ALN KENYA
Anjarwalla & Khanna

Investment Guide
Kenya

ALN.AFRICA

ONE REGION
ONE VISION
ONE ALN

About ALN Kenya

ALN Kenya is one of Kenya's pre-eminent, full-service corporate law firm, and a leading regional powerhouse.

The firm's consolidated and seamless cross-border offering is driven by a diverse and talented team of over 100 lawyers based in our Nairobi, Mombasa, Dar es Salaam and Dubai, offices. Our lawyers have the agility and expertise to operate locally and across the pan African business and economic environment. ALN lawyers combine their global perspective with local expertise to help clients navigate new territories and capitalise on future opportunities.

ALN Kenya is recognised as a market leader by distinguished global legal guides, including Chambers Global, IFLR1000, and Legal 500.

About ALN

ALN is an integrated alliance of the preeminent full-service corporate law firms in 15 African countries and a regional office in UAE. Together, ALN firms provide clients with seamless practical and business-focused legal, advisory and transactional services across Africa.

The alliance specialises in blending deep local knowledge and reach with sector-specific expertise, to successfully guide clients in navigating locally and across borders.

Executive Summary

Kenya is the largest and most advanced economy in East and Central Africa. Its GDP accounts for more than 50 percent of the region's total, and its 2021 GDP stood at 110.35 billion dollars in current market prices.

The Government of Kenya recognises the critical role investments play in economic development and realising Vision 2030 objectives. To this end, Kenya has streamlined business licensing regimes and adopted online investment facilitation portals to ensure faster registration and approval of new investment projects. These changes led to an improvement for Kenya in the World Bank Group's Doing Business Report, 2020, where Kenya's rank improved from 61 to 56 out of 190 economies in the ease of doing business.

Kenya's investment environment is fully liberalised. Foreign investors can invest up to 100% ownership, except in securities, insurance, power and lighting and any other identified sectors by the government that may be deemed to pose a security risk to the country. Sustainable growth and development are feasible by promoting local and foreign investments. One of the most significant changes in Kenya's recent history is the enactment of the Constitution in 2010. Since the new Constitution was passed, over 300 new statutes have been enacted. This flurry of new and modernised legislation has changed the investment regulatory system significantly.

There are no regulations restricting joint venture arrangements between Kenyans and foreigners or prohibiting the acquisition of Kenyan firms by foreign-owned firms. Nonetheless, there are some restrictions on investment in companies listed on the Nairobi Securities, the insurance sector, and the KPLC. Kenya's economy has demonstrated resilience to the COVID-19 shock, with output rising above pre-pandemic levels in the first half of the year. The economic performance is expected to be robust at 4.9% per year in 2022-23, similar to the pre-pandemic pace (5% average annual growth from 2010 to 2019).

Notably, Kenya's tech start-up ecosystem is often touted as a success for other nations to emulate. Kenya's start-ups are consistently among the leaders in attracting investment among the continent's countries. Kenyans are well-connected to the web, and the internet is the fastest on the continent. Kenya is home to the UN's Africa headquarters and has served as the entry point for countless companies and organisations looking to break into the continent.

Overview

Kenya

President
William Ruto

Type of Government
Autonomous Territory

Timezone
GMT +3

Currency
Kenya Shilling (KES)

GDP
USD 98.84bn

Area
580,367 Sq/Km

Local Currency to USD
130 (as at March 2023)

Languages
English, Swahili

Drives On
Left Side

Calling Code
+254

Top Level Domain
.ke

Capital City

Nairobi

Political Overview

Kenya is a Constitutional Democracy with a multi-party-political system. In 2010, the country enacted a new Constitution (the Constitution), which addresses longstanding historical, geographic, demographic, and human rights violations. Since 2010, certain functions of government have been devolved from the National Government to 47 County Governments.

Kenya is a presidential representative democratic republic, in which elected officials represent the people and the president is the head of state and government. It is a member of the United Nations (UN), the Commonwealth of Nations, World Bank, International Monetary Fund (IMF), Common Market for Eastern and Southern Africa (COMESA), International Criminal Court (ICC), and other international organisations.

47

Since 2010, certain functions of government have been devolved from the National Government to 47 County Governments.

Kenya is a member of:

United Nations

The Commonwealth

THE WORLD BANK

INTERNATIONAL MONETARY FUND

COMESA

INTERNATIONAL CRIMINAL COURT

Government Vision

The Executive

The Executive- headed by the President, who is also the Commander in Chief of the Kenya Defence Forces.

The President is elected by more than half of the votes cast in a quinquennial national election, where they must obtain at least 25 percent of the vote in each of 24 counties. The law requires the President to appoint between 14 and 22 cabinet secretaries.

The Judiciary

The Judiciary is headed by the Chief Justice and consists of the judges of the superior courts, magistrates, and other judicial officers and staff.

The superior courts are the Supreme Court, which is the highest court in the country, the Court of Appeal, the High Court, the Employment and Labour Relations Court and the Environment and Land Court. The lower courts comprise the magistrate courts. There are also several tribunals established under various statutes to deal with specific matters.

The Legislature

The Legislature - comprises two houses: a 349-seat National Assembly and a Senate with 47 members. The National Assembly comprises 290 elected constituency representatives, 47 women elected from the counties and 12 nominated members to represent special groups, including the youth and persons with disabilities and workers.

The house is administered by a speaker, who is an ex-officio member. The Senate comprises 67 members, including 47 elected county representatives, 16 women members nominated by political parties, two youth representatives and two representatives of persons with disabilities. The Senate's speaker is an ex officio member.

County Governments

Each county has two arms of government - an Executive, comprising a popularly elected governor and their appointees, and a County Assembly with members elected from separate constituencies.

The Constitution apportions responsibility for various areas between the county and national governments. The national government provides each county with significant financial transfers.

The functions and powers of the county Government include agriculture, County health services, control of air pollution, noise pollution, other public nuisances, cultural activities and public entertainment, county transport, animal control and welfare, trade development and regulation, county planning and development, county public works and services, pre-primary education and village polytechnics and implementation of specific national government policies on natural resources and environmental conservation.

Since 2013, various laws have been passed by county governments pertaining to these areas of responsibility but the availability of these laws for review and consideration is somewhat patchy. It is, therefore, important for businesses and investors to comply with the national laws as well as relevant county laws in the areas they seek to operate in.

09 Aug 2022

Kenya conducted its third national elections under the new Constitution on August 9, 2022

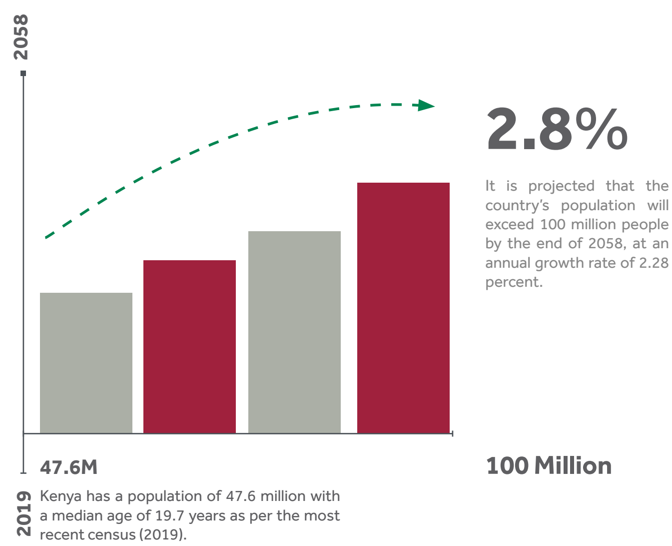

RAFIKI MILLERS LTD
LOTUS
2013

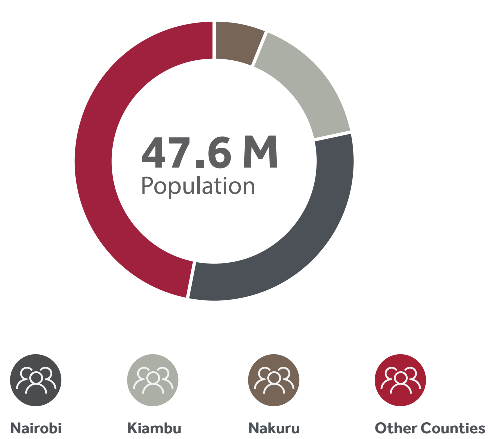
Economic Overview

Demographics

Kenya has a population of 47.6 million with a median age of 19.7 years as per the most recent census (2019). Nairobi, with 4.3 million people is the most populous county, followed by Kiambu (2.4 million) and Nakuru (2.1 million). It is projected that the country's population will exceed 100 million people by the end of 2058, at an annual growth rate of 2.28 percent.

The UN also forecasts a huge movement of people from the country to the city in the next 30 years, creating pressure on existing infrastructure and services in the major hubs of Nairobi, Mombasa and Kisumu, amongst others.





The Kenyan Economy Pre COVID-19

The International Monetary Fund (IMF) reported that between 2015 and 2019, Kenya was one of the fastest-growing economies within Sub-Saharan Africa. The country's economic growth averaged 5.7 percent due to such factors as a strong macroeconomic environment, investor confidence, and a stable service sector.

COVID-19 and the Kenyan Economy

Similar to the rest of the world, Kenya's economy has taken a hit owing to the COVID-19 pandemic. In the second quarter of 2020, the country's economic activity dropped following a reduction in global trade. Additionally, measures to contain the virus, including travel bans, limits on public gatherings and curfews, impacted the economy.

According to the IMF, although the shock to Kenya's economy was large, the effect on economic growth was well contained by the government. Such measures included temporary cuts in personal income taxes and corporate income taxes, a temporary reduction from 16 percent to 14 percent of the rate of value added tax, a reduction in interest rates and liquidity injections by the country's Central Bank.

KENYA VISION 2030

The Kenyan government is currently pursuing the Vision 2030, the country's development blueprint covering the years 2008 to 2030. The Vision 2030 aims at turning Kenya into a "middle income economy in providing high quality life for all its citizens by the year 2030".

The Vision is based on three "pillars":

1. **Economic** - aims at increasing prosperity for all Kenyans through an economic development programme aimed at achieving an average Gross Domestic Product (GDP) growth rate of 10 percent per annum in the next 25 years.
2. **Social** - seeks to build "a just and cohesive society with social equity in a clean and secure environment".
3. **Political** - aims at realising a democratic political system founded on issue-based politics that respects the rule of law and protects the rights and freedoms of every individual in the Kenyan society.

The Vision 2030 prioritises six sectors as key growth drivers - tourism, agriculture, manufacturing, ICT and business process out-sourcing, wholesale and retail trade and finance.

The Vision 2030 aims at turning Kenya into a middle income economy in providing high quality life for all its citizens by the year 2030.

External Debt Ratings

As of March 2022, Fitch Ratings has affirmed Kenya's long-term foreign-currency issuer default rating (IDR) at 'B+' with a negative outlook.

This is supported by a record of strong growth and relative macroeconomic stability. These positive factors are balanced against elevated public debt, high net external indebtedness, and GDP per capita and governance indicators that are below the 'B' range median. The negative outlook reflects uncertainty about planned fiscal consolidation and risks to economic growth around the August 2022 general election. Furthermore, the surge in global commodity prices puts upward pressure on inflation and the current account deficit (CAD).

Ease of Doing Business

Improving the ease of doing business has been a priority for the Kenyan government. The World Bank Group's Doing Business Report, 2020 ranked Kenya 56th (previously 61st) out of 190 economies in the ease of doing business. The country ranked 1st in protecting minority investors (previously 11th), 4th in credit (access previously 8th), and 50th in resolving insolvency (previously 57th).

Capital Markets

Kenya has one of the most vibrant capital markets in Africa. As of July 2021, the Nairobi Securities Exchange (NSE) had 62 listed companies classified into 8 sectors. The Capital Market Authority (CMA), the regulator of the Kenya capital markets, has developed and is implementing the Capital Markets Master plan (2013-2023), which aims at turning Kenya into the heart of capital markets.

This has seen a significant focus on corporate governance and shareholder rights. The introduction of the Code of Corporate Governance Practices for Issuers of Securities to the Public, 2016 has had a significant impact on raising the level of focus on corporate governance amongst these listed companies.

Within its focus on corporate governance, the CMA has become more stringent in its policing role. For instance, in January 2019, The Capital Markets Act, Cap 485A was amended to incorporate additional offences with a focus on persons market exploitations using insider information.

This has led investors, CEOs and boards to shift their sole focus from the traditional objectives of profit and shareholder returns to intangible assets such as companies' impacts on communities. Investors are choosing to invest in businesses that are sustainable and place a high value on their impact on society.

In Kenya, the CMA is gearing up towards promoting environmental, social (or sustainable) and governance (ESG). ESG is a measure of the environmental, social and ethical expectations of the stakeholders within a business. The CMA Corporate Governance Code has included ESG factors in determining the strength of corporate governance frameworks for listed entities. Additionally, in the 2020 'Report on the State of Corporate Governance of Issuers of Securities to the Public in Kenya', the CMA highlighted that investors are increasingly monitoring the sustainability of companies, and that investment guidelines will likely include climate-change competency. Even in the Memorandum of Understanding (MOU) entered between the CMA and the Abu Dhabi Global Market (ADGM) in 2019; the main aim was to enhance cooperation in sustainable finance in their respective markets.

Further, in line with the Marrakech Pledge of 2016 for fostering green markets in Africa, which calls for an increase in the capital flows and access to finance for climate projects and climate-resilient investments, the CMA launched the green bonds market through the publication of a Policy Guidance Note on Issuance of Green Bonds (the Policy Guidance Note) in February 2019 and amendments to the NSE Listing Rules to allow for the listing of green bonds. A green bond has been defined under the Policy Guidance Note as a fixed income instrument, either listed or unlisted, whose proceeds are used to finance or refinance new or existing projects that generate climate or other environmental benefits that conform to green guidelines and standards.

The green guidelines and standards comprise various principles and standards published separately by the International Capital Markets Association, the Climate Bonds Initiative, and the Kenya National Policy on Climate Change and Green Economy Strategy. The Policy Guidance Note provides the requirements and procedure for the issue of both listed and unlisted green bonds. The CMA has since approved the issue of Kenya's first green bond issued by Acorn Holdings for financing environmentally friendly student accommodation. This issue offered investors a chance to invest in an environmentally friendly fixed income instrument for the first time in NSE's history and marked a significant step in the development of green finance in Kenya.

Regional Body Membership

Kenya is part of the East African Community, together with Tanzania, Uganda, Rwanda, Democratic Republic of Congo, Burundi, and South Sudan. The members of the EAC entered into a Common Market Protocol (the Protocol), with effect from July 2010 and steps are being undertaken to realise its full implementation. The four freedoms of the Protocol demand the free movement of people, goods, services and capital within the common market. The member states are required to review domestic legislation to ensure their compliance with the Protocol's objectives.

Kenya is also among the 21 members of the Common Market for East and Southern Africa (COMESA), which opens up the way for trade across Eastern and Southern Africa for nearly 583 million people, or about half of Africa's total population.

Bilateral and Multilateral Treaties

Kenya is a member of the EAC, COMESA, African, Caribbean and Pacific States, the African Union, and the World Trade Organisation (WTO).

Currently, Kenya's double taxation agreements (DTAs) with Canada, Denmark, France, Germany, India, Iran, South Korea, Norway, Qatar, Seychelles, South Africa, Sweden, United Arab Emirates, United Kingdom, and Zambia, are in force.

As of August 2022, Kenya has signed DTAs with China, East Africa Community, Italy, Kuwait, Mauritius and Netherlands, however, they are yet to come into force. Further to this, Kenya has concluded respective DTAs with Botswana, Nigeria, Portugal, Saudi Arabia, Singapore, Thailand and Turkey but they are yet to be signed.

Furthermore, as of August 2022, DTAs with the following countries were under consideration: Algeria, Cameroon, Democratic Republic of Congo, Ethiopia, Ghana, Ivory Coast, Jordan, Macedonia, Malawi, Mozambique, Russia, Senegal, South Sudan, Sudan, Zimbabwe. Kenya was also under negotiations with Belgium, Egypt, Japan, Malaysia, Spain. The DTA between Kenya and Ireland has also been proposed.

The Income Tax Act (the ITA) limits the relief from double taxation to a person resident in a country that has a double taxation agreement with Kenya, or a company that is resident in a country that has a double taxation agreement with Kenya, and where 50% or more of its underlying ownership is held by an individual(s) resident in that country. An exception to this rule is where the non-resident company is listed in the stock exchange of the counterpart state, in which case the 50% ownership rule will not apply in accessing treaty benefits.

Kenya has entered into Investment Promotion and Protection Agreements (bilateral investment agreements) with France, Finland, Germany, Italy, Netherlands, Switzerland, China, Libya, Iran, Burundi and the United Kingdom and is currently negotiating agreements with other countries, including the United States of America. In early July 2020, the Kenya-United States Free Trade Agreement negotiations were launched, and will likely herald bilateral relations and future engagements between the USA and other African countries.

In March 2016, Kenya signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (commonly known as the Common Reporting Standards) which provides for all forms of administrative assistance on tax matters, such as the exchange of information on request, spontaneous exchange, automatic exchange, tax examinations abroad, simultaneous tax examination and assistance in tax collection.

In March 2018, Kenya signed the African Continental Free Trade Agreement, which created the African Continental Free Trade Area (AfCFTA). The AfCFTA will be the second-largest free trade area after the World Trade Organisation (WTO) due to Africa's large population. Its benefits include the expansion of trade among African countries; the stimulation of production through the creation of regional value chains; and boosting the capabilities of African companies to supply world markets. The AfCFTA is projected to assist in Kenya's endeavour to grow its supply capacity, increase jobs, and expand its export of goods and services in and outside Africa.

In 2020, Kenya and the United Kingdom (UK) signed an Economic Partnership Agreement following the exit of the UK from the European Union. The agreement came into force in 2021 and allows Kenya and the United Kingdom to maintain trade relations by among others, granting Kenyan goods like horticulture products access to the UK's market.

In 2021, the Belarusian Chamber of Commerce and Industry and the Kenya National Chamber of Commerce and Industry signed a cooperation agreement aimed at enhancing trade relations between Kenya and Belarus.

In January 2022, Kenya and China signed six trade agreements and promised to form a joint working group to address trade barriers between the two countries to reduce trade imbalances.

2016

Kenya signed the Multilateral Convention on Mutual Administrative Assistance in Tax Matters (commonly known as the Common Reporting Standards).

2018

Kenya signed the African Continental Free Trade Agreement, which created the African Continental Free Trade Area (AfCFTA).

2020

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2021

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2022

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Regulatory Environment

The legal system in Kenya consists of a mixture of statutory (written) law and elements of customary and Islamic law. Much of Kenya's investment law is modelled on English common law. One of the most significant changes to take place in Kenya's recent history is the enactment of the Constitution in 2010. Since the new Constitution was passed, over 300 new statutes have been enacted. This flurry of new and modernised legislation has changed the investment regulatory system significantly. The key corporate and investment laws include the Companies Act, 2015, (the Companies Act) the Insolvency Act, 2015 (the Insolvency Act), and the Competition Act, 2012 (the Competition Act).

The Constitution envisions the enactment of numerous pieces of legislation covering a wide range of subjects, including land ownership, consumer protection and the exploitation of natural resources. The Mining Act 2016 (the Mining Act) reflects a dramatic overhaul of the regulatory framework for mining activity in Kenya.

The Mining Act creates separate licensing regimes for small scale and large-scale mining operations with streamlined application processes and approval time frames. The Competition Act, which seeks to ensure a more competitive market, saw a number of guidelines and rules in relation to the assessment of mergers and restrictive trade practices published in 2015. In 2017, the Principal Act was amended to align it with the provisions of the Constitution and further rules were introduced in respect of the procedures and guidelines to be used by the Competition Tribunal in determining appeals by persons aggrieved by decisions made by the Competition Authority.

Over the past few years, there have been major efforts to privatise commercial sectors that were previously government-owned or managed in order to encourage foreign investment in these sectors. The stated aim of the Government is to have minimal interference in business, and it is increasingly adopting the role of a regulator, rather than an active market participant.

The Public Private Partnerships (PPPs) Act, 2013, (the PPP Act) aims to expand the participation of the private sector in infrastructure and development projects through concessions or contractual profit-sharing arrangements. The Public Private Partnership Regulations, 2014 set out the mechanisms for giving effect to various provisions of the PPP Act. Pursuant to these Regulations, the PPP Unit within Government is working on a pipeline of projects.

Moreover, there was the enactment of the Data Protection Act, 2019 in November 2019, which makes provisions for the regulation of personal data usage while protecting the rights of data subjects. The DPA contains core rules and legal obligations that affect businesses across all sectors of commerce, technology and industry to the extent that their operations involve the handling of personal data. Such personal data would typically include the names of natural persons, emails and physical addresses, telephone numbers, date of birth and birthplace details, age, gender, and national identification numbers.

To this extent, all business operators fall under the definition of data controllers and/or data processors and are bound by the obligations in the Act. Investors must thus be cautious that their operations are in line with the DPA's provisions, and so are the operations of businesses they choose to invest in. Furthermore, businesses are encouraged to develop policies that ensure compliance with the DPA. The Act includes different kinds of punishment for infringement, including fines and imprisonment.

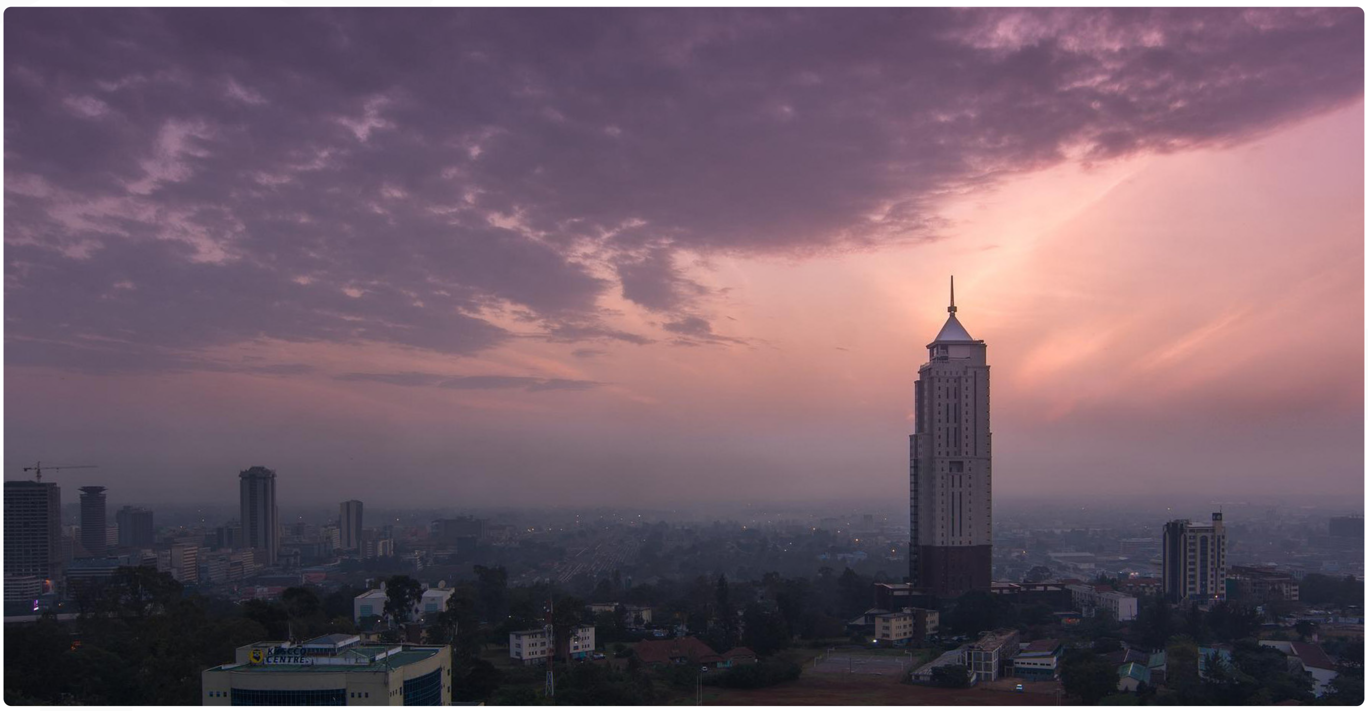
With the evolution of a devolved system of government, County Governments are targeting private investors to collaborate with them through Private Public Partnerships (PPPs) to enable them carry out their functions pursuant to Schedule 4 of the Constitution. Potential projects include the administration of county transport and infrastructure (including construction, street lighting, traffic, ports and parking), providing county health services, fire-fighting services, pre-primary education, disaster management and the implementation of other specific national government policies.

300+

Since the new Constitution was passed, over 300 new statutes have been enacted.

Additionally, procurement by government entities is governed by the Public Procurement and Asset Disposal Act, 2015, (the PPAD Act). The PPAD Act gives effect to Article 227 of the Constitution, which seeks to set out the procedures for efficient public procurement and asset disposal by public entities and for connected purposes. The PPAD Act provides a framework under which the private sector can partake in public procurement in an efficient manner.

Investment Promotion



Institutes Governing Investment Promotion

Kenya Investment Authority

In a bid to encourage investment in Kenya, the National Assembly enacted the Investment Promotion Act, 2004 (the IPA). The IPA aims to reduce bureaucratic delays in relation to licensing, immigration and negotiating tax incentives and exemptions from the relevant authorities. The IPA established a corporate body known as the Kenya Investments Authority (KenInvest) to implement the goals of the legislation. For a foreign investor to qualify for an investment certificate, the minimum value of his proposed investment should be USD 100,000 or the equivalent in another currency.

In deciding whether to issue an investment certificate, KenInvest considers the extent to which the investment will contribute to the Kenyan economy through the following factors: increasing the number and quality of jobs in Kenya, training Kenyans in new skills or technology, encouraging economic development, allowing the transfer of technology, adding to tax revenue, affecting foreign exchange, utilisation of domestic raw materials, adoption of value addition in the processing of local resources, and the promotion of information and communication technology.

Nairobi International Finance Centre (NIFC)

The Nairobi International Finance Centre has been created, however, regulations for its governance are yet to be developed. The NIFC is discussed further in the recent developments chapter

USD 100,000

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Investment Incentives

An investment certificate granted under the IPA offers investors important benefits, the principal one being that KenInvest facilitates the issue of all necessary licences and permits required for the investor's operations. Such assistance is particularly helpful when making applications for work permits and tax personal identification number (PIN) registration.

To spur economic growth, several industry-specific incentives have been developed in recent years in the form of tax exemptions and lower tax rates for the following sectors: energy, mining, hospitality and tourism, fishing and automotive industry.

Export Processing Zones (EPZs)

Kenya has established EPZs under the Export Processing Zones Act (Chapter 517) to promote and facilitate export-oriented investment. Eligible activities within EPZs include manufacturing, as well as commercial and service activities geared towards exportation. Persons may set up an EPZ by obtaining a licence to develop or operate a zone on land gazetted as an EPZ.

EPZ licensed businesses are granted certain tax exemptions, including:

1. a corporate tax holiday for 10-years;
2. exemption from VAT and customs duties on raw materials, machinery and equipment, spare-parts, tools, raw materials, intermediate goods, construction materials and equipment, office equipment and supplies as well as transportation equipment;
3. exemption from income tax for the first 10 years from the date of the first sale as an EPZ enterprise, and income tax shall be limited to 25 percent for the next 10 years following the expiry of the exemption;
4. exemption from withholding tax on dividends and other payments made to non-residents, during the period that the EPZ enterprise is exempted from payment of income tax and Perpetual exemption from VAT and customs import duty on inputs;
5. exemption from stamp duty on the execution of any instruments relating to the business activities of an EPZ enterprise; and
6. an investment deduction of 100 percent in any new investment in EPZ buildings and machinery.

Special Economic Zones

Kenya has a Special Economic Zones Act, 2015 (the SEZ Act), which allows the Cabinet Secretary for Industry, Investment and Trade to create Special Economic Zones (SEZs) - designated geographical areas where business-enabling policies are implemented with sector-appropriate on-site and off-site infrastructure and being provided by the Kenyan Government.

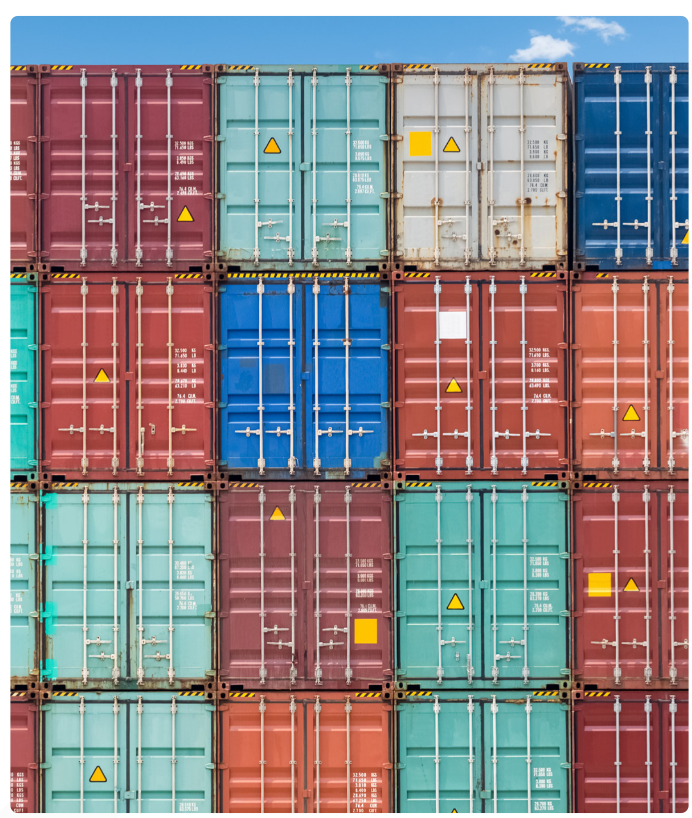
It is intended that all goods and specified services provided in SEZs enjoy incentives and are exempt from most of Kenyan taxes and duties, including:

1. exemption from excise duty, customs duty, VAT and stamp duty;
2. a corporate income tax rate of 10 percent for the first 10 years of operation, increasing to 15 percent for the next 10-year period, and then 30% for the subsequent years; and
3. investment deductions outside Nairobi and Mombasa counties of 150 percent and in other cases, 100 percent. This applies to the construction of buildings as well as the purchase or installation of machinery being used by an SEZ enterprise, and exemption from payment of IDF and RDL.

The SEZ Act establishes the Special Economic Zones Authority (the SEZ Authority), which is responsible for designing, approving, establishing, developing, operating, promoting, and regulating SEZs. The SEZ Authority is expected to make regulations on how affairs in SEZs are conducted.

Considering the new SEZ regime, the Government intends to stop issuing new EPZ licences, as it transitions to the SEZ model.

So far, SEZs have been gazetted in Uasin Gishu and Kiambu counties, although the Ministry of Industrialisation proposes establishing SEZs in Kisumu, Mombasa and Lamu – areas with fairly well-developed transport infrastructure, youthful and educated populations and which are in need of industrialisation. Naivasha has also been proposed as a potential fourth zone owing to its proximity to cheap geothermal power from the Olkaria power plant.



Tax

Income Tax

Kenya operates a source-based tax system. The income of a person (a natural person or a legal person, e.g., a company), whether resident or non-resident, which is accrued in or derived from Kenya, is subject to income tax.

A company is tax resident in Kenya:

i. if it is incorporated under Kenyan law,

ii. if the management and control of its affairs are exercised in Kenya in a particular year of income, or

iii. if the Cabinet Secretary in charge of the National Treasury declares the entity to be tax resident for a particular year of income in a notice published in the Kenya Gazette.

A non-resident person can also operate in Kenya through a registered branch. Where they have not registered a branch, the non-resident's operations may still create a taxable presence by creating a permanent establishment. A permanent establishment may arise through:

i. a fixed place of business through which business is wholly or partly carried on, including a branch and an office;

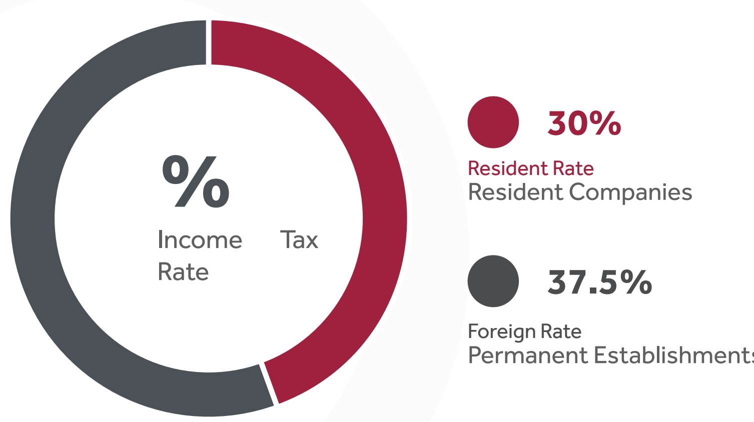
ii. building site, construction, assembly or installation project or any supervisory activity, provided that the same continues for more than 183 days;

iii. provision of services, including consultancy services through employees or other personnel, where those services continue for more than a period exceeding, in aggregate, 91 days in any 12-month period;

iv. an installation or structure used for exploration of natural resources provided that such activity continues for a period of 91 days or more; and

v. a dependent agent of a person acting on behalf of the principal in respect of activities undertaken in Kenya, including habitually concluding contracts or playing a material role in the conclusion of contracts routinely concluded without material modification.

Resident companies are subject to corporate income tax at the rate of 30%, whereas permanent establishments of foreign companies are taxed at the rate of 37.5%.



Preferential corporate tax rates may be applicable in certain instances. For example, a preferential corporate tax rate of 15% is applicable for companies whose business is the local assembling of motor vehicles for the first five years of their operation, with the possibility of extension for a further period of five years if such a company achieves a local content equivalent to 50% of the ex-factory value of the motor vehicles. A similar preferential tax rate of 15% is applicable where a company constructs at least 100 residential units annually, subject to the approval of the Cabinet Secretary in charge of housing. Further, enterprises in Export Processing Zones (EPZs) that do not engage in certain commercial activities are exempt from corporate tax in the first 10 years of operation. A tax rate of 25% is applicable for ten years immediately thereafter. Similarly, enterprises, developers and operators in Special Economic Zones (SEZs) are subject to a reduced corporate tax rate of 10% for the first ten years and 15% for the succeeding ten years. Companies operating a carbon market exchange or emission trading system certified by the Nairobi International Financial Centre Authority are also eligible for a preferential corporate income tax rate of 15% for the first ten years of operations.

The corporate income tax is applicable on the adjusted taxable income of the business. The adjusted taxable income comprises of gross income or derived from Kenya after deducting expenses wholly and exclusively incurred in the production of that income. Certain expenses may be deductible in computing income tax. The expenses that would be deductible against taxable income may include general operational expenses, interest payable on loans used for working capital, salaries and wages, and other administrative costs. Expenses not incurred wholly and exclusively for purposes of production of the income and capital expenditure are not deductible.

An individual who is a tax resident in Kenya is taxed on their worldwide employment income received from services rendered in Kenya and outside Kenya. In contrast, a non-resident person is only taxed on income earned or accrued from Kenya. Income tax is chargeable on any gains or profits from employment or services rendered. Gains or profits from employment are broadly defined and include wages, salary, leave pay, sick pay, payment in lieu of leave fees, commissions, gratuity, travelling, entertainment or other allowances. Any benefits in kind, advantage or facility received from employment are only taxable if the aggregate value exceeds KES 36,000 (approx. USD 277) annually.

An individual is a resident in Kenya: if he or she has a permanent home in Kenya and is present for any time during the year; if he or she is present in Kenya for at least 183 days in the tax year; or if he or she has been in Kenya for an average of 122 days in the tax year and the previous two years. A permanent home means a place where an individual resides or which is available to that individual for residential purposes in Kenya or where in the opinion of the Commissioner, the individual's personal or economic interests are closest.

Individual income tax rates are based on a graduated scale based on income brackets, with the lowest being 10% and the highest being 30%, as demonstrated below:

10%

First KES 288,000 (approximately USD 2,650) per annum or KES 24,000 (approximately USD 220) per month

25%

Next KES 100,000 (approximately USD 950) per annum or KES 8,333 (approximately USD 75) per month

30%

All income above KES 388,000 (approximately USD 3,550) per annum or KES 32,333 (approximately USD 300) per month

Resident persons are eligible for personal relief of KES 2,400 (approx. USD 19) per month and up to KES 28,800 (approx. USD 222) per year as of January 2021. Resident individuals are also entitled to relief on premiums paid for life, education and health policies. The education policy must have a maturity period of at least ten years. Additionally, every resident individual is entitled to an insurance relief (including National Health Insurance Fund (NHIF) contributions) of 15% of the amount of premiums paid for self, spouse or child, subject to a maximum of KES 60,000 (approx. USD 462) per annum.

Tax Losses

Effective 1 July 2021, tax losses can be carried forward indefinitely until the tax losses are fully exhausted. The carry-forward period of tax losses was previously for a period of ten years (including the year in which the losses were incurred).

Thin Capitalisation

Previously, the thin capitalisation restriction was based on a debt-to-equity ratio of 3:1. Thin capitalisation is, from 1 January 2022, based on a percentage of earnings before interest, taxes, depreciation, and amortisation (EBITDA). The new thin capitalisation restrictions require that the gross interest paid or payable to related persons and third parties in excess of 30% of the EBITDA of a resident borrower in any financial year will not be deductible for tax purposes. In addition to the thin capitalisation restrictions applying to interest on all loans, the thin capitalisation restriction also applies to payments that are economically equivalent to interest and expenses incurred in connection with raising the finance. However, any income exempt from tax will be excluded from the calculation of EBITDA for the relevant entity.

The EBITDA thin capitalisation restriction also applies to companies in the extractive sector. Banks or financial institutions licensed under the Banking Act and micro and small enterprises registered under the Micro and Small Enterprises Act as well as manufacturers (subject to meeting certain conditions) are exempted from the thin capitalisation restrictions.

Deemed Interest

Kenya also applies "deemed interest" provisions with respect to interest-free loans from non-resident shareholders advanced to resident companies. Where a non-resident shareholder has extended a loan to a resident company on an interest-free basis, the resident company is required to compute a deemed interest charge based on the prescribed rates determined on a quarterly basis by the Commissioner. The resident company is also required to apply a withholding tax on the notional (deemed) interest, which is to be deducted and remitted to the Kenya Revenue Authority (KRA) on a monthly basis.

Transfer Pricing Rules

Transfer pricing regulations require pricing arrangements in cross-border transactions concerning the sale of goods, provision of services, transfer of intangible assets and lending or borrowing of money between related entities to be considered at arm's length. Transactions between a branch and its head office are also subject to the transfer pricing regulations.

The Income Tax (Transfer Pricing) Rules, 2006 (the TP Rules) provide the guidelines for determining the arm's length prices of goods and services in transactions involving related entities and provide administrative regulations, including the types of records and documentation to be submitted to the Commissioner of Domestic Taxes by a person involved in transfer pricing arrangements. The TP Rules are broadly modelled along the principles set out in the OECD Transfer Pricing Guidelines for Multinational Enterprises (the OECD Guidelines).

The TP Rules set out:

a. the entities and related party transactions under review;

b. the methodologies that may be used by the entities in the determination of the arm's length transfer price; and

c. the records pertinent to the stipulated transactions that must be maintained.

Enterprises are related if one of the enterprises participates directly or indirectly in the other enterprise's management, control or capital, or a third person participates directly or indirectly in the management, control or capital of both enterprises. Control is currently defined under the ITA to mean:

i. a person has direct or indirect ownership of at least 20% of the voting rights in a company;

ii. a person has advanced a loan to another person and that loan constitutes at least 70% of the book value of the borrower's total assets, save for a loan from an unrelated financial institution;

iii. a guarantee by a person constitutes at least 70% of the total indebtedness of the other person save for a guarantee by an unrelated financial institution;

iv. a person has the power to appoint more than half of the board of directors or at least one director or executive member of the governing board;

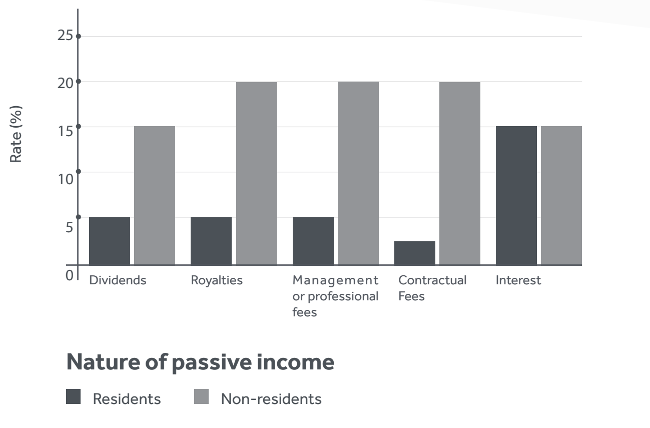
v. a person owns or has exclusive rights over intellectual property on which another person wholly depends for the manufacture or processing of goods or articles or business;

vi. a person or their assignee supplies at least 90% of the purchases of the other person, and the Commissioner, upon assessment, deems influence on pricing or other conditions relating to such supply; and

vii. a person or their assignee purchases at least 90% of the sales of another or influences pricing or conditions related to the sales, or a person deals or relates with another in a way which the commissioner deems to constitute control.

Withholding Tax

Withholding Tax (WHT) is levied at varying rates on various payments. Resident WHT is either a final tax or creditable against corporate income tax, depending on the type of payments. The rate of WHT may be reduced where the recipient of the income subject to WHT is resident in a country that has a double tax treaty with Kenya. The following table summarises the applicable WHT rates in Kenya:



*Rate applicable for dividends paid to Kenyan residents, citizens of the EAC and on listed shares. WHT on dividends is a first and final tax.

*No WHT is imposed if the recipient is a resident company which controls 12.5%or more of the capital in the paying resident company.

With respect to specific economic sectors, interest paid on a loan from foreign sources for investing in the specific sectors, for instance: energy; water; roads; ports; railways; and aerodromes, is exempt from WHT. In addition, payments made to a non-resident person (without a permanent establishment in Kenya) for services rendered under a Power Purchase Agreement are exempt from WHT.

Residential Rental Income Tax

Residential Rental Income Tax (RRIT) is applicable on any income accrued in or derived from Kenya by a resident person for the use or occupation of residential property. The rate of RRIT is 10% of the gross rental receipts per month, where the annual rental income falls between KES 288,000 (approx. USD 2,219) and KES 15,000,000 (approx. USD 115,562) in a year of income.

This means that any residential rental income below USD 2,219 per year would not be subject to RRIT. However, the taxpayer will be required to file annual income tax returns with the Kenya Revenue Authority (KRA) and declare this income together with income from other sources. On the other hand, persons earning rental income exceeding the USD 115,562 threshold will equally not be subject to the RRIT regime as the residential rental income would be chargeable to tax at the resident corporation tax rate of 30%. A taxpayer eligible under the RRIT regime can elect to opt out of the RRIT regime by issuing a notice in writing to the Commissioner.

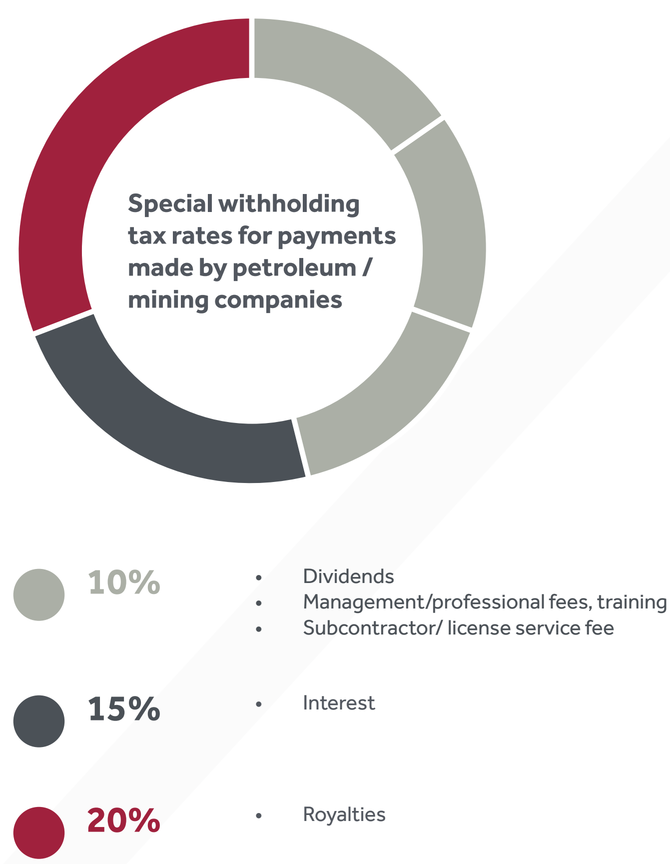
A separate Withholding Tax (WHT) regime applies to rental income, where tenants and real estate agents are appointed as WHT agents by the Commissioner. The WHT rate applicable to rent payable to resident landlords is 10%, where the WHT deducted will be an advance tax for the resident landlord to offset against their annual income tax.

On the other hand, a WHT rate of 30% applies to rental income payable to non-resident landlords, which is a final tax. Further, all persons making rental payments to a non-resident landlord are required to apply WHT.

Extractive Sector

In the oil and gas sector, farm-out transactions for contractors are taxed by including the net gain as part of the taxable income of the transferor. Other areas of interest include the ring-fencing of petroleum blocs, indefinite carry forward of tax losses, the tax treatment of the assignment of future work obligations and reporting requirements for changes of more than 10% in underlying ownership. For companies operating in the extractive industry (i.e., mining and oil & gas), any losses incurred in a year of income can be carried forward indefinitely.

Special WHT rates apply on payments made by entities operating in the extractive sector, as follows:



Capital Allowances

Effective 1 January 2022, capital allowances are claimable on a straight-line basis, as follows:

Investment Deduction	
Buildings used for manufacture	50% for first year and 25% per year on residual
Hotel Buildings	50% for first year and 25% per year on residual
Hospital buildings	50% for first year and 25% per year on residual
Petroleum or gas storage facilities	50% for first year and 25% per year on residual
Educational building	10%
Commercial building	10%
Machinery used for manufacture	50% for first year and 25% per year on residual
Ships	50% for first year and 25% per year on residual
Aircrafts	50% for first year and 25% per year on residual
Wear and Tear Allowances	
Heavy earth moving equipment	25%
Motor vehicle*	25%
Computer & computer peripheral hardware, calculators, copiers	25%
Furniture & Fittings	10%
Telecommunications equipment	10%
Filming equipment purchased by a local producer	25%
Software	25%

*Qualifying cost for saloon cars is KES 3,000,000

In addition, effective 1 January 2022, the Investment Deduction rate of 100% applies in the first year of use, where the cumulative value of an investment undertaken outside Nairobi and Mombasa counties for the preceding three years of income is KES 2 billion (approx. USD 15.5 million); or the investment value outside Nairobi and Mombasa counties in that year of income is at least KES 250 million (approx. USD 1,926,040); or the investment has been incurred in a special economic zone.

Digital Services Tax

Digital Services Tax (DST) is applicable at the rate of 1.5% of the gross transaction value on income accruing from a business carried out over the internet or an electronic network, including through a digital marketplace. A "digital marketplace" has been defined in the ITA as "an online platform that enables users to sell or provide services, goods or other property to other users." Only non-resident persons providing such digital services are subject to DST in Kenya, as resident persons are excluded from the DST regime. DST will therefore be a final tax for such non-resident persons. The non-resident persons can elect to either register for DST purposes in Kenya or to appoint a tax representative to meet their compliance obligations in Kenya.

Income earned from the business of transmitting messages by cable, radio, optical fibre, television broadcasting, Very Small Aperture Terminal (VSAT), internet, satellite or by any other similar mode of communication is exempt from DST. Similarly, income that is subject to tax through the WHT regime, such as management or professional fees, royalties, interest payments, dividends, rental income, winnings, pension and insurance or reinsurance premiums, as well as income earned from the provision of online services which facilitate payments, lending or trading of financial instruments, commodities or foreign exchange carried out by licensed financial institutions or service providers is exempt from DST.

Capital Gains Tax

With effect from 1 January 2023, Capital Gains Tax (CGT) is charged at the rate of 15% on gains arising from the transfer of property situated in Kenya. The term "property" is broad and includes shares in private companies, land and buildings, among other assets. Various exemptions from CGT are available, including on the transfer of property that is necessitated by a transaction involving the internal restructuring within a group, the transfer of a private residence where certain thresholds have been met, the gain arising on the transfer of land valued at less than KES 3 million (approx. USD 23,112), and on the transfer of agricultural property of less than 50 acres.

A transfer of property is deemed to occur when the property is sold, exchanged or disposed of in any manner. Gifts, destruction or loss of property are also deemed to be transfers and CGT will be applicable. There is, however, no transfer and hence no CGT under the following circumstances, among others: where the transfer of property is to secure a loan, debt or the issue of shares by a company, the transfer of property upon the beneficiary of a trust becoming entitled to the property or where there is a transfer of assets between spouses, former spouses as part of a divorce settlement or a bona fide separation agreement, or to their immediate family as defined under the Income Tax Act.

A "gain" is determined as the amount the transfer value of the property exceeds the adjusted cost of the property. Such adjusted cost includes costs associated with the amount of acquisition or construction of the property, expenses wholly and exclusively incurred on the property after acquisition to enhance its value, legal costs and other incidental costs to the transferor in acquiring the property.

CGT is payable by a transferor, provided the property is in Kenya. Currently, there is no inflation allowance.

Tax Procedures Act

The Tax Procedures Act 2015 (the TPA) contains provisions that harmonise the procedural aspects of tax administration in Kenya. The TPA makes senior officials of companies, partnerships, trusts etc., tax representatives of these entities. A tax representative is responsible for performing any duty or obligation imposed by tax law, including the submission of returns and the payment of tax. However, any tax payable by a tax representative would only be recoverable to the extent that the taxpayer's income or assets are in the tax representative's control. In this regard, senior officers of corporate bodies may be held personally liable for tax offences committed by their corporate employers.

The TPA also introduced the concept of transfer of tax liabilities when business assets are transferred between related persons, allowing the KRA to recover such tax liabilities from either the transferor or transferee. It also makes it an offence to engage in (or for a tax agent assisting) a transaction or scheme designed to avoid tax liability under any tax law. A tax avoidance penalty of double the tax avoided is imposed on the taxpayer.

Value Added Tax

The Value Added Tax (VAT) regime is governed under the provisions of the VAT Act 2013 (the VATA). VAT is chargeable on the supply of goods and services in Kenya and on the importation of goods and services into Kenya. The VATA provides different rates for different types of supplies: exempt supplies under the First Schedule to the VATA are exempted from VAT, 0% in the case of zero-rated supplies specified in the Second Schedule to the VATA, and 16% in all other cases.

Exemptions apply to the supply or importation of goods, including those used in clean energy, tourism, agriculture, health and education. The exportation of taxable services is currently subject to VAT at 16% with effect from 1 July 2022, with the exception of exported services provided by business process outsourcing entities which are zero-rated for VAT.

VAT registration is required for persons making taxable supplies over KES 5 million (approx. USD 38,520) in a 12-month period. A person making taxable supplies below the registration threshold may voluntarily apply to the Commissioner and register for VAT. Once an entity is registered for VAT, it is required to charge, collect and account for VAT on its taxable supplies and remit the tax to the KRA by way of a monthly VAT return filed on or before the 20th day of the following month.

Regarding administration, the output VAT charged on taxable sales is set off against the input VAT on purchases and any excess output VAT paid to the KRA. Where the input VAT exceeds the output VAT, the credit is carried forward to the next VAT return.

VAT is chargeable on the supply of goods or services at a definite time, known as "the time of supply". The time of supply becomes the tax point and VAT should be accounted for by reference to that tax point. For any supply in Kenya, the time of supply, including a supply of imported services, is deemed to be the earlier of:

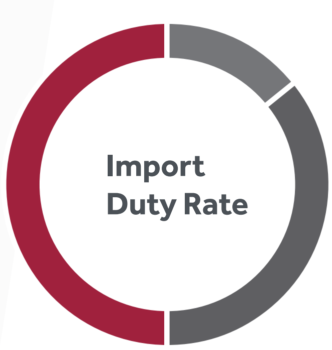
a. the date on which the goods are delivered or services performed;
b. the date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity;
c. the date on which the invoice for the supply is issued; and
d. the date on which payment for the supply is received, in whole or in part.

To increase VAT compliance, the Commissioner is empowered to appoint a person to act as an agent to withhold 2% of the taxable value on purchasing taxable supplies when paying for such supplies and remit the same directly to the Commissioner by the 20th day of the subsequent month. VAT will not be withheld on exempt goods, services and zero-rated supplies. Further, withholding of VAT by the appointed Withholding VAT agent does not relieve the supplier from his obligation to account for VAT.

Import Duty

Kenya is a member of the East Africa Community (EAC) Customs Union. Accordingly, import duty is charged under the East African Community Customs Management Act, 2004 (the EACCMA). The value for purposes of the import duty assessment is based on the cost, insurance and freight value of the goods imported. Import duty is payable by the importer; the rate depends on the nature and description of the goods in the East African Custom External Tariff Code.

The EAC's Customs Union Member States have agreed on a four band-band Common External Tariff at the following rates: 0% for raw materials and capital goods, 10% on semi-finished goods, 25% on finished goods and 35% on certain goods such as furniture, batteries and other finished products.



0%
Raw materials and capital goods

10%
Semi-Finished Goods

25%
Finished Goods

35%
certain goods such as furniture, batteries and other finished products

Excise Duty

The Excise Duty Act 2015 (the EDA) provides for the imposition of excise duty on local manufacture or the importation of certain commodities and services. Excisable commodities include, among others, items such as bottled water, soft drinks, cosmetics, cigarettes, alcohol, fuels, and motor vehicles. Excisable services include mobile cellular phone services, fees charged for money transfer services, other fees charged by financial institutions, fees charged by digital lenders, and betting, gaming, lottery and prize competition activities.

Excise duty on importation is payable by the importer at the time of importation. The excisable value of goods manufactured in Kenya is the ex-factory selling price but excluding VAT, cost of excise stamps and cost of returnable containers. The excisable value of goods imported into Kenya is the sum of the customs value of the goods (Cost-Insurance-Freight value as provided for under the EACCMA) and the amount of customs duty payable on such imports, calculated in accordance with the EACCMA.

Stamp Duty

Stamp duty is charged at nominal or ad valorem (according to value) rates on certain financial instruments and transactions. Stamp duty of 1% is payable upon the transfer of shares and where there is an increase of share capital, although not at the initial issuance of shares. A stamp duty rate of 4% of the value of land is payable on the transfer of land in municipal areas. In rural areas, the stamp duty rate is 2% of the value of the land. Other agreements and documents attract stamp duty at varying rates specified in the Stamp Duty Act (the SDA).

The SDA provides for various exemptions from stamp duty, such as on instruments executed in respect of transactions relating to loans from foreign sources received by investors in the infrastructure development sector (energy sector, roads, port, water sector, railways and aerodromes), the transfer of shares in a listed company, transfer of property to a Real Estate Investment Trust (REIT), and on the transfer of real property between associated companies provided that certain conditions are fulfilled.

Doing Business

Accounting Principles

Kenya has adopted and applies International Financial Reporting Standards. From 1 January 2018, Kenyan companies are required to comply with IRFS 9.

Investor Protection

Kenya has introduced a number of reforms to its laws aimed at protecting investors who wish to invest in the country. For instance, in March 2020 through the Business Laws (Amendment) Act, 2020, the Companies Act was amended to protect the rights of minority investors by granting minority shareholders with a threshold of 5% of a company's paid-up capital, a right to introduce agenda items in annual general meetings. Additionally, the Insolvency Act was amended in 2020 to include the protection of secured creditor's rights by providing relief in the form of an automatic stay on enforcement actions when a debtor enters a court-supervised reorganisation procedure. There is also the Companies (Beneficial Ownership Information) Regulations, 2020 which introduced new legislation on the disclosure of the beneficial owners and ultimate beneficial owners of a company. The Data Protection Act introduced in 2019 was also promulgated to make provision for the regulation of the processing of personal data and the protection of the rights of data subjects.

The Business Laws (Amendment) Act, 2020 also amended the Insolvency Act to introduce a pre-insolvency moratorium. The pre-insolvency moratorium is aimed at preventing creditors from taking enforcement actions while a company in financial distress considers its options for rescue. Prior to the amendment, the Insolvency Act only allowed a company to obtain a debt moratorium where the directors of the company proposed a voluntary arrangement or when the relevant company enters administration. The Business Laws (Amendment) Act, 2020 has availed a standalone pre-insolvency moratorium for which most companies facing financial distress will be eligible for. This change is crucial to companies which are facing financial distress even as the government continues to phase out the relief measures introduced because of the COVID-19 pandemic.

The moratorium is to be implemented where there is evidence that the moratorium could lead to the rescue of the company or an efficient liquidation of the company. As such, the pre-insolvency moratorium is not to be implemented simply to delay the insolvency of a company. During a moratorium, creditors are prohibited from initiating the liquidation process of a company and appointing an administrator or appointing an administrative receiver. Creditors to whom rent is payable may only enforce their right of forfeiture with the approval of the Court and with such conditions as may be imposed by the Court. Furthermore, lenders can only take possession of the company's property or repossess goods in the company's possession with the approval of the Courts.

In addition, a company may only dispose its property if the disposal is made in the ordinary course of business or pursuant to a Court order. However, a company can dispose its property if there are reasonable grounds for believing that the disposal will benefit the company and the monitor consents to such disposal. Lenders are protected in situations where a company decides to dispose a secured property as the consent of the lender or approval of the Court is required to effect such disposal.

To strike a balance between the interests of the creditors and those of the company, the moratorium will only provide 30 days protection from the creditor's enforcement actions. The moratorium can be extended for a further 30 days upon application by the directors to the Court and the Court is satisfied that the extension is desirable to achieve the aim for which the moratorium was initially obtained.

Industrial Relations

We have set out below, a summary of the laws governing employment and labour matters in Kenya. Kenya is party to various International Labour Organisation (ILO) conventions, which form part of its labour legislation through the operation of Articles 2(5) and (6) of the Constitution. Article 2(5) of the Constitution provides that the general rules of International Law shall form part of Kenya's laws. Article 2 (6) provides that any treaty or convention ratified by Kenya shall form part of the laws of Kenya under the Constitution. In this regard the primary statutes that govern employment and labour matters in Kenya are:

1. **The Constitution of Kenya (2010)** – provides for a number of employment rights, including the right to fair labour practices, the right to fair remuneration, the right to reasonable working conditions and the right to join a union, amongst others;
2. **The Employment Act** (Act No. 11 of 2007) (the Employment Act) - declares and defines the minimum rights of employees, provides for basic conditions of employment of children and matters connected thereto;
3. **The Labour Institutions Act** (Act No. 12 of 2007) (the Labour Institutions Act) - establishes labour institution and wage councils and provides for their functions, powers and duties and for other matters connected thereto;
4. **Employment and Labour Relations Act,** 2011 (the Employment and Labour Relations Act) - establishes the Employment and Labour Relations Court (the ELRC) as a superior court of record and confers jurisdiction with respect to employment and labour relations;
5. **The Labour Relations Act** (Act No. 14 of 2007) (the Labour Relations Act) - consolidates the law relating to trade unions and trade disputes, provides for the registration, regulation, management and democratisation of trade unions and employers' organisations or federations, promotes sound labour relations through the protection and promotion of freedom of association, the encouragement of effective collective bargaining and promotion of orderly and expeditious dispute settlement, conducive to social justice and economic development;
6. **The Occupational Safety and Health Act,** 2007 (Act No. 15 of 2007) (the OSHA) - provides for the safety, health and welfare of workers and all persons lawfully present at workplaces and provides for the establishment of the National Council for Occupational Safety and Health;
7. **The Work Injury Benefits Act** (Act No. 12 of 2007) (the WIBA) - provides for compensation to employees for work related injuries and diseases contracted in the course of their employment or due to connected purposes;
8. **The National Social Security Fund Act,** 2013 (the NSSF Act) - requires every employer to register with the state pension fund known as the National Social Security Fund and to register its employees as members of the pension fund;
9. **The National Hospital Insurance Fund Act** (Chapter 9, Laws of Kenya) (the NHIF Act)- establishes the state hospital insurance fund known as the National Hospital Insurance Fund (NHIF) and provides for rules relating to payments to the NHIF by employers and employees and benefits to contributors. The funds are used to assist the employee settle in-patient medical bills, and
10. **The Industrial Training Act** (Chapter 237, Laws of Kenya) (the Industrial Training Act) - regulates the training of apprentices and indentured learners. It requires an employer to pay a training levy of KES 600 approximately USD 6 to the Industrial Training Levy Fund for each of its employees per year at the end of each financial year.

In addition to the above statutes, The Health Act, 2017 (Act No. 21 of 2017) (the Health Act) places an obligation on employers, regardless of size or nature of work, to establish lactation stations in the workplace for employees expressing milk.

The legislative framework covers wages, leave, housing, termination of employment, health and welfare, local and foreign contracts of service, employment of women and youth, industrial relations and occupational safety and health. The Employment Act requires an employer to provide an employee with a written contract of employment where employment is for an aggregate period equivalent to three months or more. The employer is responsible for preparing the employment contract. An employer is required to keep records relating to the contract of service for a minimum period of three years. Furthermore, the Employment Act sets out various particulars that must be set out in a contract of employment, including the following: name, age, permanent address and gender of the employee; details of the employer; job description; date of commencement of employment; place and hours of work; remuneration and the method of remuneration; entitlement to annual leave, public holidays, sick leave and a pension scheme, and the length of notice for termination.

The Employment Act requires wages to be paid in local currency (Kenya Shillings). Payment should be made on a working day, during working hours, at or near the place of employment or such other place as may be agreed. The Employment Act prohibits payment of wages at a place where intoxicating liquor is sold except when the employee is employed to work there. Wage councils are responsible for formulating wage orders. The wage orders constitute the minimum rates of remuneration and terms of conditions of employment which may not be varied by agreement. The quantum of the minimum wage depends on the industry in which the employee is engaged.

Normal working hours depend on the industry and in general consist of not more than 52 hours of work per week for day work and not more than 60 per week for night work. If an employee works more than the maximum hours in one week, he or she is entitled to overtime payment. An employee is entitled to at least one rest day in seven days. Employees are also entitled to annual leave with full pay of not less than 21 working days after every year of continuous service and not less than 1.75 days per month when employment is terminated after two or more months of continuous service. The annual leave is in addition to all public holidays, weekly rest days and sick leave as fixed by law or by written agreement.

The Employment Act provides that, after two consecutive months of service, an employee is entitled to seven days of sick leave with full pay and thereafter seven days with half pay in each period of 12 consecutive months of service, subject to production of a certificate of incapacity to work signed by a qualified medical practitioner. Female employees are entitled to maternity leave of three months with full pay, while male employees are entitled to paternity leave of two weeks with full pay. The Employment (Amendment) Act, 2021 introduced the concept of pre-adoption leave of one month with full pay, which applies where a child is to be placed in the continuous care and control of an applicant who is an employee under the Employment Act.

Employers with more than 50 employees are required to have a statement on the disciplinary rules applicable to employees, and such rules must specify the person whom employee may apply to in case of dissatisfaction in the decision of the disciplinary body or any grievance.

Employers with 20 or more employees are required to have in place a policy statement on sexual harassment.

Every employee in Kenya is required under ITA to pay income tax under a system known as Pay As You Earn (PAYE). It is the employer's obligation to deduct and remit the employee's PAYE to the Kenya Revenue Authority by the 9th of the next month after the income earning month.

Pursuant to the Industrial Training Act, employers with more than 20 employees are required to register with the National Industrial Training Authority (the Authority) and pay KES 600 (approximately USD 6) per employee per year to the Authority as Industrial Training Levy. Only employers in the hotel and restaurant industry are exempt since they pay the Hotel and Catering Levy. Failure to pay the training levy attracts a penalty of 5 percent on the amount of levy due to the Authority by the employer.

In January 2014, the NSSF Act came into force repealing the previous National Social Security Fund Act (Chapter 258, Laws of Kenya) (Cap 258). The Act entitles employees to certain benefits, including medical benefits and pension. Every employer is required to register with the National

Social Security Fund and to register its employees as members of the fund. Under the NSSF Act, the social security contributions payable by both employer and employee were increased up to KES 2160 per employee (approximately USD 22), 50% payable by the employer and 50% by the employee. Contributions payable by both employee and employer are set to progressively increase over the course of the next five years. The implementation of the new rates is on hold pending the determination of a case filed in the High Court disputing the rates.

With respect to medical benefits, the NHIF Act establishes the state hospital insurance fund known as the National Hospital Insurance Fund (NHIF) and provides for rules relating to payments to the NHIF and benefits to contributors. The funds are used to assist the employee settle in-patient medical bills. The NHIF Act provides for standard contributions to the NHIF for persons whose income exceeds the prescribed minimum. At present the graduated scale effective as of 1 April 2015 starts from a gross income of KES 5,999 (Approximately USD 53.37). It is the responsibility of the employer to remit the contributions to the NHIF Fund. Employees earning a monthly gross salary of KES 5,999 will pay a monthly contribution of KES 150 (USD 1.33) while those earning KES 100,000 (USD 889.68) and above will pay a monthly contribution of KES 1,700 (USD 15.12). Self-employed persons are required to pay a monthly contribution of KES 500 (USD 4.45).

Recently, an NHIF (Amendment) Bill, 2021 (NHIF Bill), was introduced before the National Assembly which, amongst other amendments, requires employers to match their employees' monthly contributions to the NHIF similar to the NSSF contribution model. The NHIF Bill has been opposed by the Federation of Kenya Employers, which warned that the requirement for employers to match employees' contributions to NHIF would destroy private medical insurance schemes and deepen job cuts.

The Business Laws (Amendment) Act (No. 2) 2021 harmonised payroll deductions for NSSF, NHIF and the Industrial Training Levy so that NHIF and NSSF contributions will now be due on the 9th day of every month and Industrial Training Levy will be due on the 9th day of the month following the end of the financial year. Further the Business Laws (Amendment) Act (No. 2), 2021 clarified that the Industrial Training Levy is to be paid at the end of a company's financial year.

The Business Laws (Amendment) Act (No. 1), 2020 amended the OSHA such that workplaces with less than 100 employees are no longer required to register and obtain a certificate of registration of workplace for the first 12 months from the date of registration of the business. This will reduce the costs for setting up businesses in Kenya.

The Health Act requires all employers, regardless of size or nature of work to establish lactation stations in their workplaces for employees expressing milk. Employers are required to ensure that the lactation stations are equipped with the necessary equipment and facilities, including handwashing equipment, refrigerators or appropriate cooling facilities, electrical outlets for breast pumps, a small table, and comfortable seats. Additionally, an employer is required to grant all nursing employees break intervals, in addition to the regular times off for meals, to breastfeed or express milk. The Breastfeeding Mothers Bill, 2019 (The Breastfeeding Mothers Bill) ascribes penalties for non-compliance. The Breastfeeding Mothers Bill is currently being debated in the National Assembly and has passed the 1st reading stage.

Employment of Foreign Nationals

In principle, the employment of foreigners is pegged on unavailability of skills in the local market. Thus, if there is limited supply of human resources in a particular area, a foreigner may be employed subject to obtaining a work permit from the Kenya Immigration Department. Non-Kenyan citizens require a special pass or a work permit to enable them work in Kenya. A Special Pass provided for under the Kenya Citizenship and Immigration Act, 2011 (the KCIA) may be obtained if the person intends to work in Kenya for a period not exceeding six months. For periods exceeding six months, a work permit should be obtained.

Disputes and Enforcement

In situations where:

1. an employer or employee neglects or refuses to fulfil a contract of service; or
2. any question, difference or dispute arises as to the rights or liabilities of either party, or
3. any misconduct, neglect, ill treatment or an injury to the person or property of either party under a contract of service occurs; the aggrieved party can complain to the labour officer or lodge a complaint or suit in the ELRC, which has the status of the High Court and exclusive original jurisdiction over labour disputes.

The primary mechanisms for enforcement of the various provisions of the employment laws in Kenya are fines and penalties imposed by the ELRC. Under the Employment Act, where the labour officer is of the opinion that dismissal was unjustified, he/she may recommend the employer to pay the employee any or all of the following:

- wages for the notice period required to be given;
- the proportion of wages due for the period the employee has worked and any other loss consequent upon dismissal arising between the date of dismissal and the date of expiry of the notice period required, or
- the equivalent of a number of months wages or salary for a period not exceeding twelve (12) months based on gross monthly wage or salary of employee at the time of dismissal. This is however at the discretion of the court.
- We have in the recent past seen an increase in claims of discrimination in employment matters. If a discrimination suit against an employer is successful, the amount payable to the employee by way of damages is, unlike a claim of unfair termination, not capped.

Competition

Competition

Competition law is increasingly playing a significant role in respect of the timing and the cost of investments in Kenya or investments which have a Kenyan element. Currently, there are two competition regimes which apply in Kenya: Kenya's domestic competition regime and the Common Market for Eastern and Southern Africa (COMESA) competition regime. There is also an East African Community (EAC) competition regime which it is widely anticipated, will be operationalised soon, and will therefore also apply to Kenya.

Parties to merger are currently required to make a merger notification to the Competition Authority of Kenya (Competition Authority), if applicable, the COMESA Competition Commission (CCC) and potentially to the EAC Competition Authority in the near future.

The COMESA competition regime and the EAC competition regime were intended to be a "one-stop shop" for regional competition law, but in the case of COMESA, this has not yet been achieved and it is not clear what the situation will be in respect of the EAC competition regime. The overlapping competition regimes increase the burden on investors who may soon be required to make three notifications to three different competition regulators in respect of a single merger.

COMESA and EAC competition regimes were intended to be a "one-stop-shop" for regional competition law.


Citi hoppa

Merger Control

The Competition Authority of Kenya has recently begun cracking down on mergers implemented without its approval and has imposed financial penalties on the parties involved. It has the power to impose a financial penalty of up to 10% of an undertaking's gross annual turnover in Kenya for the preceding year, and there are potential criminal sanctions also.

In addition, following the issuance of conditional approvals over the last few years, the Competition Authority of Kenya has stepped up its post-merger compliance monitoring to ensure that mergers are implemented as disclosed to it and in accordance with its approval conditions. It is also placing a post-merger compliance reporting condition when approving mergers.

Restrictive Trade Practices

The Competition Authority and the CCC have in the past focused mainly on merger control but are now shifting focus to restrictive trade practices and cartel enforcement. The Kenyan Competition Act and the COMESA competition regime prohibit agreements or arrangements which contain restrictive trade practices unless exempted under the regimes.

In early 2016, the Competition Authority of Kenya conducted its first dawn raid on the premises of two fertiliser firms alleged to have been colluding in fixing the prices of their products.

The Competition Authority of Kenya has also conducted investigations and sector studies in the alcoholic beverage sector, advertising sector, fertiliser sector and cement sector seeking to unearth restrictive trade practices in the sectors. In 2016, the Competition Authority imposed the highest gazetted financial penalty of KES 5 million (USD 44,483) on an advertising company found to have engaged in price fixing. This financial penalty arose from a sectoral investigation in which several advertising companies were fined for similar practices.

In mid-2017, the Competition Authority gazetted the Leniency Guidelines aimed at enhancing cartel enforcement in the country. The guidelines provide for a leniency program in which a partial or full immunity from financial penalties is given to entities that report cartels to the Competition Authority. The immunity does not absolve one from criminal sanctions under the Kenyan Competition Act implying that one may still be prosecuted by the Director of Public Prosecutions.

Abuse of dominance

The Competition Act prohibits abuse of dominance in the market. An entity is in a dominant position where it produces, supplies, distributes or otherwise controls not less than one-half of the total goods or services of any description, which are produced, rendered, supplied or distributed in Kenya or any substantial part of Kenya.

Buyer Power

The concept of buyer power was introduced in 2017 through the Competition (Amendment) Act, 2016 and further provided for through the Competition (Amendment) Act, 2019. A buyer power department was even created within the Competition Authority of Kenya to investigate any complaints of abuse of buyer power. Any conduct that amounts to abuse of buyer power in a market in Kenya, or a substantial part of Kenya, is prohibited.

Consumer Protection

Consumer rights are primarily protected under Article 46 of the Constitution together with the Consumer Protection Act (Act No 46 of 2012), which broadens the protection offered by the Constitution. The protection offered to consumers applies to goods and services offered by private and public entities. The Consumer Protection Act governs consumer relations in individual economic sectors and generally across all sectors. Notable rights include the right to pre-contractual disclosure of the terms of a consumer agreement and the ability to cancel consumer agreements.

The Competition Authority of Kenya is mandated to protect consumers under Part VI of the Competition Act. The Competition Act provides for investigations of consumer cases relating to false or misleading representations; unconscionable conduct; and unsafe, defective, or unsuitable goods. The Competition Authority of Kenya has investigated several consumer complaints in various markets which have increased over the years because of its continued consumer rights campaign initiatives, including the creation of awareness to consumers at the county level.

KES 5M

In 2016, the Competition Authority imposed the highest gazetted financial penalty of KES 5 million (USD 44,483) on an advertising company found to have engaged in price fixing.

Legal Forms of Incorporation

In Kenya, there are several types of corporate entities, including sole proprietorships, partnerships, cooperative societies and companies. The main vehicles utilised by investors are limited liability companies which can be incorporated either as private or public companies. The law also allows for branches of foreign companies to be set up in Kenya maintaining the same legal personality as the foreign company.

Kenya overhauled its company law legislation through the enactment of the Companies Act, which is based substantively on the United Kingdom's Companies Act, 1985 and the United Kingdom's Companies Act, 2006 and it seeks to update and reform the law relating to incorporation, registration, management and regulation of companies. The signing into law of this legislation was a significant step in the Country's corporate history as it has moved companies' law legislation with one giant leap from 1948 to 2015. The Companies Act is also by far the most extensive piece of legislation among the statutes of Kenya with 1,026 sections in comparison to the previous Companies Act which had 406 sections. In this regard, the Companies Act was operationalised in stages by the Cabinet Secretary and is now fully in force.

Notably, the Companies Act now allows for flexible arrangements in relation to capital structures such as share buy backs. It also provides for the enhanced redeemability of shares, and the permissibility of financial assistance in certain instances, shareholder rights and simpler incorporation procedures. The Companies Act now permits for the incorporation of private companies with one shareholder and one director as opposed to the position previously where at least two shareholders were required.

The Company's Act is also by far the most extensive piece of legislation among the statutes of Kenya with 1,026 sections in comparison to the previous Companies Act which had 406 sections.

Online Registration of Companies and Partnerships

The Business Registration Services Act is another piece of legislation among Kenya's business laws that is aimed at easing the operation of businesses in Kenya. This Act seeks to establish the Business Registration Service (BRS) to ensure effective administration of the laws relating to the incorporation, registration, operation and management of companies, partnerships and sole proprietorships. The BRS is hosted on an online portal called e-Citizen, which was rolled out in 2016.

Most of the forms of legal entities are no longer formed through the manual lodging of documents at the Companies Registry and are now formed via the e-Citizen platform. The incorporation process entails the online submission of prescribed details to the Companies Registry. Once these details are submitted, the Companies Registry takes approximately one (1) week to review documents and issue a certificate of incorporation for private limited companies. The registration of public companies and companies limited by guarantee may take a longer period where prospective officials are required to undergo a vetting process before the entity may be set up.

The table below provides a summary of the procedures and the estimated completion time and estimated costs for setting up a private limited liability company:

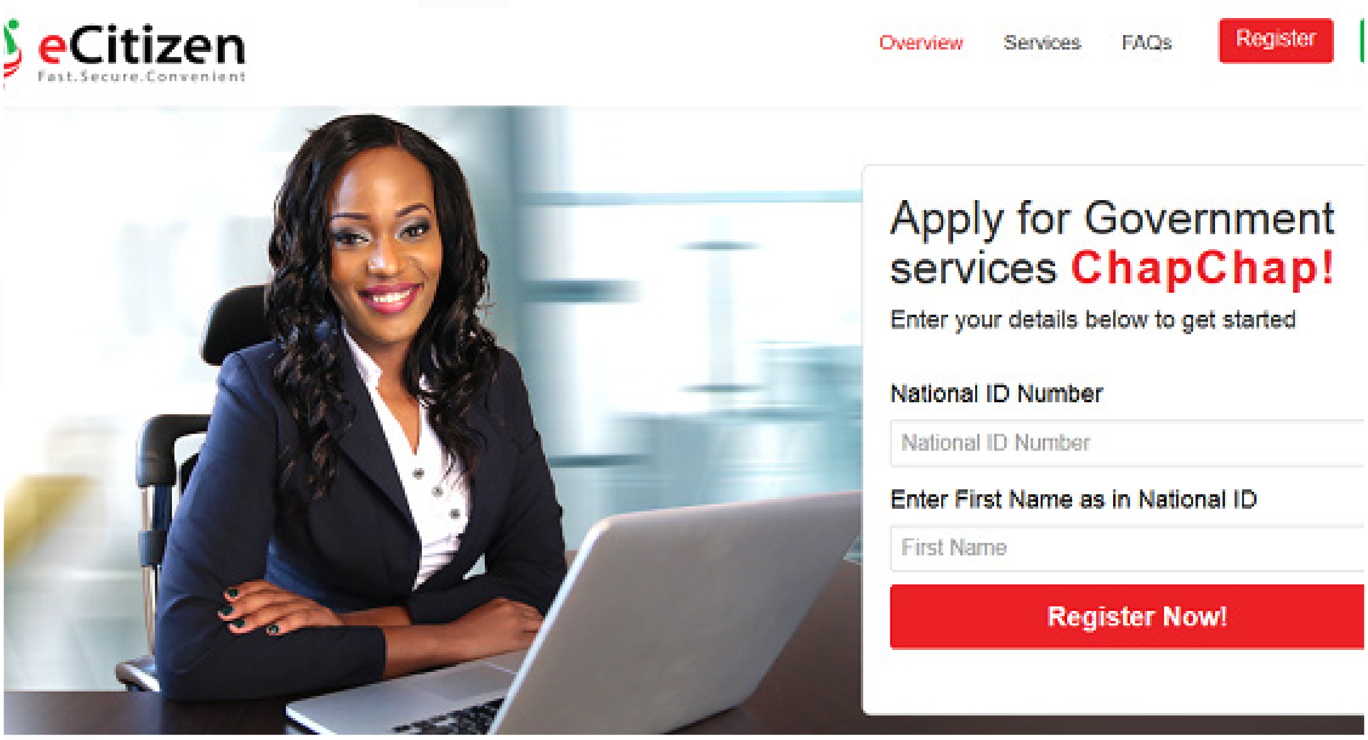
No	Procedure	Estimated time to complete (in business days)	Official costs (excluding professional fees, ancillary expenses and VAT)
1	Company name search, reservation, and completing incorporation application and generation of system generated forms.	1 day	
2	Execution of incorporation documents by shareholders, directors and company secretary and resubmission of execution documents to the Companies registry.	Depends on coordination amongst shareholders, directors and company secretary	Standard fee of KES 10,650 (approximately USD 103)
3	Processing of incorporation application and issuance of Certificate of Incorporation.	Approximately 1 week if Companies Registry does not request further details	
4	Application for Kenya Revenue Authority (KRA) PIN for the company	Approximately 1 week if the company has local directors. Where company has no local directors, it may take 2-3 weeks to get a PIN through the Kenya Investment Authority (KenInvest)	Charges will only apply where a company has no local directors, and a company PIN has to be applied for through KenInvest
5	Register for VAT online	1 day	No charge
6	Register for PAYE online	1 day	No charge
7	Register under the National Social Security Fund (NSSF) and obtain a NSSF certificate	1 week	No charge
8	Register under the National Hospital Insurance Fund (NHIF) and obtain a NHIF certificate	1 week	No charge
9	Apply for a business permit online	1 day	Permit fees depend on certain factors e.g. type of business, size of premises, number of employees etc.

The Business Laws (Amendment) Act (No. 2), 2021 deleted paragraph 11 of the sixth schedule of the Companies Act, eliminating the requirement for an existing company to seal its official documents as a mandatory document validation procedure. Therefore, a company does not need to have a common seal.

Linking of businesses to the e-Citizen portal

Companies and partnerships that were registered under the manual system before the e-Citizen portal was introduced in 2016 are now required to link their businesses to the e-Citizen portal. The directors and company secretary of a company are the only users permitted to link a business to the online portal.

Once a business has been linked, the Companies Registry will verify the details of the company as matching their records and the status of the business will read 'verified'. The directors or secretary of the company may then proceed to add users who will be issued with access rights to control or make changes to the e-Citizen business account of the company.



Importance of Linking your business to e-Citizen

A company's business must first be linked to the e-Citizen portal in order to:

- carry out a company search over a company;
- make changes to the company, including changes to shareholding, directorship, registered office and share capital, and
- file annual or interim returns in respect of the company.

The Companies Registry has stopped processing manual requests for company searches and changes to the details a company. The processes that may still be carried out manually include:

- conversion of companies;
- increase of nominal capital;
- splitting of shares;
- making changes to the details of foreign companies;
- certification of original documents;
- official search of business name;
- amendment of Memorandum and Articles of association, and
- registration of debentures and discharges.

This notwithstanding, the Companies registry has notified the public that manual processing for the above services will be closed as soon as it configures the e-Citizen portal to support these specified services.

Register of Beneficial Owners

Pursuant to section 93A of the Companies Act requiring all companies to keep and lodge with the Registrar of Companies a register of its beneficial owners and the gazettement of the Companies (Beneficial Ownership Information) Regulations, 2020, the Registrar of Companies requires all the officers of companies and authorised persons to submit a copy of the beneficial ownership register within 30 days of its preparation and to notify the Registrar within 14 days of any change in beneficial ownership information. Failure to comply with this requirement is an offence committed by the company and every officer of the company who is in default. The Registrar of Companies granted a grace period of preparation of the beneficial ownership register up to 31 July 2021 for companies to comply with the requirement before enforcement for non-compliance.

Intellectual Property

Article 40(5) of the Constitution of Kenya, 2010 (the Constitution) requires the state to support, promote and protect the intellectual property rights of the people of Kenya. Kenya's legislation protecting intellectual property includes the Trade Marks Act (Chapter 506), the Copyright Act (Chapter 130) and the Industrial Property Act, 2001, which relates to patents, industrial designs, utility models and technovations.

Regionally, Kenya is a member of the African Regional Intellectual Property Organisation. At the international level, Kenya is a member of the World Intellectual Property Organisation, and is a contracting party to various treaties recognizing intellectual property rights, including:

- the WTO Marrakech Agreement, 1994 establishing the World Trade Organisation, and the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPs);
- the Madrid Agreement Concerning the International Registration of Marks and the Protocol Relating thereto; and
- the Patent Cooperation Treaty, which provides the framework for the international filing of patent applications which designate various jurisdictions across the globe.

Steps have been taken towards controlling the importation and trade of counterfeit goods. In 2008, Parliament passed the Anti-Counterfeit Act, 2008, which established the Anti-Counterfeit Agency and the legal framework for combatting counterfeit goods in Kenya.

In relation to the standardisation of goods, the law provides for the following standards in relation to specified commodities that are manufactured or sold in Kenya:

- specifications or codes of practice that certain specified commodities must comply with (Kenya Standards) in order to be sold or manufactured in Kenya; and
- optional specifications for prescribed commodities that are sold or manufactured in Kenya.

The law provides for the establishment of a standardization mark that manufacturers and sellers can only apply on their commodities once a permit for such application has been obtained. The standardisation mark can only be lawfully applied on commodities that have been certified by the Kenya Bureau of Standards as being compliant with the applicable mandatory Kenya Standards or the optional specifications.

There has been a couple of regulatory developments for the reform of Kenya's trade mark laws. Kenya's national intellectual property office, the Kenya Industrial Property Institute (KIPI), circulated a draft Trade Marks Bill in March 2015, which was further updated and recirculated in March 2016 (together with proposed rules). The most significant proposed change under that draft Bill is the hypothecation of trademarks. The possible enactment of such provisions could herald the dawning of a new phase for intellectual property rights and valuation in Kenya. That Trade Marks Bill is however yet to be gazetted and passed into law.

Further, the Protection of Traditional Knowledge and Cultural Expressions Act (the TK Act), came into force in 2016 and established the framework for the protection of traditional knowledge and cultural expressions in Kenya. The TK Act gives effect to the provisions of the Constitution that promote culture and protect the ownership of property (including the intellectual property) of indigenous communities. In addition, a Miscellaneous Amendment Act was passed in April 2017. The most notable amendments under this Act are as follows:

- a) the extension of the time for requesting for substantive examination of a patent application from three to five years from the filing date of the application; and
- b) the introduction of the possible publication of a patent application within 18 months of the filing date or, if priority is claimed, the date of priority.

In relation to copyright, the Copyright (Amendment) Act, 2019 introduced several amendments to the Copyright Act. One of the notable amendments being the introduction of a notice and takedown regime addressing copyright infringement within the cyber space. Under the notice and takedown regime, a copyright holder can make a complaint in the prescribed form to an internet service provider (as defined under the Copyright Act) on copyright infringement requiring that the internet service provider take down the infringing content. Internet service providers are obligated to notify the infringing user of the complaint and take down the infringing content unless the internet service provider receives a counter notice from the infringing user contesting the contents of the takedown notice.

14 Days

notify the Registrar within 14 days of any change in beneficial ownership information.

Data Protection and Cyber Security

Data Protection

The Data Protection Act, 2019 (the DPA) was passed in November 2019 to make provision for the regulation of the processing of personal data and the protection of the rights of data subjects. The DPA applies to both natural and legal persons as well as to public authorities, agencies, and other bodies. It also applies extra-territorially to entities not established or ordinarily resident in Kenya, but which process personal data of data subjects located in Kenya. It has far-reaching implications on the way personal data is required to be handled.

The DPA also outlines the guiding principles of data protection, the obligations of data controllers and data processors, provides for the transfer of personal data outside Kenya and provides data subjects with remedies if their rights are violated.

The passing of the DPA came in the wake of the operationalisation of the General Data Protection Regulation (GDPR) in May 2018. The GDPR is a European law with extra-territorial applicability, and which regulates the processing of personal data belonging to data subjects in the European Union and the European Economic Area.

The DPA contains the core rules and legal obligations that affect businesses across all sectors of commerce, technology, and industry to the extent that their operations involve the handling of personal data. Such personal data would typically include the names of natural persons, email and physical addresses, telephone numbers, date of birth and birthplace details, age, gender, national identification numbers etc. To this extent, all business operators fall under the definition of 'data controllers' and/or 'data processors' and are bound by the obligations in the DPA.

Further, by virtue of being employers, businesses across all sectors also fall under the purview of the DPA as holders and processors of employee related personal data, which must also be processed in accordance with the DPA.

Kenya recently appointed its first Data Commissioner in 2020, who will oversee the implementation of the DPA and ensure compliance by data processors and data controllers with the DPA. It is expected that, in consultation with the Cabinet Secretary, the Data Commissioner will establish directorates necessary for carrying out the functions of the Office of the Data Protection Commissioner (ODPC).

The appointment of the Data Commissioner is an important milestone along the path to properly and fully implement the provisions of the DPA given its relevance to all persons and organisations (both national and international), who in one way or another process personal data while ordinarily resident in Kenya or relating to natural persons within Kenya. For those who fail to comply, the DPA will attract a fine of up to KES 3 million (USD 26, 679) or imprisonment of up to 10 years, or both.

A taskforce appointed by the Cabinet Secretary of the Ministry ICT, Innovation and Youth Affairs in April 2021 developed the following regulations to give effect to the various provisions of the DPA (i) the Data Protection (General) Regulations, 2021; (ii) Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021; and (iii) Data Protection (Compliance and Enforcement) Regulations, 2021 (collectively, the Draft Regulations). The ODPC is currently reviewing the comments submitted by the public on the contents of the Draft Regulations.

Cyber security in Kenya is governed by various provisions of law, including Article 31 of the Constitution, the Kenya Information and Communication Act, 1998 (KICA), the Computer Misuse and Cybercrimes Act, 2018 (the Cybercrimes Act) and the DPA.

Cyber Security

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The KICA includes cyber security related provisions that prohibit various actions that would threaten cyber security and prescribes criminal penalties for the same ranging between a fine of KES 200,000 (USD 1,779) to KES 1,000,000 (USD 8,893) and/or a jail term of up to five years. The KICA was amended in 2019 to provide for the regulation of electronic transactions and cyber-security by requiring the Communications Authority of Kenya to develop a framework for facilitating the investigation and prosecution of cybercrime offences and promote and facilitate the efficient management of critical internet resources.

The Cybercrimes Act aims to protect the confidentiality, integrity and availability of computer systems, programs and data as well as facilitate the prevention, detection, investigation, prosecution, and punishment of cybercrimes. It is, however, important to note that since the enactment of the Cybercrimes Act, there has been significant litigation surrounding the constitutionality of some of its provisions, with the latest being the decision of the High Court where the Court declared the Cybercrimes Act to be unconstitutional because it was passed without the input of the Senate.

However, it is important to note that the Court suspended the implementation of its decision to allow Parliament time to regularise the procedure in which the laws were passed.

The DPA imposes obligations on data controllers and data processors to provide security measures and mechanisms to ensure the protection of personal data against unlawful destruction, loss, alteration, and transfers.

Due to the increased cyber threats against banks, the Central Bank of Kenya (the CBK/the Central Bank) issued Guidelines to create a safer and more secure cyberspace, and establish a coordinated approach to the prevention and combating of cybercrime. The Guidelines set out the minimum standards that Payment Service Providers should adopt to develop effective cybersecurity governance and risk management frameworks.

USD 8893

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Dispute Resolution

Kenya follows a common law system by virtue of being a former British colony. English decisions of superior courts are binding up to 12 August 1897 and have been persuasive thereafter. There is a hierarchy of laws as follows:

- The Constitution of Kenya, 2010;
- Acts of parliament;
- Common law;
- Doctrines of equity;
- Statutes of general application in force in England and Wales on the 12 August,1897; and
- case law.

Below is a list of the principal laws governing and regulating the court system in Kenya:

1. **The Constitution -** establishes the Kenyan Court system and the hierarchy of courts, granting parliament powers to legislate on matters such as jurisdiction and other administrative aspects;
2. **The Judicature Act, Chapter 8, Laws of Kenya –** sets out provisions concerning the jurisdiction of the High Court, the Court of Appeal, subordinate courts or regarding judges and officers of courts;
3. **The Appellate Jurisdiction Act, Chapter 9, Laws of Kenya (the Appellate Jurisdiction Act) –** confers on the Court of Appeal jurisdiction to hear appeals from the High Court and for any incidental purposes;
4. **The Magistrates' Court Act, Chapter 10, Laws of Kenya –** establishes magistrates' courts, states the jurisdiction and provides for the procedure of such courts. In addition, it also provides for appeals in certain cases and for any incidental and connected purposes;
5. **The Kadhis' Court Act, Chapter 11, Laws of Kenya -** establishes the Kadhis' court, having and exercising jurisdiction over the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion. Nevertheless, nothing in this legislation limits the jurisdiction of the High Court or any subordinate court in any proceeding which comes before it;
6. **The Environmental and Land Court Act, Chapter 12A, Laws of Kenya -** gives effect to Article 162(2)(b) of the Constitution establishing a superior court to hear and determine disputes relating to the environment, the use and occupation of and title to land and makes provision for its jurisdiction, functions and powers;
7. **The Employment and Labour Relations Court Act, Chapter 234B, Laws of Kenya amended to the Employment and Labour Relations Act, (the Employment and Labour Relations Act) –** establishes the Employment and Labour Relations Court as a superior court of record, confers jurisdiction on the Court to hear and determine disputes relating to employment and labour relations and for connected purposes;
8. **The Supreme Court Act, 2015 -** gives effect to Article 163(9) of the Constitution and regulates the procedure of the Supreme Court of Kenya, including but not limited to matters such as quorum, limits of the Supreme Court's appellate jurisdiction as well as its advisory role; and
9. **The High Court (Organisation and Administration) Act, 2015 -** provides for administrative matters related to judges and officers of the High Court such as transfer and deployment of judges and qualifications, powers and functions of the High Court's registrars.

Under the Limitation of Actions Act, Chapter 22, Laws of Kenya, (the Limitation of Action Act), time limits for bringing claims for court action or arbitration are set out as follows:

a. actions concerning land must be brought within 12 years from the date of the cause of action;
b. actions concerning contracts must be brought within six years from the date of the cause of action; and
c. actions concerning any tort must be brought within three years from the date of the cause of action.

In limited instances, the Court has powers to issue an order extending the limitation periods and/or to determine at what point the limitation period started running.

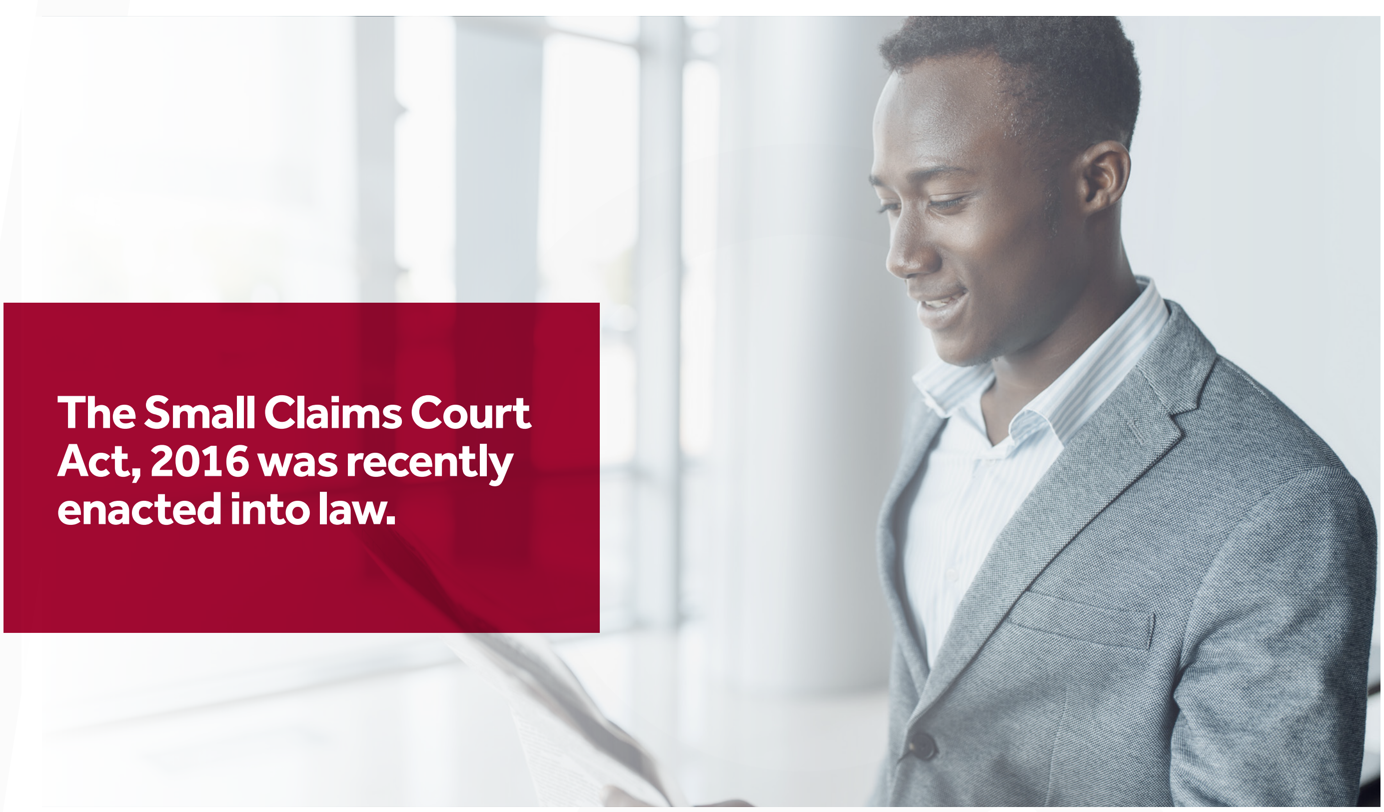
Kenyan law recognises alternative dispute resolution mechanisms. In particular, Article 159 of the Constitution provides that alternative forms of dispute resolution, including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted. Indeed, the Government's enthusiasm for arbitration is demonstrated inter alia by the passing of the Nairobi Centre for Arbitration Act, 2012, which came into force in January 2013 and establishes the Nairobi Centre for International Arbitration (NCIA). Together with Rwanda's Kigali International Arbitration Centre, there are now two international arbitration centres in East Africa. It is hoped that the NCIA will provide a cheaper alternative for foreign investors who opt to resolve their disputes in the London or Mauritius arbitration centres and provide an alternative to the lengthy court processes in Kenya. Notwithstanding these aims, the NCIA has a long way to go before becoming fully operational. It is to be noted that the Board of Trustees charged with the administration of NCIA was inaugurated in November 2013.

Arbitration is widely embraced in commercial dispute resolution settlement. Kenya is a party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and New York Convention awards would be recognised in Kenya under the Arbitration Act. Kenya is also a signatory to the International Convention for the Settlement of Investment Disputes. There is a well-established policy of the courts upholding arbitration clauses and a general judicial attitude against interfering with the powers of arbitral tribunals.

Foreign judgments from superior courts in certain reciprocating countries can be enforced in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act, Chapter 43, Laws of Kenya (the FJEA). The countries specified to be reciprocating countries under the FJEA are Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and the Republic of Rwanda.

Following promulgation of the new Constitution in August 2010, Kenya began to implement significant structural changes to its judicial system. The Supreme Court was established as the highest court in the land and has recently demonstrated judicial independence from political pressure when it annulled the election of an incumbent Kenyan president citing irregularities by the Independent Electoral and Boundaries Commission (IEBC) and directed the IEBC to conduct a fresh presidential election. In a subsequent challenge to the president's re-election, the Supreme Court dismissed the challenge and upheld the re-election as having been carried out in accordance with the law. In addition, many new judges have been appointed and the monetary jurisdictional limits of magistrate's courts enhanced to KES 20 million (USD 177,857) so to ease the workload of the superior courts. Further, judges and magistrates who were serving prior to the promulgation of the Constitution had to undergo vetting to determine whether they ought to continue serving as judicial officers, which resulted in some judges and magistrates being found unfit to serve. The process restored integrity to a judiciary that had been previously perceived to be slow in delivering justice, corrupt and insufficiently independent.

The Small Claims Court Act, 2016 was recently enacted into law. It is a subordinate court with a monetary jurisdiction of KES 1 million (USD 8,893) and below. The Small Claims Court were established to reduce the backlog of cases by having disputes resolved through simple, inexpensive and expeditious procedures, thus enhancing access to justice. Please note that parties can lodge their own complaint in this court without necessarily requiring the services of a lawyer.



The Small Claims Court Act, 2016 was recently enacted into law.

Anti-Bribery and Corruption

Transparency International's Corruption Perception Index for the year 2021 ranks Kenya at position 128 out of 180 countries, an improvement from position 144 in 2020. Further, according to the Ethics and Anti-Corruption Commission's (EACC) Annual Report for 2020-2021, there were 4,894 reports made to it, out of which only 2,029 were recommended for investigation. However, only 31 percent related to bribery.

Anti-bribery and corruption offences (ABC Offences) are quite rampant in Kenya, significantly affecting the cost of doing business and increasing the compliance requirement on companies and other business entities. This is despite comprehensive legislation aimed at curbing these vices. In fact, Section 14 of the Bribery Act commands every state officer, public officer or any other person holding a position of authority in a public or private entity to report within 24 hours any knowledge or suspicion of instances of corruption to the EACC. Meanwhile, the High Court of Kenya has an Anti-Corruption and Economic Crimes division specifically tasked to deal with cases pertaining to corruption and economic crimes.

Legislation

The following statutes regulate ABC Offences:

- The Bribery Act, 2016 (BA);
- Ethics and Anti-Corruption Commission Act, 2011 (EACC Act);
- The Public Officers Ethics Act, 2003;
- Mutual Legal Assistance Act, 2011 (MLA); and
- The Anti-Corruption and Economic Crimes Act, 2003 (ACECA).

In addition to the above, it is important to note that many other sector-specific statutes containing provisions on bribery and corruption-related offences.

Regulatory Authorities

1. The EACC established under Article 79 of the Constitution and the EACC Act is the main regulator on matters relating to bribery and corruption. In discharging its mandate, EACC works as part of a multi-agency team comprised of officers from:
    a. The Attorney General;
    b. National Police Service;
    c. Officers from the Kenya Revenue Authority;
    d. National Intelligence Service; and
    e. The Asset Recovery Agency.
2. The National Police Service established under the National Police Service Act, specifically the Directorate of Criminal Investigations, and Office of the Director of Public Prosecution established under the Office of the Director of Public Prosecutions Act, 2013, which deals in prosecuting individuals charged with ABC Offences.

Offences

Some of the offences under the provisions of the legislation outlined above include:

Bribery

1. The BA defines bribery to include giving or receiving a bribe with the knowledge or belief that the acceptance of the financial or other advantages would itself constitute the improper performance of a relevant function or activity.
2. Failure by a corporation to prevent bribery by a person associated with it. Section 11 of the BA defines "Associated Person" as "a person shall be deemed to be associated with another person if the person performs services for or on behalf of that other person as an agent, employee, or in any other capacity".
3. A corporation commits the offence of bribery if a person associated with it bribes another person intending to obtain or retain business for the corporation or an advantage in the conduct of business by the private entity. Please note that an associated person is one who performs services for or on behalf of another person or entity.
4. Bribery by associated persons occurs where an agent or employee of a private entity bribes another person to retain or obtain business for the private entity or to get an advantage in the conduct of business by the private entity.
5. Failure by a corporation to have adequate procedures for the prevention of bribery and corruption appropriate to its size, scale, and nature of operations (the Procedures). However, please note that the BA has not imposed a timeline within which private entities should put in place anti-bribery and corruption policies and procedures. Further, save for the draft EACC guidelines (link) and the Draft Bribery Regulations 2020 (link), there are no regulations in force under the BA at present on the policies and procedures.
6. Failure by a person holding a position of authority in a company who knows or suspects that a bribery offence has been committed

is under an obligation to report such to the EACC within twenty (24) hours. Section 14 (2) of the Act, on the other hand, does not restrict the duty to report only to "persons holding positions of authority". It provides that, "a state officer, a public officer or any other person who, despite being aware of or suspicious of the commission of an offence under this Act, fails to report the act to the Commission within the specified period commits an offence." The duty may extend to the senior management team and heads of departments.

7. There is an ancillary offence (on the party of the company) of recording, in a company's accounting records, property obtained as a result of or in connection with bribery.
8. Failure to prevent harassment of a whistle-blower. A 'whistleblower' is defined by Section 2 of the BA to mean a person who makes a report to the EACC or law enforcement agencies on acts of bribery or other forms of bribery.

Corruption

1. Secret inducement or soliciting resulting in an improper secret benefit from an offer or advice given.
2. An agent commits an offence where he/she deceives or gives misleading or false information to the detriment of the principal.
3. Failure to adhere to laws and regulations relating to procurement.
4. Conflict of interest where an agent has a direct or indirect interest in a decision that a principal is likely to make.
5. The offence of bid-rigging where there is an inducement or reward for refraining from submitting, withdrawing, or changing a tender, proposal, quotation or bid.
6. Fraudulent acquisition of public property.
7. The offence of abuse of office emanating from improper use of one's office to confer a benefit on oneself or an associate.
8. The offence of dealing with property acquired as a result of corrupt conduct.

Who can be charged for ABC offences?

ABC offences apply to both natural and artificial persons.

Extra-territorial application of ABC Offences

The BA makes it an offence to bribe a foreign public official to influence that officer in the performance of his or her duties. Additionally, it applies to bribery offences committed outside Kenya by Kenyan citizens or Kenyan corporate citizens which would constitute an offence under the BA if such conduct took place within Kenya. For a foreign entity not registered in Kenya, the BA will apply where part of the offence is committed in Kenya.

Penalties for ABC Offences

There are various civil and criminal sanctions, either custodial or non-custodial, that can be imposed for breach of any provision of the legislation regulating ABC Offences. Some of the sanctions include:

Bribery

1. Imprisonment for a term not exceeding ten (10) years.
2. Bar from holding public office for convicted state officers or public officers.
3. Ten (10) year disqualification from holding the position of director in the entity and any other entity in Kenya.
4. Ten (10) year ban from holding the position of a partner in the entity and any other entity in Kenya.
5. Ten (10) year disqualification from being elected or appointed to hold a state office or a public office.
6. Ten (10) year disqualification from transacting business with the National or County Government after such conviction
7. Additional mandatory fine if, as a result of the offence, the person received a quantifiable benefit or any other person suffered a quantifiable loss, being equal to five (5) times the sum of the amount of the benefit and the amount of the loss.
8. An individual or an entity may be ordered to pay back the amount or value of any advantage received by him to the Government.

Corruption

1. Mandatory fine equal to two times the sum of the amount of the benefit and the amount of the loss (where applicable) under the ACECA.
2. Fine not exceeding KES 1 million upon conviction for offences under sections 40 to 47 of the ACECA.
3. One is liable to pay a fine of KES 100,000 (USD 889) on conviction. Confiscation and forfeiture of any property acquired as a result of the advantage received by the convicted person or private entity.

128

Transparency International's Corruption Perception Index for the year 2021 ranks Kenya at position 128 out of 180 countries.

Industry Sectors

Agriculture

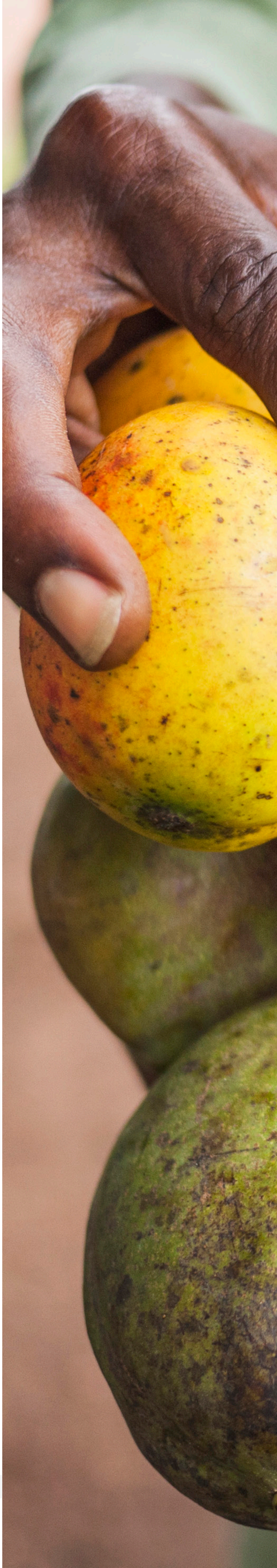
The agriculture sector continues to play a critical role in Kenya's economy accounting for 33 percent of the Gross Domestic Product (GDP) and another 27 percent of GDP indirectly through linkages with other sectors. The sector employs more than 40 percent of the total population and more than 70 percent of Kenya's rural people. The greatest contributors to the agriculture sector in recent years include crop production, livestock, fisheries, and horticulture.

Existing investment opportunities in the agricultural sector includes accelerated food crop production and increasing non-traditional agricultural exports. There are also opportunities for improvement in technology infrastructure, such as retail, packaging, storage and transportation. Intensified irrigation and additional value-added processing are also significant areas for investments.

The Government has been making several efforts to optimise on the benefits of the agricultural sector with food self-sufficiency being part of the current Government's 'Big Four' development agendas. One of the strategies for this is the allocation of a significant amount of money to the sector from the Government budget. The Government is also in the process of earmarking several processing factories, including in the cotton and sugar sectors, for privatisation, presenting potential investment opportunities for investors. Furthermore, the Government is taking active steps through new legislation to revamp the sector at both the national and county level. Key areas have been carved out of wide umbrella laws and regulatory bodies and are now specifically regulated e.g., fertilizers, animal foodstuffs, veterinary medicines, and certain pharmaceuticals.

In the last few years, Kenya has witnessed the increase in large-scale agricultural companies setting up operations in Kenya. We have also seen more interest in the fishing industry with the entrants of companies setting up fish farms, especially in Lake Victoria. Floriculture is also thriving with companies setting up market leading flower farms in Kenya.

The Land Control Act, Cap 302 (the LCA) remains a key piece of legislation that governs the ownership and use of agricultural land. The LCA defines agricultural land to include any land that is located outside of a municipality. The LCA restricts the sale, transfer, lease, exchange, or partition to persons who are not Kenyan citizens or to private companies whose shareholding is not wholly Kenyan. Foreign investors wishing to engage in agricultural activities in Kenya that requires any dealing in agricultural land needs to seek accurate legal advice on how to properly structure the investment vehicle to ensure compliance with the provisions of the LCA.



The sector employs more than 40 percent of the total population and more than 70 percent of Kenya's rural people.

Banking and Insurance

Kenya's banking sector is well developed and sophisticated in comparison to its neighboring countries. There are over forty commercial banks in Kenya and several financial institutions, including mortgage finance companies, however, the banking industry is dominated by nine major banks: Kenya Commercial Bank Limited, Equity Bank Limited, NCBA Bank Kenya Plc, Co-operative Bank Limited, and Absa Bank Kenya Plc (rebranded from Barclays Bank Kenya Plc, following the exit of Barclays Group from Africa), Standard Chartered Bank (K) Limited, Diamond Trust Bank Kenya Limited, I&M Bank Limited and Stanbic Bank Kenya Limited, which together hold approximately 75% of market share.

There has also been significant activity in the banking sector, including the entry of Access Bank Plc (Nigeria) through its acquisition of Transnational Bank Plc in February 2020 and the 2019 amalgamation of Commercial Bank of Africa and NIC Group Plc. Local banks have also sought to expand into other African territories, with Equity Group Holdings Plc (the parent company of Equity Bank Kenya Limited) for example acquiring a majority stake in Banque Commerciale Du Congo (BCDC) in the DRC and thereafter amalgamating BCDC with its existing banking asset in the country. I&M Holdings also completed the acquisition of a 90% stake in Orient Bank Limited. In 2020, KCB Group Plc also announced its proposed acquisition of banking assets in Rwanda and Tanzania from Atlas Mara.

One of the major developments in the banking sector in 2019 was scrapping of the interest rate capping. Coming into the year 2020, banks in Kenya expected strong performance with the repeal. However, the COVID-19 pandemic in 2020 impacted all sectors of the economy, including the banking sector. Banks however quickly adapted to the use of digital channels to provide banking services and there has been an overall increase therefore in use of such digital channels.

According to CBK's statistics on mobile payments, the use of mobile money in Kenya hit a historic high in December 2021, after the users transacted KES 622.14 billion on phones.

In addition, Kenya has a vibrant micro-finance sector which is expected to play a major role in developing the financial markets thus making it easier for the mainstream population to access financial products and services simply. Micro-finance motivates individuals who cannot access financial resources from banks and other traditional lending institutions because of a lack of collateral and enables them to access funds that will expand their businesses at low risks. The country is also enjoying a vibrant Islamic banking market which is growing steadily.

Many Kenyans also engage in mobile banking which is the use of a mobile device to perform online banking tasks, such as making withdrawals, depositing funds, checking account balances, paying bills and monitoring accounts. This is done using mobile payment systems such as M-Pesa and Airtel Money operated by mobile network operators, including Safaricom and Airtel Money (Bharti Airtel) respectively. Mobile phone payment services are popular due to their simplicity, convenience, and accessibility and capitalises upon the unbanked population. The partnership between Safaricom and Commercial Bank of Africa Limited, developed an innovative mobile platform (M-Shwari) for Safaricom's M-Pesa customers which enables individuals to access banking services from their phone. Subscribers can save and borrow money, as well as earn interest on the money saved using their mobile phones.

The banking industry is governed by the Banking Act, Chapter 488, Laws of Kenya (the Banking Act) and the Central Bank of Kenya Act, Chapter 491, Laws of Kenya (the CBK Act) and regulated, licenced and supervised by the CBK which conducts on-site investigations through the CBK officers who conduct routine inspections on the institutions' business records to ensure compliance with the CBK rules. They also conduct off-site investigations by reviewing reports that are required to be submitted by the institutions to the CBK. Kenya also has a small but growing number of investment banks and venture capital funds. These businesses are licensed and regulated by the CMA.

The CBK is also keen on reducing the number of banks in the market and is aiming to ensure a consolidation of the market by announcing a freeze on the issue of new banking licences. Foreign banks that intend to break into the Kenyan market are now opting to acquire banks that already have a banking licence. A case in point is the acquisition of Transnational Bank by Access Bank PLC from Nigeria. The CBK also intends to regulate digital loan providers that provide credit to Kenyans through their mobile phones over concerns of run-away interest rates, as well as privacy of data on these platforms.

Kenya has a small but growing number of investment banks and venture capital funds. These businesses are licensed and regulated by the CMA. Recent years have seen a resurgence of the Kenyan banking sector with the repeal of the interest cap that has seen bank stocks rally at the Nairobi Securities Exchange. This has provided Kenyan banks with the much-needed confidence to solidify their dominance in the region through acquisitions of banks within East Africa.

The Insurance Industry in Kenya is regulated by the Insurance Regulatory Authority (IRA) through on-site investigations, guidelines and circulars issued to industry players. The players in this industry include insurance companies, which stood at 55 in total in 2022, five reinsurance companies, insurance and reinsurance brokers and other intermediaries, including medical insurance providers, insurance investigators, motor assessors, insurance surveyors, loss adjusters, and insurance agents. The companies dominating the insurance sector in Kenya include Britam UAP, Liberty, ICEA, Kenindia, Jubilee, Corporate Insurance Company Limited (CIC), Madison and Britam. Insurance penetration in Kenya is however low at 2.17% in 2020 against a world average of 7.4%, according to Insurance Industry Annual Report 2021.

The insurance regulatory framework requires insurance companies undertaking composite life and general insurance business to separate these into two business lines. Most insurance companies currently operate under this model i.e., through a life assurance and general insurance business. The sector also has local shareholding and directorship requirements in that at least one third of the controlling interest in an insurance or reinsurance company must be under the control of Kenyan citizens and a third of the board must also be citizens of Kenya.

Insurance penetration in Kenya is however low at 2.17% in 2020 against a world average of 7.4%, according to Insurance Industry Annual Report 2021.

Fintech

Kenya continues to experience a surge in fintech business and is gaining a reputation as a leading fintech hub in Africa. Indeed, it was ranked number 37 in the 2021 Findexable Global Fintech Rankings report. Eighty-three countries and 265 cities were analysed in the 2021 edition.

In its 2020 Annual Report, the CBK recognised the need for collaboration between financial institutions and Fintech start-ups and companies, having appreciated that these two entities are no longer mutually exclusive.

The CBK has, for example, taken steps to regulate previously unregulated areas of digital financial products and a bill was recently passed in Kenya's National Assembly to amend the provisions of the CBK Act to provide for the supervisions and regulation of digital financial products and services.

Kenya enacted the Data Protection Act 2019, which makes provision for the regulation of the processing of personal data, to protect data privacy of individuals using the fintech apps, and to make clear the obligations of data controllers and processors. The office of the Data Commissioner was thereafter established in 2020 and draft regulations are already in place and undergoing public consultation.

Education

About 58% of the Kenyan population is below the age of 24 years. With such a young population, it is not surprising that in the financial year 2021/2022, 26.7% of the national budget will be allocated to education.

The disruption of education by the COVID-19 pandemic has brought about new opportunities for the provision of requisite infrastructure to provide education through the internet. In addition, the advancement of technology has led to many jobs becoming redundant hence a need for re-skilling. Massive opportunities exist for providers of education to aid in this re-skilling process. Institutions such as the Moringa School that assist individuals to learn skills such as coding are now emerging, and it is our view that many more such institutions will continue to grow.

Education is primarily governed by the Education Act, Chapter 211, Laws of Kenya which provides for among other issues, the development of schools, management and administration, development of curricula and tutor education.

Healthcare

Kenya's healthcare system is made up of several systems: public, private and faith-based or NGO. About 48% are public and operate under the Ministry of Health, 41% are in the private sector, 8% are faith-based health services, and 3% are run by NGOs. There is a glaring mismatch between needs and the available health care, there are very few specialists in Kenya and the health care workforce is way too stretched. It is estimated that Kenya's doctor-to-patient ratio is 1:16,000, far below a recommendation of the U.N. World Health Organisation of 1:1,000. This glaring mismatch and lack of capacity forces those in need of healthcare to travel to major cities and towns to where well-equipped hospitals are - a situation that further worsens the already over-stretched health care system.

Manufacturing

Although Kenya is the most industrially developed country in East Africa, the World Bank estimates that manufacturing only accounts for approximately 19% of its GDP. Yet, there are significant opportunities in Kenya's manufacturing sector, ranging from vehicle assembly and spare-parts manufacturing in the automotive sector, to pharmaceuticals, paper products and edible oils.

To bring down the cost of production and to increase profit margins for manufacturers, Kenya has been investing heavily in its infrastructure network, as well as laying down policy for the investment in the energy sector, leading to an overall reduction in the total average costs of production.

Notwithstanding the above, challenges remain. Imports from countries that can manufacture products at a comparatively lower average cost, such as China, pose a challenge to the domestic manufacturing sector.

Major concerns for manufacturers at the moment are the Kenyan tax policy, which needs to be long-term oriented, as the introduction of minimum tax as well as the amendment of the investment deduction allowance is likely to dissuade investment in the country. The forex volatility of the Kenya Shilling also affects manufacturers that import a significant proportion of their raw material and equipment in foreign currencies too.

Mining, Oil & Gas

Kenya's mining and extractive industry is becoming an important and attractive area of investment and growth. Kenya's mining map is generally comprised of four belts:

1. the under-exploited, gold-rich Greenstone belt in Western Kenya (linked to the lucrative mining belts currently under heavy exploitation in Tanzania);
2. the Mozambique belt, which passes through Central Kenya, and is a source of gemstones;
3. the Rift belt, best known for its soda ash, flourspar, diatomite and Kenya's considerable geothermal resources; and
4. the Coastal belt which encompasses existing titanium investments, extensive deposits of rare earth minerals and nobium, as well as on-going offshore oil exploration.

Kenya also boasts one of Africa's richest coal deposits but plans to exploit it have faced opposition. The significant enthusiasm for the economic potential in Kenya's mining sector is demonstrated by its inclusion in Kenya's Vision 2030 programme as a strategic sector and the creation of the Ministry of Petroleum and Mining.

There were substantial new mining regulations passed in 2017 to support the implementation of the Mining Act, 2016. These rules covered a range of issues such as local content, reporting obligations at the end of a mine, amongst other things. These new rules mark a significant departure from the legal and regulatory regime that existed before and therefore new and existing investors should study these changes very carefully.

Despite the recent downturn in the global oil and gas industry on account of the COVID-19 pandemic, as well as the shift to green energy, Kenya still hopes to benefit from its discoveries of oil and gas deposits. Kenya exported its first batch of crude oil in 2019. The oil and gas discoveries have resulted in increased interest in many on-shore and off-shore blocks.

Regarding Kenyan oil, the long-term plan by the Government is to build a pipeline that extends from the oil-rich Turkana region to the port of Lamu. The construction of this project commenced in March 2021, and it is facing various challenges especially around the acquisition of land. In the interim, however, companies will need to and transport crude oil to the coast for export through the existing rail and road infrastructure.

With the changing fortunes in the oil sector, the laws governing the sector have come under scrutiny. Petroleum exploration activities in Kenya are now primarily governed by the Petroleum Act, 2019 (the Petroleum Act) that repealed the Petroleum (Exploration and Production) Act, Chapter Cap 308, Laws of Kenya as the new substantive law relating to the oil and gas sector.

The Petroleum Act covers a variety of issues such as profit-sharing methods, local content rules, licensing requirements of various players in the oil and gas sector as well as the various regulatory bodies that will be tasked with the oversight of the oil and gas sector.

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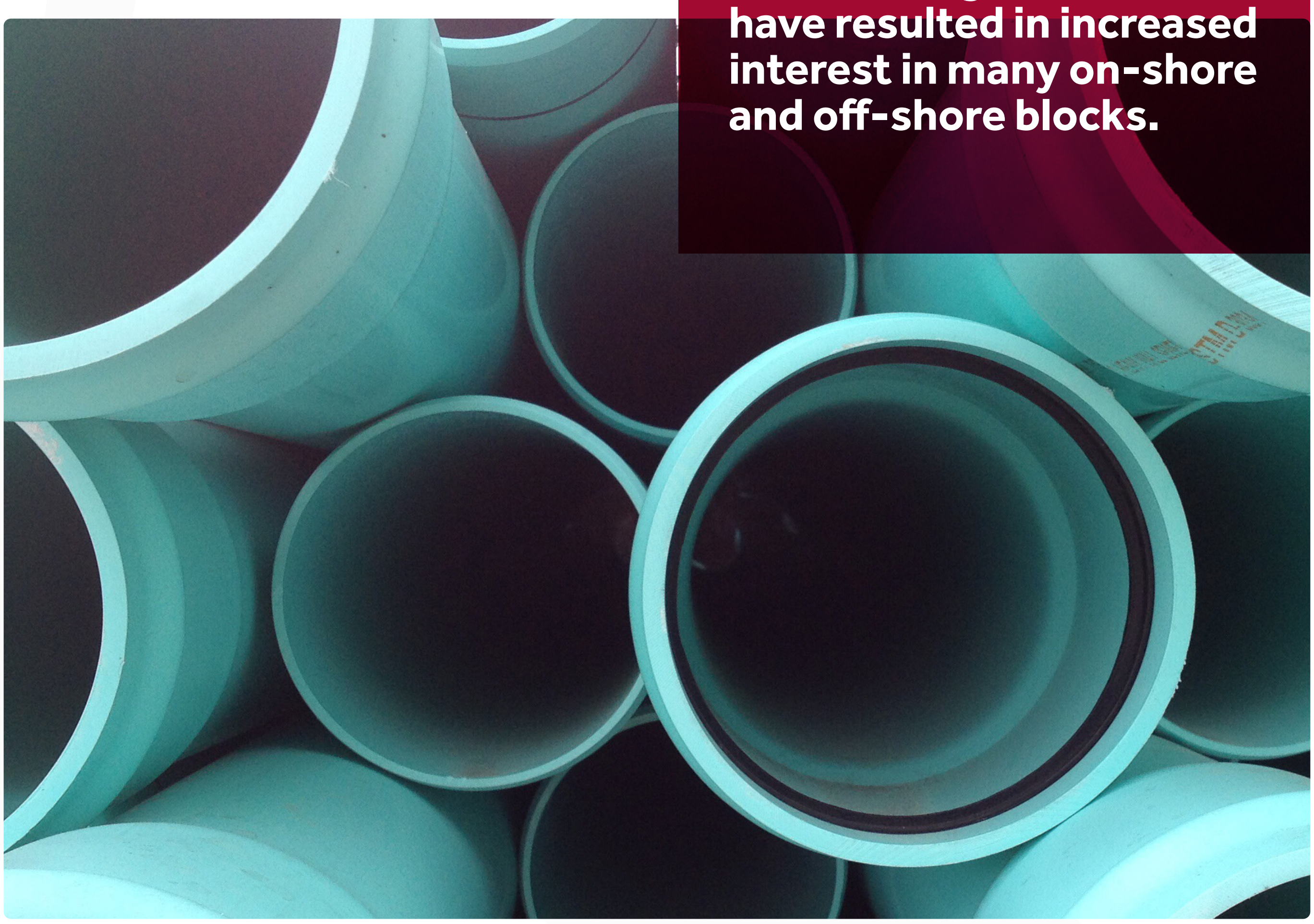

Real Estate and Construction

Impact of COVID-19 on the Real Estate Sector

On 13 March 2020, Kenya confirmed the first case of COVID-19. The Government imposed various measures to contain and mitigate the spread of the coronavirus. Some of the measures the Kenyan Government took included restricting intercounty travel, banning gatherings and imposing nation-wide curfews.

This led to a slowdown in many sectors, including the real estate sector in Kenya. For instance, the restrictions on gatherings and curfews had an impact on construction sites and construction schedules.

The 'work from home' model also impacted the appetite for commercial rental space and restrictions on public gatherings and closures of bars and restaurants impacted the retail sector. A number of tenants were unable to fulfil their obligations under their leases or their financial obligations with lenders. Reduced staff and the closure of the Lands Registries due to Government directives and fumigation after confirmed cases amongst registry staff contributed to the delays in registration of documents relating to real estate transactions.

At the height of pandemic, the Ministry of Lands and Physical Planning provided a data analysis indicating that land transfers decreased by almost half in 2020 as compared to a similar period in 2019. There were 3,988 transfers in 2020 compared to 6,162 the previous year.

As a result of increased restrictions and compliance with Government directives, stakeholders in the real estate sector had to review on-going contracts and existing bank facilities to determine how to get value, stay afloat and ride out the pandemic. For instance, many landlords were pressured by the prevailing circumstances to grant concession to their tenants like time capped rent, service charge reductions and adjustment of payment cycles from quarterly advance payments to monthly payments.

With negative impact on cash flows of a number of businesses in the country, there was an additional surge of properties in the market as investors and property owners looked to offload properties to get some liquidity.

Recognising the impact of COVID-19 on the Country's economy, the CBK issued emergency responses encouraging financial institutions to soften the terms of repayment, including the restructuring of loans and the provision of extension of periods for repayment of loans for borrowers whose loan repayments were up to date as of 2 March 2020. Financial institutions were also encouraged to use their discretion to extend the maturity period of loans for up to one year. Some of these measures gave temporary reprieve to a number of businesses. However, with these measures now having ended, it is notable that number of distress sales have increased.

On 23 March 2020, the CBK also reduced the Central Bank Rate from 8.25% to 7.25% and on April 29 2020 from 7.25% to 7% allowing favourable lending rates for individuals, SMEs and corporations which required liquidity to proceed with their operations.

Affordable Housing

The provision of affordable housing is part of the government of Kenya's Big 4 Agenda. Kenya's Affordable Housing Programme was launched in December 2017. In particular, the government has set a goal of constructing or facilitating the construction of an additional 500,000 houses by the end of 2022. To achieve this goal, the government has taken various measures, including introducing tax incentives, whose purpose is to:

1. provide for the financing of, and contribution to affordable housing schemes, and
2. incentivise developers to take up affordable housing projects.

To encourage the uptake of affordable housing projects, the Government has partnered with various private developers either individually or jointly with county governments through private public partnerships to promote the vision of offering several affordable housing projects to the public at large.

Despite the Government's efforts to promote this agenda, some affordable housing projects were undoubtedly affected by the COVID-19 pandemic as well as the numerous measures deployed to mitigate the pandemic's negative effects. These include the economic constraints on developers and financiers and the practical challenges with completing transactions as highlighted above.

In the field of development, landlords were building units with smaller spaces and according to the 2020 report by Kenya National Bureau of Statistics, developers were targeting low-income earners in a rush to attract tenants.

Demonetisation

On 1 June 2019, the CBK announced a demonetisation exercise to curb illicit financial transactions. Holders of old generation KES 1,000 (approximately USD 9) notes were given a period of four months that expired on 1 October 2019 to exchange the old notes for the new generation notes as the old generation notes would cease to be legal tender. The remaining denominations are, at the time of writing, still

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being demonetised gradually. In the four months following the CBK's announcement, there was increased scrutiny on individuals seeking to exchange large amounts of KES 1,000 (approximately USD 9) notes. The CBK required individuals exchanging large amounts to do so at commercial banks, where they held accounts. Individuals without accounts were required to obtain an endorsement from the CBK in order to have the money exchanged at banks. Considering the prevalent use of physical currency in real estate transactions, we note that this exercise may have briefly interrupted the flow of transactions.

Legislative & Institutional reforms affecting the sector

Kenya Mortgage Refinance Company Plc (KMRC)

To support the growth of the residential housing market, the Government established the KMRC to provide long-term lending and capital market access to primary mortgage lenders such as banks by providing mortgage liquidity facility and issuing bonds to investors. A report by treasury stated that as at December 2020, KMRC had refinanced 1,400 affordable housing loans worth USD 21 million. The launch of the KMRC is expected to reduce the high cost of mortgages which has limited access to affordable housing.

Access to pension funds

As part of the Government's measures to boost homeownership, Kenyans are now able to withdraw up to forty percent of their pension savings to purchase affordable housing units. This is hoped to increase liquidity in the real estate sector.

Digitisation of Records

The Lands Ministry and the National Land Commission (NLC) have been working together to migrate all the land records in Kenya to a digital land management system.

The National Land Information Management System (NLIMS) was launched on 27 April 2021 and it is intended to be a "one-stop shop" for all land transactions. The NLIMS is intended to gradually do away with the current manual system. The intent behind the NLIMS is to: (i) give some form of comfort as to security of title since the digitised records are intended to have undergone a verification process before being captured on NLIMS; and (ii) expedite land transactions, which have been known to be protracted.

The NLIMS is colloquially referred to as "Ardhisasa", and it can be accessed through https://ardhisasa.lands.go.ke.

During this transitional period, it is anticipated that there may be initial challenges and which may cause delays in the delivery of services. This may invariably impact the usual timelines within which some transactions may be completed.

The Business Laws Amendment Act 2020

The Business Laws Amendment Act 2020 (the BLA) introduced provisions that recognise electronic signatures in conveyancing documents. The BLA also provides for electronic registries and electronic stamping. These amendments will, to a large extent, ensure that conveyancing transactions progress smoothly without individuals having to necessarily meet physically for signing or to physically submit documents at the Lands Registry. Some additional amendments are required for the full alignment of the BLA with other statutes.

Sectional Properties Act, 2020

The Sectional Properties Act, 2020 (the SPA 2020) came into force on 28 December 2020 and repealed the Sectional Properties Act, 1987 (the SPA 1987). It provides for:

- the division of buildings into units to be owned by individual proprietors; and
- common property to be owned by the proprietors of the units as tenants in common; and
- the use and management of the units and common property.

No transitional provisions have been provided for in the SPA 2020 save with respect to existing registered long-term leases where there is a two-year window to regularise the existing long-term leases by 28 December 2022. However, the regulations under the SPA 2020 and the practice guidelines have yet to be finalised and it is, therefore, unclear how the transition and registration of sectional properties will work from a practical perspective. Pursuant to a notice issued on 9 May 2021, the Ministry of Lands and Physical Planning (Lands Ministry) notified the public that long term leases prepared on the basis of architectural plans will no longer be registered with effect from 10 May 2021. The import of the notice is that this will delay all: (i) property transactions in Kenya where ownership of a unit (apartment, villa, townhouse, bungalow, office space, warehouse etc.) is to be conferred by way of a long-term lease; and (ii) financing transactions where the security is a new long-term lease over the said units.

Several stakeholders, including the Law Society of Kenya, the Kenya Bankers Association, the Kenya Property Developers Association and the Kenya Private Sector Alliance (KEPSA) have been lobbying the Land Ministry to makes adjustments to the SPA 2020 and the draft regulations so that developers and other stakeholders are able to finalise transactions even as the Lands Ministry streamlines its administrative process.

Other Institutional Reforms

The Lands Ministry has been spearheading various projects, including geo-referencing of land parcels, conversion of titles, national titling, land value index, decentralisation of land administration (construction of new lands registries), amongst others. These reforms are expected to improve the ease of doing business in the real estate and construction sector.

Telecommunications

The telecommunications sector in Kenya is primarily governed by the Kenya Information and Communications Act, 1998 (KICA) and the various regulations promulgated thereunder. The regulator is the Communications Authority of Kenya (CAK).

Kenya's telecommunications sector continues to grow rapidly and remains one of the key contributors to the country's GDP. Mobile phone penetration is very high, in an African context, with over 44 million mobile phone subscriptions reaching over 95% penetration level. An example of the rapid development of the sector is the continued rise of the world's most successful and widely discussed mobile money payment service, M-Pesa, which was launched in 2007 by Safaricom Plc, has grown continuously and has opened up to other mobile operators to now serve a large number of Kenyans, and increasingly, people in other jurisdictions, such as Ethiopia. It is estimated that on average, KES 7.5 billion (Approx. USD 67 million) is transacted on the M-pesa platform daily.

In addition, mobile data and innovations by technology media and telecoms (TMT) firms continue to be a driving factor of the sector's growth. These include startup innovations in food distribution (e.g. Twiga Foods), healthcare (e.g. MyDawa), transport (e.g. Little) and renewable energy (e.g. M-Kopa). Safaricom's strong investment in mobile capacity and the success of M-Pesa have resulted in a very concentrated mobile market. In March 2021, Safaricom PLC had a 64.4% market share in mobile subscriptions. The second player is Airtel Networks Limited which has 26.6%, followed by Telkom Kenya Limited with 6.2% and Finserve Africa Limited (t/a Equitel) at 2.5 percent.

The Kenyan telecommunications industry will be an area of significant activity and interest over the next few years.

Tourism

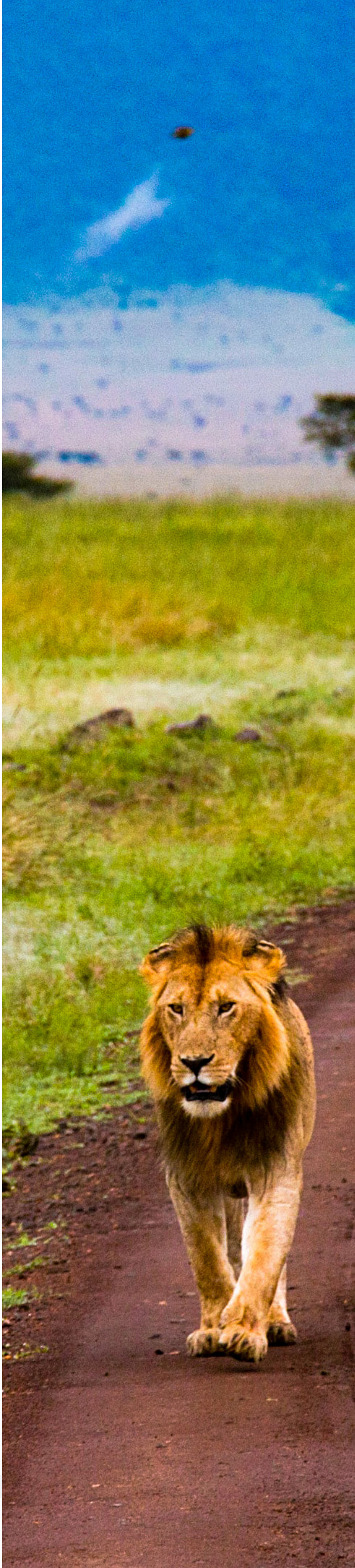
In the mid 2010's, the Kenyan tourism industry was hard hit by the 2013 Westgate Mall terrorist attack. However, with improved security, the tourism sector began to resuscitate until the onset of the COVID-19 pandemic in the year 2020. The tourism sector was further worsened when travel advisories were issued against Kenya by the United Kingdom, one of the country's most important tourism partners.

Kenya is, however, still one of the major conferences and events venues in the region and hosts a wide variety of conferences and fora. Kenya, for example, recently hosted the World Rally Championship series and is set to continue hosting the same event for the next five consecutive years. The country is also set to play host to many visitors from Eastern Europe and Asian countries that are currently not able to travel to traditional tourist destinations due to COVID-19 restrictions.

Several investment opportunities also now exist in the tourism flagship projects that are under the Government's Vision 2030 blueprint for developing the country. These include the construction of resort cities, hotels, eco-lodges, conference facilities, and marinas among others. The tourism sector in Kenya, therefore, remains a lucrative field for consideration by any person wishing to invest in Kenya.

Kenya has substantial natural assets attracting tourists, ranging from well-known areas such as the Maasai Mara and the Kenyan Coast, to relatively unexploited areas like Lake Victoria. Kenya's tourism infrastructure is also well developed in comparison with other tourist areas in the region. It is also expanding, especially in the aviation arena, where there has been an increasing number of budget airlines and direct flights from many tourist source countries and frequent internal connections.

The Tourism Act regulates the industry and The Kenya Tourism Regulatory Authority, a corporate body established under the Tourism Act, is tasked with developing the tourism sectors through policy development and measures which promote sustainable tourism throughout the country.



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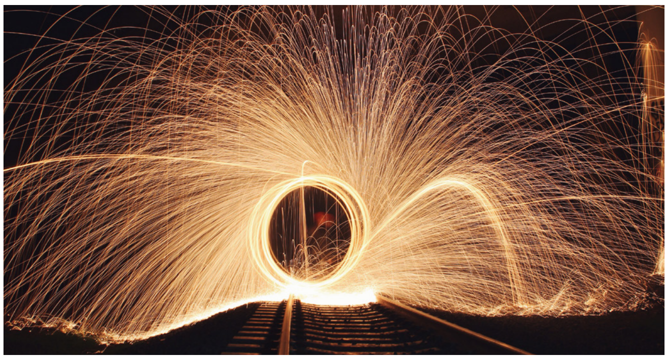
Key Developments

The Big 4

The current Kenyan government has highlighted four areas in which it will devote its efforts in 2018 - 2022. The areas are:



Manufacturing

Affordable Housing

Healthcare

Food Security

Christened the 'Big Four', the specific outcomes that are being aimed at include building 500,000 low- cost houses, universal healthcare, a 10-fold exports increase, irrigation of 1.2 million acres of land, and millions of new jobs.

The programs and projects that align and assist the achievement of these goals have been getting governmental priority for resources and attention.

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