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Foreword

This guide provides answers to questions that are frequently asked by Kenyan business people and foreign investors with an interest in Kenya. It gives a broad overview of the legislative regime applicable to business in the country.

It has been prepared by a team of our Kenyan lawyers who specialise in various relevant areas of law. We hope you find it useful.

For further information or specific assistance, please do not hesitate to contact any one of our lawyers in Kenya.

Paras Shah
Managing Partner, Kenya

The contents of this guide are for reference only and should not be considered as a substitute for detailed legal advice. It is correct as at September 2021.
INTRODUCTION

The Country at a Glance

The Republic of Kenya is situated in East Africa. It is known as the ‘cradle of mankind’. Kenya’s people, united under the green, black, red and white of the national flag, comprise more than 40 ethnic groups. Their warmth and hospitality are best expressed in the national motto: ‘Harambee’, meaning ‘let’s all pull together’.

Kenya’s capital city is Nairobi, meaning ‘the place of cool waters’. It is the highest city in East Africa at 1 700m above sea level. Modern and fast-growing, Nairobi is estimated to have over four million inhabitants. Other major cities and towns include Eldoret, Kisumu, Machakos, Mombasa, Nakuru and Nyeri.

English and Swahili are the official languages.

Kenya is a regional hub for business and trade throughout East and Central Africa. It is a member of the East African Community (EAC), which is a regional trading bloc currently comprising the economies of Kenya, Rwanda, Tanzania, Uganda and most recently Burundi and South Sudan. Kenya is also a member of the Common Market for Eastern and Southern Africa (COMESA), another regional trading bloc, comprising 21 countries.

GENERAL CONSIDERATIONS

1. What is the legal system in Kenya?

Kenya has been a Republic since its independence from Great Britain (the United Kingdom of Great Britain and Northern Ireland, (UK)) in 1963. The political system is a parliamentary constitutional democracy, which consists of a Head of State (President), Deputy President and a Cabinet of 21 Cabinet Secretaries. The Government functions through a large civil service implementing policy, and a judiciary.

The country has a well-established legislative base with laws inherited from the UK, as well as many modern statutes. English case law is of persuasive value in the Kenyan courts, and the formal business sector largely follows the European/American model of free market economics and capitalism.

The legal system in Kenya is based on:

• Statutes, including statutes of general application that were in force in England on 12 August 1897;
• English common law and doctrines of equity;
• African customary law – this only applies in civil cases where one or more parties are subject to it;
• Kenyan case law; and
• English case law (where not inconsistent with Kenyan law).

2. What are the key recent legal developments affecting companies doing business in Kenya?

• The Partnerships Act of 2012

The Partnerships Act of 2012 came into effect on 8 March 2021. As a result, the Partnership Act, Cap 29 has been repealed, save for transitional provisions.

Two acts now govern partnerships in Kenya the Limited Liability Partnership Act, 2011 and the LLP Act and the Partnerships Act.

It is worth noting that while the Partnership Act 2012 is now in force it still requires operational regulations to enable the registration of limited partnerships.

• Data Protection Act, 2019

The Data Protection Act, 2019 (the DPA) took effect on the 25th November 2019 and is now the overarching legal framework for the protection of personal data in Kenya. It regulates the collection, processing and related actions in the handling, use and storage of personal data; and was enacted to operationalize Article 31 of the Constitution of Kenya relating to the right to privacy. In addition, it applies to the processing of personal data by resident and non-resident data controllers and processors where the data subjects are located in Kenya. The DPA establishes the Office of the Data Commissioner to oversee the implementation and the enforcement of the DPA. The first Data Commissioner was appointed in 2020.

• The Data Protection Regulations

The Cabinet Secretary in charge of ICT established a Taskforce for the Development of the Data Protection (General) Regulations on 15 January 2021. The Taskforce recently introduced draft regulations intended to guide the interpretation of the DPA, known as the draft Data Protection General Regulations 2021 (the General Regulations), draft Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 (the Registration Regulations) and the draft Data Protection (Compliance and Enforcement) Regulations, 2021 (the Enforcement Regulations) (together the Draft Regulations).

The Draft Regulations provide the scope for the implementation of the Data Protection Act.

We expect the Draft Regulations to be adopted within the next 12 months.

BOWMANS
ESTABLISHING A BUSINESS

Business Vehicles

1. What are the most common forms of business vehicles used in Kenya?

The most common form of business vehicle in Kenya is the private limited liability company. Private limited liability companies are favoured because they are relatively easy to register and there are no minimum or maximum share capital requirements.

Private companies must have at least one shareholder. Single-member companies are permitted under the Companies Act, 2015. Private companies must have at least one director who is a natural person.

There is no legal requirement for a company to have Kenyan shareholders or Kenyan directors. However, a company is not able to register for tax with the Kenya Revenue Authority (KRA) without submitting the KRA Personal Identification Number (PIN) of at least one director of the company. This creates a requirement that at least one of the directors needs to be registered with the KRA. While there is no explicit law which requires this, it is the practice. If a foreign non-resident director registers with the KRA, they are then obligated to file annual tax returns (and nil returns in case they do not earn any income in Kenya).

2. In relation to the most common form of corporate business vehicle used by foreign companies in Kenya, what are the registration and reporting requirements?

Kenyan company

The BRS has introduced a one day one step registration process. The process of name reservation and application for registration of businesses has now been merged into one step.

The process

i. The applicant will be required to provide 3 to 5 proposed names in order of priority.
ii. The applicant will also be required to provide the other details of the shareholders, directors, registered office, constitutive documents, company secretary (where applicable), date of commencement of business etc. in the one step.

iii. Payment of the incorporation fee will be done upfront (at the commencement of the online registration).
iv. The total incorporation fee is KES 10,750 comprising:
   • the fee for incorporation of the company – KES 10,000;
   • name reservation referred to in (i) above – KES 100;
   • results of a company search at the Companies Registry confirming directorship and shareholding – KES 600; and
   • a convenience fee of KES 50.
   v. In case all the names that provided in (i) above are not available for use, then the application will be returned for correction. There will be no additional cost.
vi. The previous provision for name extensions shall no longer apply as the name will be available until completion of the incorporation process.

vii. The one day one step registration process does not apply for companies that are regulated and where approval from the regulator is required. The timelines will be subject to receipt of the requisite approval.

Constitutive documents

The constitutive documents of the company must be subscribed to by at least one subscriber. A company may adopt the model articles, as prescribed by the Companies Act, which provide that the objects of the company are unlimited, or it may adopt its own set of articles and prescribe specific objects within the articles if it so wishes.

While there is no legal requirement for a maximum or minimum share capital, the Registrar of Companies and the Collector of Stamp Duty recommend that a company be incorporated with a minimum share capital of KES 100,000.

A Kenyan company must notify the Registrar of any changes in respect of its:
• articles of association;
• registration details;
• directors’ details;
• secretary’s details;
• register of beneficial owners;
• share capital and allotment of shares; or
• company name.
Any changes to these details must be notified to the Registrar through prescribed forms within the prescribed timelines, which are between 14 days and 30 days. Failure to make such notification may attract penalties.

- **Company secretary**: All public companies in Kenya as well as private companies with a paid up share capital of at least KES 5 million are required to appoint a qualified company secretary who is a registered member of the Kenya Institute of Certified Public Secretaries.

- **Auditor**: Every company is required to appoint an auditor who is a member of the Institute of Certified Public Accountants of Kenya, unless the directors foresee that audited financial statements are unlikely to be required by the company.

- **Annual return**: Every company is required to file a return with the Registrar at least once a year.

A private company can be converted into a public company at any time and vice versa. All companies are required to file audited accounts at the Companies Registry unless it qualifies as a ‘small company’. A company qualifies as a small company if it satisfies two or more of the following requirements:

- it has a turnover of not more than KES 50 million;
- the value of its net assets as shown in its balance sheet as at the end of the year is not more than KES 20 million shillings; and
- it does not have more than 25 employees.

In an attempt to promote transparency in the ownership of companies in Kenya, the Companies Act introduced the requirement by Kenyan companies to disclose beneficial ownership. Kenyan companies are now required to keep a register of beneficial owners disclosing, amongst other things, the nature of control the beneficial owner has in the company.

It is worth noting that a publicly listed company is not required to maintain a register of beneficial owners.

### Branch of a foreign company

A foreign company registered outside Kenya can register a branch office in Kenya as opposed to registering a local entity. With the exception of certain specific tax considerations, the effect of establishing a local Kenyan company as opposed to a branch of a foreign company does not considerably differ from a Kenyan legal perspective.

The Companies Act contains extensive disclosure and compliance requirements for companies that are incorporated outside Kenya that wish to register a branch or representative office to do business in Kenya.

A foreign company that establishes a branch in Kenya must file certain documents and information with the Registrar within 30 days of its establishment of a place of business in Kenya. As a matter of practice, this should be undertaken in advance as a first step since the issue of the Certificate of Compliance (issued upon registration of the branch) is a pre-requisite for obtaining an entry permit and any other statutory registrations.

A branch of a foreign company is required to file its accounts alongside the parent company’s accounts with the Registrar every year, unless it was incorporated in the Commonwealth in which case it is exempted from having to file its balance sheet and profit and loss account.

Any changes to the details of the branch of a foreign company must be notified to the Registrar within 60 days of such changes. These include changes to:

- charter, statutes and memorandum and articles;
- directors or secretary of a foreign company or their particulars;
- names or addresses of persons authorised to accept service on behalf of a foreign company; and
- address of the principal registered office of a foreign company.

### Partnerships

There are three distinct types of partnerships in Kenya: general partnerships, limited partnerships and limited liability partnerships regulated by the Partnerships Act, 2012 (Act No. 16 of 2012) (the Partnerships Act; and the Limited Liability Partnerships Act, 2011 (Act No. 42 of 2011) (the LLP Act); respectively.

#### General Partnerships

General partnerships are the traditional partnership models where each partner has unlimited liability and it is the partners who have the general responsibility for the business of the partnership. General partnerships have the power to:

1. sue and be sued in its own name;
2. enter into contracts and own or hold property for the purposes of the business of the partnership;
3. subject to the partnership agreement, provide continuity for the partnership business despite a change in the partners.

#### Limited Partnerships

For a limited partnership to exist there ought to be one or more general partners, each with unlimited liability and one or more registered limited partners, each with limited liability.

A general partner is liable for the debts or obligations of the partnership. A limited partner is liable for the debts or obligations of the partnership to the extent of the amount contributed to the partnership at the time of joining the partnership.

#### Limited Liability Partnerships

The limited liability partnership (LLP) combines some of the features of a traditional partnership with the limited liability benefits more typically associated with a company.

Section 6 (2) of the LLP Act provides that, on being registered under the LLP Act, an LLP becomes a body corporate with perpetual succession and with a legal personality separate from that of its partners. This means that a change in the partners of an LLP does not affect the existence, rights or obligations of the LLP.

An LLP is required to have at least two (2) partners. Section 27 (1) of the LLP Act requires every LLP to have at least one manager who is a natural person who has attained the age of 18 years and who is resident in Kenya. An LLP is required under section 27 (2) of the LLP Act to lodge the details of the person who is designated as a manager of the partnership together with the consent of that person to act as the manager with the Registrar of LLPs (the Registrar).

### Steps taken in registration of an LLP:

Applications for registration of LLPs are done online via the e-Citizen portal. The BRS has introduced a one-day one-step registration process. The process of name reservation and application for registration of businesses has now been merged into one step.

1. The applicant will be required to provide a minimum of 3 and a maximum of 5 proposed names in order of priority.
2. The applicant will also be required to provide the details of the partners, the manager, the registered address, date of commencement of business etc. in the one-step process. The applicant will be required to provide details relating to the:
   - (a) Kenya national identification card or passport number of the manager(s) and partner(s) and PIN certificate number of the manager(s) and partner(s) issued by the Kenya Revenue Authority (not applicable to person who are not Kenyan residents).
   - Payment of the incorporation fee will be done upfront (at the commencement of the online registration).
   - The total incorporation fee is KES 25, 700 comprising:
     - name reservation and incorporation of the LLP – KES 25,150; and
     - results of a search on the LLP – KES 550
   - In case all the names that provided in (2) above are not available for use, then the application will be returned for correction. There will be no additional cost.
   - The previous provision for name extensions shall no longer apply as the name will be available until completion of the registration process.
• Partnership deed: This is the constitution of the LLP, which governs relations among the partners. It provides for the powers of each of the partners, the signing mandate for bank accounts and transactions and other such matters. It is necessary to consider these and other matters when drafting a partnership deed.

• Registration certificate: Registration of the LLP is complete when the Registrar issues a registration certificate, which must be displayed at the registered office. This process has been automated which speeds up the registration process, as such it takes between two and three weeks.

• The operational requirements of an LLP under Kenyan law

In addition to the operational requirements applicable to businesses generally (e.g. business permits, procuring KRA PIN certificates, filing tax returns, etc.), the following operational requirements are specifically applicable to LLPs in Kenya:

1. Requirement to keep proper books of account for at least seven years

Section 30 (1) and (2) of the LLP Act requires an LLP to keep proper and accurate accounting records for a period of at least seven (7) years, failing which each of the partners commits an offence and is liable on conviction: if the offender is a natural person, to a fine not exceeding KES 100,000 or to imprisonment for a term not exceeding two (2) years or to both; and if the offender is a body corporate, to a fine not exceeding KES 100,000.

2. Requirement to lodge annual declaration of solvency or insolvency with Registrar

Section 29 of the LLP Act requires an LLP to lodge with the Registrar a declaration by one of its manager(s) that in the opinion of the manager, the partnership either – appears, as at that date, to be solvent; or does not appear, as at that date, to be solvent.

The declaration is required to be lodged not later than fifteen (15) months after the registration of the LLP and subsequently once in every calendar year at intervals of not more than fifteen (15) months.

Failure to comply with this requirement is an offence punishable under the LLP Act by a fine not exceeding KES 100,000 to be paid by the LLP.

Failure to comply may also be deemed as a ground for declaring that the LLP is unable to pay its debts and the LLP may be wound up under a court process (paragraph 3(2) (g) of the fifth schedule of the LLP Act).

3. Requirement to have a registered office in Kenya

The LLP Act requires LLPs to establish and maintain a registered office within Kenya to which all communication and notices to the partnership are to be addressed.

An LLP may change the address of its registered office by lodging with the Registrar a notice of change in the manner determined by the Registrar and such a change takes effect when the notice is lodged.

4. Specific requirements for documents

An LLP is required to ensure that no invoice or other document relating to the partnership business is issued unless it bears: (a) the name and registration number of the partnership; and (b) a statement that it is registered with limited liability.

5. Other notification requirements

Whenever a change occurs in any of the details registered in respect of an LLP the partnership shall, within fourteen (14) days after the change, lodge with the Registrar a statement specifying the nature and effective date of the change and such other information (if any) as is prescribed by the regulations.

Investment Incentives

5. What grants or incentives are available to investors?

Kenya welcomes foreign investment, but does not have a wide-ranging suite of special incentives for investors from abroad. The limited incentives that are available are through special export-led schemes and by special arrangement with the National Treasury.

The Investment Promotion Act (No. 6 of 2004) established a statutory body known as the Kenya Investment Authority (KenInvest) whose main objective is to promote investments in Kenya. KenInvest is responsible for facilitating the implementation of new investment projects, providing after-care services for new and existing investments, as well as organising investment promotion activities both locally and internationally.

An investor may apply for an investment certificate from KenInvest. This certificate will entitle its holder to assistance from KenInvest in the expedient processing of licences necessary for the business and to conduct its investment activities in Kenya. The Investment Promotion Act indicates the following as some of the incentives available for holders of an investment certificate:

- Licences and permits: KenInvest will assist investors in obtaining any other licence or permit necessary in order to do business including work permits, liaising with the relevant governmental authority to do so.
- VAT and customs duty exemptions: the foreign investor, on certification by KenInvest, is entitled to assistance in obtaining VAT and customs duty exemptions on the importation of equipment and machinery.
- Tax holidays: as a rule, Kenya does not provide tax incentives for foreign investment, although there is a preferential regime for companies situated in and registered as Export Processing Zones or Special Economic Zones.

- Time scale and fees: there are no application fees for the investment certificate and the procedure may take about a month (timelines provided by the Charter of KenInvest).

KenInvest certification will only be issued upon the foreign investor making a minimum investment of USD 100,000, or the equivalent in any currency.

Foreign Investment

6. Are there any restrictions on foreign investments (including authorisations required by the central or local Government)?

Foreign investment is actively encouraged in all sectors of the economy. However, there are certain ownership and control restrictions, and authorisations that are available in specific sectors, including banking, insurance, mining and telecommunications. Restrictions are also applicable to companies holding (by lease or purchase) agricultural land. These companies require approvals or exemptions from the Land Control Board under the Land Control Act (Chapter 302, Laws of Kenya). More importantly, a company that has a foreign shareholding may not acquire agricultural land (unless a specific presidential exemption is granted).

In addition, it is necessary for entities operating in certain sectors to be licensed by the relevant regulator, for example:

- banks require licences from the Central Bank of Kenya;
- insurance companies require licences from the Insurance Regulatory Authority;
- mining companies require licences from the Mineral Rights Board;
- telecommunications companies require licences from the Communications Authority of Kenya; and
- market intermediaries such as brokers, fund managers and investment banks require licences from the Capital Markets Authority.
Exchange Controls

7. Are there any exchange controls or currency regulations?

There are currently no foreign exchange controls in Kenya and the Kenyan currency is freely tradable with all major world currencies. Banking transactions are required to be conducted through authorised and licensed banks. Most banks allow customers to operate foreign currency accounts although they are required to report all transactions in excess of USD 10,000.

Import/Export Regulations

8. Are there any import/export regulations?

Import and export is primarily regulated by the East African Community Customs Management Act, 2004. This is a regional statute enacted by the East African Legislative Assembly and regulates the levying of import taxes on goods imported into the EAC member states.

In addition, Kenya has enacted the Miscellaneous Fees and Levies Act, 2015 and the Excise Duty Act, 2015 which impose certain levies and provide regulations regarding imports and exports into and out of Kenya.

The Value Added Tax Act also provides for the levying of VAT on imports of goods and services into Kenya.
9. What are the main laws regulating employment relations?

Labour matters in Kenya are governed by various pieces of legislation namely the:

- Employment Act, 2007 (Employment Act);
- Labour Relations Act, 2007;
- Labour Institutions Act, 2007;
- Regulation of Wages (General) Order, which is subsidiary legislation under the Labour Institutions Act, 2007;
- Employment and Labour Relations Court Act, 2011;
- Work Injury Benefits Act, 2007; and

Terms and conditions of employment are regulated under the Employment Act and the Regulation of Wages (General Order). The Employment Act provides for the minimum terms and conditions of employment.

However, an employer and employee are free to enter into contractual arrangements providing for terms more favourable than the prescribed minimum.

The Employment Act does not apply to independent contractors; their terms of services, rights and obligations are regulated by contract.

10. Is a written contract of employment required? If so, what terms must be included in it? Do any implied terms and/or collective agreements apply to the employment relationship?

Yes. The Employment Act provides that a contract of service for a period or a number of working days which amount in the aggregate to the equivalent of three months or more must be in writing. The written contract of service must state particulars of employment, which may be given to the employee in instalments but not later than two months after the beginning of the employment.

Below are some of the requirements to be included in employment contracts:

- name, age, permanent address and gender of the employee;
- name of employer;
- job description;
- date of commencement of employment;
- form and duration of the contract;
- place of work;
- hours of work;
- remuneration, scale or rate of remuneration;
- details of other benefits;
- the intervals at which remuneration is paid;
- the date on which the employee’s period of continuous employment began, taking into account any employment with a previous employer which counts towards that period;
- entitlement to annual leave, including public holidays and holiday pay in sufficient detail to enable accrued holiday pay on termination of employment to be precisely calculated;
- sick leave entitlement;
- pension and pension schemes;
- grievance procedures;
- length of notice for termination of contract; and
- where employment is not for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end.

With the exception of sick leave, pension and pension schemes, which may be set out in another document that is reasonably accessible to the employee, all the above matters are required to be in a single document.

Certain human resource policies are required by law. An employer who employs more than 50 employees must have a disciplinary policy. Further, an employer who has more than 20 employees is required to have a policy on sexual harassment.

An employer must also have a safety and healthy policy pursuant to the provisions of the Occupational and Health Safety Act. Orders issued pursuant to the Labour Institutions Act, and relevant to specific classes of employees (such as security guards, agricultural workers or pump attendants), set out the minimum entitlements and conditions of employment that must be adhered to when engaging employees within such specific classes of employment.
11. Do foreign employees require work permits and/or residency permits?

Yes. Foreign employees must obtain work permits before starting work in Kenya. Immigration laws in Kenya make it obligatory for an employer to obtain the appropriate work permit (or special pass) on behalf of each foreign national intending to work in the country.

Under the Immigration Act, 2013, any person who employs a foreign national in a capacity in which the foreign national is not authorised to be employed, commits an offence which, upon conviction, attracts a fine of KES 500,000 or to imprisonment for a term not exceeding three years or to both.

There are nine categories of work permits including:

- **Class A permit** - issued to persons who intend to engage, whether alone or in partnership, in prospecting for minerals or mining in Kenya and who have obtained or are assured of obtaining any licence, or derived from a property, pension or annuity payable from sources in Kenya, or derived from sufficient investment capital to produce such assured income that will be brought into and invested in Kenya; and undertakes not to accept paid employment of any kind.

- **Class B permit** - issued to those who intend to engage in the business of agriculture and animal husbandry in Kenya and who have acquired permission to hold an interest in land in Kenya and have sufficient capital and resources for the said purpose.

- **Class C permit** - issued to members of a prescribed profession who intend to practise that profession, whether alone or in partnership, in Kenya and who possess the prescribed qualifications and have sufficient capital or resources for the purpose.

- **Class D permit** - issued to persons offered specific employment by a specific employer, and who are qualified to undertake that employment.

- **Class F permit** - issued to persons who intend to engage, whether alone or in partnership, as a specific manufacturer in Kenya and have obtained or are assured of obtaining any licence, registration or other authority or permission as may be necessary and have sufficient capital and resources for the said purpose.

- **Class G permit** - issued to investors in specific trade, business or consultancy.

- **Class I permit** - issued to persons who are members of societies approved by the Government and engage in religious and charitable activities.

- **Class K permit** - issued to persons who are not less than 35 years old, have an assured annual income that is derived from a source other than employment, occupation, trade, business or profession and being an income that is derived outside of Kenya but remitted in Kenya; derived from a property, pension or annuity payable from sources in Kenya, or derived from sufficient investment capital to produce such assured income that will be brought into and invested in Kenya; and undertakes not to accept paid employment of any kind.

- **Class M permit** - issued to persons granted refugee status or any spouse of such refugee who intends to take up employment or engage an occupation, trade, business or profession.

The main consideration in issuing work permits is whether or not the presence of the foreigner will be of benefit to Kenya. In 2019, the Department of Immigration introduced a Kenyanisation policy which seeks to reserve Kenyan jobs for Kenyan nationals. As such, there has been a notable increase in the rejection rate for Class D (Employment) Work Permits.

12. Are employees entitled to management representation and/or to be consulted in relation to corporate transactions (such as redundancies and disposals)?

While the Employment and Labour Relations Court has acknowledged that there is no express provision under the Employment Act to consult, it has held that the requirement to have consultations is implied by the provisions of law relating to redundancy and it is necessary for an employer to consult with its employees in order to prove justifiability of its intention to declare redundancies.

The Employment and Labour Relations Court have held that during the consultation period an employer must explain to the employees:

- the reasons for the redundancy and the likely extent of the redundancies, the criteria to be used in selecting the employees who will be declared redundant, any alternative action that could be taken instead of the redundancies, and the package to be paid to the employees who will be declared redundant.

The employees should also be allowed an opportunity to make representations (although they are not explicitly entitled to management representations). Further it is recommended that employers consider any other roles that may be available to individual employees.

In cases where an employer has entered into a collective bargaining agreement (CBA) with a trade union which recognises that the staff members of that employer have the right to unionise, any entitlement that a unionised employee would have either to management representation or consultations in the event of a redundancy (or other termination of employment) would be governed by the terms of the CBA that was negotiated.

13. How is the termination of individual employment contracts regulated?

An employment contract may be terminated for the following reasons:

**Gross misconduct or fundamental breach**

An employer may terminate an employee’s employment contract for gross misconduct or fundamental breach of the employment contracts.

The Employment Act considers the following acts as constituting gross misconduct:

- being absent from work without leave or lawful cause;
- being intoxicated at the workplace;
- wilfully neglecting to perform duties under the employment contract;
- using abusive language or behaving in an insulting manner to the employer or other person of authority;
- committing, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of the employer or its property;
- failing to obey a directive from the employer that is within the scope of duties;
- being arrested for an offence punishable by imprisonment and not being released within 14 days of the arrest.

If an employer wishes to terminate an employee for gross misconduct or fundamental breach, it must follow due process. This entails:

- explaining to the employee in a language he or she understands, the reasons for the termination;
- allowing the employee to have a representative of his or her choice present during the explanation; and
- hearing and considering any representations that the employee and the representative, if any, may make regarding the employee’s termination.

After following due process, an employer who finds an employee guilty of gross misconduct may summarily dismiss the employee. Summary dismissal means terminating the employment without notice or with less notice than the employee is statutorily or contractually entitled to.

**Poor performance**

For an employment to be terminated on account of poor performance, the following actions must precede the termination:

- the employer must demonstrate that there has been an appraisal of the employee’s performance over a period with the participation of the employee, and there has been no improvement;
- a performance improvement plan should be agreed, containing specified targets and timelines and allowing for a reasonable period of time (a minimum of two months) for the employee to improve his or her performance; and
- assessment of the employee’s performance over the specified period of time should clearly demonstrate that the employee has failed to achieve the targets set out in the performance improvement plan.
Before terminating the contract of employment for poor performance, an employer must:

- explain to the employee in a language he or she understands, the reasons for the termination;
- allow the employee to have a representative of his or her choice present during the explanation; and
- hear and consider any representations that the employee and the representative, if any, may make regarding the employee's termination.

After following due process, the employer may terminate the employee's employment by giving notice or paying wages in lieu of notice.

**Physical incapacity**

An employer may terminate the services of an employee on the ground of physical incapacity due to illness or physical disability. Before doing this, an employer must provide evidence to demonstrate that the employee is incapable of carrying out his work and that there are no suitable or alternative opportunities available to the employee.

Before terminating the contract of employment on the grounds of physical incapacity, an employer must:

- explain to the employee in a language he or she understands, the reasons for the termination;
- allow the employee to have a representative of his or her choice present during the explanation; and
- hear and consider any representations that the employee and the representative, if any, may make regarding the employee's termination.

After following due process, the employer may terminate the employee's employment by giving notice or paying wages in lieu of notice.

**Redundancy**

An employer may implement redundancies for various reasons, including the following:

- when there is an economic downturn caused by factors beyond the control of an employer that lead the employer to contemplate reducing staff numbers;
- where based on commercial judgment an employer considers that there are too many employees employed in a particular area or overall and there is need to reduce numbers;
- where there is mechanization of the modes of production that reduces the need for staff number;
- where there is mechanization of the modes of production that reduces the need for staff number; or
- where there is reorganization of the business or a new business strategy or model is adopted in order to run the business more efficiently and/or profitably and this involves reduction of staff number.

There are mandatory procedural requirements that an employer must comply with before terminating an employee's employment on account of redundancy:

- The employer must notify the labour officer in charge of the areas where the employee, the affected employee and/or the relevant labour union, (if the affected employee is a member of a union) of the reasons for and extent of the intended redundancy;
- The notices of intended redundancy must be issued at least one month before the intended date of termination on account of redundancy;
- The employer must have consultations with the employees;
- Where some of the employees of a particular class will be declared redundant, the employer must, in the selection the employees to be declared redundant, have due regard to seniority, skill, ability and reliability of the employees.

After following the above process, the employer may terminate the contract of employment by giving notice or paying wages in lieu of notice. In addition to the foregoing, an employee whose services have been terminated on account of redundancy is also entitled to severance pay (which is calculated at the rate of at least 15 days for every completed year of service) and payment of all leave accrued but not taken.

**Expiration of contract**

A fixed term contract of employment terminates automatically when the end date thereof reaches.

**Remedies for unfair dismissal**

Whether or not an employer conducts the termination in a fair manner, an employee is entitled to dispute the lawfulness or fairness of his or her termination.

The general rule is that an employee's employment must be procedurally and substantively fair. Even where termination is allowed pursuant to an employment contract and by giving due notice, the employee still has the ability to make a claim for unfair termination.

If the Employment and Labour Relations Court finds that the termination was not justified or was unfair, it may order the employer to:

- reinstate or re-engage the employee in a position comparable to that in which the employee was employed prior to his or her termination;
- pay the employee wages or salary in lieu of notice that should have been given;
- pay the employee the equivalent of up to 12 months gross monthly wages or salary as compensation for unlawful termination; or
- make an order for damages payable to the employee in instances where the employer's actions were particularly egregious to the employee (for example discrimination).

**14. Are redundancies and mass layoffs regulated?**

Yes, the requirements have been set out above.

**Tax**

15. When is a business vehicle subject to tax in Kenya and what are the main taxes that apply to a business?

The following laws regulate tax in Kenya:

**Income Tax Act**

The Income Tax Act, Chapter 470 of the Laws of Kenya is the law providing for the levying of income tax for businesses and individuals as well as other taxes such as capital gains tax (CGT), employment taxes etc. The Income Tax Bill, National Assembly Bill No. 12 of 2020 (the Income Tax Bill), was published by the government on 22 May 2020 and thereafter withdrawn for fresh publication. It is not currently clear when the Income Tax Bill is intended to be republished and passed into law.

The Income Tax Bill proposes to review the ITA in order to make it productive, simple to comply with, supportive to the growth of the economy as well as to embrace international best practice aligned with changes in the present business environment.

**Tax Procedures Act**

The Tax Procedures Act, 2015 is the substantive law for tax administration in Kenya. It provides, among others, for the appointment of tax representatives who are duly authorised to represent taxpayers in tax disputes are provided for in the Tax Appeals Tribunal Act.
**Value Added Tax Act**

The Value Added Tax Act, 2013 (VAT Act) imposes VAT on various supplies of goods and services in Kenya.

The VAT Act came into force in September 2013 and has been amended since then by various statutes in order to achieve one of the intentions of the VAT Act which was to reduce the number of exempt and zero rated items as these were eroding the tax base for VAT. However, since its enactment, the list of exempt items has increased by two thirds.

**The Excise Duty Act**

The Excise Duty Act, 2015 (Excise Duty Act) imposes excise duty on certain goods and services such as money transfer services, mobile cellular phone services, alcoholic products, tobacco products and fuels.

This Act came into force in December 2015 and repealed the Customs and Excise Duty Act, which had been in force since 1978. The various provisions of the repealed Act are now contained in various statutes including the Excise Duty Act, the Miscellaneous Fees and Levies Act and the East African Community Customs Management Act.

**The Miscellaneous Fees and Levies Act**

The enactment of the Miscellaneous Fees and Levies Act, 2016 reintroduced certain levies that were previously provided for in the repealed Customs and Excise Duty Act.

The Act imposes an ad valorem Railway Development Levy (RDL) at (2%) and an ad valorem Import Declaration Fee (IDF) at (3.5%) on all goods imported into Kenya (although certain exemptions are available) as well as an export levy on the export of specified products, such as animal hides and skins, and waste and scrap metal. A reduced rate of RDL and IDF at 1.5% is available for approved manufacturers importing raw materials and intermediate products.

**East African Community Customs Management Act**

Customs matters and the imposition of import duty on imports into East Africa are uniformly governed by the East African Community Customs Management Act, 2004.

Generally, import duty on finished goods is levied at 25% on finished products and at 10% for intermediaries other than raw materials.

The following are the main taxes that apply to businesses in Kenya:

**Income (or corporation) tax**

Under the ITA, Chapter 470 Laws of Kenya, income is taxed in Kenya provided that it accrues in or is derived from Kenya, irrespective of the tax-residence of the business vehicle. The taxation regime can therefore be said to be source-based.

Business profits for a company are taxed at different rates depending on whether the company is tax resident in Kenya or not. Tax residence for a company means that:

- the body has been incorporated under Kenyan laws; or
- the company is tax resident for a period of, or periods exceeding in the aggregate, 91 days in any 12 month period commencing or ending in the year of income; or
- the body has been declared by the Cabinet Secretary for the National Treasury by notice in the Gazette to be resident in Kenya for any year of income.

A company that is tax-resident in Kenya is taxed on its business profits at 30%, while a company which is not tax-resident in Kenya but has a permanent establishment (PE) in Kenya is taxed on its profits at the rate of 37.5%.

The Finance Act 2021 amended the definition of a PE in Kenya to mean:

i. a fixed place of business through which business is wholly or partly carried on and includes a place of business, a branch, an office, a factory, a workshop, a mine, an oil or gas well, a quarry or any other place of extraction or exploitation of natural resources, a warehouse in relation to a person whose business is providing storage facilities to others, a farm, plantation or related activities are carried on and a sales outlet;

ii. a building site, construction, assembly or installation project any supervisory activity connected to the site or project, but only if it continues for a period of more than 183 days;

iii. the provision of services, including consultancy services, by a person through employees or other personnel engaged for that purpose, but only where the services or connected business in Kenya, continue for a period of, or periods exceeding in the aggregate, 91 days in any 12 month period commencing or ending in the year of income concerned;

iv. an installation or structure used in the exploration for natural resources; Provided that the exploration continues for a period of not less than 91 days; and

v. a dependent agent of a person who acts on their behalf in respect of any activities which that person undertakes in Kenya including habitually concluding contracts, or playing the principal role leading to the conclusion of contracts that are routinely concluded without material modification by the person.

The definition of PE excludes activities that are of a preparatory or auxiliary character such as (a) the use of facilities solely for the purpose of storage, or display of goods or merchandise belonging to the enterprise; (b) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of storage, or display; (c) the maintenance of a stock of goods or merchandise belonging to the enterprise solely for the purpose of processing by another enterprise; (d) the maintenance of a fixed place of business solely for the purpose of purchasing goods or merchandise, or collecting information, for the enterprise; (e) and the maintenance of a fixed place of business solely for the purpose of carrying on, for the enterprise, any other activity.

**Double taxation treaties**

Kenya currently does not have a wide double taxation treaty network. Double taxation agreements (DTAs) are in force with Canada, Denmark, France, Germany, India, Iran, Korea, Norway, Qatar, South Africa, Sweden, the United Arab Emirates, the UK, Zambia and Seychelles. A number of other treaties, including for East African Community member states, have been signed but are yet to be ratified.

**Withholding tax on the payment of dividends and interest**

Withholding tax (WHT) is applied to a wide range of payments made to both residents and non-residents such as management, technical or professional fees; royalties; consultancy and agency fees; and fees earned from entertainment, sport and promotion.

The WHT rate on payment of dividends to non-residents is 15% (and 5% for Kenya residents) and on payment of qualifying interest is 15%. Other withholding taxes apply on management fees, royalties and other service payments to non-residents. These rates may be lower where there is a DTA between Kenya and the country of residence of the trading partner.

**Distribution tax**

With effect from 1 January 2019, companies that pay dividends out of untaxed profits and gains will be subject to a distribution tax equivalent to the resident corporate tax rate of 30%. The new regime replaces the previous compensating tax regime. Payments of dividends out of income that is exempt under the ITA are not subject to this tax.
Repatriation of profits out of Kenya

Given the absence of foreign exchange controls in Kenya, repatriation of any profits and dividends is possible subject to the payment of relevant taxes payable. Note that the new Income Tax Bill, which is yet to become law, proposes a tax of 10% on repatriated income for branches of non-resident companies.

Capital gains tax

Capital gains tax (CGT) was re-introduced with effect from 1 January 2015. A capital gain is the net gain from the disposal of capital assets. It is chargeable on the whole of a gain that accrues to a company or an individual on or after 1 January 2015 on the transfer of property situated in Kenya, whether or not the property was acquired before 1 January 2015. The rate of tax is 5% of the net gain and is a final tax that cannot be offset against other income taxes.

For a company, the ‘property’ whose transfer is subject to CGT covers all property and includes immovable and movable property, as well as leaseholds, intellectual property (IP) and goodwill, as well as stocks and bonds. For an individual, ‘property’ means land in Kenya as well as marketable securities in Kenya.

The reintroduced CGT regime has had several teething problems owing largely to the fact that the 1985 CGT framework was reintroduced with mostly cosmetic changes. For example, it currently fails to factor in inflation and provides no indexation relief, although this is to some extent compensated for with the low rate of the tax.

Certain transactions involving property dealings do not constitute a transfer for capital gains purposes. These include:

- the transfer of property for the sole purpose of securing a debt or a loan;
- the issuance by a company of its own shares or debentures;
- the vesting of property in a personal representative of a deceased person by operation of law;
- the transfer of property by an individual to a spouse or former spouse as part of a divorce settlement or bona fide separation agreement, including a transfer to ‘immediate family’ (i.e. children of the parties) provided this is done within two years of death or, if subject to a court case, two years from determination of the case;
- the transfer of property between spouses;
- the transfer of property to immediate family;
- the transfer of property where spouses or a spouse and immediate family own 100%; and
- gains realised on the sale or transfer of listed securities with effect from January 2016. Listed securities refer to securities that are listed and traded on any securities exchange approved under the Capital Markets Authority (Cap 485A of the Laws of Kenya) and any licenced securities exchange (i.e. the Nairobi Securities Exchange).

The Finance Act 2019 introduced a new exemption for CGT i.e. where a transfer of property is necessitated by a transaction involving the incorporation, recapitalisation, acquisition, amalgamation, separation, dissolution or similar restructuring where the transfer is:

- a legal or regulatory requirement;
- as a result of a directive or compulsory acquisition by Government;
- an internal restructuring within a group which does not involve transfer of property to a third party; or
- in the public interest and approved by the Cabinet Secretary.

Minimum tax

The Finance Act, 2020 introduced a minimum tax payable at the rate of 1% of the gross revenues of companies subject to corporation tax, effective 1 January 2021.

The minimum tax will be payable where the instalment tax that would have ordinarily been payable by the entity is lower than the minimum tax whilst instalment tax will be payable if it is higher than the minimum tax. The minimum tax is a final tax which cannot be carried forward and offset against future taxes, unlike instalment taxes.

However, in a ruling delivered by the High Court on 19 April 2021 in Constitutional Petition No. E005 of 2021, the High Court in Machakos granted conservatory orders restraining the Kenya Revenue Authority (the KRA) from enforcement of minimum tax pending the hearing and determination of a petition challenging minimum tax filed at the High Court (the Petition). The case is still pending determination.

Digital service tax

Effective 1 January 2021, a new Digital Services Tax (DST) was introduced and is payable by a person whose income arises from the provision of services derived from or accruing from a business carried out over the internet or an electronic network including through a digital marketplace at the rate of 1.5% of the gross transaction value.

DST is an advance tax for residents and non-residents with permanent establishments in Kenya, and a final tax for non-residents without a permanent establishment in Kenya. The DST will be due at the time of the transfer of the payment for the services to the service provider and it is expected that the Kenya Revenue Authority (KRA) will appoint digital service tax agents to assist with the collections.

16. How are the following taxed:

- Dividends paid to foreign corporate shareholders?
- Dividends paid to foreign shareholders are subject to withholding tax at the non-resident rate of 15% (lower if provided for in a double tax treaty or to a member state of the East African Community), which is a final tax.
- Dividends received from foreign companies?
- Foreign dividends received by a Kenyan tax resident are not taxable in Kenya.
- Interest paid to foreign corporate shareholders?
- Interest payments to foreign shareholders whether or not they have a permanent establishment in Kenya are subject to withholding tax at the rate of 15% (lower if provided for in a double tax treaty).
- IP royalties paid to foreign corporate shareholders?
- IP royalties paid to foreign shareholders with a permanent establishment in Kenya are subject to a withholding tax at the rate of 5% of the gross amount payable. IP royalties paid to foreign shareholders without a permanent establishment in Kenya are subject to a withholding tax at the rate of 15% of the gross amount payable (lower if provided for in a double tax treaty).

17. Are there any thin capitalisation rules (restrictions on loans from foreign affiliates)?

The Finance Act, 2021 changed the rules of thin capitalization such that (a) the rules now apply to all businesses with loans and not just companies controlled by non-resident persons, and (b) the manner of computation is based on Earnings before Interest, Taxes, Depreciation, and Amortization (EBITDA).

Debt includes all debt, including local debt such as bank overdrafts. 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 of any realised exchange losses.

In addition to thin capitalisation rules, Kenyan incorporated companies that are controlled by a non-resident person alone or together with four or fewer other persons, are subject to a ‘deemed interest’ on loans that are provided interest-free by the non-resident person controlling the company or a non-resident associate of the non-resident person controlling the company. KRA prescribes the rate of deemed interest from time to time.

KRA would thus deem interest on any such interest free loans and a withholding tax at the rate of 15% would be payable. The implication is that withholding tax is payable to the KRA on the deemed interest, although the deemed interest does not actually have to be paid by the company to the lender.
18. Must the profits of a foreign subsidiary be imputed to a parent company that is tax resident Kenya (controlled foreign company rules)?

Yes, where an ultimate parent entity of a multinational enterprise group is tax resident in Kenya, the entity will be required to submit to the Commissioner a return describing the group’s financial activities in Kenya, where its gross turnover exceeds the prescribed threshold, and in all other jurisdictions where the group has a taxable presence, not later than twelve months after the last day of the reporting financial year of the group. The information to be included in the Return includes information on revenue, profit or loss before income tax paid, income tax accrued, stated capital, accumulated earnings, number of employees and tangible assets other than cash or cash equivalents with regard to each jurisdiction in which the group operates.

19. Are there any transfer pricing rules?


The transfer pricing rules and regulations are only applicable to companies with related non-resident entities. A branch of a foreign company will also be subject to these rules as well as transactions between entities in preferential tax zones such as special economic zones and export processing zones and resident entities. The Transfer Pricing Rules provide guidelines to be applied by related enterprises in determining the arm’s length prices of goods and services in transactions involving them and to provide administrative procedures to be followed in the implementation of Transfer Pricing Rules, including the documents that the Commissioner of Domestic Taxes may require from enterprises in determining the arm’s length prices.

There are no specific transfer pricing penalties. However, the Commissioner of Domestic Taxes can conduct an audit, make adjustments to the taxable profit, and demand tax where applicable. The Tax Procedures Act provides that the failure to keep, maintain or retain a document required by a tax law without reasonable cause shall be liable to a penalty equal to the higher of:

- 10% of the tax payable by the person under the tax law to which the document relates and to the reporting period to which the failure relates; or
- where no tax is payable in the reporting period, the penalty shall be KES 100,000.

20. How are imports and exports taxed?

Customs duty

The duty is charged on goods imported into Kenya depending on their assessed customs value. The East African Community Customs Management Act provides for several methods of ascertaining the customs value of goods imported into the EAC for purposes of levying customs duty and the transaction value method is the primary method for ascertaining the customs value. The transaction value method generally relies on the declared cost, insurance and freight (CIF) value of the goods imported. The applicable customs duty rate is prescribed in the EAC Custom External Tariff, 2017, commonly referred to as the CET Code.

Value added tax

Value added tax (VAT) is chargeable on goods and services imported into Kenya unless the goods or services are exempted from VAT. The applicable rate could be the standard rate of 16% or the zero rate. Zero rating and exemption from VAT is granted sparingly to essential goods and services. The taxable value of imported goods for purposes of VAT is the sum of:

- the value of the goods ascertained for the purpose of customs duty, in accordance with the East African Community Customs Management Act, whether or not any customs duty is payable on the goods;
- to the extent not included above, (a) the cost of insurance and freight incurred in bringing the goods to Kenya; and (b) the cost of services treated as part of the imported goods; and
- the amount of customs duty, if any, paid on the goods.

The VAT Act provides for zero rating of services exported out of Kenya. For services to be deemed to have been exported out of Kenya, the direct beneficiary of the services must be a foreign person and the services must be used or consumed outside Kenya.

Import declaration fee

An import declaration fee (IDF) is payable at the rate of 3.5% of the customs value of all goods imported into Kenya for home use (use in Kenya). In this respect, every importer of goods is required to complete an import declaration form.

The Miscellaneous Fees and Levies Act prescribes a few specific exemptions from IDF.

Additionally, an exemption is available on the importation of any other goods provided for in the Act.

Railway development levy

A railway development levy payable at the rate of 0.5% of the customs value of goods imported into Kenya for home use (use in Kenya). Exemption from this fee is only available to very few specific goods prescribed in the Miscellaneous Fees and Levies Act. A lower rate of 1% is available on the importation of raw materials and intermediary goods by approved manufacturers.

Additionally, an exemption is available on the importation of any other goods as provided for in the in the Miscellaneous Fees and Levies Act.

Excise duty

Excise duty is chargeable on the manufacture and importation of goods which are classified as excisable goods pursuant to the Excise Duty Act, 2015, at the rates prescribed in the Excise Duty Act.

Export levy

An export levy is payable on certain goods exported out of Kenya as specified in the Excise Duty Act. Such goods include hides, skins and other animal products used in the production of leather and fur clothing, and scrap metal. The applicable rate of the export levy is an ad valorem rate based on the customs value of the goods. The export levy does not apply to goods exported to the EAC partner states.

Anti–adulteration Levy

The Act also provides for an anti–adulteration levy imposed on the customs value for Kerosene imported into Kenya’s customs territory. The levy is Kenya Shillings eighteen (KES 18) imposed on the customs value of kerosene.

Motor vehicle processing fee

The Act imposes a processing fee of Kenya Shillings ten thousand (KES 10,000) on all motor vehicles excluding motor cycles imported or purchased duty free to be levied before clearance as provided in the East African Community Customs Management Act, 2004.

21. Is there a wide network of double tax treaties?

Kenya currently does not have a wide double taxation treaty network. Double taxation agreements (DTAs) are in force with Canada, Denmark, France, Germany, India, Iran, Korea, Norway, Qatar, South Africa, Sweden, the United Arab Emirates, the UK, Zambia, and Seychelles. A number of other treaties, including for East African Community member states, have been signed but are yet to be ratified.

22. In what circumstances are employees taxed in Kenya and what criteria are used?

Income tax is charged for each year of income on all the income of a person, whether resident or non-resident, which accrued in or was derived from Kenya.

An individual is resident for tax purposes if:

- he or she has a permanent home in Kenya and was present in Kenya for any period in a particular year of income under consideration; or
- he or she has no permanent home in Kenya but:
  - was present in Kenya for a period or periods amounting in the aggregate to more than 183 days or more in that year of income; or
  - was present in Kenya in that year of income and in each of the two preceding years of income for periods averaging more than 122 days in each year of income.

Anti–adulteration Levy

The Act also provides for an anti–adulteration levy imposed on the customs value for Kerosene imported into Kenya’s customs territory. The levy is Kenya Shillings eighteen (KES 18) imposed on the customs value of kerosene.
A resident individual is liable to tax on his or her world-wide income arising from his or her employment, regardless of where it is paid or where the services were rendered. A non-resident is only liable to tax for the income derived from Kenya.

23. What income tax and social security contributions must be paid by the employee and the employer during the employment relationship?

A key requirement in the remittance of taxes and other mandatory deductions is the registration and obtaining of a Personal Identification Number (PIN) from the Kenya Revenue Authority. The PIN is required for the following transactions:

- incorporation of companies;
- registration of property titles and stamping of instruments;
- approval of plans and payments to the county authorities;
- registration with the National Social Security Service and National Hospital Insurance Fund;
- registration of motor vehicles, transfer of motor vehicles, and licensing of motor vehicles;
- registration of business names;
- underwriting of insurance policies;
- trade licensing;
- importation of goods and customs clearing and forwarding;
- payment of deposits for power connections;
- all contracts for the supply of goods and services to government ministries and public bodies;
- opening accounts with financial institutions and investment bank;
- registration and renewal of membership by professional bodies and other licensing agencies;
- registration of mobile cellular pay bill and till numbers by telecommunication operators.

Pay as you earn and personal income tax returns

Pay as you earn (PAYE) is the method of deducting income tax from salaries and wages. It applies to all income and benefits from any employment (namely wages, salaries, bonuses, commissions, directors’ fees and taxable benefits).

National Social Security Fund

Social security contributions are made to the National Social Security Fund (NSSF). Participation in this fund is mandatory and is intended to provide a State retirement benefit for salaried workers. Contribution is made by both the employer and the employee. The employee’s portion is deducted from his or her salary and the total amount is paid by the employer to NSSF.

Under the current NSSF regime, 12% of an employee’s monthly earnings (with 6% deducted from the employee’s earnings and 6% drawn from the employer) should be contributed into the pension fund established by the Act. This is subject to a maximum of KES 2,160 for employees earning above KES 18,000.

Currently, the upper earning limit (UEL) is KES 18,000 while the lower earnings limit (LEL) is KES 6,000. The contributions relating to the earnings below the LEL (a maximum of KES 720) are credited to what is known as a Tier I account while the balance of the contribution for earnings between the LEL and the UEL (up to a maximum of KES 1,440) is credited to what is known as a Tier II account.

The NSSF regime also provides a full opt-out option for employers to pay contributions in respect of Tier II contributions into a contracted-out scheme that it participates in or has established. Such a scheme must have been approved under a Reference Scheme Test set out by the Retirement Benefits Authority. In this case, pensionable earnings that are below the statutory wage are subject to contributions to the NSSF and those that are above the statutory wage become subject to contributions to the voluntary scheme.

(Due to an existing court case in which the lawfulness of the above NSSF rates has been challenged, the NSSF has not demanded compliance with the above rates of contribution. Accordingly, some employers are voluntarily deducting and remitting contributions at the above rates while others are deducting and remitting contributions at the old rates (i.e. KES 400/s of which KES 200/s is deducted from the employee’s salary and KES 200/s is contributed by the employer).

National Hospital Insurance Fund

Each employee contributes a sum, depending on his or her salary, that must be deducted by the employer from his or her salary and submitted to the National Hospital Insurance Fund. The contributions are used to offset the costs of medical treatment, but they only cover a fraction of actual costs.

Competition

24. Are restrictive agreements and practices regulated by competition law? Is unilateral (or single firm) conduct regulated by competition law?

The Competition Authority

Competition law in Kenya is regulated by the Competition Act, No. 12 of 2010 (the Competition Act). The Competition Act is enforced by the Competition Authority of Kenya (the Competition Authority) and the Competition Tribunal, which hears appeals against decisions made by the Competition Authority.

Restrictive agreements and practices

The Competition Act applies to all economic activity within, or having an effect in Kenya. Part 3 of the Competition Act regulates restrictive trade practices and prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings or concerted practices by undertakings which have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya or a part of Kenya unless they are exempt in accordance with the Competition Act.

Agreements, decisions and concerted practices contemplated include agreements concluded between parties in a horizontal relationship or parties in a vertical relationship or both.

Unilateral conduct

Unilateral conduct, such as abuse of dominance and abuse of buyer power, is prohibited by the Competition Act.

Exemptions

The Competition Act allows undertakings to apply for an exemption from the Competition Authority in respect of any category of agreement, decision or practice that is considered to be a restrictive trade practice under the Competition Act. The Competition Authority may grant an exemption if it is satisfied that there are exceptional and compelling reasons of public policy as to why the agreement, decision or concerted practice should be exempted. However, conduct which amounts to an abuse of dominance or abuse of buyer power cannot benefit from the exemption process.

In addition, the Competition (General) Rules, 2019 (the Competition Rules) contains block exemption guidelines (the Block Exemption Guidelines) in respect of franchise agreements, stadia and sport branding rights agreements, content development and broadcasting agreements and one-off sporting and promotional events. The Block Exemption Guidelines exempt the category of agreements listed above from the prohibition on restrictive trade practices in the Competition Act provided that they meet the criteria prescribed in the Block Exemption Guidelines. Parties who have conducted a self-assessment and fall within the provisions of the Block Exemption Guidelines are required to notify the Competition Authority that their agreement meets the Block Exemption Guidelines prior to execution of the agreement.

25. Are mergers and acquisitions subject to merger control?

The Competition Act deems a merger to have occurred when one or more undertakings, directly or indirectly, acquire or establish, direct or indirect control over the whole or part of the business of another undertaking.
The Competition Rules consider that, among others, the following categories of transactions do not qualify as mergers:

i. joint ventures that are not full function;
ii. the appointment of a receiver or administrator or entry into an arrangement with creditors that does not result in a change of control;
iii. the acquisition of an additional interest in an undertaking by an acquiring undertaking that already controls the undertaking in question (in a manner contemplated under the Competition Act) unless the transaction results in the transfer from joint control to sole control;
iv. the purchase of current assets in the ordinary course of business; and
v. internal restructurings between a holding company and its wholly owned subsidiaries or between subsidiaries which are wholly owned by undertakings belonging to the same group.

The merger thresholds prescribed by the Competition Rules are outlined in the table below:

<table>
<thead>
<tr>
<th>MERGERS NOT REQUIRING APPROVAL OF THE COMPETITION AUTHORITY</th>
<th>MERGERS SUBJECT TO AN EXCLUSION APPLICATION</th>
<th>MERGERS REQUIRING APPROVAL</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Mergers where the combined turnover or assets of the merging parties (whichever is higher) does not exceed KES 500 million.</td>
<td>• Mergers where the combined turnover or asset value of the merging parties (whichever is higher) is between KES 500 million and KES one billion.</td>
<td>• Mergers where the minimum combined turnover or asset value of the merging parties (whichever is higher) is KES one billion shillings and the turnover or asset value of the Target (whichever is higher) exceeds KES 500 million.</td>
</tr>
<tr>
<td>• Mergers which meet the COMESA Competition Commission Merger Notification threshold and at least two-thirds of the turnover or assets (whichever is higher) is not generated or located in Kenya.</td>
<td>• Transactions where the combined turnover or asset value of the merging parties (whichever is the higher) is above KES one billion but the turnover or asset value (whichever is the higher) of the target is less than KES 500 million.</td>
<td>• Where the turnover or assets (whichever is the higher) of the acquiring undertaking is above KES 10 billion and the merging parties are in the same market or can be vertically integrated unless the transaction is notifiable to the COMESA Competition Commission.</td>
</tr>
<tr>
<td>• Transactions involving firms engaged in prospecting in the carbon based mineral sector irrespective of asset value.</td>
<td>• Transactions involving firms engaged in prospecting in the carbon based mineral sector, if the value of the reserves, the rights and associated assets to be held as a result of the merger exceeds KES 10 billion.</td>
<td></td>
</tr>
</tbody>
</table>

**Merger Filing Fees**

The Competition Authority imposes merger filing fees based on the combined turnover or assets of the merging parties (whichever is higher).

<table>
<thead>
<tr>
<th>COMBINED TURNOVER/ASSETS OF THE MERGING PARTIES</th>
<th>FILING FEE PAYABLE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exclusion applications</td>
<td>No filing fee payable</td>
</tr>
<tr>
<td>KES One billion and one(1000,000,001) – KES Ten billion (10,000,000,000)</td>
<td>KES One million (1,000,000)</td>
</tr>
<tr>
<td>KES Ten billion and one (10,000,000,001) – KES Fifty billion (50,000,000,000)</td>
<td>KES Two million (2,000,000)</td>
</tr>
<tr>
<td>Above KES Fifty billion (&gt;50,000,000,000)</td>
<td>KES Four million (4,000,000)</td>
</tr>
</tbody>
</table>
A merger, which meets the merger notification threshold under the Competition Rules, must be approved by the Competition Authority prior to its implementation. In the absence of an authorising order by the Competition Authority, the merger will be deemed to have no legal effect and any obligations imposed by the merger agreement will not be enforceable in legal proceedings. In addition, a person who fails to notify a merger to the Competition Authority commits an offence and is liable to conviction to imprisonment for a term not exceeding five years or to a fine not exceeding KES 10 million or both. The Competition Authority may impose a financial penalty of an amount not exceeding 10% of the preceding year’s gross annual turnover in Kenya of the undertaking or undertakings in question, for implementing a merger without approval.

The Competition Authority is further empowered to step in and propose structural and behavioural remedies where a merger raises competition or public interest concerns. In addition, the Competition Authority may require parties to mergers that fall below the exclusion thresholds to seek its approval where it is likely that the merger will substantially prevent or lessen competition; restrict trade or raise public interest concerns.

Intellectual Property

26. Is IP protected in Kenya?

IP laws in Kenya are essentially contained in the following Acts and rules or regulations under these Acts where applicable:

- Constitution of Kenya, 2010 (Constitution);
- Industrial Property Act, 2001;
- Trade Marks Act, 2001;
- Copyright Act, 2001;
- Anti-Counterfeit Act, 2008.

Plant variety protection in Kenya is regulated under the Seeds and Plant Varieties Act (Chapter 326 of the Laws of Kenya) and Regulations under this Act.

Unregistered IP rights, such as trade secrets, are also protected under English Common law, which is applicable in Kenya by virtue of the Judicature Act, Cap II.

The Industrial Property Act, Trade Marks Act and Copyright Act have largely been drafted in line with international best practices as contained in the various international treaties governing IP rights that Kenya is a party to, most notably the Agreement on Trade-Related Intellectual Property (TRIPS). The Anti-Counterfeit Act borrows heavily from the South African Anti-Counterfeit Act.

The Anti-Counterfeit Act, provides a means of enforcement of IP rights relating to trade marks and copyright, where these rights are infringed through counterfeiting activities. It provides for seizure and destruction of counterfeit goods by its inspectors and criminal sanctions and penalties against offenders.

Key government agencies involved in the IP rights landscape in Kenya are the Kenya Industrial Property Institute (KIPI), the Copyright Board of Kenya (KECOBO), the Judiciary and the Anti-Counterfeit Agency (ACA).

To a large extent, the KIPI and KECOBO regulate IP laws in Kenya, exercising their mandates. KIPI is responsible for the granting of trade marks, certification marks, patents, industrial designs and utility models certificates. The Industrial Property Tribunal under the Industrial Property Act hears and determines patent, utility model and design infringement cases. Trade mark infringement disputes are however heard, in the first instance, by the High Court.

In 2020, KECOBO launched the National Rights Registry (NRR) to facilitate the online registration of copyright.

The NRR platform will allow a rights holder to access their work and generate a certificate at any time. Copyright registration is not mandatory in Kenya, but is highly advisable as the certificate can serve as formal proof of ownership of copyright works.

The ACA is fully established and supported by the Government. It is equipped with inspectors drawn from various key government agencies that previously dealt with counterfeiters/piracy who now work with owners of IP rights to identify, seize and destroy counterfeit products. They have powers to enter a premises and seize suspected goods without court orders. The only requirement for court orders is when destroying goods. Once counterfeit activity is discovered, the owner is required to file a complaint on the required form together with a completed indemnity form. Raids can be conducted within two to three days of filing a complaint.

The outbreak of the COVID-19 pandemic has greatly affected the operations of the government agencies mentioned above. In relation to KIPI specifically, there have been delays in receiving search results, examination reports and in filing of documents. KIPI has also experienced an increase in the backlog of matters being handled by the Registrar of Trademarks as hearings are not ongoing.

Consumer Protection

27. Are marketing agreements regulated?

Marketing agreements made between parties are usually made with the intention of dictating the quality of products to be maintained in the market; ascertaining the standardisation of packages and containers used; and regulating the flow of products to the market. These agreements are not regulated by any governmental authority and are commercially based.

28. Are there consumer protection laws and if so, what are they?

The Consumer Protection Act 46 of 2012 (the Consumer Protection Act), which came into force on 14 March 2013, governs consumer protection in Kenya. Prior to its enactment, Kenya did not have a specific law governing consumer protection.

The main objective of the Consumer Protection Act is to provide for the protection of consumers and prevent unfair trade practices in consumer transactions. It generally applies to transactions involving the supply of goods and services, and has specific provisions on certain items such as credit agreements, leases, repairs to motor vehicles and internet agreements.

Notably, there are provisions relating to consumer protection in the Competition Act, which grants the Competition Authority a mandate to carry out inquiries, studies and research into matters relating to competition and to protect the interests and welfare of consumers.

The Consumer Protection Act gives a consumer the right to commence legal action on behalf of a class of people in relation to any contract for the supply of goods or services to the consumer. This right cannot be ousted by any agreement between the parties. The consumer rights include:

- **Implied warranties:** A supplier of goods and services is deemed to warrant that the goods and services are of a reasonably merchantable quality. There are additional implied warranties that are deemed to apply notwithstanding any provisions to the contrary in the agreement.
- **Ambiguities to be interpreted in favour of the consumer:** Any ambiguities in a consumer agreement shall be interpreted in favour of the consumer.
- **Estimates:** If a supplier of goods or services provides an estimate, the supplier cannot charge the consumer an amount that exceeds the estimate by more than 10%, unless additional or different goods or services are provided.
- **Unsolicited goods or services:** Except as provided under the Consumer Protection Act, a recipient of unsolicited goods or services has no legal obligation in respect of their use or disposal.
- **Advertising on internet gaming sites:** Advertisements (including sponsorship relationships) on internet gaming sites that are operated contrary to the law are prohibited.

The Consumer Protection Act provides unfair practices and provides for radical sanctions against a supplier who engages in unfair practices. The following, among others, are deemed to be unfair practices under the Consumer Protection Act:

- making false, misleading or deceptive representations, including representing that goods or services have sponsorship, approval, performance or characteristics that they do not have, and representing that goods or services are of a particular standard, quality, grade, style or model, if they are not;
- a representation that the goods have been used to an extent that is materially different from the fact;
- a representation that a specific price advantage exists, if it does not; and
• making an unconscionable representation. In determining whether a representation is unconscionable some of the matters that will be taken into account include whether the person making the representation knows inter-alia:

• that the consumer is not reasonably able to protect his or her interests due to disability, ignorance, illiteracy, or inability to understand language;
• the price grossly exceeds the price at which similar goods or services are readily available to like consumers;
• there is no reasonable probability of the consumer making payment in full;
• the consumer transaction is excessively one-sided in favour of someone other than the consumer;
• that a statement of opinion is misleading or upon receipt of information or a complaint Authority may initiate investigations into a supply of goods or services. The Competition Act prohibits misleading representations in the course of unconscionable conduct and making false or

• similar, the Competition Act prohibits representation. Prohibited representations would be prescribed by the relevant authority and likely communication or cause to be communicated any

• representation that is prescribed as a prohibited representation.

• The Consumer Protection Act also provides that operators and/or suppliers should not communicate or cause to be communicated any representation that is prescribed as a prohibited representation. Prohibited representations would be prescribed by the relevant authority and likely cover instances such as where a supplier seeks to sell an illegal product.

Similarly, the Competition Act prohibits unconscionable conduct and making false or misleading representations in the course of supplying goods or services. The Competition Authority may initiate investigations into a consumer complaint either on its own initiative or upon receipt of information or a complaint from any person, government agency, Ministry, or consumer body.

29. How are product liability and product safety regulated?

The Competition Act sets out the rights of consumers with respect to product liability, providing for the required standards; liability in respect of unsuitable or defective products; and a mechanism for redressing infringement. Some of the key provisions include that:

• it is an offence for a person to supply goods that are unsafe, banned or which do not comply with a prescribed consumer product information standard, to a consumer;
• it is an offence for a person to supply goods that do not comply with a prescribed product information standard, to a consumer;
• the Competition Authority will require a supplier to act where it appears to the Authority that the goods may cause injury to any person; the supplier has not taken satisfactory action to prevent the goods causing injury; or the goods supplied to the consumer do not comply with a prescribed consumer product safety standard.

The actions required to be taken by the supplier are to:

• recall the goods;
• disclose to the public (or a class of persons) the nature of the defect in the goods; circumstances in which their use is dangerous and the procedures for disposing of the goods; and
• inform the public (or a class of persons) the manner and period within which the supplier undertakes to repair the goods, replace the goods, or refund the consumer the price of the goods;

• where a manufacturer supplies goods and such goods are found to have a defect as a result of which an individual suffers loss or injury, such manufacturer is liable to compensate the individual for the loss or injury suffered.

An individual who suffers loss or damage as a result of defective products may recover compensation through court action. In such an action, the supplier may defend him or herself on the following grounds:

• the defect in the products did not exist at the time of the supply of the goods;
• the defect existed only because there was compliance with a mandatory standard for them;
• the state of scientific or technical knowledge at the time when the supplier was supplied by the actual manufacturer was not such as to enable the defect to be discovered; or
• if the defects were comprised in other finished goods, the specific defects are only attributable to the design of the finished goods, the markings on or accompanying the finished goods; or the instructions or warnings given by the manufacturer of the finished goods.

The Competition Act envisages collaboration between the Competition Authority and other agencies. The Competition Authority is required to consult with the Kenya Bureau of Standards in all matters involving the definition and specification of goods and the grading of goods by quality; and the receipt of notifications from recognised consumer bodies of alleged infringement of the consumer welfare and product liability provisions for the purpose of initiating investigations.

Data Protection

30. Are there specific statutory data protection laws? If not, are there laws providing equivalent protection?

The Data Protection Act, 2019 (the DPA) was assented to in November 2019 and is now the overarching legislation regulating the handling of personal data in Kenya. However, the Constitution, the Access to Information Act and case law by the courts constitute additional sources of law on data protection.

The DPA applies to the processing of personal data by resident and non-resident data controllers and data processors where the data subjects are located in Kenya. It enshrines the obligations of data controllers and data processors in their handling of personal data and provides for a registration regime for data controllers and processors with the Office of the Data Commissioner. The DPA outlines the rights of data subjects including the requirement to obtain the consent of the data subjects in certain circumstances, and mandates adherence to data protection principles by data controllers and data processors. It further includes provisions on cross-border transfer of data that must be complied with by both data controllers and data processors.

The DPA establishes the Office of the Data Commissioner to oversee implementation and enforcement of the DPA. Amongst other duties, the Data Commissioner is tasked with publishing guidance on how certain parts of the DPA are to be interpreted and effected. The Data Commissioner was appointed on 16 November 2020 and has developed some draft data protection guidelines to facilitate the effective implementation of the Data Protection Act.

The Cabinet Secretary in charge of ICT established a Taskforce for the Development of the Data Protection (General) Regulations on 15 January 2021. The Taskforce recently introduced several draft regulations intended to guide the interpretation of the DPA. These are the draft Data Protection General Regulations 2021 (the General Regulations), draft Data Protection (Registration of Data Controllers and Data Processors) Regulations, 2021 (the Registration Regulations) and the draft Data Protection (Compliance and Enforcement) Regulations, 2021 (the Enforcement Regulations) (together the Draft Regulations).

Whilst the Draft Regulations are still at stakeholder participation stage, they will form a key guideline for the enforcement of the Data Protection Regulations.

We anticipate that the Draft Regulations will be adopted within the next 12 months.
31. Are there laws protecting personal information?

The Constitution provides, in Article 31, that every person has the right to privacy which inter alia includes the right to not have information relating to his or her family or private affairs unnecessarily required or revealed. It also includes the right to not have the privacy of an individual’s communications infringed.

The Access to Information Act requires an entity to correct, update or annotate information held on a data subject at his or her request.

Sector laws (such as those governing health, financial transactions and telecommunications) contain provisions requiring service providers to maintain customer data in a secure manner and limits the use and transfer of such data.

Under the DPA, a person is not permitted to use personal data for commercial purposes unless express consent has been given by the data subject. Further, the collection, use and purpose for collection of personal information must be lawful, disclosed and limited; and collection of personal data must be by lawful means in accordance with the provisions prescribed under the DPA.

Fintech

32. Is fintech regulated? If so, how?

There are no sector-specific regulations governing fintech in Kenya. Fintech businesses have to identify and comply with the regulations controlling the specific area of business that they operate in and acquire the approvals required, if any.

The Kenyan fintech sector remains one of the fastest growing in Africa, with technology increasingly defining the day-to-day running of businesses in the country. Notable activities in the fintech space include:

• Alternative lending practices are growing rapidly in Kenya. Fintech enterprises are targeting micro-enterprises (small businesses) that cannot access formal credit facilities through banks. The uptake of mobile money in Kenya has enabled alternative lenders to use this convergence of technology to reach more customers and lower the cost of obtaining credit. In the process, they have developed new ways of extending credit to the small and micro-business segments that they serve.
• The formal lending industry is regulated by the Central Bank, but there is no legislative framework governing alternative lending platforms.
• The Central Bank of Kenya (Amendment) Bill, 2020 was published on 19 June 2020 with the intention to allow the Central Bank of Kenya to regulate these services, but the Bill is yet to be approved by parliament.
• The National Council for Law Reporting has published the Computer Misuse and Cybercrimes (Amendment Bill) 2021 (the Bill). The Bill seeks to amend the Computer Misuse and Cybercrimes Act No. 5 of 2018 (the Act). The key takeaway from the Bill is that it seeks to widen the functions of the National Computer and Cybercrimes Coordination Committee (the Committee) to include the power to recommend websites that would be rendered inaccessible within the Republic.
• The use of distributed ledger technology is becoming increasingly attractive to innovators in Kenya. Government bodies appear to be eager to use distributed ledgers on proof of concept as evidenced by the adoption and continued exploitation of blockchain technology by the Ministry of Lands.

Environmental Considerations

33. Are there laws protecting the environment? If so, what are they?

Environmental law in Kenya generally comprises the rules and doctrines arising from common law, provisions of constitutions, statutes, general principles and treaties that deal with protection, management and use of natural resources and the environment. The aims of environmental law are:

• to facilitate environmental management by providing rules and regulations for environmental conservation and preservation;
• to protect indigenous knowledge and generic resources; and
• to facilitate sustainable development.

The sources of environmental law in Kenya include the Constitution, framework law, sectoral statutes, regulations, judicial decisions, customary law, treaties, general opinions of international law and qualified writings among other sources. Such laws have increasingly been guided by principles which promote international cooperation in management of shared environmental resources, inter-generational and intra-generational equity, sustainable use of resources and the precautionary approach to environmental conservation.

The main written laws applicable to environmental management and governance in Kenya include:

The Constitution

The promulgation of the Constitution effectively elevated environmental rights and environmental issues generally to constitutional status under the Bill of Rights.

Article 42 of Constitution states that: “Every person has the right to a clean and healthy environment, which includes the right: to have the environment protected for the benefit of present and future generations through legislative and other measures, particularly those contemplated in Article 69; and to have obligations relating to the environment fulfilled under Article 70.”

Furthermore, Article 70(1) of the Constitution guarantees a clean environment as a legal right by any member who feels that his or her rights to a clean environment have been infringed.

This Article provides that, “if a person alleges that a right to a clean and healthy environment recognised and protected under Article 42 has been, is being or is likely to be, denied, violated, infringed or threatened, the person may apply to a court for redress in addition to any other legal remedies that are available in respect to the same matter”.

The Environmental Management and Coordination Act (Cap 387, Laws of Kenya)

The Environmental Management and Coordination Act (EMCA) and regulations thereunder (including the water quality regulations, the waste management regulations, the controlled substances regulations, the air quality regulations, the noise and excessive vibration pollution control regulations, the wetland, river and seashore regulations, and the environmental impact assessment (EIA) regulations (the Regulations)) serve as the main framework for environmental law in Kenya. The EMCA mirrors the environmental rights and duties provided for under the Constitution.

The institutional framework under this Act include:

i. National Environmental Management Authority (NEMA): This is the national regulatory agency charged with enforcing the Act’s provisions. It exercises general supervisions and co-ordination over all matters relating to the environment and is the principle instrument of government in the implementation of all policies relating to the environment. NEMA reviews and grants licences to proponents that plan to develop projects in Kenya. Pursuant to the authority granted to it under the Act, NEMA may compel any authority or ministry to comply with existing environmental laws including the EMCA and the Regulations and may enforce such legislation by issuing administrative sanctions and/or instituting criminal proceedings against persons or institutions which contravene environmental laws in Kenya. NEMA co-ordinates the activities of other agencies charged with environmental management in Kenya and liaises with such agencies and the country government in its enforcement actions.
The Act also established various committees on standards enforcement and action plans to support NEMA’s performance in matters of environmental quality standards and planning.

ii. National Environmental Complaints Committee: This committee is charged with investigating any allegations or complaints against any person or against NEMA in relation to the condition of the environment in Kenya and any suspected case of environmental degradation. It also undertakes public interest litigation on behalf of the citizens in environmental matters.

iii. National Environmental Tribunal: The mandate of this tribunal is to decide on grievances and appeals against decisions made by NEMA with respect to issues such as environmental licensing.

iv. County Environment Committees: These committees are responsible for the proper management of the environment within the county and the development of county strategic environmental action plans.

The Environmental and Land court which is established pursuant to Article 162 of the Constitution with the same status as the High Court of Kenya also plays a pivotal role in the enforcement of environmental laws in Kenya. It has both original and appellate jurisdiction to hear and determine environmental law matters. Appeals from decisions of the National Environmental Tribunal are referred to this court for determination.

34. Are there any environmental permits and licences required?

Any prospective investor setting up a business in Kenya needs to consider whether the business as proposed would affect the environment, and whether there are any sector-specific requirements for registration by NEMA.

Information on environmental permits and licences is provided in the following table:

<table>
<thead>
<tr>
<th>PERMIT/LICENCE</th>
<th>ENABLING FRAMEWORK</th>
<th>BUSINESSES APPLICABLE/ WHERE REQUIRED</th>
<th>PROCESSING TIME</th>
<th>HOW OFTEN (FREQUENCY)</th>
<th>BOTTLE-NECK/CHALLENGES</th>
<th>FEES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environmental Impact Assessment (EIA) Licence</td>
<td>Section 58 of the Environmental Management and Coordination Act; Regulations 18-24 of the Environmental Impact Assessment Regulations; The Environmental Management and Coordination Act (Conservation of Biological Diversity Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006.</td>
<td>Any project that may impact the environment (construction, manufacturing and processing industries). A project, programme, development or policy that leads to projects that may have an impact on the environment.</td>
<td>Under the Regulations, the authority is required to communicate the decision upon review of an EIA report within three months of receiving the licence application.</td>
<td>Every year. If the project does not start within two years, validity can be extended for a maximum of four years at a fee of KES 5 000.</td>
<td>If the issues raised by the NEMA reviewers are not properly addressed, the process may take longer.</td>
<td>In 2017 the EIA fees were scrapped. Previously, the fee applicable was 0.1% of the total cost of the project to a minimum of KES 10 000 with no upper capping. This does not affect the fees charged by EIA experts.</td>
</tr>
<tr>
<td>Effluent Discharge Licence (EDL)</td>
<td>Section 74 and 75 of the Environmental Management and Coordination Act; The Environmental Management and Coordination (Water Quality) Regulations, 2006.</td>
<td>Any trade or industrial undertaking that discharges any effluents or other pollutants resulting from the trade or industrial undertaking only into an existing sewerage system.</td>
<td>Approximately 60 working days.</td>
<td>Every year.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Sewerage service providers: KES 500 000. Discharging facilities listed under Fourth Schedule: KES 100 000. Institutions: KES 20 000. Other: KES 10 000.</td>
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<tr>
<td>NEMA Waste Disposal Licence</td>
<td>The Environmental Management and Coordination (Controlled Substances) Regulations, 2006.</td>
<td>Any person who is in the business of handling (including transportation), packaging, treatment, conditioning, reducing, recycling, reusing, storage and disposal of waste. Generally for persons involved in waste disposal.</td>
<td>Approximately 21 working days.</td>
<td>Every year.</td>
<td>If the issues raised by NEMA are not properly addressed, the process may take longer.</td>
<td>Varies between KES 5 000 and KES 75 000.</td>
</tr>
<tr>
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<tr>
<td>Air Pollution Emissions Licence</td>
<td>The Environmental Management and Coordination (Air Quality) Regulations, 2014.</td>
<td>All the facilities as well as equipment listed under the Third Schedule of the regulations.</td>
<td>Within 90 days of application.</td>
<td>Generally every year, however subject to conditions of the licence. Renewal application must be made 45 days prior to its expiry.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Varies between KES 3,000 and KES 50,000.</td>
</tr>
<tr>
<td>Noise and Vibrators Licence</td>
<td>The Environmental Management and Coordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.</td>
<td>Any person with intention to make or cause to be made any loud, unreasonable, unnecessary or unusual noise which annoys, disturbs, injures or endangers the comfort, repose, health or safety of others and the environment.</td>
<td>Approximately five working days.</td>
<td>Valid for three months.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Ranging from KES 2,000 to KES 5,000.</td>
</tr>
<tr>
<td>Licence to produce, import, transport or export controlled substances</td>
<td>The Environmental Management and Coordination (Controlled Substances) Regulations, 2007.</td>
<td>Any business that deals with ozone depleting gases that are listed.</td>
<td>Within 45 days of application.</td>
<td>Every year.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Ranging from KES 1,500 to KES 15,000.</td>
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</thead>
<tbody>
<tr>
<td>Biomedical waste permit</td>
<td>Environmental Management and Co-ordination (Waste Management Regulations), 2006.</td>
<td>Any business that transports biomedical waste.</td>
<td>When required.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Application fee: KES 3,000. Licence fee: KES 30,000.</td>
<td></td>
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<tr>
<td>Transit permit</td>
<td>Environmental Management and Co-ordination (Waste Management Regulations), 2008.</td>
<td>Any business that transports toxic or hazardous waste destined for another country through the territory of Kenya.</td>
<td>Within seven days of application.</td>
<td>When required.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Application fee: KES 3,000. Licence fee: KES 30,000.</td>
</tr>
<tr>
<td>Export permit</td>
<td>Environmental Management and Co-ordination (Waste Management Regulations), 2008.</td>
<td>Any business that exports hazardous substances.</td>
<td>Within seven days of application.</td>
<td>When required.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Application fee: KES 3,000. Licence fee: KES 30,000.</td>
</tr>
<tr>
<td>Permits for fireworks, demolition, firing ranges and specific heavy duty industry</td>
<td>Environmental Management and Co-ordination (Noise and Excessive Vibration Pollution Control) Regulations, 2009.</td>
<td>Any business/ activity relating to fireworks, demolitions, firing ranges or specific heavy industry.</td>
<td>Approximately five working days.</td>
<td>Valid for a maximum of three months.</td>
<td>No specific issues, subject to administrative efficiencies of government offices such as NEMA.</td>
<td>Application fee: KES 500. Permit fee: KES 5,000.</td>
</tr>
</tbody>
</table>
35. Are there environmental reporting obligations?

Proponents of projects in Kenya are required to conduct assessments and prepare project reports for projects likely to have an impact on the environment (listed in Schedule 2 of the EMCA) before being issued with an EIA licence.

Once a project has been EIA approved, the entities are required to submit annual environmental audits. Regulation 34 of the Environmental (Impact Assessment and Audit) Regulations, 2003 provides that in executing a project, after the environmental impact assessment study report has been approved by NEMA, or after the initial audit of an ongoing project, the proponent shall take all practical measures to ensure the implementation of the environmental management plan by:

- carrying out a self-auditing study on a regular basis;
- preparing an environmental audit report after each audit and submitting the report to the authority annually or as may be prescribed by the authority; and
- ensuring that the criteria used for the audit are based on the environmental management plan developed during the environmental impact assessment process or after the initial audit.

Once NEMA receives the audit report, it is required to acknowledge receipt and review it within seven days. If the audit report is found to be in conformity with the environmental impact assessment plan, NEMA will release the entity to continue with the project. If the audit report is found to be not in conformity with the environmental impact assessment plan, NEMA will issue a notice for the entity to rectify the discrepancies within the prescribed timelines.

NEMA may also carry out its own audits on licensed projects whenever it deems necessary in order to ascertain proponents’ compliance with conditions of approval of such projects.

Project planners are also required to register their proposed projects with the National Construction Authority within the prescribed timelines.

36. What liabilities may arise for breach of environmental laws?

Persons found in breach of environmental laws or the conditions specified under environmental permits may be liable to both criminal and civil sanctions. Criminal sanctions are usually issued in the form of fines and/or imprisonment of the offender (or directors if the offender is a corporate entity) and will vary depending on the breach. Civil sanctions may include orders for compensation of affected parties or orders requiring restoration of the area which is the subject matter of the environmental breach.

Dispute Resolution

37. How are disputes resolved in Kenya?

Inevitably, occasional disputes arise in the course of doing business in Kenya. The most common form for dispute resolution is litigation through the judicial system. The Judiciary consists of the Supreme Court, Court of Appeal, High Court, Employment and Labour Relations Court (ELRRC) and Environment and Land Court (ELC). The subordinate courts consist of the Magistrate Courts, District Court, Small Claims Court, and Tribunals as established by an Act of Parliament.

The Magistrate Court has the jurisdiction to hear and determine civil disputes where the value of the subject matter does not exceed KES 20 million. Whilst the Small Claims Court has the jurisdiction to hear and determine disputes where the value of the subject matter does not exceed KES One (1) million. The establishment of the Small Claims Court has been an innovative move to enhance the ease of doing business in Kenya.

The High Court has jurisdiction to determine appeals from the Magistrate Court and other local tribunals and quasi-judicial bodies. It also has unlimited original jurisdiction to hear and determine all civil matters including all IP matters, bankruptcy and insolvency matters and matters relating to arbitration. Its jurisdiction extends to the power to interpret the Constitution and make determinations on the denial, infringement or violation of constitutional rights.

The ELCRC and ELC are two courts established by statute with status equal to the High Court. These courts have the authority to hear and determine disputes relating to employment and labour relations and the environment and the use and title to land, respectively.

The Court of Appeal has jurisdiction to hear appeals from the High Court. The Supreme Court’s jurisdiction relates to hearing and determining appeals from the Court of Appeal where such disputes are certified as matters of general public importance.

Due to the global pandemic caused by the spread of COVID-19, the Hon Chief Justice announced a scale down of court activities to allow for appropriate measures to be put in place to prevent the spread of the COVID-19 virus in our courts. All physical court appearances were therefore suspended with an exception to arraigning criminals in relation to crimes violating the measures put in place by the government to curb the spread of the COVID-19 virus. Parties are however still able to file urgent and time bound documents electronically and courts are sitting on Thursdays to attend to and issue directions on any urgent applications. Many courts have since created forums through which parties may file pleadings electronically.

The COVID-19 crisis has seen the judiciary integrate technology in judicial proceedings by introducing electronic filing, electronic delivery of judgments and hearings via video conference.

38. Are there any alternatives to litigation?

The Constitution encourages the promotion of alternative forms of dispute resolution. Alternative forms of dispute resolution include arbitration, mediation and reconciliation. Additionally, the Civil Procedure Act (Chapter 21) requires courts to promote alternative methods of dispute resolution.

Kenyan branch of the Chartered Institute of Arbitrators (CIArb) unveiled its revised Arbitration Rules, 2020 (the “Rules”). The Rules came into force on 1 October 2020 and will apply to all cases registered after this date. The Rules provide a more comprehensive set of procedural rules as compared to the 2012 Arbitration Rules which it replaces. The changes introduced in the Rules focus on increasing the efficiency and flexibility of arbitrations administered by CIArb.

Kenya is a signatory to other international arbitration-affiliated treaties such as the International Center for Settlement of Investment Disputes (ICSID) Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (New York Convention). Both conventions form part of Kenyan law by virtue of the application of Article 2(6) of the Constitution.

Arbitration is generally appreciated as a faster and more efficient method of dispute resolution than litigation. It is becoming increasingly popular as a method of dispute resolution in Kenya-law governed contracts.

Whereas parties are free to choose their preferred forum for arbitration, the Nairobi Centre for International Arbitration (NCIA) is a dispute resolution service provider established by statute suited for domestic and international arbitration. The primary mandate of the NCIA is to administer international commercial arbitration and other forms of dispute resolution processes including mediation. The NCIA has published the NCIA Arbitration and Mediation Rules, which facilitate institute-administered arbitration and mediation under its auspices.

Mediation is progressively gaining ground as one of the most successful ways of resolving disputes in Kenya. The traction of mediation is attributed to the court-annexed mediation programme established by the Judiciary. The programme, which has been rolled out across several divisions of the High Court, allows the Court to screen cases to establish whether they qualify for mediation. If so, the qualifying case is referred for resolution by a mediator appointed by the Court. The mediator is required to guide the parties to settlement within a capped 60-day prescribed period. The period may be extended by the Court for a further ten (10) days.
39. Are foreign judgments and international arbitration awards enforceable in Kenya?

Foreign judgments are enforceable in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act (Chapter 43). Foreign judgments are enforceable under the principle of reciprocity. To be enforceable, the foreign judgment must originate from a country with which Kenya has a reciprocal recognition agreement. Presently, these countries are Australia, England and Wales, Malawi, Rwanda, Seychelles, Tanzania, Uganda and Zambia.

The recognition of foreign judgments is not automatic and is only accepted on a case-by-case basis upon consideration by the High Court.

The Arbitration Act makes the New York Convention applicable to the recognition of international arbitration awards, including grounds for the refusal to recognize and enforce such awards. International arbitral awards may be denied recognition in Kenya for several reasons, such as public policy or where the subject matter of the international arbitration award is not capable of settlement through arbitration.

Anti-Corruption, Money Laundering And Bribery

40. Are there laws against money laundering and corruption? If so, what are they?

The Constitution lays the foundation for anti-corruption laws in Kenya. The following statutes expound on its provisions:

- the Anti-Corruption and Economic Crimes Act, 2003;
- the Companies Act, 2015;
- the Leadership and Integrity Act, 2012;
- the Public Officers Ethics Act;
- the Proceeds of Crime and Anti-Money Laundering Act, 2009;
- the Ethics and Anti-Corruption Commission Act, 2011; and
- the Bribery Act, 2016.

The Constitution

Principles that should govern the exercise of authority by the State and its officials are entrenched in Chapter 6 of the Constitution. This chapter defines the authority given to a State officer as a public trustee. The authority should be exercised in a manner that, among other things, promotes public confidence in the integrity of the office and should be used to serve the people rather than ruling them.

State officers are called on to behave in a manner that avoids compromising public interest in favour of personal interest. Where they fail to do so, disciplinary action will be taken against them including dismissal from office and the resulting inability to apply for another State officer position.

State officers are:

- required to hand over all gifts and donations they receive on a public or official occasion to the State unless exempt under an Act of Parliament;
- not allowed to keep bank accounts outside Kenya except when allowed to do so by an Act of Parliament; and
- not allowed to receive benefits or personal loans in circumstances that will threaten their integrity.

A full-time State officer is prohibited from participating in any other gainful employment. A State officer is prohibited from holding office in a political party.

A retired State officer who is receiving a pension from public funds is restricted from holding more than two concurrent remunerative positions as chairperson, director or employee of a company owned or controlled by the State or a State organ.

A retired State officer shall not receive remuneration from public funds except where they are holding a remunerative position as chairperson, director or employee of a company owned or controlled by the State or a State organ.

For the avoidance of doubt, the Constitution of Kenya lays down the term Public officer to mean:

i. any State officer; or
ii. any person, other than a State Officer, who holds a public office.

Constitution of Kenya defines the term State officer as a person holding a State office.

Anti-Corruption and Economic Crimes Act, 2003

The Anti-Corruption and Economic Crimes Act, 2003 defines corruption to include:

- Bid rigging - where a person receives, solicits or agrees to receive as well as where a person gives, offers or agrees to give or offer a benefit as an inducement a reward for:
  - refraining from submitting a tender, proposal, quotation or bid;
  - withdrawing or changing a tender, proposal, quotation or bid; or
  - submitting a tender, proposal, quotation or bid with a specified price or with any specified inclusions or exclusions.

- Dealing with suspect property - where a person deals with property that he believes or has reason to believe was acquired in the course of or as a result of corrupt conduct;
  - bribery;
  - fraud;
  - embezzlement or misappropriation of public funds;

- Abuse of office - where a person who uses his office to improperly confer a benefit on himself or anyone else
  - breach of trust; or
  - dishonesty;
  - in connection with any tax, rate or impost levied under any Act; or
  - under any written law relating to the elections of persons to public office.

A person who conspires with another to commit an offence of corruption or economic crimes is guilty of an offence.

A person who incites another to do any act or make any omission of such a nature that, if that act were done or the omission were made, an offence of corruption or an economic crime would thereby be committed, is guilty of an offence under the Anti-Corruption and Economic Crimes Act, 2003.

The definition of corruption is very wide and covers acts by both principals and agents. Offences under the Act carry a fine of KES 1 million and/or imprisonment for a period of up to 10 years.

Where a person received a quantifiable benefit or any other person suffered a quantifiable loss, a person found guilty under the Act shall be liable to an additional mandatory fine which is determined as follows:

i. the mandatory fine shall be equal to two times the amount of the benefit or loss; and
ii. if the conduct that constituted the offence resulted in both a benefit and loss, the mandatory fine shall be equal to two times the sum of the amount of the benefit and the amount of the loss.

Anti-Corruption and Economic Crimes Court

On 8 December 2015, the Chief Justice of Kenya issued a gazette notice for the Anti-Corruption and Economic Crimes Division of the High Court of Kenya to facilitate effective case management and the expeditious disposal of cases; and to ensure that similar disputes are effectively and efficiently adjudicated.

The new court was established on 15 January 2016 in Nairobi with its own registry and a total of 13 sitting judicial officers. The judicial officers are bound by the provisions of the Anti-Corruption and Economic Crimes Act that provide for continuous hearing of cases on a day-to-day basis until determination. All corruption-related offences under the Act are now to be determined by the Anti-Corruption Court. The Court also has power to determine all criminal offences allied or connected to corruption.

The Ethics and Anti-Corruption Commission Act, 2011

Pursuant to Article 79 of the Constitution, the Ethics and Anti-Corruption Commission Act was assented into law on 27 August 2011 and came into effect on 5 September 2011. Article 79 directs Parliament to enact legislation to facilitate the establishment of an independent Ethics and Anti-Corruption Commission (the EACC).
The EACC is established as an independent commission with a corporate nature. The Commission consists of a chairperson and four other members appointed in accordance with the provisions of the Constitution and the Ethics and Anti-Corruption Commission Act. It replaced and took up the functions and powers of the defunct Kenya Anti-Corruption Commission established under the Anti-Corruption and Economic Crimes Act. The functions of the EACC include:

1. in relation to State officers:
   (i) develop and promote standards and best practices in integrity and anti-corruption;
   (ii) develop a code of ethics;
2. work with other State and public offices in the development and promotion of standards and best practices in integrity and anti-corruption;
3. receive complaints on the breach of the code of ethics by public officers;
4. investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under the Ethics and Anti-Corruption Commission Act, the Anti-Corruption and Economic Crimes Act or any other law enacted pursuant to Chapter Six of the Constitution;
5. recommend appropriate action to be taken against State officers or public officers alleged to have engaged in unethical conduct;
6. oversee the enforcement of codes of ethics prescribed for public officers;
7. advise, on its own initiative, any person on any matter within its functions;
8. raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 (No. 3 of 2003), as to confidentiality;
9. monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
10. institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures including proceedings for the recovery of property or proceeds of corruption located outside Kenya.

The Companies Act

The Companies Act provides for the disqualification of directors, administrators or liquidators for fraud or a breach of duty committed while a company was under liquidation or administration. Any person who holds or formerly held office in such circumstances and is found guilty of fraud or breach of duty can be disqualified for a period of 15 years.

The Companies Act also criminalises the fraudulent falsification, mutilation and destruction of company records. It is an offence that attracts a fine not exceeding KES 1 million or imprisonment for a term not exceeding seven years, or both.

The Companies Act prohibits directors from receiving benefits from third parties where such benefits are attributable to the person’s directorship or to any act or omission by the director and will create a conflict of interest. Any director found guilty of this is liable to a fine of KES 1 million and he or she must return the benefit that he or she received to the company.

The Companies Act only criminalises the receiving of the benefit not the giving of the benefit. As such, the person who gave the benefit would be prosecuted under the Ethics and Anti-Corruption Commission Act.

The Companies Act is aligned with the Constitution in that it only recognises lobbying in the form of advocacy and does not allow for any lobbying that includes giving benefits to directors.

The Leadership and Integrity Act, 2012

The primary purpose of the Leadership and Integrity Act, 2012 is to ensure that State officers respect the values, principles and requirements of the Constitution and to establish procedures and mechanisms for the effective administration of Chapter 6 of the Constitution which provides for leadership and integrity. The EACC is responsible for overseeing and enforcing the implementation of this Act.

The Act provides that a State officer shall not accept or solicit gifts, hospitality or other benefits from a person who has a contractual or legal relationship with the State officer’s organisation. The Act does, however, prescribe circumstances in which a State officer may accept a gift in his or her official capacity and states that such a gift shall be treated as a gift or donation to the State. The Act provides that a State officer may receive a gift in an official capacity provided that:

A. the gift is within the ordinary bounds of propriety, a usual expression of courtesy or protocol and within the ordinary standards of hospitality;
B. the gift is not monetary; and
C. the gift does not exceed such value as may be prescribed by the Commission in the regulations.

Public entities must keep and maintain registers of gifts received by State officers or public officers; and gifts given by the public entity to State officers or public officers.

State officers are also prohibited from using their office to wrongfully or unlawfully influence the acquisition of property. If this occurs and is proven, the State officer will, subject to any appeal which the officer may make, forfeit the property and the property will be held by the EACC, or by an agent appointed by the EACC in trust for the Republic, until it is lawfully disposed of.

It is important that a person who is charged with the responsibility of managing an organisation, whether private or governmental, avoids a situation where personal interests conflict, or appear to conflict, with his or her official duties.

Therefore, a public officer is prohibited from awarding or influencing the award of a contract to:

- himself or herself;
- the State officer’s or public officer’s spouse or child;
- a business associate or agent; or
- a corporation, private company, partnership or other body in which the officer has a substantial or controlling interest.

The Act requires State or public officers to declare any interest that may arise regarding a certain issue at the beginning of the meeting during which the issue is deliberated upon. Public entities are required to keep a register of conflicts of interest for five years. Similarly, members of Parliament and members of county assemblies are required to declare any direct pecuniary interest or benefit of whatever nature in any—

(a) debate or proceeding of the body of which he or she is a member;
(b) debate or proceeding in any committee of that body; and
transaction or communication which the State officer may have with other members of the body, State officers, public officers or government officers.

Clerk of the Senate, the National Assembly or a county assembly shall maintain a register of conflicts of interest, which shall be open to the public for inspection.

State or public officers should not participate in tenders for the supply of goods or services to a public entity in which they are serving or are otherwise similarly associated with. However, the holding of shares by a State officer or a public officer in a company is not construed as participating in the tender of a public entity unless the State officer or public officer has a controlling shareholding in the company.
Bank accounts outside Kenya
State officers and Public officers are not allowed to open or continue to operate bank accounts outside Kenya without the approval of the EACC. Where a State officer or Public officer operates a bank account outside Kenya, he or she must submit annual statements of the account to the EACC. The officer must authorise the EACC to verify the statements, and any other relevant information, from the foreign financial institution in which the account is held.

A State officer or Public officer who fails to declare the operation or control of a bank account outside Kenya commits an offence and shall, upon conviction, be liable to imprisonment for a term not exceeding five years, or a fine not exceeding KES 5 million.

Care of property
State officers are required to:

i. take all reasonable steps to ensure that public property in the officer’s custody, possession or control is taken care of, and is in good repair and condition;
ii. refrain from using public property, funds or services that are acquired in the course of or as a result of the official duties, for activities that are not related to the official work of the State officer; and
iii. return to the issuing authority all public property in their custody, possession or control at the end of the appointment, or election term.

Failure to adhere to the above requirements relating to care of property shall render the State officer personally liable for any loss or damage to the public property.

Mise of official information
A State officer is prohibited from directly or indirectly using or allowing any person under the officer’s authority to use any information obtained through or in connection with the office, which is not available in the public domain, for the furthering of any private interest, whether financial or otherwise.

Establishment of specific codes
Public entities are required to prescribe a specific Leadership and Integrity Code for the State officers in that public entity. The specific Leadership and Integrity Code prescribed by a public entity shall include all the requirements in the general Leadership and Integrity Code under the Leadership and Integrity Act, 2012 and may provide for the manner in which any requirements of the specific or general Code may be satisfied.

Public Officers Ethics Act (Cap 183)
The Public Officers Ethics Act was enacted to advance the ethics of public officers by providing for a Code of Conduct and Ethics for public officers for which it is the responsible commission. The commission responsible for a public officer may, on its own initiative or pursuant to a complaint by any person, investigate to determine whether the public officer has contravened the Code of Conduct and Ethics.

According to the Act, a public officer may accept a gift given to him or her in his or her official capacity. However, unless the gift is a non-monetary gift that does not exceed the value prescribed by regulation, such a gift shall be deemed to be a gift to the public officer’s organisation. Public officers are allowed to receive gifts from friends or relatives where such gifts are given on a special occasion recognised by custom.

A public officer may not be an agent for, or further the interests of, a foreign government, organisation or individual in cases where such agency is detrimental to the interests of Kenya.

The Public Officers Ethics Act requires each public officer, once every two years, to submit to his or her responsible commission a declaration of the income, assets and liabilities of himself or herself, his or her spouse or spouses and his or her dependent children under the age of 18 years.

Proceeds of Crime and Anti-Money Laundering Act (Cap 59B)
The Proceeds of Crime and Anti-Money Laundering Act provides for the offence of money laundering and introduces measures for combating the offence. It also provides for the identification, tracing, freezing, seizure and confiscation of the proceeds of crime, and for connected purposes.

The Act defines money laundering as a situation where a person who knows, or who ought reasonably to have known, that property is, or forms part of, the proceeds of crime and:

- enters into any agreement or engages in any arrangement or transaction with anyone in connection with that property, whether that agreement, arrangement or transaction is legally enforceable or not; or
- performs any other act in connection with such property, whether it is performed independently or with any other person, whose effect is to:
  - conceal or disguise the nature, source, location, disposition or movement of the said property, or the ownership thereof, or any interest which anyone may have in respect thereof; or
  - enable or assist any person who has committed or commits an offence, whether in Kenya or elsewhere, to avoid prosecution; or
  - remove or diminish any property acquired directly or indirectly as a result of the commission of an offence.

The Act creates a financial reporting centre (FRC) where all institutions and individuals should report any suspicious activity. Failure to do so when a person has knowledge of money laundering amounts to a crime. Money moving in and out of Kenya must be cleared by relevant agencies to ensure that money laundering is curtailed.

All reporting institutions shall register with the FRC within such period and in such manner as the FRC may prescribe. Regulation 4 (1) of the Proceeds of Crime and Anti-Money Laundering Regulations, 2013 (the Regulations) also contains similar requirements and provides that every reporting institution shall register with the FRC within one year of the enactment of the Regulations or such other longer period as the FRC may allow. The Regulations came into force pursuant to Legal Notice No. 59 of 2013 dated 28 March 2013.

Section 2 of the Proceeds of Crime and Anti-Money Laundering Act defines the term “reporting institution” to mean a financial institution and designated non-financial business and profession.

The Proceeds of Crime and Anti-Money Laundering Act defines a “financial institution” to include any person or entity that conducts the business of lending including consumer credit, mortgage credit, factoring, without recourse, and financing of commercial transactions; financial leasing or financial guarantees.

The Proceeds of Crime and Anti-Money Laundering Act defines “designated non-financial businesses or professions” to include:

i. casinos (including internet casinos);
ii. real estate agencies;
iii. dealing in precious metals;
iv. dealing in precious stones;

v. accountants, who are sole practitioners or are partners in their professional firms;

vi. non-governmental organisations; and

vii. such other business or profession in which the risk of money laundering exists as the Minister may, on the advice of the FRC, declare.

Any reporting institution that fails to register with the FRC as required by the Proceeds of Crime and Anti-Money Laundering Act and the Regulations commits an offence.
Although the Proceeds of Crime and Anti-Money Laundering Act does not prescribe a penalty for the offence of failing to register with the FRC, Regulation 42 of the Regulations provides that any person, reporting institution or supervisory body who contravenes the provisions of the Regulations commits an offence and shall, on conviction, be liable to a fine not exceeding Kenya Shillings five million (KES 5,000,000.00) or to imprisonment for a term not exceeding three (3) years or both fine and imprisonment.

Reporting institutions are required to monitor and report to the FRC any suspicious activities or transactions immediately and, in any event, within seven days of the date of the transaction or occurrence of the activity that is considered suspicious.

Section 44 (3) of the Proceeds of Crime and Anti-Money Laundering Act requires reporting institutions to file reports all cash transactions exceeding USD 10,000 or its equivalent in any other currency carried out by it.

A reporting institution which obtains information which is suspicious or indicates possible money laundering activity shall not disclose such information to an unauthorised person but shall report it to the Centre as required by these Regulations.

Reporting institution must ensure that they maintain and keep records of all transactions for a minimum period of seven years from the date the relevant business or transaction was completed or following the termination of an account or business relationship.

Reporting institutions must ensure that:

1. they do not to tip off persons involved in a suspicious activity;
2. they comply with instructions, directions or rules issued by the FRC;
3. they aill information during inspection and respond to inspection reports within the prescribed time;
4. take measures to prevent use of new technologies for money laundering purposes;
5. undertake a Money Laundering risk assessment to enable it identify, assess, monitor, manage and mitigate the risks associated with money laundering and update the risk assessment policies at least every two years;
6. appoint a money laundering officer who shall be of management level and shall have relevant and necessary competence, authority and independence; and
7. adopt an independent audit function to check compliance by the institution with the AML Act and the Regulations.

Each reporting institution must undertake customer due diligence which entails:

1. taking reasonable measures to satisfy itself as to the true identity of any person who seeks to enter into a business relationship with the financial institution.
2. undertaking due diligence on existing customers;
3. refusing to open or maintain an anonymous or fictitious account; and
4. identifying and verifying the natural persons behind a legal person and arrangement.

Reporting institutions must maintain internal controls and internal reporting procedures with the aim of identifying persons (within the institutions) to whom reports should be made, the procedures for making the report and the course of action to be taken.

Regulation 34 of the Regulations provides that at the end of each calendar year, each reporting institution shall submit to the FRC by the 31st of January of the following calendar year or as may be required by the Centre, from time to time, a compliance report detailing the institution’s compliance with the AML Act, the Regulations and the institution’s internal anti-money laundering rules.

Other laws

Kenya is also party to four International Conventions aimed at combating corruption and corruption-related offences including:

- United Nations Convention against Corruption (ratified 9 December 2003);
- United Nations Convention against Transnational Organised Crime (accessed 16 June 2004);
- United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (accessed 19 October 1992); and

41. Are there laws against bribery? If so, what are they?

The Bribery Act, 2016 came into force on 13 January 2017 with the object of providing a framework for the prevention, investigation and punishment of bribery and related offences in Kenya.

The Act came in the wake of changes and new appointments to the EACC in a bid to battle corruption in all sectors of the country’s economy. The Bribery Act applies to all individuals and entities in the private and public sectors.

Previously, the law did not impose significant responsibilities on the private sector in the fight against corruption. Importantly, the Act now imposes express duties on private entities and individuals, for example, the duty to prevent and report incidents of bribery, as well as the requirement to have procedures for the prevention of bribery in place. It prescribes penalties for private entities and individuals who fail to adhere to its provisions.

The Bribery Act generally has implications to both individuals and entities in the private and public sector. As a “Sister Act” to the Anti-Corruption and Economic Crimes Act 2003, it seeks to comprehensively expound the offence while providing a contextual application of the Act.

The Act does not give an express definition of the term ‘bribery’. It however clarifies the meaning of ‘giving and receiving a bribe’ as follows:

Giving a bribe

A person gives a bribe if he or she offers, promises or gives a financial or other advantage to another person, who knows or believes the acceptance of the financial or other advantage would itself constitute the improper performance of relevant function or activity.

Receiving a bribe

A person receives a bribe if:

- he or she receives or agrees to receive a bribe with the intention to improperly perform an activity or function;
- where the action of receiving a bribe, or agreeing to receive it, is deemed to constitute an agreement for the improper performance of an activity or function; or
- where, as a consequence of receiving a bribe or agreeing to receive a bribe, a function or activity is performed improperly by that person, or by another person, at the recipient’s request.

Extra-territorial application

The Act has extra-territorial application in relation to bribery-related offences carried out outside Kenya to include Kenyan citizens, public or private entities, as well as persons associated with these entities whether as employees, agents or otherwise. Accordingly, all acts of bribery committed by a Kenyan citizen, a public or private entity or a person associated with such a private entity outside Kenya are treated as if the acts of bribery took place in Kenya.

Any bribery of a foreign public official in order to influence his or her capacity is also an offence under the Act.

Duty to report bribery

All persons holding a position of authority in a public or private entity must report to the EACC any knowledge or suspicion of instances of bribery. Failure to report the bribery within a period of 24 hours constitutes an offence.

Prevention of bribery:

- Procedures: Public and private entities are required to put in place procedures for the prevention of bribery and corruption appropriate to their size and scale and the nature of their operations. Failure of private entities to put in place such procedures is an offence on the part of the director or senior officer.

- Protection of whistleblowers and witnesses:

Under the Act, it is an offence to harass, intimidate or disclose any information regarding informants, whistleblowers or witnesses. The Act mandates law enforcement agencies to establish mechanisms to protect the identity of informants and witnesses. Additionally, the EACC is charged with the responsibility of assisting any entities and interested persons to develop and put in place procedures to protect whistleblowers. This is in addition to the protection under the Witness Protection Act.
• **Penalties:** The Act imposes heavy penalties for bribery-related offences including:
  - imprisonment for up to 10 years;
  - a fine not exceeding KES 5 million;
  - requirements to pay the benefit to the Government;
  - confiscation of property;
  - disqualification from being an elective person;
  - disqualification from serving as a director or partner in Kenya; and
  - being barred from holding public office.

**Assisting/Aiding/Enabling Bribery**

Any person who knowingly assists a person or a private entity to give or receive a bribe by—

1. obtaining property intended for use in bribery;
2. using, having possession of or transferring property which was obtained as a result of or in connection with bribery; or
3. recording property which was obtained as result of or in connection with bribery in the accounting records of any private entity, commits an offence.

Where the offence is committed by a director or senior officer of a private entity such private entity is deemed to have committed the offence.

**Outlook**

The Act has far-reaching implications for those doing business in Kenya or with Kenyan entities, alongside other extra-territorial statues on bribery such as the US Foreign Corrupt Practices Act and the UK Bribery Act.

Its effectiveness is yet to be tested, but businesses need to make sure their compliance programmes are appropriate.
42. Are there any considerations in terminating a business?

Introduction

There are two main laws that govern the dissolution or winding up of a business: the Companies Act and the Insolvency Act, 2015 (Insolvency Act).

Solvent vs. Insolvent dissolution

It is imperative to consider the status of the company/branch in question from a perspective of solvency when talking about dissolving a business.

The dissolution of a business may be carried out either voluntarily or, where the company is deemed unable to pay its debts (as defined in the Insolvency Act), involuntarily by either the members of the business itself or other stakeholders such as creditors or the Registrar.

Options for solvent companies

The Companies Act sets out the process for the dissolution of non-trading companies striking off the Register of Companies. The process is initiated by an application by the shareholders and the directors of the company. The Registrar can undertake the task of striking a company off the Register if he or she has ascertained that the company is neither trading nor active.

A branch of a foreign company may be deregistered either by a representative of the branch itself making an application to the Registrar to do so at least one month after the branch ceases to operate, or it may be struck off the Register by the Registrar, in cases such as where the branch is not carrying on business in Kenya or is carrying on business in Kenya without a local representative.

The Insolvency Act has set out two processes for the winding up of a company. It can be undertaken by the members themselves (members’ voluntary liquidation) where the company is solvent.

Options for insolvent companies

Liquidation by an application to the court by any relevant stakeholders of the business. Alternatively by way of a creditor’s voluntary liquidation where creditors of the business are tasked with appointing a liquidator after the passing of a resolution of its members.

Business rescue

The Insolvency Act has introduced a number of business rescue concepts including:

- Pre-Insolvency Moratorium
- Administration; and
- Company voluntary arrangements.

Pre-Insolvency Moratorium

The Business Laws (Amendment) (No. 2) Act amended the Insolvency Act, 2015 to introduce a new pre-insolvency moratorium as a standalone procedure that can be used by the directors of eligible companies to obtain temporary protection from creditors, while a company considers a business rescue plan. The pre-insolvency moratorium is for a period of thirty (30) days but a Court has the discretion to extend the moratorium for a period of at least thirty (30) days if it believes that the extension is desirable in order to achieve the aims of the initial moratorium. While a pre-insolvency moratorium is in place, a “monitor” is responsible for the supervision of the company.

Administration

Administration has the primary objective of rescuing a company in financial difficulties and allowing it to continue as a going concern. It is intended to enable an eligible company to undergo reorganisation or to realise its assets under the protection of a statutory moratorium. The moratorium prevents winding-up petitions from being made or resolutions from being passed. Security over the company’s assets may not be enforced without the court’s permission.
Company voluntary arrangement (CVA)

This is a procedure that allows a company:
• To settle debts by paying only a proportion of the amount that it owes to creditors; and/or
• To come to some other arrangement with its creditors over the payment of its debts.

A CVA is proposed by the directors of an insolvent company. It is however implemented by an insolvency practitioner. A CVA comes into force at the time when a majority (in number and value) of its creditors approve a CVA proposal made in respect of the said company.

Once approved, the CVA binds all the unsecured creditors of a company who were entitled to vote on the CVA proposal. Once bound by a CVA, a creditor is prevented from taking steps against the company that the terms of the CVA prohibit. Typically these terms will be drafted to prevent the creditor from recovering any debt that falls within the scope of the CVA, other than through an agreed mechanism set out in the CVA. A CVA does not give rise to an automatic moratorium and only binds preferential/secured creditors to the extent they agree to be bound by the terms of the CVA.

A scheme under the Companies Act

A scheme of arrangement allows for a company to make a compromise or arrangement with its creditors (or any class of them). It is binding on all creditors provided that, pursuant to section 936 of the Companies Act, it is both: (a) approved by a majority in number representing three-quarters in value of the creditors present and voting either in person or by proxy at the meeting convened for the purpose. As it is always necessary to take account not only of the number of creditors who approve the scheme but also the value of their holdings, the resolution to approve the scheme must be by way of a poll; and (b) sanctioned by the court.

There is nothing in the legislation that prescribes the subject matter of a scheme. In theory, a scheme could be a compromise or arrangement about anything that the company and its creditors may properly agree on among themselves.

Director’s duties

For directors of a company, steps prior to going into administration or any insolvency regime are critical. The duties owed by a director to a company are altered where that company is in or is facing the threat of insolvency, so as to require directors to have proper regard for the interests of creditors. It is therefore imperative that the directors of a company facing financial difficulty understand and keep in mind their fiduciary and statutory duties. Failure to do may result in directors being personally liable for carrying out activities such as fraudulent trading or wrongful trading.
We have an enviable track record of providing legal services to the highest professional standards in Africa. We work for clients across numerous African jurisdictions on corporate, finance, competition, taxation, employment, technology and dispute resolution matters.

With eight offices in six African countries and over 400 specialist lawyers, we draw on our unique knowledge of the business and socio-political environment to advise clients on a wide range of legal issues.

Everywhere we work, we offer clients a service that uniquely blends expertise in the law, knowledge of the local market, and an understanding of their businesses. Our aim is to assist clients to achieve their objectives as smoothly and efficiently as possible while minimising the legal and regulatory risks.

Our clients include domestic and foreign corporates, multinationals, funds and financial institutions, across almost all sectors of the economy, as well as state-owned enterprises and governments.

Our expertise is frequently recognised by independent research organisations. Most recently, we won three IFLR Africa Awards (2021) including National Firm of the Year for South Africa and for Zambia. At the 2021 Africa Legal Awards, we won five practice awards, more than any other law firm. In the 2020 Dealmakers East Africa Awards, we ranked first for number of M&A transactions among which was the East Africa Deal of the Year. In 2020, Mergermarket identified us as the number one legal adviser in Africa by number of completed deals.

Recognising the size and enormous diversity of Africa, our approach to providing legal services across the continent is intended to offer on-the-ground advice in the countries that matter for our clients. Our presence in Africa is always evolving to meet the changes that are shaping the future of this vast continent.

Currently, we have our own offices in six African countries: Kenya (Nairobi), Mauritius (Moka), South Africa (Cape Town, Durban, Johannesburg), Tanzania (Dar es Salaam), Uganda (Kampala) and Zambia (Lusaka).

We work closely with our Bowmans Alliance firms in Ethiopia (Amrani Assesse & Associates Law Office) and Nigeria (Udo Udoma & Belo-Okagie). These are two of the leading corporate and commercial law firms in their jurisdictions.

We have special relationships with competent practitioners in Malawi and Mozambique. We also have a non-exclusive co-operation agreement with French international law firm Gide Loyrette Nouel that provides our clients access to assistance in francophone west and north Africa and Gide’s. The arrangement provides complementary access for Gide’s clients and lawyers to markets in central, southern and eastern Africa.

We ensure that, whenever our clients need legal advice in other parts of Africa, we can assist them by tapping into our comprehensive database of contacts of the best firms and practitioners across the continent.

On the global front, Bowmans has long-standing and excellent relationships with a range of international law firms with whom we often work on Africa-focussed client mandates. We are also a member firm of Lex Mundi, a global association of more than 160 independent law firms in all the major centres across the globe. Lex Mundi gives us the ability to connect our clients with the best law firms in each of the countries represented.
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