



CM ADVOCATES LLP



RE-INTERPRETING SECTION 143 OF THE COMPANIES ACT, 2015: *Personal Director Liability for Climate Risk Inaction*

For a long time, climate change was viewed by many Kenyan boardrooms as a "soft" issue, a matter for the Corporate Social Responsibility (CSR) department or a footnote in the annual sustainability report. But the legal landscape has shifted beneath our feet. Today, climate risk is no longer just an environmental concern, it is a core financial risk and, more importantly, a significant legal risk for individual Directors.

If you sit on a Board, you might be wondering if you can actually be held personally liable for the company's failure to address climate change.

Recent jurisprudence, both locally and at a global level, has confirmed that failure to act on climate risk may expose directors to personal liability.

1. THE FIDUCIARY DUTY; IS "HAVING REGARD" JUST A TICK-BOX EXERCISE?

Under the **Companies Act, 2015**, the duties of Directors are codified. Specifically, **Section 143(1)** mandates that a director must act in a way that they consider, in good faith, would be most likely to promote the success of the company for the benefit of its members as a whole.

Sub-section 143(1)(d) adds a critical layer to this duty to the extent that a director **must** have regard to "the impact of the operations of the company on the community and the environment."

Now, let's pause for a moment.

Historically, many interpreted “**having regard to**” as a passive requirement, something to be noted in minutes but not necessarily acted upon if it conflicted with short-term profits. But in the current global and local climate, “having regard” has been re-interpreted as a mandatory duty of inquiry and mitigation. Where climate-related disruptions pose a foreseeable threat to capital or operational continuity, a failure to mitigate is no longer a protected “business judgment”, it is a failure of oversight that may constitute a breach of the duty of care and skill.

The Game Changer The turning point in Kenyan jurisprudence came with the landmark case of ***Richu & 2 others v Mbau & another [2025]***. In this matter, the High Court was faced with a derivative action brought by minority shareholders against the Directors of a large manufacturing firm.

The shareholders argued that the Directors had failed to transition the company's energy sources despite clear warnings of upcoming carbon-border adjustments and local environmental regulations. The result? A massive loss in company valuation and heavy regulatory fines.

What did the Court decide?

The Court held that the Directors could not hide behind the “business judgment rule.” The Judge noted that **Section 143(1)(d)** is not a mere decorative provision. By failing to assess and mitigate climate-related financial risks, the Directors had failed to promote the long-term success of the company. The Court further emphasized that in the modern era, environmental stewardship is inseparable from financial prudence.

At an international level, in the case of ***ClientEarth v Shell Plc (UK, 2023)***, the NGO brought a derivative claim against Shell's directors for inadequate climate risk strategy. Though dismissed, the case demonstrates shareholder activism targeting directors personally.

Similarly, in ***McGaughey v Universities Superannuation Scheme Ltd (UK, 2023)***, the claimants alleged breach of duty for failing to divest from fossil fuels and although the Court rejected the claim but signalled that fiduciary duty challenges tied to climate risk are gaining traction.

2. THE VEHICLE FOR ACCOUNTABILITY: DERIVATIVE ACTIONS

You might wonder, how do these cases even get to court if the company itself refuses to sue? In the Kenyan context, **Section 238 of the Companies Act, 2015** is the operative provision. This section allows a member of a company to bring a derivative claim in respect of a cause of action arising from an actual or proposed act or omission involving:

- (i) Negligence
- (ii) Default
- (iii) Breach of duty; or
- (iv) Breach of trust by a director of the company.

In the ***Richu v Mbau case***, the shareholders successfully used **Section 238** to bypass the board and hold the Directors directly accountable. This means that even a single activist shareholder can now potentially trigger a legal process that puts a Director's personal conduct under the judicial microscope.

3. CAN YOUR PERSONAL ASSETS BE AT RISK?

This is the question that keeps Directors awake at night. When a court finds a breach of fiduciary duty under Section 143, the remedies can be severe. Directors may be ordered to:

- i) Indemnify the company for losses incurred due to their inaction;
- ii) Account for profits; or
- iii) Pay damages for negligence.

If the company's Directors and Officers insurance policy has exclusions for "pollution" or "known environmental breaches," directors may find themselves personally footing the bill for multi-million-shilling judgments.

4. HOW SHOULD BOARDS RESPOND?

The era of "climate blindness" is over. To mitigate the risk of personal liability, Directors must move from passive awareness to active governance.

The critical questions a director should ask are enumerated below:-

- i) Does our board have a standing agenda item for climate-related risks and opportunities?
- ii) Have we commissioned a climate-risk audit that aligns with **Section 143(1)(d)**?
- iii) Are our sustainability disclosures accurate, or are we drifting into "greenwashing" territory that could trigger a **Section 238** claim?

The reality is that courts are no longer treating the environment as an "externality." It is now a core component of a director's legal duty to the company. From the foregoing, it is clear that Kenyan jurisprudence is aligning with global trends and directors can no longer treat climate risk as peripheral. Both local and international jurisprudence demonstrates that fiduciary duties now encompass proactive climate governance, with derivative actions becoming a powerful enforcement tool.

HOW WE CAN ASSIST

At CM Advocates LLP, our ESG and Corporate Governance teams are at the forefront of navigating this new legal frontier. We provide comprehensive services to protect both the company and its Directors, including:

- a) **Board Inductions & Training** - Sensitizing Directors on their evolving duties under the Companies Act and recent case law.

- b) ESG Legal Audits** - Reviewing corporate policies to ensure compliance with Section 143(1)(d).
- c) Derivative Action Defense** - Representing Directors and companies in complex shareholder litigation under Section 238.
- d) Policy Drafting** - Developing climate transition plans that serve as evidence of "good faith" and "due regard."

Do not wait for a demand letter to land on your desk. Let us help you ensure that your board's decisions are climate-resilient and legally sound. For more information, reach out to us at rbf@cmadvocates.com or corporate.commercial@cmadvocates.com.

Contact our Practice Groups

Real Estate, Banking & Finance Practice Group

E: rbf@cmadvocates.com

Corporate, Commercial & Regulatory Advisory Practice Group

E: corporate.commercial@cmadvocates.com

Contributors:

Jane Mugo

Partner

jmugo@cmadvocates.com

Nelly Ng'ang'a

Associate Advocate

nnganga@cmadvocates.com

CM Advocates LLP – Contact Details

Head Office Nairobi

I&M Bank House, 7th Floor, 2nd Ngong Avenue
T: +254 20 2210978 or +254 716 209673
P.O. Box 22588 – 00505, Nairobi Kenya
E: law@cmadvocates.com

Mombasa Office

Links Plaza, 3rd Floor, Links Road, Nyali
T: +254 041 447 0758 / +254 41 447 0548
P.O. Box 90056 – 80100, Mombasa Kenya
E: mombasaoffice@cmadvocates.com

Regional Presence

Uganda | Tanzania | Rwanda | Zambia | Ethiopia | South Sudan

www.cmadvocates.com

Disclaimer: This publication is for informational purposes only and does not constitute legal advice.
For tailored legal support, please consult our team.