

# KENYA

## KAPLAN & STRATTON



### FIRM INFORMATION

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### COUNTRY INFORMATION

Kenya covers a total area of approximately 582 650 square kilometres. The population is approximately 45 million.

### POLITICAL SYSTEM

Multiparty democracy.

### INVESTMENT CLIMATE

The Investment Promotion Act encourages foreign investment and facilitates the issue of general and industry specific licences.

There are limited foreign investment incentives available in Kenya. The main area of growth has been in light assembly manufacturing in export processing zones where 10-year tax holidays are available to approved enterprises. The Special Economic Zones Act commenced in December 2015 to promote and facilitate both global and local investors in Special Economic Zones. A Special Economic Zone under the Act will operate as a designated area with preferential trade and business policies. This Act has not yet been fully implemented as the Authority tasked with the role of overseeing the establishment and operation of Special Economic Zones has not been constituted. Enterprises licensed under the Act will be exempted from all taxes and duties that are payable under all domestic tax laws including the East African Customs Management Act, in addition to receiving other significant incentives.

The Companies Act 2015 was fully implemented in June 2016. The Act has completely overhauled the legal framework governing companies in Kenya. There have been some challenges in the implementation of the new statute such as unclear statute provisions, drafting errors as well as lack of regulations and statutory forms. There remains some uncertainty on certain aspects of the Act and presently there is an ongoing initiative by the State Law Office to review the Act and regulations with a view to addressing these issues.

The Insolvency Act 2015 was also enacted alongside the Companies Act 2015 and it has replaced the provisions of the Companies Act Cap 486 relating to the winding up of companies. Some of the significant changes introduced by the

Act include administration of insolvent companies as part of new business rescue processes and the introduction of the requirement for qualified insolvency practitioners to conduct the liquidation processes of a company.

There are no restrictions on investments by foreigners in private companies incorporated in Kenya and foreigners can be directors of companies.

Minimum Kenyan co-ownership in insurance companies, banks, telecommunications companies, engineering firms, financial sector advisers (non-statutory government policy restrictions), airlines (air services providers) and maritime services providers is mandatory. Dealings in agricultural land involving non-citizens are prohibited unless special exemption from the restriction is obtained.

The Land Laws (Amendment) Act 2016 has recently been enacted and has introduced new restrictions under the Land Act prohibiting foreigners from dealing with what is described as "controlled land" without prior approval from the Cabinet Secretary. Controlled land is defined as land in Kenya which is: (i) within a zone of 25 kilometres from the inland national boundary of Kenya; (ii) within the first and second row from the high water mark of the Indian Ocean; or (iii) any other land as may be declared controlled land under any law or statute.

Kenya's membership of the East African Community (EAC) and the Common Market for Eastern and Southern Africa (COMESA) presents opportunities for manufacturing operations to exploit the benefits of those markets. The East African Community Common Market Protocol, which provides for the free movement of goods, services, persons, labour and capital commenced on 1 July 2010. Member states have not however put in place the necessary institutional framework for enforcement. The promulgation of the 2010 Kenyan Constitution and continued government investment in infrastructure continues to enhance Kenya's business environment. The country however continues to grapple with challenges related to devolution of government which has raised a number of teething issues that have directly and indirectly affected the private sector.



Construction, infrastructure and real estate industries continue to be very active.

#### FORMS OF BUSINESS

- Company limited by guarantee
- Co-operatives
- Foreign companies otherwise known as branch offices
- Joint venture companies
- Limited liability partnerships
- Multinational companies
- Non-Governmental Organisations (soon to be known as Public Benefit Organisations)
- Partnerships
- Private or public limited liability companies
- Private unlimited liability companies
- Sole proprietorship
- Sole traders
- Trusts.

#### FORMATION OF A COMPANY

Companies and foreign companies (branch offices) must be registered at the Companies Registry based in Nairobi. Businesses such as banks, telecommunications and insurance companies require special licenses from the regulators of these sectors. Transition to the new legislative framework under the Companies Act 2015 is ongoing after the relevant provisions of the new law relating to formation of companies were brought into operation in November 2015. The process of registration of companies has also been modified with the introduction of an online government portal known as e-Citizen onto which applications are submitted and processed. The introduction of e-Citizen is in line with the government's project of digitising all its processes and this has invariably improved the timelines involved in the registration of companies.

#### REGULATORY FRAMEWORK

There is an active Capital Markets Authority. The statutory Capital Markets Authority and Nairobi Securities Exchange regulations govern issues of and dealings in securities listed on the Nairobi Securities Exchange.

The Competition Authority regulates the creation or strengthening of monopolies, including acquisitions and takeovers of businesses where a change in control occurs.

#### EXCHANGE CONTROLS

There are no exchange control restrictions. Residents may hold foreign currency accounts. Foreign exchange for eligible transactions is purchased from commercial banks without any controls. Eligible transactions include payments in respect of dividends, capital and interest on loans, current account transactions and proceeds on disposal of investments.

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\*The rates of VAT and income tax on individuals and companies was reduced effective 1 April 2020 as measure by the Kenyan Government to cushion Kenyans from the negative impact of the COVID-19 pandemic.

#### TAXATION

Currently the main taxes are as follows:

Tax	Rate <sup>1</sup>
Income tax on individual	25% (a tax relief has been introduced for persons earning a gross monthly income of up to KES 24,000)
Corporate tax	25%
Branch of a foreign company	37.5% (non resident)
VAT	14% (8% for petroleum and petroleum products)
Capital gains tax	5%
Creation or increase in share capital	1%
Stamp Duty on transfers of land	2% or 4% of value of land depending on location.

Kenya has double taxation treaties with Canada, Denmark, Norway, Sweden, India, Zambia, United Kingdom, Germany, France, Tanzania, Uganda, South Africa, Mauritius and Iran and is currently negotiating a number of others with various countries. The USA does not have a double taxation treaty with Kenya.

Various capital deductions are available on industrial buildings, hotels, plant and machinery and mining investment. Capital allowances are provided on the basis of cost on a reducing balance basis.

Benefits-in-kind paid to employees such as motor cars, housing and loans are taxable. Employee taxes are based around a pay-as-you-earn income tax deduction, a national social security fund and a national hospital insurance levy. Excise and customs duties are also payable depending on the nature of the goods produced or imported. There are no death duties/taxes payable on personal estates.

#### LEGAL SYSTEM

Kenya has a well developed legal system, partially inherited from its colonial past, with English common law forming the basis, but combining traditional customary law and elements of Islamic law with regard to marriage and succession. Kenya adopted a new Constitution on 27 August 2010 which sets a reform agenda for better governance and a path to democratic stability. Kenya has a four tier court system, namely Magistrates Courts, High Court, Court of Appeal and Supreme Court. There is provision for enforcement in Kenya of certain foreign judgments and arbitral awards.

Kenya is a signatory to and has adopted the 1923 Protocol on Arbitration Clauses of the League of Nations and the 1958



New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The Arbitration Act is now operative and embodies most of the provisions of the UNCITRAL Model Law.

### INTELLECTUAL PROPERTY

Protection is provided by statute. Kenya is a signatory to the Paris and Berne Conventions, the TRIPS Agreement, the African Regional Intellectual Property Organisation (ARIPO), Harare Protocol and the Madrid Agreement and Protocol. There are public registries for trade and service marks, designs and patents.

### FINANCIAL SERVICES/INSURANCE

Kenya has the most sophisticated financial and capital markets in the East African region. The Central Bank of Kenya is responsible for the management of Kenya's financial and banking system with the Treasury. Bank supervision is of a high standard. Currently, M-Pesa, which is a mobile phone-based money transfer service (owned by Kenya's biggest telcom firm, Safaricom) has revolutionised the financial sector and it is the most preferred method for transactions in both formal and informal sectors although it is not regulated by the Central Bank of Kenya.

The Capital Markets Authority is responsible for the regulation and supervision of the capital markets, including the Nairobi Securities Exchange. The Insurance Regulatory Authority is responsible for the regulation of the insurance sector.

### MEMBERSHIP OF INTERNATIONAL AND REGIONAL ORGANISATIONS

Kenya is a member of the EAC, COMESA, African Union (AU), United Nations (UN), African Caribbean and Pacific Group of States (ACP) and the British Commonwealth.

### TRANSPORT

The Government is currently spending large amounts of money to improve infrastructure including major ring roads around Nairobi. Nairobi has a commuter rail service system which was introduced to ease traffic congestion but this is not yet fully functional.

There are a number of huge transport infrastructure projects under way including a standard gauge railway whose phase I (from Mombasa to Nairobi) is already complete and operational while construction of phase II (from Nairobi to Naivasha) is underway and expected to be completed by June 2019. This railway system is expected to considerably reduce the time and cost expended for both cargo and passenger transport. This is the biggest infrastructure project in Kenya since independence and eventually the new railway is envisaged to connect Kenya, Uganda, Rwanda and South Sudan.

### WATER

Water is regulated under the recently enacted Water Act 2016, and by the Water Resource Authority which has completely taken over the functions of the previous Water Resource Management Authority. This statute has also created new

bodies to replace the previous ones including (i) the National Water Conservation and Pipeline Corporation with the National Water Harvesting and Storage Authority, (ii) Water Services Trust Fund with the Water Sector Fund, (iii) Water Services Boards with Water Works Development Agencies throughout the country. The previous statute was amended principally to devolve the roles in the management of water and water resources to local governments

### ENERGY

The Energy and Petroleum Regulatory Authority (EPRA) is established as the successor to the Energy Regulatory Commission (ERC) under the Energy Act, 2019 with an expanded mandate of regulating upstream petroleum, electricity, coal and renewable energy. The new legislation was passed to consolidate the laws relating to energy in Kenya and to provide national and county governments functions in relation to energy matters.

### TELECOMMUNICATIONS

The Communications Authority of Kenya regulates the telecommunications sector which is fully liberalised.

### MANUFACTURING

There is historically no substantive industrial manufacturing carried on in Kenya.

### INFORMATION AND COMMUNICATIONS TECHNOLOGY (ICT)

This is a fast expanding sector and good opportunities for investment continue to exist in this sector. The Kenya ICT Board has the mandate to promote development and investment opportunities in ICT.

### OIL

With the recent discovery of profitable oil and gas deposits in Kenya, there is increased focus on petroleum and gas exploration. The slump in global petroleum prices has caused activity in oil exploration and development ventures in the region to be slower than in 2014. Exploration is however not expected to stop and investment in the sector is still ongoing. The Petroleum (Exploration, Development and Production) Bill 2015 is pending in Parliament and seeks to overhaul the legal framework governing upstream and midstream petroleum activities in Kenya.

### MINING

Mining in Kenya is regulated by the Mines and Geology Department under the Ministry of Mining. Mining does not contribute considerably to Kenya's economy, however, certain mining projects in the recent past may have a significant positive impact on Kenya's exports.

The regulatory regime for mining in Kenya has recently been overhauled following the enactment of the Mining Act 2016. The Act has repealed the old Mining Act (Cap. 306 of the Laws of Kenya), the Trading in Unwrought Precious Metals Act (Cap. 309 of the Laws of Kenya) and the Diamond Industry Protection Act (Cap. 310 of the Laws of Kenya).



These previous laws had been in force for about 70 years and were considered outdated and inadequate for the growing sector.

### **TOURISM**

Kenya has one of the biggest and most diverse tourism industries in East Africa. The tourism sector in Kenya has experienced a steady growth in 2016 following a slump in 2014 and 2015. Tourism remains one of the largest foreign exchange earners in Kenya and is a key economic driver. There has been a spike in conference tourism in Nairobi following a number of high level international conferences held within the city.

### **AGRICULTURE**

This is one of the main income earners for the country especially in recent years with the expansion of the floriculture and horticulture sectors. Tea and coffee are major crops.

### **LABOUR RELATIONS**

The terms and conditions of employment are regulated by the Employment Act, the Labour Institutions Act and the Employment and Labour Relations Court Act. The Labour Institutions Act governs the functions, powers and composition of various labour related bodies, such as the National Labour Board as well as the appointment, functions and powers of officers responsible for labour matters. The Labour Relations Act governs the establishment, registration, dissolution and operation of trade unions, federations of trade unions, employers' organisations and federations of employers. The Occupational Safety and Health Act regulates safety, health and welfare in the workplace.