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Incorporating Environmental, Social and Governance in an Organisation

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Abstract

This paper discusses how to successfully introduce Environmental, Social and Governance (ESG) into organizations. The paper defines ESG and its applicability in Kenya. It then proceeds to look at the importance of incorporating ESG into an organization. It also suggests how to equip the Board and the Corporate Secretaries so that they can be ESG leads in organizations since ESG is quickly metamorphosing into a must have in all organizations intending to remain a going concern in Kenya.

1. Introduction

We may recall sometime in early 2022 when Kentucky Fried Chicken (KFC)¹ announced that they could no longer sell potato chips in Kenya as they had run out of potatoes.² In a tweet on their official

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¹ KFC is a United States of America based fast food restaurant which has franchises in most major towns and cities in Kenya and globally. They are popular for their air fried potato chips and crispy coated chicken,

² Waihiga Mwaura 'How KFC in Kenya got fried over its chip shortage' BBC News 8th January, 2022 <<https://www.bbc.com/news/world-africa-59898362>> accessed 11th June, 2023; See also Brin Oruta 'Kenyans furious as KFC runs out of imported potatoes for chips' *The Star Nairobi* 4th January, 2022 <<https://www.the-star.co.ke/news/2022-01-04-kenyans-furious-as-kfc-runs-out-of-imported-potatoes-for-chips/>> accessed 11th June, 2023. and Duncan Omondi

page, they blamed it on Kenyans who loved their chips a “*little too much*” during the festive season and they had run out of potatoes which had to be imported.³ They claimed that the delays had been caused by the COVID pandemic and other factors.⁴ This inevitably led to an uproar on social media threatening to boycott the enterprise claiming they ought to import their customers as well.⁵ Other members of the public were disappointed that after ten years of selling potato chips in Kenya, the enterprise did not find the potatoes grown in Kenya “good enough” for their potato chips.⁶ Other Companies such as Chicken Inn and Burger King who are also known for selling potato chips and other fast foods took the golden opportunity to advertise their foods on social media which they said are locally produced in an attempt to outsmart and/or outshine KFC.⁷ As with most social media news, this too faded away without causing

‘KFC runs out of potatoes as farmers struggle with oversupply’ *The Standard*, Nairobi, 4th January, 2022

<<https://www.standardmedia.co.ke/business/news/article/2001433386/kfc-runs-out-of-potatoes-as-farmers-struggle-with-oversupply>> accessed 11th June, 2023.

³ See <<https://twitter.com/KFCinKenya/status/1477930454036594769>> accessed 16th June, 2023.

⁴ Bonface Otieno ‘KFC runs out of imported potatoes for chips, snubs local farmers’ *Business Daily Nairobi* 4th January, 2022 <<https://www.businessdailyafrica.com/bd/corporate/companies/kfc-runs-out-of-potatoes-for-chips-3671470>> accessed 16th June, 2023.

⁵ Njoroge Josephine ‘Import customers as well, Kenyans retort after KFC announces potato shortage’ *Nation*, Nairobi 4th January, 2023 at <<https://nation.africa/kenya/business/import-customers-as-well-kenyans-retort-after-kfc-announces-potato-shortage-3671730>> accessed 16th June, 2023.

⁶ Marita Bosco ‘KFC reveals why they cannot buy Kenyan potatoes’ *The Star Nairobi* available at <https://www.the-star.co.ke/news/2022-01-04-kfc-reveals-why-they-cannot-buy-kenyan-potatoes/> accessed 16th June, 2023.

⁷ See Waihiga Mwaura n2

too much harm on the KFC enterprise.⁸ However, this was a classic example of a Company failing to appreciate the locals particularly suppliers in the community in which it operates which is important for ESG compliance. The Potato scenario was lacking in the S section of ESG as we will understand shortly as we problematize, conceptualize and contextualize ESG in this paper.

2. Defining ESG;

But what exactly are these Environment, Social and Governance issues abbreviated as ESG? We will break it down into three parts and explain each part as follows.

The **E** in ESG stands for the Environment, that is Environmental aspects which include measures taken to reduce climate risks and emission of greenhouse gases, proper waste management, sustainable water use and management, protection of biodiversity and ecosystems and any other steps taken for the protection of the environment.⁹

The **S** in ESG stands for the social aspect including Social Welfare and other issues including avoidance of child labour and slavery, fair labour practices including fair pay and reasonable working hours, safe working environment and concern for the local community¹⁰

⁸ The *#boycottKFC* hashtag was only trending on twitter during the month of January but other, more pressing issues overtook it shortly thereafter. A topic is trending when several people are tweeting about it.

⁹ Who Cares Wins; Connecting Financial Markets to a Changing World see <https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf> accessed 14th June, 2023.

¹⁰ Presentation made to Corporate Secretaries on 10th February, 2023 under the ESG series at the Sarova Stanley Hotel Nairobi dubbed *ESG Course part 1*.

and racial equity.¹¹ It recognizes that *people* matter, including the organization's customers, suppliers and communities.¹² It also incorporates Corporate Social Responsibility (CSR) which is basically how the organization participates in improving the life of the Community within which it operates.¹³

In the KFC scenario discussed above, the enterprise was lacking in the S sector of ESG as they completely ignored and/or belittled local potato farmers as potential suppliers for the ten or so years that they had been trading in Kenya.¹⁴ This came to light when there were delays in the importation of potatoes and the local farmers were not very amused by this.¹⁵ The Kenyan customers threatened to desist from making purchases from the said restaurant if the local potato farmers were not supported.¹⁶

The **G** stands for Governance, particularly, good corporate governance practices including shareholder rights and executive compensation. Governance could also broadly include innovation

¹¹ Alicia E. Plerhoples, 'ESG & Anti-Black Racism' (2022) 24 U Pa J Bus L 909

¹² Debra Brown and Brown, David 'ESG Matters'. 1st edn. Governance Solutions Inc (2021) available at <https://www.perlego.com/book/2939870/esg-matters-how-to-save-the-planet-empower-people-and-outperform-the-competition-pdf> accessed 13th June, 2023.

¹³ Bradley, B. *ESG Investing For Dummies* 1st edn. Wiley (2021) available at: <https://www.perlego.com/book/2237439/esg-investing-for-dummies-pdf> accessed 16th June, 2023.

¹⁴ KFC was launched in Kenya on 12th August, 2011 at the Junction Mall, Ngong Road, Nairobi, see <https://newint.org/immersive/2021/06/08/when-kfc-came-kenya-fff#:~:text=On%20the%20afternoon%20of%2012,in%20Nairobi%2C%20the%20Kenyan%20capital.> accessed 6th June, 2023.

¹⁵ See Njoroge Josephine, n5.

¹⁶ See Njoroge Josephine, n5.

and infrastructure adopted by organizations as well as partnerships including mergers and acquisitions entered into by organizations.¹⁷ Incorporating ESG into financial reports means that the organizations are required to report on the steps they are taking to ensure the three categories are complied with.¹⁸

3. The Genesis of ESG

So where did ESG come from?

Environmental, Social and Governance as a term was coined in 2005 in the “Who Cares Wins” initiative.¹⁹ The initiative had its genesis when the former United Nations invited top investors for a joint initiative to find ways to incorporate Environmental and Social Governance Issues into financial analysis of organizations.²⁰ The initiative produced a report coined “*Who Cares Wins*” which report attempts to assist investors, and financial analysts to deal with problems arising from ESG including its definition and

¹⁷ Kariuki Muigua, ‘*Embracing Environmental, Social and Governance (ESG) Principles for Sustainable Development in Kenya*’ (2022) Volume 9(2) *Journal of Conflict Management and Sustainable Development*, <<https://journalofcmsd.net/wp-content/uploads/2022/10/Embracing-Environmental-Social-and-Governance-ESG-Principles-for-Sustainable-Development-in-Kenya.pdf>> accessed 15th June, 2023.

¹⁸ See generally ‘ESG and Sustainability reporting guidelines for Mongolian Companies’ Chapter three: How to Report, at page 26-27 available at <https://www.undp.org/sites/g/files/zskgke326/files/2022-08/ESG%20reporting%20ENG.pdf> accessed 16th June, 2023.

¹⁹ Georg Kell, The Remarkable Rise of ESG *Forbes* 11th July, 2018 <<https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=75ba82661695>> accessed 13th June, 2023.

²⁰ Secretary-General Launches ‘Principles for Responsible Investment’ Backed by World’s Largest Investors, *United Nations Meetings Coverage and Press Releases* 27th April, 2006 <<https://press.un.org/en/2006/sg2111.doc.htm>> accessed 16th June, 2023.

applicability.²¹ Around the same time, the United Nations Environmental Program Finance Initiative also produced the famous “Freshfield Report” which is basically a “legal framework for the integration of Environmental, Social and Governance issues into organizational investment”²²

4. ESG applicability and enforceability in Kenya

Although Environmental and Social Governance has been in existence for a while although not properly so called, it has become quite prevalent in the past two or so years in Kenya.²³ It is argued that organizations that adopt ESG have a higher probability for success, or rather, pose a much less risk for investors.²⁴ In the past, we have had environmental regulations and provisions on sustainable development guiding companies including the Sustainable Development Goals.²⁵ We have also had Corporate Social Responsibility (CSR) activities where companies voluntarily

²¹ Financial Sector Initiative, Who Cares Wins: Connecting Financial Markets to a Changing World

<https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FFinancial_markets%2Fwho_cares_who_wins.pdf> accessed 13th June, 2023

²² See

<https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf> accessed 13th June, 2023

²³ The Nairobi Securities Exchange ESG Disclosures Guidance Manual was launched in Kenya in 2021, barely two years ago which was a huge step in the ESG conversation in Kenya.

²⁴ Beth Haddock, Tucker Pribor and Kate Starr, ‘Why Corporate Attorneys and other Gatekeepers should consider ESG and Sustainability Principles’ (2018), Vol. 30, No. 1, Fordham Environmental Law Review <<https://www.jstor.org/stable/10.2307/26775220>> accessed 16th June, 2023

²⁵ The SDGs in Action, UNDP <https://www.undp.org/sustainable-development-goals?gclid=CjwKCAjwyqWkBhBMEiwAp2yUIFquAIEKqT2mqwI-9DjsIMWxZ9-Mn5xRsy09VtoCoF73T8K76RliAihoC5KYQAvD_BwE> accessed 14th June, 2023

participate in assisting the less privileged in the community.²⁶ The CSR activities have previously been used as a marketing strategy rather than actual care and concern for the community since the organizations are aware that CSR, if well utilized, would contribute to competitiveness and profit-maximization.²⁷ Social Responsibility of organizations, which can be summarized as 'the unwritten contract between an organization and the community in which it operates'.²⁸ Social Responsibility can be deduced from Article 66 of the Constitution of Kenya.²⁹ Other examples of social responsibility under the Kenyan law include the provisions of the Petroleum Act which encourages developing and procuring of a locally available workforce.³⁰ The Companies Act also requires Directors to have regard to the impact of their activities on the community.³¹

Finally, we have had corporate governance guidelines governing companies on governance issues including the Mwongozo Code of Governance³² which governs public companies, the Code of Corporate Governance Practices for Issuers of Securities To The Public, 2015 which are Regulations under the Capital Markets Act Cap 485A governing listed/quoted companies and general

²⁶ Muthuri Judy N. and Gilbert Victoria 'An Organizational Analysis of Corporate Social Responsibility in Kenya' 2011, Vol. 98, No. 3 pp.467-483, *Journal of Business Ethics* < <https://www.jstor.org/stable/41476144> > accessed 16th June, 2023.

²⁷ Ibid

²⁸ Debra Brown and Brown, David n12.

²⁹ The Article provides that local communities and their economies should benefit from investment in property.

³⁰ Petroleum Act Number 2 of 2019, S2 and Part VI of the Act.

³¹ See S143 (1)(d) of the Companies Act, Number 17 of 2015

³² < <https://www.scac.go.ke/index.php/2015-02-16-09-56-36/2015-10-22-05-29-57?download=14:overview-of-mwongozo> > accessed 15th June, 2023.

guidelines in the Companies Act and Regulations.³³ ESG is a conglomeration of all these subsectors as it includes environmental and social impact and governance structures that enhance stakeholder wellbeing.³⁴

Other than the above steps which have been taken to introduce ESG whether wholly or partially into Kenyan organizations, the Institute of Certified Secretaries (ICS), Kenya has also launched ESG courses³⁵ aimed to train Corporate Secretaries on ESG to enable them lead in ESG issues in their respective organizations.³⁶ Further, the annual conference organized by ICS this year will be ESG themed³⁷ just to sensitize members of the Institute and other attendees on matters ESG. Additionally, Kenyan companies such as Bamburi Cement

³³ Sections relating to the Directors and the Company Secretary under the Companies Act, Number 17 of 2015.

³⁴ Kyle Peterdy, ESG (Environmental, Social & Governance) A management and analysis framework to understand and measure how sustainably an organization is operating 30th June, 2022 see <<https://corporatefinanceinstitute.com/resources/esg/esg-environmental-social-governance/>> accessed 16th June, 2023

³⁵ See the relevant brochures for the ESG courses here <<https://ics.ke/downloads-center-2?task=download.send&id=208&catid=3&m=0>> and here

<<https://ics.ke/downloads-center-2?task=download.send&id=209&catid=3&m=0>>

³⁶ Institute of Certified Secretaries Calendar of events, 2023 <<https://ics.ke/downloads-center-2?task=download.send&id=205&catid=3&m=0>> accessed 16th June, 2023.

³⁷ See

<<https://www.facebook.com/photo/?fbid=585109470474814&set=gm.1993269354341770>> accessed 16th June, 2023.

PLC³⁸, Safaricom PLC³⁹ and KCB⁴⁰ and a few others have already published their maiden sustainability reports as required by the ESG guidelines in Kenya.⁴¹

a. ESG Regulation in Kenya

Despite all the above steps and guidelines on matters ESG, organizations would only see the need to adhere to the principles set out under ESG were there are actual enforceable rules and regulations regarding the same.⁴² Unfortunately, there are no clear regulations on ESG as a concept in Kenya to date. All that is there is an ESG Disclosure Manual developed by the Nairobi Securities Exchange. The Manual is to guide listed/quoted companies on the material issues that they must disclose in adhering to ESG Guidelines.⁴³

5. Why should organizations care about ESG? After all, they are just unenforceable guidelines!

ESG Investing⁴⁴ has grown exponentially over the past one decade.⁴⁵ Lead investors, after years of investing in companies and only

³⁸ See <<https://www.lafarge.co.ke/sites/kenya/files/2022-11/bamburi-cement-sustainability-report-2021.pdf>> accessed 14th June, 2023.

³⁹ See <<https://www.safaricom.co.ke/images/Downloads/2022-Safaricom-Sustainability-Report.pdf>> accessed 14th June, 2023.

⁴⁰ See <<https://kcbgroup.com/wp-content/uploads/2022/08/KCB-Sustainability-Report-2021.pdf>> accessed 14th June, 2023.

⁴¹ Otiato Guguyu, Only 10pc of listed firms comply with ESG norms, *Business Daily*, Nairobi 28th July, 2022
<<https://www.businessdailyafrica.com/bd/data-hub/only-10pc-of-listed-firms-comply-with-esg-norms-3894194>> accessed 16th June, 2023.

⁴² Ibid

⁴³ Kariuki Muigua, n17.

⁴⁴ Responsible investing where the investor is conscious of the role the investment will make on the environment and society at large. See Beth Haddock, Tucker Pribor and Kate Starr, at n24

⁴⁵ Dana Brakman Reiser & Anne Tucker, 'Buyer Beware: Variation and Opacity in ESG and ESG Index Funds' (2020) 41 *Cardozo L Rev* 1921.

considering financial risks realized that a company may have very good accounting books projecting profits but still end up in great losses due to non-financial losses.⁴⁶ The impact of ESG on the financial performance of a company could no longer be downplayed.⁴⁷ The investors therefore decided that they were safer if the companies gave full disclosure of other factors particularly environmental, social and governance factors which may have an impact in the future of the company.⁴⁸ But rather than the risk aversion that investors were concerned with, they were also genuinely concerned about the environment, the society and good governance in the Companies they were associated with.⁴⁹

From the above, the Board ought to be concerned with ESG for two reasons. First is the full disclosure required for purposes of securing financial and other assistance from investors.⁵⁰ Since investors are now considering ESG investing where they only invest in companies that are ESG compliant, an organization which wants to maximize its property by looking towards investors investing in their company must consider implementing ESG requirements.

The second is that the board of directors of companies and organizations generally, regardless of the size has a duty to ensure the success of the organization which success may be achieved through non-financial activities such as ensuring the needs of the employees are well taken care of, foster the company's business

⁴⁶ Financial Sector Initiative, Who Cares Wins n21

⁴⁷ Roopali Garg & Gurjant Singh Cheema, 'The Role of International Arbitration in the Rise of ESG Disputes' (2023) 32 *Supremo Amicus* [255]. Introduction.

⁴⁸ Financial Sector Initiative, Who Cares Wins n21

⁴⁹ *Ibid*

⁵⁰ *Ibid*

relationships with suppliers, customers and others, protection of the environment by taking onto consideration the impact of the organization's activities on the environment and the community at large and good governance practices among other activities.⁵¹

Finally, other jurisdictions that are way ahead of Kenya in terms of ESG compliance have considered prosecuting Directors for failing to adhere to ESG guidelines and thereby causing companies untold losses.⁵² The Directors could be sued by the minority under derivative action for failing to abide by their fiduciary duty of ensuring the success of the company.⁵³ Considering our company laws are borrowed from other jurisdictions,⁵⁴ very soon, our Directors may be liable for failing to comply with ESG despite ESG itself being unenforceable in Kenya.⁵⁵

⁵¹ Section 17 of the Companies Act Kenya Number 17 of 2015

⁵² Dewi Tamara & Feronia Budiman, 'New Index ESG Leaders & Investment Decisions in Indonesia Relating to ESG Principles' (2022) 12 J Mgmt & Sustainability 64 available at https://vpn.uonbi.ac.ke/proxy/1507e9ab/https://heinonline.org/HOL/PrintRequest?public=true&handle=hein.journals/colb2022&div=17&start_page=732&collection=usjournals&set_as_cursor=19&men_tab=srchresults&print=section&format=PDFsearchable&submit=Print%2FDownload accessed 18th June, 2023.

⁵³ Ibid.

⁵⁴ Such as the attempts made in Delaware although they have not been successful yet due to the pre-requisites of filing derivative claims. See more on Roy Shapira, 'Mission Critical ESG and the Scope of Director Oversight Duties' (2022), 2022 Colum Bus L Rev 732

⁵⁵ Dewi Tamara & Feronia Budiman, n52

6. Who should enforce ESG? The Board, the Company Secretary or the Legal Department?

ESG as defined above is very wide.⁵⁶ If it were to be properly implemented, it would require an environmental specialist or conservationist, a labour rights activist, a community development enthusiast, a corporate governance expert and an actuarial scientist⁵⁷ to predict and assess the risks involved.⁵⁸ This would be a very expensive affair for any organization.

In the recent past, titles like the *ESG lead* have emerged where different professionals with different career backgrounds but with a passion in ESG have come out to lead organizations in the pursuit of ESG Compliance.⁵⁹ This is because of the wide nature of ESG which has in some instances forced Directors to hire experts from outside the organization who are conversant with the divergent ESG components.⁶⁰

⁵⁶ Ibid.

⁵⁷ See Sean O'Neill 'What kind of jobs can you get with a qualification in ESG?' 2022 Corporate Governance Institute
<<https://www.thecorporategovernanceinstitute.com/insights/guides/what-kind-of-jobs-can-you-get-with-a-qualification-in-esg/>> accessed 18th June, 2023.

⁵⁸ ESG reporting involves a material analysis which involves identifying the areas and/or topics that would make an impact on the company's performance. The material topics are diverse and could include human rights, bribery and corruption, occupation, health and safety, carbon emissions, waste management, data privacy and compliance among others. See Nairobi Securities Exchange ESG Disclosures Guidance Manual. These areas are quite diverse and each would require a certain level of expertise to sufficiently report on their effect on the organization's overall performance. See also Virginia Harper Ho, 'Modernizing ESG Disclosure' (2022) U Ill L Rev 277.

⁵⁹ An ESG lead could be an actuary, an accountant, a portfolio manager, a financial adviser, Sean O'Neill n 57

⁶⁰ Roy Shapira, n54

The Institute of Certified Secretaries which is also known as the “Governance Profession” and which institute is mandated to train Corporate Secretaries, has taken it upon itself to train Secretaries on ESG matters through several short courses.⁶¹ The annual 3- day international conference is themed “ESG for a Sustainable Future: Aligning People, Profit and Planet” which will be held in August 2023.⁶² Any Certified Secretary intending to remain in good standing with the institute is required to obtain at least 20 Continuous Development Points (CPDs) in a year or an aggregate of 60 CPD Points earned in the immediate past three years. Only members in good standing are entitled to practice as corporate secretaries and participate in the activities of the Institute. The CPD points are acquired through attending the trainings held by the Institute.⁶³ The trainings are therefore somewhat compulsory although a participant has the liberty to choose the topic for the training they wish to attend. A certified Secretary desirous of advancing the ESG conversation in their organization would therefore prefer ESG themed trainings and conferences.

Since ESG would need participation from most if not all departments of the organization, and since the Board has a duty to ensure the success of the organization by giving it general direction,⁶⁴ and the

⁶¹ <<https://www.ics.ke/downloads-center-2?task=download.send&id=208&catid=3&m=0>> accessed 17th June, 2023

⁶² <https://events.ics.ke/events/ODE=and>
<<https://www.facebook.com/photo/?fbid=585109470474814&set=gm.1993269354341770>> accessed 16th June, 2023

⁶³ The Institute of Certified Secretaries current CPD Policy may be accessed on <<https://ics.ke/downloads-center-2?task=download.send&id=85&catid=3&m=0>> accessed 17th June, 2023.

⁶⁴ Section 143 of the Companies Act, Number 17 of 2015, Laws of Kenya.

Corporate Secretary is Compliance lead in the organization,⁶⁵ the Board with the help of the Corporate Secretary must take the lead in introducing ESG to the organization. As much as the role of the Corporate Secretary has evolved from being a mere minute taker⁶⁶ to being recognized as an officer of the Company⁶⁷ who would therefore be liable in the event of corporate criminal culpability, it is well settled that it is the Board that gives the general direction of the Company including the introduction of new concepts such as ESG. However, the Corporate Secretary, being the general adviser of the Company in matters governance must take the initiative to guide the Board on the entire process. The Board's Role would be to facilitate the process while the Corporate Secretary would be in charge of ensuring enforcement.⁶⁸

In most organizations, the Corporate Secretary has a legal background as is therefore both the organizations Corporate Secretary and head of legal affairs as evidenced by recent job adverts in Kenya for renowned companies such as Development Bank of

⁶⁵ Kariuki Muigua, The Company Secretary as a Compliance Leader – Maintenance of Global Standards, <http://kmco.co.ke/wp-content/uploads/2018/08/076_CS_Compliance_Leader.pdf> accessed 17th June, 2023.

⁶⁶ See the case of *Barnett, Hoares & Co v South London Tramways Co* (1887) 18 QBD 815, where Lord Esher MR described the secretary as “a mere servant” who must “do what they are told.”

⁶⁷ In a later case of *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* [1971] 2 QB 711, the Court reversed the decision in *Barnett, Hoares & Co* and held that the Company secretary is an officer of the Company with extensive duties and responsibilities.

⁶⁸ See generally the role of the Corporate Secretary as discussed by William B. Browder in ‘The Corporate Law Department and the Corporate Secretary Function’ 1979 Vol. 34, The Business Lawyer, Proceedings of “Corporate Law Department Forum, March 8 and 9, 1978” (February 1979), pp. 875-880, American Bar Association see <https://www.jstor.org/stable/40685958> accessed 18th June, 2023.

Kenya,⁶⁹ National Oil Corporation, Kenya,⁷⁰ National Hospital Insurance Fund (NHIF),⁷¹ Kenya Airports Authority (KAA),⁷² and Kenya National Commission for UNESCO (KNATCOM).⁷³ According to some, the ideal situation is to have the Corporate Secretary and the General Counsel as one and the same person.⁷⁴ This combination of qualifications comes with its set of advantages since the legal affairs department would be at a better place to confirm that all the laws and guidelines related To ESG are complied with. As explained earlier, ESG has a very wide coverage and therefore, a professional with an Environmental, Employment and Governance background would have a lot of value addition to a company seeking to comply with ESG Guidelines.

7. Is the Corporate Secretary sufficiently equipped to handle ESG issues?

Considering how wide ESG is, it would be virtually impossible for a single person to be an expert in the entire ESG concept. However, an organization should have a leader in all major departments. In my

⁶⁹See <https://www.myjobmag.co.ke/job/company-secretary-and-head-of-legal-development-bank-of-kenya> accessed 18th June, 2023.

⁷⁰ See <https://nationaloil.co.ke/wp-content/uploads/2020/07/Job-Advert-Company-Secretary-Manager-Legal-Services.pdf> accessed 18th June, 2023.

⁷¹ See <https://www.nhif.or.ke/wp-content/uploads/2023/04/CORPORATION-SECRETARY-AND-DIRECTOR-LEGAL-SERVICES.pdf> accessed 18th June, 2023.

⁷² See <https://www.kaa.go.ke/jobs/corporation-secretarychief-legal-officer-ref-legalcssept-2021/#:~:text=The%20Corporation%20Secretary%2FChief%20Legal,litigation%20function%20of%20the%20Authority.> Accessed 18th June, 2023.

⁷³ See <https://jobs.digger.co.ke/39539/corporation-secretary-and-director-legal-services> accessed 18th June, 2023.

⁷⁴ William B. Browder n68

view, it is advisable for the Corporate Secretary to take the lead in matters ESG.⁷⁵ I will explain why.

The Corporate Secretary already distinguished themselves as the Governance specialist in organizations.⁷⁶ The statutory mandate of the Institute of Certified Secretaries includes promoting good governance.⁷⁷ In fact, the Certified Governance Secretaries Bill 2023 is proposing to change the name of the Certified Secretary to a Certified Governance Secretary at Section 2.⁷⁸ The corporate secretaries have a role to ensure that the Organization, whether public or private is adhering to governance best practices.⁷⁹ The Corporate Secretary already has the G covered and only needs to expand their territory to the E and S of ESG.

Having already covered the G aspect, the Corporate Secretary would have an easier task enforcing the E and S as compared to other professionals. I strongly opine that the Corporate Secretary should therefore lead the ESG discussions, of course with the support of the board and other relevant departments. Being a compliance expert, the Company Secretary would find it easy to ensure compliance with ESG guidelines. Furthermore, the Institute of Certified Secretaries

⁷⁵ Some have argued that accountants are best equipped to take the lead in ESG matters due to their analytical skills and expertise in reporting, see Sean O'Neill, n57.

⁷⁶ Kariuki Muigua, *The Company Secretary as a Compliance Leader* n65

⁷⁷ See <https://www.ics.ke/about-us> accessed 17th June, 2023.

⁷⁸ <https://mcusercontent.com/95d0a0e7ae38d71e257b38a32/files/d616814f-d9e4-a753-4ab9-a23a2fdce8f8/Draft_Certified_Governance_Secretaries_Bill_2023.pdf> accessed 17th June, 2023.

⁷⁹ Kariuki Muigua, *The Company Secretary as a Compliance Leader* n65

continues to train Secretaries on this emerging issue to ensure the corporate secretaries guide the corporations appropriately.⁸⁰

8. Conclusion

As much as ESG only seems like an advisable step that organizations should take, it is worth noting that ESG is a wave which will cover every organization eventually. The earlier organizations start planning for it, the safer they will be when it becomes compulsory for all organizations to adopt it. It does not matter whether an organization is self-sufficient such that it does not require investors who will insist on ESG compliance. ESG is important for an organization that wishes to remain competitive, improve its brand and enjoy other reputational benefits.⁸¹ Our planet is one and it must be utilized sustainably for our benefit and the benefit of future generations.⁸² Every single person in Kenya has a responsibility to care for the environment and it matters not that an organization is too small to make an impact.⁸³ It would therefore be wise for small enterprises (as well as big ones), to invest in sustainability.⁸⁴ Every

⁸⁰ The Institute of Certified Secretaries Calendar of events, 2023 <<https://ics.ke/downloads-center-2?task=download.send&id=205&catid=3&m=0>> accessed 16th June, 2023.

⁸¹ Sanders, N. and Wood, J. *Foundations of Sustainable Business* 2nd edn. Wiley. (2019) <<https://www.perlego.com/book/2328887/foundations-of-sustainable-business-theory-function-and-strategy-pdf>> accessed 17th June 2023

⁸² <<https://www.undp.org/cambodia/news/only-one-earth-living-sustainably-harmony-nature>> accessed 18th June, 2023.

⁸³ Article 69 (2) of the Constitution of Kenya provides that “Every person has a duty to cooperate with State organs and other persons to protect and conserve the environment and ensure ecologically sustainable development and use of natural resources.”

⁸⁴ Joey Hodges the Role Small Businesses Can Play in Building A Sustainable Future *Forbes* 9th June, 2021

<<https://www.forbes.com/sites/forbesagencycouncil/2021/06/09/the-role-small-businesses-can-play-in-building-a-sustainable-future/?sh=1023fec72da5>> accessed 18th June, 2023.

organization, even a sole proprietorship produces waste and uses energy.⁸⁵ Separation of waste and using energy saving bulbs and clean energy would be contributions to the ESG mantra by the sole proprietor.⁸⁶

9. Recommendations

First, more steps need to be taken to sensitize both the Board and the Corporate Secretaries on Matters ESG. Other medium sized and small enterprises including sole proprietorships which have no board should also be sensitized from the onset as it is these companies which sometimes grow into big companies complete with boards.

The Institute of Certified Secretaries may consider ESG Certification Courses as well as incorporating ESG as a concept in the professional papers required for qualification as a Certified Secretary. They could also include an award for ESG leads in the Champion for Governance Awards which is held annually and which event commends corporate secretaries who have done well in their respective organizations.⁸⁷

Other Courses such as Company Law or the Law of Business Associations taught in Law Schools⁸⁸ and Commercial Transactions taught at the Kenya School of Law⁸⁹ and any other courses on the Environment and corporates and other organizations could also consider incorporating ESG as an examinable topic in their curricula.

⁸⁵ Ibid.

⁸⁶ Ibid.

⁸⁷ <<https://www.ics.ke/cog-award>> accessed 17th June, 2023.

⁸⁸ See Part II, Number 9 of the Second Schedule to the Legal Education Act Kenya, Number 27 of 2012.

⁸⁹ See The Kenya School of Law (Training Programmes) Regulations, Regulation 10(i) under the Kenya School of Law Act Number 26 of 2012.

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