Doing Business in Kenya

This document describes some of the key commercial and taxation factors that are relevant on setting up a business in Kenya.

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Background

Country overview

Kenya is a sovereign state located in the region of East Africa. Its capital and largest city is Nairobi that prides itself with a river and a national park right in the middle of the city. Kenya is positioned on the equator right in the middle of 5 other countries and Indian Ocean in the south-east, that is Tanzania at the south, Uganda west, South Sudan to the northwest, Ethiopia to the north and Somalia on the north-east.

Kenya covers 581,309 km2 (224,445 sq miles) and had a population of about 49.6 million in 2017 census report according to (United Nations, 2018) estimates.

The stability experienced in the past few years is attributed to the new constitution 2010 which introduced a bicameral legislative house, county government and independent judiciary. Kenya has so far had 2 general elections since the introduction of the new constitution. The second election was held on August 8th, 2017 however, the Presidential Elections were nullified on September 1st, 2017 by the Supreme Court citing excessive irregularities by the electoral body, Independent Electoral and Boundaries Commission (IEBC). The repeat polls were later held on October 26th, 2017 where one of the major contenders of the then sitting opposition called for a national boycott, nonetheless, the polls were carried out by the IEBC; Uhuru Kenyatta was duly declared the elected president for a second and final term of 5 years. Presently, the country is poised towards achieving the big four agenda with intention to push Kenya into a middle-income economy. These are President Kenyatta's legacy development projects, they include; manufacturing, universal healthcare, affordable housing and food security.

Economic overview

Kenya is viewed as the economic giant of East Africa alongside prevailing political structural and economic environments. It has however, managed to create reforms which have largely resulted into a continual economic growth, socio-cultural development and political mileage in the past years. It is important to note that Kenya still experiences various development challenges including; poverty, inequality, climate change, corruption, and the vulnerability of the economy to internal and external shocks.

The Kenyan national and official languages are Kiswahili and English respectively. The Constitution promulgated in the year 2010 introduced the devolved system of Government which has been transformative and has strengthened accountability and public service delivery at grassroot levels.

According to the World Bank, (2018), while economic activity weakened following the 2008 global recession, growth recommenced in the last three years up to 5.8% in 2016 placing the country as one of the fastest growing economies in the continent. The economic expansion has been accelerated by a stable macroeconomic environment, low oil prices, tourism influx, substantial diaspora remittance inflows and a government led infrastructure development activities.

Based on the report by the World Bank, (2018), Medium-term GDP growth is expected to rebound to 5.8% in 2018 and 6.1% in 2019 respectively dependent on completion of ongoing infrastructure projects, resolution of slow credit growth, strengthening of the global economy and tourism.

In the long-term, adoption of sound macroeconomic policies will hasten the possibility to safeguard Kenya's healthy economic performance. This includes execution of sound financial and lowering debt down to 4.3% by FY19/20 as per the Mid-term fiscal outlined estimates. The financial merging needs to avoid interrupting public investments in crucial infrastructure key to unlocking the economy's ability and productive capacity.

Alongside fostering economic development through the country's development agenda to the lasting development plan; Vision 2030, President Uhuru Kenyatta charted the "Big Four" development primary areas for his final term as President. The Big Four will focus on manufacturing, universal healthcare, affordable housing and food security. In this regard it is believed that Kenya has met some Millennium Development Goals (MDGs) targets which include reduction of child mortality rate, universal primary school education enrollment and reduced gender gaps concerning education. The introduction of free maternal healthcare has enhanced tremendously the benefits reaped by ordinary Kenyans in accessing health services.

Some of the opportunities that Kenya can capitalize on include; a growing youthful population, dynamic private sector which holds the backbone of its economic growth, highly skilled workforce, improved infrastructure, a new constitution, and its pivotal role in the East Africa as an economic giant.

It is worth noting that Kenya has been ranked as having the fastest internet in Africa. This is as per statistics released by Akamai, a leading Content Delivery Network (CDN). It also leads in Africa in terms of internet penetration in Africa where it is the largest internet user with approximately 43.4 million users according to the Communications Authority of Kenya representing 88% penetration rate. This is just above South Africa with 30.8 million internet users representing 53% penetration rate as at 2017 according to (World internet statistics, 208). Other countries ahead of Kenya are; Nigeria with 98.3 million users representing 50.2% pentration rate, Egypt with 49.2 million representing 49.5% penetrtaion rate and Morrocco with 22.5 million users representing 62.4% penetration rate.

Some of the benefits of the ICT integration in Kenya are embraced in the eCitizen platform that was launched in August 2014. eCitizen is an online Government portal through which Government services can be obtained online. This process of digitizing every function into the eCitizen platform enables citizens to obtain government services like immigration while applying for passports, ministry of lands, Kenya Revenue Authority (KRA) and National Transport Services Authority (NTSA) when renewing driving license among others at the touch of a button.

Transport infrastructure

Kenya enjoys an extensive infrastructure that spans across the entire nation. Nairobi is the transportation pivot of Eastern and Central Africa. It also connects many of the landlocked countries.

The Port of Mombasa is part and parcel of the important deep-water harbor in the region, providing the shipping needs of many countries surrounding Kenya despite glaring deficiencies in equipment, corruption and inefficiency. Because of these deficiencies, the Port of Mombasa has been earmarked for major expansion and rehabilitation; this is positive considering the recent introduction of the SGR construction which has a cash outlay of 327 billion shillings. The Government has contracted China Roads and Bridges Corporation (CRBC) to construct the railway line between Mombasa and Nairobi and the construction of this railway line has since been finalized. This is the first phase of the project with expectations to expand to other regions in East Africa. The passenger services of the train were launched on 1st June 2017 as Madaraka Express train services.

Major opportunities for investment are in five major sectors: ICT, energy, infrastructure/construction, agribusiness and medical. ICT, the computer and peripherals industry remain one of the fastest growing business sectors in Kenya.

The Government is building a Techno-city in in Kenya at a place called Konza. This will give the country an opportunity of growth in ICT reaching almost any country in the world.

Real estate is also booming market. As a result of creation of County Governments, new blue prints are coming up and the property market is responding to demand that has been created by an expanding middle class population.

Choice of Legal Form

Limited liability company

A company is an entity registered under the Companies Act and it is a legal entity with an existence that is autonomous from that of its owners. A company can either be private or public. A private company is one with restricted membership and it is not allowed to invite members of the public to subscribe for its shares. The maximum number of members in a private company is fifty excluding past and present members who are also employees of the company. A public company on the other hand allows for invitation of members of the public to subscribe in its shares.

Private companies may either have limited liability or unlimited liability. It is however rare to come across a registered unlimited company. Liability of members in a limited company can either be limited by guarantee or by shares.

To establish a company in Kenya the shareholders must:

- Reserve a company name and get it approved Registrar of Companies.
- Fill in the requisite forms.
- Pay the requisite fees.

Company registration is now done online in Kenya through the Government platform; eCitizen.

Companies limited by shares

A company limited by shares is one where its members liability is limited to the amount unpaid on its shares. In these companies, members own shares in the company and are entitled to certain membership rights.

Companies limited by guarantee

A company limited by guarantee is one where its members liability is limited to the amount they undertake to contribute to the liabilities of the company in the event of liquidation.

Foreign companies

Foreign companies that want to do business in Kenya can either incorporate a subsidiary in Kenya or register their company is Kenya as a foreign company. If registered as a subsidiary, the subsidiary will be resident in Kenya for tax purposes. However, if they chose to register a foreign company, the foreign company will be a regarded as a branch for tax purposes unless the management and control of the company is done in Kenya in that year of income in which the control and management was done in Kenya.

General partnership

General Partnerships in Kenya should have a minimum of two partners and a maximum of 20 partners. The partners contribute to the capital of the business and they share the profits as per their partnership agreement. General Partnerships do not have a limitation on the liability of its partners. Partnerships should register their business name and should have a personal identification number ("PIN") for tax purposes.

The income of the partnership is subjected to tax at the share of profits level and not at the partnership level.

Limited liability partnership (LLPs)

A limited liability partnership is a partnership with legal existence and limitation of liability of the partners. The minimum number of members of a limited liability partnership is two and if the number of members fall below two, the partner that continues business while the number of partners is reduced to two for a period of two years or more becomes liable to an unlimited extent for the liabilities of the partnership. A Limited Liability Partnership must maintain its registered office in Kenya.

Sole proprietorship

A sole proprietorship is a business owned and conducted by one person either in his own name or under a business name which he has chosen and registered with the Registrar of Business Names.

All business profits are treated as income of the sole proprietor who then pays income tax according to the applicable rates in force.

Audit Requirements

Audited accounts are required for purposes of filing a return of a non-individual entity. However, the Companies Act does not compel all companies to undergo a statutory audit.

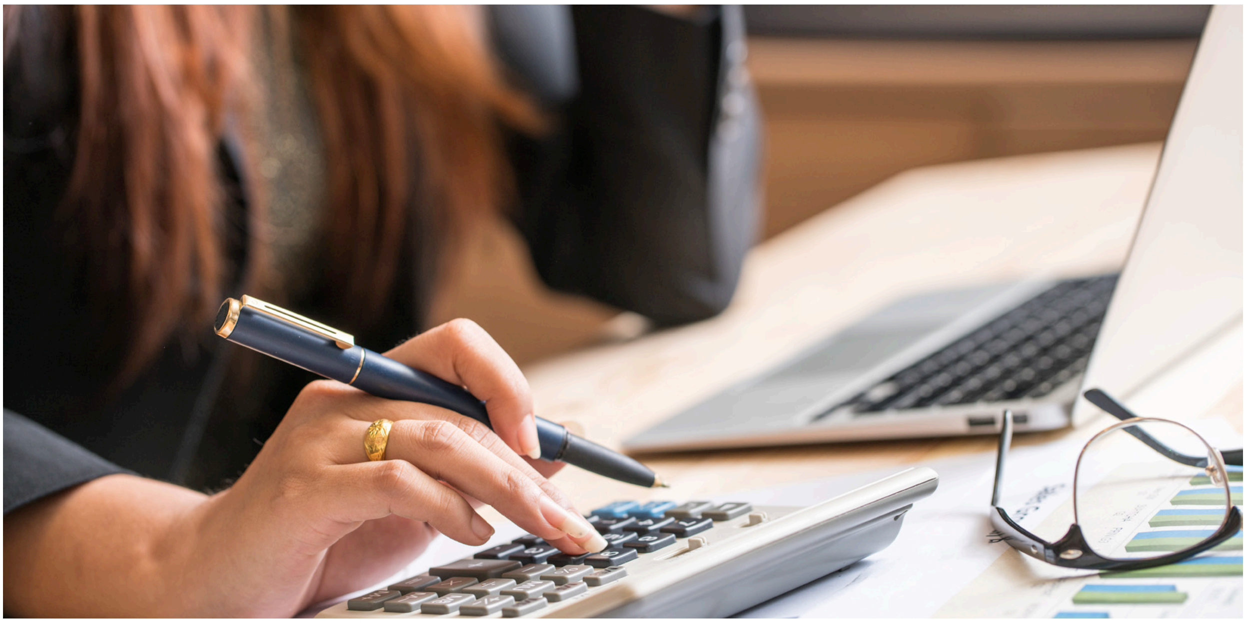
The Companies Act 2015, requires companies to have their financials audited unless the company is exempt from the requirement to have their financials audited. A company is exempt from requirements to have its financials audited if the company;

1. Qualifies as a small company in that financial year and in the preceding year. A small company is a company whose turnover is not more than Kshs 50 million, its net assets do not exceed Kshs 20 million and has a maximum of 50 employees. Note however that public companies, listed companies and companies in the insurance and banking industry are ineligible for purposes of the small companies' regime; or

2. Has been dormant since incorporation or since the preceding financial year and the company is a small company and it is not required to prepare group financial statements in that year of income; or

3. Is a non-profit making entity that is audited by the Auditor General.

Taxation



Tax regimes include income tax, value added tax, excise duty tax, stamp duty tax and customs. These taxes are regulated by, among others, the Value Added Tax Act, the Income Tax Act, the Excise Duty Act, the Stamp Duty Act and the East African Community Customs Management Act.

Income tax

This is a tax imposed on the income of an individual or an organization.

Scope of tax

Income Tax is a direct tax imposed on:

- Gains and profits from business;
- Employment income, including benefits;
- Rent Income;
- Gains made on disposal of property; and
- Investment income.

Personal identification number (PIN)

Every taxpayer in Kenya is assigned a Personal Identification Number (PIN). There are transactions that cannot be effected unless the parties to the transactions have a PIN. For instance, sale of land, opening a bank account, registration of vehicles, etc. Every holder of a PIN is under an obligation to file annual tax returns. These returns are filed on the Self-Assessment Return form that is generated through the Revenue Authority's portal; iTax.

Failure to file the annual return attracts a minimum penalty of Kshs. 20,000. Those without transactions during the financial year can file a nil return.

Self-assessment return

This is a template in which a taxpayer is required to declare income and compute tax liability. The Self Assessment Return should be completed and submitted. For individuals, the tax returns should be filed on or before 30th June of the succeeding year.

For non-individuals, the return is due on or before the last day of the sixth month after the end of the accounting period. For all categories of Taxpayers, the tax returns are filed through the iTax platform.

Withholding tax

Withholding Tax is deducted at source on certain specified sources of income such as, interest, dividends, royalties, management, professional or training and contractual fees, commissions, pensions, rent received by non-resident person. Withholding tax is a form of advance income tax since the withholdee will be able to claim the amount withheld as a tax credit.

Withholding tax rates vary depending on the income on which it is imposed and also depending on whether the withholdee is a resident or non-resident. The payer of the income is responsible for deducting and remitting the tax to the Commissioner on or before the 20th day of the following month.

For the countries that have a entered into a Double Taxation Agreement/Treaty, preferential tax rates apply depending on the terms of the treaty. At Appendix I we have listed the countries with which a Kenya has entered into a Double Taxation Treaty/Agreement.

Pay as you earn (PAYE)

PAYE is a type of income tax that applies to employment income. The obligation of remitting PAYE rests with the employer and PAYE is a final tax as regards employment income. Employers deduct PAYE on the prevailing individual rates and have an obligation to remit it on or before the 9th day of the month after that which the salary relates. Employers file monthly PAYE returns which should be filed on or before the 9th day of the month after that which the salary relates.

The prevailing individual tax rates in the year 2018 are as shown below;

Annual Income	Monthly Income	Tax Rate	Compulsive tax p.a.	Compulsive p.a.
0 to 147,580	0-12,298	10%	1,230	14,758
147,580-286,623	12,298-23,885	15%	2,968	35,614
286,623-425,666	23,885-35,472	20%	5,285	63,423
425,666-564,709	35,472-47,059	25%	8,182	98,184
564,709 and above	Above 47,059	30%		
Relief			1,408	16,896

Capital gains tax

Capital Gains Tax is imposed on gains made on transfer of property. The rate is 5% and this is a final tax. The tax should be remitted on or before the 20th day of the subsequent month after the date of transfer of the property.

Corporation tax

Corporation tax is a form of Income Tax that is levied on corporate bodies such as Limited Companies, Trusts, and Co-operatives. Resident Companies are taxable at a rate of 30% while non-resident companies are taxable at the rate of 37.5% on taxable income. For purposes of taxation, a body corporate is any non-individual entity. A lower corporation tax rate is available for the following types of entities;

Assemblers of motor vehicles

For the first 5 years new assemblers of motor vehicle shall be paying 15% corporation tax with effect from 1st January 2018.

EPZ

Export Processing Zones (EPZ), Enterprises operating within the EPZ’s enjoy the following benefits:

- 10 years tax holiday giving exemption from corporation tax for the first 10 years of trading.
- A lower corporation tax rate of 25% for the subsequent 10 years.
- Exemptions from all withholding tax on dividends and other payments to nonresidents during the first 10 years of trading.

- Investment Deductions @100% of capital expenditure claimable in the 11th year after commencement of production.

Listed companies

Listed companies have preferential rates as follows;

- Newly listed companies with at least 25% of its issued capital listed – 27% for three years
- Newly listed companies with at least 30% of its issued capital listed – 25% for five years
- Newly listed companies with at least 40% of its issued capital listed – 20% for five years
- A company introducing its shares through listing on any securities exchange through introduction – 25% for five years

Company that constructs more than 400 residential units annually

These companies are entitled to a lower corporation tax at the rate of 15% for the year of income in which it constructed the units. This is subject to approval by cabinet secretary responsible for housing.

Capital deductions

Capital Deductions are incentives to investors on the capital expenditure incurred on Industrial buildings and purchase of machinery used to produce income. They are available to body corporates and are claimed against corporation tax.

Capital deductions are made on expenditure incurred in respect of the following;

a. Wear and tear allowances in respect of:-

   - Tractors, Combine Harvesters, Heavy earth-moving equipment and similar Heavy self-propelling machinery, 37.5%.
   - Other self-propelling vehicles including aircrafts; 25%.
   - Other machinery including ships; 12.5%
   - Computers and peripheral computer hardware, calculators, copiers and duplicating machines; 30%.
   - Purchase of software and cost of license for the acquisition of rights in software; 5%.
   - Telecommunication Equipment purchased and used by a telecommunication operator; - 20%.
   - Purchase or acquisition of an indefeasible right to use a fibre optic cable by a telecommunication operator; 5%.

b. Industrial Building Allowance (on straight line) in respect of capital expenditure on:

   - Educational Buildings, Hostels and Training facilities – at 50%
   - Educational Buildings used to train film producers, actors and crew – 100%
   - A building which is in use as a residential building and is constructed in a planned developed area which is approved by the Minister for Housing. (2nd Schedule Par. 5 (1)(f) – 25%
   - Residential buildings where the cost of roads, sewage, power and social infrastructure are borne by the Investor; 25% w.e.f 1st January 2010
   - Other Industrial Buildings – 10%

c. Farm Works Allowance (on straight line basis) in respect of capital expenditure incurred on a farm - 100%

d. Investment Allowance (once only at a given percentage) in respect of capital expenditure on:-

   - Hotel sector on the buildings, which are certified as Industrial Building under the Act; 100%.
   - Ordinary manufacturing sector on both machinery and buildings;100%
   - Manufacture under bond on both machinery and buildings (within major towns); 100%.
   - Power-driven ships owned by residents where the ship is of more than 125 tons; 100%.

- Capital Equipment purchased and used by a local film producer; 100%.
- Capital expenditure incurred on construction of liquified petroleum gas storage facility – 150%

Transfer pricing

Companies that have inter-company transactions with related third parties outside Kenya have an obligation to maintain a transfer pricing policy. Transfer pricing documentation shows whether a company's transactions with these related entities have an arm's length price.

Value added tax (VAT)

This is an indirect tax imposed on the supply of goods and services and it is primarily regulated through the Value Added Tax Act. The tax is passed on to the ultimate consumer of the goods or the recipient of the service. The prevailing VAT rates are; the general rate (16%), petroleum products (8%) and zero rate (0%).

The Commissioner of Taxes may appoint any taxpayer as a withholding VAT agent in which case the person so appointed would be under an obligation to withhold 6% of the taxable value and remit it to the revenue authority on or before 20th of the month after that in which the supply was made.

Value added tax is applicable on;

- Supply of goods and services that are taxable – these refers to goods and services that are not exempt from VAT;
- Importation of taxable goods; and
- Importation of taxable services.

Registration

A person who makes or expects to make supplies that are subject to VAT whose value exceeds five million shillings over a twelve-month period is liable to register for VAT. On being registered for VAT, the registered person will be able to claim input tax arising from purchases as against the output VAT (arising from sales).

Accounting for VAT

VAT is due monthly and should be remitted on or before the 20th day of the month after that in which the supply took place. A VAT return should be filed monthly by persons registered for VAT. The due date for submitting returns is on or before 20th of the month following that which the supplies were made.

Interest and penalty for late filing of returns

Failure to submit and late submission of returns or submission of payment returns without payment of the tax due is liable to a default fine of Kshs 20,000 or 5% of tax due, whichever is higher.

Interest and penalty for late payment of VAT

A penalty of 20% applies on shortfall of taxes paid if the shortfall was not deliberate and 75% on the shortfall if it is deliberate. Interest of 2% per month or part thereof is also levied on the amount remaining unpaid after the due date.

Excise duty

Excise Duty is an indirect tax and it applies on select goods and services.

Examples of excisable goods include cigarettes, certain beauty products, water, food supplements, spirits, etc and examples of excisable services include money transfer, mobile cellular phone services, other wireless telephone services, etc. The excise duty rates are prescribed for each good or services.

Excise Duty returns should be filed on or before 20th of the subsequent month and the excise duty should also be remitted on or before the 20th of the subsequent month.

Customs duty

Customs Duty is enforced in East Africa by the East African Community Customs Management Authority for all the member states of the region. This authority works with the Revenue Authorities in the respective East Africa Community countries to enforce customs duties and to collect the customs duty.

Miscellaneous

There are other matters that do not exactly fall under taxation or business registration but are relevant to a person doing business in Kenya. These are discussed below;

County government levies

Kenya uses a devolved system of Government with some functions and powers being vested in the County Governments. For this reason, every County has its own revenue collection mechanisms, and these include charging rates and rent on property, charging for permits and licenses, costs for advertising among other levies.

General Employment Matters

Health Insurance

It is mandatory for every employer to remit funds to the National Hospital Insurance Fund (NHIF) on behalf of employees. All persons with an income of more than one thousand shillings should be registered with NHIF.

The employer has an obligation to remit the amounts to NHIF on or before the 9th date of the subsequent month. The penalty for later payment is 5 times the amount that should have been remitted. The NHIF rates are on a graduated scale.

Social security

The Government's National Social Security Fund (NSSF) is a fund to which all employers must remit retirement contributions for employees. The deadline for remittance is 15th of the month following. Late payment of NSSF contributions expose the employer to a penalty of 5% of the due amount.

National industrial training authority (NITA)

Every employer is under an obligation to contribute fifty shillings (Kshs. 50) per employee to the national authority tasked with industrial training.

Work injury benefits insurance

Every employer is under an obligation to take up an insurance cover over employees against work-related injuries.

Land ownership in Kenya

Citizens can own land either as freehold or leasehold. Non-citizens may hold land for a leasehold period not exceeding 99 years. A company is regarded as a citizen if it is owned entirely by Kenyan citizens.

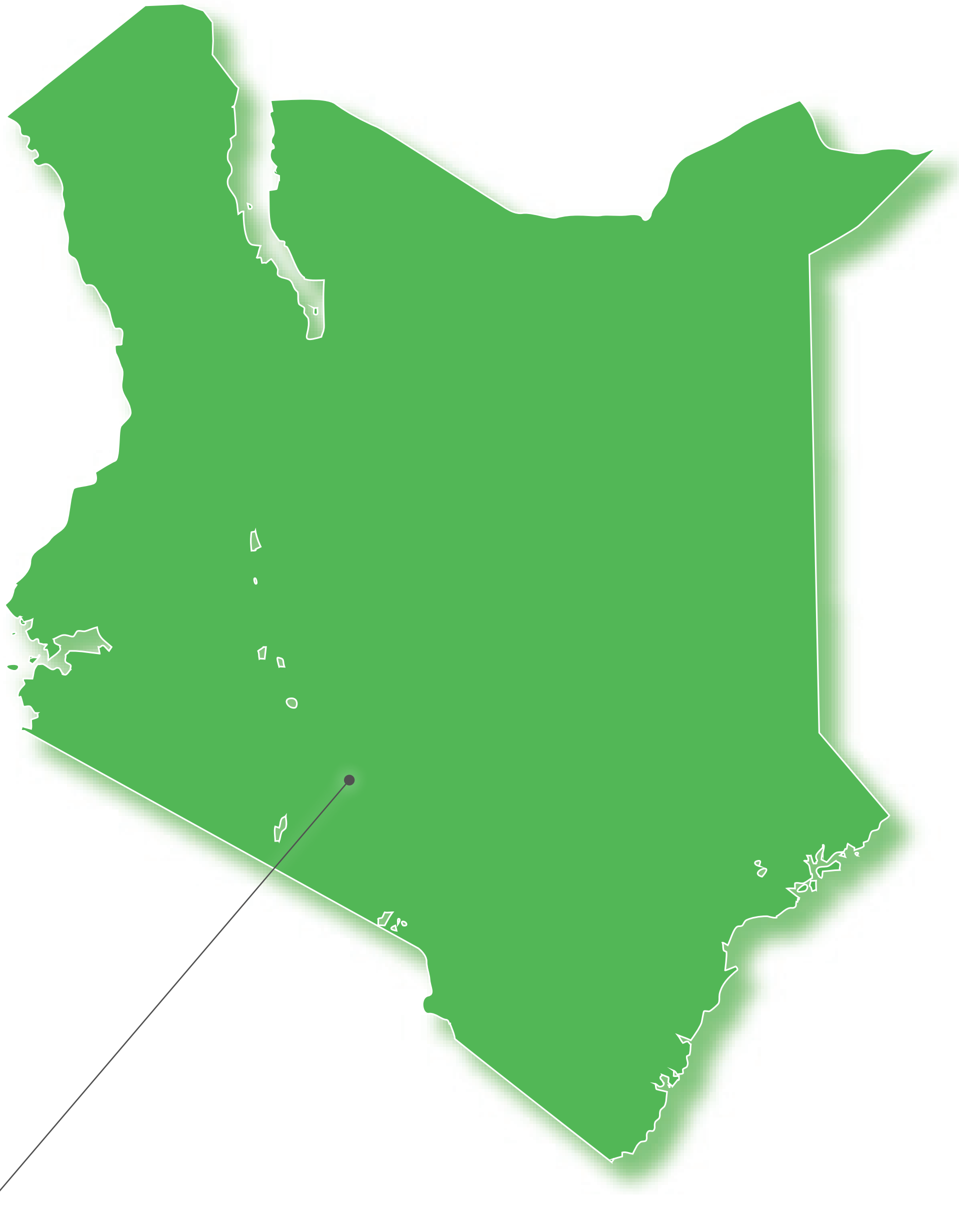
The Government has digitized transactions concerning land to enable online transactions through the Government's eCitizen platform.

This document is provided by KKCO East Africa as a general overview of matters to be considered when setting up an overseas business in Kenya. It is essential to take advice on specific issues. No liability can be accepted for any action taken or not taken arising from the information provided in this publication.

If you are setting up a business in Kenya, the members of DFK International can help you to achieve this efficiently. You will receive practical advice on business issues, tailored to meet your objectives, from experienced business advisers.

For further information on the services available from the DFK member firms in Kenya please see overleaf.

Last updated April 2019



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