

Kenya

Ong'anya Ombo Advocates LLP



Ombo Malumbe



Jack Ong'anya

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.

Operating under a product licence entails compliance with a comprehensive set of laws and regulations. These encompass both direct and indirect regulations, namely the: Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021; Betting, Gaming and Lotteries (Regulations) 2019; Trade Marks Act; Betting, Lotteries and Gaming Regulations; Income Tax Act; Bribery Act; Income Tax (Transfer Pricing) Rules 2006; Kenya Citizenship and Immigration Regulations 2012; Excise Duty Act; Unclaimed Financial Assets Act; Computer Misuse and Cybercrimes Act (CMCA); Constitution of Kenya; Data Protection Act; Unclaimed Financial Assets Regulations; Data Protection (Regulation of Data Controllers and Data Processors) Regulations 2021; Consumer Protection Act; Betting, Lotteries and Gaming Act (BLGA); Bribery Regulations; Kenya Information Communication Act; Data Protection (General) Regulations 2021; Proceeds of Crime and Anti-Money Laundering Act 2009; Value Added Tax Act; Kenya Citizenship and Immigration Act; Proceeds of Crime and Anti-Money Laundering Regulations; and Trade Mark Rules.

In this regulatory landscape, responsibilities are typically divided between the National and County Governments. The National Government primarily focuses on licensing for operations in Kenya, while the County Government issues business permits or licences within its jurisdiction. County authorities grant permits, approvals or licences based on factors such as the nature of the product, workforce size, premise size, location and any additional products offered beyond those directly regulated by the BCLB.

These laws and regulations establish the operational framework for entities seeking to introduce products to the Kenyan market. The regulatory framework provides guidance on the optimal approach to offering products to the public, taking into consideration underlying political and socio-economic factors. Consequently, the investor-friendliness of Kenya's laws and regulations, in terms of permitting or restricting operations, hinges on a comparative analysis with the regulatory frameworks of similar jurisdictions.

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 an investor from abroad wishes to actively participate in managing the entity, they must seek either an investor permit or a work permit from the Directorate of Immigration Services.

Under the authority of the BLGA, the National Government is responsible for granting licences and permits for various activities, including amusement machines, amusement activities with prizes at specific commercial and non-commercial venues, betting premises, advertising authorisation, private lotteries, public gaming premises, charitable lotteries, prize competitions, bookmakers (both on and off the course), bookmakers at race meetings, exemptions for small lotteries, gaming machines, games of chance, charitable lotteries, horse racing lotteries, sports-related lotteries, pool betting schemes, totalisator licences (on, off, or on and off the course) and remote gaming (including SMS games and promotions).

Data handlers, including both data controllers and processors, must obtain a certificate from the Office of the Data Protection Commissioner (ODPC) in the Republic of Kenya.

Furthermore, any entity licensed by the BCLB must adhere to the regulatory requirements of the County Government in the specific location where it plans to establish its physical presence. The County Government permit or licence will consider factors such as the activity code, description, total premises area in square metres, as well as health and fire safety codes, among other requirements.

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

The National and County Governments grant different authorisations to facilitate the functioning of gambling-related entities. The issuance of the core operating licence for gaming businesses falls under the jurisdiction of the National Government. Conversely, the County Government is responsible for ensuring adherence to locally applicable regulations.

The National Government issues the primary operating licences and permits, while the County Government, once the relevant permit or licence is obtained, imposes additional requirements related to health, safety, staffing levels and location. Additionally, in certain counties, such as Nairobi County, various licences and permits related to gaming are available.

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

Investors should seek guidance regarding the corporate structure and management framework, along with an understanding of the regulatory landscape. Once investors have a clear market strategy, the key steps outlined below should be taken.

Under Section 5 of the BLGA, applicants are required to submit their applications in the prescribed format. The regulatory authority retains the discretion to request additional documents, declarations or conduct investigations for a comprehensive assessment of the application. Notably, both the National and County Governments oversee gambling activities. Consequently, the BCLB will share a copy of the application with the relevant

County Government regulator chosen by the applicant, allowing the County Government regulator the opportunity to raise objections or provide recommendations regarding the intended licence. Section 5A of the BLGA outlines more stringent requirements for applicants seeking licences or permits to operate casinos.

Furthermore, the BCLB will request a security deposit in the form of funds, capped at KES 40,000. It is important to note that this amount is refundable, but it may be forfeited by the BCLB as per Section 64 of the BLGA.

2.4 Are any restrictions placed upon licensees in your jurisdiction?

There are both direct and indirect restrictions placed on licensees. Direct restrictions stem from the operational law, specifically the BLGA, and the preconditions or conditions imposed by the governing board.

In addition, it is essential to be aware of various other laws, including the Data Protection Act, the Consumer Protection Act and the CMCA, among others. Furthermore, each County Government has its set of regulations governing specific products, making it imperative for entities to consider these regulations when establishing their operations.

Under the BLGA, a certain level of gaming, whether games of chance or those involving a combination of chance and skill, may be deemed lawful if conducted as per its provisions. There are also restrictions on the number of gaming machines permitted per premises. When it comes to lotteries, the regulator may impose limitations on the use of proceeds generated from the lottery outside of Kenya. Additionally, there are constraints on activities such as touting or soliciting with bookmakers and the sale, supply or consumption of liquor, all of which have defined limitations.

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

Through the BCLB, the National Government issues a 12-month licence that holds from July 1st to June 30th of the following year, unless explicitly changed by the BCLB. This licence places specific terms and obligations upon the licensee or applicant, which must be followed throughout its validity period. Failing to meet these specified conditions or other regulatory requirements can lead to a review, suspension or complete revocation of the licence.

Unannounced inspections are conducted by both the BCLB and the County Government throughout the duration of the licence to confirm compliance. Consequently, if instances of non-compliance are identified, the licence may be subject to alteration, cancellation or suspension, even prior to its designated expiration date as mandated by law.

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 Kenyan Government has executed key measures to direct the gaming business. Section 25 of the BLGA specifies that earlier approval is important for any notices expected for distribution by licensees. Nonetheless, there is some ambiguity encompassing the utilisation of this arrangement, particularly concerning how it relates to item situation, especially when used by forces to be reckoned with.

Notwithstanding these guidelines, one of Kenya's Area Legislatures, Nairobi Province, has presented the Nairobi City District Wagering, Lotteries and Gaming Act 2021. This act covers a scope of functional arrangements, including safeguards for minors in connection with wagering-related promotional activity. Inability to agree with this arrangement can bring about punishments, which might incorporate fines not surpassing KES 200,000, detention for up to a term of 90 days, or a blend of both.

2.7 What are the tax and other compulsory levies?

In Kenya, the taxation landscape covers both direct and indirect taxes. Direct taxes encompass a range of elements, which include:

1. Corporate tax, fixed at a rate of 30% for local or subsidiary companies.
2. Branch office taxation, established at a rate of 37.5%.
3. Mandatory contributions to the National Hospital Insurance Fund (NHIF).
4. Levies designated for the National Industrial Training Authority (NITA).
5. Application of Transfer Pricing Rules, especially at the local level.
6. Obligatory contributions to the National Social Security Fund (NSSF).
7. Implementation of Pay As You Earn (PAYE) taxation.
8. Taxation applied to winnings.
9. Compliance with Organisation for Economic Co-operation and Development (OECD) standards when making payments for white-label Platform as a Service (PaaS) or Software as a Service (SaaS) solutions.

Additionally, with the assent of the Finance Act 2023, the Kenyan Government introduced a Content Creators Tax, where there is a remittance of 5% of tax from the income generated by Content Creators. There is also a compulsory housing levy that is funded jointly by employers and employees, with the aim of financing the National Housing Development Fund (NHDF). Employers are mandated to submit the following contributions:

1. 1.5% of the employee's monthly gross salary as the employer's contribution.
2. 1.5% of the employee's monthly gross salary as the employee's contribution.

On the contrary, indirect taxes encompass taxes like Value Added Tax (VAT) and Excise Duty. VAT responsibilities come into play when a company either makes or anticipates making taxable supplies totalling KES 5 million within a 12-month period. When engaging in business-to-business transactions, certain businesses might favour working with entities that are VAT-registered, as this can encourage prompt VAT registration.

2.8 What are the broad social responsibility requirements?

In Kenya, social responsibility falls into two categories. The first is legally required, while the second encompasses corporate public relations and engagement efforts known as Corporate Social Responsibility (CSR). The first type is applicable to gambling entities based on the specific licences they hold, while the latter is primarily focused on enhancing visibility and establishing affiliations.

Under the BLGA, a minimum of 25% of gross income must be allocated to the stated objective of the lottery being promoted. This means that the BCLB has the power to require a percentage higher than 25%. Failure to observe these statutory or legally

supported requirements constitutes an offence. Moreover, there are special circumstances in which the entire proceeds from specific lotteries organised for charitable, sporting and approved purposes by the BCLB are dedicated solely to that particular activity.

When it comes to CSR that lacks statutory support, it is subject to the terms set by the entity offering the CSR. Such initiatives can be concluded without incurring legal penalties, except in cases where contractual agreements specify remedies. Additionally, there are typically socio-economic and political repercussions involved. The Fund receives contributions from taxes collected by the Kenya Revenue Authority from licensed entities and players, as outlined in the BLGA. Furthermore, the Kenyan Government, through the Ministry of Sports, Culture and Heritage, administers the Sports, Arts and Social Development Fund, aimed at fostering the development of the sports industry in Kenya.

2.9 How do any AML, financial services regulations or payment restrictions restrict or impact on entities supplying gambling?

The recently accented to law amendments known as the Anti-Money Laundering and Combating of Terrorism Financing Laws (Amendment) Act 2023 has introduced more power and penalties to the supervisory authority. The penalties for corporate entities will not exceed KES 20,000,000 and KES 1,000,000 for natural persons.

Gaming entities have been required to register with anti-money laundering agencies, particularly the Financial Reporting Centre (FRC). The FRC was created by the Proceeds of Crime and Anti-Money Laundering Act 2009 to aid in identifying and combatting proceeds of crime and money laundering.

2.10 Does your jurisdiction permit virtual currencies to be used for gambling and are they separately regulated?

Kenya has for the first time provided provisions (Finance Act 2023) that regulate virtual currencies in the sense that a tax of 3% is applied to income through transfer or exchange of virtual currencies. Therefore, since the caution issued by the Central Bank of Kenya in December 2015, and the Central Bank Digital Currency (CBDC) 2022 conversation, the Finance Act 2023, gives the impression that the Kenyan Government is keen on taking advantage of the activities touching on virtual currencies.

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 of 2019 offer a means to address substantial shortcomings within the framework of the BLGA. When considering some regulatory requirements, operators who are based outside Kenya are obliged to establish and sustain an in-house customer care centre within the country. The primary purpose of this customer care centre is to supervise and respond to inquiries made by players. It is important to rehash the necessity for a customer care centre in conjunction with the Data Protection Act and its related regulations, especially regarding the role of being a data handler and the storage of data related to Kenyan citizens.

Recent developments have revolved around the alteration of taxes involving mobile phones and airtime and this has led to a hike in prices. In the case of airtime, even though prices have remained constant, there may have been reductions in package quantity or value. While a limited number of gambling games still rely on SMS and are suitable for feature phones, the majority of newly introduced games in the market require smartphones and access data bundles. Nevertheless, these tax revisions might bar access to smartphones and cost-effective data plans. Consequently, although the tax modifications regarding phones and data were not specifically directed at gambling entities or players, they have a direct influence 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 accompanying guidelines establish procedures for data collection and processing. Requiring consent from data collection schemes serve to grant individuals more control over their personal information. In the past, data brokers had a habit of selling contact details to various entities.

Moreover, the Consumer Protection Act imposes restrictions on gaming sites, uttering that they cannot advertise gaming activities unless they adhere to the present laws. It is important to note that advertisements in violation of the Consumer Protection Act can either originate from within Kenya or target the Kenyan market. This provision should be considered alongside other laws governing gaming activities. In Section 11 of the Consumer Protection Act, the term “advertisement” covers the dissemination of information through methods such as printing, publication, broadcasting, telecommunications or distribution, all intended to promote the use of an internet gaming site.

The Proceeds of Crime and Anti-Money Laundering Act 2009 mandates that similar entities implement measures to prevent money laundering activities. These measures include the establishment of minimum Know-Your-Client (KYC) standards for user registration and the implementation of verification procedure. Furthermore, the CMCA outlines various punitive measures for actions like unauthorised interference, false publication, computer forgery and computer fraud, among others. Engaging in such activities can have repercussions for licensees, with some offences carrying fines of up to KES 20 million for individuals and KES 50 million for corporate entities, in addition to the possibility of imprisonment for a maximum of 10 years.

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

The governing authority, the BCLB, maintains the authority to grant authorisation for the use and operation of gaming machines within a facility that it has sanctioned. Additionally, County Governments, such as the Nairobi County Government, have established regulations mandating the exclusive use of approved gaming machines.

The regulatory body can grant authorisation for the use of gaming machines, particularly those associated with fully automated games of chance, where player intervention is not involved. Moreover, the regulator may also approve the use of amusement machines and totalisator machines. The regulatory authority holds the prerogative to evaluate the suitability of the premises intended for a specific type of gaming machine, ensuring that minors are not users of such machines.

4 Enforcement and Liability

4.1 Who is liable under local law/regulation?

Liability may be against a company or natural person depending on the kind of offence.

4.2 What form does enforcement action take in your jurisdiction?

The BCLB will implement repercussions prescribed by law, which may include imprisonment, suspension, licence or permit cancellation, modification or the imposition 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?

While there is not a well-defined regulatory framework in place, it is crucial to note that one of the fundamental principles of establishing a contract is ensuring the legality of its purpose. In instances where there is no law explicitly forbidding the provision of a facility from gambling, but all other essential contract formation principles are met, an individual may pursue legal recourse to enforce their contractual rights.

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, in its efforts to ensure and enforce compliance, takes direct or indirect actions by exercising its authority in accordance with the relevant laws. It also liaises with other various Government agencies to ensure adherence to the said regulations. For instance, in 2022, the Communications Authority of Kenya issued a directive stating that non-compliant entities would be unable to receive payments. Any entity licensed by the Communications Authority was required to deactivate their payment channel to remain in compliance.

5 Anticipated Reforms

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

There is a Gambling Control Bill 2023, which is currently under deliberation. The Government intends to slash a chunk of money that is staked every year from gamblers and channel the funds into a compulsory “Hustler Fund”, which is a savings kitty that was adopted and promoted by His Excellency President William Ruto’s administration. This Bill proposes to carve out a portion of the wagered amount for savings, which will be determined by the new Gambling Regulatory Authority in consultation with the Interior Cabinet Secretary.

This Bill is intended to replace the BLGA. The proposal to force gamblers to save with every bet that they place will come at an additional cost with regard to the deductions and taxes placed on the gambling and betting industries. The Gambling Regulatory Authority shall be expected to facilitate and monitor gambling in Kenya.



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 and 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.

Ong'anya Ombo Advocates LLP

Mayfair Suites, 4th Floor, Parklands Gardens
Westlands, Nairobi
Kenya

Tel: +254 724 026 355
Email: om@onganyaombo.com
URL: www.onganyaombo.com



Jack Ong'anya, a Managing Partner at Ong'anya Ombo Advocates LLP, is a talented litigation and alternative dispute resolution (ADR) lawyer with a client portfolio of both local and international entities. He has a track record of winning more than 93% of his litigation and ADR cases. In 2022, he neutralised eight litigation cases against the law firm's clients.

He has represented clients on cross-border distributorship contracts, procurement disputes, white-collar crimes, commercial disputes, shareholders' disputes, intellectual property, employment disputes, aviation law, bank account signatory disputes, intercountry debt recovery, and product liability.

Jack is the team leader of the Litigation & ADR Department and, in 2022, was recognised by *Leaders League* as a Highly Recommended Business Law lawyer.

Ong'anya Ombo Advocates LLP

Mayfair Suites, 4th Floor, Parklands Gardens
Westlands, Nairobi
Kenya

Tel: +254 711 185 636
Email: jb@onganyaombo.com
URL: www.onganyaombo.com

Ong'anya Ombo Advocates LLP is a full-service law firm providing dedicated and curated legal solutions that factor in the socio-economic and political factors that affect a client's operations in the Kenyan jurisdiction. We provide advice on litigation, ADR, corporate commercial and cross-border practice, stakeholder mapping and engagement, tax strategies, transaction strategies, competition/anti-trust and regulatory compliance, securities, transacting in hard commodities, intellectual property transactions and disputes, and fintech compliance and licensing.

We have been highly recommended as a business law firm by *Leaders League* (2022), ranked by *ITR World Tax* for two consecutive years – 2023 and 2024, Finalist for IP Team of the Year at the *African Legal Awards 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).

www.onganyaombo.com

