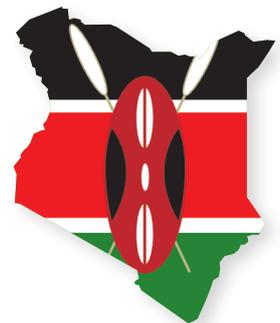




Developing strategies

Doing Business in Kenya

Chebet Mehta Advocates in
association with Rödl & Partner



April 2017

Developing strategies

„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.“

Rödl & Partner

„Also every human tower we build is unique. From a strategic point of view there is more than just one way. The most important thing is to keep your eyes fixed on the goal, discuss it together and work towards success.“

Castellers de Barcelona

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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. It is estimated to have reached around 48 Million in March 2017. The Gross Domestic Product (GDP) has been at USD 63.40 billion at a growth rate of 5.6 % in 2015. In recent years the Government of Kenya ("GOK") has introduced new laws such as the Companies Act (2015), Land Registration Act (2012) and the Insolvency Act (2015). There is hope that Kenya will become a promising investment location. These changes have not gone unnoticed as we rank 92 of 190 in the latest World Bank ease of doing business index. Kenya's level in the 'Corruption Index' stays at 26 out of 100. The inflation rate is at 6.99 in January 2017.

In regard to the energy sector, it can be noted that the field still requires more expansion. The total electricity generation increased to 850.83 million KWh in January 2017, while domestic consumption of electricity expanded to 747.51 million KWh. Expenditure on services rendered by non-residents increased by 55.1 % from KES 42.375 million to KES 65.735 million in 2013.

2 Background Information Rödl & Partner

As an integrated professional services firm, Rödl & Partner is active at 108 wholly-owned locations in 50 countries. We owe our dynamic success in the service lines audit, legal, management and IT consulting, tax consulting as well as tax declaration and BPO to our 4.500 entrepreneurial minded partners and colleagues. For more information: www.roedl.com.

Chebet Mehta Advocates 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 Renewable energy, Intellectual property 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.chebetmehtaroadl.com.

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.



Business Guide

Background Information

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 is headed by a Governor and supported 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 coloniser, the United Kingdom and English common law is still of persuasive value in Kenyan courts. The formal business sector mainly follows the European/US model of free market economics and capitalism. Kenya's civil service has historically been quite substantial, but unfortunately due to continued growth, the national and county salaries account for a disproportionate amount of recurring government expenditure.

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. While some of it is based on cases from the courts of England, there is now a workable base of jurisprudence from decisions of the Kenyan courts. While Kenyan courts would entertain decisions made by English and other Commonwealth courts, such decisions would not be considered binding but of persuasive value.

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 in respect of breach of contract is six years.

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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 and New Legislation

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	yes
India		yes
Italy	yes	
Netherlands	yes	
Norway		yes
Sweden		yes
Switzerland	yes	
United Kingdom	yes	yes
Zambia		yes
Mauritius		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);
- › 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-Kenyans to ultimately hold agricultural land.



Business Guide

Kenyan Law

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
<p>1. Registration with the eCitizen online platform of the Immigration Department (online)</p> <p><i>No costs</i></p>	The same	10 minutes
<p>2. Name Reservation (online)</p> <p><i>Costs: USD 1.5 (KES 150)</i></p>	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.
<p>3. Company Registration (online): The following documents have to be uploaded in the online platform:</p> <p><i>Costs: USD 106.50 (KES 10,650)</i></p>	<p>Branch Registration (online)</p> <p><i>Costs: USD 68.50 (KES 6,850)</i></p>	We would recommend giving this 1 week to 30 days.
<p>> Application Form signed by the director and the secretary.</p>	<p>> Application Form giving – details of the holding company (foreign company)</p> <ul style="list-style-type: none"> >> details of foreign director >> details of the local representative 	
<p>> 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.</p>	<p>> Certificate of Incorporation of the foreign company</p>	
<p>> Articles of Association must be signed by the subscribers. Model articles, provided for under the Company (General) Regulations, 2015 may be adopted. The objects are not specifically restricted, they are unlimited.</p>	<p>> Certified copy of the Memorandum and Articles of Association of the foreign company</p>	

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

All the relevant forms can be downloaded at: www.kenya.eregulations.org.

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 element could be done within two (2) weeks, however, inefficiencies at the Registry mean that it could take 4-6 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 and does not necessarily require a share capital. 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 Commonwealth 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.
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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.

Given the absence of foreign exchange controls, it is possible to repatriate profits subject to payment of the relevant taxes. Currently though, under the Proceeds of Crime and Anti-Money Laundering Act and guidelines issued by the Central Bank of Kenya, any transaction which involves the transfer of USD 10,000 or more must be supported by documentary proof of the source of such funds or the reason for such a transfer. The CBK Regulations permits any person leaving or entering Kenya may take out or bring into Kenya currency upto a maximum of five hundred thousand (500,000) shillings, or the equivalent of five thousand United States dollars (US\$5,000), in foreign currency.

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 7 days followed by up to 7 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.

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. 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.

An D Class 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 Land Laws (Amendment) 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. It repeals

the Way Leaves Act and The Land Acquisition Act. Additionally, the Land Registration Act gives effect to the objects of devolved government in land registration.

The Land Laws (Amendment) Act, which came into effect on 21st September 2016, amends these Land Acts. The land registration is now 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.

Section 44 of the Land Registration Act states that the execution of any instrument effecting a disposition under this Act shall be effected by the relevant (foreign) law. If it is executed outside Kenya, it has to be endorsed or attested by a Notary Public.

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 that had been issued before the Constitution came into force are deemed to be 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.

There has been a debate on when the 99 year period is deemed to commence. One view is that the 99 years commence on the date the Constitution was promulgated, while another view is that the 99 years commence on the date the title was granted first. Unfortunately, the land laws do not provide any clarity on this.

What also remains unclear is whether a freehold title or title with an unexpired term of over 99 years that is owned jointly by a Kenyan citizen and non-citizen would be converted to a lease of 99 years or whether the tenure would remain intact.

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-citizens will not have a first right of pre-emption but may nonetheless apply for an extension. 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 Government of Kenya. The Government therefore has the sole authority to grant licenses to those persons who would like to engage in prospecting and mining activities.

2.3.3 The Oil and Gas Industry

The overarching statute is the Energy Act, which governs all sources of energy, including petroleum and other fossil fuels, as well as regulating the functions of the Energy Regulatory Commission, which oversees the electricity and downstream petroleum sectors.

At present, upstream petroleum activities are managed by the State Department for Energy and Petroleum (formerly “Ministry of Energy”) and accordingly, oil and gas exploration and production falls under the auspices of the Cabinet Secretary, responsible for energy and petroleum.

The law dealing specifically with the acquisition of oil and gas resources in Kenya and the exploration, development, production and decommissioning of oil and gas is governed by the Petroleum (Exploration and Production) Act (PEPA) together with the Petroleum (Exploration and Production) Regulations. Under the PEPA, no person can engage in any petroleum operations in Kenya without having previously obtained the permission.

2.3.4 Renewable Energy Industry

The Energy Act and regulations govern the Renewable Energy sector.

Renewable Energy is one of the four technical Directorates of the Ministry of Energy and Petroleum, which mandate among others is to provide an enabling framework for the efficient and sustainable production, distribution and marketing of these energy sources: biomass, solar, wind, small hydropower, municipal waste, including charcoal; and to contribute to the Feed-in-tariff policy development.



Business Guide

Tax Regime

3 Tax Regime

3.1 Kenyan Tax Regulations

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 %.

Other taxes: Land rates

Land rates are based on a percentage of the site value.

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
Tractors/heavy vehicles	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	–	
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 %

0 % if dividend subject to tax in Zambia

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



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About us

As lawyers, tax advisers, management and IT consultants and auditors, we are present in 108 own locations in 50 countries. Worldwide, our clients trust our 4,500 colleagues.

The history of Rödl & Partner goes back to its foundation as a solo practice in 1977 in Nuremberg. Our aspiration to be on hand wherever our internationally-active clients are led to the establishment of our first, own offices, commencing with Central and Eastern Europe in 1989. Alongside market entry in Asia in 1994, the opening of offices in further strategic locations followed, in Western and Northern Europe in 1998, USA in 2000, South America in 2005 and Africa in 2008.

Our success has always been based on the success of our German clients: Rödl & Partner is always there where its clients see the potential for their business engagement. Rather than create an artificial network of franchises or affiliates, we have chosen to set up our own offices and rely on close, multidisciplinary and cross-border collaboration among our colleagues. As a result, Rödl & Partner stands for international expertise from a single source.

Our conviction is driven by our entrepreneurial spirit that we share with many, but especially German family-owned companies. They appreciate personal service and value an advisor they see eye to eye with.

Our 'one face to the client' approach sets us apart from the rest. Our clients have a designated contact person who ensures that the complete range of Rödl & Partner services is optimally employed to the client's benefit. The 'caretaker' is always close at hand; they identify the client's needs and points to be resolved. The 'caretaker' is naturally also the main contact person in critical situations.

We also stand out through our corporate philosophy and client care, which is based on mutual trust and long-term orientation. We rely on renowned specialists who think in an interdisciplinary manner, since the needs and projects of our clients cannot be separated into individual professional disciplines. Our one-stop-shop concept is based on a balance of expertise across the individual service lines, combining them seamlessly in multidisciplinary teams.

What sets us apart

Rödl & Partner is not a collection of accountants, auditors, lawyers, management and tax consultants working in parallel. We work together, closely interlinked across all service lines. We think from a market perspective, from a client's perspective, where a project team possesses all the capabilities to be successful and to realise the client's goals.

Our interdisciplinary approach is not unique, nor is our global reach or our particularly strong presence among family businesses. It is the combination that cannot be found anywhere else – a firm that is devoted to comprehensively supporting German businesses, wherever in the world they might be.



„Jeder Einzelne zählt“ – bei den Castellern und bei uns.

Menschentürme symbolisieren in einzigartiger Weise die Unternehmenskultur von Rödl & Partner. Sie verkörpern unsere Philosophie von Zusammenhalt, Gleichgewicht, Mut und Mannschaftsgeist. Sie veranschaulichen das Wachstum aus eigener Kraft, das Rödl & Partner zu dem gemacht hat, was es heute ist.

„Força, Equilibri, Valor i Seny“ (Kraft, Balance, Mut und Verstand) ist der katalanische Wahlspruch aller Castellern und beschreibt deren Grundwerte sehr pointiert. Das gefällt uns und entspricht unserer Mentalität. Deshalb ist Rödl & Partner eine Kooperation mit Repräsentanten dieser langen Tradition der Menschentürme, den Castellern de Barcelona, im Mai 2011 eingegangen. Der Verein aus Barcelona verkörpert neben vielen anderen dieses immaterielle Kulturerbe.

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