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DEVELOPING STRATEGIES

Doing Business in Kenya

Munyaka Advocates LLP in association with Rödl & Partner

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„Successful strategies do not fall out of the sky. They are well thought out. After all they serve as a fundamental basis for our actions. We are very well equipped with our strategy to meet future challenges. Our business model is unique.“

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Content

Introduction

1. BACKGROUND INFORMATION KENYA

Below we provide an analysis of Kenya's background information such as the country's population, rankings and outlook. Kenya's population is increasing by approximately one million people per year. The Kenya Population and Housing Census conducted in 2019 enumerated a total of 47.6 million people, an approximately 10million increase from the 37.7 million people enumerated in the 2009 census. Kenya's Gross Domestic Product (GDP) in 2018 stood at USD 87.9 billion according to the World Bank. The Central Bank of Kenya estimated growth at 6.2%.

In recent years the Government of Kenya ("GOK") has taken forward looking steps to increase its global competiveness and attractiveness for investment. Kenya rank in the World Bank Doing Business index has risen from a low of 129 to 56 in the 2020 report. Kenya continues to make legal and structural changes with the intention of making Kenya a top investment destination. Kenya has made various commonly accessed government services available through an easy to use online platform which works seamlessly due to its integration with mobile and other cashless payment systems that are highly developed in Kenya. Kenya ranks highly in the Doing Business report for indicators such as ease of access to credit, reliability of its energy supply, easy tax administration and resolution of insolvency. Kenya has also vastly increased the ease with which one can start a business through the use of transparent electronic systems.

2. BACKGROUND INFORMATION RÖDL & PARTNER

As attorneys, tax advisers, management and IT consultants and auditors, we are present with more than 100 own offices in around 50 countries. Worldwide, our clients trust our more than 5,500 colleagues. For more information about Rödl & Partner please visit www.roedl.com.

Munyaka Advocates LLP is a law firm based in Nairobi, Kenya. We provide our local and international clients with legal and professional service assistance in corporate and commercial law. Our niche is in Mergers and Acquisitions, Renewable Energy, Intellectual Property, Data Protection and Technology law. Additionally, we provide legal support in conveyancing and real estate transactions, general commercial contracts, and financing. We also provide transaction, and market entry and expansion support particularly for SMEs and owner-managed businesses. For more information: www.roedl.com/kenya.

Rödl & Partner Kenya is a member of the German Business Association (www.gba.co.ke). And we work closely with the Delegation of German Industry and Commerce (www.kenia.ahk.de). We contributed to their 'Kenya Business Guide' online platform, which serves as a simple tool and guide on how to set up a business in Kenya: www.kenyabusinessguide.org.

1. BACKGROUND INFORMATION

1.1 Political and Economic Systems

Kenya promulgated a new constitution in 2010 and since then there have been a raft of new statutes adopted into law. After the general election in March 2013, a new and devolved system of government took effect. The executive arm of government now operates through the national government, which comprises of a number of Ministries whose heads, known as Cabinet Secretaries, form the cabinet. The GoK is supported by the county governments. There are forty-seven (47) counties in Kenya and each county's executive functions are headed by a Governor, while legislative functions are conducted by a county assembly. County governments are mandated to handle the affairs of the county save for certain matters, such as tax, which are primarily the domain of the GoK.

Kenya is a regional hub for business and trade throughout east and central Africa. It is the largest economy in the region and one of the larger ones on the continent. Both the current Kenyan Government and the previous one invested heavily in the ICT sector and in infrastructure, focusing mainly on easing the barriers of doing business in Kenya. These initiatives have transformed Kenya into an attractive and favourable investment destination. Kenya is a member of regional economic trading blocs, such as the East African Community (EAC), comprising Kenya, Uganda, Tanzania, Rwanda, Burundi and recently South Sudan, as well as COMESA (Common Market for East and Southern Africa), comprising nineteen (19) African countries.

The judicial system was inherited from Kenya's former colonial power, the United Kingdom and English common law is still of persuasive value in Kenyan courts. The formal business sector follows the European / US model of free market economics and capitalism.

1.2 Statute Based Law

Kenya gained independence from the United Kingdom on 12th December 1963. While certain statutes were adopted from British colonial times with appropriate modifications to accommodate local circumstances, new ones have been passed in the following years. The pre-independence acts are very similar, if not identical, to acts in other former British colonies such as Uganda, Tanzania, Zambia, Malawi and Zimbabwe. Many of the changes have been made to the political, judicial and administrative systems of Kenya since the adoption of the Constitution in 2010.

1.3 Common Law

Apart from statutory law, local courts also rely on common law in the absence of applicable regulations in the Constitution and other statutes. The main body of the common law can be found in the jurisprudence from decisions of the Kenyan courts. Decisions made by English and other Commonwealth countries courts have a persuasive value in our courts.

1.4 Contract Law

Kenyan contract law is governed by the Law of Contract Act (which is founded on the English common law and doctrines of equity). Additional statutes that govern the enforcement of contracts include the Consumer Protection Act, Sale of Goods Act, and Limitation of Actions Act.

Disputes arising out of commercial transactions are handled either by magistrates or by presiding judges depending on the monetary thresholds of the contracts. There is a special Commercial Division in the High Court of Kenya. Certain contracts must be in writing before the courts can enforce them, including contracts for the sale of land. The limitation period for actions for breach of contract is six (6) years.

1.5 Foreign Judgments and Contracts

Kenyan law permits parties to choose the governing law applicable to their contracts, except for certain contracts such as those dealing with land and employment, which must automatically be subject to Kenyan law. Under the Foreign Judgments (Reciprocal Enforcements) Act, certain foreign judgments (such as those from the superior Courts of the United Kingdom, Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia and Rwanda) are recognised and enforceable in Kenya, subject however to registration with the Kenyan courts.

Kenya is also a signatory to the Convention on the Settlement of Investment Disputes and therefore a member of the International Centre for the Settlement of Investment Disputes (ICSID).

1.6 Dispute Resolution and Arbitration

Arbitration is widely used in Kenya and is governed by the Arbitration Act, 1995 (which is an UNCITRAL model of arbitration law). Kenya is also a signatory to the 1958 New York Convention. In addition, Kenya has an active local chapter of the United Kingdom's Chartered Institute of Arbitrators (CiArb.), which is often called on by parties in commercial contracts to resolve disputes.

Cases in Kenyan courts can take some time to be concluded. In relation to commercial contracts it takes at least two (2) years, but depending on the nature and complexity of the case it could take up to six (6) years. In recent times, there have been attempts to reform the judiciary and a number of judicial officers have been appointed to the judiciary in a bid to ease the backlog of cases.

1.7 Incentives

1.7.1 The Export Processing Zones Act

The Government of Kenya has established Export Processing Zones (EPZs) to provide for the promotion and facilitation of export orientated investments and the development of an enabling environment in the fields of manufacturing, commerce and services. An „export processing zone" is defined under the Export Processing Zones Act as a designated area within Kenya in which any goods introduced are generally regarded as being outside the customs territory while still being duly restricted by controlled access. This applies in so far as import duties and taxes are concerned.

The EPZ Act defines an EPZ enterprise as 'a corporate body, including a developer or an export processing zone operator, which has been granted a licence under this Act'. The benefits that accrue to EPZ enterprises are:

- an income tax holiday for the first ten years of operation and a reduced rate of 25 % for the next ten years;
- exemption from all existing and future taxes and duties payable under the Customs and Excise Act and Value Added Tax Act on all export processing zone enterprise purchases including machinery and equipment, spare parts, tools, raw materials, intermediate goods, construction materials and equipment, office equipment and supplies, and transportation equipment;
- exemption from payment of withholding tax on dividends and other payments made to non-residents during the period that the export processing zone enterprise is exempt from the payment of income tax referred to above (the usual withholding tax rate on dividends paid to non-residents would be 10 % depending on the availability of double tax taxation relief);

- exemption from stamp duty on the execution of any instruments relating to the business activities of an export zone enterprise;
- exemption from quotas or other restrictions or prohibitions on import or export trade with the exception of trade in firearms, military equipment or other illegal goods;
- exemptions from rent or tenancy controls; and
- any other exemptions as may be granted by the Minister responsible for finance by way of notices published in the Gazette.

1.7.2 The Special Economic Zones Act

While under the EPZ Act, activities that can be carried out by EPZ enterprises are limited to manufacturing, commercial and service activities, the recent Special Economic Zones Act, 2015 (SEZ Act) provides a long, non-exhaustive list of activities that may be carried out within an SEZ by an entity licenced to operate within an SEZ, an SEZ enterprise. These activities include agricultural activities; business process outsourcing; call centres; management consulting and advisory services; headquarter management services; commercial activities; manufacturing and processing; information communication technology services; livestock marshalling and inspection, livestock feeding or fattening, abattoir and refrigeration, deboning, value addition, manufacture of veterinary products, and other related activities; science and technology services; and services and activities to facilitate the development of the local tourism and recreation sector, services and associated activities.

According to the Finance Acts of 2015 and 2016, all licensed special economic zone entities (including SEZ developers, operators and enterprises) are exempt from all taxes and duties payable under the Excise Duty Act, the Income Tax Act, East African Community Customs Management Act and the Value Added Tax Act, on all transactions carried out pursuant to being licensed as a SEZ entity. Furthermore, licensed SEZ entities are entitled to work permits for up to 20 % of their full-time employees, with the possibility of additional work permits being obtained.

Kenya's film industry is another industry set to benefit from recent changes to legislation and FDI incentives, in addition to those mentioned above (which also exempts licensed EPZ entities from having to obtain a filming licence) and the Finance Act 2015, which grants income tax and VAT exemptions to industry players.

EPZ entities enjoy tax breaks only for the first ten years of operation. During this period, EPZ entities pay no corporation tax and the supply of goods and services to these entities is not subject to VAT. After the first ten years, EPZ entities pay corporation tax at 25 % for the following ten years and 30 % thereafter (which is the current rate of corporate tax).

The tax exemptions that SEZ entities enjoy are by far the most extensive that the government has granted to date. It remains to be seen whether the returns, which the country will reap from this, will be as impressive. Under the Income Tax Act, as amended by the Finance Act, 2015, SEZs will be exempt from corporate taxation for the first ten years following commencement of operation, following which they will pay corporation tax at 15 % for the next ten years, and 30 % thereafter.

EPZ entities have been known to stop their operations as soon as their tax-free period expires and it remains to be seen what the government will do to ensure the benefits of the significant tax incentives are reaped by the country once these entities become taxable.

1.8 Bilateral Agreements and DTAs

Bilateral agreements in the form of Investment Promotion and Protection Agreements (IPPAs), provide for the protection of foreign investment into Kenya, include guarantees against nationalisation, guarantee for foreign investors to repatriate profits. Kenya is party to a number of Double Taxation Agreements (DTAs) which provide some guarantees for foreign investment from certain countries and provide for cooperation in taxation matters to avoid double taxation on such investments.

Country	Bilateral Investment Treaties	Double Taxation Agreements
Canada		yes
Denmark		yes
France	yes	
Germany	yes	
India		yes
Italy	yes	
Mauritius		yes
Netherlands	yes	
Norway		yes
Sweden		yes
Switzerland	yes	
United Kingdom	yes	
Zambia		yes

1.9 Brand protection and other Intellectual Property

Brands enjoy legal protection in Kenya by virtue of the Trade Marks Act and common law. A registered trade mark gives its registered proprietor the right to its exclusive use in respect to the category / class of goods for which registration is obtained. Registered trade-marks can be renewed after ten years.

In addition, Kenya is party to various international treaties protecting foreign investments, such as the WTO's TRIPS Agreement. It affords well-known brands protection in Kenya, a fact that has spurred the growth of franchises and dealerships (such as KFC, Nando's and L'Oreal) which significantly rely on the country's recognition and protection of intellectual property assets.

Patents and utility models (petty patents) can be registered directly with the local patents office in Nairobi (KIPI), regionally in the Africa Regional Intellectual Property Organisation (ARIPO) office in Harare, or internationally under the Patent Convention Treaty. Patents are granted for new inventions (global novelty standard), which are inventive (non-obvious) and which are capable of being used in industry. Software is eligible for patent protection as well. A granted patent lasts for twenty years.

Copyright is automatically protected for eligible works – such as books, magazines, music, broadcasts and artistic works – provided such works are created in Kenya or in a Berne Convention member country. Works may, however, be registered with the Kenya Copyright Board for evidentiary purposes.

With the growth of the ICT sector and innovative mobile phone technologies in Kenya, copyright protection and enforcement are gaining importance particularly among young entrepreneurial software developers..

1.10 Kenyan Ownership of local Companies

Generally, Kenyan laws do not require compulsory local equity participation or ownership in locally incorporated companies, with the following notable exceptions:

- Banks and other financial institutions and intermediaries (various shareholding restrictions but no citizen minimum, unless listed on the Nairobi Securities Exchange);

- Insurance companies (minimum ownership by East African Community citizens: 33.3 % for insurers; 60 % for insurance brokers; 100 % for insurance agents;
- Telecommunications and associated companies (minimum 20 % Kenyan citizen requirement);
- Engineering – a minimum of 51 % of the ownership of an engineering firm must be held by Kenyan citizens.
- Mining – Small scale mining operations are reserved and protected for citizens and citizen owned companies.
- Aviation: Fifty one percent (51 %) of the voting rights, in the case of a body corporate or a partnership, must be held by the State, a citizen of Kenya or both; and
- Land Tenure: Non-Kenyan citizens or companies are able to hold leasehold interest in land for a maximum of 99 years. Those which are not wholly-owned by Kenyans are able to own or acquire agricultural land only if the president exempts them from the application of the Land Control Act, although there are other legal mechanisms that may be adopted to enable Non-Kenyansto ultimately hold agricultural land.

2. KENYAN LAW

2.1 Company Law

2.1.1 The Companies Act, 2015

The new Companies Act came into force on 11th September 2015. It replaces the previous one which had been in existence since 1962 and was taken from the UK's 1948 Companies Act. We note that the new Companies Act also mirrors the UK Companies Act 2006.

Below, we set out the requirements for setting up of a private company or a branch of a foreign entity under the Companies Act. The types of a local company are: a company limited by shares, a company limited by guarantee and an unlimited company. Companies which are incorporated outside Kenya mostly register a subsidiary or a branch, the latter being part of the foreign entity. By registering a branch, one will receive a Certificate of Compliance and by registering a subsidiary, it will be a Certificate of Incorporation, both are recognised as separate entities.

The other business structures available are the Sole Proprietorship, which is a business name given to a single person; the Partnership, a business structure between two or more people with the same business idea and the Limited Liability Partnership (LLP), which combines characteristics of a company and a partnership.

Local subsidiaries are considered independent of their parent company and are liable for their own debts. We set out a bit further in this section a comparative table of various taxes applicable to residents (local subsidiary) and non-residents (branch).

2.1.2 Registration Process

We have outlined the registration requirements and general information in relation to the subsidiary and branch below. All registrations can only be done through the eCitizen online platform. This can be done by using an agent, such as a law firm, if none of the directors is a Kenyan citizen. Everything up to the receipt of the Certificate is done online. All the relevant documents have to be scanned and uploaded in the online platform.

A foreign company, which establishes a place of business in Kenya, is required to file certain documents and information with the Registrar of Companies in Kenya ("the Registrar") and register the company before commencing the business in Kenya.

Registration of a Subsidiary	Registration of a Branch	Approximate Time
1. Registration with the eCitizen online platform of the Immigration Department (online) No costs	The same	1 hour
2. Name Reservation (online) Costs: USD 1.5 (KES 150)	The same	Within 3-4 days of submission. The Registrar has the right to reject names he considers undesirable or which are similar to the names of existing companies. It is therefore advisable to decide on 2-3 alternative names.
3. Company Registration (online): The following documents have to be uploaded in the online platform: Costs: USD 106.50 (KES 10,650)	Branch Registration (online) Costs: USD 68.50 (KES 6,850)	We would recommend giving this 1 week to 30 days.
– Application Form signed by the director and shareholders.	– Application Form giving – details of the holding company (foreign company) – details of foreign director – details of the local representative	
– Memorandum of Association stating that the subscribers wish to form a company and agree to take at least one share each in case of a company with a share capital.	– Certificate of Incorporation of the foreign company	
– Articles of Association must be signed by the subscribers. Alternatively model articles, provided for under the Company (General) Regulations, 2015 may be adopted. The objects are not specifically restricted, they are unlimited.	– Certified copy of the Memorandum and Articles of Association of the foreign company	

– A Statement of Nominal Capital if required, e.g. not for a company limited by guarantee. A nominal share capital of KES 1,000,000 is advisable.	– Notice of place of business + opening hours	
4. The initial nominal share capital of a company to be registered with limited liability shall be exempt from Stamp Duty.	No Stamp Duty	
5. The documents are filed online with the Registrar of Companies and a Certificate of Incorporation is obtained online.	The documents are filed online with the Registrar of Companies and a Certificate of Compliance is obtained online.	
6. Company Secretarial Activities: This requirement is not mandatory for smaller companies (with a share capital of less than KES 5 million). Costs: Charges vary depending on the service provider. Munyaka Advocates LLP can provide this service if required.	Not a requirement, but a local representative is.	

All the relevant forms can be downloaded from the eCitizen platform.

2.1.3 Setting up a Branch of a Foreign Company

The above listed documents must be certified by a Notary Public and translated into English where applicable. The particulars of the Directors of the foreign company including their full names, postal address, nationality and business occupation must be given. A statement of all charges issued by the company comprising property in Kenya (usually nil) must be submitted. Names and postal addresses of one or more persons residing in Kenya and authorised to accept service of any process on behalf of the foreign company must be stated. This may be the resident representative. We have an in-house process representative agent available for this purpose and are thus in a position to provide this service.

2.1.4 Incorporation of a Kenyan Company (Subsidiary)

Company Incorporation: Ideally this could be done within two (2) weeks, however, follow up queries by the Registries and inefficiencies with procedures mean that it could take three (3) to four (4) weeks from the date all relevant documents are received up to completion. The majority of companies are incorporated as private companies. A private company is a company which restricts a member's right to transfer shares, limits the number of shareholders to a minimum of one (1) and a maximum of fifty (50) excluding employees, prohibits offering of shares and / or debentures to the public and limits the personal liability of the shareholders. The Companies Act allows single member companies. Only specific sectors require a resident shareholder.

2.1.5 Comparative Review

With the exception of certain specific distinctions principally outlined below, the effect of establishing a Kenyan Company as opposed to a branch of a foreign company does not considerably differ from a Kenyan legal perspective. Both companies have similar powers including the power to borrow and to purchase and take security over movable and immovable property. We would however recommend that you verify whether this position would change from the perspective of your country.

Subject	Representative Office	Kenyan Company + Subsidiary	Branch
Ability to conduct business	Conducted by a third party agent.	Freedom to carry out business.	Freedom to carry out business.
Legal Presence	No	Yes	Yes
Liability	Third party.	Yes	Parent company.
Tax			
Income Tax	N/A – responsibility of appointed representative	Resident companies are taxable at the rate of 30 % of taxable profits.	A branch of a foreign company (which under Kenyan law is considered a non-resident company) is taxable at the rate of 37.5 % of taxable profits.
Withholding Tax	As above	Dividend payments made to resident corporate Shareholders, who control more than 12.5 % of voting power in the company paying the dividend, are exempt from withholding tax.	N/A
Compensating Tax	As above	Please see Part IV below	N/A
Filing accounts / Reporting	N/A	Private companies are exempt from filing annual accounts with the registrar of companies.	Other than in Common- wealth countries, annual accounts are required to be filed.
Altering constitution	N/A	By way of a special resolution without any recourse to Registrar of Companies.	Particulars of the alteration must be filed with the Registrar of Companies.

Service of Process	N/A	N/A	Independent agent may be required to be appointed.
Regional Trading	Conducted through the appointed agent, if such agent is capable of carrying out such business.	Easier through a Kenyan subsidiary.	It may be required to establish branch offices region-wide.

2.1.6 Exchange Control
There is no mandatory exchange control for the regulation of transactions in foreign currencies and the Kenya Shilling. Foreign exchange business is conducted through financial institutions licensed under the Banking Act and regulated by the Central Bank of Kenya (CBK). Foreign entities are free to transfer funds into Kenya and to remit sales and investment proceeds from Kenya. Bank accounts are denominated in the major currencies.

2.2 Employment and Immigration Matters

2.2.1 Minimum wage and PAYE
The terms and conditions of employment are regulated under the Employment Act. In addition to the Act, various orders have been made regulating wages and conditions of employment in specific industries and generally. The relevant order, which covers the business sector, is the Regulation of Wages (General) Order.

The Order includes provision for minimum wages and other matters. The prescribed minimum wage varies for different categories of employment. Wages and certain benefits are subject to pay as you earn income tax (see below).

Paid absences required by law
In addition to public holidays, an employee is entitled to fully paid sick leave of up to 30 days followed by up to 14 days on half pay in each period of 12 months and fully paid holiday or vacation leave of not less than 21 days in each period of 12 months. Female employees are entitled to fully paid maternity leave of 3 months in addition to their annual leave, whilst males are entitled to 2 weeks paternity leave.

Standard working hours
The statutory number of days of work in a week is six (6) days with a rest period entitlement of one (1) day. There is nothing in Kenyan Law which states that Saturday is a rest day and employers can insist on their employees working on that day at no higher rate than normal.

Severance pay
If employment of an employee is terminated on account of redundancy, the employee is entitled to severance pay at the rate of 15 days for each year served plus one month’s notice or pay in lieu of notice plus any accrued leave or leave pay which is due to the employee.

Health, welfare and life insurance schemes
Under the Employment Act, an employer is under an obligation to provide medical treatment to an employee taken ill or make full reimbursement of the costs incurred. As a result, many employers participate in medical insurance schemes for their employees.

Further under the Work Injury Benefits Act, all employers are required to obtain and maintain an insurance policy to cover any liability that may arise and to provide compensation for injuries and diseases employees may contract in the course of their employment.

National Social Security Fund

Participation in this fund is mandatory and is intended to provide a state retirement benefit for salaried workers. The employer pays a standard contribution of approximately 12 % of the salary. One half of the contribution is deductible from the employee's salary while the other is contributed by the employer to an upper limit of KES 2,160 for employees earning above KES. 18,000.

National Hospital Insurance Fund

The employee contributes a fixed sum, which must be deducted by the employer from the employee's salary before receipt of the same. The maximum contribution is KES. 1,700 per month. The contributions are used to offset the costs of medical treatment but only cover a fraction of actual costs.

2.2.2 Immigration

Non-citizen employees who are sent to work in Kenya will require Class "D" work permits under the Immigration Act authorising them to reside and to work in Kenya. Permits are usually granted for a period of 2 years. Employees on short-term assignments may apply for Special Passes, which last for up to 3 months but which can be renewed for a further 3 months in a year. The application will be submitted online and a signed print-out has to be handed in at the Immigration Department. After the endorsement into the Passport a visa is no longer necessary, even to re-enter the country. For further information: www.immigration.go.ke.

A Class D permit will be granted to a full time employee if the immigration authorities are satisfied that the presence of the employee is essential to the running of the business and the job cannot be performed by a properly qualified and experienced Kenyan. Dependants of entry permit holders being wives and children up to 18 years are required to have Dependants Passes which are granted more or less automatically. To re-enter the country the holder of Dependant Pass needs to apply for a Re-entry permit.

2.3 Land Laws

One of the major sectors, that the Constitution of Kenya sets out to revolutionize, is the land sector. The Constitution mandates Parliament to revise, consolidate and rationalize existing land laws in the country. Pursuant to this, the following pieces of legislation have been enacted:

- Land Act;
- Land Registration Act;
- National Land Commission Act;
- The Community Land Act.

The Community Land Act creates a new classification of land giving effect to Art. 63 of the Constitution, repealing the Land (Group Representative) Act and the Trust Lands Act.

The Land Act provides for the administration and management of land and land-based resources. The Act vests public land in the National Government and the County Government as the case may be. Additionally, the Land Registration Act provides the regime for the registration of interests in private, public and community land.

The Land Laws (Amendment) Act, which came into effect on 21st September 2016, amended the land laws. The land registration was vested in the Cabinet Secretary instead of the National Land Commission, which only has to be consulted. The officers who are to deal with land registration are the Chief Land Registrar and the County Land Registrars and any other official appointed by the Public Service Commission. They shall be vetted by the Commission, which makes the recruitment process competitive and transparent.

The Amendment Act clarifies the roles of the different entities, which has been left open in the still effective National Land Commission Act. It gives effect to the object and principles of devolved government in land management and administration.

The National Land Commission (NLC) however keeps the task of reviewing all grants and dispositions of public land and establishing the legality of each grant or disposition. Every person that has an interest in a grant or disposition, that is under review, shall be given notice of such a review and the opportunity to appear before the NLC. After such a hearing, the NLC shall make a determination. If it finds that the title was acquired in an unlawful manner, it shall either recommend a revocation of the title to the Registrar or requests that the national or county government pay compensation to the aggrieved party. A different section of the National Land Commission Act provides, however, that no revocation of title shall be effected against a bona fide purchaser for value without notice of a defect in title.

2.3.1 Land ownership by non-citizens
The Constitution guarantees the security of land rights by land owners as follows:
- Every person (citizen and non-citizen alike) has the right to acquire property in Kenya;
- Parliament is prohibited from enacting any law that would arbitrarily deprive a person of their interest in or over property;

Article 65 of the Constitution restricts ownership of land by non-citizens in that they can only hold land on leasehold tenure and the lease period cannot exceed 99 years. Leases for periods over 99 years and freehold titles that had been issued before the Constitution came into force are deemed to be leaseholds for periods of 99 years. For the purposes of this provision every company that is not wholly owned by Kenyan citizens is regarded as a foreign company.

The 99 year limit on leasehold and freehold properties takes effect on the 27th of August, 2010, when the current Constitution was promulgated. The process of conversion of tenure will be undertaken by the National Land Commission which is required to complete the process by 2022.

On the expiry of a lease granted to a non-citizen, the interests or rights over the land shall vest in the national or county government and, unlike citizens, non-citzens will not have a first right of pre-emption but may nonetheless apply for an extension however the expired term and the extended term should not exceed 99 years. Any subleases or charges granted by the non-citizens would be extinguished at the expiry of the term. If such land reverts to the national or county government, it can then be allocated by the Cabinet Secretary in a manner that it is to be prescribed.

The other restriction on ownership of land by non-citizens is with regard to agricultural land. The Land Control Act prohibits the acquisition of agricultural land by non-citizens unless they obtain exemption from the President. Agricultural land in Kenya can only be acquired by:
- A citizen of Kenya;
- A private company or co-operative society all of whose members are Kenyan citizens;
- An incorporation of group representatives who have been recorded as owners of trust or community land on behalf of members of their community; or
- A state corporation.

2.3.2 The Mining Industry

The principal Act that regulates mining and exploration activities in Kenya is the Mining Act (MA), 2016.

The MA is fairly comprehensive and confers wide-ranging discretionary powers on the Commissioner of Mines and Geology. The overriding principle of the MA is that ownership of un-extracted minerals vests in the national government of Kenya in trust for the Kenyan. The Government therefore has the sole authority to grant licenses to those persons who would like to engage in prospecting and mining activities. A person cannot, search for, prospect for or mine any mineral in Kenya without a licence being granted by the Cabinet Secretary in the Ministry of Petroleum and Mining.

2.3.3 The Oil and Gas Industry

The overarching statute is the Petroleum Act, 2019 which governs upstream, midstream and downstream petroleum operations being carried out in Kenya.

The development of the policy governing petroleum operations, the national petroleum strategic plan in Kenya is the responsibility of the Cabinet Secretary in the Ministry of Petroleum and Mining. The Cabinet Secretary with the support of an advisory committee and the Energy and Petroleum Regulatory Authority (EPRA) is charged with the responsibility for the negotiations entry and revocation of petroleum agreements, the review and approval of exploration activities and generally overseeing upstream petroleum activities. The general regulation of activities in this sector is managed and coordinated by the EPRA.

All the petroleum within strata in Kenya and the continental shelf is vested in the national government of Kenya in trust for the Kenyan people. No person can engage in any petroleum operations in Kenya without having previously obtained the approval of the Cabinet Secretary in the Ministry of Energy or the EPRA.

2.3.4 Renewable Energy and Electricity Sector

The Energy Act, 2019 and regulations govern the renewable energy sector. The purpose of the Act is to consolidate the laws relating to energy, to properly delineate the functions of the national and devolved levels of government in relation to energy, to provide for the exploitation of renewable energy sources and for the supply and use of electricity and other forms of electricity.

All unexploited renewable energy resources in Kenya are vested in the national government unless rights have been granted to persons under a written Kenyan law. The generation, exportation, importation, transmission, distribution and retail supply of electricity is regulated under the Act and cannot be conducted without obtaining a licence from the EPRA. One does not need to obtain a licence or permit for the generation of electrical energy for own use under 1 MW.

3. TAX REGIME

<u>3.1 Kenyan Tax Regulations</u>

Company tax

Company tax is based on computed tax profits as follows:

Turnover tax	3 % of turnover (with effect from 1 January 2007 for turnover of up to KES. 5,000,000)
Resident companies (and subsidiaries)	30 %
Non-resident companies (branch)	37.5 %

Company tax is paid on an instalment basis. It is payable in the 4th, 6th, 9th and 12th months of the year – depending on the end of the company's accounting year. Only expenses that are wholly and exclusively incurred to generate income are allowable for company tax purposes. Fixed assets enjoy certain capital allowances depending on the class of the said assets.

Tax Losses

Tax losses in Kenya are carried forward as allowable deductions against future income. A deficit for a year of income is treated as an allowable deduction in preparing income tax computations for the next nine (9) successive years of income.

This is strictly applied for each of the seven sources of income specified below:

- Income from renting or occupation of immovable property;
- Income from employment;
- Income from agriculture, horticulture, forestry, etc.;
- Income from withdrawals from a registered pension / provident fund by employer;
- Business activities;
- Gains made as a result of the disposal of direct or indirect interest in immovable property (extractive industries); and
- Natural resource income.

Losses are, however, not transferable from one entity to another.

Capital gains tax

Capital Gains Tax (CGT) was re-introduced with effect from 1st January 2015. The tax rate is 5 % of the net gain on the transfer of property. There are exemptions on certain classes of shares and on specific transfers of property. CGT is a final tax and cannot be offset against other income taxes.

Branch profits tax

Branches of foreign entities pay tax at the rate of 37.5 %.

Sales taxes / value added tax (VAT)

The VAT rates are 16 % and 0 %. Exports are zero rated. Industrial fuel and electricity are vatable at 16 %. Some goods and services, such as unprocessed agricultural products and financial services, are VAT exempt.

Fringe and employment benefits tax

Generally, non-cash benefits are taxable on the cost incurred by the employer or the fair market value (depending on which is higher). The taxable value is added to the emoluments for tax purposes. Tax exemption will be granted should the aggregate total not exceed KES 36,000 per annum.

Motor Vehicles

The benefit is the higher of 2 % per month of the initial cost of the vehicle or the prescribed rates. For leased vehicles the benefit is the cost of leasing.

Housing

For non-executive directors the benefit is the higher of 15 % of total income (emoluments – for a whole time service director), market value and rent paid. For agricultural employees, it is 10 % of emoluments and for other employees it is the higher of rent paid and 15 % of emoluments.

Loans to employees

These are taxed at the corporate tax rate on the difference between the interest rate prescribed by the Commissioner and the actual rate paid by the employee.

Other benefits

Other taxable benefits include:

- Furniture – 1 % of cost per month and
- Telephone – 30 % of cost per month.

Employee share ownership plans (ESOPs) is the difference between the market price of shares and offer price at date option is granted.

Local taxes

Employment income is taxed on a withholding tax basis known as Pay As You Earn (PAYE) at a graduating scale of 10 % - 30 %.

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Single business permit
Depending on the nature of business undertaken, this permit costs between KES 2,000 and KES 100,000.

3.2 Determination of Taxable Income
Capital allowances
The rates for capital allowances are as follows:

Wear and tear	Rate
Rate	30 %
Computers hardware, copiers, scanners	30 %
Other motor vehicles, aircrafts	25 %
Ships, plant, machinery, furniture and equipment	12.5 %
Telecommunication equipment	20 %
Computer software	20 %
Loose tools and implements (straight-line)	33.3 %

Industrial building allowances	Rate
Factories (2.5 % up to 2009)	10 % from 1 January 2010
Prescribed hotels (up to 2006 was 4 %)	10 % from 1 January 2010
Prescribed low-cost residential housing developments	5 %
Hostels or approved educational building (from 2007 was 10 %)	50 % from 1 January 2010
Commercial Buildings with infrastructure	25 % from 1 January 2010
Residential Buildings with services	25 % up to 31 December 2012

Farm works	Rate
Farm works	100 % from 1 January 2010
Investment deductions eligible for building and machinery for manufacture (from 2008)	100 %
Investment deductions eligible for construction of a building or purchase and installation of machinery of 200m or over outside Nairobi, Mombasa & Kisumu	150 %
Manufacturing under Bond – combined investment deduction	100 %
Shipping investment deduction	100 %
Purchase of filming equipment by licensed film producers	100 %

Mining allowance (on capital expenditure or mining)	Rate
Year 1	40 %
Years 2-7	10 %

Depreciation
This is an accounting expense not allowable for tax purposes, and wear and tear allowances as shown above are given instead.

Stock / inventory
The cost of sales is deducted as allowable expenditure before arriving at taxable profits.

Capital gains and losses
Capital Gains Tax applies at a rate of 5 % from 1st January 2015. For individuals, the tax is imposed on the transfer of land and shares. For companies, the tax is applicable to the transfer of money, goods, choses in action, land and every description of property, whether movable or immovable; or property acquired or held for investment purposes other than a motor vehicle.

Dividends
Dividends are taxed on a withholding tax basis which is a final tax. Expenses are therefore not allowable on the dividends' income or on any other income of the taxable person. Dividends are tax-exempt for resident companies controlling more than 12.5 % of shareholding. Dividends received by financial institutions are exempt.

Compensating tax (corporation tax) may arise if non-taxed income is distributed, e.g. capital gain or profits on capital allowances. It is worked out through an annual dividends tax account which traces the movement of dividends received or paid and taxes paid.

Interest deductions
Interest incurred wholly and exclusively in the production of income is allowable. Where a company is controlled by a non-resident person together with four or fewer resident persons, however, the interest deductibility is restricted only to the extent that the total indebtedness of the company does not exceed three times the paid-up share capital and revenue reserves or an amount of deemed interest (thinly capitalised). The Commissioner of Income Tax is empowered to prescribe the form and manner in which deemed interest is to be computed. Realised foreign exchange losses are deferred as long as the firm is thinly capitalised.

Foreign-sourced income
Income that is not accrued or derived from within Kenya is not assessable in Kenya except in the case of:
- Employment income for an employee who at the time of employment was a resident person in respect of any employment by him outside or inside Kenya;
- Business activities carried out across borders; and
- Foreign bank branches' income on investments or trading abroad using locally generated income.

Thin capitalisation
The deduction of interest for tax purposes may be restricted where a Kenyan company has a too high level of debt. The basic rule is that where a company is controlled by a non-resident, together with four or fewer residents, the highest level of debt in any one year should not exceed three times the company's issued share capital and revenue reserves. If this limit is breached, then a state of "thin capitalisation" exists and any interest paid on the excess debt is not allowed as a deduction. In this respect, it is important to note that debt includes all debts, including bank overdrafts, and that it is not limited to loans granted by affiliated companies.

If a state of thin capitalisation exists, there are also provisions relating to the timing of the deduction for any realised exchange losses. The thin capitalisation rules also apply in principle to branches of foreign companies, although the method of calculating share capital and reserves is more complicated.

Compensating Tax
Compensating tax is a penalty tax payable if dividends are paid out of reserves which have not borne income tax at the corporate rate. It is intended to prevent companies, which may have been entitled to certain tax incentives, from using their tax holiday to distribute dividends to their shareholders, rather than reinvesting the profits in the business. It can also have the effect of subjecting certain capital gains to income tax which would otherwise not be subject thereto when those gains are distributed to shareholders.

Compensating tax is monitored through a dividend tax account. This is a memorandum account that does not form part of the books of the company. The dividend tax account is credited with income tax actually paid by the company and is debited with a proportion of any dividend paid by the company. At the end of the accounting period, if the dividend tax account is in credit, it can be carried forward. If the account is in debit because excess distributions have been made, an amount of compensating tax must be paid to bring the account back to zero.

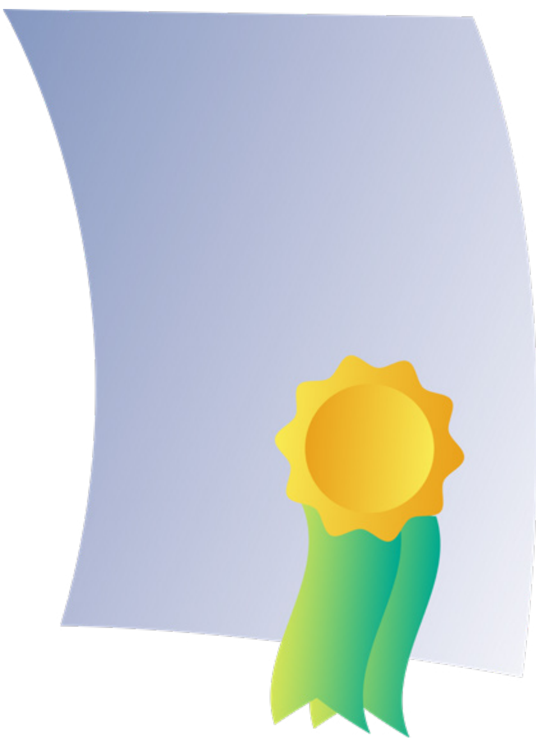
If the company is able to claim significant tax deductions in respect of its investment, it may not be in a position to pay a dividend to shareholders in the early years of business. The provisions relating to compensating tax do not apply to branches of foreign companies.

Incentives
Capital deductions are as given under 'Capital allowances' above. There are currently double taxation treaties with the UK, India, Germany, Zambia, Norway, Sweden, Denmark and Canada.

A ten year tax holiday is available to certain designated enterprises that undertake activities consisting of the manufacture of goods for exports only (under the export processing zones). At the end of the tax holiday, a reduced rate of tax of 25 % is available.

A lower rate of corporation tax at 27 % for the first three years for companies newly listed on a securities exchange, with at least 20 % of the issued share capital listed. Tax exemptions apply for organisations undertaking charitable, medical, alleviation of poverty, and religious activities.

Foreign tax relief
Foreign tax relief is limited only to countries with double taxation relief.



Corporate groups
Generally, a corporation tax rate of 30 % applies to all incorporated companies irrespective of groups in Kenya. Non-resident companies are subject to tax at the rate of 37.5 %.

Transfer pricing
Related party transactions are allowable expenses if incurred wholly and exclusively in the production of income and taxed as income if earned or accrued in Kenya as business activities. Transfer pricing rules were brought into operation with effect from 1st July 2006 and apply to transactions between independent entities of a MNE or permanent establishments and their head office or branch.

Entities involved in such transactions are required to have a transfer pricing policy document in place detailing the following:

- the selection of the transfer pricing method and the reasons for the selection;
- the application of the method, including the calculations made and price adjustment factors considered;
- the global organization structure of the enterprise;
- the details of the transaction under consideration;
- the assumptions, strategies, and policies applied in selecting the method; and
- such other background information as may be necessary regarding the transaction.

Withholding tax
The relevant rates are as follows:

	Resident	Non-Resident
Artists and entertainers	–	20 %
Management fees	5 %	20 %*
Professional fees	5 %	20 %*
Training fees (inclusive of incidental costs)	5 %	20 %*
Royalties	5 %	20 %
Dividends (nil for resident shareholders with a holding of >12.5 %)	5 %	10 %
Equipment (movable) Leasing	N/A	5 %
Interest (bank)	15 %	15 %
Interest (Housing bond-HBI)	10 %	15 %
Interest Two-year government bearer bonds	15 %	15 %
Other bearer bonds interest	25 %	25 %
Rents – buildings(immovable)	N/A	30 %
Rents – others (except aircraft)	N/A	15 %
Pensions / provident schemes (withdrawal)	10-30 %	5 %
Insurance commissions	10 %	20 %
Contractual (from 1 July 2003)	3 %	20 %
Telecommunication services / Message transmission	–	5 %

* The applicable rate is 15 % for countries within the East African Community

Taxation of betting and gaming industry
Withholding tax provisions in the Income Tax Act (ITA) have been repealed and taxation is now governed by the Betting, Gaming and Lotteries Act. All the taxes will be payable to the KRA Commissioner General and are due on the 20th of the month following the month of collection.

The new taxes introduced are:

- Betting tax – 7.5 % of gaming revenue, this is defined as “the gross turnover less the amount paid out to customers as winnings”.
- Lottery tax – 5 % of lottery turnover
- Gaming tax – 12.5 % of gaming revenue
- Prize competition tax – 15 % of gross turnover

Personal tax
The tax rates are as follows:

Annual income	Monthly income	Rate
On first KES 134,164	KES 11,180	10 %
On next KES 126,403	KES 11,181 – KES 21,714	15 %
On next KES 126,403	KES 21,715 – KES 32,248	20 %
On next KES 126,403	KES 32,249 – KES 42,781	25 %
On all income over KES 513,373	KES 42,782 >	30 %

Treaty and non-treaty withholding tax rates
The withholding tax rates are as follows:

	United Kingdom	Germany & Canada	Denmark, Norway, Sweden & Zambia	India
Management and professional fees	12.5 %	15 %	20 %	17.5 %
Royalties	15 %	15 %	20 %	20 %
Dividends	10 %	10 %	10 % [i]	10 %
Interest	15 %	15 %	15 %	15 %
Pension and retirement annuities	5 %	5 %	5 %	5 %
Entertainment and sporting events	20 %	20 %	20 %	20 %
Promoting entertainment or sporting events	20 %	20 %	20 %	20 %
Rent – immovable property	30 %	30 %	30 %	30 %
Rent – Other than immovable property	15 %	15 %	15 %	15 %

[i] 0 % if dividend subject to tax in Zambia

For more information: **www.kra.go.ke**.

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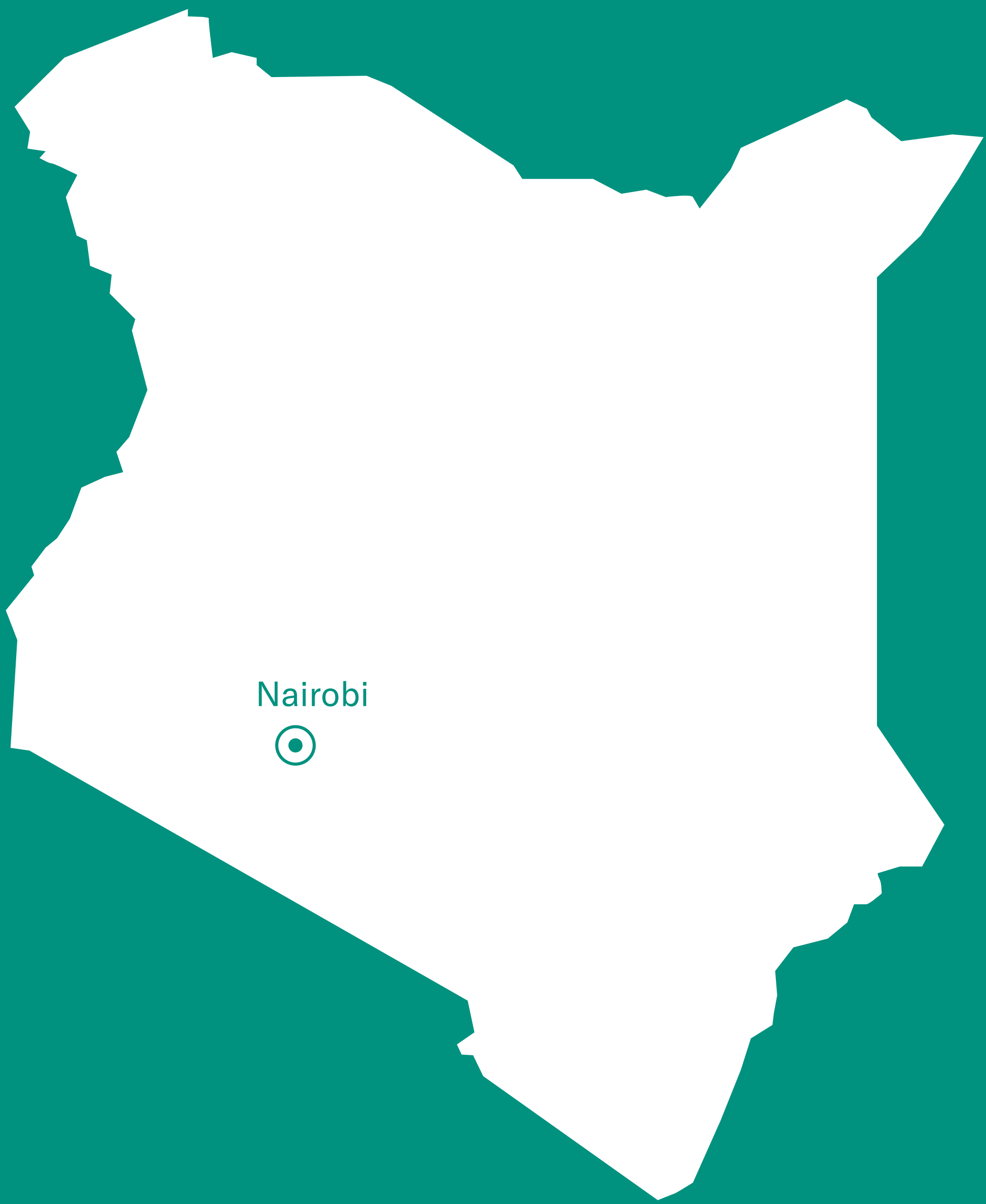
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