

International Comparative Legal Guides



Practical cross-border insights into gambling law

Gambling 2023

Ninth Edition

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1 Relevant Authorities and Legislation

1.1 Which entities regulate what type of gambling and social/skill gaming activity in your jurisdiction?

Relevant Product		Who regulates it in digital form?	Who regulates it in land-based form?
Gaming	Casino gaming (including slots and casino table games such as roulette & blackjack)	Betting Control and Licensing Board (BCLB).	
	Poker		
	Bingo		
Betting	Betting	BCLB.	
	Sports/horse race betting (if regulated separately to other forms of betting)		
	Fantasy betting (payment to back a 'league' or 'portfolio' selection over a period of time, for example in relation to sport or shares)		
Lotteries	Lotteries	BCLB.	
Social/Skill arrangements	"Social" gaming with no prize in money or money's worth	BCLB.	
	Skill games and competitions with no element of chance		

1.2 Specify: (i) the law and regulation that applies to the Relevant Products in your jurisdiction; and (ii) – in broad terms – whether it permits or prohibits the offer of Relevant Products to persons located in your jurisdiction.

A series of laws and regulations apply when operating under the licence of any product. Some of the direct and indirect laws and regulations include: the Betting, Lotteries and Gaming Act (BLGA); the Betting, Lotteries and Gaming Regulations; the Bribery Act; the Bribery Regulations; the Computer Misuse and Cybercrimes Act; the Consumer Protection Act; the Constitution of Kenya; the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021; the Data Protection (General) Regulations, 2021; the Data Protection (Regulation of Data Controllers and Data Processors) Regulations, 2021; the Data Protection Act; the Income Tax (Transfer Pricing) Rules, 2006; the Excise Duty Act; the Kenya Citizenship and Immigration Act; the Kenya Citizenship and Immigration Regulations, 2012; the Kenya Information Communication Act; the Proceeds of Crime and Anti-Money Laundering Act; Proceeds of Crime and Anti-Money Laundering Regulations; the Betting, Gaming and Lotteries (Regulations), 2019; the Income Tax Act; the Trade Mark Rules; the Trade Marks Act; the Unclaimed Financial Assets Act; the Unclaimed Financial Assets Regulations; and the Value Added Tax Act.

Generally, the obligations under the regulatory framework are distributed between the National and County Governments, whereby the former focuses on licensing to allow operation in Kenya, while the latter provides an equivalent of business permits or licences to operate within its jurisdiction. The County Government will issue various approvals, permits or licences based on the product to be offered, size of the premises, number of employees, location of the premises, and other products provided or sold other than those directly regulated by the BCLB.

The laws and regulations provide operational structures for an entity interested in offering a product in the Kenyan market. The regulatory framework only provides guidance on how to offer products to the public in the best way based on underlying socio-economic and political factors. Therefore, whether the laws or regulations of Kenya are investor friendly or not, in terms of permitting or prohibiting operations, depends on a comparative analysis of what other similar jurisdictions have under their regulatory framework.

2 Application for a Licence and Licence Restrictions

2.1 What regulatory licences, permits, authorisations or other official approvals (collectively, "Licences") are required for the lawful offer of the Relevant Products to persons located in your jurisdiction?

If the investor is a natural foreigner and would like to take an active role in the entity's management, the person will be required to apply for an investor permit or a work permit from the Directorate of Immigration Services.

The National Government, through the BLGA, will, upon approval, issue licences or permits concerning amusement machines, amusements with prizes at specific commercial entertainment venues, amusements with prizes at certain non-commercial entertainment venues, authorisation to advertise, betting premises, bookmakers (on the course, off the course or on and off the course), bookmakers race meetings, exemptions on small lotteries, games of chance, gaming machines, lotteries for charitable purposes, lotteries for sports, lotteries on horse racing, pool betting schemes, private lotteries, prize competitions, public gaming premises, public lotteries for charitable purposes, remote gaming including short message service (SMS) games and promotions, and totalisator licences (on the course, off the course or on and off the course).

Data handlers, including both controllers and processors, will be required to apply for a certificate from the Office of the Data Protection Commissioner (ODPC) of the Republic of Kenya.

The BCLB-licensed entity must comply with the County Government regulatory requirements of the location where it intends to set up its physical address. The County Government permit or licence will – among other things – factor in the activity code and description, the total area of the premises in square metres, and health codes and fire hazards.

2.2 Where Licences are available, please outline the structure of the relevant licensing regime.

The National and County Governments provide various authorisations to ease the operation of an entity dealing in gambling. The issuance of the operating licence to operate a gaming business is reserved for the National Government, while the County Government is accorded the obligation to ensure compliance with applicable County-specific regulations.

The National Government provides the primary operation licence or permits, while the County Government, upon securing the relevant permit or licence, has requirements in relation to health and safety, number of staff and location. Moreover, a County like Nairobi County will provide various gaming-related licences or permits.

2.3 What is the process of applying for a Licence for a Relevant Product?

An investor must seek advice on the corporate and management structure and the regulatory framework. Once an investor has a clear understanding of what it intends to go for in the market, the following are the key steps to follow:

s 5 of the BLGA requires an applicant to apply in the prescribed form and manner. The regulator reserves the right to ask for additional documents and declarations or conduct any investigation to assess the application comprehensively. As already

indicated, both the National and County Governments regulate gambling, as such, the BCLB will issue a copy of the application to the relevant County Government regulator that the applicant would like to operate to allow the County Government regulator to have a chance to object or make any recommendations on the intended licence. s 5A of the BLGA provides more stringent measures for applicants interested in securing a licence or permit to operate a casino.

The BCLB will require security in the form of funds. The security will not exceed KES. 40,000. The amount is refundable; however, it may be forfeited by the BCLB pursuant to s 64 of the BLGA.

2.4 Are any restrictions placed upon licensees in your jurisdiction?

There are direct and indirect restrictions on a licensee. The direct restrictions are provided under the operational law, in this case, the BLGA, and the pre-conditions or conditions the board places upon the licensee.

On the other hand, there are different laws that one must be aware of, such as the Data Protection Act, the Consumer Protection Act and the Computer Misuse and Cybercrimes Act, to mention a few. Further, each County Government has its own regulations with regard to certain products; therefore, entities must consider these when setting up operations.

A certain degree of gaming (games of chance or of chance and skill combined) that is carried out incidentally as entertainment may be considered lawful if carried out as per the BLGA; there is a restriction on the number of gaming machines available for play per premises; for lotteries, the regulator may impose restrictions on the proceeds that may be utilised for the purpose of the lottery outside Kenya; and there are limitations on where one can tout or solicit with a bookmaker, where liquor can be sold, supplied or consumed.

2.5 Please give a summary of the following features of any Licences: (i) duration; (ii) vulnerability to review, suspension or revocation.

The National Government, through the BCLB, will issue a 12-month licence that runs from 1 July to 30 June of the coming year, save where the BCLB advises otherwise. The licence is issued with pre-conditions to which the licensee or applicant must adhere throughout the duration of the licence. Non-compliance with the pre-conditions and other regulatory frameworks may lead to grounds for review, suspension or revocation.

The BCLB and the County Government will always conduct various *impromptu* inspections during the duration of the licence to confirm compliance. Therefore, in the event of non-compliance, a licence may be varied, cancelled or suspended, even before its statutory expiry date.

2.6 By Relevant Product, what are the key limits on providing services to customers? Please include in this answer any material promotion and advertising restrictions.

The Government of Kenya adopts strategic measures to control various activities in the gaming industry. s 25 of the BLGA requires prior authorisation of any advertisement that a licensee would like to publish – however, it is not clear how this provision is applied to product placement as currently being done by influencers.

One of the County Governments in Kenya, Nairobi County, has enacted the Nairobi City County Betting, Lotteries and Gaming Act, 2021, which provides various operational provisions such as protection of minors in relation to betting-related advertising. Breaching that provision may result in a fine not exceeding KES. 200,000 or imprisonment for a term not exceeding three months, or both.

2.7 What are the tax and other compulsory levies?

There are direct and indirect taxes. The direct taxes include corporate tax at 30% for local/subsidiary companies and branch offices at 37.5%, Pay As You Earn (PAYE), taxation on winnings, National Social Security Fund (NSSF), National Hospital Insurance Fund (NHIF), National Industrial Training Authority (NITA) levy, application of Transfer Pricing Rules on a local level and Organisation of Economic Co-operation and Development (OECD) standards when paying for white-label Platform as a Service (PaaS) or Software as a Service (SaaS), while indirect taxes may include Value Added Tax (VAT) and Excise Duty.

A VAT obligation arises when making or expecting to make (within 12 months) taxable supplies worth KES. 5 million. Regardless, in relation to business-to-business interactions, some businesses may prefer dealing with a business with VAT obligations, which may push for early registration for VAT.

2.8 What are the broad social responsibility requirements?

There are two types of social responsibility in Kenya. The first is statutorily mandated, while the second comprises corporate public relations and affairs activities through Corporate Social Responsibility (CSR). The former applies to a gambling entity based on the licence secured, while the latter is more for visibility and association-based practice.

The BLGA provides for at least 25% of gross proceeds to be subjected to the object of the lottery being promoted. It means that the BCLB may require the percentage to be higher than 25%. Failing to comply with the statutory or statutory backed pre-conditions is an offence. There are unique circumstances whereby the whole proceeds for specific lotteries being conducted for charitable, sporting and approved purposes by the BCLB will be applied for that particular activity.

CSR that is not statutorily backed is subject to the terms of the entity offering the CSR. It can be terminated without legal ramifications, except where the contracts provide remedies. Also, there are usually socio-economic and political ramifications.

In addition, the Government, through the Ministry of Sports, Culture and Heritage, operates the Sports, Arts and Social Development Fund for developing the sports industry in Kenya. The Fund receives contributions from taxes collected by the Kenya Revenue Authority from licensed entities and players as per the BLGA.

2.9 How do any AML, financial services regulations or payment restrictions restrict or impact on entities supplying gambling? Does your jurisdiction permit virtual currencies to be used for gambling and are they separately regulated?

The Government is keen to apply laws that have both local and international obligations, including in relation to anti-money laundering. Since e-money through mobile wallets has a high penetration rate in Kenya, most gambling-focused companies

heavily rely on online deposits through e-money. In the event the BCLB is of the view certain compliance issues require suspension of operation, the BCLB would issue directives to telecommunication service providers offering Customer to Business (C2B) deposit channels to lock the payment channels.

The Central Bank of Kenya (CBK) reserves the right to address the legality or illegality of virtual currencies. In February 2022, CBK released a paper requiring public participation on the viability of launching a Central Bank Digital Currency (CBDC). This is the closest CBK has entertained the concept of virtual currency since the caution it released in December 2015 (in which it cautioned the public and indicated that no entity is licensed to provide services pertaining to virtual currencies, but also stated that virtual currencies are not regulated in Kenya).

Considering CBK's position on virtual currencies, other Government agencies do not permit the use of virtual currencies.

2.10 What (if any) restrictions were placed during the COVID-19 pandemic? Are they still in force?

The Government of Kenya issued nine-point restrictions on 15 March 2020, after the first known case of COVID-19 was reported in Kenya on 13 March 2020. Some of the initial measures included the suspension of travels inbound from countries with cases of COVID-19 (inbound visitors who are Kenyans or foreigners with valid resident permits would be allowed in as long as they self-quarantine), suspension of learning at all educational facilities, employers being permitted to allow remote working for placements that can be carried out remotely, and encouraging the use of cashless transactions.

Some restrictions had an impact on the gaming industry as the Government did stop in-person activities; therefore, lack of sports (like football) directly affected the gambling industry. Other applicable measures include the mask mandate, availability of sanitisation points in various publicly accessible points, and intercountry travel restrictions, which were lifted progressively. In 2022, the Health Cabinet Secretary lifted the mask mandate and relaxed other key conditions but still encouraged the public to consider taking safety measures, such as putting on masks when attending indoor functions. The Government also eased the polymerase chain reaction (PCR) test requirement while indicating that the unvaccinated would be subjected to antigen tests at their own cost. However, the Government reserved the right to revise any of its directives in light of any new developments.

3 Online/Mobile/Digital/Electronic Media

3.1 How does local law/regulation affect the provision of the Relevant Products in online/mobile/digital/electronic form, both from: (i) operators located inside your jurisdiction; and (ii) operators located outside your jurisdiction?

The Betting, Lotteries and Gaming (Online Gaming) Regulations, 2019, provide room to address some critical gaps under the BLGA. While factoring in other regulatory provisions, an operator outside the Kenyan jurisdiction must establish and maintain an in-house customer care centre within Kenya. The customer care centre is meant to monitor and provide relevant feedback to queries posed by players.

The requirement to have a customer care centre should be read together with the Data Protection Act and its subsidiary legislation in terms of being a data handler and storing data concerning Kenyan citizens.

Recent developments have been in relation to the revision of various taxes on mobile phones and airtime, which resulted in hiked prices, while for the latter, where the price remained constant, the package quantity/value may have been reduced. Although a small number of gambling games rely on SMS, hence, are viable for feature phones, most games that are appearing on the market require smartphones and access to cheap data. However, the tax revision may limit access to smartphones and cheap data. Therefore, while the revision of taxes in relation to phones and data did not directly target gambling entities or players, the same has a direct effect on the industry.

3.2 What other restrictions have an impact on Relevant Products supplied via online/mobile/digital/electronic means?

The Data Protection Act and its subsidiary legislation provide measures on data collection and processing. The requirement to secure consent from a data subject is meant to give a data subject more control. Data brokers had tendencies of selling contact details to various entities, which resulted in unsolicited marketing.

The Consumer Protection Act, among other restrictions, provides that no gaming site can advertise any gaming unless it complies with the applicable laws. An advertisement that is contrary to the Consumer Protection Act may originate from Kenya or target the Kenyan market. This provision must be read together with other laws on gaming activities. For the purposes of s 11 of the Consumer Protection Act, the term “advertisement” includes the printing, publication, broadcast, telecommunication or distribution, by any means, of information to promote the use of an internet gaming site.

The Proceeds of Crime and Anti-Money Laundering Act requires similar entities to incorporate measures that curb the possibility of money laundering activities. The measures include developing statutory bare minimum know-your-client (KYC) standards for sign-up and requiring verification processes.

The Computer Misuse and Cybercrimes Act (CMCA) provides for various deterrent measures on actions such as unauthorised interference, false publication, computer forgery and computer fraud, to mention a few. The application of the CMCA will affect a licensee that engages in such activities. Some of the offences have fines of up to KES. 20 million (for natural persons), KES. 50 million (for juridical persons) and imprisonment of up to 10 years.

3.3 What terminal/machine-based gaming is permitted and where?

The regulatory body, the BCLB, reserves the right to authorise the use of gaming machines in a facility that it has approved, and the County Governments – like the Nairobi County Government – have put in place laws requiring the use of approved gaming machines only.

The regulator may authorise the use of gaming machines in reference to a game of chance that is purely machine automated, and the player is not required to take any action. Also, the regulator may permit the use of amusement machines and a totalisator machine.

The regulator reserves the right to assess the premises that an applicant would like to use for that particular type of gaming machine, which minors should not wholly or mainly use.

4 Enforcement and Liability

4.1 Who is liable under local law/regulation?

Depending on the offence, liability may be against a company or natural person.

4.2 What form does enforcement action take in your jurisdiction?

The BCLB will adopt statutorily provided measures such as imprisonment, suspension, cancellation, varying the licence or permit, or the application of statutory fines.

4.3 Do other non-national laws impact upon liability and enforcement?

Directly, no. Indirectly, under the Financial Action Task Force (FATF), Kenya implements international anti-money laundering recommendations as part of the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

4.4 Are gambling debts enforceable in your jurisdiction?

There is no clear regulatory framework. However, as one of the critical principles of establishing a contract is the legality of the purpose of the contract, if no law prohibits the issuance of a facility for gambling and other principles on forming a contract are achieved, then a person may take legal action to secure a contractual right.

4.5 What appetite for and track record of enforcement does your local regulatory authority have? Have fines, licence revocations or other sanctions been enforced in your jurisdiction?

The BCLB takes action directly or indirectly by utilising its authority under the applicable law or collaborating with other Government agencies to ensure compliance. For instance, in 2022, the Communications Authority indicated that non-compliant entities would not be able to collect payments, as any entity licensed by the Communication Authority must deactivate the payment channel.

5 Anticipated Reforms

5.1 What (if any) intended changes to the gambling law/regulations are being discussed currently?

The National Government is discussing the provision of new legislation that catches up with the numerous developments in the gambling industry. The Gaming Bill 2020 (NA No. 38 of 2019) legislation is anticipated to address gaming while factoring in socio-economic factors comprehensively.

The Constitution provides that both the National and County Governments have a role in betting, casinos and other forms of gambling. Therefore, the legislature's intention with the Gambling Bill is to crystallise the functions between the

two Government systems and how best they can regulate the gambling industry.

The Gaming Bill is comprehensive, providing the public and investors with a clear understanding of the applicable provisions in relation to gambling products, particularly remote gaming. This clarity on the regulatory framework enhances investor confidence in the market.

County Governments can come up with a regulatory framework on gambling matters. Nairobi County – after discussions – enacted the Nairobi City County Betting, Lotteries and Gaming Act, 2021.

There is a disagreement between the regulator and Nairobi County concerning the intended amendment of the Nairobi City County Betting, Lotteries and Gaming Act, 2021, through the Nairobi City County Betting, Lotteries and Gaming (Amendment) Act, 2021. Some of the proposals under the proposed amendment are the introduction of watershed hours, whereby gaming activities, including online gaming, are to be conducted between 8:00 PM to 6:00 AM; betting, lotteries or gaming is to be undertaken at or within five-star hotels as rated by the Tourism Regulatory Authority.



Ombo Malumbe is a Partner at Ong'anya Ombo Advocates LLP focusing on corporate, commercial and cross-border matters. He has provided strategic and deal structuring advice to some of the new and most complex transactions in Kenya, such as the intended cross-listing of a US company in Kenya, and structured a deal that saved a UK client from being scammed US\$ 21 million by scammers focusing on the buyers' hard commodities from East Africa.

He has advised on compliance and structuring in matters involving aviation engine leasing transactions, the Capital Markets Authority, CBK, the Communications Authority, tax structures, the competition authority, gaming laws, corporate data structuring, share & asset acquisition transactions, and Turnkey Product Development (pre-designing, mass manufacturing in China and distribution in the USA as per ASTM and CPSC). Ombo is a member of the Law Society of Kenya's Committee on Cross-Border Practice & Immigration.

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We have been highly recommended as a business law firm by *Leaders League* (2022), ranked by *ITR World Tax* (2023), called the best law firm in Corporate Structuring, Immigration, and IP Law by *Global Law Experts* (2022), and a finalist for awards by *African Legal Awards* in the following

categories: IP Team of the Year (2021); Competition & Regulatory Team of the Year (2022); and CSR, Diversity, Transformation and Economic Empowerment Award (2022).

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