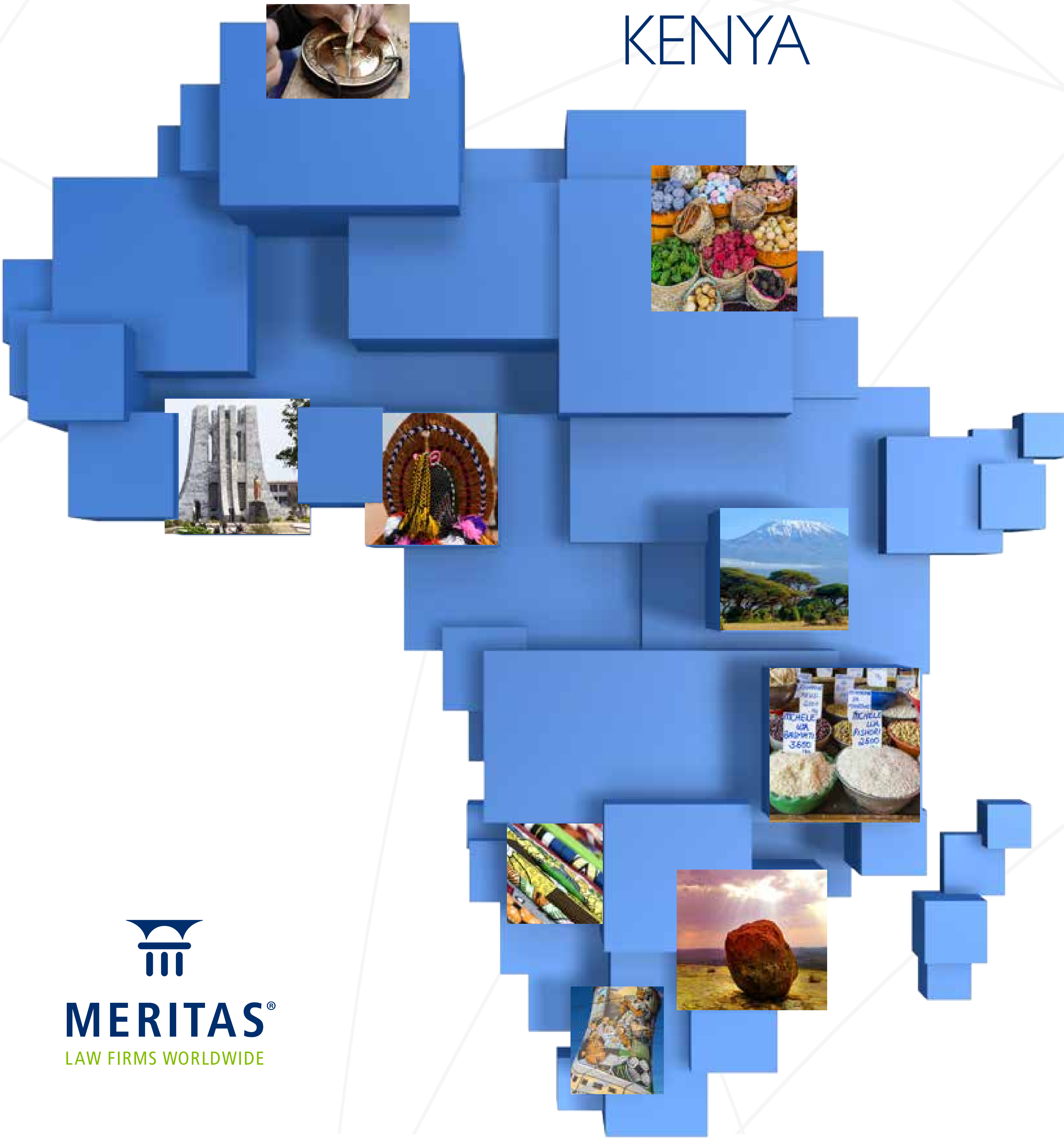
AFRICA

A Legal Guide for Business Investment and Expansion

KENYA



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1. What role does the government of Kenya play in approving and regulating foreign direct investment?

There is no regulation on foreign direct investment in Kenya except in specific sectors where state corporations have a monopoly (such as firearms, currency printing and port infrastructure). There are specific governmental agencies that promote and assist foreign investment and they include the following:

- the Kenya Investment Authority (KenInvest) assists companies in setting up their businesses in Kenya and promotes investment in the country;
- the Export Processing Zones Authority issues licences to companies wishing to set up in the Export Processing Zone (EPZ) zones;
- the Ministry of Mining issues licences to companies in the extractives sector;
- the Kenya Industrial Property Institute administers intellectual property in Kenya;
- the Kenya Revenue Authority (KRA) is charged with the responsibility of collecting revenue on behalf of the Government of Kenya.

2. Provide advice on best entry strategies to employ in Kenya and common corporate structures used.

Limited Liability Companies. The most common forms of business vehicles used by foreign investors in Kenya are Private Limited Liability Companies as they are relatively inexpensive to establish and there are no minimum or maximum share capital requirements. This type of company is legally required to have one director but will usually have at least 2 directors for practical purposes. It is required to have at least 1 shareholder in a one-man company. Kenya's Companies Act, 2015 mirrors the UK's Companies Act, 2005.

Branches of foreign companies. It is also relatively common for foreign enterprises to set themselves up in Kenya as branches of foreign companies. Branches of foreign companies are liable to be charged corporate tax at 37.5% (as compared to Kenyan Companies which pay corporate tax at a rate of 30%).

Limited Liability Partnerships. Limited Liability Partnerships (LLPs) are partnerships that enjoy unique benefits. They have several advantages over companies incorporated under the Companies Act. LLPs differ from ordinary partnerships in that they accord the players a separate legal identity and also give the arrangement a corporate identity but they are treated as a tax transparent vehicle by the revenue authority

3. How does the Kenya government regulate commercial joint ventures between foreign investors and local firms?

There is no regulation on commercial joint ventures in Kenya.

4. How does the Kenya government regulate proposed activities by foreign investors and are there any areas of the economy where they are prohibited (e.g., natural resources, energy, telecommunications or real estate)?

There are very few restrictions on foreign ownership of businesses in Kenya. The following sectors are restricted:

- Aviation: 51% of the voting rights of a body corporate or partnership must be held by the state or a citizen of Kenya or both.
- Insurance: For insurers, the Insurance Act provides that a minimum of one third of the paid-up capital of an insurer should be owned by Kenyan citizens, or partnerships whose partners are all citizens of Kenya, or wholly owned by citizens of Kenya, or wholly owned by the Government. The Act further requires that one third of the members of the Board of Directors be citizens of Kenya.

For purposes of insurance brokers, the Insurance Act requires that 60% of the paid-up share capital of an insurance broker shall be owned by Kenyan citizens or partnerships whose partners are citizens of Kenya or by corporate bodies whose shares are wholly owned by citizens of Kenya or wholly owned by the Government of Kenya.

- Telecommunications: In order to be licensed in Kenya in this sector, a company is required to issue at least 20% of its shares to Kenyans on or before the expiry of three years after issuance of a licence.

- Land: According to the Land Control Act, any transaction to sell, transfer, mortgage or dispose of agricultural land, or deal with any shares of a private company which for the time being owns such land, can only be conducted by Kenyan citizens or a private company, all of whose members are citizens of Kenya. It is worth noting that there are currently no restrictions on the ownership of non-agricultural properties by foreign citizens or entities, except that foreigners can only have a maximum of 99 years of leasehold in such land.
- Financial institutions: Only banks, financial institutions, the Government of Kenya, foreign governments, state corporations, foreign companies licensed to operate as financial institutions, and non-operating holding companies approved by the Central Bank, may hold more than 25% of the share capital of a financial institution.
- Mining: The new Kenya Mining Act 2016 provides for the Cabinet Secretary to prescribe limits on local equity participation. It remains to be seen what these are. Preference is, however, to be given to local products. The holder of a mineral right shall, in any dealings in minerals, give preference to the maximum extent possible to materials and products made in Kenya, to services offered by Kenyan citizens, and to companies or businesses owned by Kenyan citizens. The old Mining Act provided a requirement of 35% local equity participation for all mineral rights. A mineral dealer's permit was at the time only to be issued to Kenyan citizens or in the case of a legal entity, only where 60% of the shareholders are Kenyan citizens. However, this is not the case now.
- Engineering: A foreign firm may only be registered as an engineering consulting firm if the firm is incorporated in Kenya and a minimum of 51% of its shares are held by Kenyan citizens. Individuals may only be registered as professional engineers if they are resident in Kenya and hold a valid working permit.
- Architecture: In order for architects to practise as limited liability companies, they must be registered in Kenya and have met certain requirements including having had a minimum of one year of professional experience in Kenya to the satisfaction of the Board of Registration of Architects and Quantity Surveyors, or have satisfied the Board that they have otherwise acquired an adequate knowledge of Kenya building contract procedures.

5. How do labour statutes regulate the treatment of local employees and expatriate workers?

The Employment Act (No. 11 of 2007) and The Labour Relations Act (No. 14 of 2007) may be relevant if there is to be a termination of employment or if workers are to be made redundant. There is no automatic transfer of employment contracts to an acquirer on a business combination except where the employer company is taken over, in which case there is no change of employer, merely a change in its shareholders. It is common for the terms of the transaction agreements to provide for the acquirer of business assets to undertake to offer to hire all staff of the business on like terms and to honour all past-service obligations on condition that the employees waive their rights to receive terminal payments. If the acquirer does not take on some of the employees (or all of them), the company would have to terminate and compensate.

Immigration Act. Expatriates who want to work in Kenya are required to obtain a work/entry permit under the Immigration Act (Chapter 172, Laws of Kenya). These permits are categorized according to the areas of work to be undertaken. An entry permit holder can apply to be granted a dependant's pass for each of his dependants. If the application is approved by the immigration officer, an entry permit will be issued subject to the payment of a fee (which varies depending on the class issued). The period of validity of an entry permit or its renewal is at the discretion of the immigration officer but is restricted under the regulations to the Immigration Act to a period not exceeding five (5) years from the date of issue or renewal. In general, a permit is for two (2) years. A person wishing to enter Kenya for the purpose of conducting any business, trade or profession can make an application to an immigration officer for a visitor's pass. The validity period for a visitor's pass is six (6) months from the date of the person's entry into Kenya. The validity of a visitor's pass may be extended by an immigration officer for such further periods as the officer may determine. However, such an extension will at no time exceed six (6) months.

6. Capital availability and access considerations in Kenya – any major capital, infrastructure or labour constraints to be aware of and strategies to mitigate?

None outside those already discussed.

7. What types of taxes, duties, and levies should a foreign investment in Kenya expect to encounter?

Withholding tax was introduced into Kenya in 2012. It is tax which is payable in respect of the amount or value of the consideration from the sale of property.

This tax is payable at the rate of 20 per cent for payments to non-resident persons and 10 per cent for payments to resident persons. With the exception of the above, there have not been any recent major overhauls of the tax legislation with respect to foreign investment, and all businesses would be subject to the following taxes; income tax, corporate tax, customs and excise dependent on the sector of operations.

8. What are the main IP law provisions likely to be most relevant to inbound investors and/or foreign imports and their distributors (e.g. trademark protection, licensing, other)?

Kenya has a comprehensive legal framework to ensure intellectual property rights (IPR) protection. These include the Anti-Counterfeit Act, the Industrial Property Act, the Trade Marks Act, the Copyright Act, the Seeds and Plant Varieties Act, and the Universal Copyright Convention. Kenya is a member of the World Intellectual Property Organization (WIPO) and of the Paris Union (International Convention for the Protection of Industrial Property), along with the United States and 80 other countries. The African Intellectual Property Organization (AIPO) embodies a future prospect for patent, trademark, and copyright protection, although its enforcement and cooperation procedures are still untested. Kenya is a member of the African Regional Intellectual Property Organization (ARIPO). Kenya is also a signatory to the Madrid Agreement Concerning the International Registration of Marks.

9. If a commercial dispute arises, will local courts or will international arbitration offer a more beneficial forum for dispute resolution to foreign investors?

The court system is slow and expensive in Kenya, with some cynicism about the objectivity of certain executive and judicial branch decisions. Recent major reforms in the judicial system in Kenya have been targeted at addressing these challenges. There are dedicated commercial courts of the status of high courts. The delays and legal costs involved in solving disputes through courts have seen the emergence of alternative dispute resolution methods such as arbitration and mediation. Kenya is a signatory to the 1958 New York Convention and has adopted the UNCITRAL model of arbitration. There is also an active local chapter of the Chartered Institute of Arbitrators. Kenya also recently established the Nairobi International Arbitration Centre which mirrors the London Court of International Arbitration modalities and operations. Parties can agree on the criteria that this arbitration tribunal must have so that complex issues are only heard by suitably qualified arbitrators.

10. What laws and business practices are peculiar to Kenya?

There are no special requirements imposed on foreign investors. All investors (foreign and local) receive the same treatment in the initial screening process. The particular sector regulations are as discussed herein.

11. What are the regulations, protocol, and practicalities around public procurements and financing in Kenya?

Public procurement in Kenya is regulated by the Public Procurement and Asset Disposal Act. The Act contains all the regulations and protocols for public procurement but there are no restrictions or regulations on financing those projects.

12. What kind of actions should investors take to avoid corrupt practices in Kenya?

Kenya has recently enacted the Bribery Act 2016 which creates a legal obligation (statutory duty to act) on a person holding authority in a private entity, who becomes aware of an act of bribery, to report the matter to the Ethics and Anti-Corruption Commission within 24 hours. The Act requires all public or private entities to put in place appropriate measures to prevent bribery and corruption. Directors or senior officers of private entities who fail to take such prevention measures are liable of committing punishable offences.

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