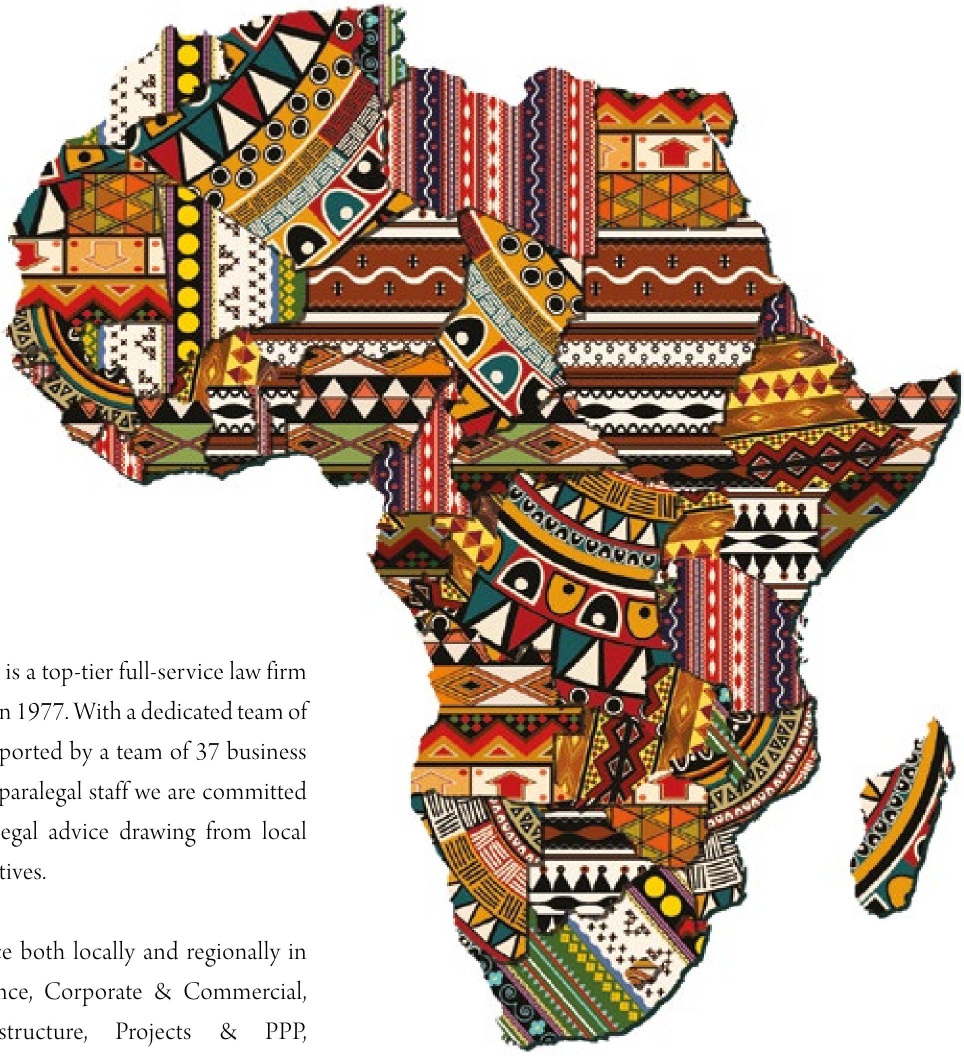
ORARO & COMPANY
ADVOCATES

# KENYA'S INVESTMENT & TAX OUTLOOK

# **ABOUT**
# ORARO & COMPANY ADVOCATES



Oraro & Company Advocates is a top-tier full-service law firm in Nairobi, Kenya established in 1977. With a dedicated team of 13 partners, 12 associates supported by a team of 37 business managers, administrative and paralegal staff we are committed to offering our clients with legal advice drawing from local knowledge and global perspectives.

We offer specialist legal advice both locally and regionally in Arbitration, Banking & Finance, Corporate & Commercial, Dispute Resolution, Infrastructure, Projects & PPP, Restructuring & Insolvency and Tax. Through our strong ties with international law firms, we provide clients with cross border advice regionally and internationally.

Over the years we have represented local, regional and international companies, financial institutions, government agencies and regulators, real estate developers and non-governmental agencies in all sectors of the economy.

We have been consistently ranked and recognised by Chambers Global, IFLR 1000 and Legal 500 as a top-tier firm.

> “The firm continues to lead the way and has great litigators”
>
> Chambers Global, 2018

# Contents

# Karibu

It is my pleasure to welcome you to Kenya's Investment and Tax Outlook by Oraro & Company Advocates a first of its kind to provide local and international investors with insights on doing business in Kenya.

In this edition, we have put together perspectives from different practice groups in the firm in order to highlight myriad sectors of the Kenyan economy. We aim to provide insights into various investment opportunities based on the Government of Kenya's Big Four Agenda which is embedded on Kenya's vision 2030. It is my hope that you'll find this publication an incisive read.

All this and more, inside.
Enjoy.

Patricia M Mutiso

**Editor**

# Overview

Kenya's positive investment climate has attracted a number of international firms to locate their regional or Pan-African operations in Kenya. Kenya has improved tremendously by attaining the best performance in fifteen (15) years in the Ease of Doing Business 2018 by moving from position eighty (80) globally out of one hundred and ninety (190) countries compared to position ninety two (92) in the 2017 report. In Africa, Kenya was ranked the third position behind Mauritius and Rwanda. In addition, the same report ranked Kenya as one of the economies which reduced regulatory complexity for a more attractive investment environment, such as: starting a business (ease of registration of a company), acquiring credit and cross border trading.

Kenya's global innovation index fluctuated substantially in recent years, it tended to increase through 2011 - 2017 period ending at thirty one (31) index in 2017. Kenya has improved according to Transparency International (TI) latest index which shows the country was ranked one hundred and forty three (43) out of the one hundred and eighty (180) countries which were sampled. TI awarded Kenya a score of twenty eight per cent (28%), a slight improvement from 2016 when the country earned twenty six per cent (26%).

The improvement is attributed to reforms in starting a business, dealing with construction permits, getting electricity, access to credit, paying taxes and trading across borders.

Kenya has a strong telecommunications infrastructure, a robust financial sector and extensive aviation connections within Africa to Europe and Asia. In October 2018, Kenya Airways (KQ), the flag carrier airline of Kenya, plans to roll-out direct flights to New York City, USA. Mombasa Port is the major trade gateway for much of East Africa. Kenya's resources sector is under developed but this is likely to change with the exploitation of the newly found reserves of oil, coal, natural gases and other minerals.

The Kenyan regulatory framework has over the past three (3) years developed improving attractiveness of foreign direct investments. Foreign Direct Investment levels in Kenya have risen from KES 40.1 billion in 2013 to KES 207 billion in 2016.

Kenya is a member to several regional and international bodies, for example, African Union (AU), East African Community (EAC), Common Market for Eastern and Southern Africa (COMESA), the World Trade Organization (WTO) and the EU-EAC Economic Partnership Agreement (EPA).

On 21st March 2018, Kenya was among the fifty five (55) member states of the African Union that signed the landmark African Continental Free Trade Area ( **AfCFTA**) Agreement. It is seen as the largest free trade area in terms of participating countries since the formation of the WTO. According to the UN Economic Commission for Africa (UNECA), the implementation of the AfCFTA will create a market of 1.2 billion people and it could increase intra-African trade by fifty two per cent (52%) by 2022 compared with trade levels in 2010.

The AfCFTA is posed to see African countries remove tariffs on ninety per cent (90%) of goods with ten per cent (10%) of sensitive items to be phased in later. The agreement is also expected to tackle the issue of non-tariff barriers.

Kenya's growth objectives are generally based on six (6) priority sectors, as targeted in the Vision 2030. These sectors are: Tourism; Agriculture, Livestock and Fishing; Wholesale, Retail and International Trade; Manufacturing; Business Process Outsourcing; and Financial Services.

However, the Government has set out the Big 4 Agenda, which narrows down the above captioned six (6) priority sectors to four (4) areas, namely, Manufacturing, universal health care, affordable housing and food security. These are the Government priorities aligned to the MTP III of the Vision 2030 which will define the Government's priorities and development path for the 2018–2022 planning cycle.

## Manufacturing

Under the Big 4 plan, the government has set out to increase the share of manufacturing to twenty per cent (20%) of the GDP, this shall catapult it from the current nine point two percent (9.2%) to twenty per cent (20%) by 2022. In order to attain this target, the Government plans to roll out the following projects:

i. A modern industrial park in Naivasha;
ii. Apparel industrial sheds in Athi River;
iii. The establishment of the Dongo Kundu special economic zone (**SEZ**);
iv. Rollout of genetically modified cotton;
v. For leather, they will complete the Machakos leather park, and train five thousand (5,000) cottage industries, change policies to stop imports of finished leather and identify three other industrial parks along the SGR;
vi. Accelerate the export of agro-processed products by mapping tea, dairy, meat, and crop value chains. Attract two global tea processors to Mombasa;
vii. Regulate milk hawking;
viii. Develop warehousing (there is already a warehouse receipts bill in Parliament) and cold chains and make Mombasa a food value hub and all these could create two hundred thousand (200,000) job opportunities;
ix. The manufacturing of construction materials could create ten thousand (10,000) new job opportunities when combined with a "buy Kenya build Kenya" policy that targets seventy per cent (70%) of housing material;
x. In oil and mining, they plan to attract one global mining player and export Turkana oil.
xi. In iron and steel they hope to attract USD1 billion in new investments and establish coal and iron deposits;
xii. In ICT, they hope to assemble phones, TV's and laptops, and have five (5) BPO players, an IT entrepreneurs programme

and an innovation ecosystem of incubators and accelerators which could create ten thousand (10,000) new job opportunities;

xiii. For fish processing, there will be a USD 20 million fish feed mill, a blue ocean policy and an aquaculture SEZ on Lake Victoria, which could see Kenya's fish exports grow from two thousand five hundred (2,500) tonnes annually to eighteen thousand (18,000) tonnes and this should create twenty thousand (20,000) job opportunities;

xiv. There will be two hundred and ninety (290) vocational training centres in all constituencies, tightening of import rules for finished goods, and support for ten thousand (10,000) SMEs to reach export standards;

xv. The Government shall set up a Kenya Export Guarantee Fund, expand the India and China markets, and establish a Kenya Biashara Bank.

## Ensuring food security:

The GoK has made a hundred per cent (100%) commitment to increase food security in the country. Some of the initiatives that will drive food and nutrition security over the next five (5) years include:

i. Large-scale production whereby seven hundred thousand (700,000) new acres of maize, potato, and rice will be cultivated under a Public-Private Partnership (**PPP**) Scheme;

ii. Form an Agriculture and Irrigation Sector working Group (AISWAG) to provide coordination for irrigated agriculture;

iii. Increasing domestic maize production from the current forty (40) million bags to sixty seven (67) million by 2022 and potato from one point six (1.6) million tonnes to two point five (2.5) million tonnes over the same period;

iv. The use of locally blended fertiliser, waivers of duty for cereal-drying equipment, bags, and fishing equipment. The latter will boost smallholder productivity with sixty eight (68) new fishing vessels on the Coast, curb illegal fishing in Kenya's waters, build a new shipyard, have traceability of animals to drive exports, a warehouse receipt system and a commodity fund for farmers;

v. Train one thousand (1,000) SMEs in food processing along the value chain;

vi. Reduce the cost of food, use contract farmers to supply the strategic food reserve and a subsidy model for farmers to ensure investments in post-harvest loss reduction, early warning systems, rehabilitation of fish landing sites on Lake Victoria (at Busia, Migori, Homa Bay) and elimination of multiple levies along the value chain;

vii. Improve access to credit/input for farmers through warehouse Receipt System and strengthen commodity fund;

viii. Establish East Africa's Premier food hub, secure investors to construct a Shipyard (in 2018-site existing) and increase domestic fishing fleet by sixty eight (68) vessels in the Coast.

The legislative action that is required to ensure that the Government delivers on the above captioned initiatives are:

i. Enact legislation to make soil liming mandatory by 2018;

ii. Enact legislation to cap the cost of leasing land in order to attract private and foreign investors;

iii. Enact legislation to halt further subdivision of arable land;

iv. Enact a Warehouse Receipt System Bill;

v. Enforce Fisheries Management and Development Act;

vi. Enforcement of the Road legislation to eliminate multiple levies across Counties;

vii. Discuss the Food Security Bill 2017;

viii. Legislation to stimulate water harvesting across the Country;

ix. Legislation on irrigated land for each constituency;

x. Legislation on caged fish farming;

xi. Enforcement on Agriculture regulations on crops like tea,sugar and potatoes;

xii. Restoration of commodity levies to beef up commodity fund;

xiii. Regulations on Commodity levies.

## Affordable housing:

The focus will be on building affordable houses for the low cadre by raising low-cost funds from the public and private sectors for investment in large-scale housing production. This will ensure that the housing sector creates three hundred and fifty thousand (350,000) job opportunities, and provides a market for manufacturers and suppliers. The Goverment of Kenya (**GoK**) will also create a company known as the Kenya Mortgage Refinancing Company to issue bonds to local capital markets and extend longer term loans to financial institutions to secure mortgages. In addition, there will be PPP land swaps, centralised housing for police and prisons, more activities at the National Social Security Fund (**NSSF**), and reduced tax rates for developers who construct a hundred (100) houses a year. There will also be a pilot scheme at Mavoko for construction of eight thousand two hundred (8,200) houses.

There are seven (7) initiatives to drive this program, namely:

i. **Develop demand-based master plan** for social and affordable housing;
ii. **New legislation on private land incentives** for private land owners or idle land tax;
iii. **Use scale to reduce construction cost by negotiating low rates** for key construction inputs for participating developers;designing to value and standardising design elements and attracting investments into construction technology;
iv. **Scale-up developer capacity and financing by establishing PPP arrangements** for example land swaps to attract developers, selectively using the NSSF balance sheet for financing;
v. **Growing the mortgage finance market** by arranging credit line with International bodies like World Bank and African Development Bank (AfDB) for providers of long term mortgages; setting up the Kenya Mortgage Refinancing Company (KMRC) to manage low cost liquidity for mortgages and working with banks to expand offering to informal sector through new background checks;
vi. **Ensure a supportive ecosystem** by ensuring fast public processes, reviewing of the PPP framework to allow for faster process;enacting rules on staged off-plan payments to support developer financing; reducing administration burden and cost;aligning county development plans, zoning and location selection, and public infrastructure and spending.
vii. **Launch projects to create momentum** by starting social housing program, supported by allocations from the Unclaimed Financial Assets (UFA); developing fifty five (55) acres in Mavoko; developing PPP for Portland land; managing interfaces; connectivity infrastructure & project completion in delivery units and redevelopment of old estates.

The legislative approvals needed shall be;

- Operationalization of the NSSF Act of 2013 to increase contributions from current KES 400 to KES 1080;
- Amendment of the RBA Act to allow NSSF invest more than thirty per cent (30%) in real estate;
- Amendment of the Stamp Duty Act to exempt first time home owners;
- Approval of the idle land tax;
- Review of PPP act to allow fast-track process for predefined models or cases;
- Reduction in the property transfer costs for social and affordable housing.

## Affordable healthcare:

The GoK intends to achieve a hundred percent (100%) universal health care by scaling up National Health Insurance Fund (**NHIF**) uptake. It plans to increase health spending from KES 61 billion in 2018 to KES 73 billion in 2021. This will enable Kenya to go from the current thirty six percent (36%) coverage to achieve a hundred (100%) universal health coverage by 2022 when the population is approximated to be fifty (50) million. In addition, the GoK plans to reconfigure the NHIF, which, besides digitisation, will also extend services through thirty seven thousand (37,000) bank agents. The Linda Mama (free maternity) programme will be rolled out to missionary and private hospitals and there will be CT scan capability in all counties.

Improving the Country's healthcare will require more funds to be spend in healthcare and this will be raised through myriad ways, namely:

i. Gradual increment of budgetary allocation to health (from seven percent (7%) in 2017 to ten percent (10%) in 2022);
ii. Introduction of Robin Hood taxes on high value RTGS, mobile money transfers, and airfares;
iii. Dedicate a percentage of Excise duty and Sin tax to health;
iv. Adopt new low service delivery health models for example eHealth for telemedicine; mHealth and eHubs collection and dissemination of information.

It is also worth noting that there are proposed legal reforms to align NHIF with Universal Health care and this includes redefining NHIF to include multi-tier benefit packages.

The review of the IRA and RBA Act is set to ensure that Private Health Insurance will be the primary health insurance. NHIF will be the secondary insurer for the formal sector. This will mean amending the CARA to ring fence health funds at County level (changes to the PFM Act).

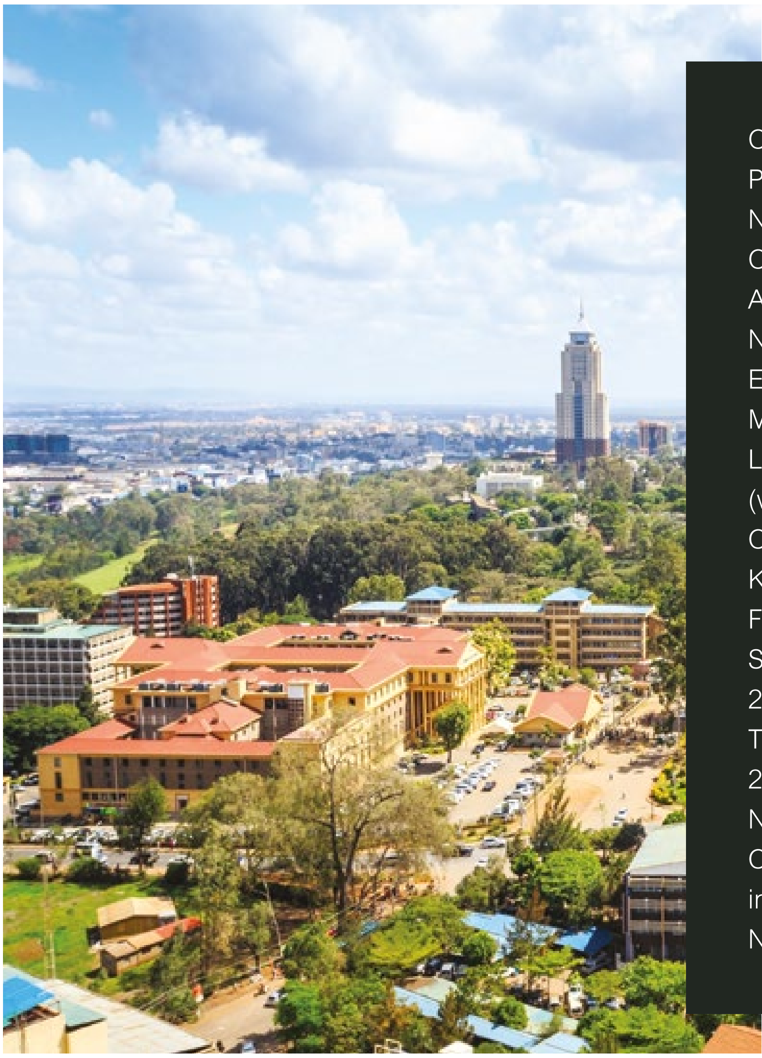
2017 saw a deceleration in GDP growth to five point five percent (5.5%) due to political turmoil, drought and weak credit growth. However, the economy is expected to grow up to six per cent (6%) in 2018 – rebounding from its previous state where the average Annual Growth Rate in Kenya averaged five point four five per cent (5.45%) from 2004. 2018 will see reforms in a number of sectors, for instance: Kenya's Tourism industry is expected to witness a remarkable growth following recognition by a number of prestigious awards. Further, the calming down of the Kenyan political climate will positively affect domestic tourism. The Energy sector also looks promising. Kenya plans to set up its first nuclear power plant with a capacity of 1,000MW by 2027. Since 2015, Kenya has signed nuclear power deals with China, Russia, Slovakia and South Korea. Kenyan students have also enrolled in the Korea Electric Power Corporation International Nuclear Graduate School over the last three (3) years to gain expertise in power engineering, and 2018 will mark its first class of graduates.

Elsewhere, following the issuance of Eurobond in 2014, Kenya was able to pay five point nine (5.9%)and six point nine percent (6.9%) interest to creditors for five (5) year and ten (10) year tranches. In February 2018, the government issued yet another round of Eurobond of KES 202 billion in two equal tranches of ten (10) years at a coupon of seven point two five percent (7.25%) and thirty (30) years at a coupon of eight point two five percent (8.25%). The new bond issue will ease the repayment pressure of the initial bond projected at KES 658.2 billion.

Four (4) priority areas have been targeted in this ***Investment & Tax Outlook***, namely: Manufacturing, Energy, Oil & Gas, Mining and Dispute Resolution. The purpose of this ***Investment & Tax Outlook*** is to give a general overview of the key areas as mentioned above, and further give an outline of other existing areas. Ultimately, it is hoped that the insight derived from this ***Investment & Tax Outlook*** is constructive in guiding prospective investors.

## Disclaimer

The information in this ***Investment & Tax Outlook*** is for general purposes and guidance only and does not constitute legal or professional advice. For further information on this ***Investment & Tax Outlook***, contact insights@oraro.co.ke.



Country: Kenya
President: Uhuru Muigai Kenyatta
Number of counties: 47
Current population: 48.5 million
Area: 582,646 sq km (224,961 sq miles)
National and official languages: Swahili, English
Major religion: Christianity
Life expectancy: 63 years (men), 69 years (women)
Currency: Kenya shilling (KES)
Kenyan independence: 1963
First president: Jomo Kenyatta (1962-78)
Second president: Daniel Arap Moi (1978-2002)
Third president: Mwai Kibaki (2002 – 2007; 2007- 2013)
New constitution: Enacted 2010
Current president: Uhuru Kenyatta (2013-2017; incumbent)
Next general election: August 2022

# About Kenya

## Introduction

Kenya is situated in East Africa bordering the Indian Ocean in the south east and its neighboring countries are Ethiopia, Somalia, South Sudan, Tanzania, and Uganda. Kenya's macroeconomics has been among the strongest in Africa. Medium-term GDP is expected to hit five point eight percent (5.8%) in 2018 and six point one percent (6.1%) in 2019 depending on the completion of ongoing infrastructure projects, the resolution of slow credit growth, and the strengthening of the global economy and tourism. There has been great interest on the part of international companies to establish or expand their business presence in myriad sectors due to the expanding market: financial services, energy, extractives, transportation, infrastructure, retail, restaurants, technology, health care, and mobile banking.

## Political Overview

Kenya gained independence from the British regime in 1963. The constitution enacted at the time was based heavily on the English common law. A new draft constitution was then approved in a referendum in August 2010, marking the end of a two-decade long struggle for reform, with sixty seven per cent (67%) of Kenyans voting in its favour.

The Constitution of Kenya, 2010 introduced a tenured judiciary and bicameral legislative house, that is, the National Assembly and the Senate. It also decentralised the government by introducing county governments; a move that has had a largely positive impact on service delivery in rural areas.

Following the March 2013 elections, President Uhuru Kenyatta assumed office in April 2013 under the Jubilee Alliance party. Elections in August 2017 returned President Uhuru Kenyatta to office for a second term, but were nullified in September 2017 by

Kenya's Supreme Court, paving the way for another presidential election in October 2017 after which President Kenyatta was sworn into office. However, due to the atmosphere of political uncertainty created by the disputed elections the economy stalled and there was heightened political tensions in Kenya which worried its neighbours because they use the Kenyan port of Mombasa as a transit point for their imports and exports. The two Principals met in March 2018 and there has been a sense of calmness. The next presidential and parliamentary election is scheduled to be held in August 2022.

### Socio-Economic Overview

On social development, Kenya reduced child mortality, reached near universal primary school enrolment, and narrowed gender gaps in education. Interventions and increased spending on health and education are certainly paying dividends. It is anticipated that despite several challenges in the healthcare system, devolved health care and free maternal health care at all public health facilities will improve health care outcomes and develop a more equitable health care system.

## Investment Climate

In order to promote and facilitate export oriented investments in 1990, the Export Processing Zone (**EPZ Act**) established the EPZ Authority. Export Processing Zones (**EPZ**) primary objective was to promote production for export, hence they were market oriented.

EPZ investors are currently enjoying ten (10) year corporate tax holiday and twenty five percent (25%) tax thereafter, ten (10) year withholding tax holidays and stamp duty exemption. About fifty four percent (54%) of EPZ products are exported to the United States under America's Growth Opportunities Act (AGOA).

They also get a hundred percent (100%) investment deduction on initial investment applied over twenty (20) years and VAT exemption on industrial inputs. The EPZs have not proven their worth to the Government over the years amid concerns that their operations had failed to add meaningful economic value despite numerous tax incentives. The Government plans to freeze new investments within its EPZs before the end of this year as it takes up the Special Economic Zones (**SEZs**) model. At the expiry of their contractual period, existing investors in the EPZs will be required to start paying taxes in line with Kenya's taxation laws. They will also have a choice to either relocate or re-apply afresh to be considered for investments in the SEZs under stringent conditions.

The GoK aims to transform Kenya into a newly industrialized 'middle-income country providing a high quality life to all its citizens by the year 2030'. The establishment of SEZs is key to the achievement of this vision. The Government has proposed to set up SEZ in key urban areas. The purpose of setting up EPZ is to exploit factors of production.

EPZs are designed to boost local economies by offering benefits for goods that are consumed both internally and externally. The SEZs will allow for a wider range of commercial ventures, including primary activities such as farming, fishing, and forestry.

This is likely to attract more foreign direct investments (**FDI**) inflows into the country. Currently, the setup of SEZs is governed by the Special Economic Zones Act, 2015 (**SEZ Act**) which came into effect on 15th December, 2015 and the Special Economic Zones Regulations, 2016 plus any other subsequent amendments to the Act.

This establishment of SEZ is a flagship project under the national development blueprint Vision 2030. SEZ are to contribute towards the transformation of the country's economic base in order to realise higher sustained growth, employment creation and poverty reduction.

In Kenya, SEZs, can be any type of business operation as long as the businesses are legal elsewhere in Kenya. Some of the business activities that are allowed in the SEZs are: Trade, Manufacturing, other business and service activities. These business enterprises should be able to sell their products as exports to the Kenyan market or other markets. According to the SEZ Act, SEZs can be set up by the PPPs.

So far, the SEZ Act has been gazetted in Uasin Gishu, Kiambu and Kajiado counties. The second medium term plan of Kenya's Vision 2030 economic development agenda calls for establishing SEZs in Mombasa (2000 sq. km), Lamu (700 sq. km), Kisumu (700 sq. km), and eventually to additional towns throughout the country. The SEZs in Kenya have been setup in areas with location advantages. It is anticipated that the enterprises in the SEZs will exploit specific production advantages such as access to raw materials, cheap labour, access to power, access to markets etc. There were a number of changes introduced by the Finance Act, 2017, to the SEZ Act regime. For instance, the Finance Act, 2017 provides for a resident company under a preferential tax regime. If the host company transacts with a related resident company not under a preferential tax regime, the Transfer Pricing (**TP**) Rules will apply.

Further changes have been made through amendments to the Tax Procedure Act which aims to lower taxes for SEZ to boost Kenya's investment profile. The SEZ Act provides for numerous tax incentives for investors, including exemption from all existing taxes and duties payable under the Customs and Excise Act, Income Tax Act, East African Community Customs Management Act and Value Added Tax Act on all special economic zone transactions. These changes should simplify and consolidate tax administration, both for the government and the taxpayer, broadening the tax base to net in more taxpayers. These include:

- Investment deductions for businesses in SEZ; that is business operation in these zones are allowed to deduct a hundred percent (100%) investment cost on construction, machinery purchase etc;
- Dividends from businesses operating in SEZ to non-residents will now be exempt from withholding tax;
- Effective Jan 2017 – withholding tax rates for businesses operating in SEZ reduced in areas such as: Management fees, royalties etc;
- When businesses operating in SEZ start paying corporate tax, they will be eligible to give donations which will be tax deductible;

According to 2015/2016 budget, which was read before the SEZ Act became effective but whose proposals were ratified and incorporated into the SEZ Act, Special Economic Zones were granted the following direct tax incentives:

a. Exemption from Value-added tax (**VAT**);
b. Corporate tax rate at the rate of ten per cent (10%) for the first ten (10) years and fifteen percent (15%) for the next ten (10) years;
c. Normal one hundred and fifty per cent (150%) investment deduction for investments outside Kisumu, Nairobi and Mombasa for investments more than KES 200 million;
d. Exemption from duties and taxes under EAC Customs Management Act and subsequent amendments;
e. Waiver of exchange controls for repatriation of profits and capital to parent country;
f. License fees, stamp duty and advertisement fees exemption at the County government level.

## Foreign Direct Investment (FDI)

In 2016, global flows of foreign direct investment fell by about two per cent (2%), to USD 1.75 trillion. Investment in developing countries declined by fourteen per cent (14%), and global flows of FDI to Least Developed Countries (LDCs) and structurally weak economies remain volatile and low. Although UNCTAD predicts a modest recovery of FDI flows in 2017–2018, they are expected to remain well below their 2007 peak.

In Kenya, foreign investors generally receive the same treatment as local investors. Kenya's industrial sector is largely made up of multinational companies. Since 2013, the Government has been prioritising foreign investment talks and investment retention. Further, the Kenya Private Sector Alliance (**KEPSA**) has held bi-annual meetings with the President on investment in Kenya.

The Investment Promotion Act, 2004 (**IPA**) that exists to promote and facilitate both domestic and international investments, established a corporate body, Kenya Investment Authority (**KenInvest**). The main objective of KenInvest is to promote investment in Kenya and enable the country to be viewed favourably by international investors. KenInvest has developed an online database known as eRegulations (kenya.eregulations.org) designed specifically to help investors navigate local regulations. According to the UNCTAD report 2017, this move makes Kenya one of the twenty five (25) countries to earn a perfect rating on its information-sharing platform.

## International Membership

Kenya is a member of a number of regional and international organisations. Some of the notable ones include: East African Community (**EAC**) of which it is the founding member, African Union (**AU**), Common Market for Eastern and Southern Africa (**COMESA**), United Nations (**UN**), World Trade Organization (**WTO**), International Telecommunication Union (**ITU**), just to name a few.

In July 2016, the AU launched a passport that will allow visa-free access in its fifty four (54) member states, signalling a rise in Pan-Africanism and more integration in the region. The AU is now working on the development of a Pan-African Investment Code (**PAIC**), which is expected to include innovative provisions aimed at balancing the rights and obligations of African host States and investors.

## Types of Business Entities

There are various forms of business entities in Kenya. The main entities include:

- Registered Companies including private and public companies limited by shares, companies limited by guarantee, unlimited companies;
- Partnerships such as general, limited and limited liability partnerships (**LLPs**);
- Sole proprietorships;
- Public Benefit Organisations (**PBOs**);
- Societies;
- Branch Office of a foreign registered Company.

The primary investment vehicles used for commerce in Kenya are companies, particularly private limited liability companies. In addition, investors can set up "local" branches of a foreign company. Further, the introduction of the eCitizen online portal has provided a more convenient means for the registration of business associations. The portal also aims to integrate different government information and services such as official land searches and immigration services.

Noteworthy are LLP's which are formed as separate legal entities under the Limited Liability Partnership Act, 2011. A natural person or a body corporate may be a partner in an LLP. In addition, the LLP must have a manager who must be resident in Kenya. The partners in an LLP have limited liability.

In September 2016, the Public Benefit Organizations Act, 2013 (**PBO Act**) came into force as a result of order by the court, and a key aspect of the new statute is the creation of a body called the Public Benefit Organisations Regulatory Authority which has the authority to bestow "public benefit organization" status on organisations registered under the PBO Act. However the provisions of the PBO Act have not been implemented.

The Authority may institute inquiries to establish whether the activities of PBOs comply with the PBO Act. Furthermore, where entities such as community based organisations, cooperative societies, microfinance institutions, public bodies, religious organisations, SACCOS and societies register under this new statute and are granted a certificate of registration, their previous registration under any other written law is immediately deemed invalid.

Kenya Investment Authority (**KenInvest**) is a one stop office that is the focal point to assist all investors in processing all the relevant licences and permits that are issued by the various government Ministries and Departments. Keninvest is a statutory body established in 2004 through an Act of Parliament (Investment Promotion Act No. 6 of 2004) with the main objective of promoting investments in Kenya.

The Companies Act, 2015 (**the Act**) was signed into law on 11$^{th}$ September, 2015 and is now fully operational after various provisions of the Act came into force at

## Company Registration and Overview

| Procedure | Time to complete | Associated Cost |
|---|---|---|
| Name search and reservation of company name | 1 day (name is reserved for 30 days) | KES 150.00 (USD 1.50) per name |
| Register the Company with Registrar of Companies (Online through eCitizen portal) | 7-14 days | KES 10,650.00 (approx. USD 105) |
| Conversion of a company | 1-3 days | KES 5,000 (USD 50) |
| Registration of KRA PIN | 1 day | No charge |
| Registration for VAT and PAYE | 1 day | No charge |
| Register for NSSF and NHIF | 1 day | No charge |

different times. The Act has brought about sweeping changes in the realm of company law, including new provisions on corporate governance, incorporation of private companies, registration of foreign companies as well as members' meetings and resolutions. The Act also introduces new offences and penalties in a bid to deter errant practices.

The functions of directors are stipulated under the Act and in the articles of association of the company, which are also known as the company's constitution. Directors are charged with the overall power and duty of managing the company, including being the company's signatories. The old Companies Act, (Cap. 486) (Repealed) did not expressly provide for directors' duties and as such, directors were subject to the duties established under common law. However, the new Act has now codified directors' duties which are provided for at Division 3 of Part 9 of the Act. Though codified, these duties are largely similar to those prescribed under common law and equitable principles.

## Business Registration Service

The Business Registration Service Act, 2015 (**the BRS Act**) that was assented to on 11th September, 2015 and came into force on 6th November, 2015. Observers say that the BRS Act was enacted for purposes of attaining the goal of making Kenya a more attractive business destination. The purpose of the BRS Act is to ensure the effective administration of laws relating to the incorporation, registration, operation and management of companies, partnerships and firms.

The BRS Act establishes the Business Registration Service which shall be governed by a Board of Directors who shall consist of (i) a chairperson; (ii) the Solicitor-General or his representative; (iii) the Principal Secretary in the Ministry for the time being responsible for matters relating to trade; (iv) the Principal Secretary in the National Treasury; (v) four other members; and (vi) the Registrar-General.

In December, 2015, Carol Musyoka was appointed as the Chair of the newly formed Business Registration Service Board.

## Statutory Framework

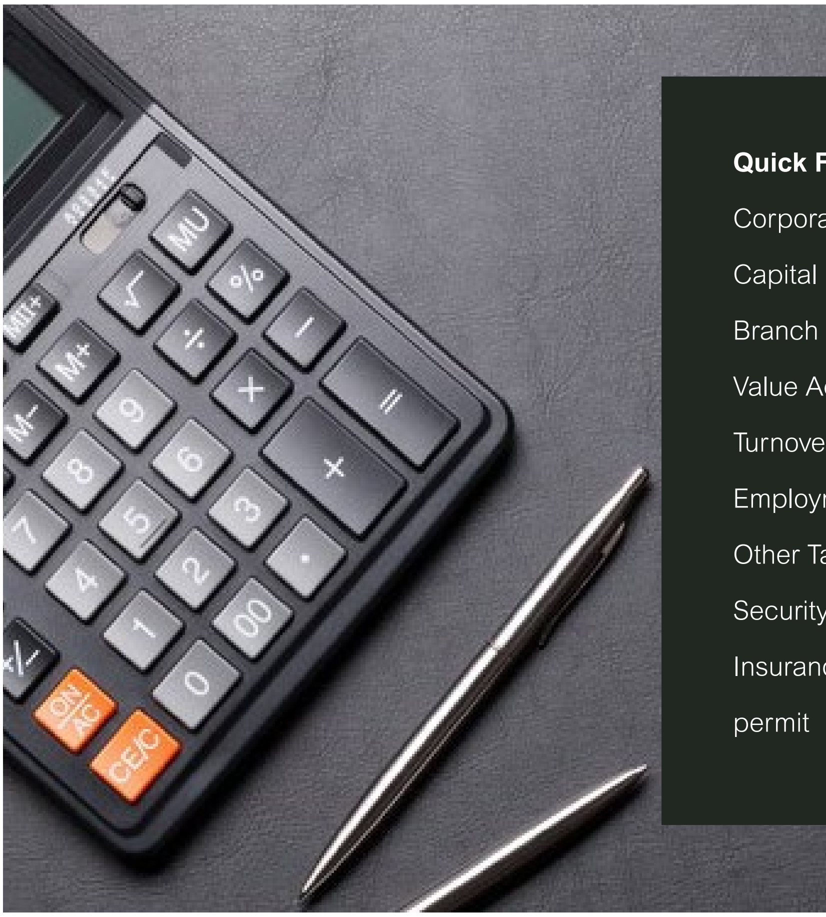
The Companies Act is the legislation that governs companies' financial reporting. In addition, there are other legislations that impact on financial reporting because they deal with specialised sectors such as insurance, banks, retirement benefits schemes and listed companies.

The Act mandates all limited liability companies to prepare and keep proper books of account as are necessary to give a true and fair view of the state of the companies' affairs.

## Financial Reporting and Auditing Standards

The Institute of Certified Public Accountant of Kenya (ICPAK) requires that all financial statements must be prepared in accordance with International Financial Reporting Standards (IFRS) or International Financial Reporting Standards for Small and Medium Enterprises (IFRS for SMEs) framework.

ICPAK also requires that all audits should be carried out in accordance with International Standards on Auditing (ISA).




**Quick Facts:**

Corporation Tax – 30%

Capital Gains Tax – 5% of net gains

Branch Profits Tax – 37.5%

Value Added Tax (VAT) – 16% and 0%

Turnover Tax – 3%

Employment Tax – PAYE 10%-30%

Other Taxes: land rates, National Social Security Fund (NSSF), National Hospital Insurance Fund (NHIF), single business permit

# Taxes

In Kenya, income tax is charged on all income accrued or derived from Kenya, it is not pegged on the residency of the person (whether legal or natural receiving it) though the rates may be different as will be set out shortly. The Kenyan tax regime has been undergoing a number of changes over the recent past with enactment of new legislation and substantive amendments to others. From an indirect tax perspective, the enactment of the Value Added Tax Act 2013 and the Excise Duty Act, 2015 sought to simplify the administration of indirect taxes in Kenya. From a dispute resolution perspective, the dissolution of the defunct tribunals and subsequent formation of one Tax Appeals Tribunal in the year 2013 has played a key role in providing an avenue for tax payers to have their appeals heard before a specialist Tribunal.. The Tax procedures Act,of 2015 has in turn consolidated all the procedures in the respective tax legislations and has enhanced the penalties and offences as a result of non compliance with tax laws. Though the Kenyan tax system has undergone a number of changes to facilitate ease of compliance with tax laws, the fight against tax avoidance schemes has gone beyond the borders, with Kenya signing up to the convention on Mutual Administrative Assistance in Tax Matters in early 2016. The convention covers a number of taxes including Capital Gains Tax (**CGT**), Income Tax, Value Added Tax (**VAT**) and Excise Duty are all globally in this Convention. The Convention is aimed at facilitating exchange of information, assistance in tax recovery, service of documents and joint tax audits by parties to the Convention. On 14th ,June, 2018, the Cabinet Secretary for the Ministry of Finance (CS) read the Budget for financial year 2018/2019, which published the Finance Bill, 2018 (the Bill). The Bill seeks to realise the Government's Big Four Agenda by boosting revenue collection and further expanding the tax base in Kenya.

The salient changes to the current tax law introduced by the Bill include amendments to the Income Tax Act (ITA), the Tax Procedures Act (TPA), the Tax Appeals Act (TAA), the Value Added Tax Act,2013 (VATA), the Excise Duty Act (EDA), the Miscellaneous Fees & Levis Act (MFLA), the Betting Act, Lotteries & Gaming Act (the Betting Act) and the Stamp Duty Act.

| Tax | Key Elements |
|---|---|
| Capital Gains Tax (**CGT**) | CGT was re-introduced in Kenya effective 1st January,2015, after having been in suspension from in the year 1985.<br><br>It is a tax chargeable on the whole of a gain, which accrues, to a person (whether natural or legal) on the transfer of property situated in Kenya. It applies to all transfers of Property after 1st January, 2015 regardless of the year in which the same acquired.<br><br>Some exempt transfers include:<br>• Any gain on transfer of shares that are listed on the Nairobi Securities Exchange (NSE);<br>• Any transfer of property either between, or a company in which either or both of the spouses or immediate family (including their children and former spouses) holds one hundred percent (100%) of the shareholding;<br>• If an individual transfers land, whose transfer value is less than KES three (3) million. This also applies to the transfer of agricultural land which is less than fifty (50) acres, where it is located in a municipality, gazettetownship or an area gazetted by the (Cabinet Secretary for Lands, Housing and Urban Development) to be an urban area;<br>• All property (including investment shares) which is transferred or sold for the purpose of administering the estate of a deceased person where the transfer or sale is completed within two years of the death of the deceased or within such extended time as the Commissioner may allow in writing; |
| Corporate Income Tax (CIT) | Resident companies are taxable at a rate of thirty percent (30%) while non-resident companies are taxable at a rate of thirty seven point five percent (37.5%) with effect from year of income 2000.<br><br>A company is a resident company if it is (i) incorporated under a law of Kenya; (ii) where its management and control of the affairs of the body was exercised in Kenya in a particular year of income under consideration; or (iii) that it has been declared by the Cabinet Secretary for the National Treasury by notice in the Gazette to be resident in Kenya for any year of income.<br><br>Where a business is carried on or exercised partly within and partly outside Kenya by a resident person, the whole of the gains or profits from that business are deemed to have accrued in or to have been derived from Kenya. |
| Income Tax | All income accruing, in or derived from Kenya is subject to tax in Kenya. Also, a Kenyan resident is taxable on his/her worldwide employment income.<br><br>Residential Rental Income Tax is payable by a resident person for rental income which is less than KES ten (10) million, in any particular year of income. Rental income will be taxed at the rate of ten percent (10%) of the gross rental receipts. This means that no expenses, including interest expense shall be deducted. Landlords however have an option to elect not to pay Rental Income Tax. Notifying the Commissioner in writing can do this. The move is not surprising given that Kenya's property market has seen tremendous growth over the last couple of years, and is expected to remain strong in coming years.<br><br>A number of proposals were made under the Amendment to the Income Tax Act, for both personal and corporate income tax. They include:<br>• Employment Income: SEZ ACTs are expected to deduct PAYE and pension and remit it to Kenya Revenue Authority (**KRA**), changing tax bands and relief. |
| Presumptive Tax | A newly introduced tax under the proposed Income Tax Bill, 2018 requires businesses issued with a single permit and with a turnover of less than KES 5 million be taxed at fifteen percent (15%) rate of the single business permit fee issued by a County Government. |
| Excise Duty | Excise Duty is applicable on among others, the production of alcoholic beverages, bottled water, juice, plastic bags and tobacco products.<br><br>Some excisable services include mobile cellular services, money transfer services and fees charged by financial institutions. The Cabinet Secretary for the National Treasury has the authority to vary Excise Duty rates by an amount not exceeding ten percent (10%). This is however subject to its publication in the Gazette and approval by the National Assembly, within seven (7) days after its publication. On Excise Duty rate adjustments, the Commissioner, may by notice in the Gazette, adjust the Excise Duty rate annually by a proportion of the inflation rate. This is aimed at cushioning the Government against inflation.<br><br>Kenya provides for a hundred percent (100%) investment deduction on hotel buildings and on buildings and machinery used in manufacturing. Manufacturing investment in buildings and machinery situated within satellite towns adjoining Nairobi, Mombasa or Kisumu attracts an investment allowance of one hundred and fifty percent (150%). What's more, enterprises in export processing zones enjoy a ten (10) year tax holiday. |

| | |
|---|---|
| Transfer Pricing, It is worth noting that a different residency test exists under the double tax treaties entered into with Kenya. | Kenya has tightened its transfer pricing guidelines and the Commissioner now has additional powers to investigate pricing agreements between local units of multinational corporations and their parent companies or a Kenyan resident where such a person enters into transactions with non-resident related parties and the transactions are such that they produce no profits or less than the actual expected profits which should accrue to the resident person if the transactions had been conducted by independent persons dealing at arm's-length. The Act also gives powers to the Minister to issue guidelines for the determination of the arm's-length value of a transaction.<br><br>The Income Tax Transfer Pricing Rules of 2006 came into operation on 1st July, 2006 and requires related parties to develop an appropriate transfer pricing policy. Branches of foreign companies are also affected by this rule with effect from July 2014. Previously they were exempted. Compliance with OECD guidelines ensures compliance with Kenyan Law. |
| Withholding Tax | This is charged on the following sources of income (at source): commissions, dividends, management of professional fees (including consultancy, agency or contractual fees), pensions, rent received by non-residents and royalties. The rates vary between three per cent to thirty per cent (3%-30%), depending on the above-mentioned types of income and whether the recipient is a non-resident or resident.<br><br>Also, a foreign company's dividends are not subject to withholding tax in Kenya. Withholding tax will now be payable by a tenant appointed as an agent, on rental income at the rate of ten percent (10%) on all rental payments withholding tax (including premium or similar consideration) made to a resident landlord for the use or occupation of immovable property.<br>The withholding tax can be offset by the landlord against its tax liability. |
| Withholding tax paid abroad. | This can be claimed against Kenya income tax only if there is a unilateral or bilateral provision for relief. Kenya has only eleven bi-lateral tax treaties that allow for direct tax offsets (and relief from double taxation).<br><br>Where direct tax set-offs are not possible, withholding tax paid abroad (where the income is taxable in Kenya) is deductible as an expense. Unilateral relief of foreign tax in Kenya setting is extended to Kenyan nationals in respect of employment, sports and entertainment income required to be reported and taxed in Kenya. |
| VAT | VAT is charged on a broad range of consumer expenditure, chargeable on the supply of goods and services in Kenya and importation of goods and services. Recently, in the midst of a lot of controversy, withholding VAT was reintroduced whereby any person appointed by the Commissioner can now withhold a six percent (6%) tax upon purchasing taxable supplies and remit the same to the KRA.<br><br>All traders who have a turnover of taxable supplies of KES 5 million per annum and above are required by law to register for VAT, and then collect and remit VAT on their taxable supplies, with an allowance to recover tax paid on their purchase of inputs. Only registered traders are required to charge VAT. However, there are provisions for voluntary registration even when a trader is below the KES 5 million threshold.<br><br>The KRA currently owes taxpayers VAT refunds in the billions of shillings. In an effort to ensure prompt claims for refunds the law was recently amended so that a taxpayer may claim a refund if the excess arises from the supply of zero-rated items. In addition, the claim for such refunds must be made within five years from the date the tax becomes due and Payable and the KRA need to respond to an application for refund within ninety (90) Days.<br><br>A tax payer who has been appointed as a withholding VAT Agent is required to remit the 6% withheld VAT every 20th day of the month following the transaction. |

## Amendments to the Tax Procedure Act (2015)

The Finance Act, 2016 amended the Tax procedures Act, 2015 and introduced a number of proposals which include:

- Allowing KRA officers to initiate prosecution on tax payers;
- Tax penalty as liability;
- Tax amnesty for income earned outside Kenya;
- Time frame of withholding VAT;
- Exception for suppliers in perpetual VAT credit.

## Tax Agreement and Foreign Tax relief

Foreign tax relief is only applicable if it relates to a country that has a Double Tax Agreement (**DTA**) with Kenya. Kenya has double taxation treaties with several countries including Canada, Denmark, East Africa Community Countries (awaiting notification from Tanzania, Uganda and Burundi), France, Germany, India, Iran, Mauritius, Norway, Sweden, UK and Zambia. In January 2016, a DTA with South Africa came into force, effectively providing that the profits of a Kenyan enterprise shall be taxable only in Kenya, unless the enterprise carries on business in South Africa through a PE. Furthermore, in August 2017 the GoK issued a Legal Notice No.169 giving effect to the DTA agreement with the Kingdom of Netherlands so as to afford relief from double taxation in relation to income tax and any rates of similar character imposed by the laws of Kenya.

In most cases, the standard tax rates set out above apply but some of these treaties provide for preferential withholding tax rates. The treaties will in most cases allow for the set-off of withholding tax against tax liability in the respective countries. Treaties with East African partner states, Kuwait, Iran, Mauritius and UAE have been concluded but not ratified.

## Key Sectors

The Energy Regulatory Commission (**ERC**) is established under the Energy Act, 2006 to regulate the electrical energy, petroleum and related products, renewable energy and other forms of energy. Energy in Kenya is primarily derived from: biomass (wood fuel and charcoal) sixty nine percent (69%), petroleum twenty two percent (22%) and electricity nine percent (9%). Given the heavy reliance on non-renewable resources such as petroleum, the GoK is trying to harness viable renewable energy sector.

Oraro & Company Advocates has been an active contributor in the energy sector particularly in policy and advocacy. We have advised both local and international energy companies on project structures and have been part of the team that reviewed the legislation affecting the energy sector on instructions by the GoK. Further, we have worked with an American firm to review and recommend an appropriate legal and institutional framework in the energy sector and thereafter overseeing the legal aspects of the restructuring of Kenya Power & Lighting Company Limited in particular, the assets and liabilities transfer in respect of power generation and transmission/distribution

## Oil and Gas

In the last two and half years (2.5 years), the global oil and gas industry experienced its deepest downturn. However, oil prices are now steadily rising as Kenya benefits from oil discoveries in its semi-arid areas. In July 2013 – Tullow Oil Plc confirmed the commercial viability of oil reserves discovered in Northern Kenya. In March 2017, the national Government signed a production agreement with the British explorer and producer Tullow Oil Plc, paving way for the exportation of crude oil from Turkana fields. The pact draws the roadmap for Kenya's early oil export plan that is expected to pump out two thousand (2,000) barrels per day for transportation by trucks and storage at the defunct Kenya Petroleum Refinery's storage tanks in Mombasa. According to Tullow's 2017 full year results announced in 2nd February, 2018, Kenya recorded discoverable oil of up-to 4 billion barrels with a Phased development planned for 2019 and First Oil in 2021/22.

The Ministry of Energy has offered a number of on and offshore blocks for exploration purposes. In May 2016, seventeen (17) new oil exploration blocks were created and competitive bidding processes are underway. The government's long term plan is to build a pipeline from the oil-rich Turkana region to the port of Lamu but in the interim, there are plans to transport crude oil to the coast for export through existing rail and road infrastructure.

The main laws governing petroleum exploration and production activities in Kenya are as follows:

- Petroleum (Exploration and Production) Act, Chapter 308 of the Laws of Kenya (**PEPA**);
- Petroleum (Exploration and Production) Regulations, 1984 (**the PEPA Regulations**);
- Petroleum (Exploration and Production) (Training Fund) Regulations, 2006 (the Training Fund Regulations).

There are also proposed laws which will affect the oil and gas sector if passed into law including:

- The Petroleum (Exploration, Development and Production) Bill, 2015 (**the Petroleum Bill**). Once passed, the Petroleum Bill will repeal PEPA and be the new substantive law relating to upstream oil and gas.

Oraro & Company Advocates has been actively involved in the oil and gas sector in Kenya in various ways including the following:

- Advising on the government-to-government collaboration between the Kenyan Government and China National Petroleum Corporation on a proposed USD 1.8 billion project to develop a 350 MW geothermal power plant. The project will be completed in phases using existing geothermal wells licensed to third parties in its initial stages, and subsequently wells discovered through exploration. Oraro & Company Advocates has advised on the legal aspects of the proposed business plan of the Project working with technical and commercial advisors for the Project. Oraro & Company Advocates is further assisting in all legal aspects of the project structuring, licensing and operationalisation of the Project;
- Assisting counsel to an international mining company in a dispute with Kenya Pipeline Company worth USD 52.5 million;
- Advising on a due diligence exercise for a multinational oil & gas Company, with a Kenyan presence;
- Advised and drafted share purchase agreements for a Kenyan oil and gas distillery company.

## Mining

The Constitution of Kenya mandates Parliament with the enactment of various legislations. Some of these legislations include: land ownership, consumer protection and natural resource exploration.

The Mining Act, 2016 commenced on 27th May, 2016 and reflects a much needed refurbishment of regulatory framework for mining and extractive activities in Kenya. The Mining Act, 2016 regulates the mining sector and applies to minerals which include all geological substances whether in solid, liquid or gaseous form occurring naturally in or on the earth or under water, in mine waste or tailing but does not include petroleum, hydrocarbon gases or groundwater. It creates obligations of the state with regard to the environment, especially sustainable use of environment.

In February 2017, Acacia Mining announced the discovery of one point three (1.3) million ounces of gold at its mines in the Liranda Corridor in Kakamega, whose grade is one of the highest in Africa. The Ministry of Mining estimates the discovery to be valued at over KES 150 billion.

The GoK has further allocated KES 200 million for geological mapping and mineral exploitation, and also expects a further KES 6 billion support from China for geo mapping once discussions are concluded.

Oraro & Company Advocates has ventured into the mining sector and has so far been involved in the following:

- Advised on establishing a mining and export operation in Kenya, with a range of four counties;
- Reviewed the Mining Act as well as the recommendation of an appropriate legal and institutional framework; and
- Assisting counsel to an international mining company in a dispute with Kenya Pipeline Company worth USD 52.5 million.

## Dispute Resolution

The main alternative dispute resolution (**ADR**) methods available in Kenya are negotiation, conciliation, mediation and arbitration.

Although there is no mandatory requirement for parties in commercial litigation to submit to ADR proceedings, they are associated with a number of advantages including providing cost effective, speedy and less formalistic remedies to the aggrieved parties.

However, in terms of the Civil Procedure Act, the courts may, either on the application of the parties or on its own motion, refer a commercial dispute to ADR mechanisms. The Constitution of Kenya, 2010 also encourages Alternate Dispute Resolution.

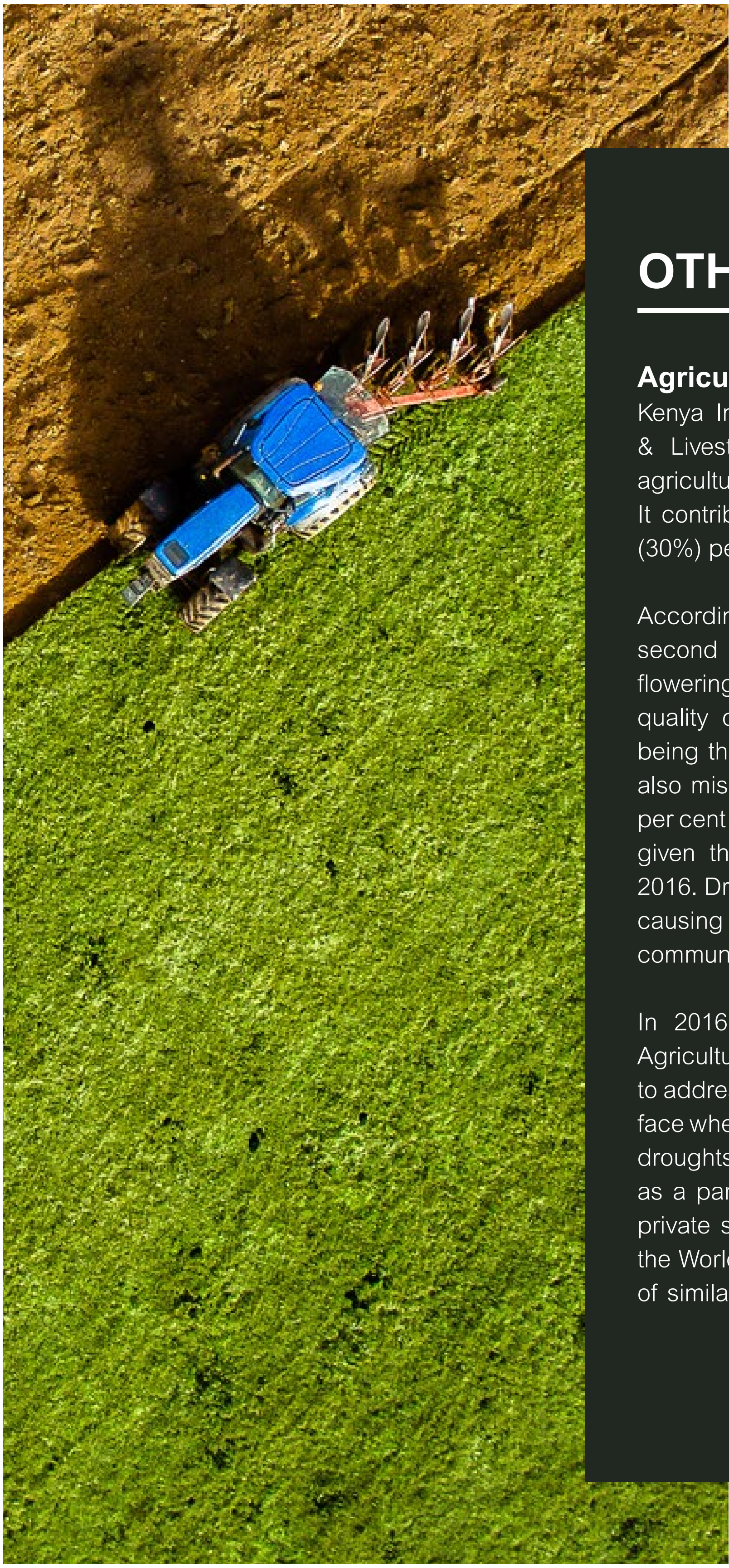
In ADR proceedings parties generally agree that each party will bear their own costs and expenses and the parties will share the costs of any third party involved in facilitating the resolution of the dispute (example, conciliator or mediator).

In arbitration, the costs of arbitration may be agreed upon by the parties, fixed by the arbitrator as part of the arbitral award in the absence of an agreement; or shared, with each party bearing its own legal and other expenses and the parties equally sharing the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration. ADR proceedings are confidential.

## Infrastructure Development

According to recent trends, Kenya's infrastructure sector has shown growth. Kenya is targeting to become a middle-income economy by 2030, and infrastructure development is a key component. The GoK has been rolling out a number of infrastructure projects, for which they have issued a fifteen (15) year infrastructure bond of USD 300 Million for funding. Further, Kenya has also secured funding from the World Bank and the African Development Bank for on-going projects.

It is believed that regional integration is a driving force when it comes to Kenyan Infrastructural projects. Some ongoing projects include: USD 24.5 Billion northern trade route and construction of railway tracks between East African countries.



# OTHER SECTORS

## Agriculture

Kenya Investment Authority and Kenya Agricultural & Livestock Research Organization have ranked agriculture as the main economy driver in the country. It contributes between twenty five (25%) and thirty (30%) per cent of Kenya's GDP.

According to World Bank, the late onset of Kenya's second rainy season in 2016 delayed coffee-bush flowering and the 2017 drought hurt the size and quality of the nation's Arabica crop. The country, being the world's largest exporter of black tea may also miss a target to raise tea output by twenty five per cent (25%) to five hundred (500) million kilograms given the persistence of dry spell that begun in 2016. Drought has also affected livestock production causing violent clashes amongst pastoralist communities.

In 2016, the GoK launched the Kenya National Agricultural Insurance Program, which is designed to address the challenges that agricultural producers face when there are large production shocks, such as droughts and floods. The program, which is designed as a partnership between the Government and the private sector, was developed with assistance from the World Bank Group and builds on the experience of similar programs in Mexico, India, and China.

extended a KES 10 billion loan to Kenya for agricultural mechanisation. The following key allocations have been made to the agriculture sector in the 2018/19 budget:-

- KES 8.5 billion has been allocated for on-going irrigation projects countrywide and transformation of agriculture from subsistence to productive commercial farming;
- KES 4.3 billion for inputs subsidy (Fertilizer and Seed);
- KES 1.4 billion for Strategic Grain Reserves;
- KES 0.5 billion for Mechanisation of Agriculture;
- KES 300 million for Livestock & Crop Insurance Scheme;
- KES 0.9 billion for Food Security & Crop Diversification Programme;
- KES 1.9 billion for the Kenya Cereal Enhancement Programme.

It is worth bearing in mind that foreign nationals are not allowed to own agricultural land.

## Consumer Goods and retail

The Constitution of Kenya, 2010 and the passing of the Consumer Protection Act 2012 (**CPA**) were a positive step towards consumer protection in Kenya. Prior to this, there were no specific laws as such. Some aspects were covered in various legislations, for instance: Fertilizer and Animal Foodstuff Act, Food Drugs and Chemical Substance Act, to name a few.

The CPA was the much-needed law for consumers. For instance, it gives the right to commence legal action on behalf of a class of persons in relation to any contract for the supply of goods or services to the consumer. The CPA prohibits 'unfair practices' and proceeds to provide for radical sanctions against a supplier who engages in 'unfair practices'. The CPA also touches on the rapidly growing internet gaming areas: it provides that, "no person shall advertise an internet gaming site that is operated contrary to any written law". The provisions of the CPA are further supplemented by another key piece of consumer protection law – the Sale of Goods Act (Cap. 31. Laws of Kenya)

Although the CPA has been in place for five years now, consumers in the country seem unaware of it and of the rights enshrined in it to protect them. However this is only now slowly turning around, with the advent of the more technically savvy and informed citizen.
The fact that a law that supports consumer rights now exists is a step in the right direction. It is very encouraging to note that although the CPA is in place – and even with its inherent shortcomings – to safeguard the rights of customers as the main piece of legislature, it is very closely backed up by the work of the Competition Authority of Kenya established under the Competition Act, No. 12 of 2010.

## Employment

Employment relations in Kenya are regulated by a number of sources: the Constitution, collective agreements, contracts, labour regulations and statutes. These sources are interpreted by the Employment and Labour Relations Court, and in some cases by the ordinary courts. The tripartite Industrial Relations Charter laid the foundation for an industrial relations system prior to Kenya's independence in 1963. International standards, especially International Labour Organization (**ILO**) Conventions ratified by Kenya are used by the Government and courts as guidelines, even though they are not binding.

Kenya is party to various ILO Conventions which form part of its labour legislation through the operation of various articles under the Constitution. Other laws governing employment and labour matters include:

- The Employment Act (Act No. 11of 2007);
- The Labour Institutions Act (Act No.12 of 2007) and the Principles of Common law governing employment contracts;
- Employment and Labour Relations Court Act (No. 20 of 2011);
- The Labour Relations Act (Act No.14 of 2007);
- The Occupational Safety and Health Act, 2007 (Act No. 15 of 2007);
- The Work Injury Benefits Act (Act No. 12 of 2007);
- National Social Security Fund Act (Act No.45 of 2013);
- National Hospital Insurance Fund Act (Act No. 9 of 1998).

The legislative framework covers a number of aspects such as salaries, wages, termination etc. For instance: the Employment Act requires an employer to provide an employee with a written contract of employment where employment is for an aggregate period equivalent to 3 months or more. The employer is responsible for preparing the employment contract and ensuring that the employee consents to the employment contract. An employer is required to keep records relating to the contract of service for a minimum period of 3 years. Furthermore, the Employment Act sets out various particulars, which must be set out in a contract of employment.

The Employment (General Rules), 2014 (the General Rules) as per section 91 (1) of the Employment Act provide for the following:

- Rights of employees – provisions;
- Employment of children;
- Sanitation;
- Medical treatment;
- Foreign Contracts.

Work Permits are issued to any foreigners wishing to engage in employment or invest in Kenya. Nationals of EAC and COMESA countries don't need visa to enter Kenya.

Foreign workers are required to have work permits before starting work in Kenya. Kenya has been toughening its stance on work permits. The rule is that work permits will only be issued to expatriates where Kenyans lack the requisite skills and qualifications to undertake such jobs.

## Statutory deductions

### National Social Security Fund (NSSF)

NSSF is the statutory retirement benefits scheme and it operates as a public trust. It provides retirement benefits for employees in the formal and informal sectors. The deducted amount must be remitted by the fifteenth ($15^{th}$) day of the following month.

### National Hospital Insurance Fund (NHIF)

NHIF is a state parastatal which covers eligible members from both the formal and informal sectors by providing limited in-patient medical insurance cover at accredited health facilities to them. The deadline to remit the deducted amount is the nineth ($9^{th}$)day of the following month.

The benefits from the scheme are arguably limited and most companies choose to provide their employees with private medical insurance.

### Department of Industrial Training (DIT) Levy

Every employer should pay the DIT levy and the payment is due by the end of every month.

### Pay As You Earn (PAYE)

This is deducted by the employer from the salary paid to an employee and teh same is remittd to KRA by the $9^{th}$ day of the following month.

### Personal Relief on Income Tax

Every employee is allowed an Income Tax Relief of KES Personal relief of KES 15,360 p.a.

### Tax Exempt Income

This includes bonuses, overtime and retirement benefits paid to low income earners (i.e. those earning KES 121,969 p.a.). They are exempt from income tax.

### Union Dues

In instances where employees are members of a trade union, the employer is required to deduct and remit the monthly union dues to the respective union.

## Process of obtaining work permits

The process of obtaining a work permit has now been automated. The following are the steps:

- Registration on e-citizen (accounts.ecitizen.go.ke/login);
- Creating an account as a foreign citizen;
- Applying for the appropriate work permit; This is done via the Foreign National Service (eFNS) portal. (fns.immigration.go.ke) Different permits have different documentations requirements and can be submitted online;
- Payment is made online;
- Hard copy of the application and payment is produced at Nyayo house for processing;
- Work permit take approximately five to ten (5-10) days to process.

## Finance

The 2016/2017 Report by The Kenya National Bureau of Statistics (**KNBS**) outlined that Kenyan Financial Services Industry (FSI) which contributes approximately six point eight per cent (6.8%) to the country's GDP, withstood a turbulent year to post a growth of six point one per cent (6.1%) in the third quarter of 2016. This was a lower growth compared to the third quarter in 2015.

The Financial Services Authority Bill, 2016 (**FSA**) proposed the merging of four financial regulatory bodies: the Capital Markets Authority (**CMA**), the Retirements Benefits Authority (**RBA**), the Insurance Regulatory Authority (**IRA**) and the SACCO Societies Regulatory Agency (**SASRA**). The Bill is currently undergoing legal drafting before being submitted to Parliament for approval. The purpose of the reform of the financial sector is to provide a consolidated supervision for financial services to eliminate regulatory gaps, to increase protection of consumers of financial services and to ease doing business in Kenya. Under the proposed Bill, all non-bank financial service providers will be licensed by the FSA through a single license.

Nairobi has been positioned as the financial centre, and to do so, the Nairobi International Financial Centre Bill was passed into law in August 2017. This marks a new era for Nairobi, as it will then be financial door to east and sub-Saharan Africa.

## Banking

As at 30th March, 2017, there were forty two (42) Commercial Banks, thirteen (13) Microfinance Institutions and one Mortgage Finance Company regulated by Central Bank of Kenya (**CBK**), which sets prudential regulations including minimum liquidity ratios and cash reserve ratios. CBK reported that it is currently processing requests for licensing by two new banks, ending a moratorium it put in place in 2015 on licensing of new commercial banks. There are three fully fledged Islamic Banks in Kenya ( First Community Bank, Gulf African Bank of Kenya Ltd and Dubai Islamic Bank Ltd) and five (5) conventional commercial banks have introduced Islamic banking products (KCB Bank, Chase Bank Kenya (now SBM Bank Kenya) and NIC Bank of Kenya.)

The Banking (Amendment) Act, 2016 (**Banking Act**) that came into force in September 2016, capped the maximum interest rate chargeable by banks at four per cent (4%) above the prevailing base rate set by CBK. Kenya Economic Outlook 2017 Reports from the Kenya Bankers Association (KBA) indicated that micro-and small sized enterprises could be struggling to get loans following the enforcement of the Banking Act. The CBK noted the negative impact the interest rate cap has had on the economy and there is a proposed amendment of the Banking Act by repealing section 33B of the said Act.

The majority of Kenyans also engage in "mobile banking" which is basically the use of a mobile device to perform online banking tasks such as depositing funds, checking account balances, paying bills and monitoring accounts. This is done through the use of mobile payment systems operated by mobile communication companies such as M-Pesa (Safaricom), Equitel (Equity Finserve) and Airtel Money (Bharti Airtel). Mobile phone payment services are popular due to their simplicity, convenience and accessibility. The joint partnership between Safaricom and Commercial Bank of Africa Limited has developed an innovative mobile platform (M-Shwari) for Safaricom's M-Pesa customers, which enables individuals to access banking services from their phone.

## Capital Markets

Kenya's capital markets are the deepest and most sophisticated in East Africa. Sixty seven (67) companies were listed on the Nairobi Stock Exchange for a total market capitalization of KES 1.9 trillion (approximately USD19 billion) as of March 2016. The Kenyan capital market has grown rapidly in recent years and has also exhibited strong capital raising capacity. As of February 2016, the domestic government bond market denominated in local currency represents a total of USD14 billion dollars, of which only five percent (5%) is comprised of international institutional investors. In March 2017, the Kenyan National Treasury launched its mobile money platform government bond to retail investors locally. The name of the product is M-Akiba, through which local Kenyans will be able to purchase bonds as small as USD 30 on their mobile phones. The CBK is working with regulators in EAC member states through the Capital Market Development Committee (**CMDC**) and East African Securities Regulatory Authorities (**EASRA**) on a regional integration initiative and has successfully introduced cross listing of equity shares. The combined use of both the Central Depository System (**CDS**) and an automated trading system has moved the Kenyan securities market to globally accepted standards. Kenya is a full (ordinary) member of the International Organization of Securities Commissions (**IOSCO**).

The President of Kenya in an effort to strengthen the investment ties markets was in London in April 2018, and visited the London Stock Exchange where he held a meeting with investors to share areas of investment opportunities as envisioned in the country's Big Four Agenda mentioned above. While at the London Stock Exchange, the President rung in trade and noted that the Nairobi Securities Exchange and London Stock Exchange have entered into an agreement for dual listing and this will increase business between Kenya and then UK. It is worth noting that The National Oil Corporation shall be the first company to dual list on both Nairobi and London Stock Exchange under the agreement.

Kenya is positioning herself as the hub for Sharia'h financial services in East and Central Africa. The Country's Muslim population is estimated to be about eleven per cent of the total population plus there is the non-Muslim population that may be keen on taking up Islamic Finance products. This definitely outstrips the two percent penetration of Islamic finance in the global economy. Kenya's capital market has fully embraced Islamic Finance and as a result it has registered two Islamic Collective Investment schemes and one Islamic Fund Manager.

The strategy to accelerate Islamic finance uptake is underpinned by the ambition to transform Kenya into an International Finance Centre as part of the implementation of the Capital Market Master Plan, which is a Vision 2013 flagship project. As part of this strategy, the CMA Kenya was admitted by the Council of the Islamic Financial Services Board (**IFSB**) as an associate member of the Islamic Financial Services Board based in Kuala Lumpar, Malaysia. The decision to admit CMA Kenya was made at the 29th IFSB Council meeting held in Cairo, Egypt on 14th December, 2016.

In line with the GoK's aspiration to position Kenya as an Islamic Finance hub in the region and deepen the application of Islamic Finance within the economy, the Authority was had several wins, namely:

a. Hosted the joint financial sector regulators Project Management Office on Islamic Finance launched in October 2017. The PMO is overseen by the National Treasury with the technical/financial assistance of Financial Sector Deepening Africa (FSDA), and under the mandate delegated to it by Kenya's Financial Sector Regulators Forum (FSRF). The PMO is led by Islamic Finance Advisory & Assurance Services (IFAAS), an international consultancy firm specialised in Islamic finance, in collaboration with Simmons & Simmons - an international law firm. It drove a raft of targeted measures which were included in the Finance Act, 2017 designed to support the growth of Islamic Finance in Kenya. The measures included:
   (i) Amendment to the Capital Markets Act to facilitate ***Sharia'h*** compliant capital market products;
   (ii) Amendment of the Income Tax Act to provide for equivalent tax treatment of ***Shariah-compliant*** products with conventional financial products;
   (iii) Exemption from payment of Stamp Duty on transfer of title relating to ***Sukuk*** (the ***Shariah-compliant*** equivalent of conventional bonds) and to support Asset-Backed Securities transactions;
   (iv) Amendment to the Public Finance Management Act to allow for Government to raise capital through ***Sukuk***.
b. Another significant development in Islamic finance as a whole is the appointment of members of the Islamic Finance Consultative Committee (**IFCC**) by the National Treasury. The IFCC is an industry stakeholder committee whose main objective is to provide support and feedback on the proposed Islamic Finance policies and regulatory changes to facilitate operations in this complementary form of finance. The IFCC is a key governance committee that shall be next in line to the apex committee – the Islamic Finance Steering Committee (**IFSC**). The IFCC shall be the one to refer issues requiring urgent resolution to the IFSC for expeditious guidance.
c. The Financial sector needs to put in place an Islamic Finance policy and regulatory framework in Kenya once the Islamic Finance advisory structures are set up.

CMA in its Islamic Capital Markets Development Action Plan intends to grow Islamic Capital Markets further by:

i. Developing a Shariah screening criteria by the *Sharia'h* Advisory Council;
ii. Developing of *Sukuk* issuance guidelines;
iii. Developing Islamic Collective Investment Scheme (CIS) guidelines;
iv. Development of legal and regulatory framework for Islamic Capital Markets in Kenya.

## Private Equity (PE)

PE has grown exponentially in recent years due to the increased interest by investors from developed countries who want to take advantage of Africa which is the new frontier and an emerging market too. There is a lot of interest in Ethiopia which has a large market of KES.100 Million people. Most of the PE deals are in manufacturing,fast moving consumer goods, retail and health care.

## Intellectual Property

The Constitution of Kenya 2010 has placed a mandate on the State to support, promote and protect intellectual property rights of people. Kenya is a member of the World Intellectual Property Organization (WIPO) and party to a number of treaties for instance the Marrakech World Trade Organization Agreement and the Madrid Agreement concerning International Registration of Trade Marks. Regionally Kenya is part of the African Regional Intellectual Property Organisation (ARIPO), and locally there are a number of legislations which protect intellectual property. They include:

- Copyright Act 2001:literary and artistic works (Copyright Board Kenya);
- Trade Marks Act;
- Industrial Property Act 2001: for patents,trademarks,service marks,industrial designs and utility models. Kenya Industrial Property Institute (KIPI) is in charge of this docket;
- Anti-counterfeit Act, 2008;
- Varieties Act of Kenya:this is for the protection of new varieties of plants. Kenya Plant Health Inspectorate Service (KEPHIS) looks after this docket.

Parliament passed the Anti-Counterfeit Act in 2008, which established an agency and legal framework to police counterfeit goods. All locally manufactured goods must have a standardisation mark issued by the authority.

## Tourism

The Ministry of Tourism oversees the Kenya tourism sector which is home to sixty (60) national parks and reserves and over five hundred (500) kilometres of coastline. The country has seen the tourism sector become second largest foreign exchange earner.

The sector saw declining visitor arrivals and earnings between 2011 and 2015 due to insecurity. However, in 2016 after the travel warning had been lifted by the UK, the sector made a comeback and recorded a sixteen percent (16%) growth from the previous year. The government has since moved to support the sector with a tourism recovery program. It is being forecasted that with the rising number of domestic and regional travellers and increased incentives, conferences and exhibitions, the sector should fully recover in 2018.

Tourism Secretary, Najib Balala in his bid to promote tourism climbed Mount Kenya, Africa's Second highest mountain, in 2017. This was one of the steps toward 2018 objectives to promote adventure sites.

## Telecommunication and Technology

The Kenya Information and Communications Act, 1998 (KICA) governs the telecommunication sector in Kenya. Under the The Companies Act, 2015 ('the Principal Act"),there is a restriction of upto seventy per cent (70%) on the percentage of equity that foreign nationals may hold in locally incorporated companies operating in the communications industry. 2017 reported the highest upsurge in Kenyans' short messaging services (sms) habits, having up to fifty four point seven (54.7) billion texts having exchanged. Another major factor contributing to the sector's growth is the rise in the world's most successful mobile payment platform; M-Pesa, Airtel-Money and Equitel. This market currently split into four (4) major giants: Safaricom, connected to UK's Vodafone, Bharti Airtel, Equitel and Telkom. However Safaricom's dominance has seen it come under scrutiny by the Communications Authority in the recent past with debates on whether the company should be split into two (2); the mobile money platform M-Pesa and voice and internet company Safaricom.

## Cyber security

The burgeoning of ICT into every aspect of everyday life has brought about the modern concept of the information society. This development of the information society offers great opportunities. Unhindered access to information can support democracy, as the flow of information is taken out of the control of state authorities. Technical developments have improved daily life – for example, online banking and shopping, the use of mobile data services and voice over Internet protocol (VoIP) telephony are just some examples of how far the integration of ICT into our daily lives has advanced.

However, the growth of the information society is accompanied by new and serious threats. Essential services such as water and electricity supply now rely on ICT. Cars, traffic control, elevators, air conditioning and telephones also depend on the smooth functioning of ICT. Attacks against information infrastructure and Internet services now have the potential to harm society in new and critical ways and have already taken place. Online fraud and hacking attacks are just some examples of computer-related crimes that are committed on a large scale every day. In 2016, financial loss as a result of hacking and other computer-related crimes was reported to be KES.17 billion.

Kenya now has a Computer Misuse and Cybercrimes Act, 2018 which intends to enable timely and effective detection, investigation and prosecution of computer and cybercrime matters. The Act also contains provisions aimed at facilitating international co-operation in dealing with cybercrime.

## Technology trends

Innovations by various technology companies are at its highest, with start-up firms trying their hand on mobile apps. A number of ICT hubs in Kenya have been established to promote the development and use of ICT technologies through co-working, collaboration and incubation services. One good example is iHub, which brings together technologists, investors, tech companies and hackers, creating an ecosystem of creators and users of ICT and mobile technologies.

## Real Estate

In the past two decades, the real estate sector in Kenya has seen an increase. High returns were measured in 2016 averaging twenty five point eight per cent (25.8%) across all themes. In 2017, despite being an election year, the sector continued with the good performance across all themes. The key drivers of the real estate market include demographics, income, availability and cost of credit and changing lifestyles.

The retail sector in Kenya has been booming, with a number of malls opening up. The growth in the retail submarket was largely driven by increased urbanisation and a growing middle class with increased purchasing power. Kenya has quickly become one of the leading retail destinations in Africa. 2017 saw the struggle of retail supermarket giants - Nakumatt, however it also saw the entry of a French Franchise: Carrefour.

In 2015, Kenya's first Income REIT was issued by Stanlib Investments but managed to raise only a third of the KES twelve point five (12.5) billion it had hoped to raise. In 2016, another player Fusion Capital issued a Development REIT however the firm recently announced that it will now be engaging private investors due to a slow investor uptake, blamed mostly on lack of public education and awareness. The Constitution of Kenya 2010, the Lands Act, No. 6 of 2012 and the Land Registration Act No. 3 of 2012 provide that foreigners or non-citizens can only own land under a leasehold tenure not exceeding ninety nine (99) years.

Residential sector performance is heavily dependent on household disposable income and availability of credit. On average Kenya's household disposable income has been on an upward growth. This means households are able to spend more on shelter and other basic needs. On the other hand the price of both rent and sale of property has also been on an upward trend mainly because the middle and low-income segments of the residential market have been having a huge supply deficit.

Between 2016 and 2017 the country experienced its fair share of factory closures and relocations. On a positive note, the government has made tremendous efforts to improve the business climate. These efforts include massive investment in road, railway and sea port construction and/or expansion; power generation including investment in clean energy such as geothermal, wind and solar energy; and reducing the bureaucracy in company registration. With improved network of roads and a revamped railway line new warehouses and logistics centres present a major real estate investment opportunity in 2018 and beyond.

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