



## An Overview of Electronic Signing in Kenya

### Introduction

The constant progression of technology through innovations continues to revolutionize how people live and work. One key technological development is the emergence of electronic signatures (e-signatures) and advanced e-signatures. The use of these in place of written signatures has increased significantly recently.

The Kenya Information and Communications Act (KICA), is the primary law governing electronic transactions in Kenya. In 2020, The Business Laws (Amendment) Act introduced changes relating to electronic signing into various laws to ease doing business in Kenya.

We look at electronic signing, the validity of electronically signed documents, and the admissibility of electronically signed documents in court below.

### E-Signatures and Advanced E-Signatures

KICA defines an e-signature as data in an electronic form which is affixed to or is logically associated with other electronic data that may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message.

An e-signature uses common electronic authentication procedures to verify the identity of the signatory. This may include use of a biometric signature, a Personal Identification Number (PIN), an email address or even a company registration number.

On the other hand, KIC defines an advanced e-signature, as an e-signature which is uniquely linked to and capable of identifying the signatory, is created by means the signatory can maintain under their sole control, and is capable of identifying changes to the data after signing.

Advanced e-signatures are accompanied by an e-signature certificate issued by an accredited certification service provider (CSP). The certificate is a record issued by the CSP that confirms the identity of a signatory, identifies the CSP issuing it, and is signed by an officer of the issuing CSP.

A CSP intending to provide electronic certification services in Kenya is required to be licensed by the Communications Authority of Kenya (CA). Failure to procure a license is punishable by a fine of up to KES 300,000.00 or imprisonment for up to three years, or both.

A foreign CSP may be licensed to provide electronic certification services in Kenya. A foreign CSP must show it is licensed or authorized licensed or authorized by the relevant authority in its country of origin; complies with internationally acceptable standards and requirements; and has a local agent who will provide the certification services locally.

Kenya's Data Protection Act (DPA) also requires a CSP to be registered with the Data Commissioner and to obtain consent from subscribers for collecting and processing their personal data.

Anyone who wishes to use advance e-signatures therefore must confirm that the CSP they use is licensed to provide the services in Kenya. Using an unlicensed CSP means that the certificate they issue will not be definitive proof of the authenticity of the advanced e-signature.

Failure to do so would make the certificate issued by the CSP merely persuasive to a Kenyan court rather than definitive proof of authenticity of the e-signature. Currently, Geda is the only CSP licensed by CA.

### Execution of Documents

Parties may now electronically sign contracts to signify their acceptance and intention to be bound by the terms. The Law of Contract Act now recognizes the use of advanced e-signatures for signing contracts over land or interests in land.

This change was mirrored in the Land Registration Act which now recognizes as valid electronically signed instruments. However, there is need for synchronization as the Law of Contract Act only recognizes as valid documents signed with advanced e-signatures, while the Land Registration Act recognizes the use of normal e-signatures.

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Until the laws are synchronized, it would be advisable when dealing with land to avoid using e-signatures.

It is noteworthy that not all documents may be executed with e-signatures. KICA forbids the use of e-signatures to execute wills, negotiable instruments and title documents.

## Proving an E-Signature in Court Proceedings

It is important for parties relying on e-signatures to obtain evidence that they can present in court to prove the authenticity of the e-signature. Kenyan courts may direct an e-signature to be validated by production of an e-signature certificate or by following the verification process listed on the certificate.

Under Kenyan law, where an advanced e-signature is used, the courts are allowed to presume that the document has not been altered since it was signed, and the person who signed intended to be bound by the document. The courts are also allowed to presume that the information on the e-signature certificate is correct if it was accepted by the user.

## Conclusion

Undoubtedly, the use of e-signatures will be convenient to many as it will enable remote working, speed up contract execution, and reduce the need for physical interaction in a post-pandemic world.

However, there is need to be careful when using e-signatures. This is because normal e-signatures may be more prone to cyber-fraud as they can be easily modified or altered without detection. Additionally, where you are using an advanced e-signature, it is important to confirm that the Certification Service Provider is licensed to provide those services locally. Finally, there are instances where e-signatures will not be acceptable either for practical reasons (e.g., stamping documents at the Lands Registry) or legal ones (e.g., wills).

It is therefore prudent before you use e-signatures, that you obtain legal advice on whether they will be effective and binding, or meet applicable statutory requirements.

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