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ISSUE 02
2019

MMAN INSIGHTS

The Big Four Agenda

What partnerships will help the government achieve its ambitious plans?

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LETTER FROM THE EDITOR

Welcome to this year's MMAN Investor Guide.

Investors have been keen on the goings on with Brexit. Sooner or later the whole world and in particular Britain's economic trade partners, such as Kenya, will soon find out whether it's a 'Deal' or 'No Deal'. In any event the question investors need to ask themselves is if there is a 'No Deal' scenario; will they be ready? What does a 'No Deal' mean to them?

In very general terms, in the event of a No Deal, there may be some international logistical nightmares and increased costs of trading but other than that there is some reassurance that at a political level not much will change between Britain and Kenya as trading partners.

Given the international circumstances and considering a renewed ray of hope in the local current economic environment, investors need to prepare themselves for some increased level of activity starting now!

True to his word, His Excellency, Hon. Uhuru Kenyatta, C.G.H. President of the Republic of Kenya, has yet again led government in allocating a whooping KShs.450.9 billion into supporting the 4 pillars of his economic agenda; Universal Health Care, Manufacturing, Food Security and Affordable Housing. The articles in the Guide rehash the gist of the pillars and give highlights on the various recent tax related exemptions introduced in

the Budget.

This Guide puts together a series of articles that focuses on those sectors that will ramp up growth in Kenya given the tough economic environment that investors have been battling with in the past few months.

We have also taken a quick look at the dynamic Financial Services Sector, particularly Debt Financing and Global Repository Receipts. With increased capital flow expected in the country then, it behoves us to look at other factors of production such as labour and land. Consequently, we have looked at Land and Property Rights in Kenya and Real Estate Development. We have also offered some perspectives surrounding Employment, Intellectual Property and the Judicial System in Kenya.

The Guide would not be complete without touching on the Transport Sector and in particular what the Kenya Civil Aviation Authority has in store for the investors and travellers in the near future. Finally we touched on the Extractives Industry which although today is growing in leaps and bounds, still needs to ensure that there is actual development of the affected communities.

In this era of Devolution one can only imagine the number of opportunities the counties have to offer in those various sectors! We hope you, like us, will find all of this very interesting.

Enjoy

Carole Ayugi

CAROLE AYUGI

ABOUT MMAN

MMAN Advocates is a Kenyan corporate law firm that provides innovative legal solutions to its clients.

The firm comprises of 16 lawyers and over 17 support staff members who offer expert legal advice and support services to businesses, banks and financial institutions, corporate entities, governments, multinationals and private clients.

Our primary practice areas are banking and finance, corporate, commercial, employment and pensions, litigation and alternative dispute resolution, projects and real estate. While we advise clients across all sectors, we have focus on financial services, agribusiness, engineering and construction, energy, ICT, retirement benefits, real estate and transport sectors.

The Firm has consistently been ranked by leading international legal directories such as Chambers Global, the ILFR1000 and the Legal500 as one of the leading commercial law firms in Kenya.

We provide both local and cross-jurisdictional legal services, either directly or through our international legal networks with our mission being to offer our clients incisive and seamless advice of the highest professional standards. MMAN is the sole Kenya member of TerraLex (www.terralex.org) a pool of law firms rigorously vetted from strategically-resourced locations and the Eversheds Sutherland Africa Alliance, the largest legal network in Africa with firms in 37 countries.

PRACTICE AREAS AND TARGET SECTORS

Our primary practice areas are Banking and Finance, Corporate, Commercial, Employment and Pensions, Litigation and Alternative Dispute Resolution, Competition, Projects and Real Estate. While we advise clients across all sectors, we focus on Agribusiness, Engineering and Construction, Energy, Financial Services, ICT, Retirement Benefits, Real Estate, Aviation and Transport.

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We take pride in producing high quality work and delivering exceptional legal services. We are committed to continuous improvement and professional growth.

OVERVIEW

1. KENYA: AT A GLANCE.

1. Political

One of the major impacts on economic growth across Africa is political tension. Kenya's emergence from a period of political uncertainty saw its GDP growth rebound to 5. 4% in 2018 after it dropped to 4.9% in 2017. Between 2012- 2016 growth averaged to 5.5%. Kenya therefore enjoys a stable macroeconomic environment with the government operating sound macroeconomic policies intended to promote growth by providing a more secure environment for the private sector investment decisions.

Kenya is a multi- party Democracy with a unicameral parliament which creates laws that are administered by the Executive arm of government. The constitution protects private property and provides safeguards against expropriation of such property without compensation. Kenya is also a signatory to Multilateral Investment Disputes (ISCID). In case of commercial disputes, Kenya has a Commercial Court under the Kenyan Judiciary.

2. **Government**

Since the year 2018, projects suggest that growth of Kenya's economy will be on an upwards trend until the year 2022. The World Bank explained how the growth has been boosted by a stable macroeconomic environment, rebound in tourism, strong remittance inflows, low oil prices and a government- led infrastructure development initiative.

The government- led infrastructure projects; from ports to airports, roads and the standard gauge railway has created demand for goods and services in turn positively affecting Kenya's economic growth. The Government's focus on the Big Four priority sectors also plays a role in the growth of a macroeconomic environment and leading to an expected increase in trade and tourist arrivals following the direct flights to the US.

3. **Economic**

The Kenyan economy is East Africa's largest and the most advanced with strong growth prospects supported by an emerging, urban middle class and an increasing appetite for high value goods and services. Some of the advantages the country enjoys as a result of the large economy include; a vital port that serves as an entry point for goods destined for countries in the East and Central Africa Interland, a well-educated labor force, kilometers of attractive coast line, abundant wildlife and above all, a government that is committed to implementing business reforms.

Being on of the strongest economy in Africa, Kenya recorded a GDP of KShs 7749.4 Billion (US$ 77.494 Billion and growing at 4.9% in 2017 with agriculture being recognized as the largest contributor to the GDP at 24.9%. In addition, tea and horticulture were the leading export earners for Kenya in 2017; valued at KShs 147.3 Billion (US$ 1.473 billion) and Kshs. 113.3 Billion (US$ 1.133 Billion) respectively.

Kenya mainly exports to other parts of the Africa followed by Asia and Europe. Pakistan is Kenya's leading importer of tea. Kenya's main exports to Japan are tea, coffee and cut flowers. Kenya is one of the best investment destinations globally following its position in the commercial, economic and logistical hub in the East and Central Africa. This has in turn led to the rise of Foreign Direct Investment (FDI) which is the strongest in the East African region. The Gross Domestic Product (GDP) figures of USD 58.1 Billion in 2014 led to the elevation of Kenya has been elevated to a lower Middle-Income Country with one of the largest economies in Sub Saharan Africa and amongst the fasting economy in the world. Kenya's dominant economy in the East African community contributes to more than 40% of the regions GDP making it uniquely distinguished from many other countries by the fact that its economy has been diverse with no oil or gas exports. However, the recent discovery of oil in Turkana is likely to strengthen and boost the economy's growth further.

Kenya has also been put on an accelerated developmental pedestal by sectors such as modernizing railways, seaports, the airports and development of geothermal power stations. This is further complemented by Kenya being a member of both the EAC and COMESA economic regional blocs, which both gives a combined market population of over 400 Million.

4. **Demographics**

Kenya has one of the most varied land in terms of its geography and its ethnic population, with an estimated population of more than 41 Million people. With improved life expectancy and a drop in infant mortality, Kenya seems set to build on an ever-increasing growth in population and by 2020, the UN predicts that the Kenyan population will have risen to more than 51 Million. This ranks Kenya 29th in the world in terms of population size.

Kenya has the second largest population with the EAC

and is growing at a rate of 2.7 per cent per annum. There is a rising trend towards urbanization which is contributing to an increase in consumer demand for high value goods. This trend is however forecasted to continue with 50 per cent of the population expected to live in urban areas by 2050. The size of Kenya's middle class is growing as evidence by the growth in its gross national income per capita, which has increased at a CAGR of 2 per cent over the past 10 years.

a) **Population, Density and Surface Area in Kenya.**

Almost three-quarters of the Kenyan population is under the age of 30 and Kenya has grown from 2.9 million to almost 40 million people within a century.

As far as population density is concerned, Kenya is the 47th largest country in the world in terms of pure land mass. It is relatively sparsely populated, however, and for every square kilometer of land, there is an average of 79.2 people (205 per square mile) and this means that Kenya is the 140th most densely populated country on earth.

b) **Population Growth and Life Expectancy.**

Kenya has sustained population growth, but it has both high birth and infant mortality rates. This is consistent with Africa as a whole. There has been marked improvement in life expectancy, particularly in recent years. In 2006, the average level stood at 48.9 years. This figure rose, however, to around 59 years in 2016. This has increased to 64 years of age in 2018. The current median age is only 19.7 years of age in Kenya.

Kenya has a very young population that has led to very rapid population growth. Almost three-quarters of the population is under the age of 30 and Kenya has grown from 2.9 million to almost 40 million people within a century.

c) **Quality of Life.**

The World Fact book also has a collection of information that pertains to quality of life. In terms of healthcare, Kenya spends approximately 5.7% of the national GDP on this sector, earning it a low physician density of .2 per 1,000 individuals and only 1.4 hospital beds per 1,000 residents. When we turn to sanitation and clean drinking water access, only 63.2% have improved access to drinking water and only 30.1% of the total population has access to improved sanitation facilities. In addition to these relatively poor numbers, educational spending is at 5.3% of the GDP and only 78% of the population over 15 years of age can read and write. The figures likely give some influence on the prevalence of HIV/AIDS in the country, which currently estimates 4.8% of adults living with the disease, and a death rate from HIV/AIDS of at least 28,000.

5. **Foreign Direct Investments (FDIs)**

Foreign direct investment (FDI) is an investment made by a firm or individual in one country into business interests located in another country.

Kenya is one of the largest recipients of FDI in Africa, with FDI inflows increasing significantly since 2010. The rise is related to Investments coming mainly from China in the Hydrocarbon and mining sectors. In the recent years, the ICT Sector has attracted the most FDI as a result of development and laying of fibre optics undertaken between 2009- 2010. The other sectors targeted by the FDI are banking, infrastructure, tourism and extractive industries. China, South Africa, Belgium, the United Kingdom, the United States of America and the Netherlands are the main investors in Kenya.

The Government has been actively taking measures and implementing reforms to attract FDI. As a result, the country made remarkable progress in the Doing Business ranking published by the World Bank and gained 16 places in the 2017 report, 12 places in the 2018 report, and 19 places in the 2019 report, reaching the rank 61st out of 190 countries in the World.

The rise in Kenya's ranking has been attributed to simplified procedures for business creation, simplified process to register properties, strengthened access to credit and minority investor protections and ease of paying taxes and resolving insolvency matters. The development of public-private partnerships as part of the 'Vision 2030' strategy has positively influenced FDI inflows. FDIs have also been attracted by Kenya's pivotal role within the East African Community, acting as a regional economic hub, a strategic geographic location with sea access, a growing entrepreneurial middle class, a diversified agriculture and expanding services sector, and recently discovered hydrocarbons resources.

GOVERNMENT BUSINESS REGULATORS

1. **Competition Authority of Kenya**

The Competition Authority of Kenya is established under the Competition Act, No. 12 of 2010. The Authority's mandate is to enforce the Act with the objective of enhancing the welfare of the people of Kenya by promoting and protecting effective competition in markets and preventing misleading market conduct throughout Kenya.

The functions of the Authority are;

i. Promoting and enforcing compliance with the Act;

ii. Receiving and investigating complaints from legal or natural persons and consumer bodies;

iii. Promoting public knowledge, awareness and understanding of the obligations, rights and remedies under the Act and the duties, functions and activities of the Authority;

iv. Promoting the creation of consumer bodies and the establishment of good and proper standards and rules to be followed by such bodies in protecting competition and consumer welfare;

v. Recognizing consumer bodies duly registered under the appropriate national laws as the proper bodies,

in their areas of operation, to represent consumers before the Authority;

vi. Making available to consumers information and guidelines relating to the obligations of persons under the Act and the rights and remedies available to consumers under the Act;

vii. Carrying out inquiries, studies and research into matters relating to competition and the protection of the interests of consumers; Studying government policies, procedures and programs, legislation and proposals for legislation to assess their effects on competition and consumer welfare and publicize the results of such studies;

viii. 8.Investigating impediments to competition, including entry into and exit from markets, in the economy or sectors and publicize the results of such investigations;

ix. Investigating policies, procedures and programmes of regulatory authorities to assess their effects on competition and consumer welfare and publicize the results of such studies;

x. Participating in deliberations and proceedings of government, government commissions, regulatory authorities and other bodies in relation to competition and consumer welfare.

xi. Making representations to government, government commissions, regulatory authorities and other bodies on matters relating to competition and consumer welfare;

xii. Liaising with regulatory bodies and other public bodies in all matters relating to competition and consumer welfare;

xiii. Advising the government on matters relating to competition and consumer welfare.

2. **Kenya Revenue Authority**

The Kenya Revenue Authority was established by an Act of Parliament on July 1st, 1995 Cap. 469 for enhancing the mobilization of Government revenue, while providing effective tax administration and sustainability in revenue collection.

The Board and Management of KRA have since its inception spent time and resources setting up systems, procedures and the adoption of new strategies aimed at enhancing the operational efficiency of the Authority's processes. The functions of the Authority are:

i. To assess, collect and account for all revenues in accordance with the specified provisions of all revenue collection laws;

ii. To advise on matters relating to the administration, and

iii. Collection of revenue under the specified provisions of all revenue collection laws and, to perform such other functions in relation to revenue as the Minister of Finance may direct.

In fulfilling its mandate, KRA administers 17 revenue Acts, with the key ones (in terms of revenue importance) being the Value Added Tax (VAT) Act (Cap. 476), the East African Community Customs Management Act (EACCMA), the Income Tax Act (Cap. 470), the Customs and Excise Act (excise provisions) (Cap. 472) and the Traffic Act (Cap. 403).

KRA has continued to enlarge in size as well as in the scope of its operations. Regarding the organization structure, KRA is composed by centralized and decentralized units, located across the national territory. The centralized units are basically situated at Times Towers in Nairobi, the capital of the country. The jurisdictions of the decentralized units are geographically distributed across the country in five

fiscal regions namely: Southern, Central, Rift Valley, Western and Northern Region.

3. **Capital Market Authorities**

The Capital Markets Authority is the Government Regulator charged with licensing and regulating the capital markets in Kenya. It also approves public offers and listings of securities traded at the Nairobi Stock Exchange. It is a regulating body charged with the prime responsibility of supervising, licensing and monitoring the activities of market intermediaries including the stock exchange and the central depository and settlement system and all the other persons licensed under the Capital Markets Act. It plays a critical role in the economy by facilitating mobilization and allocation of capital resources to finance long term productive investments.

4. **Nairobi Securities Exchange**

The Nairobi Securities Exchange (NSE) is a leading African Exchange, based in Kenya which is one of the fastest growing securities exchange in Sub- Saharan Africa. It was founded in 1954 and has a six- decade heritage in listing equity and debt securities. It looks into gaining exposure to Kenya and Africa's economic growth by offering a world class trading facility for local and international investors.

NSE self-enlisted and demutualized in 2014. Its Board and management team are comprised of some of Africa's leading capital markets professionals, who are focused on innovation, diversification and operational excellence in the exchange. NSE is playing a vital role in the growth of Kenya's economy by encouraging savings and investment, as well as helping local and international companies' access cost-effective capital. NSE operates under the jurisdiction of the Capital Markets Authority of Kenya. It is a full member of the World Federation of Exchange, a founder member of the African Securities Exchanges Association (ASEA) and the East African Securities Exchanges Association (EASEA). The NSE is a member of the Association of Futures Market and is a partner exchange in the United Nations-led SSE initiative.

4. KEY DEVELOPMENTS/ EMERGING ISSUES –

Big Four Agenda: Discuss the focus areas, and investment opportunities

On 12th December 2017, His Excellency President Uhuru Kenyatta announced his new plan, the 'Big Four', which is to guide the development agenda of the country in the period 2018-2022. It focuses on key basic needs that are critical in uplifting the standard of living of Kenyans on the path to becoming an upper middle-income country by 2030. Prioritized are; affordable and decent housing, affordable healthcare, food and nutritional security, and employment creation through manufacturing. These four areas are expected to bolster strong inclusive economic growth.

a) **Manufacturing**

The government's aim is to raise the manufacturing sector contribution GDP from 8.5% to 15%, to be ranked as top 50 in the world Bank's Ease of Doing Business global index, creating 1,000,000 new jobs in the manufacturing sector, achieve 5 times increase in FDI inflows from $672M to $3.8B FDI inflows. The administration focuses on boosting the blue economy, leather and textiles as well as agro- processing businesses.

Agro- processing is aimed at increasing local value for tea, coffee, meat, dairy, nuts and oils, Increasing the number of warehouses and chain sites, increasing jobs in the process, increasing aquaculture, fish feed mills and fish processing industries. In achieving the goal, the government aims at cutting the cost of off- peak power to heavy

industry make arrangements with expatriates versed in manufacturing sector so as to ensure training of Kenyans is achieved and ensure the protection of Intellectual Property rights, as well as in order to protect local products and ideas where it was directed that counterfeit products be destroyed.

b) **Affordable housing**

Affordable housing implies the development of adequate, standardized and well-spaced houses with continuous supply of clean water and electricity. The houses are to be located in decent places and be readily available to both the lower, middle and upper class in the society. The President targets to have established at least 500,000 housing units by 2022. The houses should be affordable enough to enable the occupants meet other basic needs. Article 43 of chapter four of the constitution clearly states that every person has a right to accessible and adequate housing and to reasonable standards of sanitation. With the continued growth of Kenya's population, especially in urban centers, providing affordable housing is becoming a challenge. The following steps can be taken to achieve affordable housing:

i) Enacting strict measures to regulate land costs and rates.

The continued rise of land costs, especially in urban centers, has greatly jeopardized affordable housing. Small pieces of land are being sold to small scale as well as large scale investors in the housing sector at a very high cost, thus rendering the process of developing affordable housing for the growing population very expensive. The tenants are forced to pay the entire costs the investors incurred to set up the houses. This has made low-income earners move into the already congested slums where they can access cheap houses. This is despite the slum's sanitation and other essential services being poorly managed. The government should intervene to regulate land costs and prevent housing investors from being exploited by land sellers. This will cut down the cost of investing in housing projects and ensure houses are affordable even to the low-income earners.

ii) Availing public land for housing and settlement.

The government owns large tracts of land in both urban and rural areas. This land should be released for public settlement, especially by squatters. It should also be availed to developers willing to invest in affordable housing, ensuring low and middle-income earners have access to affordable housing

iii) Enact measures to control and regulate land holding by investors.

The notion of investors acquiring large tracts of land, especially in urban areas, and waiting for the prices to escalate before selling them has greatly hindered provision of affordable housing. The government should come up with strict measures to regulate and control land holding by investors.

iv) Development of good infrastructure in both rural and urban centers.

Infrastructure refers to basic facilities, services and installations needed for proper functioning of a system, that includes provision of clean water, good transport, a communication system and sanitation services. This should be effective, especially in slum areas and urban centers. If essential infrastructure is developed, it can open up more areas by making them attractive for people to settle in and for private investors to develop affordable housing.

v) Effective zoning by the government.

Zoning is a legislative action for regulating the use of property-like land and the construction

of buildings within the area of jurisdiction of the legislative body concerned. The government should put measures to prevent investors from setting up expensive houses in specific zones known for low-income earners, such as the slums. The government should also be keen with the quality of houses being set up in such areas.

Investors should start investing in less congested areas to prevent further congestion. This will promote affordable housing.

c) **Universal Healthcare**

The aim of this agenda is to actualize 100% cost subsidy on essential health services as well as reduce medical out- of- pocket expenses by 54% as a percentage of household expenditure. In order to achieve the said plan, the Government, in December 2018, launched the Universal Health Coverage (UHC) Pilot Program dubbed Afya Care – Wema Wa Mkenya that is to enable Kenyans to access affordable healthcare without financial hardship.

It was launched in a phased manner starting with a pilot phase in the counties of Kisumu, Nyeri, Isiolo and Machakos where the government expects to learn critical lessons that shall inform the rapid scale up to the rest of the country. with the UHC card, Kenyan residents in the four pilot counties can now access health services ranging from emergency Services, child Health Services, Maternal Health Services, Mental Health Services, Infectious Disease Management, Non-communicable Disease Management, Inpatient and Outpatient Services and Community Health Services across county public health facilities. The attainment of UHC program will adopt a Primary Health Care Approach that will entail scaling up immunization services, Maternal and Child Health Services including family planning, skilled delivery, and antenatal and postnatal care services.

The Government also announced that UHC will involve scaling up prevention of water borne, vector borne, TB, HIV and sexually transmitted diseases; improving nutrition of women who conceive; early screening and treatment for non-communicable diseases such as diabetes, hypertension, mental illnesses and cancers to identify for early treatment initiation, rehabilitation and palliative care and treatment of the common out-patient and in-patient medical and surgical conditions in the public hospitals.

d) **Food Security.**

Making Kenya food secure is one of the government's Big Four agenda for enhancing Kenya's growth. The aims of the agenda are to;

- 34% increase in the average daily income of farmers
- 27% reduction in malnutrition among children under 5 years of age
- Create 1000 agro- processing SMEs & 600,000 new jobs
- 50%reduction in the number of food insecure Kenyans
- 48% increase in Agriculture sector contribution to GDP
- 47% reduction in the cost of food as a percentage of income.

The aims therefore create a number of opportunities including;

i) Large scale commercial agriculture production.

This is in the form of;

- Fisheries (aquaculture, inland and ocean)
- Crop production (maize, rice and potatoes)
- Orchards (fruits, oil and nuts)
- Animal production (dairy and meat.)

ii) Agriculture mechanical equipment

This is in the form of;

- Leasing, direct sales and operation of warehousing, cold store chains, driers, storage and handling equipment
- Leasing and direct sales of tractors, transplanters, combined harvesters, weeders and irrigation equipment

iii) Agriculture Production inputs

This is in the form of;

- Local manufacture, distribution and direct sales of certified crop seeds, livestock feed mills and animal brood stock
- Local manufacture, distribution and direct sales of fertilizers, high quality animal feeds, pesticides, herbicides, fungicides and certified livestock vaccinations

iv) Agriculture support services

This is in the form of;

- Dairy processing and cold chain development
- Provision of crops and animal insurance services

The government intends on achieving the agenda by using science and technology to achieve inclusive agricultural growth, nutrition and food security in the country. The new approach is said to enhance agricultural productivity by targeting small scale farmers with new technologies. The new approach will mean moving away from the old policy of using subsidies as the only method to boost production. Subsidies have always benefited the rich but not the small scale farmer who is crucial in the country's resilience.

Farmers are encouraged to rely more on scientific data to drive policy interventions on input subsidies and strategic food reserves and the government urged to empower farmers with the information necessary to increase their output per acre, reduce their unit cost of production and, therefore, significantly improve returns on their investment. The Government is seeking ways to support the revival of crop and livestock extension services, which hold the key to improved productivity. 'Feed the Country Plan' was launched and it aimed at making Kenya food secure, which is championed by the American government and Kenyan research institutions.

The US Government through USAID has already allocated KShs 11.5 Billion for food security and agribusiness under the Feed the Country Plan. In the last five years the USAID Feed the Future program, has invested Kshs 22 Billion in Kenya to assist over a million farmers and pastoralists with various interventions towards achieving food security and higher incomes.

The answer to reducing the cost of food is innovation, mechanization and increasing scales where empirical evidence shows bigger acreages results in better yields. The sectors responsible for setting the necessary policies and regulating the agricultural sector have been urged to open ourselves to new ideas, and benchmark our standards with countries that are food sufficient. Research organizations have also been called upon to get more involved the transformation of agriculture.

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JUDICIAL PROCESS IN KENYA

DISPUTE RESOLUTION

1. Judicial Process in Kenya

Kenya's legal system is largely based on English common law and comprises private and public law. The primary sources of law in Kenya are the 2010 Constitution (which is the supreme law binding on all persons and state organs), statutes and case law. The Kenyan judicial system is adversarial in nature. This is a system where the judge or the magistrate has a passive role of listening to opposing parties present their arguments and finally make a binding decision. Kenya's legal framework is business-friendly, and with its main principals being largely based on English law, it is familiar to foreign investors.

There are two levels of courts, Superior Courts (consist of **Supreme Court,** Court of Appeal and High Court) and **Subordinate Courts** (Resident Magistrate Court, Kadhi Courts, Court Martials and Tribunals). All commercial disputes whose subject matter value exceeds 20 million Kenyan shillings are heard and determined by the Commercial and Admiralty Division of the High Court of Kenya – a specialized division of the High Court created in Nairobi and Mombasa – and before the High Court of Kenya in all other stations where it sits. Appeals from the decision of the High Court lie to the Court of Appeal with limited chances of further appeal to the Supreme Court if the case involves interpretation or application of the Constitution or a matter certified by the Supreme Court

or the Court of Appeal as one that involves a matter of "general public importance".

Once a case is filed [if it is a commercial dispute or family related dispute] it goes through a mandatory screening for mediation, and if it qualifies it is referred to mediation. The mediation process should be undertaken and finalized within 60 days from the date of referral. If the process fails, the case goes through the normal litigation process. Parties will file all the documents they intend to rely on during the hearing, such as witness statements and expert reports, within the time allowed in law, following which the case is set for a Case Management Conference, whose purpose is to confirm whether or not the case is ready for hearing and, if not, to set time limits for compliance. This avoids adjournments once a hearing date is scheduled. The hearing then proceeds in the normal manner and a judgment is subsequently delivered (by law, it should be delivered within 42 days of filing of final submissions by the parties).

2. Alternative Dispute Resolution (ADR) in Kenya

The Constitution of Kenya provides, under article 159, that alternative dispute resolution should guide the courts as a dispute resolution method. Indeed, the Parliament of Kenya passed the Nairobi Centre for International Arbitration Act in a bid to promote Nairobi as a regional and international center for dispute resolution. The Act set up the Nairobi Centre for International Arbitration [NCIA] and it is government policy to have all contracts involving government or government agencies/department to have an arbitration clause identifying NCIA as the center for dispute resolution.

Most commercial agreements have a dispute resolution clause that emphasizes mediation, conciliation and arbitration. Arbitration is viewed as a way to unclog the congested court system, which lacks the capacity to efficiently and speedily adjudicate on commercial disputes. It is also viewed as confidential and faster, and appeals to parties that may require specialists to arbitrate on their disputes. The Chartered Institute of Arbitrators Kenya Branch is very vibrant and has a growing membership. Arbitration is also actively promoted by professional bodies such as the Law Society of Kenya and the Architectural Association of Kenya. Lastly, the Civil Procedure Rules, as used within the court system, have specifically provided for arbitration as an alternative dispute resolution process, and the court can either *suo moto* or, on application of parties, refer a matter to arbitration.

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TAXATION IN KENYA

1. Bilateral Agreements

Kenya is a signatory to a number of bilateral trade agreements with several countries. As at 22 June 2018, Kenya had entered into bilateral agreements with the following countries: Argentina; Bangladesh; Bulgaria; China; Comoros; Congo (DRC); Djibouti; Egypt; Hungary; India; Iraq; Lesotho; Liberia; Netherlands; Nigeria; Pakistan; Poland; Romania; Russia; Rwanda; Somalia, South Korea, Swaziland, Tanzania, Thailand, Zambia and Zimbabwe.

2. Double Tax agreements

Kenya has entered into double tax agreements with the following countries: Zambia, Norway, Denmark, Sweden, UK, Germany, Canada and India. Kenya has also signed DTA's with Italy, Tanzania and Uganda but these agreements are yet to come into force.

3. Tax Incentives

Tax incentives are mainly in form of capital deductions. These deductions are made at the point of computing the gains or profits of a person /company for any year of income. Capital deductions are granted in the following segments:

a) **Industrial deductions:** They cover capital expenditure incurred by a person on the construction of an industrial building to be used in a business carried

out by them or their lessee [2.5% for industrial buildings, 10% for hotels and 25% for commercial buildings]

b) **Farmwork deduction:** expenditure by the owner or tenant of agricultural land on construction of farm works. For a farmhouse, allow 1/3 of the expenditure of one house and for any other immovable buildings for the operation of the farm, 100% deductible.

c) **Wear and Tear:** This is an allowance that is granted to the investor to cater for wear and tear on machinery. The rates vary.

d) **Investment deduction:** This is a deduction granted on cost of a building and machinery installed therein as an incentive to encourage investments.

4. Capital Gains Tax [CGT]

CGT is tax that is levied on transfer of property situated in Kenya. It is declared and paid by the transferor of the property. The rate of tax is 5% of the net gain [sales proceeds minus acquisition and incidental costs]. Exemptions to CGT are:

- Income that is taxed elsewhere
- Issuance of a company of its own shares and debentures
- Disposal of property for purposes of administering the estate of a deceased person.
- Transfer of property between spouses as part of divorce settlement.
- A private residence if the individual owner has occupied the residence continuously for the last three years prior to the transfer.
- Agricultural property having an area of less than 100 acres where that property is situated outside a municipality or urban area.

5. Stamp Duty

Stamp duty is payable on transfer of properties, leases, and securities. For transfer of properties, the rate is 4% for urban properties and 2% for rural properties. A 1% stamp duty is charged for creation or increase of chare capital and for transfer of unquoted shares or marketable securities.

6. VAT

VAT is levied under the VAT Act, 2013 and the VAT Regulations, 2017. VAT is a tax on value addition and is accounted for using the input-output mechanism. The following supplies attract VAT at different rates: 16% for local taxable supplies, 8% on local supply of fuel (effective September 2018), 0% for zero-rated supplies and exports, exempt supplies, and supplies that are out of VAT scope.

VAT registration is required for persons making or expecting to make taxable supplies of over KES 5 million in a 12-month period. In determining the registration threshold, the sale of capital assets is excluded. However, a person making taxable supplies below the registration threshold may voluntarily apply to the Commissioner and register for VAT.

Input tax on a taxable supply (or importation) may be deducted from the tax payable by a registered person to the extent that the supply was acquired to make taxable supplies. Input tax is allowable for deduction within six months after the end of the tax period in which the supply or importation occurred.

7. Income Tax

Income Tax is administered through the pay-as-you-earn (PAYE) mechanism of deducting income tax from employment income (salaries, wages, bonuses, commissions, etc.). PAYE also applies to taxable non-cash benefits. It is the employers' obligation to deduct and account for income tax on a monthly basis. The PAYE deducted thereof should be paid to the KRA by the 9th day of the following month and the employer should submit a monthly PAYE return [P10].

Resident employees are taxed on worldwide earned income, in respect of any employment or services rendered in Kenya or outside Kenya. Residents are also

taxed on any other income that has accrued in or is derived from Kenya.

Non-resident employees are taxable only on their income earned from within Kenya or derived from Kenya.

The rate of tax is charged on graduated scale with a maximum rate of 30% for income over KES 564,709.00.

8. Export and Import Tax

Import Duty

Import duty is levied under the East African Community (EAC) Customs Management Act ('the Act'). Imported goods are generally subject to import duty at varied rates, including 0% for raw materials and capital goods, 10% for intermediate goods, and 25% for finished goods. Enterprises established in an EPZ are exempt from customs duty on machinery and inputs for products manufactured for export while licensed oil and gas contractors with a Production Sharing Contract (PSC) with the government of Kenya are exempt from customs duty on importation of machinery, spares, and inputs used in exploration activities, excluding motor vehicles. In addition, enterprises that are established under the Special Economic Zones Act enjoy import duty exemption.

Where raw materials that are not subject to 0% import duty are used to manufacture goods for use locally within the EAC and for export outside the EAC, one may apply for remission under the EAC duty remission scheme. This is subject to a requirement for proof of export, and one may be required to execute a bond/ bank guarantee.

There is a list of other items and persons that are exempt from import duty under the Act.

Export Duty

In accordance with the provisions of Sec.73 of the EACCMA 2004, goods for exportation shall be entered (declared) in the prescribed manner and the owner furnish customs with the full particulars, supported by documentary evidence, of the goods referred to in the entry. The goods declared shall be exported within thirty days from the date of entry.

Some select items attract an export levy as outlined the First Schedule of the Miscellaneous Fees and Levies Act of 2016.

VAT registration is required for persons making or expecting to make taxable supplies of over KES 5 million in a 12-month period. In determining the registration threshold, the sale of capital assets is excluded. However, a person making taxable supplies below the registration threshold may voluntarily apply to the Commissioner and register for VAT.

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IP AND CONSUMER PROTECTION

REGISTRATION OF DOMAIN NAMES IN KENYA

In the digital space, every country in the world has a unique identifier. Kenya's unique identifier is dot KE (.ke). To register a domain name[1] in Kenya, the owner of the name does various subdomains also known as the second level .ke domain names. Some examples of these subdomains include such two letter codes as ".go", which denotes government, ".co", which denotes a commercial enterprise, ".ed" which denotes an education institution, or ".or" which denotes an organisation.

Currently, the .ke domain name registry services are administered by the Kenya Network Information Center ("KENIC"), a non-profit-making organisation established as a public private partnership with Kenya's telecommunications regulator, the Communication Authority of Kenya.

Registration of a domain name is done on behalf of the owner by a registrar who is duly accredited and licensed by the Dot KE Domain Registry Services Provider.[2]

Registration Process: easy as abc

a) go to the KENIC website, choose a domain name, search and confirm its availability for registration;

1 Domain name refers to the unique name that identifies an internet site.
2 For such a registrar to be accredited, authorization to do so must be granted by the Communication Authority as part of the requirements for licensing

b) select a registrar from the provided list and apply for the registration of the intended name;

c) pay the prescribed registration fee to the and confirm the domain name is available for use.

PRIVACY AND DATA PROTECTION: THE DATA PROTECTION BILL, 2018

The right to privacy is a universal human right. [3] In Kenya, legislation on privacy and data protection is found under the Constitution of Kenya 2010, [4] the Kenya Information and Communications Act [5] and international conventions [6] adopted or ratified by Kenya in accordance with Article 2 of the Constitution.

At present, Kenya has no data protection legislation. Nevertheless, there is a Data Protection Bill, 2018 (Bill) proposed by the senate and currently due for the committee stage of the legislative process. If enacted in its current form, the Bill is intended to give effect to Article 31 of the Constitution which specifically provides the right to privacy. It also mandates the Kenya National Commission on Human Rights (KNCHR) as the body to oversee its implementation and enforcement once assented into law.

Fundamentally, the Bill purports to guarantee privacy and protect data by giving the owner of data (Data Subject) extensive rights to control how personal data can be processed or applied or consumed by a user. In particular, the Bill requires that the consent of the Data Subject is provided at all times where personal information collected is being utilised. Further, Data Subjects have a right of access to their personal information and a right to demand for the correction of any inaccurate information.

Section 15 of the Bill expressly provides for the protection and security of personal data against loss, damage or unauthorised destruction, unlawful access or unauthorised processing of data. [7] Interference with the personal data of a Data Subject or the infringement on a person's right to privacy is an offence punishable, on conviction, by either (i) a fine not exceeding KES. 500,000 (approximately USD 5,000, or (ii) imprisonment for a term not exceeding two (2) years, (iii) or both.

The restriction under the Bill will not apply to matters related to national security, to matters related to the prevention, detection, investigation, prosecution or punishment of a crime, matters related to safeguarding the rights of the Data Subject or another person, to matters related to public interest and to matters related to compliance with an obligation imposed by law.

CYBER SECURITY: HOW WELL ARE YOU COVERED?

Information sharing is the key ingredient to successfully marketing one's business. In this digital era, having an online presence, transacting through an online platform or sharing information over a registered network has become the mode of operation for most businesses. Inevitably, businesses disclose the nature of their products to enable consumers make informed choices, while consumers disclose personal and sensitive information such as credit card details to enable the verification and approval of purchase orders. This exposure of crucial information and records needs protection

3 Article 12 of the Universal Declaration of Human Rights 1948.

4 Article 31.

5 No. 2 of 1998.

6 the Universal Declaration of Human Rights 1948 and the International Covenant on Civil and Political Rights.

7 **Kenya Human Rights Commission v Communications Authority of Kenya & 4 others [2018] eKLR** at paragraph 54 of the judgment, it was held that, 'The processing of information by the data user/responsible party threatens the personality in two ways: [22] a) First, the compilation and distribution of personal information creates a direct threat to the individual's privacy; and (b) second, the acquisition and disclosure of false or misleading information may lead to an infringement of his identity.'

from cyber-attacks.

Kenya enacted the Computer Misuse and Cybercrimes Act, No. 5 of 2018 [8](Act) which aims to criminalise certain behaviors relating to computer systems, to enable the effective detection, prohibition, prevention, response, investigation and prosecution of computer and cybercrimes, to facilitate international co-operation in dealing with computer and cybercrime matters and cater to other connected purposes.

The Act came into force after the unveiling of the Internet Infrastructure Security Guidelines for Africa, 2017 (Guidelines) [9] which provided recommendations and solutions to promote and ensure internet infrastructure security amongst members of the African Union.

Under the Act, any court of competent jurisdiction in Kenya has the mandate to try any offence where the offence is committed in Kenya or against a Kenyan citizen irrespective of the nationality of the offender. [10] Moreover, where the offence is committed outside Kenya by (1) a Kenyan citizen or (2) a person ordinarily resident in Kenya, the Kenyan courts still have the jurisdiction to try such an offence.

The offenses include cybersquatting, unauthorized access and disclosure of password or access codes, publication of false information, computer forgery and fraud, identity theft and impersonation among others. The punishment for such offences, upon conviction, ranges from compensation orders for loss and damages caused, confiscation of assets gained as a result of an offence, fines of up to KES. 10,000,000.00 (approximately USD 100,000), imprisonment of up to five (5) years or a combination of any of these punishments.

The Act is a welcome addition to Kenya's legislative landscape since it identifies cybercrimes which were previously not provided for under our laws. An offender under the Act will face the full force of law, geographical location notwithstanding.

8 The Act was assented to on 16 May 2018 and came into force on 30 May 2018.
9 The Guidelines were adopted under the African Union Convention on Cyber Security and Personal Data Protection which Kenya ratified in 2014.
10 Section 66 (1) of the Act.

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KENYA CIVIL AVIATION

What's Happened and What's Next For 2019

The Kenyan Civil Aviation Authority (KCAA) had a busy 2018. The KCAA accelerated the review of the regulations to the Civil Aviation Act, No. 21 of 2013 (Aviation Act) to enhance its standing in relation to other members of the International Civil Aviation Organisation (ICAO). According to the ICAO Universal Safety Oversight Audit Programme (USOAP), Kenya is marginally ahead of its regional competitor Ethiopia on implementation of its aviation safety oversight legislation but remains behind Madagascar and South Africa [1].

Amongst the first regulations to be published by the KCAA as it updated the aviation regulatory framework were the Civil Aviation (Remotely Piloted Systems) Regulations, 2017 (Drone Regulations) which have since been repealed by Parliament (on 26th June 2018) [2] on the grounds of insufficient public consultation, inadequate safe guards to privacy of persons, and failure to address security concerns that arise from drone operations. Although the regulatory set back to commercialisation of drone operations, significant strides have been made by the KCAA to overhaul the regulations governing the aviation sector with the new regulations.

1 ICAO provides an interactive viewer to compare its country audits on effective implementation under various categories (including legislative implementation) against the global average or that of ICAO members. Madagascar and South Africa each have a compliance score of 100%, Kenya - 85.71% and Ethiopia 71.43%. Several African countries remain ahead of Kenya bearing scores in excess of 90% legislative compliance, examples are Nigeria, Equatorial Guinea, Cote d'Ivore, Togo and Botswana. See https://www.icao.int/safety/Pages/USOAP-Results

2 See the Kenya National Assembly Hansard http://parliament.go.ke/sites/default/files/2017-05/Hansard_Report_-_Tuesday_26th_June_2018P.pdf

AVIATION SECTOR OVERHAUL

The KCAA has published a total of 26 new regulations that focus on both the technical [3] and operational [4] aspects of aviation regulation. Though the regulations published substantially remain unchanged from their respective predecessors, there are some elements and notable changes to look out for, such as:

1. New regulations

Regulations relating to helicopters are now substantially set out in a single regulation - the Civil Aviation (Operation of Aircraft – Helicopter) Regulations, 2018 (Helicopter Regulations). The Helicopter Regulations now consolidate the provisions relating to helicopter operational requirements, flight operations and operating limitations, helicopter equipment and documents, as well as, the flight crew requirements and qualifications. Similarly, several regulations addressing technical aspects (aviation communication, navigation and surveillance systems) have also been consolidated and published [5].

2. New timelines for applications

Several of the newly published regulations retained their original timelines to submit applications. However, in some cases, some applications shall need to be filed earlier. A notable example identified under the Civil Aviation (Air Operator Certification and Administration) Regulations, 2018 (AOC Regulations) is the requirement for an operator to submit their application for an initial issue for an air operators certificate at least 90 days before the intended date of operation, instead of the 60-day period previously provided. Similarly, an approved training organisation (ATO) is also now required to renew its certificate at least 60 days before it expires, instead of the 30 days previously required under the repealed regulations, to ensure the continuity of its training programmes.

In the same way, a party that is aggrieved by the decision of the KCAA under the Civil Aviation (Aircraft Nationality and Registration Marks) Regulations, 2018, is now required to lodge their appeal to the decision within 21 days and not the 30 days stipulated under the Aviation Act.

3. New compliance requirements and standards

It is now mandatory under the Civil Aviation (Approved Maintenance Organisation) Regulations, 2018 that an approved maintenance organisation (AMO) have a dedicated Head of Safety amongst its management personnel. At a minimum, the Head of Safety should have at least 5 years' experience in aircraft maintenance or flight operations and should have successfully completed a training in safety management systems course recognised by the KCAA. Also provided under the AMO regulations, is the prohibition of an AMO to operate with freelance certifying personnel and maintenance engineers unless they are in permanent employment.

There is also a new requirement under the AOC Regulations, that the Head of Operations of an air carrier should have at least 3 years' experience in the management of a commercial air transport operation. Likewise, for aircraft maintenance engineers with no relevant technical training, they are now required to have a minimum of 5 years practical maintenance experience in order to obtain a license under the Civil Aviation (Personnel Licensing) Regulations 2018.

3 The term "technical" is used to refer to the Regulations that deal with communications systems, aeronautical charts, instruments and equipment, aeronautical radio frequency spectrums etc

4 The term "operational" is used to refer to the regulations that deal with the licensing of aviation personnel, organizations, certification requirements, registration etc.

5 Examples of technical regulations published are the Aeronautical Charts Regulations, Aeronautical Information Services Regulations, Units of Measurement To Be Used In Air and Ground Operations Regulations, amongst others.

Under the Civil Aviation (Operation of Aircraft for Commercial Air Transport) Regulations, 2018 provisions relating to the minimum rest period for crews have been expounded upon. The provisions now include minimum rest periods in relation to the distance of a crew member's residence. The regulations also place an obligation on an operator to not allow any crew member to fly without being in possession of accurate and up-to-date flight records for the preceding 28 days before the flight. Failure to adhere to the new provisions, an operator risks on conviction a fine of up-to KES 1 million, imprisonment for a period of up-to 1 year, or both. Furthermore, action to the contrary exposes an operator not only to the risk of civil claims by its employees but also third parties on the further spectrum of negligent liability.

4. Delegation of Authority the KCAA

The new regulations provide for the delegation of powers by the KCAA to inspectors to impose restrictions on a regulated entity to preserve safety where an undesirable condition has been detected. In exercising the powers, the inspectors are required to exercise due care and to act in good faith in the interest of preserving safety until such time that the undesirable condition has been resolved.

REGIONAL INTEGRATION AND INCREASED COMPETITION

The grant of a category 1 status to Jomo Kenyatta International Airport that paved the way for direct flights from Kenya to the United States of America (US) provides new opportunities for local and international operators and investors. The opportunities are not only in operation of aircraft but also in the provision of auxiliary aviation services [6]. The national carrier, Kenya Airways, is already leveraging this opportunity [7] by its entry into a code sharing agreement with Delta Airways (US) to access a larger market, and at the same time seek to harness the benefits of the operational synergy of the arrangement. The entry into code sharing agreements, joint ventures, shareholders agreements or similar arrangements allows a carrier to leverage customer loyalty and retention, and `stem off competition from existing regional carriers [8] and new entrants [9] to the lucrative market.

FUTURE DEVELOPMENTS – WHAT'S NEXT FOR 2019

For the first time, the civil aviation regime in Kenya will have the Consumer Protection Regulations with substantial penalties and compensations for the denial to board, cancellations, damage to or loss of baggage, or passing off by an air carrier. It also proposes to extend liability from the air carrier, in respect to persons with disabilities or special needs, to aerodrome operators and ground handling services for denial to board, or failure to provide necessary services.

6 The Jomo Kenyatta International Airport is scheduled for expansion. The Government of Kenya under the Lamu Port-South Sudan-Ethiopia-Transport Corridor (LAPSSET) project, amongst other development objectives, was to develop an airport in Isiolo (Eastern, Kenya) and Turkana (North, Kenya). The former is already complete, and the latter is likely to receive renewed interest with the advent of oil exploration within Northern Kenya and acquisition of aircrafts with mid-range capabilities.

7 Kenya Airways had its first cross-Atlantic inaugural flight from Nairobi to New York in October 2018 becoming the first East African airline to offer non-stop flights to the US.

8 According to the Flight Global, World Airline Rankings 2018, Ethiopia Airways (under the Star Alliance) is the leading African carrier in revenue and traffic.

9 Uganda, Tanzania and Nigeria now seek to relaunch their national airlines. Zambia Airways is set to be re-launched after Ethiopia Airlines acquired a 45% stake in the airline. Furthermore, according to the KPMG, Aviation Industry Leaders Report 2018, African airlines in future should also expect greater competition from Chinese carriers.


FOOD SECURITY
UNIVERSAL HEALTH
AFFORDABLE HOUSI

01

THE BIG FOUR AGENDA

In December 2017, the Government of Kenya (GOK) introduced the Big Four Agenda as an accelerated 5-year development plan designed to fast-track the realization of Kenya's Vision 2030. The priority areas for the Big Four Agenda are: investments in Universal Health Coverage (UHC) to ensure access to quality and affordable healthcare for all Kenyans; quality and affordable housing; food security to ensure all Kenyans are well fed and enhancing manufacturing to promote value addition to products, whilst creating employment opportunities for the country's working-age population by 2022.

In the 2019-2020 financial year budget, GOK has allocated Sh. 450.9 billion to the four development pillars (50.9 billion more than the 2018-2019 financial year allocation). For the 2019-2020 financial year, the universal health coverage programme was allocated Sh. 35.8 billion while Sh. 10.5 billion went to the ambitious housing project. Food security was allocated Sh. 15.6 billion and Sh. 3.8 billion was set aside to support value addition and raise the manufacturing sector's contribution to the GDP to 15 per cent by 2022.

As noted by the President on several occasions, the national government is seeking partnerships with the private sector and foreign investors to achieve the Big Four Agenda, more so due to the resource-intensive nature of the investments needed to achiev the set priorities.

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ENHANCING MANUFACTURING

Manufacturing sectors play a pivotal role in the economic growth of any country. Enhancing manufacturing is one of the Big 4 Agenda items and the Government of Kenya seeks to do so with the result of increasing the GDP contribution of the sector from 8.5% to 15% by 2022, improving on Kenya's World Bank's ease of doing business global ranking, creating 1,000,000 jobs and increasing foreign direct investment inflows. In addition to the Big 4 Agenda, Kenya's Vision 2030 and the Kenya Industrial Transformation Programme (KITP) are also aimed at rebuilding the manufacturing sector.

The four key ingredients to a flourishing manufacturing industry in Kenya have been identified as: competitiveness, fighting against illicit trade, securing market access particularly for exports and creating a predictable and stable policy environment to support long-term planning. [1]

Under the manufacturing pillar, priority areas with potential for high growth and economic impact were identified, with the following business opportunities available to local and foreign investors being recognised:

- agro-processing (vegetables, fruit, vegetable oil, fish, animal feeds, tea and beef);
- textile (developing Kenyan brands and partnerships with global apparel buyers);
- leather (leather export, manufacturing footwear, central collection systems for hides and skins, rehabilitation of closed tanneries and training and skilling);
- construction materials ;
- oil and mining (petroleum, gold and base metals, minerals, limestone, gypsum, coal and iron ore);
- iron and steel ;
- information communication technology (ICT) – (assembly of phones,

1 Manufacturing in Kenya Under the 'Big 4 Agenda' A Sector Deep-dive Report. Kenya Association of Manufacturers | Kenya Business Guide, 2018.

laptops, televisions and business process outsourcing); [2]

After implementation of the initiatives under this agenda item, it is intended that by 2022, the following targets will have been achieved:

a) **Agro-processing** – investments in the sector will increase from 16% to 50%, 1000 small and medium enterprises will be established, 200,000 new jobs will be created and $ 20m fish feed mill investment creating 20,000 jobs;

b) **Textile/apparel/cotton** - investments in the sector will increase from $350million to $2billion, 500,000 new cotton jobs and 100,000 apparel jobs will be created. Cotton planting will be on a large scale;

c) **Leather -** investments in the sector will increase from $140million to $500million, $50,000 new jobs and 20million shoes to be made;

d) **Construction materials –** investments in the sector will increase from $470million to $1billion and 10,000 new jobs will be created;

e) **Oil, mining and gas** – attraction of 1 global scale player in mining value add;

f) **Iron and steel -** $1billion investments;

g) **Information communication technology (ICT) –** assembly plants (for phones, laptops and television), 5 business process outsourcing players and 10,000 jobs; [3]

The Government of Kenya intends to make the necessary policy and incentive reviews and facilitate the training of persons engaged in the sector to enable achievement of the above targets.

2 Manufacturing in Kenya Under the 'Big 4 Agenda' A Sector Deep-dive Report. Kenya Association of Manufacturers | Kenya Business Guide, 2018.
3 The Big Four – Immediate priorities and actions,2017.

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AFFORDABLE HOUSING

The Government of Kenya (GOK) has a goal to transform the country into a newly industrialising middle-income country providing a high quality of life in a clean and secure environment to all its citizens by 2030. [1] The Vision 2030 has political, social and economic pillars which lay a foundation for the Big 4 Agenda items. Affordable housing is one of those items that the Government of Kenya has adopted to facilitate the realisation of the country's development goals.

The affordable housing programme will apply to the following income segments:

- USD 500- 1,490 per month (mortgage gap housing)
- USD 200 – 499 per month (low-cost housing)
- USD 0 – 199 per month (social housing)

The Government of Kenya will support the affordable housing programme initiative as follows:

- provide land for free or at a low cost in certain designated areas within the country for the construction of pre-approved modular housing to be developed in a controlled/ mega city designed master plan;
- develop or subsidise bulk infrastructure for those sites;
- coordinate and expedite statutory approvals from authorities and utility providers;
- through the National Housing Corporation or other GOK contracting authorities, guarantee the acquisition of the housing units from the developer;
- ensure the entry into appropriate contracting arrangements.

1 Vision 2030

The business opportunities available to local and foreign investors include:

1. **Direct investment in the construction of affordable homes**

- Construction of social, low-income and mortgage gap housing through crowding-in private sector funding and close partnerships with the county governments and national government.
- Construction and operation of social and commercial amenities within the developments i.e. Education, recreation, health facilities and operation of transport systems.
- Construction and operation of mass rapid transit systems within urban centers.

2. **Financing of affordable homes**

- Investment in the housing fund which will provide unit off-take and long-term financing for home buyers.
- Investment in the provision of affordable long-term tenant purchase schemes to low-income earners through the housing fund (which GOK has set up and to which employees and employers are to contribute to every month).
- Provision of credit enhancement for developers and the housing fund e.g. Wraps, mitigation covers, etc.

3. **Low cost construction products and services**

- Local manufacture of construction materials e.g. cement, iron rods and woodwork through direct investments or partnerships.
- Scalable low-cost construction technology and modern innovative building technologies.
- Provision of insurance services (construction and housing insurance).

After implementation of the initiatives under this agenda item, it is intended that by 2022, the following targets will have been achieved:

- reduction of the cost of home ownership by 50%;
- delivery of 500,000 affordable homes across Kenya's 47 Counties;
- reduction of the average construction costs by 30%;
- creation of 300,000 new jobs in the construction sector;
- reduction of the low-income housing gap by 30%;
- increment of the construction sector's contribution to GDP by 100%.

The Government of Kenya has already implemented the necessary policy and legal steps required to operationalise this agenda item. Moreover, as at the time of going to press, the first and second round calls for investment have now closed.

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FOOD SECURITY

That achieving food security in Kenya is long overdue is an understatement. This is in view of agriculture being the main economic activity in the country, accounting for more than a quarter of the country's GDP. Moreover, more than 75% of Kenyans venture into or make a living from the sector.

The major contributors to the country's severe food insecurity include high increase in population growth, high domestic food prices influenced by high cost of fertilisers and other inputs, a lack of food variety leading to overreliance on maize as the staple food, frequent droughts facing most parts of the region and high level of poverty leading to low purchasing power globally.

The Government of Kenya has therefore identified food security as one of the four pillars to underpin Kenya's economy. The agenda seeks to alleviate these problems by identifying growth opportunities and formulating policies that promote and facilitate food security. The largest opportunity involves maximising on the use of the arable land in Kenya by offering subsidies, farm equipment and inputs to farmers to realise maximum yields. Other opportunities include partnering with the local communities with donors and private investors to invent new farming techniques that would be suitable for arid and semi-arid areas, developing the rural agricultural markets and providing agri-business skills to such communities, improving infrastructure and providing vital agriculture support services.

If successfully implemented, the Government believes it can achieve the following:

1. a **34% increase** in the average **daily income** of farmers;
2. a **27% reduction in malnutrition** among children under 5 years of age;
3. the creation of 1,000 agro- processing SMEs and **600,000 new jobs**;
4. a **50% reduction** in the number of **food insecure** Kenyans;
5. a **48% increase** in the **country's GDP** contribution by the agricultural sector; and
6. a **47% reduction** in the **cost of food** as a percentage of income.

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UNIVERSAL HEALTH COVERAGE

The rationale for universal health care programs is to enable citizens regardless of their social -economic status access health care services without the risk of financial impoverishment.

The aim of this agenda item was to attain 100% universal health coverage by scaling up the National Health Insurance Fund (NHIF) through the adoption of five initiatives including: the digitisation of NHIF, re-definition of NHIF to include multi-tier benefit packages, the adoption of an agency model, activation of the community health worker network, and legal reforms to align NHIF with universal health coverage.

The Government of Kenya's priority initiatives include financing and cost reduction. On financing, the initiatives involve increasing budgetary allocations to the health sector from 7% to 10%, attracting USD 2billion private sector investment, implementing alternative financing mechanisms, taxation and dedication of a percentage of excise duty and sin tax to the health sector. On cost reduction, the initiative was to adopt low cost service delivery models to reduce overhead costs and improve efficiency. [1]

Business opportunities available to local and foreign investors under this pillar include:

a) direct investment in the provision of healthcare services
b) provision of financing services to the health sector
c) provision of hospital equipment
d) training and skilling of medical personnel

After implementation of the initiatives under this agenda item, it is intended that by 2022, the following targets will have been achieved:

a) **Financing :** 100% of the poor should have access to free healthcare, 9 million people covered by member contributions, 12million people covered by informal member contributions and 50% reduction in out of pocket medical expenses.

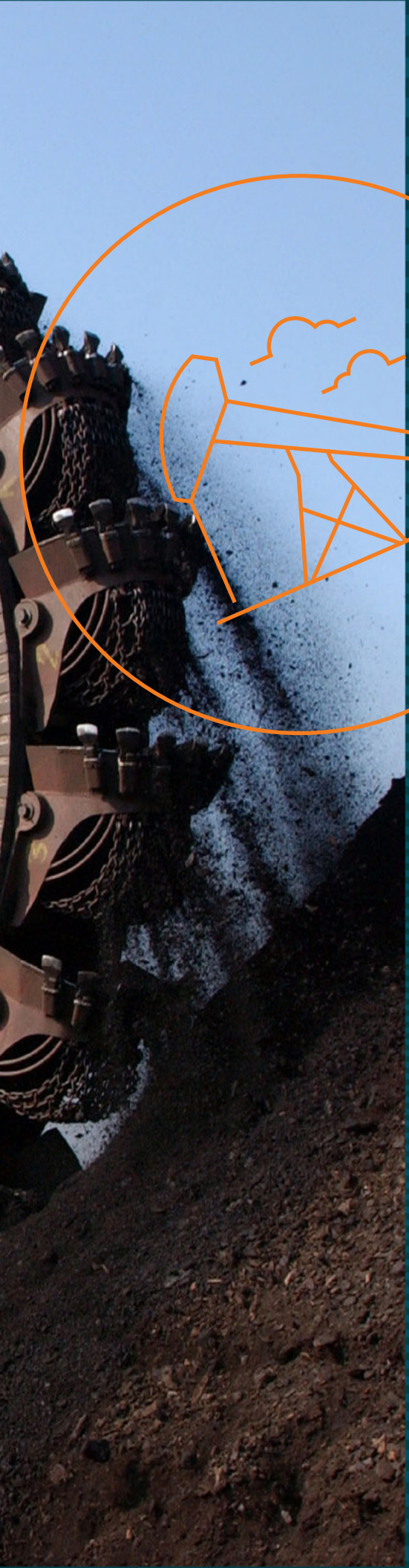
1 The Big Four – Immediate priorities and actions , 2017.

b) **Access to services:** set up of 10 referral hospitals, 4 new comprehensive cancer centers, 1 center of excellence for kidney disease, 21 hospitals equipped with surgical theatres and other equipment and 50% increase in ratio of health worker to people served.

c) **Coverage:** to include 1.79million elderly persons above 70 years of age, 1.5million poor households, 1.36million women under the 'Linda Mama' program and 100% universal health coverage.[2]

Improving the nation's healthcare system and providing its citizens with access to basic healthcare is a key continuing Government deliverable.

2 The Big Four – Immediate priorities and actions , 2017.



02

ENERGY AND EXTRACTIVES

- Permitting And Licensing In The Energy, Mining And Petroleum Sectors In Kenya
- Local Content Requirements In The Kenya Extractive Sector

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LOCAL CONTENT REQUIREMENTS
In The Kenyan Extractive Sector

The abundance of natural resources like oil and gas has generally been associated with increased isolation of communities, deepening inequality, environmental degradation and armed conflict in many a country. Governments often implement local content policies to create jobs, spur local industries and tame 'Dutch Disease'. [1]

Local content refers to the use of Kenyan local expertise, goods and services, people, business and financing before the systematic development of national capacity and capabilities for the enhancement of the Kenyan economy.

Legislation

Presently, local content requirements are outlined in Part IV of the Petroleum Act No. 2 of 2019 ("Petroleum Act") which provides for local content requirements (section 50), monitoring and enforcement of local content (section 51) Training and Training Fund (section 52) and the Mining (Community Development Agreement) Regulations, 2016.

When applying for any permit or license in the explorative sector, the applicant must submit to the Authority

1 What Dutch disease is, and why it's bad, https://www.economist.com/the-economist-explains/2014/11/05/what-dutch-disease-is-and-why-its-bad

[2] for approval a long term and annual local content plan. This plan should inter alia give priority to the employment or engagement of qualified and skilled Kenyans at all levels of the value chain [3] and guarantee involvement of the local community and Kenyan citizens at large in operations. Locally sourced goods and services should also be given preference over imported ones.

The Energy Regulations further emphasise that foreign companies intent on operating in Kenya must incorporate a joint venture with a Kenyan company and strategise on a technology transfer plan. This is important as it increases the capabilities and expertise of the local companies, subsequently sustaining economic growth in the sector.

The Mining (Community Development Agreement) Regulations call for the signing of community development agreements between the mineral permit/license holders and the locals detailing the community development plan, the steps to be adhered to in maintaining the community's cultural heritage and the overall protection of natural resources. Such an agreement remains in force for the lifetime of the mine and is transferable from one licensee/permit holder to another.

If these regulations are implemented effectively, they can have great impact on the Kenyan economy. It will open up opportunities across a broad spectrum of different sectors, including financial services, transport and logistics, and security.

The extractives industry is likely to experience further regulatory changes if the Local Content Bill of 2016 ("Bill") is passed. The Bill, initiated by the Senate, will regulate local ownership, control and the financing of gas, oil and natural resources.

Any concerns that the Bill may create regulatory duplication and confusion can be overcome by streamlining both regulatory regimes.

2 Authority means the Energy Regulatory Commission established under section 4 of the Energy Act,2006
3 Section 50 (1) c

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PERMITTING AND LICENSING in The Energy, Mining And Petroleum Sectors In Kenya

Every natural resource, in its natural state, in, under or upon the land in Kenya is the property of the Republic and is vested in the national government in trust for the people of Kenya. For this reason, special permits, granted by the relevant licensing bodies are therefore required to pursue investment interests in the extractive sectors.

ENERGY SECTOR – POWER GENERATOR

The energy sector in Kenya is dominated by petroleum and electricity, with wood fuel commonly used in rural communities. The sector's main goal, according to the 2004 sessional paper on national energy is to promote equitable access to quality energy services at the lowest cost, while protecting the environment.

The Energy and Petroleum Regulatory Authority (EPRA) [1] is the independent body established under the Energy Act No.1 of 2019 [2] ("Energy Act") to inter alia regulate electrical energy except nuclear, petroleum & petroleum products except crude oil , renewable energy, coal bed gas and other energy forms.

EPRA takes into account the preservation of natural resources before granting licenses to any entity seeking to undertake any of the above activities in the country.

1 The Energy and Petroleum Regulatory Authority (EPRA) is yet to be established. In the meantime, the Energy Regulatory Commission shall perform the role of EPRA.

2 The Energy Act came into force on 28 March 2019

Below are some of the approvals a power producer is required to obtain from various entities to support their license application.

a) **National Environment Management Authority (NEMA)** – approving the Environmental Impact Assesment and providing a report

b) **Kenya Forest Service (KFS)** where applicable – granting Special Use license to those proposing to establish power plants or sub stations situated on KFS land.

c) **Water Resources Management Authority (WRMA) –** granting water abstraction permits for hydropower projects.

d) **Kenya Civil Aviation Authority –** giving clearance for wind power projects.

e) **Ministry of Energy –** granting the geothermal resource license and authorizes geothermal exploration

f) **County Government –** approving of change of user

Once the above approvals have been obtained, EPRA may approve the Power Purchasing Agreement between Kenya Power & Lighting Company (KPLC) the offtaker and the power producer.

Licensing

Once the power purchase agreement is approved, a generation licence may be granted by the EPRA. It is notable a person shall not require any authorisation to generate electrical energy for own use of a capacity not exceeding one megawatt. Requirements for license applications are outlined in the Energy Act. [3] The license application shall be in the form and manner prescribed by regulations made under the Energy Act. [4]

Ultimately, the electrical energy from power generating plants is conveyed over transmission systems owned by KPLC or the Kenya Electricity Transmission Company (Ketraco), both of whom are licensed by the EPRA to provide transmission services.

KPLC then carries out distribution and retail supply of the electrical energy to customers in accordance with licenses and permits issued to it. EPRA will also approve the retail tariffs charged to customers for such supply.

MINING SECTOR

Mining in Kenya is an industry dominated by production of non-metallic minerals encompassing industrial minerals such as soda ash, fluorspar, kaolin and some gemstones and certain rare earth metals. Mining accounts for a very small part of Kenya's annual GDP.

Persons intending to carry out any mining activities must apply for the appopriate permit or license from the Ministry of Mining and Petroleum through the Cabinet Secretary. Such applications are submitted through the Ministry's online mining cadaster. [5]

The application should include:

- The details of the person or, if it is a company, the constitutional documentation must be included
- Type of mineral to be mined
- Description of previous experience or knowledge in dealing with minerals
- Certified statement or a formal letter of intent from a financial institution of the funds available to the applicant
- Any other information that may be requested.

Licensing

Once the license is granted, it is issued digitally.[6] This license is valid for only one year and is renewable on

3 Part VI – Electrical Energy, Energy Act, No. 1 of 2019
4 Regulations under the old Energy Act of 2006 remain in force until new Regulations under the Energy Act of 2019 are gazetted.
5 http://www.mining.go.ke/index.php/cadastre
6 Regulation 6, Dealings in Minerals Regulations, 2016

the same online cadaster. [7] The holder can thereafter only deal in the mineral specified in the mineral dealer's license.

In order to buy and sell minerals, one must obtain a mineral dealer's permit using form L-11. [8] Such a permit is only granted to Kenyan citizens and body corporates with at least 60% of their shareholding held by Kenyan citizens. Like the mineral dealer's license, this permit is valid for one year and allows the holder to deal only in the minerals specified in the permit.

Where a mineral license holder's proposed investment exceeds USD 500 million, the Cabinet Secretary responsible for mining in consultation with the National Treasury may enter into a mineral agreement with the holder. This agreement is then submitted to the National Assembly and the Senate for ratification. [9]

PETROLEUM SECTOR

Petroleum is Kenya's main source of commercial energy. It has, over the years, accounted for about 80% of the country's commercial energy requirements. The sector is mainly governed by the Petroleum Act No. 2 of 2019 ("Petroleum Act"). [10]

Persons intending to carry out actvities in the exploration, production and development of upstream petroleum operations must apply for the requisite permits and or execute the petroleum agreement as provided in the Petroleum Act.

In their application, the applicant needs to specify interalia;

a) Their name, nationality, nature and place of business
b) The name & nationality of each director if it is a company
c) The delineation of the proposed area of exploration

In order to buy and sell minerals, one must obtain a mineral dealer's permit using form L-11. [8] Such a permit is only granted to Kenyan citizens and body corporates with at least 60% of their shareholding held by Kenyan citizens.

7 Regulation 10, Dealings in Minerals Regulations, 2016
8 Regulation 11 and 13, Dealings in Minerals Regulations, 2016
9 Section 117, Mining Act, No 12 of 2016, Laws of Kenya
10 The Petroleum Act came into force on 28 March 2019

d) Description of the purpose and estimated duration of the exploration.

Licensing

The Cabinet Secretary responsible for Petroleum is empowered to enter into petroleum agreements with contractors on behalf of the Government. Model formats of certain of these agreements have been provided under the Petroleum Act. Only companies incorporated in Kenya may enter into a petroleum agreement with the government [11]

In the case of non – exclusive exploration activities , the Authority is the body that grants appropriate permits [12]. The application for this permit should be made in the prescribed form and the appropriate fees should be paid.

The permit only allows the right to prospect and carry out geological and geophysical surveys of the land. It is important to note that the permit does not allow the holder the right to drill. Additionally, permit holders are not granted any right of priority over any person with respect to applications for petroleum agreements relating to the relevant exploration area.

Operational permits are also granted by the Authority to contractors who intend to conduct upstream petroleum operations such as drilling a well; developing and producing petroleum;constructing petroleum gathering systems in the field; building a crude oil storage facility; plug or abandoning an individual well and operating an underground injection control well.

11 Regulation 2(2), Petroleum (Exploration and Production) Regulations 1984

12 Authority means the Energy Regulatory Commission established under section 4 of the Energy Act,2006


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03

FINANCIAL SERVICES

- Debt Financing In Kenya
- Global Depository Receipts: Old But New Capital Raising Avenues For Kenyan Companies
- Sectoral Analysis: Key Developments And Regulations In The Financial Services.

OLIVER KIBAGADI
Associate, MMAN Advocates

SECTORAL ANALYSIS:
Key Developments and Regulations in The Financial Services.

The financial services sector in Kenya has largely been dominated by banks, micro-credit institutions, insurance and microfinance institutions. With the advancement of technology, fintechs and insurtechs are now finding their way into the financial services sector as key players.

Recently, Kenya has witnessed a widespread acquisition of stakes in banks. Catalyst Principal Partners and Africinvestment bought a stake in Prime Bank; KCB Bank Kenya Limited won the bid to takeover of the troubled Imperial Bank (In Receivership); and SBM Bank Limited acquired Fidelity Bank and Chase Bank Limited (In Receivership).

Other mergers and acquisitions in the works are; the intended acquisition of the state-run Consolidated Bank of Kenya by the Lake Region Economic Block and the merger of NIC Bank Limited and CBA Bank Limited.

In the banking sector, Parliament amended the law lifting the interest capping on interest rates for savings. The courts have also ruled that the interest capping on borrowing is vague and unconstitutional and has given Parliament 12 months to amend the law.

In the fintech sector, there has been an upsurge of fintech platforms offering borrowing services to Kenyans. Applications such as Tala and Branch have acquired a large client base over a short period of time. To cash in on that market sector, Safaricom, the largest telecommunications company in Kenya, launched Fuliza an overdraft facility for its customers, and in eight days from its launch, it had lent over Kshs. 1 Billion.

The fintechs have been instrumental in increasing financial inclusion within the country, they however have onerous and predatory terms that often increase poverty within the populace. To control the fintechs and other non-regulated financial service providers there is a proposed Financial Markets Conduct Bill which seeks to regulate the financial services sector in totality and protect consumers of financial services.

The Capital Markets Authority (CMA) has made steps in diversifying the products offered at the capital markets by launching a framework for issuance of green and unlisted bonds. It also launched a policy guidance note on Global Depository Receipts and Global Depository Notes which creates a framework for Kenyan and international firms to sell their shares without cross listing on the Nairobi Securities Exchange.

For a while now, companies have not been listing in the securities exchange largely attributed to the stringent regulatory requirements by the CMA. In a bid to encourage listing while still maintaining the compliance requirement, the CMA has created an incubator and accelerator for companies to help them create proper structures and compliance in readiness for listing in the future.

In the mortgage refinancing sector, the Central Bank of Kenya prepared the Central Bank of Kenya (Mortgage Refinance Companies) Regulations to provide the incorporation, licensing and operationalisation of the mortgage refinance companies in Kenya. The Regulations were gazetted on 2nd August 2019 vide Legal Notice 134.

In the insurance industry, Insurance companies are now required to comply with new accounting standards as provided for under the IFRS17-Insurance Contracts. These standards introduce a risk-based supervision regime to distribute policies and will focus on the risk exposure of a company as opposed to say premiums offered by the company and cash received by the firm.

In the retirement benefits realm, there are new regulations aimed at enhancing governance and safeguard workers' retirement savings. The regulations focus on implementing and promoting proper standards of conduct in schemes and ensure service providers execute duties effectively. This would work hand in hand with the new mobile application developed by the Retirement Benefits Authority that enables members of the public to file complaints and access all registered pension service providers enhancing good governance of the schemes.

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THE WAREHOUSE RECEIPT SYSTEM ACT, 2019

What it means for agribusiness and financing in Kenya

A warehouse receipt system ("WRS") is the use of a stored agricultural commodity, evidenced by the issue of a warehouse receipt. The receipts issued are acceptable to banks as collateral for loans to the producer or trader of the commodity. In addition, a WRS enhances participation of smallholder farmers in the market as the warehouses allow them to collect, consolidate and sell their products jointly and reduces post-harvest losses for farmers who use warehouses that have mandatory storage and handling standards [1]. Further, the storage and records by the warehouses aid to improve food security within the country.

Prior to the enactment of the Warehouse Receipt System Act, 2019 ("the Act") in June 2019, Kenya did not have legal framework for warehouse receipting although industry players such as the Eastern African Grain Council and the National Cereals and Produce Board respectively took steps to develop regulations to facilitate receipting on a contractual basis and certify warehouses.

In a country where more than half of the gross domestic product is derived from the agricultural sector, the lack of a centralised WRS was a significant gap. Therefore, with the enactment of the Act the use of warehouse receipting as a tool of trade in agricultural commodities is likely to achieve its full potential.

1 FAO, 2015: Designing warehouse receipt legislation

The objective of the Act is to provide the required legal framework and thereby address marketing challenges associated with the cereals and grains subsectors. The Act commenced on 2nd July 2019.

SALIENT FEATURES OF THE ACT

1) **Establishment of the Warehouse Receipts System Council:** The Act establishes the Council as a body corporate which shall be mandated, among other things to facilitate the establishment, maintenance and development of a warehouse receipt system for agricultural commodities in Kenya, establish a central registry for the management of warehouse receipt transactions and develop, implement an efficient commodity grading and weighing system that ensures quantity and quality assurance, and to facilitate the enforcement of commodity standards necessary for the WRS in conjunction with the relevant government agencies.
2) **Licensing of warehouse operators:** The Act introduces licenses for warehouse operators. Licenses shall be issued at the County level by the county executive committee member responsible for matters relating to agriculture and shall be valid for a period of twelve (12) months from the date of issue. The county executive committee member may also refuse to grant a license, suspend or revoke a license. However, the Act provides that any person who is aggrieved by a decision of the county executive committee member may, within thirty days of being notified of the decision, appeal to the Council.

   The Act further provides that a person applying for licensing shall among other requirements provide a performance bond in such form as the Cabinet Secretary may prescribe. The performance bond shall serve as a financial assurance for the fulfilment of all obligations arising out of the license including potential costs relating to the rescue, recovery of other costs and fines, penalties or compensation for violations against the provisions of the Act.
3) **Warehouse Receipts:** A warehouse operator under the Act is mandated to issue a receipt for any agricultural commodity deposited in his or her warehouse in either hard or electronic form. The warehouse receipt shall be a document of title to goods and need not to be in any particular form. However, the receipt must state the following:
   a) name and physical address of the warehouse operator;
   b) name and address of the warehouse where the goods are stored;
   c) license number of the warehouse operator;
   d) date of issue of the receipt;
   e) serial number of the receipt;
   f) particulars of the depositor;
   g) statement whether the goods will be delivered to the bearer to a specific person or his order for negotiable receipt;
   h) full description of the agricultural commodity deposited including the type, grade, crop year and season and weight;
   i) signature of the warehouse operator, which may be made by his authorized agent;
   j) statement that the agricultural commodity covered by warehouse receipt is insured by the warehouse operator for full value; and
   k) security features to be determined by the Council.

   The Act prohibits the details in a warehouse receipt from being altered for any reason.
4) **Central Registry:** The Act establishes a central registry where all warehouse receipts issued shall be delivered for registration within fourteen (14) days of any issue or negotiation. The Registrar

shall issue a Certificate of Registration which shall be conclusive evidence of the issue or negotiation of a warehouse receipt. The Act further provides that the Cabinet Secretary in consultation with the Council may make regulations to govern the day to day operations of the Central Registry.

5) **Negotiation and transfer of warehouse receipt:** The Act provides that a warehouse receipt issued to a person may be negotiated by endorsement and delivered to another specified person. A person to whom a receipt has been duly negotiated shall acquire the same title in the goods as the person who negotiated to him. It also creates a direct obligation of the warehouse operator to hold the goods for him as if the warehouse operator had contracted directly with him; and all rights accruing under the law of agency.

6) **Warehouse Receipts System Dispute Resolution Committee:** The Act establishes a dispute resolution committee which shall hear and determine appeals relating to the refusal to grant a license; the imposition of any conditions on a license; the revocation, suspension or variation of a license; a decision of a warehouse inspector; complaints by registered, licensed, or other persons operating under the Act; or any other decision of the Council or a county executive committee member in relation to the provisions of the Act.

IMPACT ON AGRIBUSINESS AND FINANCING IN KENYA

It is anticipated that the WRS Act shall play a significant role in the growth of the agricultural sector in Kenya in conjunction with the **Movable Property Security Rights Act No. 13 of 2017,** an Act which facilitates the use of movable property as collateral for credit facilities.

Under the Movable Property Security Rights Act No. 13 of 2017, a warehouse receipt is considered a negotiable document capable of being used as collateral and registrable in the Movable Property Security Rights Registry, also known as the Collateral Registry.

It is hoped the Act will boost agribusiness in this country by ensuring that farmers have access to licensed warehouses on reasonable terms. It shall also formalise the use of warehouse receipts as collateral and increase access to credit facilities by small scale farmers.

With regards to the enforceability of a receipt as a security, the Act indicates that a certificate issued by the Central Registry is conclusive evidence of the issue or negotiation of a warehouse receipt. The Act also provides that commodities stored at the licensed warehouses must meet the standards published by the Kenya Bureau of Standards and be weighed using equipment certified in accordance with the Weights and Measures Act, further providing the critically needed reassurance to the lenders as to the quality and quantity of the goods for which the receipts were issued. Further enforcement support is provided by the Movable Property Security Rights Act at Part VII which sets out how a creditor can exercise its rights in case of default by the debtor.

WRS IN THE CAPITAL MARKETS AND LOOKING BEYOND AGRICULTURE

Of note is that the Act requires the Central Registry to have the necessary infrastructure to link it with a central depository system of a commodities exchange licensed by the Capital Markets Authority.

Related to this, the Capital Markets Authority has now taken steps to link commodity exchanges licensed by it with the Central Registry as envisioned by the Act. On 9th August 2019, the Authority released the Capital Markets (Commodity Exchange) Draft Regulations, 2019 for public comment. The draft regulations provide for the licensing of commodity exchanges,

commodity brokers, approval of clearing houses and the trading, and conduct of business of commodity exchanges [2]. In addition, the draft regulations provide that the Warehouse Receipt System Act shall apply to commodity contracts and that a commodities exchange shall ensure that only licensed warehouses and warehouse operators licensed in accordance with the Act are used in connection with trading in a commodity market.

A notable limitation of the Act is its exclusion of non-agricultural commodities from its scope, such as extractives. It would seem an opportunity has been lost to regulate warehouse receipting of all tradeable commodities, noting that the Capital Markets Act and its proposed commodities regulations already include minerals and energy goods within their scope.

2 CMA Public Notice dated 13th August 2019

JOY KAMAU
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DEBT FINANCING IN KENYA

LENDING IN KENYA BY FOREIGN ENTITIES

In the last quarter century, Kenyan businesses have become more open to borrow from foreign entities, be they equity or debt finance lenders. Debt financing entails the raising of funds by an entity through borrowing from a lender with the assurance of repayment at a later specified date. [1]

With the removal of foreign exchange controls in the 1990s, the government has progressively encouraged foreign investors to operate in Kenya as lenders by promoting a permissive environment as follows:

- no restrictions on granting of loans by foreign lenders except for financial institutions set up in Kenya as branches;
- absence of legal restrictions in granting of security or guarantees by foreign lenders;
- right to exercise debt buybacks by the borrower or sponsor;
- favorable loan and security transfer mechanisms;
- access to foreign investors through capital markets; and
- credit information exchange among lenders and stakeholders.

Additionally, lending has been revolutionised by the integration of mobile services and online services with the lending sector for small value loans of between USD 2 to USD 1,000. This has been done via partnering of mobile phone networks with commercial banks to offer competitive banking products such as loan facilities with no securities.

GUARANTEES: GUARANTEES TO FOREIGN LENDERS?

Under Kenyan law, Kenyan individuals and companies are allowed to guarantee loans from foreign lenders. The instruments of guarantee and/or indemnity would however need to be drawn by a Kenyan lawyer and

1 Practical Law, Methods of Raising Debt Finance, Practical Law UK Practice Note 9-201-8490 (2016

stamped upon payment of stamp duty. A lender would ordinarily consider the integrity and creditworthiness of the guarantor to repay the loan. Where a corporate guarantor is involved, it has to demonstrate the commercial benefit to be gained in issuing a guarantee.

It is not farfetched that a guarantor would place assurance on the borrower to fulfil the obligation to repay a loan. However, in the unlikely event that the borrower defaults, the guarantor is not entirely without recourse to the exposure and vulnerability to repay the loan when the lender calls upon the guarantee.

Certain defences are available to guarantors when the guarantee is called upon. A guarantor can seek to withdraw the guarantee with the consent of the lender, which discharges the guarantee. Additionally, a corporate guarantor can be relieved from its obligations upon proof that no commercial benefit was derived from the guarantee.

Lenders should be aware of the requirement to notify a guarantor of the borrower's default as was determined in **Civil Suit No. 275 of 2014, Obadhia Gitonga Micheu v Co-operative Bank of (K)Ltd [2018] eKLR** where the lender, a financial institution in Kenya, proceeded to enforce the guarantee and had the guarantor listed with the credit reference bureau for default without notice. For such failure to notify, the court determined that the guarantor was only liable to pay the principal amount of the loan and not the interest.

Other matters for consideration include the notification to the guarantor of any amendment or variation to the indebtedness initially guaranteed or of any factor that would increase the guarantor's risk under the guarantee.

TAKING SECURITY

Perfection of Securities under the Movable Property Security Rights Act, No. 13 of 2017

Perfection of a security interest over an asset requires the registration of the security under the applicable legal regime. Such registration gives the holder of the security right priority over third parties with an interest in the asset and renders the security enforceable.

Effective 16 May 2017, security rights in movable assets have to be registered under the Movable Property Security Rights Act (MPSRA).[2] The movable assets under the MPSRA include tangible assets such as motor vehicles, crops, livestock and machinery and intangible assets such as receivables, choses in action, deposit accounts, electronic securities and intellectual property rights. Security rights under the MPSRA are validly created by execution of a security agreement by the owner of such asset.

The registration is undertaken at the collateral registry, which is an online registry established under the MPSRA. A lender would submit an initial notification of entry into the security agreement for the registration of the security right established therein. Such registration will be confirmed by the issuance of a notice in the prescribed form to the lender by the Registrar of the collateral registry. [3]

Where a security comprises a charge over a company's assets, such security should be perfected by registration at the companies registry and at the collateral registry within 30 days from the date of creation. [4] Generally, registration under MPSRA accords a lender the same rights and remedies as any other secured creditor under Kenyan laws. However, the date and time of registration determines the priority of the security right in relation to other such secured creditors.

2 No. 13 of 2017
3 This notice takes the prescribed Form 4 as per the Movable Property Security Rights Regulations.
4 Section 885 of the Companies Act, No. 17 of 2015.

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GLOBAL DEPOSITORY RECEIPTS

Old but New Capital Raising Avenues for Kenyan Companies

Dual listing (also referred to as cross listing or inter listing) is the listing of a security on two or more different stock exchanges. It involves a company listing its shares within its local securities market and undertaking a secondary listing in a foreign jurisdiction. In East Africa, Kenyan companies already lead their contemporaries in dual listings, but cross listings to or from the Nairobi Securities Exchange remain very few and limited to the region . However, with the introduction of global depository receipts (GDRs) to the capital markets legal framework by the Kenyan Capital Markets Authority (CMA), it is hoped that the challenges of dual listing will no longer be a hinderance to local and global companies seeking to tap into new and existing investor markets.

WHAT ARE GDRS

GDRs are negotiable certificates that represent ownership of shares in a company listed in another country. GDRs are classified as either sponsored or unsponsored. A sponsored GDR is issued with the direct involvement of the issuer of the underlying shares and an unsponsored GDR is offered without the involvement, participation or consent of the issuer of the underlying securities.

Depository receipts have been available in the United States of America (USA) since the 1920s and have for numerous years been products of the financial markets such as the London Stock Exchange (LSE). Even so, they

have continued to receive significant attention in the last decade with globalization of capital markets and increased competition amongst firms both regionally and internationally.

BENEFITS OF GDRS

The immediate benefit to a Kenyan company that successfully offers GDRs is increased capital. However, there are other benefits from offering GDRs, such as:

- access to a larger pool of potential investors and conversely greater access to capital;
- enhanced reputation of a company both locally and internationally giving the company a competitive advantage amongst its peers; and
- less stringent listing requirements than a main investment market listing, resulting in reduced costs and fees in comparison to a direct public offer.

From an investor's perspective, the benefit of a GDR offer is that it:

- allows for diversification of their investment portfolio;
- provides an alternative option for market participation; and
- increased information to assess a company's performances, amongst others.

REQUIREMENTS FOR LISTING GDRS

The requirements for the issuance of a GDR are set out in the CMA's Policy Guidance Note on Global Depository Receipts and Global Depository Notes in Kenya, which specifies the eligibility, documentation and disclosure requirements. The Guidance Note also identifies the various sections of the Capital Markets (Securities) (Public Offers, Listing and Disclosure) Regulations, 2002 that are to be modified to cater for GDRs.

Eligibility Requirements

The Guidance Note requires that the issuer (originator of the underlying shares or the depository bank);

- is a duly incorporated entity and operating in conformity of the laws of its jurisdiction and constitution;
- comply with the minimum capitalization and net asset guidelines in force in its jurisdiction for primary listing;
- offer securities that are freely transferable, unencumbered and not subject to any restrictions on marketability or any pre-emptive rights;
- shall not be in breach of any of its loan covenants or other contractual obligations;
- shall not be insolvent and shall have adequate working capital;
- shall, (subject to waiver by the regulator),
  - i) over the last five years have carried on as its main activity, either by itself or its subsidiaries an independent business capable of generating revenue;
  - ii) have in at least three of the last five years completed accounting periods to the date of the application, declared profits after tax attributable to its shareholders; and
  - iii) to be listed on a permissible exchange for a minimum of two years.

It is to be noted that the CMA also requires that following a public offer of depository receipts, 25% of the GDRs be held by public investors.

Documentation and Disclosure Requirements

The CMA shall require that that an issuer provide, inter alia:

- a legal opinion at the time of the application confirming that it has complied with the eligibility requirements and that all consents, approvals,

registrations and filings to be taken, obtained or made by the issuer in its local jurisdiction have taken or obtained; and

- an issuance prospectus for prospective investors that sets out:

  i) the corporate information of the issuer and the depository bank, and the capital market regulatory provisions under which they operate;

  ii) highlight the content and conditions of the deposit agreement (agreement between the issuer and the depository bank, if applicable);

  iii) the class, number, issue price of shares to be held by the depository, and whether it is a public or private placement; and

  iv) a summary of the terms and conditions of the GDRs.

The disclosure and reporting requirements for companies vary in each financial market. The more sophisticated the financial market the stricter the legal and disclosure requirements for listed companies. Therefore, it is important for companies issuing in-bound GDRs from markets with less stringent disclosure requirements and corporate governance policies than Kenya to note that they may need to adjust their structures to comply with Kenyan regulations.

NATIONAL OIL CORPORATION OF KENYA – AN IDEAL CANDIDATE?

In 2017, the London Stock Exchange and the Kenyan Ministry of Energy and Petroleum signed a memorandum of understanding paving the way for the dual listing of the National Oil Corporation of Kenya (National Oil), a corporation wholly owned by the Government of Kenya. National Oil aims to raise USD 1 Billion through a dual listing on the LSE. It is not yet known whether GDRs or equity shares shall be utilised. Should National Oil opt for GDRs, it shall join other similar state-controlled companies such as Brazilian Petroleum Corporation, commonly known as Petrobas.

The attractiveness of the LSE has been enhanced by its creation of a new category of premium listing in July 2018, exclusively for sovereign controlled commercial companies. These are companies in which a sovereign shareholder controls 30% or more of the company's voting rights. Under this category, a sovereign controlled commercial company can either elect to issue GDRs or equity shares on the financial market. This financial product shall be especially attractive for state owned or controlled commercial companies in oil, gas, mineral extraction and energy (extractive industries) which require a significant amount of capital outlay to accomplish their strategic objectives, but which often have local content shareholding requirements.

Conclusion

In the ABSA Africa Financial Markets Index 2018 (ABSA Report), Kenya was ranked third overall in Africa and first in access to foreign exchange. As a growing financial hub, it is likely that Kenya shall see a rise of in-bound GDRs, particularly in light of the existing and growing extractive industries in East Africa. Competition for local investors is therefore likely to increase. In addition, the progress made by the CMA to align its regulatory framework with the international standards for financial markets is expected to enhance the ability of Kenyan listed companies to meet the eligibility and disclosure requirements for out-bound GDRs. Kenyan companies therefore appear poised to maintain their edge over their East African peers in accessing financial markets with greater investor capacity.


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Secretary of the Treasury

04

LAND AND REAL ESTATE

- Land Rights in Kenya: Land Rates and Taxes.
- Environmental & Planning Regulation.
- Key Developments in the Real Estate space of Kenya

JUDY KABUBU
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KEY DEVELOPMENTS in The Real Estate Space of Kenya

The Real Estate market in Kenya has grown in leaps and bounds over the years but in the last two years, this growth has almost stagnated. That said, there have been developments in the recent past that have either had a positive or negative effect on the Real estate environment.

The biggest key development in the real estate sector is the coming into force of the Land Law Regulations at the end of 2017. Some of the silent features of the regulations include: introduction of new land registries, cadastral mapping system, new land forms, online registration and so on.

In embracing doing business in Kenya with ease, there has been an introduction of several online services such as payment of land rent and obtaining land rent clearance certificates. The services offered through the online portal are set to increase as the Ministry of Lands and Physical Planning continues to digitize its operations. Whereas when full and properly implemented it will speed the rate of transacting with the lands registry. At present, dealing with lands registry is slower due to the continuous closure of registries, movement of registry staff and the fact that most of the staff members are not trained to work with the new system impacting the speed at which services are delivered.

The fall of Nakumatt Supermarket also had a very serious effect on the malls and shopping centers, as a supermarket tends to be the anchor tenant attracting the necessary footfall. New supermarkets have since taken up those spaces enabling landlords to attract new tenants.

In the same breath, there is an oversupply of malls and shopping centers not only in the capital city of Nairobi but in other towns such as Nakuru, Meru and Naivasha. This has led to a tenant dominant market, as potential tenants are dictating more favourable letting terms and conditions. As a positive note this has seen more international retailers such as Carrefour, Shoprite, Choppies, KFC, Burger King, and Dominos entering the Kenya Market. Furthermore, brands familiar to Kenya such as Java have expanded their operations all over the country.

The real estate space in Kenya has also seen an increase in the construction of office units and residential units for the upper middle to high income earners. This has led to the oversupply of office space and residential units for that market segment. This has impacted the developer/seller/landlord who is unable to dispose of the units as quickly as projected. The impact is that developers/sellers/landlords are defaulting in their obligations to their financiers due to the slow uptake of the office spaces and residential units.

Whereas there is an oversupply of housing for the upper middle to high end housing, there is still a massive shortage of housing for the middle and lower income earners. In line with this, the President, Hon. Uhuru Kenyatta introduced the Big Four Agenda with one of its pillars being the provision of affordable housing. The government aims to build about 1 million houses under the Public Private Partnership framework.

In 2016, the Banking Act was amended to introduce an interest capping, with banks allowed to lend at no higher than 4 % above the Central bank rate which presently stands at 9%. Due to this interest capping, banks have been reluctant to lend to the populace but rather opting for less risky investment options such as trading in market securities and in government bills and bonds. The effect of that is that there has been a slow uptake of units for buyers who would have otherwise taken financing. In a bid to improve uptake of units, developers are exploring non-traditional methods of selling their units such as long payment plans and tenant purchase.

Overall, the political climate from the run up to the elections in 2017 up to the “handshake” have had a negative effect on the economic climate in Kenya with investors being reluctant to invest unsure of peace and stability of the county.

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LAND RIGHTS IN KENYA
Land Rates and Taxes

Article 209 of the Constitution of Kenya allows the National and County Governments to levy taxes and charges to raise revenue. The National Government is charged with imposing value added tax (VAT) and custom duty among others while the County Governments may impose entertainment taxes, property taxes or others as allowed under an Act of Parliament. These taxes and charges sometimes relate to land. Below are some of the taxes charged, both by the national and county government relating to land;

Land Rates: This is a tax imposed by county governments within a municipality or township. Rates are payable in respect of services such as water, sanitation and sewerage services provided by the county. Whereas the county may not provide the services, it is mandatory for land owners to pay the rates imposed on the property. The imposition of rates is provided under the Rating Act while the Valuation for Rating Act empowers the county governments to value land for the purpose of determining the rates. Some properties such as land used for educational institutions, public religious worship centres, cemeteries and crematoria among others are exempted from payment of rates.

Land Rent: Land rent is a tax/rental amount payable to the lessor. In most circumstances, the lessor is the government or county government or state authorities such as the Kenya Railways Corporation, Kenya Ports Authority among others. Land rent is payable to the Les-

sor every year before end of January. The Lessor may revise the land rent as they will although most times, it is revised when a lessee seeks a development approval or a renewal of the lease. Land rent is only payable on leasehold property.

Income Tax: Income Tax Act (ITA) provides the framework for imposition of taxes on income from among others land. The main income taxes payable in respect of Land are Capital Gains Tax (CGT) and tax on rental income.

CGT is a tax chargeable on the gain on transfer of land, building and shares. This tax was re-introduced in 2015 having been suspended in 1985. CGT is charged at the rate of 5% of the gain. There are various exemptions on CGT provided under the ITA.

The tax on rental income is a tax arising from the gains and profits for occupation of property. The ITA provides for various ways of taxing rental income;

- Where the rent is payable to a non-resident, the tenant is required to withhold 30% of the rent and remit it to the Kenya Revenue Authority. The tax withheld is a final tax.
- Where the rent is payable to a resident, if the property is commercial, the tenant being an appointed agent, is required to withhold 10 % of the rent. The tax withheld is not a final tax and the landlord is required to file their income tax in the usual way.
- Where the rent is payable to a resident and the property is residential, the landlord may opt to either pay a monthly rental income tax, computed at 10 % of the gross rent a (final tax) or pay the instalment tax and final income tax in the usual way.

Stamp duty- Stamp duty, provided for under the Stamp Duty Act, Cap 480, is a tax payable on various instruments. Stamp duty is charged on instruments relating to land such as transfers, charges and leases on land. The rate of stamp duty is based on the instruments, the user of the property and the time of payment among others. There are various exemptions to payment of stamp duty granted under the Stamp Duty Act.

Value Added Tax (VAT) – Under that Value Added Tax Act, VAT is payable on the sale of commercial land. Last year (in 2018) however the High Court ruled that VAT is not payable on the sale or purchase of land, irrespective of whether or not the buildings standing on it are residential or commercial.

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LAND & PROPERTY RIGHTS IN KENYA

Environmental & Planning Regulation

In pursuit of development, the environment has become more vulnerable to both natural and human induced changes. Buildings and other developmental projects are coming up every day threatening our water systems, our forests and the air is polluted daily in the pursuit for industrialization and advancement. Kenya's pursuit of developments in the last two decades has highlighted the need for effective environmental and planning regulation. Proper environmental and planning regulations are a key to sustainable development in our country.

At a local level, various laws have been put in place to achieve a systematic planning process and counter the negative impacts of people's actions on the environment. The current legislation touching on environment and planning include the Constitution of Kenya 2010, the Environmental Management and Co-ordination Act, Cap No. 8 of 1999 ("EMCA"), the Physical Planning Act, No. 6 of 1996 and the Water Act Cap 372 Laws of Kenya.

The Constitution provides for the sustainable and productive management of land and its resources. The Government has been mandated in the constitution with the responsibility of regulating the use of any land and any right over any land, in the interest of defence, public safety, public order, public morality, public health or land use planning.

The EMCA establishes an appropriate legal and institutional framework for the management of the environment and matters connected therewith. The EMCA has created the following authorities;

- The National Environmental Management Authority (NEMA), charged with the exercise of general supervision and co-ordination over all matters relating to the environment. NEMA is the principal instrument of Government in the implementation of policies relating to the environment;
- The National Environment Council, responsible for policy formulation and direction. It is also charged with setting national goals and objectives and the determination of policies and priorities for the protection of the environment.
- The Provincial and District Environment Committee, the key in decentralisation of environmental management and enable the participation by local communities in environmental matters.

The Physical Planning Act regulates land use both at the district and at the national level. It should be noted that the Physical Planning Act bases its planning at the national level, but its implementation is done through the local authorities. It ensures that what is intended is actualised and developers, though acting separately as individuals end, up conforming to the intended planned developmental objectives and plans collectively. Development applications such as change of user, extension of use, subdivision, amalgamation, and approval of building plans are done under this Act.

Complementary to the Physical planning Act are the Physical Planners Registration Act and the Urban Areas and Cities Act. These Acts envisage various plans namely county plans, county spatial plans, county integrated development plans, sectoral plans, integrated urban development plans and the city/municipal/urban area land use plans all aimed at realizing the effective land use and planning.

Related to the environment and planning is the Water Act which provides for among others the management, conservation, use and control of water resources. It further creates a Water Resource Management Authority which has a wide range of functions including the regulation and protection of water resources from adverse impacts and activities. This directly relates to development activities taking place or are likely to take place near water bodies. Though there are sufficient regulations, Kenya still seems to struggle with proper environment management and planning control mostly attributed to corruption within the system.

05

PEOPLE

- What You Need To Know About Kenyan Entry Permits And Foreign Contracts Of Service.
- Employment Issues In M&A Transactions/Activities
- Retirement Benefits

JEFF KINUTHIA
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WHAT YOU NEED TO KNOW ABOUT
Kenyan entry permits & foreign contracts of service

ENTRY PERMITS

There are various forms of entry permits issued by the Department of Immigration dependent on the nature of activities/business for which a foreigner wishes to be engaged in while in Kenya.

These are:

Class A permit: issued to a person who intends to engage, whether alone or in partnership, in prospecting for minerals or mining in Kenya. The foreigner must have obtained a prospecting or mining right or licence that may be necessary for the purpose.

Class B permit: issued to a person who intends to engage (either alone or in partnership) in the business of agriculture or animal husbandry in Kenya. The foreigner must have acquired, or received all necessary permissions to acquire an interest in land of sufficient size and suitability for the purpose.

Class C permit: issued to a person who is a member of a prescribed profession who intends to practice that profession (alone or in partnership) in Kenya. The foreigner must possess the prescribed qualifications set out under the Eighth schedule to The Kenya Citizenship and Immigration regulations, 2012 and must be duly registered by the professional body association or institute to which he belongs in his own country. The prescribed Professions, as provided for in the Kenya Citizenship and Immigration Regulations, 2012 are; Medical profession,

Dentists, Legal profession, Surveyors, Estate Agent, Valuer and Land Agent, Architects or Quantity surveyors, Pharmacists, Veterinary Surgeons, Engineers, Nursing Profession, Physiotherapists, Accountants, Chartered Secretaries, Actuaries, Scientist, Information and Communication Technology Experts.

Class D permit: issued to a person who is offered specific employment by a specific employer, the Government of Kenya or any other person or authority under the control of the Government or an approved technical aid scheme under the United Nations Organization or some other approved Agency (not being an exempted person under section 34 (3) of the Kenya Citizenship and Immigration Act. The foreigner must offer proof of possession of skills or qualifications that are not available in Kenya.

Class F permit - issued to a person who intends to engage (alone or in partnership) in a specific manufacture in Kenya. The foreigner must have obtained any licence, registration or other authority or permission that may be necessary for the purpose.

Class G permit - issued to a person who intends to engage (alone or in partnership) in a specific trade, business, consultancy or profession (other than a prescribed profession) in Kenya. The foreigner must have obtained any licence, registration or other authority or permission that may be necessary for the purpose.

Class I permit - issued to a person who is a member of an institution registered under the Society's Act who is engaged as a missionary, a member of a company limited by guarantee, a member of a trust registered under the Trustees Act and is approved by the Government of Kenya.

Class K permit - issued to a person who is above thirty-five years (35) of age who has an assured annual income of not less than USD 24,000 amount that is derived from sources other than employment, any occupation, trade, business or profession and being an income that is either derived from sources outside and to be remitted to Kenya, or income derived from pension or annuity payable from sources in Kenya. The applicant must give an undertaking not to accept employment, paid or unpaid, or engage in any income generating activity of any kind without a permit of the relevant class.

All the above classes have the common requirement that the foreign applicants' engagement in Kenya in the various activities should be of benefit to Kenya. With the exception of Class D (employment work permit) and Class I (missionary and non-profit permit) a foreign applicant is required to show proof that in his own right and at his full and free disposition, the applicant has sufficient capital and other resources for the purpose of the class of permit.

In addition to the above classes of entry permits, refugees are eligible for Class M permit which is granted in accordance with the Refugee Act, No. 3 of 2006. The permit is also granted to a spouse of such a refugee who intends to take up employment or engage in a specific occupation, trade, business or profession. The Class M permit is issued (upon approval) gratis (free).

For short term engagement, a foreigner is required to apply for a special pass. A special pass may be issued to a foriegner when applying for a permit or pass and/or when temporarily conducting any business, trade or profession for a period not longer than six (6) months. It is issued for an initial period of 3 months with the possibility of reapplying for a further 3 months.

Other entry permits/passes include: (a) Dependant's Pass which is issued upon application by a person whose spouse, parent or guardian is lawfully entitled to enter Kenya. A dependant's pass is issued to persons who are Dependants of Kenya citizens, valid permit holders, exempted persons and permanent residents; (b) Kenya Internship/Research pass which is issued to a foreign national who has been accepted as

an intern or researcher in an institution within Kenya and therefore seeking to enter and remain in Kenya to undertake Internship or academic research within Kenya. The Intern or researcher must not remain in Kenya for a period exceeding twelve months; (c) Kenya Student pass issued to foreign students who wish to pursue their education in Kenya's Education or Training Institutions where they have been accepted or admitted.

Timelines for application, processing and issuance of a permit/pass are not standard as these are subject to the advice of the Director of Immigration.

FOREIGN CONTRACTS OF SERVICE

Foreign contracts of service are governed by the Employment Act, No. 11 of 2007(Part XI of the Act). A foreign contract of service can be defined as a contract made within Kenya, but the performance of the contract is to be undertaken either wholly or partially outside Kenya. An example may be where a multinational or non-profit organization employs people in Kenya to work in projects based in South Africa, South Sudan, Saudi Arabia etc.

Foreign contracts of service are special in that the contracts are to be made in a prescribed form and thereafter attested/witnessed by a labour officer who must satisfy that (a) the consent of the employee to the contract has been obtained; (b) that no fraud, coercion or undue influence, mistake of fact, or misrepresentation may have induced the employee to enter into the contract; (c) that the contract is in the prescribed form; (d) that the terms and conditions of the employment contract comply with the provisions of the Employment Act; (e) that the employee has understood the terms and conditions the employment contract; (f) that the employee is medically fit for the performance of his duties under the contract; and (g) that the employee is not bound to serve under any other contract of service during the period provided in the foreign contract.

When an employer (whether resident/carrying on business or not resident within Kenya) enters into a foreign contract of service, the employer is required to submit to the labour officer a security by bond in the prescribed form together with one or more sureties resident in Kenya and approved of by the labour officer for the due performance of the contract in such sums as the labour officer considers reasonable. The security bond may be given by an agent of an employer who has an authorized agent in Kenya. This binds the authorized agent personally to the terms of the bond notwithstanding the disclosure of his principal.

It is an offence to employ, engage, induce or attempt to induce an employee or knowingly aid in the employment or engagement of a person with the intention that when so employed or engaged that person is to proceed outside the limits of Kenya unless that person has duly entered into a foreign contract of service in accordance with the Act. On conviction for such an offence, a person is liable to a fine not exceeding KES 200,000 or to imprisonment for a term not exceeding six months or to both.

For more information or advice related to this topic please contact Jeff Kinuthia (Associate) on JKinuthia@mman.co.ke or Carole Ayugi (Managing Partner) on CAyugi@mman.co.ke

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EMPLOYMENT ISSUES
in Merger & Acquisition Transactions/Activities

Whenever merger and acquisition transactions take place, employment issues are almost always certain to arise. To identify any risks, the due diligence exercise should inter alia comprehensively review the company's policies, procedures, pending employment claims, share incentive schemes, pension schemes, statutory deductions, collective bargaining agreements, benefit plans, housing and any outstanding loans.

KEY CONSIDERATIONS OF EMPLOYMENT DUE DILIGENCE

1. Merger & acquisition transactions where original legal entity is retained

When a merger or acquisition occurs, the ownership is usually transferred or combined, and this does not always result in the formation of a new legal entity. The company has its own rights and obligations and the change in shareholders does not affect its separate legal status. All the rights and obligations held under previously signed contracts, including those with employees, remain as they are and still apply even when there is a change in the company's shareholding structure.

2. M&A transactions with change in the legal entity

It is important to establish whether or not employees are going to be transferred. This is the second key consideration because many mergers and acquisitions usually result in job losses as a result of restructuring, duplication of roles or a desire to down-size. A legal entity is not required to retain the employees but may still offer them a chance to be employed by

the new entity. If the employees choose to take up such an offer, they must be employed on terms that are on a whole not less favorable than their terms of employment under the previous entity.

3. Change in control clause in employment contracts

Such provisions provide for additional rights such as the right to notification, consent, payment or termination in connection with a change in the ownership or management of the other party to the agreement. These provisions vary from contract to contract and may expressly define what this change in control amounts to.

4. Work permit when hiring expatriates

It is compulsory for all expatriates working in Kenya to hold a valid work permit issued by the Director of Immigration Services (the Director) which stems from the Kenya Citizenship and Immigration Act.

5. Notification of cessation of employment of expatriates

Employers of expatriates will be obligated to report a termination of the employment of the expatriate (circumstances notwithstanding), during the validity of the work permit, within 15 days of the cessation of employment. This is in accordance with Regulation 22 of the Kenya Citizenship and Immigration Regulations, 2012.

STATUTORY PROVISIONS ON MERGERS & ACQUISITIONS

1. Competition Act

If the employees of the organization that has been merged with or acquired decline the offer then their employment will be terminated on account of redundancy and this termination, occurring as a result of a merger or acquisition, is regulated by the Competition Act No. 12 of 2010. One of the criteria that the Competition Authority may rely on when making a determination in relation to a proposed merger is the extent to which the proposed merger is likely to affect employment.

When determining whether to approve a merger, the Competition Authority will examine the job losses that may result from the merger and will require the entities in question to clearly demonstrate how the proposed number of job loss figures were calculated and whether or how. If the termination is considered to be in accordance with these guidelines, the termination must still be in accordance with the provisions of the Employment Act 2007 (which is the primary statute on employment related matters.

2. Employment Act

The requirements and procedure of effecting a lawful redundancy have been set out under section 40 of this Act, and as interpreted by the Employment and Labour Relations Court. The requirement for notice varies depending on whether the employee in question a member of a trade union is or not. If the employee is a member of a trade union the employer must give notice to the union not less than a month prior to the date of the intended date of termination.

The employer must ensure that in selecting employees to be declared redundant, they have given due regard to seniority in time and skill, ability and reliability of each employee to be affected by the redundancy. The employer is also obligated to pay severance pay to an employee who is declared redundant at the rate of not less than fifteen days' pay for each completed year of service.

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RETIREMENT BENEFITS

The main statute relating to pensions and retirement plans is the Retirement Benefits Act (Act No. 3 of 1997). There are various rules and regulations issued thereunder. The primary regulatory authorities in Kenya are the Retirement Benefits Authority (the Authority) and the Kenya Revenue Authority (KRA). There are four types of private pensions and retirement plans in Kenya namely: **(a) public service pension fund; (b) occupational pension scheme; (c) individual pension plan; and (d) umbrella scheme**. Under these types of plans, their structures take two forms: **(a) defined contribution plan or (b) defined benefits plan.**

ARE THERE ANY CURRENT DEVELOPMENTS OR TRENDS THAT SHOULD BE NOTED?

1. The Authority has partnered with the Micro and Small Enterprise Authority (MSEA) to increase its membership and assets held by pension schemes by targeting the small-scale enterprises in the informal sector e.g jua kali artisans, vegetable vendors, mechanics and other small entrepreneurs.

2. Kenya has also introduced a new universal social security scheme under the plan labelled Inua Jamii (Swahili for 'Uplift Society'), where the elderly will receive a bi-monthly stipend and also get a National Health Insurance Fund (NHIF). The stipend, considered a non-contributory social pension for the elderly, is being implemented by the Ministry of East African Community, Labour and Social Protection cover.

3. Under the umbrella pension scheme pension plan, an employer who wants to participate in the umbrella scheme will look at the suitability of the scheme and through a deed of adherence, bind itself to the trusts of the scheme and participate in the provision of retirement benefits to its employees on the terms expressed in the scheme rules. Employers don't have to establish a fully-fledged pension scheme if they have few employees. However, the provisions of the Retirement Benefits (Umbrella Retirement Benefits Schemes) Regulations Act have been challenged in court and an order issued suspending it. Vide the Consolidated Petitiion No. 329 and 310 of 2017 between Okiyo Omtatah Okoiti v Cabinet Secretary of National Treasury, the Attorney General and the Retirement Benefits Authority.

4. Schemes are also expected to venture into investing in alternative assets classes given the broadening of the allowable investment categories. New products introduced recently include REITs (Development & Income), Private Equity & Venture Capital, Derivatives, Exchange Traded Funds (ETFs). The Authority undertakes regular review of Investments Assets Classes to align them with market developments, enhance portfolio diversification, manage risks and boost returns. The Authority has also proposed to the Government to allow for the 15th Investment Assets Class for debt financing of Public Private Partnership (PPP) projects approved under the PPP Act for infrastructure or housing. This is expected to diversify investment opportunities for the pension schemes.

5. The Authority has issued guidelines, the Retirement Benefits (Post-Retirement Medical Funds) Guidelines 2018, for the establishment, regulation and supervision of the management of post-retirement medical funds. The guidelines provide for rules with respect to the administration and investment framework, reporting and disclosure requirements, access of the medical funds by a member, transfer of members` portions and actuarial valuation requirements when dealing with post-retirement medical funds. This is expected to operationalize the post-retirement medical funds thus will reduce future financial burden from medical bills incurred by retirees.

6. The Authority has also introduced market conduct regulations in the retirement benefits sector vide The Retirement Benefits (Good Governance Practices) Guidelines 2018.The purpose is to ensure that good governance is maintained among sponsors, trustees and service providers in the sector and to improve service delivery to members who are the consumers of retirement benefits products and services. It has set out the composition of the boards of trustees of various schemes and has extensive provisions on how scheme trustees delegate their duties and functions to service providers, while abiding by governance principles stipulated by other financial regulators or professional bodies that regulate them. These provisions are then supplemented with best international practices on good governance of schemes e.g members' representation and participation, trustee's skills development, use of information and communication technology, governance and conflict of interest reporting, disclosure to stakeholders and responsible corporate citizenship.

7. There has also been establishment of appropriate structures that set out the objectives, policies, rules, practices and processes through which the scheme is managed. It also includes monitoring and evaluation of scheme performance e.g code of conduct, members' days, retirement planning seminars, trustee's remuneration policies, audit

assurance and risk management policies and committees of the board of trustees. The guidelines have gone ahead to set out the terms of reference of the following board of trustees' committees:

- Audit and risk management;
- Finance and investment; and
- Administration and communications.

It is expected that the developments or trends highlighted above will greatly enhance the level of accountability and transparency, operational efficiency, internal control measures and regulatory compliance by schemes in their operations.

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