



Electronic signatures;

An option for businesses
under lockdown in
Uganda during Covid - 19



Plot 41, Nakasero Road
P.O Box 9566, Kampala, Uganda
T +256 (0) 414 344123 +256 (0) 312 244100
Email: info@kaa.co.ug
www.kaa.co.ug

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Introduction

The Covid-19 Pandemic has gripped the world leaving most people stuck in their homes as prescribed by their respective governments. In Uganda, in order to flatten the curve and prevent mass infection, various restrictive measures were introduced including closing of all non-essential businesses and government agencies.

Stay at home orders make it impossible for an individual to execute documents normally, companies and individuals are now indirectly forced to adapt to the new normal of remote working. Electronic signatures (“e-signatures”) allow for execution of documents in soft copy using computer software without requiring the physical presence of the signatory thereby easing methods of approval in a business. Electronic signatures also allow a business to complete transactions while abiding by the safe distance measures currently in place.

This article will look at the validity of e-signatures in terms of Ugandan law and how this piece of data can be used to allow for remote working during these uncertain times.

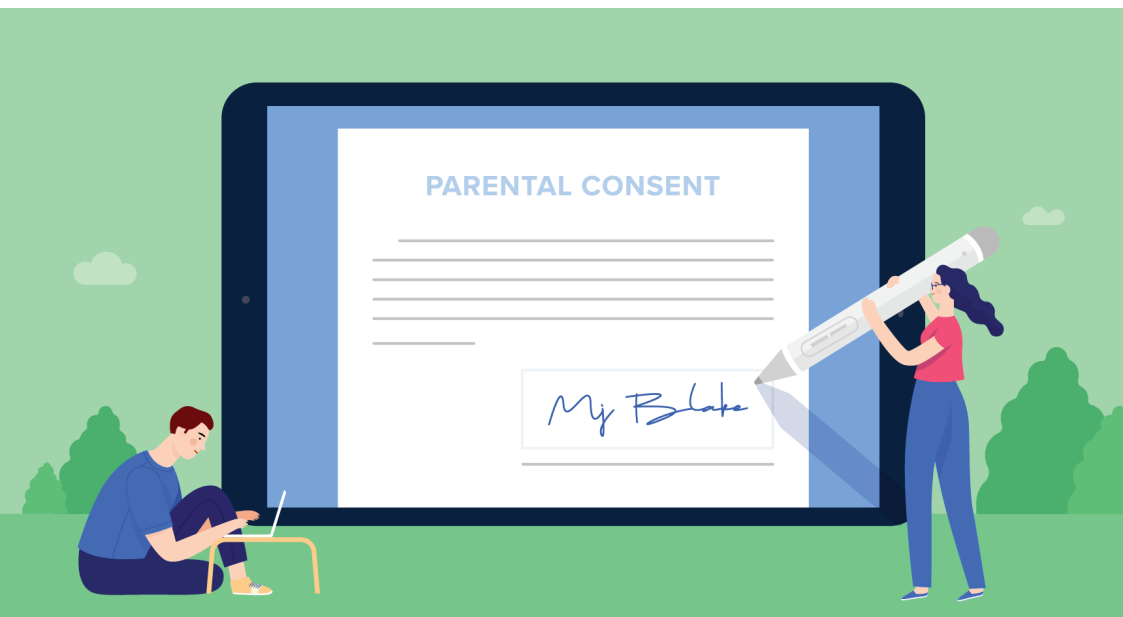
What is an electronic signature?

Simply understood, e-signature is a term generally used internationally for any signature in an electronic format. Electronic Signatures are legally binding in Uganda and are regulated by the Electronic Signatures Act No.7 of 2011 (“the Act”).

Under the Act, an e-signature is defined as data in electronic form affixed to or logically associated with a data message, which may be used to identify the signatory in relation to the data message and indicate the signatory’s approval of the information contained in the data message; and includes an advanced electronic signature and the secure signature.

Section 3 of the Act states that, nothing in the Act shall be applied so as to exclude, restrict or deprive of legal effect any method of creating an electronic signature that satisfies the requirements for a signature in the Act or otherwise meets the requirements of any other applicable law. In other words, as long as an e-signature meets the requirements under the Act, it does not matter what method, software or platform is used to create that e-signature.

According to the Act, where the signature of a person is required by law, that requirement is met if a reliable electronic signature is used. An e-signature is considered to be reliable if it meets four basic requirements, namely:



1. The signature creation data must be linked to the signatory only;
2. The signatory must be solely in control of the signature creation data at the time of signing;
3. Any alteration of the e-signature made after signing must be detectable; and
4. Where a signature is required by law for the purpose of assurance to the integrity of the information to which it relates (for instance signatures by witnesses), any alteration made to that information after signing must be detectable.

Many of the popular software such as Microsoft Word and Adobe PDF have already adapted these requirements within their e-signature feature. Businesses must therefore first ascertain that a particular e-signature feature or platform meets these requirements before adapting it.

Electronic signatures are different from “digital signatures.” A digital signature is one that is created using a framework which can create a secure method for exchanging information based on public key cryptography. The signatory owns a private key which is used to sign an electronic record and a corresponding public key is used to verify the authenticity of the signature.

The private key is only available to the signatory and the public key is made available to the person relying on such a signature. According to the Act, a digital signature is legally binding and can be used by any person whose signature is required by law.

Types of Electronic Signatures under the Act

Obviously, transactions differ based on the level of risk involved especially in high-stakes contracts or agreements. Even with wet-ink signatures, such contracts demand a higher level of caution that must be taken by any signatory in confirming that the person signing the contract is the person required by law to sign and that that person has agreed to be legally bound by appending their signature to the contract.

The Electronic Signatures Act caters for these kinds of situations by establishing different types of e-signatures, namely; Advanced Signatures and Secure Electronic Signatures. These types are distinguished based on the method used to create the e-signature and the method of verifying authenticity.

Advanced Electronic Signatures (AES)

These are e-signatures that are; uniquely linked to the signatory, reliably capable of identifying the signatory, created using a secure signature creation device that the signatory can maintain and an AES must be linked to the data to which it relates in such a manner that any subsequent change of the data or the connections between the data and the signature are detectable.

According to the Act, an AES which is verified with a qualified certificate is equal to an autographic signature (handwritten signature) in relation to data in electronic form and therefore has equal legal effectiveness and admissibility as evidence.

The main distinguishing factor of this kind of e-signature is that it is qualified by a certificate in data form which confirms the link between the signatory and the e-signature. Such certificates are awarded by Certification Service Providers who are licensed by National Information Technology Authority - Uganda (NITA-U) to issue certificates for e-signatures. The certificate must be verified and it must be valid at the time the advanced electronic signature is used.

Anyone intending to use this type of e-signature must subscribe to platforms of Certification Service Providers in order to be issued with certificates showing authenticity of the subscriber's e-signature. Both the signatory and the person relying on the signature must be in possession of a certificate.



Secure Electronic Signatures (SES)

These types of e-signatures are applied using a prescribed security procedure or a commercially reasonable security procedure agreed to by the parties involved. They are executed in a trustworthy manner, reasonably and in good faith relied upon by the relying party.

By using Secure Electronic Signatures, the party relying on that e-signature is assured that the signature shall be treated as a secure electronic signature at the time of verification. The Act requires the following criteria to be met at verification;

- a. the signature creation data used for signature creation is unique and its secrecy is reasonably assured;
- b. it was capable of being used to objectively identify that person;
- c. it was created in a manner or using means under the sole control of the person using it and those means cannot be readily duplicated or compromised;

d. it is linked to the electronic record to which it relates in such a manner that if the record was changed to electronic signature would be invalidated; (e) the signatory can reliably protect his or her signature creation data from unauthorised access. As expressed in the term itself, Secure Electronic Signatures offer assurance to the person relying on the signature. Businesses must therefore put themselves in position not only to use secure e-signatures but to also recognize secure e-signatures with ease.

Presumptions created by law where an AES and SES are used

According to the Act, in any civil proceedings involving a secure electronic record, it shall be presumed, unless the contrary is proved, that the secure or advanced electronic record has not been altered since the specific point in time to which the secure status relates.

Secondly, in any civil proceedings involving a secure or advanced electronic signature, unless the contrary is proved, the following shall be presumed: -

- that the secure or advanced electronic signature is the signature of the person to whom it correlates; and
- that the secure or advanced electronic signature was affixed by that person with the intention of signing or approving the electronic record.

These presumptions are only made in relation to secure and advanced e-signatures. In simpler terms, Advanced Electronic Signatures and Secure Electronic Signatures are safer and more reliable than e-signatures used in their basic form. Therefore, any person or business involved in high stakes transactions should consider the use of secure and advanced e-signatures.

The Company law position on Electronic Signatures

In Uganda, the Companies Act, 2012 (“the Companies Act”) has no provision pertaining to the use of electronic signatures by companies. Some companies use and recognize electronic signatures in electronic documents and the definition of “a person” under the Electronic Signatures Act which includes “any company or association or body of persons corporate or unincorporate” permits these companies to use e-signatures. Therefore, this method of signing documents is legally binding for companies as well.

The pandemic has become an impediment to the usual way companies sign documents. Under the Companies Act, documents and forms of the company are signed or executed by either one director and the secretary or by two directors and this type of execution has the same effect as if the document was executed under the common seal of the Company.

Unfortunately, the Company Registry (Uganda Registration Services Bureau-URSB) requires wet-ink signatures for the execution of a number of Company Forms and Resolutions. It may therefore be impractical for a company to use e-signatures. However, due to the prevailing circumstances, URSB has been forced to create procedures that bypass the requirement for wet-ink signatures. It is not certain if these procedures will continue to apply post COVID-19. We note that this would be a good time for URSB to start recognizing e-signatures for standard Company Forms.

Governing law of a contract

As far as Ugandan Law is concerned, parties to a contract can be assured that the contract will be considered valid and legal if executed electronically using an electronic signature.

In the event that the agreement is not governed by the laws of Uganda, it is advisable that you consult your lawyer to confirm if the use of an electronic signature will not invalidate the contract. Many countries have adopted the use of e-signatures and they recognise them as having legal effect but each jurisdiction must be looked at independently to determine the extent of this legal effect.

Can e-signatures be used everywhere?

Some documents in Uganda require additional formalities which may then limit the ability to use an electronic signature. These formalities include witnessing, attestation and swearing oaths or declarations that may even need to be notarized. Not all agreements or transactions require witnessing or attestation. Certain documents however are required by law to be signed in the presence of one witness or more. These include wills, deeds, instruments and affidavits. Witness signatures are important in proving validity of a document because the witness can confirm that the specific person signed the document and can identify the signature that was made by that person.

Where the law specifically provides for the manner in which a document should be witnessed, e-signatures may not be a viable option and the document may be rendered invalid if an e-signature is used without complying with other statutory procedural requirements. Some of these transactions are outlined in the Second Schedule of the Electronic Transactions Act, No. 8 of 2011.



Transactions under the Registration of Titles Act

Under the Registration of Titles Act, Cap. 230 (RTA), instruments and powers of attorney must be attested to by one witness. Section 147 requires particular persons to witness instruments under the RTA and lists such persons to include; advocates, bank managers, a notary public, medical practitioners and others. An instrument executed contrary to this requirement will be considered invalid. The Supreme Court of Uganda emphasized this position in the case of Fredrick J.K Zaabwe Vs Orient Bank Limited and Others S.C.C.A 04/2006.

Dealings relating to land transactions can be very contentious at times and a witness may be vital in proving the authenticity of the signatures used by the transacting parties. Instruments and powers of attorney under the RTA must be executed in the physical presence of any one of the listed witnesses.

Where e-signatures are used to execute an instrument, the witness may not be able to confirm, with utter certainty, that the e-signature was created by that particular person and that any data relating to the e-signature has not been tampered with. We must note at this point that if the law were amended to allow for use of secure e-signatures in dealings under the RTA, there would be no need for witnesses because of the secure or advanced e-signature contains data that can be used to verify the authenticity of the signature and identify the signatory.

For businesses trying to transact under the RTA while under the current lockdown, it is advisable that you transact in the physical presence of the required witness while maintaining a safe distance.

Affidavits and Statutory Declarations

An affidavit is a statement or declaration in writing on oath or affirmation made before a person having authority to administer oath or affirmation. The Commissioner for Oaths (Advocates) Act authorizes Commissioners for Oaths to administer any oath or take affidavits for the purpose of any court or any matter in Uganda. The Civil Procedure Rules S.I 71-1 require many of the applications made in civil proceedings to be supported by an affidavit sworn by a person well versed with the facts pertaining to the subject matter.

This means that affidavits intended for court or any other matter within the jurisdiction of Uganda must be made or taken in the presence of a Commissioner for Oaths who is required to append his or her wet-ink signature and stamp on the affidavit.

If the affidavit must be used outside Uganda, then it has to be made in the physical presence of a Notary Public licensed in Uganda to take any oath. Every Commissioner for Oaths or Notary Public before whom any oath or affidavit is taken or made must state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.

There is a process involved in making an oath and e-signatures would be rendered useless since the Commissioner's or Notary's physical presence is required. The person required to depone an affidavit must depone that affidavit in the physical presence of someone authorised to take oaths otherwise it will be considered invalid.

Wills and Codicils

The Succession Act of Uganda requires two witnesses who are not beneficiaries to sign a will. The witnesses must have seen the testator signing the will. The witnesses must therefore be able to confirm with certainty that the testator signed the said will and that the signature on the will was made by the testator with every intention to approve the information within the will.

If the testator used an electronic signature, the witnesses would not be in position to prove that the testator created the electronic signature and they would not be able to confirm that the data related to the e-signature was not tampered with after the e-signature was used.

Electronic signatures can be created with the ability to cater for such issues, however, until the law is amended, the physical presence of a witness remains a mandatory requirement.



Incorporation of Companies

Every Company in Uganda must have a Memorandum and Articles of Association in order to be incorporated. Section 8 and 15 of the Companies Act require the Memorandum and Articles to be signed in the presence of at least one attesting witness. This means that a company will not be able to use e-signatures while signing its memorandum and cannot therefore complete the process of incorporation using e-signatures. In any case the Company Registry does not rely or currently recognise/ accept e-signatures as already highlighted above.

Service of Summons

Under the Civil Procedure Rules, when copies of summons issued by Court are duly delivered or tendered to the defendant personally or to an agent or other person on his or her behalf, the defendant or the agent or other person is required to endorse an acknowledgment of service on the original summons.

In practice, the original summons are issued by a Court in hard copy and it is therefore impossible to append a signature electronically.

Conclusion

Economies around the world continue to suffer due to the overwhelming effects of the novel Coronavirus (Covid-19). It is without doubt that many transactions have been held off at the stage of signing because the signatories probably have no access to the hard copy documents to be signed and even if they did, the signing event may have been postponed in order to abide by the safe distance measures taken by all countries to prevent the spread of Covid-19.

Persons and businesses in Uganda that want to continue transacting during these prevailing limitations should explore the use of Electronic Signatures (e-signatures) to ease methods of approval within a business and to ensure the safety of the signatories.

Covid-19 might have us locked in our houses but that does not mean all business must be stagnated. E-signatures provide a method of execution that allows for the economy to progress without meeting which is the best way forward during these unprecedented times.

Authors



Augustine Obilil Idoot
Partner
aidoot@kaa.co.ug



Miranda Kabatsi
Associate
mkabatsi@kaa.co.ug



David Bahige
Legal Assistant
dbahige@kaa.co.ug



Rose Katanywa
Research Assistant

Consider it Solved

www.kaa.co.ug