ADVISING FAMILIES AND THEIR BUSINESSES

Navigating Governance in Family-Owned Enterprises:

Why the Board and Family Council Should Coexist

prepared by

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LAWYERS SHAPING KENYA'S GROWTH

Introduction: A Leadership Imperative

For leaders of family-owned enterprises in Kenya, governance is no longer a back-office concern; it's a boardroom priority. Family-owned enterprises are at the heartbeat of Kenya's private sector. Yet many of these enterprises face a silent threat: governance breakdown. As these businesses grow in complexity, the need to distinguish between corporate governance and family governance becomes not just strategic but essential.

When Family Influence Disrupts Strategy

The collapse of once-prominent businesses like Tuskys Supermarket has brought this issue into sharp focus. Internal family disputes, lack of succession planning, and informal decision-making structures contributed to its downfall, underscoring the risks of failing to separate family influence from business governance. When family dynamics override commercial logic, the business becomes vulnerable to legal exposure, financial instability, and reputational damage.

Two Pillars of Governance: Board and Family Council

At the heart of resilient family enterprises are two distinct yet complementary governance bodies:

- **The Board of Directors** governs the company.
- **The Family Council** governs the family's relationship with the company.

Each serves a unique purpose, and neither should substitute the other.

a. The Board of Directors: Strategic and Legal Stewardship

The Board of Directors is a legally recognized body under the Companies Act, 2015. It is responsible for setting strategy, ensuring compliance, managing risk, and safeguarding shareholder interests. Its fiduciary duty is owed to the family company, not to individual family members. Importantly, the law imposes duties of care and loyalty on directors, and failure to discharge these duties can result in personal liability. For family-owned businesses seeking to expand, raise capital, or attract external investors, a credible and professional Board is indispensable. Independent directors bring objectivity and balance; a signal to investors that the business is ready for scale and partnership.

b. The Family Council:
Unity, Strategic and Legal Stewardship

The Family Council, by contrast, is not created by statute but by family initiative. It is an informal yet increasingly critical governance mechanism. Its purpose is to provide a structured platform for family members to engage on issues such as succession planning, participation in management, and the transmission of shared values across generations. It also helps to manage expectations around dividends, employment opportunities, and leadership roles. By providing this forum, the Family Council reduces the risk of disputes being carried into the Boardroom, allowing leaders to focus on growth, not firefighting. Many families in Kenya now document their arrangements in a Family Constitution, which, while not legally binding, offers a guiding framework for future generations.

Avoiding Legal Pitfalls and Investor Distrust

However, problems arise when these roles are not clearly defined. Family members who exert influence over business decisions without formal appointment may be deemed shadow directors. This creates legal exposure not only for the individuals involved but also for the company itself.

Moreover, when family interests dominate board decisions, it can erode investor confidence and hinder the company's ability to attract external capital or strategic partners. Leaders must ensure that influence is matched by formal authority and that governance structures are respected.

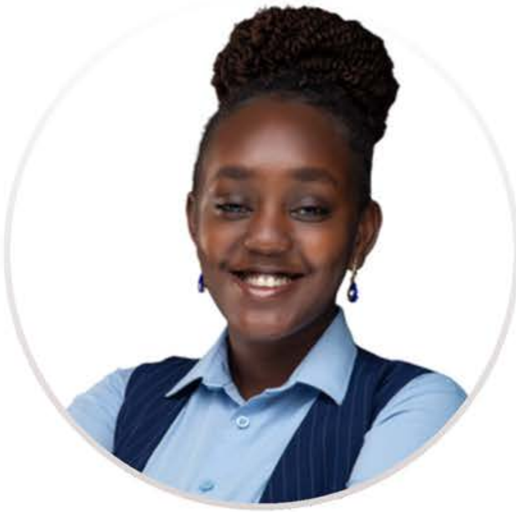
How Leaders Can Strengthen Governance

To mitigate risk and preserve unity, family business leaders should:

- Appoint **independent directors** to bring expertise and objectivity.
- Establish a **Family Council** to manage internal dynamics and succession.
- Draft a **Family Constitution** to guide generational engagement.
- Document **succession plans** to ensure continuity.
- Use **shareholders' agreements** to define ownership rights and resolve disputes.

Conclusion: Lead with Structure, Preserve with Strategy

Ultimately, the goal is not to separate family from business, but to ensure that each governs its respective domain effectively. A well-balanced governance structure allows the business to thrive commercially while preserving the family's legacy and values. Leaders must champion governance frameworks that protect both enterprise value and family unity and the coexistence of Board and Family Council in this role is not only optional but foundational.



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