

Ong'anya Ombo Advocates LLP

Corporate & Individual Immigration, Kenya

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Ong'anya Ombo Advocates LLP is a full-service law firm providing dedicated and curated legal services to Kenyan and International Clients.

Some of our key areas of practice are Corporate Law, Corporate Immigration, Individual Immigration, Tax Law, and Cross-Border Practice. The sub-categories under these fields include corporate (re)structuring, tax (re)structuring, development of an international network of companies, transfer pricing, intellectual property, fintech, among others.

Foreign Companies – New Entrants (NE) – looking forward to investing in Kenya need to understand the new environment that the investors' will be interacting with for several years before securing some of the services rendered by professional service providers. In that regard, we provide information on such essential details that may matter to an investor.

### **GENERAL COUNTRY OVERVIEW**

The Republic of Kenya (Kenya) is a country located in East Africa and with the largest economy in Eastern and Central Africa and ranked among the top 10 African countries with the highest Gross Domestic Product in 2020 (Statista, 2020). The International Monetary Fund (IMF) reclassified Kenya as a lower-middle-income country (GNI per capita between \$1,036 and \$4,045).

A business entity interested in investing in Kenya needs to understand more than what is provided under the laws or regulations but also the market based on Social, Economic, and Politics.

### **ENTITY FORMATION/ CORPORATE IMMIGRATION**

The Government of Kenya has implemented a one-step registration process for setting up an entity in the Republic of Kenya (Kenya). The portal is limited to (de)registering Business Name Registration (Sole Proprietorship, and General Partnership), Private Limited Company, Public Limited Company, Company Limited by Guarantee, Limited Liability Partnership, and Foreign Companies. Further, under the Companies Act, 2015, various entities can convert from one entity to another. For instance, Business Name to LLP or LTD, LTD to ULC, LTD to PLC, Cooperatives, Branch Offices, among others.

Generally, the Companies Act allows full ownership of the shares and directorship – however, there is a need to appoint a local representative for companies registered as Foreign Companies and, for Limited Liability Partnership, there is a need to have a local Managing Partner.

The Companies Act was amended to introduce s 93A that requires companies to disclose Beneficial Owners as per the Companies (Beneficial Ownership Information) Regulations, 2020. The information concerning the Beneficiary Owner is kept privately by the Companies Registrar.

The registration process takes 2 – 5 days after lodging the complete forms – if there are no further requirements or corrections to be addressed.

Other set-ups like Non-Governmental Organisations, Societies/ Associations, Foundations, Community Based Organisations, Trusts require manual application processes. Further, entities such as Foundations, Company Limited by Guarantee, NGO will require rigorous background checks by the National Intelligence Service – it makes the process take a bit longer (3 – 12 months).

A foreign company will get to operate locally as either a Branch or Subsidiary. The implication of the option picked results in different management model, statutory reporting's, allowable tax deductions, and tax models.

### **SECTOR SPECIFIC LAWS**

A New Entrant (NE) must inform its advisers, in detail, about its business operation and aspiration. In doing so, it will be easier to know what Sector-Specific Laws are likely to affect the NE. These Sector-Specific Laws can have an immense impact on the structures of the intended undertaking and, in most instances, result in applying for permits/approval/licenses.

### **INDIVIDUAL IMMIGRATION**

The Government offers various permits depending on the activities that a person intends to do in Kenya.

The Permits are as follows: Class A, prospecting and mining; Class B, agriculture and animal husbandry; Class D, employment; Class F, specific manufacturing; Class G, specific trade, business or consultancy; Class I, approved religious or charitable activities; Class K, ordinary residents; Class M, refugees; and Exemptions.

## TAXATION LAWS

The Corporate Tax for LTDs is 30%, and a Withholding Tax (WHT) of 5% applies to dividends paid to locals. There is a tax exemption for any dividends paid to a local company holding more than 12.5% voting rights in the company paying the dividends. For LLPs, the final tax is 30%. Capital Gains Tax (CGT) is revised from 5% to 15% as from January 01, 2023.

The tax highlighted under Corporate Tax is applicable towards subsidiaries of a foreign company. However, in a Branch, the applicable tax is 37.5% - no WHT will be applied. Further, while a subsidiary is allowed to apply allowed tax deductions, a branch does not have the benefit.

If the Parent Company and the NE interact based on matters financial assistance or licenses, the Kenya Revenue Authority (Tax Collector) will require the Transfer Pricing Rules to be observed in the letter. To effect an Intellectual Property valuation, it is safe to adopt accepted or standard practices – World Intellectual Property Organisation (WIPO) has provided some of these accepted practices.

After setting up in Kenya, some indirect taxes apply to the NE. Some of the indirect taxes include Value Added Tax: 16%; Turnover Tax: 1% of the revenue between KES. 1M to KES. 50M. Paid monthly; Minimum Tax: 1% of the revenue below KES. 1M. Paid monthly (Minimum Tax has been declared unconstitutional by the Court of Appeal); Digital Services Tax 1.5% (is applicable to persons with no presence in Kenya as per Income Tax Act and DST Regulations); Pay As You Earn (PAYE): Tax bands range from 10% - 30%; National Industrial Training Authority: KES. 50 per staff; National Housing Development: not effective (Under litigation); National Social Security Fund (is not mandatory to apply for this government scheme as per the High Court – 2022); and National Hospital Insurance Fund: KES. 150 – KES. 1,700.

## PERMITS/ LICENSES/ APPROVAL

There are various types of licenses that an entity will require for purposes of operating in Kenya. The National or County Government provides the licenses, permits, or permits. In certain instances, there are various technological solutions that the intended investor may require; hence, that should be factored in.

Permits, Licenses, or Approvals by the National or County Government may be general, like business permits, fire licenses, health certificates, among others. However, it is due to the Sector-Specific Laws that authorize certain government agencies to give authorization in certain operations.

## DOUBLE TAX TREATIES

Kenya has entered into Double Tax Treaties (DTT) with 11 countries. Countries with an effective DTT with Kenya are Canada, Denmark, France, India, Iran, Norway, Sweden, United Kingdom, Zambia, and South Africa.

## FOREIGN INVESTMENT PROTECTION

The Foreign Investment Protection Act (FIPA) provides room for Kenya and other countries or groups of countries to formalise a favourable

investment environment for their respective nationals. Currently, the Kenyan Government has established relationships with the French Republic, Republic of Finland, Swiss Confederation, Islamic Republic of Iran, Republic of Burundi, OPEC Fund for International Development, State of Kuwait, Slovak Republic, Republic of Mauritius, and the Republic of Korea.

## AFRICAN CONTINENTAL FREE TRADE AREA (AfCFTA)

The legislation's objective is to progressively integrate the African countries by creating a single market for goods, services facilitated by persons' movement.

One of the key factors is creating a foundation for the establishment of a Continental Customs Union.

According to Article 4, the law requires the progressive implementation of the provisions.

## OFFICE & BUSINESS ADDRESS

There are various classifications of rental property that an investor can consider. Tech or Software/Platform as a Service entities that do not heavily rely on office space tend to pay for Virtual Offices or Business Addresses.

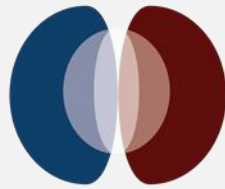
If the investor requires his/her own space, there are various prime properties that the investor can consider.

## INTERNATIONAL SCHOOLS

An investor who engages in Corporate and Individual Immigration and has a child will always need an academic facility to enroll his/her child/ren.

There are various international schools that an investor can consider enrolling a child.





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