KENYA

Law and Practice

Contributed by:
Mugambi Nandi, Mugambi Maingi, Doreen Onwong'a and Sheilla Mokaya
KN Law LLP see p.24

Contents

Contributed by: Mugambi Nandi, Mugambi Maingi, Doreen Onwong'a and Sheilla Mokaya, **KN Law LLP**

1. Legal System and Regulatory Framework

1.1 Legal System

The Laws of Kenya

Kenya's legal system is based on English common law. The Constitution provides the general framework under which businesses operating in Kenya are regulated. This is supplemented by acts of parliament, referred to as "statutes". Statutes are passed by the National Assembly; if the proposed statute relates to the counties, it will also be considered by the Senate.

The statutes in place include laws relating to the formation, operation and reporting obligations of various business vehicles, such as the Companies Act and Limited Liability Partnerships Act; industry-specific laws; those relating to trade and commerce addressing matters such as the promotion of foreign investment and standards of goods and exports; and general commercial statutes such as those relating to taxation of income. There are also statutes that generally apply to all businesses, such as the Employment Act, the Competition Act and the Bribery Act.

The extent of application of statutes depends on the business activities being undertaken, with businesses operating in the financial services, aviation, mining and telecommunications sectors being the most regulated.

The Executive, the Legislature and the Judiciary

Kenya is a constitutional democracy, with three arms of government: the executive, the legislature and the judiciary. In addition, the 2010 Constitution established a number of independent constitutional commissions.

There are two levels of government: the national government, and 47 county governments headed by elected governors.

Kenya has a bicameral parliament, comprising the National Assembly and the Senate.

The judiciary is composed of various courts, with the Supreme Court being the apex court, followed by the Court of Appeal, the High Court (which includes specialised courts responsible for land and the environment, and labour matters), the magistrates' courts, Kadhi's courts, and specialist tribunals such as the tax disputes tribunal. The decisions of the superior courts are binding on subordinate courts and the tribunals established under statute.

Regulations and Guidelines

Statutes are usually supplemented by subsidiary legislation in the form of regulations and guidelines. Regulations are published by the executive, which is organised into various ministries, each headed by a cabinet secretary appointed by the President. The cabinet secretary of the relevant ministry under which that function falls publishes regulations providing for operational matters if empowered by statute. Guidelines are issued by government entities charged with oversight of particular functions. Guidelines provide general direction to the relevant industry; they do not have the force of law, but they are often complied with in full.

Settlement of Disputes

Disputes arising between private entities or between the state and a private entity are determined by the courts. There are also specific tribunals set up to determine specific disputes – eg, the National Land Commission settles land-related disputes, the Public Procurement Administrative Review Board settles procurement and tender-related disputes, and the Tax Appeals Tribunal settles tax disputes. Appeals from these tribunals usually go to the High Court. To ensure commercial objectives are preserved, tribunals have statutorily set timelines for determining disputes.

The judiciary recently operationalised the Small Claims Court in Kenya, which is a subordinate court designed to resolve civil and commercial disputes with claims of up to KES1 million. It is projected that the operations of the subordinate court will enhance the ease of doing business in Kenya through expeditious dispensation of small claims as well as reduced costs.

ADR Mechanisms

The Constitution promotes the use of alternative dispute resolution mechanisms, such as reconciliation, mediation and arbitration. The Kenyan Arbitration Act (1995) as amended in 2010 is anchored on the United Nations Commission on International Trade Law (UNCITRAL) Model Law. The Nairobi Centre for International Arbitration (NCIA) was established as an independent, non-profit international organisation for commercial arbitration. Kenya is a member of the International Centre for Settlement of Investment Disputes and the 1958 New York Convention on the Enforcement of Foreign Arbitral Awards. Since 2018, court-annexed mediation has also been adopted by the courts.

1.2 Regulatory Framework for FDI

Kenya does not have an overarching legislative framework on FDIs. Generally, FDIs do not require approval in Kenya, although firms seeking registration with the Nairobi International Finance Centre (NIFC) will be subject to screening and, after registration, to monitoring by the NIFC Authority. To avoid regulatory overlaps, the NIFC Authority will not oversee firms that are regulated by a financial regulator.

The transfer of funds in and out of the country may also be subject to scrutiny by the Central Bank of Kenya (CBK), and supporting documentation may be requested through the transacting bank. The extent of the documentation requested may vary based on the origin and quantum of the funds. This is part of the government's efforts to curb money laundering and the financing of terrorism.

Notably, under the Kenyan Constitution, foreigners (including corporate entities with foreign ownership) can only hold land on the basis of a leasehold tenure, which should not exceed 99 years. The Land Control Act also restricts the acquisition of agricultural land by non-citizens or private companies with foreign ownership in certain areas as may be prescribed, unless an exemption is received from the President.

Some regulated sectors also have restrictions on foreign shareholding and requirements for the incorporation of a local entity (although this is rare and mostly relates to matters that are considered to touch on national security). However, foreign firms or firms with foreign shareholding may obtain exemptions from the NIFC launched in 2022 pursuant to the NIFC regulations published in 2021 if they participate in qualified activities, such as insurance and pension business, which have foreign shareholding restrictions.

In addition, the acquisition of direct or indirect control of a Kenyan business, subject to certain thresholds as set out in the Competition Act, will be subject to the approval of the Competition Authority of Kenya (in addition to the relevant sector regulator, where applicable). Kenya is a member of the Common Market for Eastern and Southern Africa (COMESA) and therefore acquisition of control in a Kenyan business may be subject to COMESA merger thresholds. Local content requirements also apply in a number of sectors, such as energy and construction, to ensure knowledge sharing.

2. Recent Developments and Market Trends

2.1 Recent Developments and Market Trends

Ease of Doing Business

Political and economic climate

Kenya conducted general elections in August 2022 and a new administration is currently in place after a peaceful election. The coming in of a new government spells out a refreshed economic agenda, which so far includes reforms to the tax system, revitalisation of the capital markets, a focus on affordable housing and enhancing access to capital for medium and small enterprises, among others.

Kenya is also one of seven countries in Africa set to benefit from carbon credit production to create jobs and protect biodiversity. This will be implemented through the Africa Carbon Markets Initiative launched at COP27. It is worth noting that climate business, including climate finance and carbon trading, is one of the qualifying activities under the Nairobi International Finance Centre Regulations and the NIFC is currently setting up a carbon exchange.

According to the World Bank, Kenya's real gross domestic product (GDP) is projected to grow by 5.5% in 2022 and 5.2% on average in 2023–24, with measures by the CBK to maintain an accommodative monetary policy stance cushioning the economy and helping to bolster recovery. Kenya continues to be the leading country in East Africa in attracting private equity and venture capital investments, particularly in financial services, consumer services and manufacturing.

Review of the business regulatory framework

Kenya continues to review its business regulatory framework in a bid to adapt to economic conditions, resolve inefficiencies and enhance the ease of doing business in the country. Recent updates on the legislative and regulatory framework that may impact foreign direct investments include the following.

- Kenya's Anti Counterfeit Authority has rolled out the intellectual property rights recordation process in a bid to curb counterfeit practices within the country's borders. The recordation process, set to commence in January 2023, will involve the creation of a database of information relating to trade marks, copyrights, trade names and other intellectual property rights for goods being imported into Kenya.
- Kenya has adopted comprehensive data protection legislation through the enactment of the Data Protection Act and the subsequent publishing of supporting regulations in December 2021. Registration as data controllers and processors officially commenced with the operationalisation of the Office of the Data Protection Commissioner in 2021.
- The Central Bank of Kenya (Digital Credit Providers) Regulations 2022, which were gazetted in March 2022, are now operational. They extend the mandate of the CBK to Digital Credit Providers, which are now subject to registration and continuing reporting obligations, with CBK as the oversight entity.
- Various amendments have been made to Kenya's tax regime, to attract foreign investments. For instance, dividends paid by Spe-

cial Economic Zone enterprises, developers and operators to any non-resident person are tax-exempt.
- The list of entities exempt from the EBITDA-based limitations has been expanded to include microfinance institutions, non-deposit institutions involved in lending, companies undertaking the manufacture of human vaccines and holding companies regulated under the Capital Markets Act. Also in the list are manufacturing companies with a cumulative investment of KES5 billion preceding the enactment of the Finance Act 2022 and companies engaged in manufacturing whose cumulative investment is at least KES5 billion, provided that the investment is outside Nairobi or Mombasa.
- The Finance Act 2022 also amends the corporate tax rate for a company operating a carbon market exchange trading system certified by the NIFC to 15% for the first ten years from the year of commencement of its operations. This is significantly lower than the usual corporate tax rate of 30% currently applied in Kenya.
- In July 2022, Kenya launched the NIFC, aimed at creating a more efficient and predictable environment for its member firms. NIFC certification is open to both domestic and international firms, and operates through innovative measures such as having bespoke operational rules and offering incentives to certified firms. The NIFC is projected to attract increased finance and investment, and to support green growth and innovation. Firms with NIFC certification will not be subject to any nationalisation requirements nor any restrictions on private ownership, and they will be free to repatriate and realise investments and capable of being owned 100% by non-citizens. NIFC firms will also have the freedom to recruit and employ staff of their choice, albeit subject to work permit provisions and any applicable international treaty.
- Beneficial ownership regulations have been amended to expand the scope of disclosure to the contracting authority of beneficial ownership information by companies participating in public procurement and asset disposal under the Public Procurement and Asset Disposal Act 2015.
- The Trustee (Perpetual Succession) Act was amended to allow for the incorporation of trusts other than charitable trusts.

Kenya has also established itself as a regional leader in the telecommunications industry. Various government services are offered online, including registration of businesses, applications for work permits, and the filing and payment of taxes. This is further enhanced by the integration of mobile money payment methods, which are largely accepted in Kenya, into the platforms to pay for services.

The government also launched the National Land Information Management System, which digitises all transactions involving land and provides an online land registry. The intention is to establish transparency, decentralisation, affordability and efficiency in land transaction processes. The pilot phase is being tested in Nairobi, Kenya's capital.

Negative Aspects

Despite the gains, Kenya has a burdensome tax regime, with the government being keen to increase its tax base. For instance, since 1 January 2023, the rate of capital gains tax is increased from 5% to 15%. The efficiency of the capital gains tax regime is challenged by the fact that Kenya has not adopted a price indexation model, especially in relation to real property where inflation has continued to erode the value of any gain made. However, the Kenyan rate remains the lowest in the region.

Furthermore, Kenya was ranked at 128 out of 180 countries in the 2021 Transparency International Corruption index. It scored 30 out of 100, with 100 being the threshold for the least corrupt. Corruption continues to be a deterring factor for foreign businesses setting up in Kenya.

In the Pipeline

The following items are currently in the pipeline.

- The Capital Markets Authority (CMA) has proposed various changes to its regulations, such as:
  - (a) amendments to the Collective Investment Scheme Regulations, which seek to boost investor participation in collective investment schemes through an effective asset management framework aligned with the ambitions of the 2014–2023 Capital Market Master Plan; and
  - (b) overhauling the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, whose salient features include the introduction of a framework for the listing of Special Purpose Acquisition Companies (SPACs).
- Kenya's new administration is keen to amend the Privatisation Act in a bid to assist ailing state-owned entities to stay afloat by raising funds through the private sector or listing on the securities exchange and thus enhance continuity and growth of their operations.
- The Insurance Regulatory Authority is in the process of updating the Insurance Act, the Insurance Regulations, the Insurance Guidelines and related insurance laws, and has invited members of the public as well as stakeholders in the insurance and the financial services sectors to recommend changes in response to market developments and stakeholder needs.

Judicial Stability

In terms of the legal environment, Kenya remains relatively stable regarding the certainty of law. The Kenyan Supreme Court has reinforced the legal position that arbitral awards are binding and may only be challenged in very limited circumstances.

However, there have been uncertainties caused by court decisions; for example, in a 2022 decision, the application of the in duplum rule was extended to student loan applicants under the government education loans scheme. This is a departure from previous decisions by the same court and could impact non-banking institutions and the credit industry at large if the principle is extended to non-bank institutions as a matter of public policy.

Kenya has also operationalised the Judiciary Fund, which is established under Article 173 of the Constitution with KES9 billion half-year allocation. It is operationalised with the support of the executive, the legislature, the CBK and the Controller of Budget, and is set to aid in the planning and timely execution of operations and projects.

Government Intervention

There have been instances, though rare, where the government has sought to intervene in contractual arrangements. The government has recently engaged banks to reduce lending rates on their digital lending platforms and to use a risk-based credit rating system to determine a borrower's access to credit rather than relying exclusively on reports from Credit Reference Bureaus.

Following the publication of the report by the Taskforce on the Review of Power Purchase Agreements between Kenya Power and Lighting Company Limited and independent power producers, an Implementation Committee was appointed. The term of the Committee has since lapsed with the implementation report still pending, indicating the government's cautious approach to interfering with existing contractual arrangements.

3. Mergers and Acquisitions

3.1 Transaction Structures

The most common structure for M&A of both public and private companies in Kenya is through the acquisition of shares from existing shareholders or by acquiring newly created shares. In the recent past, however, Kenya has witnessed an increase in the use of asset purchases in M&A transactions, especially where the target businesses are not operating as a going concern. The acquisition of public listed companies is more complex, as the acquirer must comply with both the Companies Act 2015 and the Capital Markets (Takeovers and Mergers) Regulations 2002.

Other transaction structures include:

- acquisition of a business or part of a business such as a trading division;
- joint ventures; and
- share swaps.

The key legal considerations in determining the type of transaction structure to adopt include ease of implementation, tax efficiency, risk appetite and the needs of the target business. Where an acquirer is taking a minority interest, the usual structure is the purchase of shares from existing shareholders.

3.2 Regulation of Domestic M&A Transactions

The principal legislation regulating M&A transactions is the Competition Act, No 12 of 2015. However, parties proposing to consummate a transaction must review their situation and determine whether the transaction is subject to other regulatory approval, based on the sector and status of the entities. As an example, M&A transactions involving the financial services sector may be subject to approval by all or some of the following additional regulators:

- the CBK;
- the Insurance Regulatory Authority;
- the CMA; or
- the Retirement Benefits Authority.

Similarly, a telecommunications sector transaction will require the approval of the Communications Authority of Kenya.

M&A transactions involving an entity that has operations within East Africa and COMESA markets may also need to be notified to the regional competition authorities. The COMESA Competition Regulations and their corresponding Merger Assessment Guidelines provide that notification of notifiable mergers should take place no later than 30 days after the merging parties' decision to merge. A decision to merge must comprise the conclusion of a legally binding agreement to carry out the merger, or the announcement of a public bid in the case of publicly traded security. The COMESA timelines are relatively short, which increases the risk of sanctions for participating entities.

4. Corporate Governance and Disclosure/Reporting

4.1 Corporate Governance Framework

Corporate entities used for business in Kenya are either companies or limited liability partnerships (LLPs).

Companies

The Companies Act sets the minimum corporate governance standards for companies and requires that a private company must have at least one director while a public company must have at least two directors. The general duties of directors are codified in the Act. Public companies and private companies with a share capital of more than KES5 million are also required to have a company secretary. Public companies are required to convene a general meeting every year.

Limited Liability Partnerships

The Limited Liability Partnership Act does not provide for minimum governance requirements. There is no requirement to have a partnership deed; in its absence, provisions of the Act apply. A limited liability partnership must, however, have at least two partners and a manager, who may be one of the partners but who must be a natural person. The manager is responsible for statutory filings and compliance.

Guidelines

The Code of Corporate Governance Practices for Issuers of Securities to the Public 2015, which adopts the "apply or explain" approach, applies to all entities (whether listed or not) that have issued securities to the public. The Code has the following features:

- it requires issuers to ensure independence between the office of the chief executive officer and the board chairman;
- it prescribes minimum requirements on board composition in relation to independent and non-executive directors;
- it requires that board committees must be established – ie, audit and risk and board nominations; and
- it provides for board training and evaluation, as well as reporting obligations to the CMA.

Regulated entities, particularly in the financial services sector, have specific corporate governance requirements, which apply regardless of whether they are issuers of securities to the public or not. These mirror the above requirements and are customised to the specific industry, such as the Corporate Governance Guidelines applicable to banking institutions.

The CMA has also published a Stewardship Code meant to encourage institutional investors, including foreign investors, to take up stewardship roles in listed companies in which they invest, in order to ensure conflicts of interest are managed and responsible investment policies are established, that public disclosures and reporting are done, and that sustainable investments are made.

4.2 Relationship Between Companies and Minority Investors

The company laws in Kenya require both private and public companies to treat their shareholders (including minority shareholders) in an equitable manner. In terms of rights, minority investors are entitled to:

- receive notice of general meetings of the company;

- receive information on the company's performance;
- attend and participate in the general meeting and, depending on the rights attached to the class of shares, vote; and
- apply to court for investigation of the affairs of the company.

Minority shareholders holding at least 10% of the paid-up capital of the company may also require the directors of the company to convene a general meeting of members. For private companies, the right is exercisable by members holding at least 5% of the paid-up share capital of the company.

Directors are required to give notice of at least 21 days prior to convening a general meeting. However, a general meeting of public companies may be convened at short notice where doing so is approved by 95% of the members entitled to vote. For private companies, the short notice must be approved by at least 90% of the members entitled to vote.

Members of a company may apply to the High Court for orders for protection of members where the company's affairs are being conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or some particular member.

Under the Companies Act, any five members having the right to vote on a resolution or such members representing at least 10% of the total voting rights of all the members having the right to vote on a resolution may demand a poll.

Where an offer is made for the acquisition or takeover of a company, the offeror must extend the offer to the minority shareholders on the same terms as those agreed with the majority shareholders. The CMA may suspend or cancel the listing or trading of any securities or exchange-traded derivatives contracts for the protection of investors, including minority investors.

4.3 Disclosure and Reporting Obligations

The disclosure and reporting obligations imposed on companies are twofold:

- general disclosure and reporting requirements set out in the Companies Act; and
- industry-specific requirements that mandate additional disclosures and reports to be lodged with the sector specific regulator.

These disclosure and reporting requirements are mandatory regardless of the ownership percentage.

Any changes in a company's shareholding or directorship are to be notified to the Registrar of Companies (the "Registrar") within 14 days of such changes being made.

Companies are to prepare and lodge financial statements with the Registrar comprising:

- statement of financial position;
- income statement;
- cash flow statement; and
- statement of changes in equity.

Where a company has subsidiaries, it will prepare consolidated group financial statements detailing the performance of the subsidiaries.

The notices and documents to be lodged with the Registrar are filed at the Business Registration Service through an online platform known as eCitizen, which is accessible to citizens and non-citizens alike.

Quoted companies have enhanced disclosure requirements and are supposed to disclose financial results, including half year, on their websites. They are particularly required to disclose the following in their annual reports:

- a statement of policy on good governance;
- the skills, mix and expertise of directors;
- details of their audit committee and its mandates; and
- details of the whistle-blowing policies.

The Global Reporting Initiative has been recommended as the framework for ESG reporting for listed companies in Kenya, effective November 2022. Listed companies are also expected to disclose any corporate actions that may have an impact on the share price as well as corporate governance documents, such as board charters and their codes of ethics.

Both individuals and companies are required to disclose their incomes to the Kenya Revenue Authority, and to file their tax returns on an annual basis. With effect from January 2022, ultimate parent entities for multinationals whose turnover exceeds KES2.5 billion are required to file annual returns with the Kenya Revenue Authority detailing the business activities of the group in the county and in other jurisdictions where the group entities are liable to pay tax. In addition, from June 2022 any entity resident in Kenya whose turnover exceeds KES95 billion and is part of a multinational enterprise group (MNE) is required to disclose the ultimate parent and the surrogate entity within the MNE and their tax residency to the Kenya Revenue Authority.

5. Capital Markets

5.1 Capital Markets

The Capital Markets Authority (CMA)

The capital markets are regulated by the CMA, which licenses and monitors securities exchanges, market intermediaries and issuers of securities. It provides oversight and guidance to market supervisors and plays a primary approval role for companies looking to offer their securities to the public. The CMA has prescribed regulations relating to the issuance of securities to the public, licensing requirements by market intermediaries, conduct requirements, and corporate governance and reporting obligations. However, as highlighted in **2.1 Recent Developments and Market Trends**, the CMA is in the process of reviewing various regulations to meet market demands and keep up with current market trends.

The Nairobi Securities Exchange (NSE)

The NSE is the only securities exchange licensed in Kenya and is approved by the CMA as a self-regulatory organisation. There are only 62 companies listed on the NSE (as of November 2022), with a number of delistings witnessed in the recent past. There are five active corporate bonds on the NSE. The bond markets have been particularly inactive following a number of defaults recorded in 2015 but market confidence is slowly coming back. In 2021, two corporate bonds were issued to the public and were both over-subscribed. The private capital markets also remain active, providing viable funding to SMEs.

Environment Social Governance (ESG)

In November 2021, the NSE issued the ESG Guidance Manual, aimed at improving and standardising ESG information reported by listed companies in Kenya. The guidelines provide a granular and tactical approach to ESG reporting that meets international standards on ESG reporting. The manual further acts as a guide on the integration of ESG considerations by listed companies whilst capturing significant opportunities for stakeholders and managing critical business risk. Following the issuance of the guidelines, listed companies had to comply with the ESG reporting requirements under the manual by November 2022.

Investment Opportunities

The capital markets provide opportunities for investment in different asset classes other than the conventional equity and debt securities, as well as collective investment schemes including REITs, exchange traded funds and equity derivatives. Provision has also been made for green bonds, with the first green bond having been listed on both the Nairobi and London securities exchanges in 2020.

Trading

The listing and trading of securities in Kenya is electronic and takes place through an automated platform facilitated by the NSE. This is further supported by the Central Depository Settlement Corporation (CDSC), which provides a centralised system for the transfer and registration of securities in an electronic format without the need for physical certificates.

The NSE has also established an Unquoted Scripts Platform that provides an over-the-counter market for unlisted securities. This has led to an improved flow of information and efficiency in the markets. The CMA also publishes a quarterly market-soundness report that provides the market with crucial information and gives insights as to the policy direction it is pursuing. Since 2021, investors can buy and sell shares of a listed company within the same day (same day trading).

The CDSC has been approved by the CMA to facilitate a Screen-Based Securities Lending and Borrowing model. Various initiatives by the NSE are ongoing to create awareness around securities lending and borrowing, particularly among local institutional investors, which are expected to deepen the local capital markets.

Sources of Funding

The primary source of funding continues to be the banking industry, with at least 95% of business funding coming from banks and microfinance institutions. Saving and credit co-operative societies also provide critical funding to micro, small and medium-sized businesses. Private equity and venture capital (both debt and equity) have also gained traction in the recent past by providing funding for companies in the tech and digital space, as well as businesses in the retail, e-commerce and healthcare sectors, with increased participation from Africa-focused offshore funds.

In October 2022, the CMA gazetted the Capital Markets Investments-Based Crowd Funding Regulations 2022, which are projected to be instrumental in providing access to affordable and alternative finance for medium and small enterprises. The Regulations set the licensing requirements for a crowdfunding operator and set the standards for the eligibility of a crowdfunding participant as well as investors. The amount of funds that can be raised on a crowdfunding platform is restricted to a maximum of KES100 million within a 12-month period unless an exemption is given by the CMA. Eligible investors include sophisticated investors who can invest at least KES1 million and retail investors, whose maximum investment is capped at KES100,000.

5.2 Securities Regulation

The primary legislation governing capital markets in Kenya is the Capital Markets Act No 17 of 1989. Subsidiary legislation has been published by the CMA, including the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations. Certain securities, such as asset-backed securities, also have specific requirements.

The NSE's Four Investment Market Segments

CMA approval is required for any offer of securities to the public or a section of the public. Approval is premised on the issuer meeting the eligibility and disclosure requirements, which vary depending on the segment in which the issuer intends to list. The NSE currently has four investment market segments:

- the Main Investment Market Segment (MIMS);
- the Alternative Investment Market Segment (AIMS);
- the Fixed Income Securities Market Segment (FISMS); and
- the Growth Enterprises Market Segment (GEMS).

However, through its review of the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations, the CMA proposes to replace AIMS and GEMS with an SME market segment comprising both an Equities and Fixed Income Segment.

Raising Funds Outside the Public Capital Markets

The CMA regulatory framework allows for the issuance of private offers. To qualify as a private offer, an offer has to meet one of the exemptions set out in the existing regulatory framework. In Kenya, this type of issuance is especially prevalent through commercial papers and real estate notes. Information requirements to the CMA vary depending on the nature of the offer, with offers with a wider reach in terms of number of investors or amounts being raised being subject to Information Notice filing requirements or the approval of a short form prospectus, or an Information Notice must be submitted to the CMA.

Regulation of Foreign Investors

Under the Capital Markets (Foreign Investors) Regulations 2002, foreign investors may subscribe to the shares of a listed company without any restrictions as to the level of holdings. However, the cabinet secretary in charge of finance may prescribe a maximum foreign shareholding in an issuer or listed company where:

- in a privatisation transaction, the government or its agency is divesting its shares to the public;
- some level of local ownership in a strategic industry or sector in the country is to be maintained; or
- it is in the national interest.

The conducive environment for foreign investors in the capital markets is exemplified by the fact that foreign investor turnover typically constitutes at least 60% of trading activity in the listed securities markets.

5.3 Investment Funds

Foreign investment funds looking to invest in Kenya are not subject to regulatory review, except for the purposes of compliance with the Proceeds of Crime and Money Laundering Act. Foreign investment funds continue to play a key role in funding businesses in the private equity and venture capital space, with support from development finance institutions.

However, the Capital Markets Act gives the CMA jurisdiction over investment funds, including foreign-domiciled investment funds seeking to raise funds from Kenyan retirement benefit schemes or other entities that pool funds from the Kenyan public. The CMA has not yet published regulations or guidelines in relation to its mandate.

6. Antitrust/Competition

6.1 Applicable Regulator and Process Overview

Kenya has a merger control regime set out in the Competition Act, which establishes the Competition Authority of Kenya (CAK), whose mandate is to enforce compliance with the Act. The CAK has published the Competition (General) Rules 2019 and the Consolidated Guidelines on the Substantive Assessment of Mergers, which prescribe the threshold for transactions that must be notified to the CAK, and those that are exempt. A merger shall not be subject to notification if it is taking place wholly or entirely outside of Kenya and has no local connection. Additionally, no notification is required where the COMESA Merger Notification Thresholds are met.

Where either or both the acquiring firm and the target firm operate in two or more member states, the merger must be notified to the COMESA Competition Commission if:

- the combined annual turnover or value of assets (whichever is higher) of all parties to a merger equals or exceeds USD50 million; and
- if the annual turnover or value of assets (whichever is higher) of each of at least two of the parties to a merger equals or exceeds USD10 million, unless each of the parties to a merger achieves two-thirds of its aggregate turnover or assets within one and the same member state.

Transactions Requiring Notification
The following transactions require notification:

- companies with a minimum combined turnover or assets of KES1 billion, where the turnover or assets of the target company is above KES500 million;
- in the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds KES 10 billion;
- where the turnover or assets of the acquiring entity exceed KES10 billion and the merging parties are in the same market or can be vertically integrated, unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds; and
- transactions that have met the COMESA Competition Commission Merger Notification Thresholds where two-thirds or more of the entities' turnover or assets is generated or located in Kenya.

Excluded Transactions Requiring Approval
The following transactions qualify for submission to the CAK for approval, but the CAK may exclude them from the approval requirement upon receipt of a written request for exclusion:

- transactions involving undertakings in the carbon-based mineral exploration and prospecting sectors, regardless of the asset value; and

- where the combined turnover or assets of the merging entities is between KES500 million and KES1 billion.

Transactions Excluded From Notification
The following transactions have no notification requirements:

- transactions that do not meet the thresholds set out above;
- the acquisition of voting shares where the acquisition:
  - (a) is less than 25%;
  - (b) is acquired solely for investment purposes or in the ordinary course of business; and
  - (c) does not amount to control;
- the acquisition of further voting securities by an entity that already holds more than 50% of the shares, unless the acquisition is a transfer of joint control to sole control; and
- transactions involving a parent or holding company and its subsidiary.

Unless excluded from notification, a merger will not be implemented unless it is approved by the CAK. A merger implemented without the CAK's approval has no legal effect and obligations imposed on the participating parties in respect of the merger will not be enforceable in legal proceedings.

Procedure for Requesting the CAK's Approval
Each of the companies involved will file a notification on the CAK portal. Parties share the filing credentials, with one party completing its filing and then the second party following, using the same reference number. The CAK then considers and makes a determination within 60 days after the date on which it received the notification. The CAK may extend the period for determination by a further 30 days. It will thereafter make one of the following decisions:

- approve implementation of the merger;
- decline to approve the merger; or
- approve implementation of the merger subject to certain conditions.

6.2 Criteria for Review
Merger proposals are subject to competition assessment and public interest assessment.

In undertaking the competitive assessment, the CAK takes the following factors into consideration:

- the extent to which the proposed merger would prevent or reduce competition, or restrict trade or the provision of any service;
- the extent to which the proposed merger would result in any undertaking acquiring a dominant position in a market or strengthening a dominant position in a market;
- the extent to which the proposed merger would result in a benefit to the public that would outweigh any detriment that might result from any undertaking acquiring a dominant position in a market or strengthening a dominant position in a market; and
- the benefits likely to be derived from the proposed merger relating to research and development, technical efficiency, increased production, efficient distribution of goods, or the provision of services and access to markets.

Public interest considerations require that mergers should not conflict with government policies – eg, on employment opportunities and the protection and encouragement of the growth of small businesses. The factors to be considered include:

- the extent to which the proposed merger would affect employment;
- the extent to which the proposed merger would affect a particular industrial sector or region;
- the extent to which the proposed merger would affect the ability of small undertakings to gain access to or be competitive in any market; and
- the extent to which the proposed merger would affect the ability of national industries to compete in international markets.

6.3 Remedies and Commitments
Remedies and commitments are determined by the CAK on a case-by-case basis. The following are examples of commitments imposed by the CAK in the past:

- the commitment not to lay off workers;
- the commitment not to subject employees to less favourable employment benefits;
- the commitment to reserve 20% of the space in fridges provided to retailers for use for other products, in order to assist SMEs; and
- the commitment to use locally available raw materials.

The conditions imposed are subject to appeal at the Competition Tribunal, an independent body which may overturn the decisions of the CAK Board.

6.4 Enforcement
Approval from the CAK is required prior to making an investment if said investment falls within the notification threshold in the Competition Act. However, a deposit of not more than 20% of the consideration may be made towards a merger transaction prior to the approval of the CAK. Failure to obtain the CAK's approval renders the transaction to be of no legal effect, and obligations imposed on the participating parties in respect of the merger will not be enforceable in legal proceedings. The parties may also be subject to monetary penalties from the CAK. The CAK may also, at any time, revoke a decision approving the implementation of a proposed merger if:

- the decision was based on materially incorrect or misleading information occasioned by a party to the merger; or
- a condition attached to the approval of the merger is not complied with.

The CAK's decisions may be appealed to the Competition Tribunal within 30 days of receipt of the decision. The Tribunal will give its verdict within four months after the appeal is lodged. Any party dissatisfied with the decision of the Tribunal may appeal to the High Court within 30 days after notification of the decision. The decision of the High Court will be final.

7. Foreign Investment/National Security

7.1 Applicable Regulator and Process Overview
Kenya does not have an overt foreign investment national security review regime. Merger proposals are, however, subject to public interest considerations, which require that mergers should not conflict with government policies. The public interest review is done by the CAK and proposals are determined on a case-by-case basis.

If an investor applies for an investment certificate under the Investment Promotion Act No 6 of 2004, further review procedures may be required where an investment raises an environmental, health or security issue. There are currently no guidelines on how the review will be undertaken or the parameters to be used.

7.2 Criteria for Review
This is not applicable in Kenya.

7.3 Remedies and Commitments
This is not applicable in Kenya.

7.4 Enforcement
This is not applicable in Kenya.

8. Other Review/Approvals

8.1 Other Regimes
The following laws have an impact on how foreign investments may be undertaken in the country by prescribing restrictions on foreign shareholding.

- The Retirement Benefits Act No 3 of 1997 – for an entity to be approved as an administrator of a retirement benefits scheme, at least 60% of its paid-up share capital must be owned by Kenyan citizens, unless the applicant is a bank or an insurance company.
- The National Information Communications and Technology (ICT) Policy Guidelines 2020 – only companies with at least 30% substantive Kenyan ownership (either corporate or individual) will be licensed to provide ICT services in Kenya.
- The Merchant Shipping (Maritime Service Providers) Regulations 2011 – to be licensed as a maritime service provider, one must be a Kenyan citizen and, in the case of a company, must be incorporated in Kenya with at least 51% of the share capital held directly by Kenyan citizens.
- The National Construction Authority Act Chapter 449A and the National Construction Authority Regulations 2014 – foreign contractors (ie, firms incorporated outside Kenya or firms incorporated in Kenya in which 51% of the shares are held by a non-Kenyans) will only be licensed in the uppermost category, with more stringent requirements regarding financial and technical capacity. The lower categories are restricted to local contractors. The NCA also has minimum local content requirements. Foreign contractors are required to commit to sub-contract at least 30% of the value to local contractors.
- The Engineers Act No 43 of 2011 – in order to be registered as an engineering consulting firm in Kenya, at least 51% of the shares in the firm must be held by Kenyan citizens.
- The Insurance Act – to register as an insurer, the Insurance Act provides that at least one-third of a company's paid-up capital is held by citizens of the East African Community Partner States, and that board composition reflects this as well. Insurance brokers are also required to have 60% of their share capital held by a Kenyan citizen or citizens of the East African Community.
- The Civil Aviation Authority Act–to be issued a licence relating to international air services, the applicant is required to be a Kenyan citizen or, in the case of a body corporate or partnership, 51% of the voting rights should be ultimately held by the Kenyan State, a citizen or both.
- The Kenya Information and Communications Act 1998 – a telecommunications licence can only be issued if the applicant is a Kenyan citizen or is an entity in which Kenyan citizens own at least 51% shareholding.
- The Mining Act 2016 – an applicant for mineral rights, if a body corporate, should have been incorporated or established in Kenya. The Mining Act also implements certain restrictions, such as the submission of a

detailed programme for the recruitment and training of citizens of Kenya as a condition to obtaining the mining rights. The holder of the mining rights is also required to give Kenyans preference when it comes to employment and auxiliary services such as transport, processing, refining and other dealings.
- The Private Security Regulation Act 2016 – for registration as a private security service provider in Kenya, if a body corporate, the company should be incorporated and established in Kenya and should have at least 25% local shareholding.

Kenya is a liberal market and has no foreign exchange regulations. The High Court recently declared Section 12A of the Land Act, which required non-citizens to obtain the approval of the cabinet secretary prior to owning beach properties, to be unconstitutional.

9. Tax

9.1 Taxation of Business Activities

The taxes levied on companies are split into two categories:

- direct taxes comprising income tax, turnover tax, capital gains tax and digital services tax; and
- indirect taxes, which include value-added tax (VAT), withholding tax and excise duty.

Locally incorporated companies pay corporation tax at a rate of 30%, while foreign companies are taxed at 37.5%.

Turnover tax is a final tax levied on small companies where the annual income ranges between KES1 million and KES50 million. The tax is charged at a rate of 1% of the annual income. Capital gains tax was charged at a rate of 5% of the net gain realised after the company disposes of investment property, but the rate of capital gains tax was increased to 15% on 1 January 2023. Digital service tax is levied on all services offered through the digital marketplace by companies with no permanent establishments in Kenya. The tax is payable at 1.5% of the gross transaction value.

Companies whose annual taxable supplies are KES5 million or more are required to register for the VAT obligation.

Partnerships, including limited liability partnerships, are not considered separate legal entities for tax purposes and are therefore tax-transparent vehicles. Instead, profit is taxed at the individual partner level, based on the graduated scale rate set out in the Income Tax Act.

To avoid unintended consequences of tax legislation, Kenya has double-taxation agreements (DTAs) with Canada, Denmark, France, Iran, Korea, Norway, South Africa, Turkey, the United Arab Emirates, the United Kingdom and Zambia. Kenya also has DTAs with other countries where negotiations are ongoing or they are not yet in force. For instance, Kenya concluded the public participation stage of its DTA with China in September 2022, where the National Treasury had invited members of the public and stakeholders to give their comments on the agreement.

Finally, in certain circumstances, foreign investors may be exempted from acquiring a personal identification number (PIN) by the Kenya Revenue Authority. This provides an excellent opportunity for foreign investors where the income generated in Kenya is mainly passive to avoid the onerous administrative and compliance requirements that come with procuring and maintaining a Kenyan PIN.

9.2 Withholding Taxes on Dividends, Interest, Etc

Withholding tax (WHT) is levied on dividends at a rate of 5% for residents and 20% for non-residents. However, dividends paid by Special Economic Zone (SEZ) enterprises, developers and operators licensed under the Special Economic Zones Act are exempt from taxation. WHT is levied on interest earned at a rate of 15% for both residents and non-residents. For royalties on the usage of patents, copyrights and other intellectual property rights, and management and professional fees, WHT is charged at a rate of 5% for residents and 20% for non-residents. Non-residents who are citizens of the East African Community Partner States or paid by entities operating within the SEZ are subject to WHT at a lower rate of 15% and 5%, respectively.

Gains from financial derivatives accruing to residents are subject to WHT at the rate of 15%. Since 1 January 2023, non-residents are also taxed at the same rate of 15% of the gains accrued. Once approved, the draft Income Tax (Financial Derivatives) Regulations 2022 will provide clarity on the taxation of financial derivatives, the determination of loss or gain and the timelines for submitting the WHT. Gains from financial derivatives traded at the NSE are exempt from taxation.

Currently, Kenya has signed double-taxation treaties with the governments of France, Canada, the People's Republic of China, Denmark, East African Community Partner States, Germany, Iran, Italy, Kuwait, Mauritius, Korea, the Netherlands, Norway, Qatar, Seychelles, South Africa, Sweden, the United Arab Emirates, the United Kingdom and Zambia. The treaties provide for exemption from taxation or a reduction in the rate. The treaty benefits are only applicable to citizens of the contracting parties. In the case of companies, treaty benefits will not be available where 51% or more of the shares are held by persons who are not residents of the contracting states. This rule does not apply for listed companies.

9.3 Tax Mitigation Strategies

Kenyan tax laws do not provide a wide scope for tax planning, but there are strategies that can be deployed by companies doing business in Kenya. In some cases, these differ depending on the sector in which the company is doing business. The following methods can be adopted.

Debt Capital Structures

Prior to the Finance Act 2021, the interest restriction rules on thin capitalisation were that interest on debt in excess of thrice the shareholders' equity was not tax deductible. The Finance Act 2021 made changes to the allowable deductions for gross interest paid by restricting the allowable gross interest to 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA), with the exception of banks as the nature of their business involves a lot of borrowing. The Finance Act 2022 has extended this exemption to other business that are cash intensive, such as microfinance institutions, hire purchase businesses, non-deposit taking lending and leasing business, human vaccines manufacturers, manufacturing companies with an investment of KES5 billion and above, and holding companies regulated by the CMA.

The Finance Act 2022 made changes to the Income Tax Act on provisions relating to the deductibility of foreign exchange losses to align with the thin capitalisation rules introduced in 2021. The foreign exchange losses deduction now extends to all loans and is only deductible if the interest paid or payable is 30% or less than the company's EBITDA.

Leases

Use of lease financing arrangements for the acquisition of assets is common as an alternative to debt where the funds are to be applied for an asset acquisition. Lease payments made under both capital and operating leases are tax deductible for the lessee.

Capital Investment Allowances

The Finance Act 2022 provides for capital allowance of 150% for investments made outside the cities of Nairobi and Mombasa where the cumulative investment value for the preceding four years or the succeeding three years (from 1 July 2022) is at least KES2 billion. A similar capital allowance applies to investments made towards the construction of bulk storage and handling facilities to support the operations of the Standard Gauge Railway if such investments are made before 31 December 2023.

Special Regime Entities

Companies licensed to operate within the Export Processing Zone (EPZ) and SEZ are granted certain tax advantages, including reduced tax rates.

Certification by the NIFC Authority

The Finance Act 2022 grants a tax relief to companies operating a carbon market exchange or emission trading system certified by the NIFC Authority. From 1 January 2023, such companies will be levied corporation income tax at the rate of 15% for the first ten years from the year of commencement of operations.

Licensing and Transfer Pricing

Transfer pricing rules are applied in respect of non-resident entities trading with related resident entities or those with permanent establishments in Kenya, for the purposes of determining the arm's-length prices of goods and services in such transactions. The Income Tax (Transfer Pricing) Rules 2006, which borrow heavily from the Organisation for Economic Co-operation and Development (OECD) Transfer Pricing Guidelines, were enacted to prevent the shifting of profits by multinationals. The amount ascertained to be the rightful profit if the transaction is conducted at arm's length will be subject to taxation. Methods of charging for services or payment of licences therefore have to conform to the rules on transfer pricing.

The Finance Act 2022 has expanded the application of the transfer pricing rules to transactions between resident persons and persons located in a preferential tax regime. This will impact MNEs that have operations in preferential tax regimes, and has increased the administrative and compliance burden on the entities as they have to file country-by-country reports with the Kenya Revenue Authority detailing their financial activities in Kenya and all other jurisdictions where they have a taxable presence. MNEs with a gross turnover of less than KES95 billion are exempt from the requirement to file the country-by-country reports.

Offsetting Losses Against Future Business Income

The Finance Act 2021 removed the ten-year limit on the offsetting of taxable losses against future profits; there is no limit in place any more. In addition, the minimum tax rules introduced through the Finance Act 2020 at the rate of 1% of gross turnover were declared unconstitutional by the High Court. The tax authorities have appealed the decision but no orders staying the decision are in place, which effectively means that minimum tax rules are not in force.

Consolidation by Companies and Their Controlled Subsidiaries

Each company in a group is taxed as a separate entity in Kenya. There are no rules on controlled foreign companies. Companies that are managed and controlled in Kenya are considered resident for tax purposes. The ITA sets out specific rules on permanent establishment status and tax residency. Restrictions do exist on the deductibility of interest and foreign exchange losses of companies that are foreign controlled and thinly capitalised. Any dividends paid to non-residents and any overseas holding companies attract 15% withholding tax.

Double-Taxation Treaties

Double-taxation treaties are in place for a few countries (see **9.2 Withholding Taxes on Dividends, Interest, Etc**), which, based on the specific treaty, reduce the overall tax liability for a foreign company doing business in Kenya.

9.4 Tax on Sale or Other Dispositions of FDI

There are generally no specific exemptions available to foreign investors for the sale or disposal of interests. Existing exemptions apply to both local and foreign investors. The most common exemption is that gains on transfers of securities traded on the securities exchange are not subject to capital gains tax.

Blocker corporations are not registrable in Kenya.

9.5 Anti-evasion Regimes

Generally, all expenses incurred in the year of income are deductible from the company's income if they were incurred wholly and exclusively in the production of that income. Various rules have been enacted to prevent tax evasion by companies, such as transfer pricing, thin capitalisation and restrictions on the recognition of foreign exchange losses (see **9.3 Tax Mitigation Strategies**).

10. Employment and Labour

10.1 Employment and Labour Framework

The main statutes governing employment and labour relations in Kenya are:

- the Employment Act No 11 of 2007;
- the Labour Relations Act No 14 of 2007;
- the Labour Institutions Act No 12 of 2007;
- the Employment and Labour Relations Court Act No 20 of 2011;
- the Work Injury Benefits Act No 13 of 2007; and
- the Occupational Safety and Health Act No 15 of 2007.

Kenya has also ratified various International Labour Organization (ILO) treaties on non-discrimination, minimum age of work, forced labour, equal remuneration, the right to organise and collective bargaining.

Employment Act Provisions and Procedures

Employment contracts in Kenya are generally not contracts at will, as the Employment Act sets out minimum provisions that must be provided under contract as well as certain procedural requirements that must be followed during disciplinary proceedings, terminations and redundancies. It is important that these procedures are strictly followed to avoid any legal liability.

Employees are also entitled, by law, to certain rights under the Employment Act, including:

- paid annual leave of at least 21 working days;

- paid maternity leave of at least three months for female employees and 14 days for male employees; and
- paid sick leave of at least seven days.

In addition, employees are entitled to at least one rest day in every period of seven days. The Act has also introduced a one-month pre-adoptive leave for employees who adopt children. The Employment (Amendment) Bill 2021 proposes the right to disconnect and for employers with more than ten employees to develop policies on working hours, circumstances under which the employer may contact an employee out of work hours and compensation for employees working outside working hours.

The Employment and Labour Relations Court

Disputes relating to employment and labour relations are determined by the Employment and Labour Relations Court. The law also encourages alternative dispute resolution mechanisms, particularly conciliation, for the resolution of such disputes.

Conditions of employment

The Labour Institutions Act has established the General Wages Council, which, from time to time, sets the minimum wage and other conditions of employment in respect of employees in various sectors. The Work Injury Benefits Act No 13 of 2007 provides for compensation to employees for work-related injuries and diseases contracted in the course of their employment. As provided in the Constitution, employees have the right to participate in the formation of a trade union, to join a trade union or to leave a trade union. The Labour Relations Act requires employers to recognise trade unions for the purposes of collective bargaining.

Collective bargaining

Collective bargaining is common in the public sector and industries that employ large numbers of individuals, such as horticulture and hotels. Trade unions and employers may conclude collective bargaining agreements (CBAs) setting out the terms and conditions of employment of the unionised employees. CBAs are binding on the parties and are enforceable upon registration by the Employment and Labour Relations Court. In addition, the terms of a CBA are incorporated into the employment contracts of employees covered by the CBA. Where implemented, CBAs have been able to prevent industrial unrest.

10.2 Employee Compensation

The Employment Act requires employers to pay their employees in Kenyan currency and in cash, or into an account at a bank designated by the employee, or by cheque in favour of the employee. To attract and retain talent, companies create employee share ownership schemes for the purposes of motivating employees and supplementing their monthly cash payments, particularly in the private sector. The value of the benefit is the difference between the offer price per share at the date the option is granted by the employer and the market value per share when the employee exercises the option.

Employee remuneration is subject to taxation at a graduated scale based on the income amounts.

Employers are required to make contributions to the National Social Security Fund and the National Hospital Insurance Fund on behalf of their employees. They may provide additional retirement benefits to employees by making contributions to retirement benefit schemes regulated by the Retirement Benefits Authority.

These contributions enjoy tax exemption to a capped level.

10.3 Employment Protection

Kenya does not currently have any law on the transfer of employees in the event of an acquisition or transfer of business, but the CAK may set conditions for the retention of employees when approving a merger proposal. For instance, in the acquisition of National Bank of Kenya Limited by KCB Bank PLC, the CAK approved the merger on the condition that KCB Bank PLC retained 90% of the employees from National Bank of Kenya Limited for a period of at least 18 months, and the CAK approved the merger between NIC Group PLC and Commercial Bank of Africa Limited on condition that both entities retained all the employees for a period of at least one year.

The current practice is for the target to declare the employees redundant, after which they sign new employment contracts with the acquiring entity. Accrued rights and benefits are not lost as a result of an acquisition or the change of control of an employer. It is not usual for CBAs to provide for employee rights during a merger transaction. However, certain common clauses, such as those on redundancy, could have an impact on how a merger transaction is implemented. In such cases, the company must comply with the terms of the CBA.

11. Intellectual Property and Data Protection

11.1 Intellectual Property Considerations for Approval of FDI

Foreign investments are not subject to mandatory screening in Kenya, except for the specific sectors mentioned in **8.1 Other Regimes**, and where the investments involve a merger or acquisition. In exceptional cases where a review is done, intellectual property does not form a material aspect of such reviews. However, the Competition Act prohibits the use of intellectual property rights in a manner that would prevent or distort competition – eg, through exclusive licensing agreements and territorial restrictions.

Entities with registered intellectual property rights are required to submit information relating to the registered rights annually to the Anti-Counterfeit Authority (ACA), regardless of the place of registration. It is an offence to import into Kenya any goods or items bearing intellectual property rights that have not been recorded with the ACA.

11.2 Intellectual Property Protections

Kenya has strong intellectual property protections, provided for in the Copyright Act No 12 of 2001, the Trademarks Act Chapter 506, the Industrial Property Act No 3 of 2001 and the Seeds and Plant Varieties Act Chapter 326. Kenya is also a signatory of the Patent Convention Treaty and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The rights protected under copyright apply automatically and do not need registration. Trade marks, industrial property rights and plant breeders' rights must be registered in order for intellectual property protections to apply. Intentional infringement of a patent, a registered utility model, an industrial design, a copyright or a registered trade mark constitutes an offence punishable under the law.

The intellectual property rights of owners may be limited only where so required by public interest considerations, such as national security, nutrition, health, environmental conservation or the development of other vital sectors of the national economy. In such cases, the cabinet secretary responsible may allow the government or authorised third parties to exploit the intellectual property upon payment of adequate compensation to its owner.

11.3 Data Protection and Privacy Considerations

The Data Protection Act No 24 of 2019 sets out the principles for the processing of personal data, the rights of data subjects and the obligations for data controllers and processors regarding the handling of personal data. The Act has extraterritorial application where the data subjects are in Kenya, regardless of where the data is being processed.

Data controllers and data processors must comply with the provisions of the Act when handling personal data, regardless of jurisdiction. Non-compliance amounts to an offence punishable by a fine not exceeding KES3 million or an imprisonment term not exceeding ten years, or both. The data commissioner may also impose an administrative fine of up to KES5 million or 1% of the entity's annual turnover of the preceding financial year.

The Data Protection (General) Regulations, the Data Protection (Complaints Handling and Enforcement Procedures) Regulations (2021) and the Data Protection (Registration of Data Controllers and Data Processors) Regulations (2021) published on 14 January 2022 lay down procedures for the registration of data processors and data controllers, among other provisions for the implementation of the Act. It is noteworthy that the right to privacy is a constitutional safeguard and, prior to the enactment of the Act, enforcements were made pursuant to the Constitution.

12. Miscellaneous

12.1 Other Significant Issues

There are no other significant issues to discuss.

Contributed by: Mugambi Nandi, Mugambi Maingi, Doreen Onwong'a and Sheilla Mokaya, **KN Law LLP**

KN Law LLP is a medium-sized specialist corporate and commercial law firm operating in Nairobi, with a regional reach across several jurisdictions. The firm also has a liaison office in London, headed by a partner. KN Law LLP provides legal solutions and comprehensive and sound advice on a range of areas, including capital markets, corporate finance, employment and retirement benefits law, private equity and corporate M&A, and real estate investments. The firm's recent experience includes advising on the acquisition and subsequent disposal of a majority stake in a fund manager with operations in Kenya and Uganda, giving legal advice in a USD200 million merger deal, acting in a multi-tranche note issuance facility of KES2 billion, giving legal advice in a KES4 billion Commercial Paper issue, and advising on the privatisation of four state-owned enterprises.

Authors

Mugambi Nandi is the founding partner of KN Law LLP and has more than 20 years' experience, including substantial legal and boardroom experience as in-house counsel, company secretary and member of several corporate boards. He has been involved in M&A, private equity, capital markets, privatisations, corporate restructurings and corporate finance transactions valued at over KES100 billion. Mugambi is dual-qualified as an advocate of the High Court of Kenya and a solicitor of the senior courts of England and Wales. He is a member of the Law Society of Kenya, the East African Law Society, the Law Society of England and Wales, and the Institute of Certified Secretaries.

Mugambi Maingi is a partner at KN Law LLP and has more than a decade of experience. He has been involved in several complex financial and commercial transactions, including M&A, corporate restructurings and reorganisations, debt and equity capital-raising transactions, securitisations, retirement benefits and scheme administration, scheme conversions, general corporate commercial law and capital markets matters. Mugambi has also served as in-house counsel for a multinational corporation investing in insurance, pension and fund markets, and was the lead in-house legal adviser for a syndicated financing transaction worth KES5.5 billion. He is a member of the Law Society of Kenya and the East African Law Society.

Doreen Onwong'a is a partner at KN Law LLP, with a keen interest and wide experience in the areas of real estate law, project finance, building and construction contracts, securitisation, capital market transactions and general corporate commercial law. She has over seven years' experience and has been involved in the delivery of complex multibillion-shilling capital markets transactions. Doreen was the lead legal counsel in the establishment of GenAfrica's KES10 billion property fund and in Centum Re's KES4 billion Zero Coupon Corporate Bond, 2020. Doreen is a member of the Law Society of Kenya, the East African Law Society and the Institute of Certified Secretaries.

Sheilla Mokaya is an associate in KN Law LLP's commercial department, specialising in transaction advisory, banking and finance, private equity, capital markets transactions, corporate governance and company secretarial services. She has served as an in-house counsel for a Kenyan bank and was involved in the due diligence review for the acquisition of Jamii Bora Bank Limited by the Co-operative Bank of Kenya. She is a member of the Law Society of Kenya, the East African Law Society and the Institute of Certified Secretaries, and is also a Certified Public Accountant (CPA) finalist.

KN Law LLP

5th Floor The Pavilion
Westlands
Lower Kabete Road
PO Box 27547-00100
Nairobi
Kenya

Tel: +254 20 386 1305
Email: info@kn.co.ke
Web: www.kn.co.ke