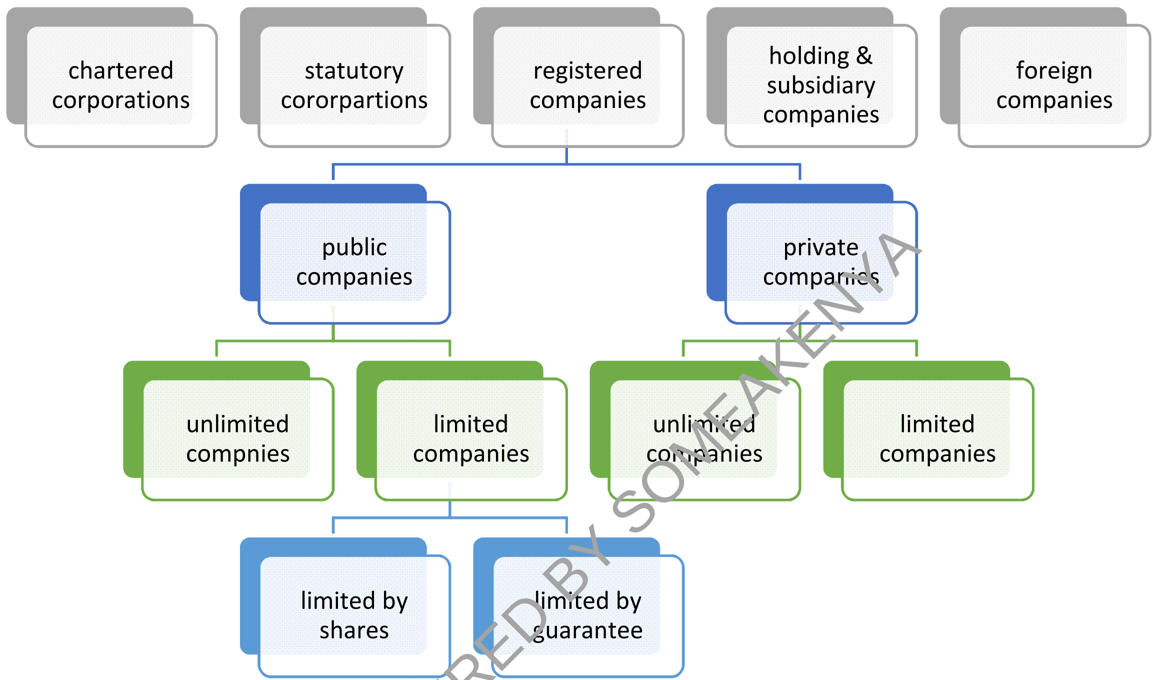
COMPANY LAW

NATURE AND CLASSIFICATION OF COMPANIES

- *Definition of company law*
- It's a study of the rules & principles that governs and regulates the affairs of a company/corporation.
- **Types of companies**



1. **Chartered corporations**

- These are corporations created by a charter that is granted by the president.
- Only private universities are created through charter in Kenya.
- Under university's act, the president is empowered to grant a charter to any private university intending to be set up to benefit the country.
- The charter must set out the name, membership and also the powers and functions of the universities e.g.mount Kenya University.

2. **Statutory corporations**

- They are created by an Act of parliament or an order of the president in accordance with the state corporations Act.
- These are government corporations especially parastatals.
- The Act creating the corporation gives it a name, management structure and also prescribes the objects i.e. Kenya pipeline, Kasneb, NSSF, NHIF, Central Bank etc.

3. **Registered corporations**

- Are created in accordance with the provisions of companies Act.
- Certain documents must be delivered to the registrar of companies for registration i.e. MOA and AOA. Examples include public and private companies.

Public company

- This is a company with the following features:

1. Must have a minimum of 7 members and no. maximum.
2. Must have at least 2 directors.
3. Its shares must be freely transferable.
4. It must have a statutory meeting i.e. first AGM within 3 months of formation for companies that were created before 2015.
5. Must publish annual accounts.
6. After acquiring certificate of incorporation, it must go ahead and acquire certificate of trading to commence business.
7. It must have a company secretary.

N/B: A public company is required to include at the end of its name the words- public limited company (PLC) e.g. Safaricom PLC

Private company

A private company is a company with the following features.

1. Members are a minimum of 1 and max of 50 persons excluding employees.
2. It requires at least 1 director.
3. Restricts the right to transfer its shares.
4. It prohibits any invitation to the public to subscribe for its shares i.e. doesn't issue a prospectus.
5. Not mandatory to publish its accounts.
6. Required to have a Company secretary if it has a share capital of 5million.

*N/B: A private company must include the word **limited or Ltd** at the end of its name.*

A public and private company may be classified under;

a) Companies Limited by shares

It refers to a company which the liability of members is limited to the amount unpaid on the shares held by them.

b) Companies Ltd by guarantee

A company Limited by Guarantee if:

1. it does not have a share capital;
2. The liability of its members is limited by the company's articles to the amount that the members undertake, by those articles, to contribute to the assets of the company in the event of its liquidation; and
3. Its certificate of incorporation states that it is a company limited by guarantee.

Companies Limited by Guarantee in Kenya are mainly registered for the purpose of operating non-profit organizations that require a legal personality.

c) Unlimited companies

- These are companies where member's liability is unlimited.
- Such members may lose their private assets, in case the company is declared insolvent.

Difference between Public Company and private company

	Public company	**Private company**
Membership	Minimum of 7 and no maximum	Minimum of 1 and maximum of 50
Prospectus	Can issue a prospectus	Cannot issue a prospectus
Director	At least 2 directors	At least 1 director
Transfer of shares	Shares are freely transferable	Restricts transfer of shares to members only
Commencement of business	Can only commence business after certificate of trading is issued	Can commence business after certificate of Incorporation is issued
Publication of accounts	Must publish its account	No requirement to publish accounts

Registered company	**Statutory company**
Incorporated under the provisions of the Company Act	Created by an Act of parliament
Governed by directors	Owned by the government
Can only engage in transactions stipulated in memorandum and articles of association	Can only engage in transactions set by the statute.

	COMPANIES	PARTNERSHIP
LEGAL PERSONALITY	Is a legal person distinct from its members	Is not a legal person in eyes of law
MEMBERSHIP	1-50 members for private companies and minimum of 7 and no maximum for public companies.	Requires a min of 2-20 persons.
REGISTRATION	Registered under Companies Act	Registered under partnership Act
CAPACITY TO OWN PROPERTY	Has capacity to own property under its own name.	Property is jointly owned by partners
MANAGEMENT	Managed by directors.	Managed by partners
MEETINGS	A legal requirement to hold AGM.	It is not a legal requirement.
PERPETUAL SUCCESSION	Has perpetual succession.	Death, bankruptcy or insanity can lead to dissolution of partnership
DOCTRINES OF ULTRA VIRES	Ultra vires means beyond power. A company is bound by this doctrine since any act beyond AOA is beyond power.	Not bound by doctrine of ultra vires
AUDITORS	Must appoint auditors to audit books of accounts.	Is not a legal requirement.
LIABILITY	Limited by shares or guarantee	Members liability is unlimited i.e. partners may lose personal assets in case of insolvency.

<u>Features of a company/consequences of Incorporation/advantages of a company</u>

1. **<u>Separate legal existence</u>**

- Upon incorporation a company becomes a separate legal entity separate and distinct from its members. ***Ref. Salomon vs Salomon and co. ltd.***

2. **<u>Capacity to own property</u>**

- Upon incorporation of a company, it acquires the capacity to own property e.g. land. The property is acquired in the company's name.

3. **<u>Contractual capacity</u>**

- Company contracts on its own name through its agents known as directors. Such contracts are binding on company itself and not the directors.
  Ref. Lee vs Lee Air Farming co. Ltd

4. **<u>Capacity to sue and be sued</u>**

   A company can sue and be sued in its own name as a plaintiff or defendant defendant.
   Ref. Foss vs Harbottle

5. **<u>Perpetual succession</u>**

- Once a company is formed, it continues to operate indefinitely until corporate insolvency. Death of members does not affect continuity of a company.

6. **<u>Common seal</u>**

- After formation, it acquires a common seal similar to company's hand for signing important documents.

7. **<u>Limited liability</u>**

- Members liability to company's debt is limited to shares held by them i.e. personal assets cannot be lost in case the company is declared insolvent.

8. <u>Independent management</u>

- Shareholders are not involved in management of a company.Management lies with the directors, not shareholders.

Disadvantages of a company

1. **It's expensive**: Registration of a company involves costs, including legal fees.
2. **Complicated procedures**: A lot of procedures are involved in formation and running the company.
3. **Publicity/lack of confidentiality**: A company is subject to undue publicity i.e. such documents must be delivered to the registrar and are open to public scrutiny.
4. **High taxation**: companies pay corporation tax at 30% for local companies and 37.5% for foreign companies which is relatively high compared to an income tax paid by individual partners.
5. **Participation in the management:** shareholders other than those who are directors are not involved in the day to day management of the company
6. **Doctrine of ultra vires**: Any act done beyond articles of association is null and void i.e. beyond powers.

- There are two types of corporations mainly:

i) Corporation sole
ii) Corporation aggregate

1. Corporation sole

This is a legally established office distinct from the owner and can only be occupied by one person after which he is succeeded by another e.g. the president's office, chief justice office etc.

It has the following features

1. It is a legal person with limited liability.
2. It can own property.
3. It can enter into a contract.
4. It has perpetual succession.
5. It can sue or be sued.

2. <u>Corporation aggregate</u>
- This is a legal entity formed by two or more persons for a lawful purpose.

It has the following features:

1. It has independent legal existence with limited liability.
2. It has perpetual succession.
3. Capacity to contract.
4. It can own property.
5. It can sue or be sued.

Examples of corporation aggregate

1. *Chartered corporations.*
2. *Statutory corporations.*
3. *Registered corporations or companies.*

<u>Other types of companies</u>

1. <u>Holding and subsidiary company</u>

Holding is a company which controls the management of another company known as the subsidiary.

Subsidiary is a company controlled in terms of management by another company known as parent company.

- ***<u>A company is deemed to be a holding company of a subsidiary company if:</u>***

i) The holding company controls the majority of the BOD i.e. controls the management of another company.

ii) If the holding company owns more than half in nominal value of equity share capital of subsidiary i.e. controls more than 50% of share capital of subsidiary company.

iii) If a subsidiary of another company which is that other company's subsidiary.

2. <u>Foreign company</u>
- This is a company incorporated outside Kenya but having a place of business in Kenya.
- Ordinarily this companies are known as multi-nationals because they operate in many countries outside their country of origin.

Unincorporated association

This is a group of people who have come together to promote/pursue a common purpose but without going through the various legal procedures of registering a company. These associations are not body corporate.

They include:

1. Trade union
2. Societies
3. Partnerships
4. Staff union

1. Trade unions

- Are organisations whose primary objective is to regulate the relationship between employer and employees e.g. COTU, KNUT etc. A registered trade union has special privileges

i) It may sue/be sued under its registered name.

ii) Its offices are immune from civil prosecutions for acts committed in furtherance of a trade dispute.

iii) All properties of trade unions are vested on trustees for benefits of its members.

2. Co-op societies

- It is basically an independent organisation of people who have come together voluntarily to meet a common economic, social or cultural needs.

Cooperative principles

1. Voluntary and open membership
2. Democratic membership control i.e. one man one vote
3. Economic participation by members.
4. Autonomy and independence
5. Education, trading and information.
6. Cooperation among cooperatives.
7. Concern for the community in general.

Advantages of co-operatives

1. Mobilization of savings
2. Marketing of agricultural produce
3. Provision of credit to members.
4. Creating employment both directly and indirectly
5. Training, education and information to members. E.g technology
6. Collection, transportation and process of agricultural produce

Types of cooperative societies

1. **Primary Cooperatives**: This is one whose membership is restricted to individual members.
2. **Co-operative union**: This is a co-op society whose membership is restricted to primary societies i.e. KUSCO
3. **Apex**: it is a co-op society whose membership is restricted to co-op unions.

Difference between a cooperative society and a company

Co-op society	Company
Created and regulated by societies act.	Created under companies act.
Formed by at least 10 members.	At least 1 member for private companies 7 for public companies
It is not a legal person.	It is a legal person
Main purpose is to serve its members.	Main work is to serve the public
Managed by management committee.	Managed by board of directors.
Registered by commissioner of co-operative development.	Registered by the registrar of the company.
It is democratic as members have equal voting powers.	Members voting is based on number of shares held
8. Members have unlimited liability.	Members have limited liability either by shares or guarantee.

PRINCIPLE OF LEGAL PERSONALITY/VEIL OF INCORPORATION

- This is the rule in the Salomon's case i.e. the company becomes a legal person separate from its members and management.
- A company acquires an independent legal existence upon incorporation.
- It is a legal person (artificial person) created by law.
- The concept of legal personality gives rise to consequences of incorporation.

EXCEPTIONS TO CONCEPT OF THE LEGAL PERSONALITY

- A company is a legal person and it is separate from its members.
- This principle is regarded as a curtain/veil/shield between the company and its members.
- There are some exceptional instances where a company and members may be treated as one and the same thing.
- These instances are known as **lifting the veil of incorporation or exceptions to the case of Salomon vs. Salommon**
- The concept of legal personality is disregarded.
- Lifting the veil of incorporation may be categorised into two:

i) Lifting the veil by the statute/Act of parliament.

ii) Lifting the veil by court.

LIFTING THE VEIL BY ACT OF PARLIAMENT/LEGISLATION/ COMPANY ACT

These are circumstances when provisions of Company Act are not adhered to.They include:

1. **Reduction in number of members below statutory minimum**
- Where the membership of a company falls below the statutory requirement and members do business for more than 6 months
2. **Non-publication/mis- description of companies name**
- Every company is required by the Company Act to publish its name in legible roman letters on all official publications e.g. cheques, invoices, bills exchange.Failure to comply with those provision may lead to lifting of the corporate veil.
3. **Group accounts**
- The holding company is obligated to incorporate into its balance sheet the assets and liabilities of the subsidiary as it was as their own asset and liabilities.
- This is also regarded as lifting the veil of incorporation.

4. **<u>Investigation of the companies affair by an inspector appointed by court</u>**
- Company Act requires an inspector appointed by the court to investigate company's affairs. This investigation may go beyond and investigate the company's members.
5. **<u>Investigation of companies membership by inspector appointed by registrar of company</u>**
- The law empowers the registrar to appoint an inspector to investigate the membership of any company for the purpose of determining the true person who are financially interested in the success of the company.
6. **<u>Take-over bid</u>**
- A scheme of take-over bid requires that 90% of the shareholders of the transferor to approve.
- The dissenting and minority shareholders may apply to the court within one month to restrain compulsory acquisition of their shares.
- The court may be in appropriate situation lift the veil of incorporation and investigate members in protecting interest of minority.
7. **<u>Fraudulent trading</u>**
- The law requires that if it appears that any business of the company has been carried on with the intention to defraud creditors during winding up, the court may lift the veil of incorporation and hold those involved personally liable.

<u>LIFTING BY COURT</u>

1. **<u>Determination of character</u>**
- This is in order to determine whether a company is an enemy in times of war i.e. a company whose members behind it are foreigners who come from a country which at war with Kenya is also declared an enemy to Kenya.
2. **<u>The company is a sham</u>**
- This is where the company is used to carry out illegal or improper activities or to perpetuate fraud, corruption, crime, sexual immorality etc.
3. **<u>Where the company is acting as the agent of the shareholder</u>**
- The company is not in law an agent of the subscribers. If the court holds that a company acted in as particular instance as an agent of its shareholders, the veil of incorporation would be lifted.
4. **<u>Protection of revenue</u>**
- The court would disregard the corporate entity where its used for tax evasion or to circumvent tax obligation

5. Prevent deliberate evasion of contractual obligation

The veil is lifted where members are using the company to evade contractual obligation.

Partnership

- It is a relationship which exists between persons carrying out a business with a view of making profit.

Duties of partners

1. Contribute capital.
2. To be accountable and not make secret profit.
3. To be honest and have full disclosure.
4. Not to compete with the firm.
5. Duty to share loss.

➢ *Rights of a partner*

1. To participate in decision making of the firm.
2. To participate in sharing profit.
3. To be informed in case of admission of a new partner.
4. To inspect or access partnership records.

➢ *Dissolution of partnership*

- It may be dissolved under the grounds:

i) By court order

ii) Without court order

1. By court order

- A partner in a partnership may apply to the court for the dissolution of partnership under the following grounds.

i) Insanity

ii) Permanent incapacity

iii) Pre-judicial conduct/unfairness.

iv) Persistent breach of partnership agreement.

v) Continuous carrying of business at a loss

vi) Just and equitable grounds i.e. continuous disagreement.

2. Without court order

i) Lapse of time.
ii) Performance i.e. Completion of the objectives intended.
iii) By notice of the partners.
iv) Through bankruptcy of a partner.
v) Death of a partner.
vi) Insanity.