

# 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 43 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 was 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. The requirement for 30% Kenyan ownership of foreign companies wishing to register in Kenya was abolished with effect from 1st January 2017.

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. At least 25% of the shares of companies listed on the Nairobi Securities Exchange must be held by Kenyans. 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
- External companies (i.e. a branch of a foreign companies)
- 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 external companies (branches of foreign companies) must be registered with the authorities in Nairobi. Businesses such as banks, telecommunications and insurance companies require special licenses. Transition to the new legislative framework under the recently enacted 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. Some delays in company formation are expected in the course of the transition.

### 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.

### TAXATION

Currently the main taxes are as follows:

Tax	Rate
Income tax on individuals	30%
Corporate tax	30%
Branch of a foreign company	37.5% (non resident)

VAT	16%
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.

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.

There are a number of huge transport infrastructure projects under way including a new standard gauge railway already being constructed from the coastal city of Mombasa to Nairobi and 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 Water Act 2002 (soon to be replaced by the Water Act 2016) and by the Water Resource Management Authority (soon to be replaced with the Water Resources Authority). Water Boards (to be replaced by Water Works Development Agencies) have also been established throughout the country.

## ENERGY

The Energy Regulatory Commission (ERC) regulates the energy sector including petroleum prices based on a price capping formula. New energy legislation is expected to be passed soon by the Kenyan Parliament which will overhaul the current regulatory framework for energy and introduce provisions for regulation of new sources of energy including nuclear energy.

## TELECOMMUNICATIONS

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

## INDUSTRY

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 Environment and Mineral Resources. 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 "Mining Act").

The Act has repealed the old Mining Act (Cap. 306 of the Laws of Kenya) (the "Old Act"), 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 legislations 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 to be one of the largest foreign exchange earners in Kenya and is a key economic driver. There has been a spike in conference tourism within Nairobi in 2016 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.

