

23RD MARCH 2020



Dear Client,

Changes to Doing Business in Kenya

The Business Laws (Amendment) Act No. 1 of 2020 was assented to by the President on 18th March 2020 and came into force upon assent.

Kenya has been a constant participant in The World Bank's Doing Business project and has risen in the overall rankings from position 106 in 2010, before deteriorating to 129 in 2013 and 2014 and then saw the need to get its act together, leading to major changes that moved it to position 50 on the latest published report (2020).

In a very much interconnected world (the current COVID19 epidemic notwithstanding), countries must be able to analyze comprehensive quantitative data to compare business regulation environments across economies and be competitive. That competition requires more efficient regulation and in turn offers measurable benchmarks for reform. The studies carried out by the World Bank provide data on the ease of doing business, rank each location, and recommend reforms to improve performance in each of the indicator areas. The issues that businesses grapple with on a daily basis include regulations regarding starting a business, dealing with construction permits, getting electricity, registering property, getting credit, protecting minority investors, paying taxes, trading across borders, enforcing contracts and resolving insolvency. It also measures features of employing workers.

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Obviously, for Kenya, some of the changes required to improve the economy can be implemented in the short term, while other changes of a structural nature will take long. With an eye to what can be implemented immediately the Kenya Government has come up with the Business Law (Amendment) Act, 2020, which we look at below.

The Act may be accessed through

http://kenyalaw.org/kl/fileadmin/pdfdownloads/bills/2019/BusinessLaws_Amendment_Bill_2019.pdf.

Yours faithfully,

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I. LAW OF CONTRACT ACT, CHAPTER 23 LAWS OF KENYA



The change

Under the Law of Contract Act, for a contract to be deemed valid, it must be in writing and signed. Signing is defined as *'the making of one's mark or writing one's name or initial'*.

The Amendment Act seeks to change Section 3(6) of the Law of Contract Act in the definition of "sign" by inserting the words *"physically" or electronically* after the word "initial". By virtue of the Amendment, a sign may be made physically or electronically.

The effect

The amendment introduces an **electronic** and an **advanced electronic signature** as recognized means of executing documents in Kenya. With this change a contract with an electronic signature is as valid and enforceable as one which has been signed or initialized physically. This is a big step towards embracing technological developments in the business world and will reduce time taken in getting parties to sign contracts.

II. INDUSTRIAL TRAINING ACT, CHAPTER 237 LAWS OF KENYA



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The change

The Industrial Training Act regulates the training of persons in the industrial sector. Under the Act, the Cabinet Secretary may impose training levies payable by persons. This is done by issuing a Training Levy Order that stipulates the amount payable and the time within which it should be paid. When a training levy order is issued and one fails to pay the training levy as required, the Act stipulates a 5% penalty of the amount due for each month and part of the month when it remains due. This penalty has now been reduced for new companies

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as the Amendment seeks to compound the charging of this levy to a year.

The effect

In effect a company newly incorporated will, following this enactment, have no obligation to pay the training levy for a period of up to one year after commencing operations. This will no doubt afford a relief to new businesses.

III. REGISTRATION OF DOCUMENTS ACT, CHAPTER 285 LAWS OF KENYA

The change

The Registration of Documents Act is one of the oldest statutes still applicable in Kenya. Enacted in 1901, the legislation provides for the registration of documents, which is a condition for validity and enforceability of certain defined documents.

The Amendment seeks to include electronic documents and signatures to the statute. The definition of Book under Section 2 of the Act has been amended to include an electronic book. Further, just like the changes in the Law of Contract Act, the Amendment seeks to recognize electronic signatures in the execution of documents.

By virtue of the amendment, signing can be done through an **advanced electronic signature** or an **electronic signature**; both of which have been defined to mean **electronic data used to uniquely identify the signatory and is in the signatory's sole control**.

Pursuant to the Amendment, the Registrar of Documents is required to establish and maintain the registry of documents in electronic form. Finally, Section 4 of the Registration of Documents Act is to be amended to allow registration of documents by filing the documents in physical or electronic form.

The effect

The Registrar is now allowed to maintain both the Principal and Coast Registries in an electronic form. The recognition of electronic signatures is a step in the right direction as it embraces technology and would ease the process of registration of various documents.

IV. SURVEY ACT, CHAPTER 299 LAWS OF KENYA

The change

The Survey Act, Cap 299, is the legislation that provides for geographical names and establishes the Survey of Kenya. Section 2 of this Act is amended to include the definitions of various forms of electronic



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signatures. Section 5 of the Survey Act is further amended to provide for the sealing and security features of electronic documents that have been processed under the Act.

The Seal of the Director of Surveys, being the mark that confirms authenticity of survey documents such as plans can now be made electronically by virtue of the Amendment in Section 32 provided that the document is processed electronically and bears a security feature.

Plans indicating that land has been surveyed or resurveyed can therefore be authenticated by way of an advanced electronic signature or electronic signature with a prescribed security feature.

The effect

Authentication of survey records has long been a major impediment to transactions as the process has been tedious leaving users of the service unsure as to the origin and authenticity of survey documents that they hold. This amendment should reduce the turnaround time on verifying survey records but also should, perhaps more importantly, provide a greater assurance as to the veracity of survey documents, and in particular deed plans and PDPs.

V. INCOME TAX ACT, CHAPTER 470 LAWS OF KENYA

The change

Since its inception in the year 1974, The Income Tax Act, has been amended almost annually to cater for new taxation provisions during the annual government budget exercise.

Among other things, the Act prescribes investment deductions which are made on capital expenditures made on items especially building and machinery used for prescribed purposes such as the Economic Processing Zones and the Special Economic Zones.

The effect

The Amendment seeks to provide that capital expenditure of at least KShs. 10Billion incurred in the construction of bulk storage and handling facilities for supporting the Standard Gauge Railway operations to be deductible as an investment deduction at the rate of 150% of the capital expenditure in computing the profits of the person incurring the profit.

VI. STAMP DUTY ACT, CHAPTER 480 LAWS OF KENYA



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The change

The Stamp Duty Act is set to be amended by allowing for the stamping of documents by electronic means. This means that the collector of stamp duty may duly stamp a document or instrument electronically in addition to the use of dye, franking machines and adhesive stamps as has been used since time immemorial.

The effect

The changes proposed should hopefully propel Kenya into the twenty-first century solutions and move us away from a system developed almost 150 years ago (in 1884 by Engle Frankmussler, a Norwegian who was keen to solve the problem of security in the long-established postal system).

Previously, the stamping of documents could only be verified by the franking thereof or by adhesive stamps. With this amendment, stamping can also be carried out and verified electronically. As practitioners and users of the various land registries are aware, stamping of documents has been a very tedious process with the franking machines breaking down every so often, and with a dearth of people to repair them, we have seen a process that should take minutes, take weeks. This amendment solves the challenge of the perennial breakdown of the franking machines, thereby greatly reducing the completion time in most transactions.

VII. KENYA INFORMATION AND COMMUNICATIONS ACT, NO 2 OF 1998

The change

The Kenya Information and Communication Act provides for the application for licenses and enforcement by the Communications Commission of Kenya. Section 83B (1) of the KICA Act is amended under the title electronic transactions and cyber security, by deleting paragraph (c) which refers to title documents.

The effect

By virtue of the amendment, rules and laws requiring writing or signatures in documents of title shall be subject to the provisions of the Act on licensing and enforcement.





VIII. OCCUPATIONAL SAFETY AND HEALTH ACT, NO 15 OF 2007



The change

The Occupational Safety and Health Act, No. 15 of 2017 makes provisions for the safety, health and welfare of employees and all persons present at workplaces. The Act requires one to apply to the Director of Occupational Safety and Health Services for registration of a workplace before one occupies or uses a premise as a workplace.

The Cabinet Secretary was however empowered to exempt certain premises from this requirement. By virtue of the Amendment, a premise occupied by less than 100 employees is exempt from seeking registration for the first 12 months of its registration as a business.

The effect

Like the changes made with regard to industrial training, this amendment seeks to postpone the coming into effect, for newly registered entities, of the duty to comply with certain elements of the OSHA. One of the problems every new business face are the numerous registration requirements, this being one of them. However, those with more than 100 employees at inception must comply ab ignition.

IX. THE LAND REGISTRATION ACT, NO 3 OF 2012



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The change

The Land Registration Act 2012 (LRA) provides for registration of instruments relating to transactions in land. Section 2 of the Act has been amended to include the definition of various forms of electronic signatures. It also proposes to amend Sections 44 and 45 of the LRA to allow the use of electronic signatures in the execution of documents processed under the Act.

By virtue of the amendment, the law shall now recognize the use of advanced electronic signatures, electronic signatures, and electronic seals in execution and authentication of instruments in land, which may as well be electronic.



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The Amendment also seeks to eliminate the requirement for land rent and land rates clearance certificates as a pre-condition to registration of dispositions in land such as transfers and charges. One of the most contentious issues in conveyancing has been the requirement of Land Rent and Land Rates Clearance Certificates as completion documents. Actors in the conveyance field have always felt that collection of land rates for instance, which is a function of the local authorities should not be an impediment to property transactions.

In a move that seems to have been born out of this debate, the Act amends the LRA, by deleting Sections 38 (Certificate of Payment of Rates) and Section 39 (Certificate of Payment of Rent) of the Act. This is a step in the right direction for expeditious transactions in land. Of course, these provisions do not do away with the requirement to pay rates and land rent which remain the duty of the landowner. It's just that now the registrar will not require evidence of the payment as a pre-condition to registration of a disposition.

Finally, with respect to indemnities relating to changes in the register. Section 83 of the LRA is amended by providing for the procedure one is to follow when claiming indemnity for suffering damage by reason of any rectification of the register or any error in a copy of or extract from the register or in a copy of or extract from any document or plan certified under the LRA.

Under the Amendment, any person claiming indemnity would be required to make an application for investigation and consideration to the Chief Land Registrar in the prescribed form. The decision of the Chief Land Registrar may be appealed in the Environment and Land Court.

The effect

As already mentioned, the recognition of electronic signatures is a step towards embracing technological advancement and would be a great ease to doing business, particularly in the land registries. The abolition of the requirement of land rent and rates clearance as a prerequisite for registration is likely to speed up the registration of dispositions.

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X. NATIONAL CONSTRUCTION AUTHORITY ACT, NO. 41 OF 2011

The change

The National Construction Authority Act, No. 41 of 2011 (NCA Act) establishes the National Construction Authority (NCA) whose functions include the promotion of quality assurance in the construction industry.

The amendment Act amends Section 5 and Section 23 of the Act and seeks to empower the NCA to enforce the prescribed Building Code in the Construction industry.

The Act further empowers the Board of the NCA to appoint investigation officers to carry out investigations with respect to compliance with the orders of the authority. The amendment Act seeks to create the offence of willful disobedience to the lawful order of the Investigation officer which is punishable by an imprisonment terms of 3 years or a fine or KShs. 1 Million or both. Finally, the Amendment Act seeks to empower the NCA to undertake mandatory inspections of sites of construction at any time in line with regulations issued by the Cabinet Secretary.

The effect

Lack of enforcement of the provisions of the NCA Act has been a major problem. Kenya has still from time to time experienced cases of poor construction leading to buildings collapsing because of lack of adherence to the Building Codes possibly caused by the inability of the Authority to effectively supervise construction work going on around the country. The consequence of this has been diminishing faith in the Kenyan construction industry, which of course has a knock-on effect on confidence in Kenyan systems. Criminalizing the failure to adhere with the prescribed codes could act as a deterrent and would see a reduced number of poorly constructed buildings.

XI. PUBLIC FINANCE MANAGEMENT ACT, NO 18 OF 2012

The change

The Public Finance Management Act provides for effective management of public finances by both levels of government.

Section 39A of this Act dealing with submission, consideration and passing of Finance Bill is amended in subsection (4) by deleting the words “and the Division of Revenue Act” appearing in paragraph (a). It now reads “(4) Any recommendations made by the relevant committee of the National Assembly or resolution passed by the National Assembly on revenue matters shall (a) ensure that the total amount of revenue raised is consistent with the approved fiscal framework.



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The effect

By virtue of the Amendment, the recommendations made by the National assembly do not need to ensure total amount of revenue raised is consistent with the Division of Revenue Act. The amendment has been made to clean up the process of introducing the Finance Bill in the National Assembly.

XII. VALUE ADDED TAX ACT, NO 25 OF 2013

The change

The proposed changes to the Value Added Tax Act relate to tax imposed on supplies made in or imported to Kenya and specifically as those apply to supplies which are exempted from VAT.

Section A of Part I of the first schedule of this Act dealing with exempt supplies, is amended by inserting a new paragraph immediately after paragraph 110 and Part II of the First Schedule to the Act dealing with services, is amended by inserting a new paragraph immediately after paragraph 31.

The effect

This Amendment exempts the goods, services and supplies procured locally or imported for the construction of bulk storage or handling activities related to the Standard Gauge Railways approved by the CS Transport from VAT.

XIII. BUSINESS REGISTRATION ACT, NO 15 OF 2015

The change

The Business Registration Act provides for the incorporation, registration, operation and management of companies, partnerships and firms.

Under the proposed Amendment, the composition of the Business Registration Service Board shall include the Principal Secretary for the time being responsible for business reforms and transformation. This is pursuant to an amendment to Section 5(2) (c) of the Act by deleting the word “trade” and substituting it with the words “business reforms and transformation”.

The effect

The purpose here seems to be a bid to align the mandate of doing business with the Ministry in charge of coordination of ease of doing business reforms. This mandate has hitherto fallen solely in the province of the Attorney General/Registrar General.





XIV. COMPANIES ACT, NO. 17 OF 2015

The Companies Act which provides for dealings in Companies has undergone various amendments since its enactment in 2015. It is set to be substantially changed by the Amendment Act 2020.

The Amendment does away with the requirement of execution of documents using a **company seal** in various company transactions. It amends Section 35 of the Companies Act, 2015, to provide that contracts made by companies **shall no longer require company seals**. Section 37 of the Companies Act, 2015, is amended to provide that documents executed on behalf of companies shall no longer require to be sealed with company seals. The Act also deletes Section 38 which relates to the common seal of a company and section 42 which relates to the official seal for use by a company outside the country. Section 43 of the Companies Act which provides for an official seal for sealing share certificates is also deleted.

The Amendment does away with the requirement of execution of documents using a company seal in various company transactions. It amends Section 35 of the Companies Act, 2015, to provide that contracts made by companies shall no longer require company seals.

Thus, under the Amendment, company contracts need not be sealed but must be **in writing and duly executed**. The amendment has also eliminated provisions relating to company seals for documents in and out of Kenya, as well as company seals

evidencing transfer of shares or securities.

The amendment has also made provisions on dealings with bearer shares. By virtue of the Amendment, companies are required to convert bearer shares to registered shares whether or not its Memorandum and Articles require it to do so and thereafter notify the registrar within 30 days of such conversion. Here, a right attached to a bearer share can only be exercised after the conversion and a company. A company that fails to convert the shares accordingly or notify the registrar commits an offence and would be liable to a fine of KShs. 500,000 compounded on continued default.

Finally, the Amendment Act has an effect on the Companies Act's transitional provisions. Particularly, the Amendment Act has eliminated the provision that recognized the validity of share warrants issued under Section 86 of the repealed Act (Cap 486).

XV. INSOLVENCY ACT, NO 18 OF 2015



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The change

The Insolvency Act which provides for bankruptcy of individuals and liquidation of companies has also been affected by amendments in Section 560A and Section 723A of the Act.

Under the Act, when a company is under administration, a moratorium takes effect and one may only enforce a security over the company's property with the administrator's consent. The court may however lift this moratorium and one of the things the court is required to take into consideration is the perishability of a movable property and whether or not the movable property is being used to maintain the company as a going concern.

The Amendment also entitles Creditors to information from the insolvency practitioner, which information should be granted within 5 business days of such request unless extended for good cause.

The effect

The amendments seem to guarantee greater protection to Creditors, and in so doing, may improve the business environment for potential investors.

XVI. EXCISE DUTY ACT, NO. 23 OF 2015

The change

The Excise Duty Act that provides for the charging, assessment and collection of excise duty has also been amended. Paragraph 1 of Part I of the First Schedule to the Act that prescribes the rates of excise duty is amended to include imported glass bottles whose excise duty rate shall be 25%.

The effect

This change is expected to encourage the local manufacture of glass bottles by levying excise duty tax on imported glass bottles at 25%. This will no doubt be welcome news to local glass manufacturers.

XVII. MISCELLANEOUS FEES AND LEVIES ACT, NO 29 OF 2016

The change

The Miscellaneous Fees and Levies Act imposes duties, fees and levies on imported or exported goods. The Act also prescribes the goods which are exempt from payment of import declaration fees or railway development levy when imported or purchased before clearance through customs.



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The effect

By virtue of the Amendment, the goods imported or purchased the construction of bulk storage or handling activities related to the Standard Gauge railways as approved by the CS Transport are exempt.

Conclusion

We hope that implementation of the above changes will make conducting of business in the country expeditious and affordable and would in turn bring about growth in our economy.

