CM ADVOCATES LLP

RESIDUAL POWERS OF THE BOARD OF DIRECTORS IN THE ABSENCE OF REQUISITE QUORUM IN KENYA.

A Critical Legal Analysis under the Companies Act, 2015 and Common Law

1. Introduction

The governance of corporate entities in Kenya underwent a transformative reorganization with the promulgation of the Companies Act No. 17 of 2015 (hereinafter referred as "the Act"), which effectively repealed the long-standing Companies Act (Cap 486). Among the most practically consequential yet underexplored questions in company law is what happens to the powers of a board of directors when it lacks the quorum necessary to conduct business. The question is deceptively simple but carries profound implications for corporate governance, the continuity of business operations, and the protection of creditors, employees, and shareholders.

Under the Act, the internal management of a company is primarily delegated to the board of directors through the articles of association, yet this delegation is contingent upon the board operating as a functional, collective body. Quorum requirements for board meetings serve an important function; they ensure that decisions are made collectively, that adequate deliberation takes place and that no single director can unilaterally bind the company. However, where vacancies, deaths, resignations or disqualifications reduce the board below the quorum

The company then faces governance paralysis, it has a board that is legally incapable of acting, yet the ordinary business of the company cannot wait indefinitely for the quorum deficit to be remedied.
This article examines the doctrine of residual powers of directors specifically in the context of inquorate boards in Kenya. It considers the statutory framework under the Act, the applicable common law authorities, the scope and limits of the powers available to an inquorate board and the practical steps available to resolve such situations.

2. The Quorum Requirement for Board Meetings in Kenya

2.1 The Statutory Framework of Board Management.

The Act establishes strict mandatory requirements for the composition of a board of directors, which serves as the starting point for any analysis of quorum. Section 128 of the Act dictates that every private company must have at least one director, while public companies are required to maintain a minimum of two.

A critical innovation introduced by the 2015 Act is Section 129, which mandates that every company must have at least one director who is a natural person.

This requirement prevents the historical practice of using corporate entities to shield human accountability, ensuring that at least one individual can be held liable for the company's actions. In the event of a failure to maintain these minimums, the Registrar of Companies possesses the authority under Section 130 to issue a direction requiring the company to make the necessary appointments. Failure to comply with such a direction constitutes an offense, reflecting the state's interest in maintaining clear lines of corporate governance. The procedural integrity of board meetings is further reinforced by Section 210, which requires that minutes of all proceedings at board meetings be recorded and kept for at least seven years.

2.2 The Mechanics of Quorum Requirement

Quorum is the procedural lifeblood of board authority. The Act does not prescribe a fixed quorum for board meetings; therefore, it is primarily a matter of private ordering set by the company's articles of association. Without a quorum, a meeting of directors is generally incapable of exercising the powers conferred upon the board by the articles of association. The Companies (General) Regulations, 2015, specifically the Fourth Schedule, provide the Model Articles that apply to private companies by default unless specifically modified or excluded. Article 10 of these Model Articles establishes that the quorum for directors' meetings is generally two, unless the board decides otherwise.

The legal challenge arises when the number of directors falls below this quorum. For a company to function, its directors must take decisions collectively, typically by a majority vote at a meeting or via unanimous written resolution. When the board is depleted, it is technically non-existent as a decision-making body for ordinary business. However, the Model Articles contain a vital residual power in Article 11 or its functional equivalent in bespoke articles.

This article provides that if the total number of directors is less than the quorum, the remaining directors may only act for two limited purposes: to appoint additional directors to restore the quorum or to call a general meeting of the members to do the same. This limited grant of power is a statutory safety net intended to prevent total paralysis.

(a) The Power to Appoint Additional Directors

The most important residual power available to an inquorate board is the power to appoint additional directors to fill casual vacancies or to add to the board, for the purpose of restoring quorum. This power is typically preserved in the company's articles expressly for situations where the board falls below the minimum number required to act. Under the Model Articles, the directors may appoint a person as a director to fill a vacancy or as an additional director. Crucially, this power is available even where the directors are fewer in number than the quorum required for a directors' meeting. The rationale is self-evident; if the power to appoint directors could only be exercised by a quorate board and the board is already inquorate, the mechanism for restoring the board's capacity would itself be incapacitated, an outcome the law is designed to avoid.

(b) The Power to Call a General Meeting

Another critical residual power preserved to an inquorate board is the power to convene a general meeting. This is of enormous practical importance because it enables the remaining directors, even if inquorate, to trigger the alternative governance mechanism, the general meeting of shareholders, through which the quorum deficit can be remedied. Under section 296 of the Act, directors have power to call general meetings. This power does not require a quorate board meeting to exercise; individual directors may act to convene a meeting even where they cannot collectively form a quorum. Once the general meeting is convened, the shareholders may appoint additional directors, thereby restoring the board to quorum. Where the remaining directors are unable or unwilling to call a general meeting, section 280 of the Act empowers the court to order the holding of a general meeting on the application of any director or member. This provides an important backstop remedy for shareholders and other stakeholders.

2.3 Powers NOT available to an Inquorate Board

It is equally important to understand what an inquorate board cannot do. The residual powers doctrine does not permit an inquorate board to transact ordinary business, pass resolutions on substantive commercial matters or exercise any power that is contingent on a valid board meeting having been held. An inquorate board cannot, for example, approve audited financial statements, declare dividends where board approval is required, authorise the issue of shares, approve major transactions or exercise the powers of management generally. These powers require a quorate meeting and cannot be exercised by the remaining directors acting individually or collectively below quorum. It follows that in a company with three or more directors; the board cannot validly transact business at a meeting where fewer than the prescribed number of directors are present. Any resolution purportedly passed at an inquorate meeting is generally void and of no effect, subject to the important exceptions discussed below.

Furthermore, the residual powers of an inquorate board should be distinguished from the authority of individual directors to take urgent protective action in an emergency. Even where the board is inquorate, an individual director may in exceptional circumstances take steps that are strictly necessary to protect the company's assets or to prevent imminent and irreparable harm, but this is a narrow category and the director acts at their personal risk if the action is later found to have been unjustified.

2.4 Situations giving rise to an Inquorate Board

An inquorate board may arise in a variety of circumstances. The most common include; the death, resignation or removal of one or more directors reducing the board below quorum; the disqualification of directors by a court under Section 214 of the Act; the vacation of office by directors whose appointment was procedurally defective; conflicts of interest that require certain directors to absent themselves from a meeting; and in joint venture companies, the failure of one party to appoint its nominated directors, leaving the board without sufficient members to achieve quorum.

Whatever the cause, the result is the same; the board finds itself legally incapable of conducting business through the ordinary mechanism of board meetings, even though the company's affairs continue to require attention.

3. The Doctrine of Residual Powers in the Context of an Inquorate Board

3.1 The General Principle

The doctrine of residual powers, as it applies to an inquorate board, draws from a distinct but related strand of company law to that which addresses general shareholder-director deadlock. Specifically, it addresses the question of whether the remaining directors, who are individually insufficient in number to constitute a quorum, retain any authority to act on behalf of the company. The starting position in law is that an inquorate board has no general authority to transact business or pass resolutions. However, the common law and the company's articles typically preserve to the remaining directors certain limited powers that they may exercise notwithstanding the absence of quorum. These are the residual powers of an inquorate board.

3.2 The Common Law Foundation

While the 2015 Act and its regulations provide a structured approach to board depletion, the common law remains a fundamental source of guidance when the board is incapacitated due to internal conflict or deadlock rather than mere vacancies. The seminal case of *Barron v Potter 1 Ch 895* is the cornerstone of the doctrine of residual powers in both the United Kingdom and Kenya. The case involved a company where two directors, Mr. Barron and Mr. Potter, were the shareholders and directors. Due to a profound and irreconcilable personal difference, they were unable to hold a board meeting because Mr. Barron refused to attend any meeting convened by Mr. Potter.

When Mr. Potter attempted to hold a board meeting on a train station platform as Mr. Barron got off a train, the court ruled that such a casual meeting did not constitute a valid board meeting against the will of one of the directors.

More importantly, the court had to decide if the shareholders in a general meeting could appoint additional directors when the articles expressly reserved that power for the board. Warrington J. held that where the board is incapable of acting or unwilling to exercise its powers, the power to conduct the company's affairs must revert to the general meeting to prevent a total deadlock. Kenyan courts have cited *Barron v Potter* to affirm that shareholders, as the ultimate source of corporate power, retain the residual right to intervene when the board of directors, as the company's agent, is unable to function. This reversion is not a general right to override board decisions but a restricted remedy for cases of genuine board inability.

3.3 The Position in Kenyan Law

The Companies Act, 2015 provides an additional layer of protection through the judiciary. Section 280 of the Act empowers the High Court of Kenya to order a meeting of the company if it is impracticable for a meeting to be called or conducted in the manner prescribed by the articles. This power is extensive; the Court can order a meeting on its own motion or on the application of a director or a member entitled to vote.

In cases where a board is deadlocked or below quorum, and the remaining directors are unwilling to use their residual power to call a general meeting, the Court's Order serves as the ultimate remedy. The Court can even direct that one member present in person or by proxy shall constitute a quorum for such a meeting. This one-person quorum effectively breaks the impasse caused by a shareholder or director who purposefully stays away to prevent a meeting from proceeding.

Kenyan courts apply English company law jurisprudence as persuasive authority, particularly for questions on which the Companies Act, 2015 is silent or incomplete. The doctrine of residual powers of an inquorate board has not been extensively litigated in Kenya, but the principles from English law are applicable and would be adopted by the Kenyan courts.

Additionally, the Capital Markets Authority's Code of Corporate Governance Practices for Issuers of Securities to the Public, 2015 (the "CMA Code") and the guidelines issued by other regulators such as the Retirement Benefits Authority reinforce the principle that companies must maintain functional governance structures, even in times of board vacancy or incapacity.

4. The Role of the General Meeting as the Primary Remedy

Where the board is inquorate and the residual powers available to the remaining directors are insufficient to address the company's needs, the primary mechanism for resolving the governance impasse is the general meeting of shareholders. Kenyan law provides several routes through which the general meeting can be convened and can act.

First, the remaining directors, even if inquorate, retain the residual power to call a general meeting under section 296 of the Act. They should ordinarily exercise this power as the first step upon recognising that the board is or has become inquorate.

Second, shareholders holding at least five percent of the paid-up voting share capital of the company may requisition a general meeting under section 277 of the Act. This gives minority shareholders an independent mechanism to force a meeting where the directors have failed to act.

Third, where it is impractical to call or hold a meeting in the ordinary manner, section 280 of the Act empowers the court to order a general meeting on such terms as it thinks fit. Applications under this section are appropriate where, for example, the remaining director is the sole director of a company that requires two directors for quorum, or where procedural obstacles make the ordinary convening of a meeting impossible.

Once the general meeting has been convened, the shareholders may pass an ordinary resolution to appoint new directors to fill the vacancies and restore the board to quorum, in accordance with the Act.

5. De Facto Directors and the Validity of Acts Done Without Quorum

6.1 The doctrine of a De-Facto Director

A related issue that frequently arises alongside questions of board quorum is the status of persons who purport to act as directors without a valid appointment, or whose appointment is defective in some respect.

Under the doctrine of de facto directorship, recognised in Kenya and traceable to English decisions such as Re Hydrodam (Corby) Ltd [1994] 2 BCLC 180, a person who acts as a director without having been validly appointed may nonetheless be treated as a director for the purposes of the duties and liabilities attaching to that office.

The practical significance of this doctrine in the quorum context is that a board operating below quorum, whose acts are technically void, may nonetheless incur liabilities and responsibilities as if they had validly acted. Directors who purport to manage the company's affairs despite the absence of quorum may find themselves treated as de facto directors with full exposure to the duties and liabilities under the Act, including personal liability for insolvent, wrongful and fraudulent trading.

6.2 The Saving Provision for Acts of Directors

Section 133 of the Act provides an important saving provision; the acts of a director are valid notwithstanding any defect that may afterwards be discovered in their appointment or qualification. This provision, sometimes referred to as the rule in Turquand's Case, is a saving provision for directors' appointments, protects third parties who have dealt with the company in good faith on the basis that the director was validly appointed.

However, section 133 is generally understood to protect against defects in appointment, not against the complete absence of quorum for board decisions.While the transaction may be binding on the company, a director who acted without quorum may still be liable for a breach of duty to act within powers or duty to exercise reasonable care, skill.

The distinction is therefore between a director whose appointment was procedurally defective and a board that lacked the quorum to take a decision.

7. Practical Guidance for Directors and Companies

7.1 Immediate Steps upon Discovering an Inquorate Board

Where a board discovers that it has fallen below the required quorum, whether through vacancy, disqualification, conflict, or any other cause, the following steps should be considered as a matter of priority.

The remaining directors should

- First assess the scope of their residual powers and act strictly within them.
- Avoid taking any substantive business decision that requires a quorate board.
- Promptly exercise their residual power to appoint additional directors if available under the articles; or
- To convene a general meeting at which shareholders can appoint new directors.

If the remaining directors cannot agree or if there are no remaining directors at all, application to the court under section 280 of the Act to order a general meeting is the appropriate remedy. Legal advice should be sought promptly to avoid the risks of acting beyond the scope of the residual powers or incurring personal liability.

7.2 Drafting Considerations to avoid Quorum Deadlock

Companies should consider including express provisions in their articles of association to address the scenario of an inquorate board. Such provisions may include; a clear statement that the remaining directors being below quorum may appoint additional directors and may call a general meeting but may not otherwise transact business; provisions for a sole remaining director to have the power to act for the limited purposes of appointment and convening meetings; a mechanism for reducing the quorum requirement where the board has been reduced by vacancies;

- and provisions requiring the board to maintain a minimum number of directors at all times, with obligations to fill vacancies promptly.

In joint venture companies and shareholders' agreements, parties should include specific deadlock resolution mechanisms tailored to address quorum failure, including timelines for the appointment of nominated directors, consequences of failure to appoint, and escalation procedures leading to mediation or arbitration.

7.3 Regulatory Considerations

In listed and regulated companies, regulated by the Capital Markets Authority, the Central Bank of Kenya, the Insurance Regulatory Authority or other regulatory bodies, the law provides a more rigorous layer of oversight. Quorum failure on the board may trigger regulatory notification obligations and may attract regulatory intervention.

A board that consistently fails to form a quorum or that remains deadlocked would likely be in violation of the regulator's requirements, potentially leading to regulatory sanctions or the loss of a license. Directors of regulated companies should be particularly vigilant about ensuring that quorum deficits are remedied promptly and that regulators are informed where required.

8. Conclusion

The residual powers of a board of directors in the absence of the requisite quorum in Kenya represent a narrow but important area of company law. The law is clear that an inquorate board cannot transact ordinary business but preserves to the remaining directors two critical powers; the power to appoint additional directors to restore quorum and the power to convene a general meeting at which shareholders may act to remedy the governance deficit.

Beyond these express residual powers, an inquorate board operates in a legally constrained space. Directors who act beyond the scope of their residual powers risk personal liability and expose the company to the consequences of void transactions.

The appropriate response to quorum failure is prompt, disciplined action within the residual powers: appointing additional directors where the articles permit, convening a general meeting, and where necessary, seeking court intervention under the Act.

The best protection against the consequences of an inquorate board lies in proactive governance, well-drafted articles that expressly address quorum failure, shareholders' agreements with robust deadlock resolution mechanisms and a culture of timely compliance with corporate governance obligations. The doctrine of residual powers is, at its heart, an emergency measure of last resort, not a substitute for sound governance practice.

How We Can Help?

Navigating the complexities of corporate governance, particularly where board functionality is impaired by the absence of a requisite quorum, demands precise legal guidance grounded in both statutory interpretation and practical corporate experience. At CM Advocates LLP, our Corporate and Commercial Law team is well-positioned to advise boards of directors, shareholders and other stakeholders on matters arising from quorum deficiencies and the exercise of residual board powers.

Specifically, we help in the following areas:

- Corporate Governance Advisory. We advise companies on the proper structuring of their articles of association and board charters to ensure that residual powers and quorum thresholds are clearly defined, legally compliant, and operationally workable under the Companies Act, 2015.
- Reviewing and Drafting Constitutional Documents. We assist in reviewing and amending a company's articles of association to incorporate robust quorum-saving provisions, emergency board action clauses, and delegation frameworks that safeguard the continuity of corporate decision-making.

- Dispute Resolution and Litigation. Where the validity of decisions made in the absence of a quorum is contested, whether by shareholders, creditors, or regulators, our litigation team is equipped to represent clients before the High Court, the Capital Markets Authority, and other relevant tribunals.
- Transactional Support. In mergers, acquisitions, or restructuring transactions where board composition issues may affect the validity of approvals or resolutions, we provide targeted due diligence and remedial advice to protect the integrity of the transaction.

- Regulatory Compliance. We guide companies in meeting their obligations to the Registrar of Companies, the Capital Markets Authority, and other oversight bodies, including where board incapacity may have affected statutory filings or compliance timelines.

- Board Training and Capacity Building. We conduct tailored training sessions for boards of directors on their legal duties, governance obligations, and the legal limits of residual powers, equipping them to make sound decisions even in operationally challenging circumstances.

Whether you are a startup navigating early-stage governance challenges, a mid-sized enterprise managing a transition in board composition, or a listed company under regulatory scrutiny, our team brings the depth of expertise and practical insight necessary to protect your interests and ensure corporate continuity.

If you would like to consult on this article or any other related matter, you may contact the contributors on the emails below or the corporate and commercial team through commercial@cmadvocates.com.

Also visit our website https://cmadvocates.com for more information about us and our services.

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