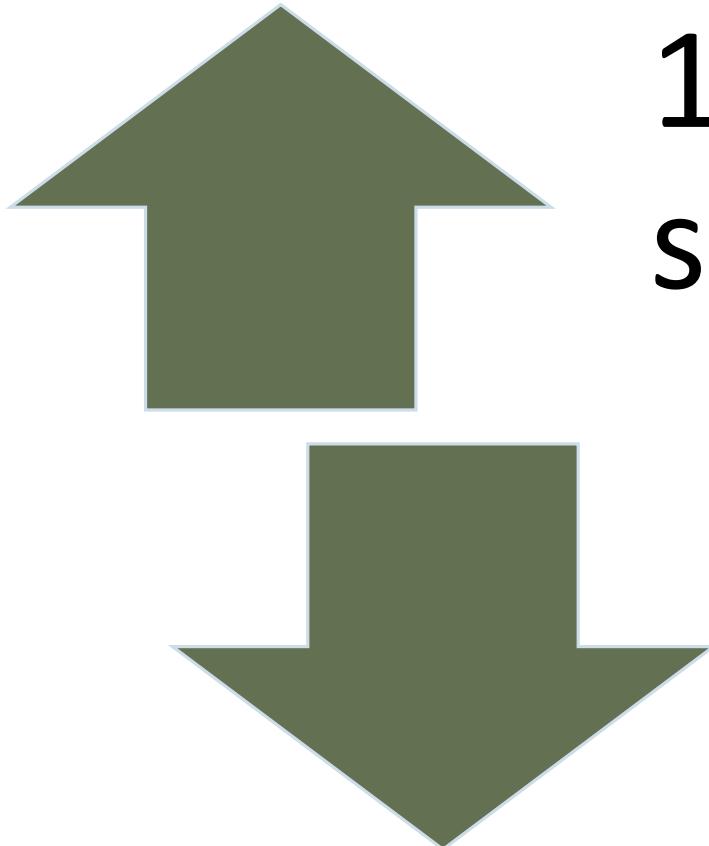
**A corporation may be found guilty of some crimes**

**They can be fined, but not imprisoned.**



# Types of corporations

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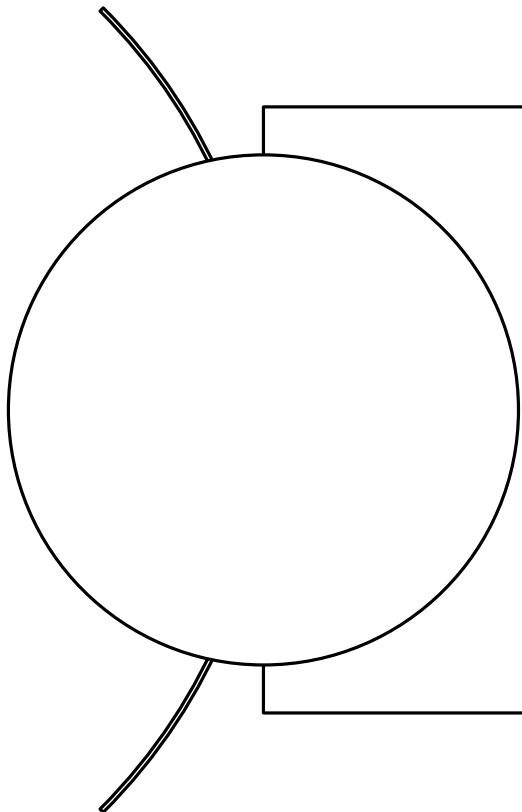


1. Corporation  
sole

2. Corporation  
aggregate

# A corporation sole

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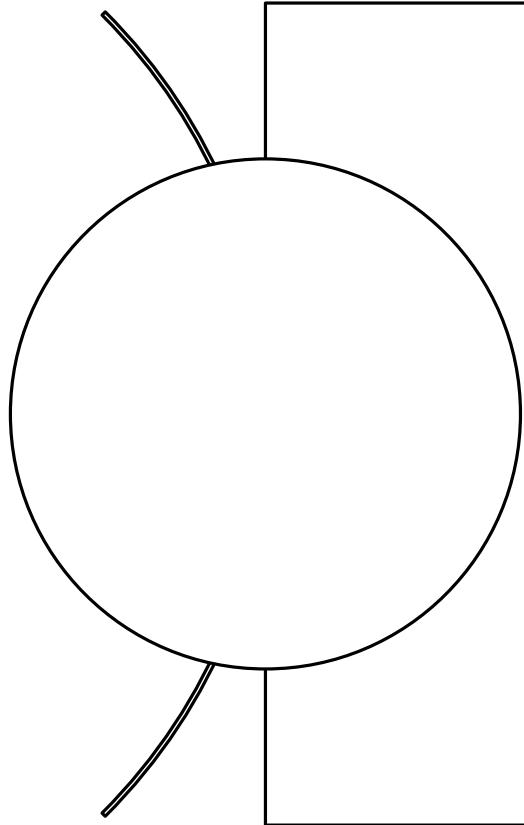


**A corporation sole is a legal person representing an official position which will be occupied by a series of different people. It is a legal entity consisting of a single "sole" incorporated office, occupied by a single "sole" natural person.**

# Examples

- 
- The president in his public capacity;
  - The queen in her public capacity;
  - The bishops and parish priests; and
  - The Public Trustee.

# Corporations sole

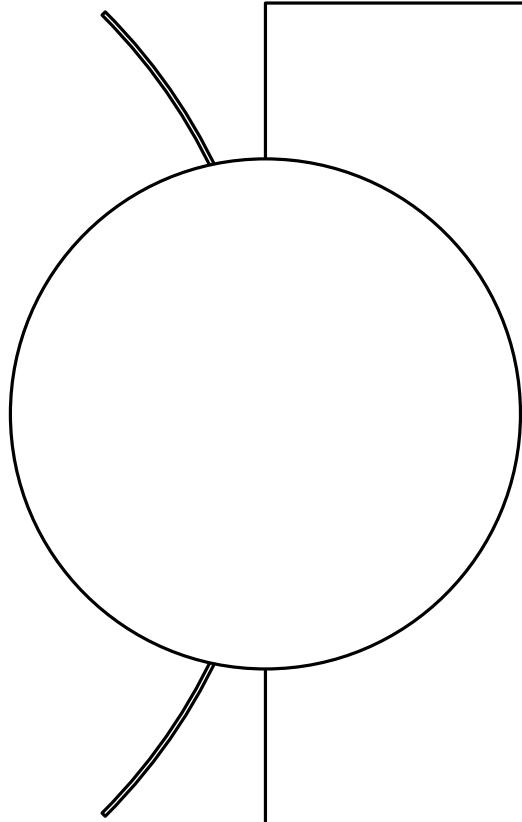


**They are legal entities which are quite distinct from the people who actually hold the positions at any given time.**

**When a bishop for example dies, he ceases to exist as a natural legal person but the office of bishop remains.**

**The corporation cannot die, and regardless of when the new bishop assumes office, there is no break in its powers and its property remains vested in it.**

# Corporation aggregate



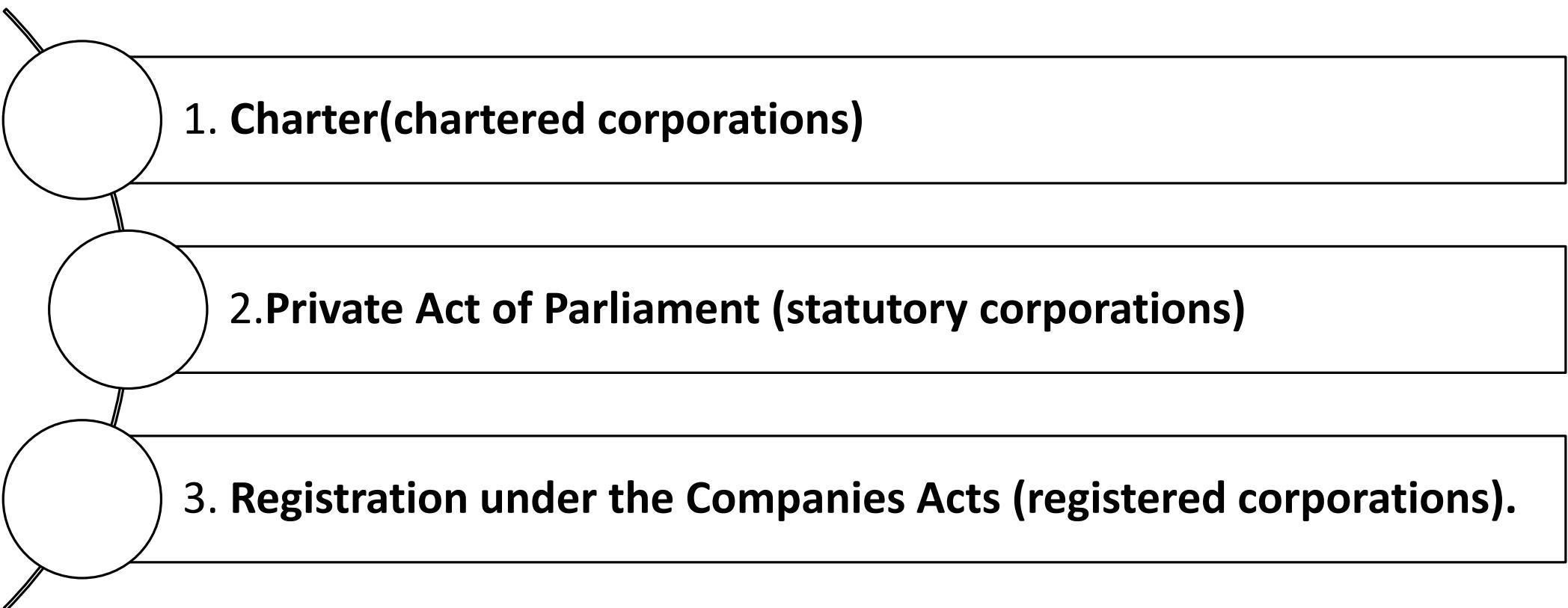
**A corporation aggregate is a legal person consisting of a number of people who come together for a common purpose.**

**Its legal existence is quite separate from the members.**

**Examples are universities in Kenya whose membership is always changing because of new admissions, resignations and deaths but the corporation does not change except to the extent that its charter and bye-laws may be altered from time to time and it has the same legal rights and liabilities as a natural person.**

# Creation of corporations aggregate

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- 
1. Charter(chartered corporations)
  2. Private Act of Parliament (statutory corporations)
  3. Registration under the Companies Acts (registered corporations).

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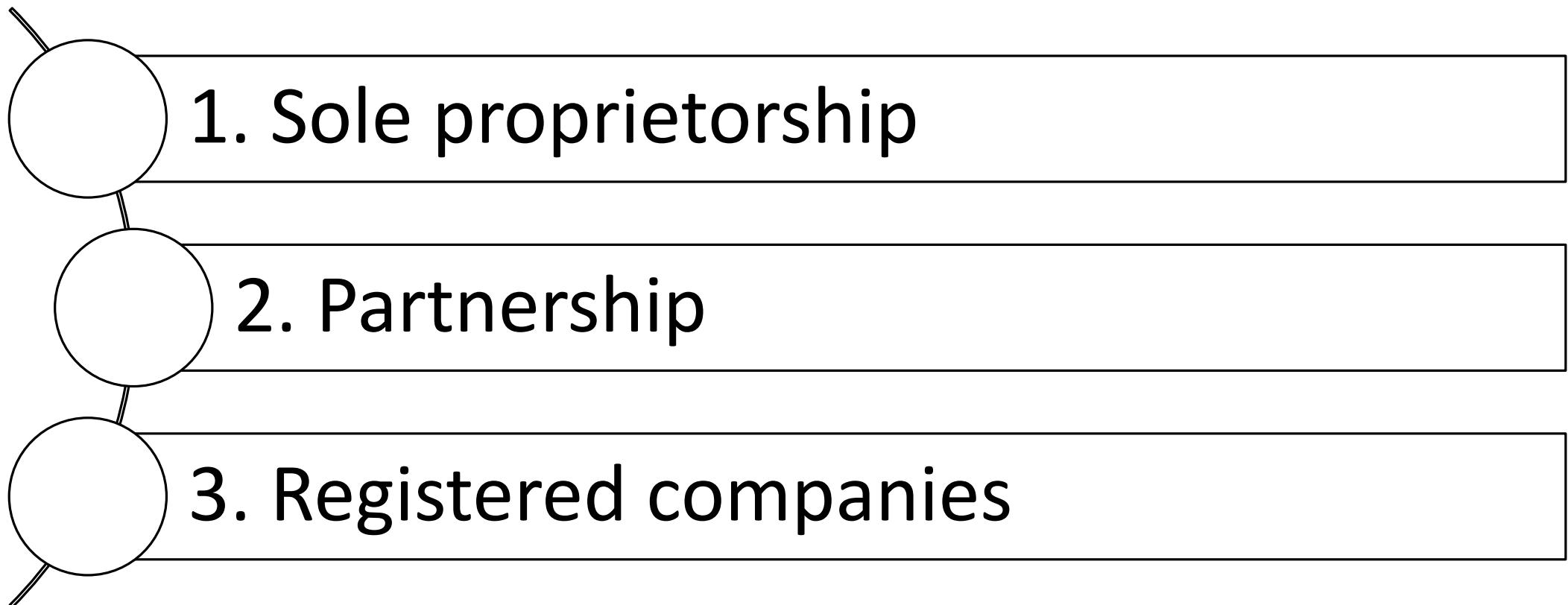
Welcome to session five

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# Forms/types of business organizations

# FORMS OF BUSINESS ORGANIZATIONS

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- 
1. Sole proprietorship
  2. Partnership
  3. Registered companies

# Sole proprietorship

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- ❖ These are also known as sole traders. They are natural persons engaged in business on their own without association with others.
- ❖ They are thus deemed to be unincorporated business (or trading) organisations.
- ❖ Generally there is no regime for the regulation as to setting up and conduct of business as a sole trader and anyone is, therefore, free to engage in any type of business activity.
- ❖ The only requirement is that where the business name is not that of the owner, the same must be registered with the Registrar of Companies within 28 days of commencement of business by virtue of the provisions of the Registration of Business Names Act (Cap 499).

## Cont'd

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- ❖ The main feature of the sole trader is that the owner and the business are the same i.e. the business is not a separate entity from the owner.
- ❖ The sole trader is therefore liable for the debts of the business to the full extent of their fortune.
- ❖ Sole proprietorships are the most common business structure.

# Advantages of sole proprietorship

- Formation
- Regulation

- Taxation
- Personal contact with customers

- Sharing of profits
- Decision making

# Disadvantages



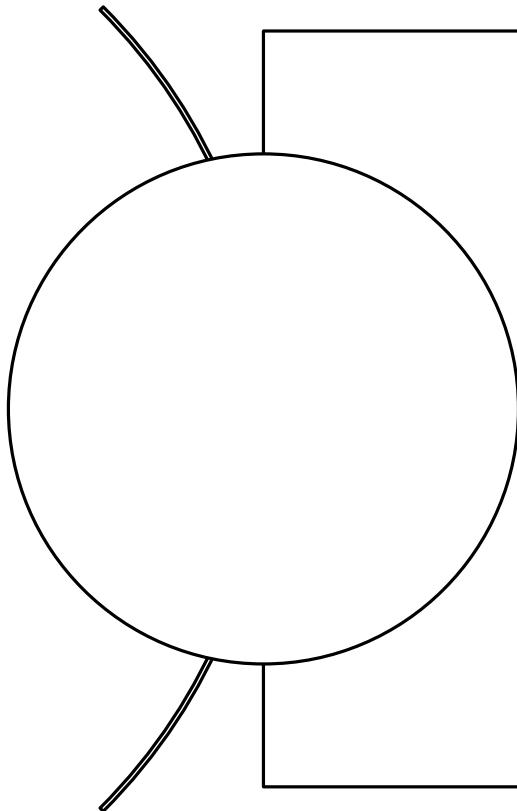
- Unlimited liability
- Lack of continuity in case of death

- Expansion
- Limited expertise

- Losses
- Financing

# Partnerships

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A partnership is the relationship existing between two or more people carrying on business in common with a view to profit.

In Kenya, there is limited regulation for this class of business under the Partnerships Act (Cap 29).

A partnership can have up to 20 members.

# Cont'd

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- ❖ The partnership is not a separate legal entity and therefore the partners own all property of the firm jointly.
- ❖ A partnership is therefore merely the association of persons carrying on business together. Partnerships are not limited liability organizations and consequently the partners are liable for the debts of the business to the full extent of their fortunes.
- ❖ It is possible to have some of the partners having limited liability in which case such firm is known as a limited liability partnership. The only caveat here is that even then at least one partner must have unlimited liability. Such is known as a general partner with the other(s) being limited partners.

# Cont'd

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- ❖ In Kenya, the Limited Liability Act, 2012 now allows persons (individuals and body corporate) to register limited liability partnerships that are body corporate with a legal personality of their own. The Act requires such businesses to employ managers and make declarations of solvency or insolvency to the registrar of companies.
- ❖ In a partnership, each member of the firm is the agent of the other partners and is therefore liable for any wrongs committed by any of the other partners, provided they are committed in the course of business.
- ❖ Partnerships are formed by simple agreements unlike companies which require the registration of various documents – partnership deed/agreement
- ❖ A partnership is not affected by the rules of *ultra vires* and therefore can engage in any business activity.

# Key features of partnerships

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- ❖ Scope of activities may be changed by mutual agreement
- ❖ All partners normally play an active role in management
- ❖ Details of accounts and affairs may be kept private
- ❖ Partnership must be in business 'with a view to profit'
- ❖ All partners must agree to the appointment of a new partner
- ❖ All partners other than limited partners have unlimited liabilities for the debts of the firm

## Cont'd

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- ❖ Any partner can bind the partners in a contract with third parties.
- ❖ All partners are jointly and severally liable for meeting the obligation of contracts on behalf of the partnership
- ❖ No corporate existence. A partnership like a sole proprietor is not a separate legal entity like a limited company. It is the partners who are liable.
- ❖ All partners share profit according to agreement.
- ❖ The name of each partner and the business addresses must be showing clearly on business documents.

# Advantages

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- ❖ Raising finances
- ❖ Increased expertise - division of labour
- ❖ Sharing losses
- ❖ Formation procedure is simple
- ❖ Not subject to ultra vires rule

# Disadvantages

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- ❖ Unlimited liability
- ❖ Lack of continuity – death or withdrawal
- ❖ Sharing profits
- ❖ Slow decision making
- ❖ One partner's acts binding the others
- ❖ Disagreements in controlling the business

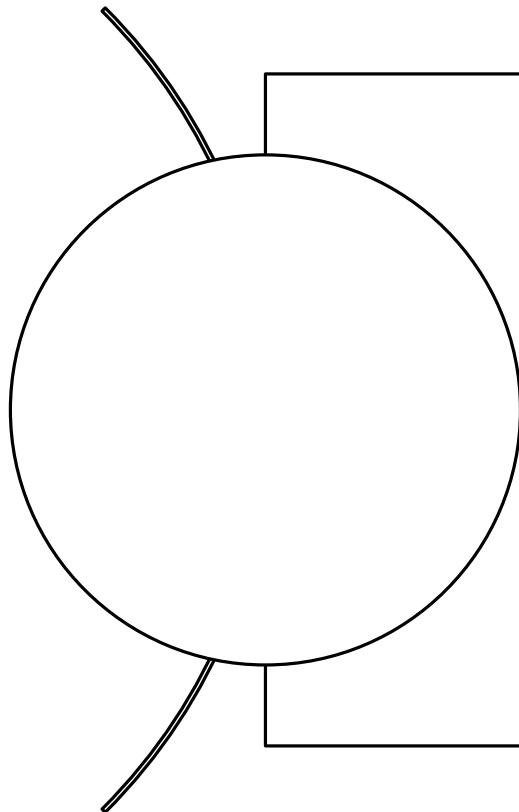
# Features of unincorporated associations

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- ❖ Unincorporated associations are groups of people which have not been incorporated through detailed legal procedures
- ❖ They range in size and importance from small social clubs and voluntary organizations with a few participants, to trade unions with memberships of a million or more.
- ❖ Unlike corporations, unincorporated associations are not generally treated as separate legal entities although there are 'quasi-corporations' which share some characteristics with corporations.
- ❖ They are simply groups of individuals, each of whom is a natural legal person with their own legal rights and responsibilities.

# Contracts

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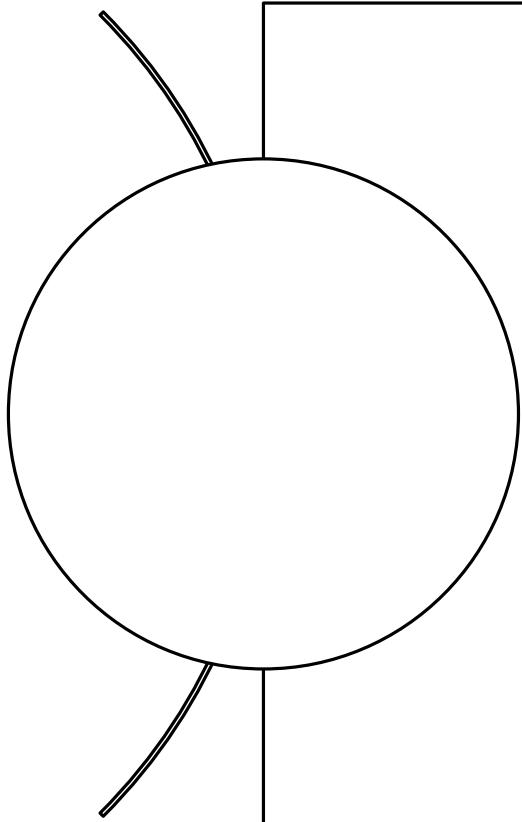
A member who makes a contract on behalf of an unincorporated association, such as a social club, is usually personally liable on the contract.

This means that a member who orders goods or supplies for the use of a club is personally liable to pay for them.

The other members of the club will be liable only if they authorize or ratify the making of the contract, which may well happen if the rules of the club provide for it

# Tort

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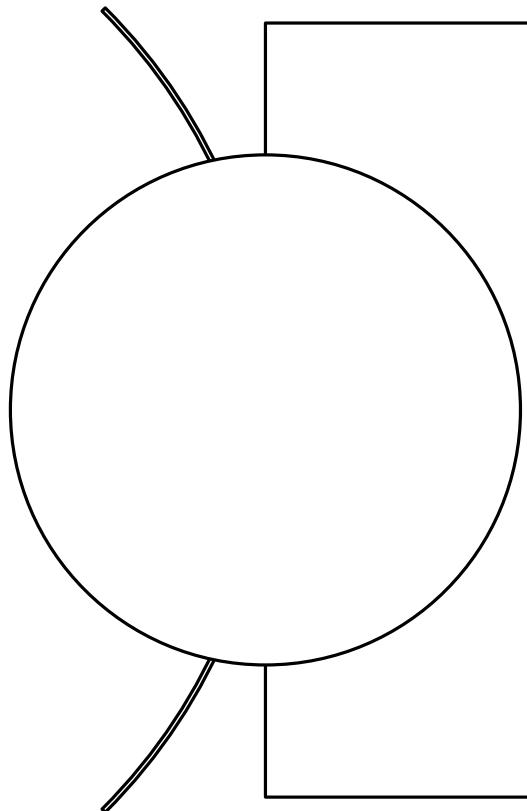


Members of unincorporated associations are generally liable for their own torts, even when they are committed in the course of the association's activities. Therefore, if one member of a club negligently injures another the former is personally liable and no other member will bear any responsibility.

However, if a person is injured as a result of the dangerous condition of the club's premises which it occupies, the committee which runs the club may in some cases be liable, depending again on the rules of the association.

Again, if a person is injured as a result of the negligence of an employee of the club the person or persons who appointed them may be vicariously liable. Vicarious liability arises where a person is held liable for a legal wrong committed by another.

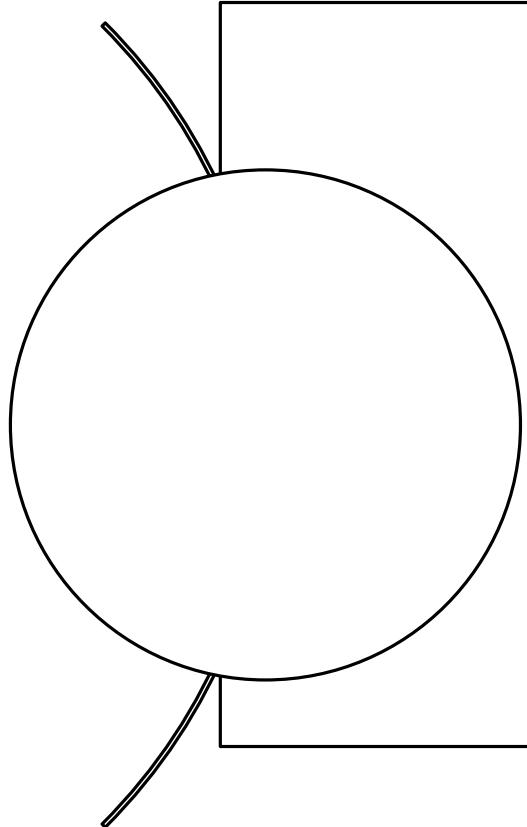
# Ownership of property



Since an unincorporated association such as a club has no distinct legal existence it cannot own property, property thus belongs to the members jointly. For this reason, it is commonly arranged for club property to be held by trustees for the benefit of the association, in order to keep it separate from the members' own property.

The members may, subject to the rules of the association, call for the dissolution of the trust, in which case the property will be divided amongst them in accordance with the rules of the association. In fact, if a club is dissolved for any reason, and whether or not its property is held in trust, the club property will be divided amongst the members in this way.

# Rights of members



The rights of members generally depend upon the rules of the club. Every member is deemed to be in a contractual relationship, governed by the rules, with every other member.

Therefore, a member who is denied rights given to them by the rules such as the right to vote or who is wrongfully expelled, may be able to sue for damages for breach of contract or for an injunction to prevent the association from acting in breach of the rules.

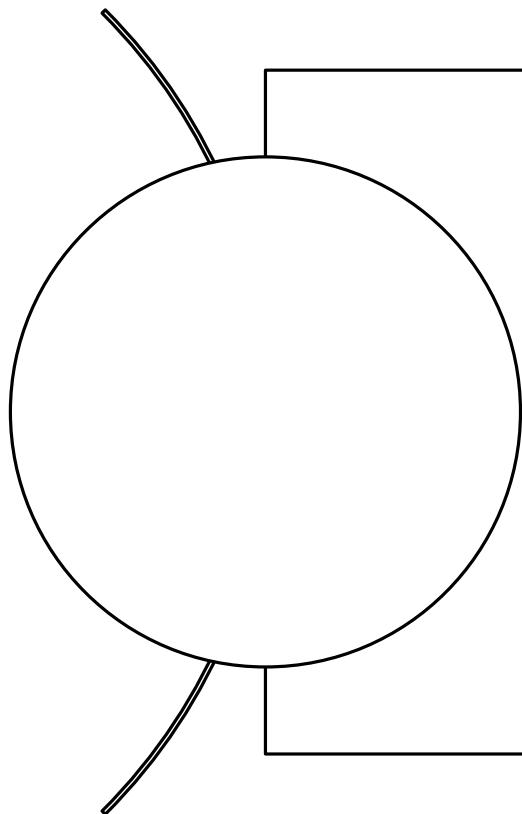
The action may be brought against all the members personally or, if this is impractical, the aggrieved member may apply for a representative order against a certain member or members only, such as the secretary or officers of the club.

# State corporations

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- ❖ Our concern are state corporations formed by the government for trading purposes under specific statutes of parliament.
- ❖ They may be formed under statutes enacted specifically to create and provide for them, e.g. the Kenya Railways Corporation, Kenya Meat Commission, Kenya Ports Authority among others.
- ❖ State corporations are regulated by the Acts by which they are established. In addition, some are subject to the provisions of the State Corporations Act.
- ❖ Like companies, they have a legal personality, can own property, can sue and be sued, have perpetual succession and limited liability.

# Companies registered under the Company's Act



A company is an artificial person recognized by the law with an entity separate from its members for the purpose of preserving in perpetual succession the rights, which would fail if vested in a natural person.

In Kenya, the incorporation (by registration), regulation and winding up of companies is governed by the Companies Acts No. 17 of 2015 which repealed the Company's Act Chapter 486.

# Formation of companies

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- ❖ The process of forming companies is referred to as promotion of companies. Promotion is the process by which a company is incorporated or brought into existence by registration under the company's Act and established as a going concern by issue of a prospectus.
- ❖ People wishing to form a company are known as promoters. A promoter has been defined in the **case Tycross vs. Grant** as one who undertakes to form a company with reference to a given project and to set it going, and who sets the necessary steps to accomplish the purpose.
- ❖ A promoter is a person who assumes the primary responsibility to promoting a company.

## Promoter to do;

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- ❖ The type of company to be registered
- ❖ A suitable name for the company
- ❖ The object of the company, each member's liability and
- ❖ the registered office
- ❖ Drawing up rules for internal management
- ❖ Memorandum of association
- ❖ Directors, auditors and bankers for the company
- ❖ Printing and issuing a prospectus

## File with the registrar

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- ❖ Application for registration
- ❖ Memorandum of association
- ❖ Articles of association
- ❖ A statement of the nominal capital of the company
- ❖ A list of directors with their written and signed consent to be directors
- ❖ A statutory declaration by the proposed secretary that all the requirements have been complied with

Registration documents

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MEMORANDUM AND ARTICLES OF  
ASSOCIATION

# Memorandum of association – contents/clauses



- Name clause
- Registered office clause

- Limitation of liability clause
- Nominal capital clause

- Objects clause
- Guarantee clause
- Association and subscription clause

# Articles of association - contents



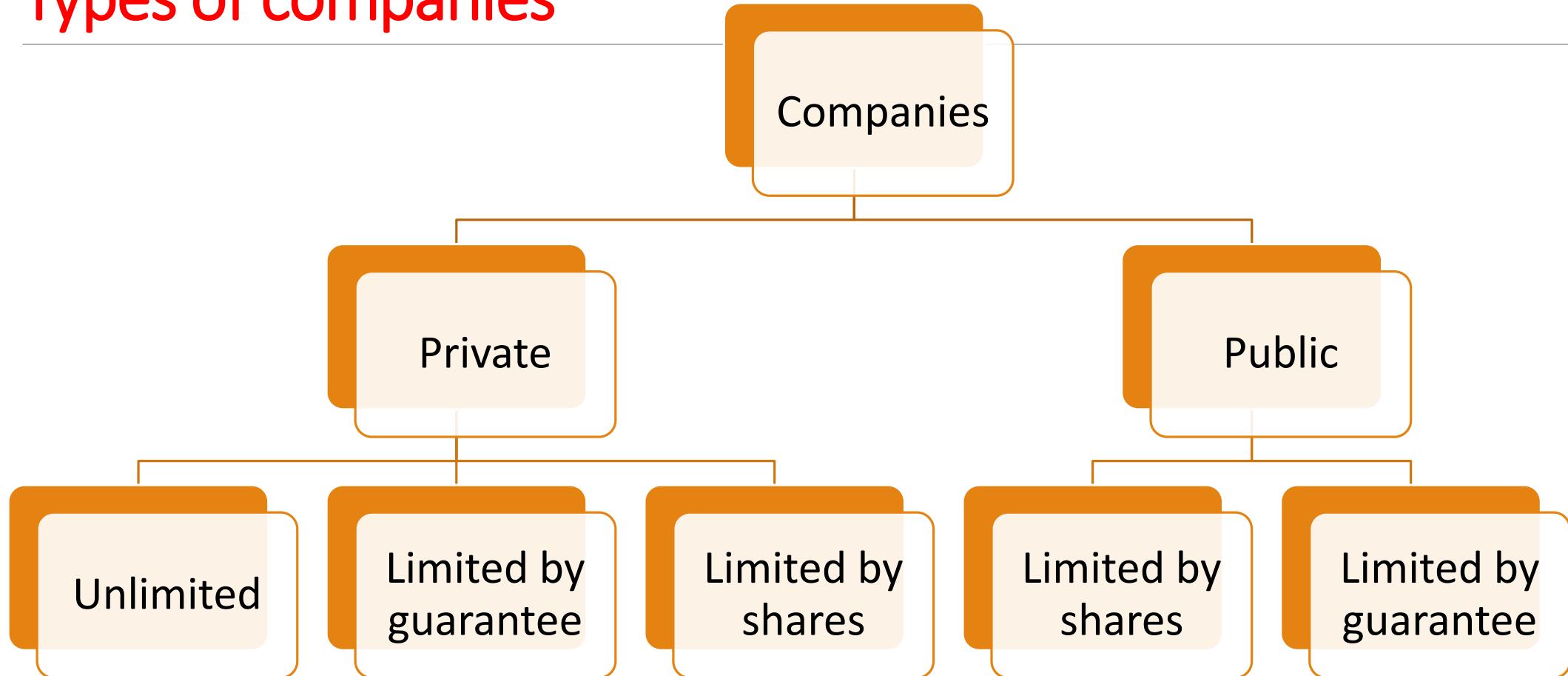
- Preliminary contracts
- Division of capital into shares
- Meetings

- Directors
- Registers
- Books of account and audits

- Quorum
- Books of account
- Winding up

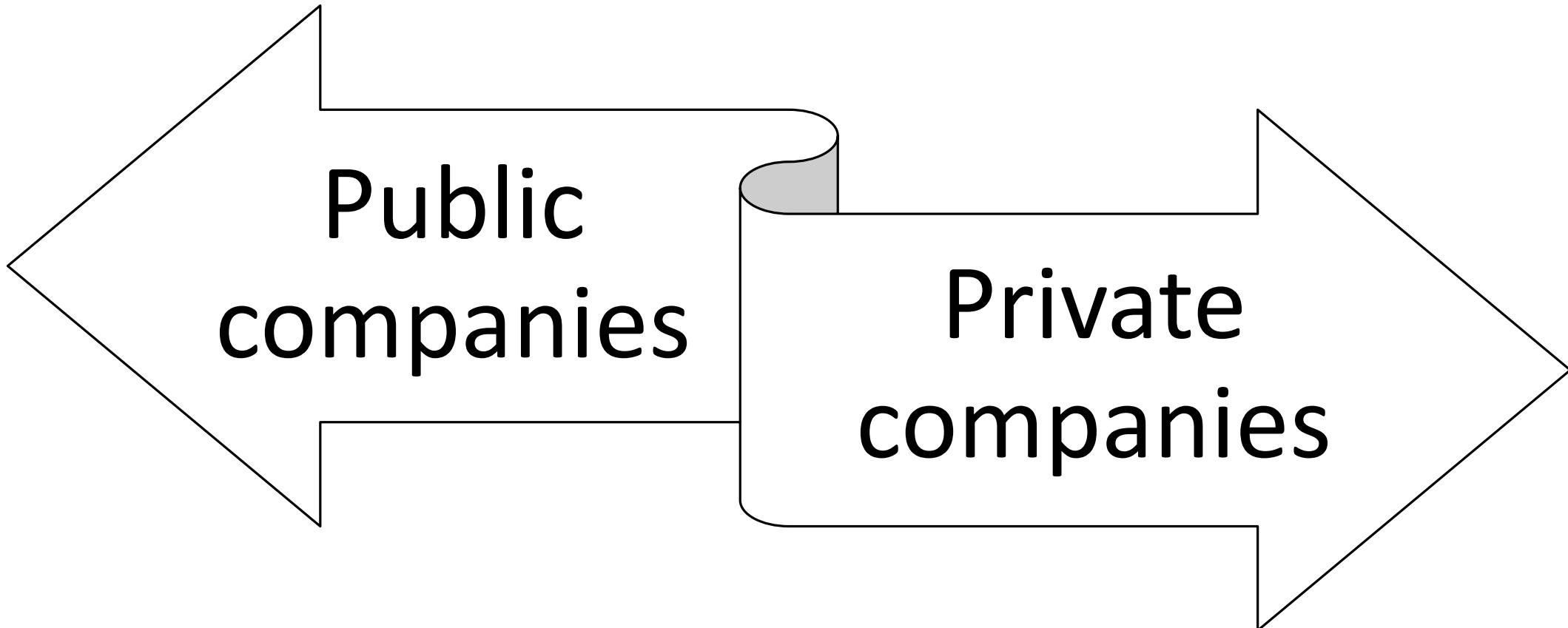
# Types of companies

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# Types of companies

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# Public companies vs. private companies

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## PUBLIC COMPANIES

- ❖ restrict the right to transfer its shares;
- ❖ limits the number of its members to fifty (excluding present and past employees); and,
- ❖ prohibits any invitation to the public to subscribe for shares in it.
- ❖ Must hold AGMs
- ❖ Must have a secretary
- ❖ Min.2 directors

## PRIVATE COMPANIES

- ❖ its articles allow its members the right to transfer their shares in the company;
- ❖ its articles do not prohibit invitations to the public to subscribe for shares or debentures of the company ; and
- ❖ its certificate of incorporation states that it is a public company.
- ❖ Not compulsory to hold AGMs
- ❖ A secretary compulsory if share capital exceeds KES 5 million
- ❖ 1 director

## Characteristics/features of registered companies

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- ❖ Separate legal status from members
- ❖ Activities defined in the memorandum of association
- ❖ Managed by a board of directors
- ❖ Liability of members limited
- ❖ Perpetual succession
- ❖ Subject to general law

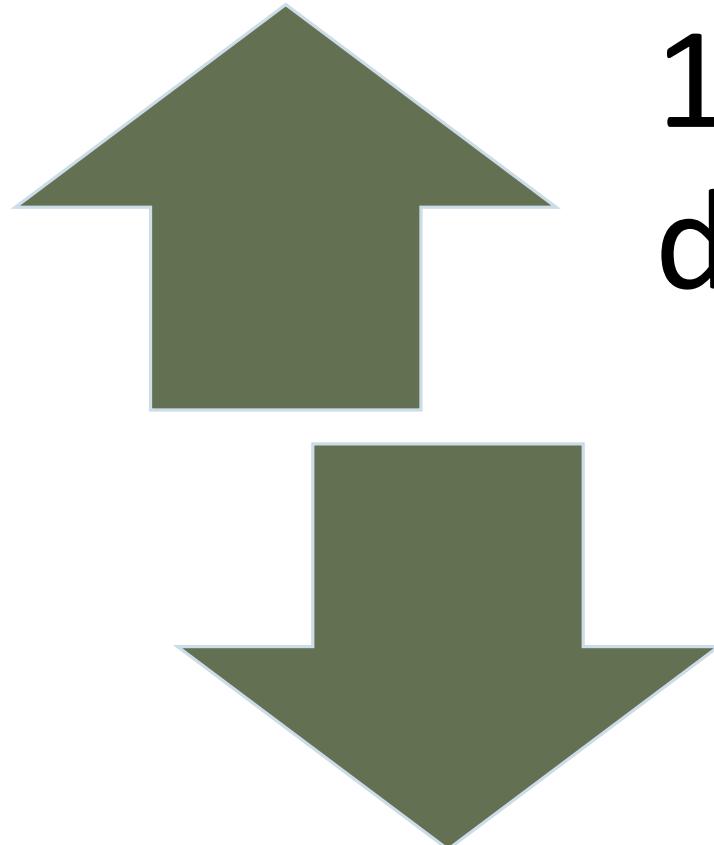
## Cont'd

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- ❖ Details of accounts and other matters must be made public
- ❖ Company may or may not trade for profit
- ❖ Shares (and therefore membership) of public limited companies may be freely acquired
- ❖ Capacity to own immovable and moveable property
- ❖ A corporation once formed can sue and be sued in its own name

# Internal management of companies

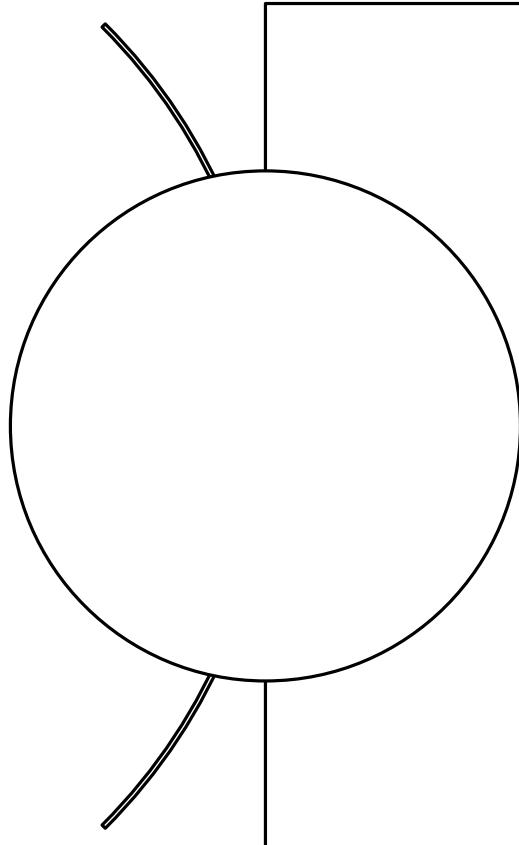
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1. Board of  
directors

2. Meeting of  
shareholders

## Board of directors



A company is an artificial legal person and runs its affairs through natural legal persons known as directors.

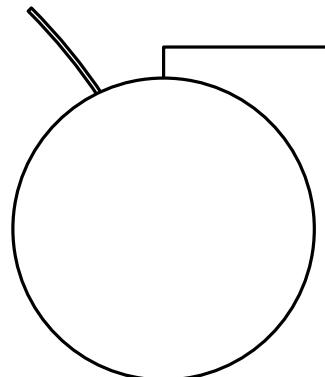
The directors' main responsibility is to manage the company whereas the shareholders' main control lies in the power to appoint directors.

This consists of a relatively small number of persons who have been appointed directors of the company.

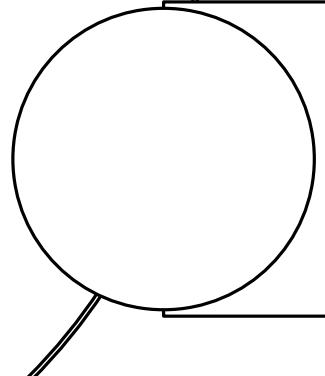
Usually they are granted extensive powers under the Articles of Association including the control of day-to-day operations, which they often delegate in turn, to one of them — the managing director/chief executive.

# Cont'd

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The first directors are usually named in the articles of association but such appointment is not valid until the director named has delivered to the registrar a written consent to act and a written undertaking to take his qualification shares.

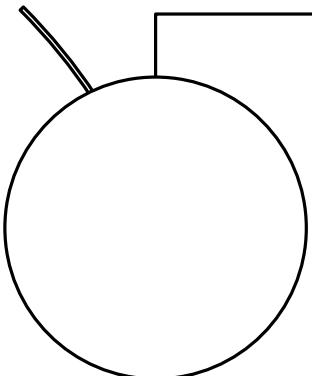


Subsequent appointment of directors is done by members of the company in a general meeting by ordinary resolution.

The number, appointment, term and removal from office of the directors will ordinarily be provided for in the Articles.

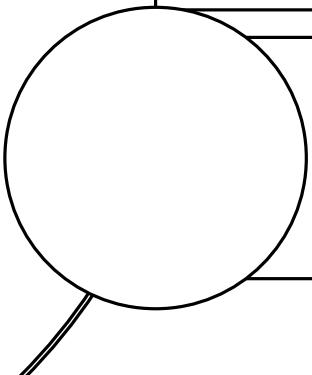
# Duties of directors

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**The relationship between a company and its directors is that of a principal and agent.**

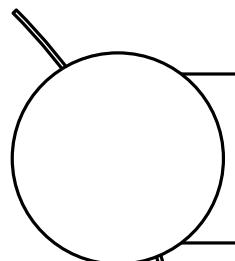
**As agents, directors stand in a fiduciary relationship to their principal.**



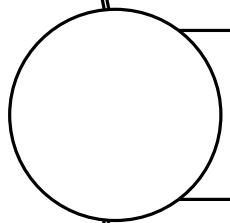
**These duties are codified**

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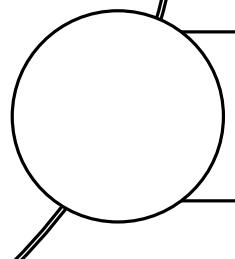
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**Act within Their Powers/Intra Vires**



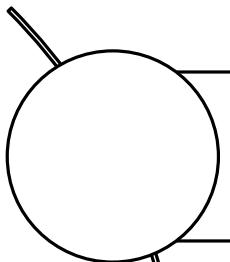
**Exercise Independent Judgment**



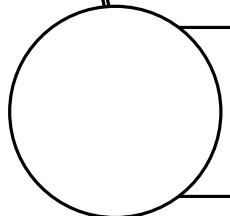
**Exercise reasonable care, skill and diligence**

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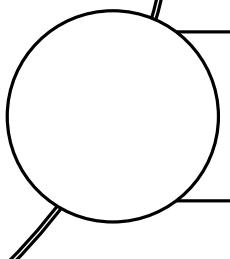
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**Duty to Avoid Conflicts of Interest.**



**Duty not to Accept Benefits from Third Parties**



**Duty to Declare Any Interest in a Proposed Transaction with the Company**

## Duty to promote success of the company by;

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- ❖ Comprehend the long term consequences of decisions;
- ❖ Ensure to consider the interests of employees;
- ❖ The need to foster the company's business relationships with suppliers, customers and others;
- ❖ The impact on the community and the environment;
- ❖ The desire to maintain a reputation for high standards of business conduct; and
- ❖ The need to act fairly as between members.

# Powers of directors

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- ❖ Enter into contracts on behalf of the company;
- ❖ Engage and dismiss employees;
- ❖ Keep a register of members;
- ❖ Call an annual general meeting within the statutory time; and
- ❖ Fill casual vacancies in the board. The number, appointment, term and removal of directors are ordinarily provided for in the articles. Initial directors will normally be subscribers and the articles may provide so.

## Remuneration of directors

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- ❖ Directors have no right merely by virtue of their office to remuneration.
- ❖ If a director is to receive remuneration, his contract of service or the Articles of Association must expressly provide for it.
- ❖ The Act provides that the remuneration should be determined from time to time by the company through a general meeting.
- ❖ If the directors have a contract of service, the company should keep a copy which is open to inspection by members and the accounts of the company must disclose the emoluments of the directors and the chairperson.

## Circumstances of removal of a director from office

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Ordinary  
resolution in an  
AGM

Disqualification

Age

Retirement

Resignation

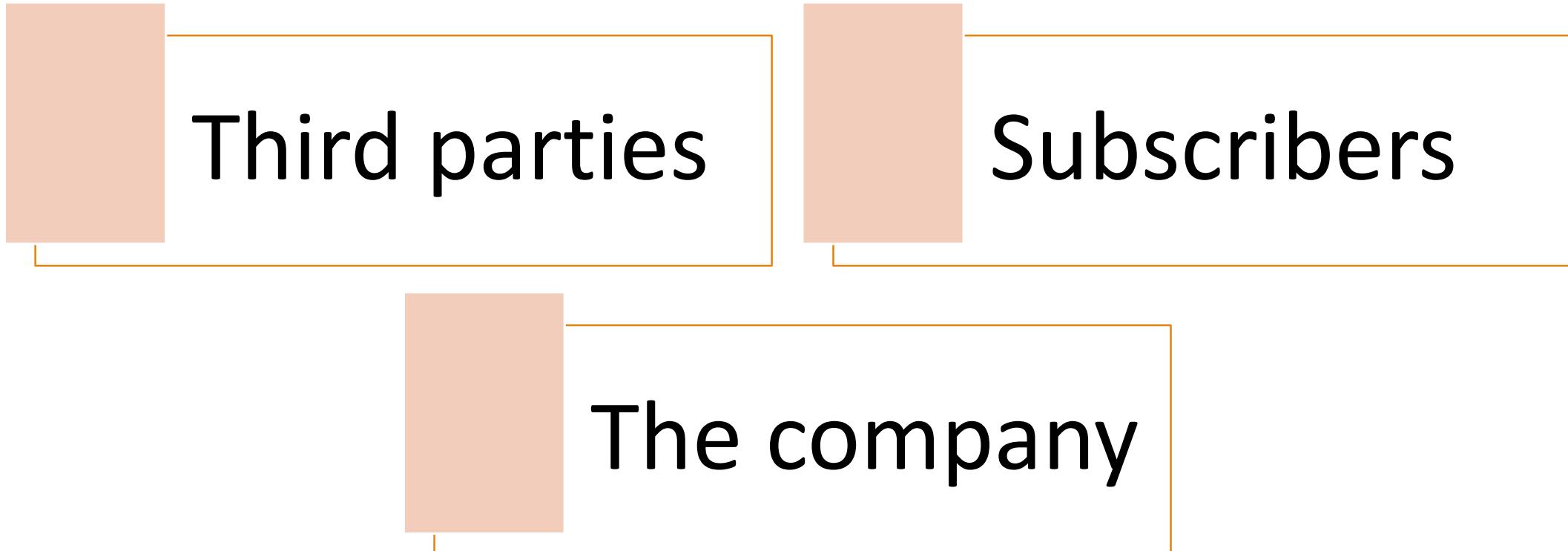
# Disqualification

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- ❖ Becoming a person of unsound mind;
- ❖ Being absent for more than six months from the meetings without permission of the other directors;
- ❖ Being declared bankrupt unless with leave of the court to act;
- ❖ By virtue of the age limit; and
- ❖ By sickness.

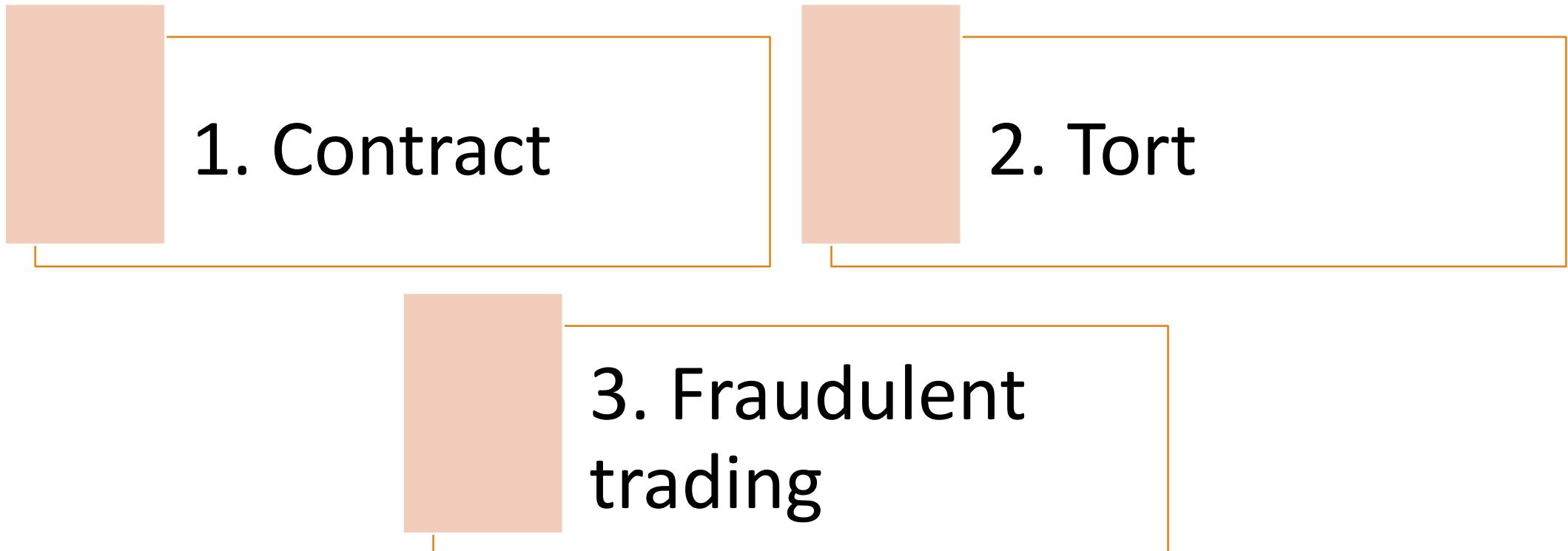
# Liability of Directors and Executive Officers

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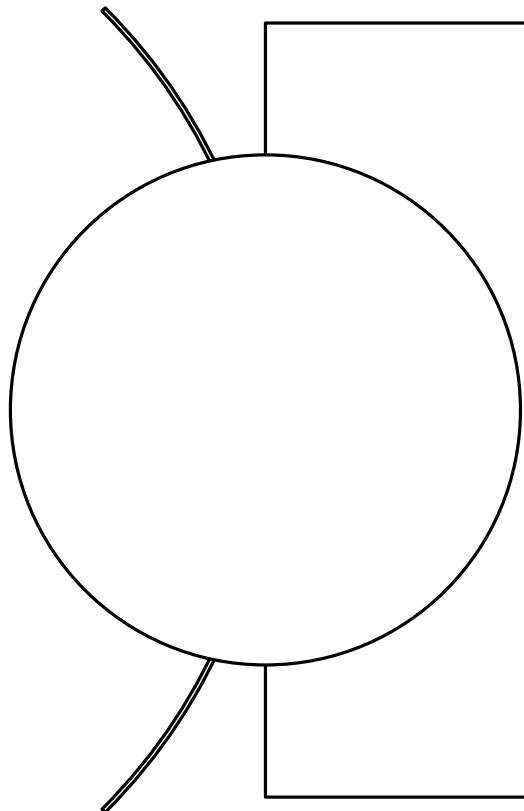
## Third parties

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## Subscribers

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**An offer for sale of shares through a prospectus must be signed by two directors of a company.**

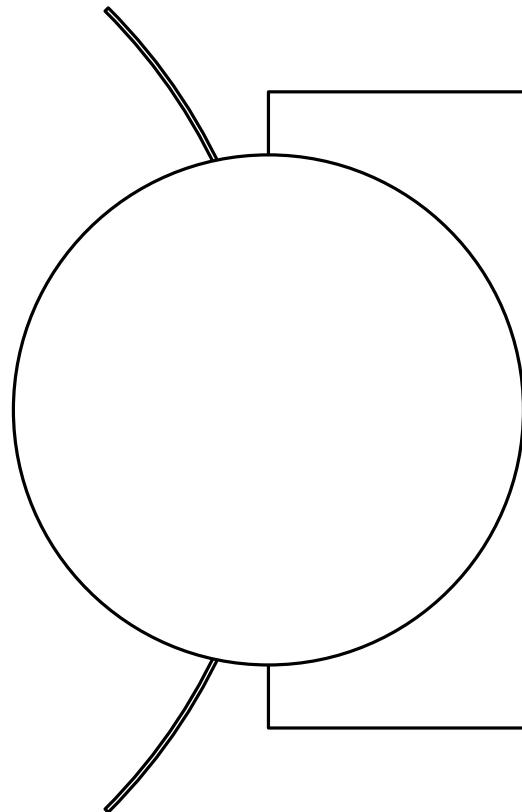
**The intending purchaser is entitled to true disclosure and accurate and fair picture of the company.**

**Where there are misrepresentations, the subscribers may rescind the contract.**

**Directors may be held liable for misrepresentations or omissions made in the listing particulars and may be held liable to pay damages.**

## What is a prospectus

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**A prospectus is defined as any notice, circular, advertisement or other invitation offering to the public subscription or purchase of shares/debentures of a company.**

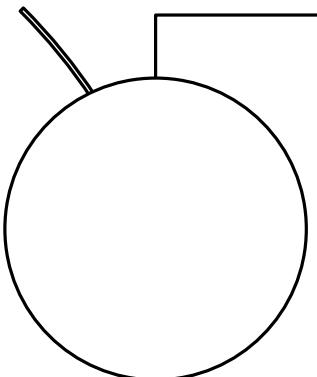
## **Contents of the prospectus**

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- ❖ The ownership business;
- ❖ The number of shares issued or agreed to be issued;
- ❖ Details of any property acquired by the company and the amount paid or agreed to be paid;
- ❖ Details of the voting rights of each class of shares; and
- ❖ Names, addresses and description of directors.

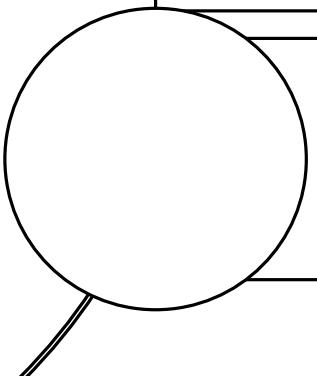
# To the company

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**Negligence:** directors are expected to exercise a reasonable degree of skill and diligence and to act honestly when performing their duties. They can be found liable to the company if in breach of this duty.

The standard of care expected is not one of a specialist. For instance, a director of a life company need not act like an actuary or a doctor.



**Breach of trust:** this occurs where the director(s) has wrongfully applied the company's funds and includes for instance, paying dividend out of capital or applying funds to *ultra vires* purposes.

## Chairman of the board - Duties

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- ❖ Declaring the meeting open and welcoming the members.
- ❖ To call the secretary to read the notice of the meeting if necessary.
- ❖ Ensure that they require quorum is present. Ask for apologies and the secretary records.
- ❖ Ensure members have copies of the previous minutes, read through them.
- ❖ Indicate what the items of the agenda are to begin/end (calling the meeting to order).
- ❖ To ensures that each member has an opportunity to speak and encourage the members to speak.

# Cont'd

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- ❖ Controlling the meeting by ruling the irrelevant remarks disallowing items not in the agenda.
- ❖ Maintaining order (dealing with unruly members and calm down disputes) and any issue to be raised through the chair.
- ❖ Clarify contributions by members so that each is understood by all (can summarize discussion for the benefit of all).
- ❖ The date of the next meeting should be arranged by mutual consent of the chair.
- ❖ The chair is to declare the meeting closed/ended and thank the people for attendance.
- ❖ Ensure impartiality in the meeting

# Managing director

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- ❖ The board will also usually be authorised to appoint a managing director who reports to the board. The board normally delegates the whole of the management of the day-to-day affairs/operations of the company to the managing director.
- ❖ The MD receives such remuneration as the directors may determine.
- ❖ The board can revoke such appointment. The MD can be removed by a general meeting irrespective of the fact that his duration (term) is not over.
- ❖ Where services have been terminated in breach of the terms of appointment, the directors can claim for damages

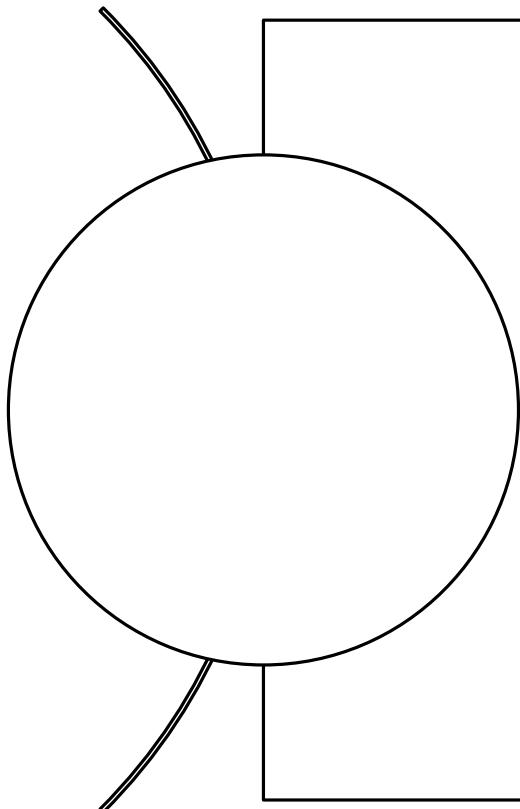
# Secretary

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- ❖ **Section 243 of the Company Laws 2015 provides that a private company is required to have a secretary only if it has a paid up capital of five million shillings or more.**
- ❖ **If a private company does not have a secretary, anything authorised or required to be given or sent to, or served on, the company by being given or sent to, or served on its secretary.**
- ❖ **Section 244 provides that every public company is required to have at least one secretary.**
- ❖ **Section 246 of the Act provides that a secretary be a person who appears to have the requisite knowledge and experience to discharge the functions of a secretary of the company; and is the holder of a practicing certificate issued under the Certified Public Secretaries of Kenya.**

## Cont'd

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**The appointment of the secretary must be recorded in the register for directors and secretaries.**

**Termination must also be recorded. The appointment should be notified to the registrar of companies.**

**The secretary can be removed from office by the directors whether he/she has been appointed in a resolution or under agreement.**

# Duties of a secretary

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- ❖ To send out notice of the meeting in good time to all members.
- ❖ Requests ad receives items for discussion at each meeting.
- ❖ He draws up and agenda in conjunction with the chair.
- ❖ Circulate among the members any document which may be necessary to enable to contribute fully to discussion of matters listed on the agenda.
- ❖ Draws up special agenda for the chair include details that will help him/her conduct the meeting satisfactory.
- ❖ During meetings he sits by the chair to give any assistance required.
- ❖ Records details to what takes place during the meetings.
- ❖ After meeting, writes up the note into a formal recording and circulates this among members after gaining approval from the chair.

## Personal liability for a secretary

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- ❖ He fraudulently issues share certificates where he has forged the signature of directors;
- ❖ Contracts entered into on behalf of the company and sufficient care is not taken that is, failure to disclose that he is an agent of the company.

**End of session five**

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**WELCOME TO SESSION SIX**