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Doing Business in Kenya

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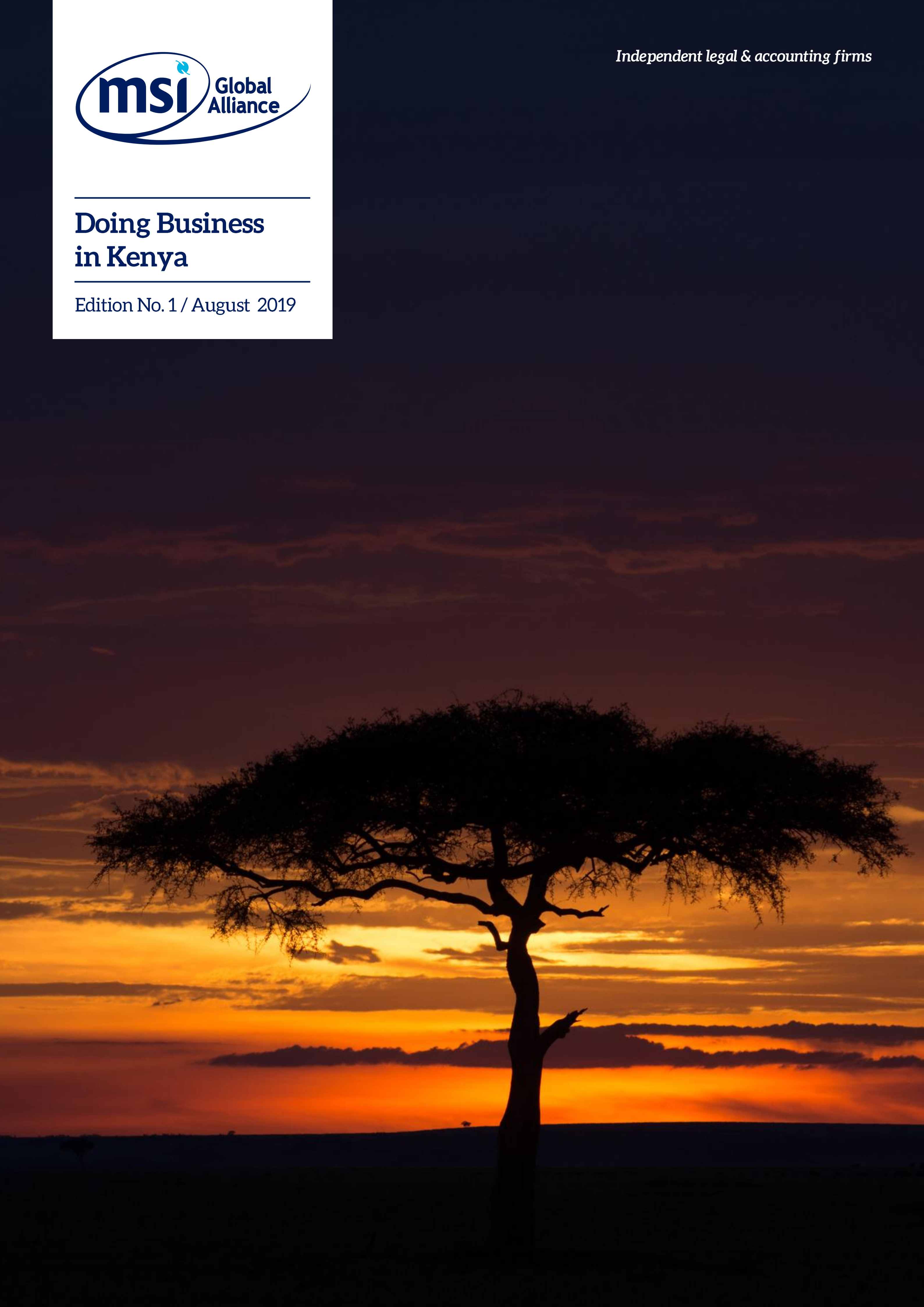

Doing business in guide: Kenya

MSI's guide on Doing Business in Kenya provides current information about the financial, regulatory and legal considerations that could affect business dealings within Kenya. For further assistance please contact our MSI member firm in Kenya.

Country overview

Population
The Republic of Kenya has a total population of about 45 million.

Government
Kenya has a democratic government. The current President is Uhuru Kenyatta. The Permanent Secretaries are the ministers with portfolios for the government.

Kenya operates a devolved government with 47 counties, each with its own Senator, Governor, and local assemblies.

The capital city is Nairobi.

Languages
The major languages are Swahili and English. Most people speak English, especially in the big cities like Nairobi, Mombasa, Kisumu, and Nakuru.

Currency
The Kenyan Shilling (KES) is the currency of Kenya.

Economic summary
GDP: US$79 billion
Income per capita: US$3,016
Inflation: 4.7% (Jan 2019)

KES / US$: 101.50 (31-01-2019)
Govt. Debt to GDP: 57.1%

Major Exports: Tea, horticultural products, coffee, petroleum products, fish, cement, apparel.

Major Imports: Machinery and transportation equipment, oil, petroleum products, motor vehicles, iron and steel, resins and plastics.

Main sectors of the economy
Kenya is the sixth largest economy in sub-Saharan Africa. It is the regional hub for trade and finance in Eastern Africa and the natural entry point to the region. Kenya has the largest gross domestic product (GDP) economy in Southeast and Central Africa. Kenya has emerged as one of Africa's key growth centres and is poised to become one of the fastest growing economies in East Africa, supported by lower energy costs and investment in infrastructure, agriculture and manufacturing

Sectors attracting investment include oil and gas exploration, energy, banking, real estate, retailing, consumer goods manufacturing, vehicle assembly, agriculture and tourism with the FDI flows coming from a wide variety of sources, including the US, Europe, key Asian economies and South Africa.

Kenya is also among the countries experiencing a significant growth in retail, entertainment and lifestyle facilities and as a result a rise in real estate activity. Investors are attracted by Kenya's relatively diverse economy and pro-market policies, brisk growth in consumer spending and the country's central role in the East African Community (EAC).

Kenya is a member of the East African Community (EAC), and the Common Market for Eastern and Southern African States (COMESA) trading blocs. Kenya also qualifies for duty-free access to the United States (US) under the African Growth and Opportunity Act (AGOA). Kenya has moved up 19 places to position 61 in World Bank Ease of Doing Business rankings, out of 190 countries.

Exchange control
The economy was liberalised in 1994 and there are no exchange controls. However, the Proceeds of Crime and Anti-Money Laundering Act of 2009 requires a reporting institution to file reports of all cash transactions exceeding US$10,000 or its equivalent in any other currency to the Financial Reporting Centre.

Setting up a business

The Kenyan legal system is largely modelled on the English legal system. It is a mixture of a statutory law system and common law and equitable principles.

Kenyan investment law is modelled on British investment law. The Companies Act, the Investment Promotion Act, and the Foreign Investment Act are the main pieces of legislation governing investment in Kenya.

Business operations can be set up in the Kenya as incorporated or unincorporated. If an incorporated entity is registered, the entrepreneur cannot be held liable for more than the nominal value of the company's paid-up capital.

Legal types of business entities
1. Branch (of a Foreign Company)
2. Sole proprietorship
3. Partnership
4. Limited liability partnership (LLP)
5. Private limited liability company (LTD)
6. Public limited liability company (PLC)

In international business, the Private limited liability company (LTD) and the branch are most commonly used.

There are no general requirements concerning local participation of management, although restrictions are imposed in specific areas. Non-resident participation in companies quoted on the Nairobi Stock Exchange is restricted such as 25% of the issued shares are reserved for locals and East Africans while the balance of 75% can be owned by locals as well as foreigners.

There is no minimum capital requirement for Companies under the local legislation. The law also does not provide a restriction on time period for capital injection. Payment in kind for share settlement is permitted.

Process of how to set up a business

A lawyer, an accountant, or a qualified Company secretary can prepare the relevant formation documents.

Financial year of taxes and financial accounts

The financial year is equal to the calendar year. However, incorporated entities may choose a different financial year if they wish. Any return, record or document required to be kept or produced should be in either English or Kiswahili. A tax payer is also required to preserve the financial records and supporting documents for at least 5 years.

Accounting and auditing

When is a statutory audit required? A statutory audit is required when the following criteria are met:

1. Annual turnover > $500,000;
2. Total assets > $200,000;
3. The company is part of a larger group.

The financial statements must be prepared as per IFRS (International Financial Reporting Standards).

Investment Approval Process

To facilitate the investment approval process, the Investment Promotion Authority (IPA) operates a one-stop office as the focal point for investor assistance in the acquisition of relevant licences and permits from various Government Ministries, among other services.

Incentives foreign investors/ local investors

The Kenya Government offers a number of incentive schemes in various sectors to support companies in their business operations. Entrepreneurs who set up industries in rural or urban areas benefit from enhanced investment deduction allowances for the capital cost incurred, from their taxable income.

In addition, enterprises that set up their businesses in designated Export Processing Zones or Special Economic Zones enjoy tax holidays and other benefits.

There are very few restrictions on foreign ownership of businesses in Kenya:

- Aviation – At least 51% must be held by Kenyan
- Insurance companies – At least 33.33% must be held by citizen of East Africa.
- Telecom – At least 30% must be held by Kenyan
- Brokerage - At least 30% must be held by Kenyan
- Fund management fund - At least 51% must be held by Kenyan

Taxation

Kenya has the following direct and indirect taxes:

- Income tax
- Customs and excise duties
- Value added tax (VAT)
- Corporate tax
- Personal income tax

Taxation of profits made by corporate bodies has its legal basis in the Income Tax Act. Kenyan income tax is payable at the corporation rate of tax by companies and unincorporated organisations and associations (excluding partnerships, sole proprietorships, and interest or dividend paid by a designated co-operative society) that have taxable income. The income of a partnership or a sole proprietorship is taxed on the individual partner or the proprietor.

Each partner of a partnership and a sole proprietor is therefore required to declare his business and professional income as part of his personal income and pay tax according to his respective personal tax bracket.

Income tax

Resident and non-resident corporate entities are subject to tax on all income accruing or deriving from Kenya.

There are seven sources of income (“specified sources”). Gains or profits derived from one specified source shall be computed separately from the gains or profits derived from any of the other specified sources. Moreover, any losses incurred in any specified source can only be offset against income from the same source in the current and nine subsequent years, unless an extension application is made and approved by CS Treasury.

Corporate income tax

Adjusted profit generated by limited liability companies is taxed at 30%, and that of branches of foreign investors are taxed at 37.5%.

Registration procedures and PIN

All taxpayers are required to obtain a Personal Identification Number (PIN). This is the tax registration number. An application for a PIN is to be made to the Kenya Revenue Authority (KRA) online. For businesses, such application can only be done after completing the company registration formalities and obtaining the Registration certificates.

When undertaking the PIN registration, the taxpayer is required to indicate the tax obligations applicable to the taxpayer. These include corporation tax, VAT, PAYE, income tax, etc.

All employees and directors/ partners/ sole proprietors are also required to have an individual PIN.

Instalment Taxes

Companies are required to pay instalment taxes on income as the year progresses. For non-agricultural businesses, there are four instalments to be paid by the 20th day of the month as set out below:

- 1st instalment – 4th month
- 2nd instalment – 6th month
- 3rd instalment – 9th month
- 4th instalment – 12th month.

Agricultural instalments are payable by the 20th day of the 9th and 12th month in the year of income.

Capital Gains Tax (CGT)

CGT is applicable on the transfer of property situated in Kenya, for example, land, buildings and marketable securities. Currently the CGT rate is 5%, which is the final tax.

A gain on transfer of a marketable security traded on any securities exchange licensed by the Capital Markets Authority of Kenya is not subject to CGT in Kenya. Transfer through inheritance is exempt from capital gains tax.

Withholding taxes

Withholding tax is applied to a wide range of payments made to both residents and non-residents. The applicable non-resident rates for the most common payments are:

- 10 percent on dividends
- 15 percent on interest
- 15 percent on equipment rentals
- 20 percent on management, professional and other consultancy fees

Kenya has signed double taxation treaties with some countries and reduced rates apply.

Repatriation of profits

In general, taxed profits can be repatriated through dividends, interest payments, management services/ royalties etc. For companies, repatriation will be subject to withholding tax at the relevant non-resident rates. For branches however, repatriation of taxed profits will not be subjected to withholding tax.

Transfer Pricing

Kenyan law requires the arm's length pricing between related enterprises. The Transfer Pricing Rules are based on OECD guidelines.

Thin Capitalisation

Interest expenses are proportionately restricted for foreign controlled companies (other than licenced financial institutions) when the ratio of all interest bearing liabilities exceeds three times the Company's paid up share capital and reserves/accumulated losses. Control in this case refers to 25% or more of the foreign participation in equity.

Tax losses

Tax deficits can only be used in the year of income that they arise and the subsequent nine years. This period can be extended by the Cabinet Secretary (National Treasury) on the recommendation of the Commissioner.

Turnover Tax

For businesses with a turnover of less than KES 5,000,000, there is a turnover tax that replaces both value added tax (VAT) and corporate tax. The rate is 3% of gross receipts of the business. Turnover tax is, however, not applicable to incorporated companies or on professional, management and training fees or rental income.

Personal Taxation

All income accruing in or derived from Kenya is subject to tax in Kenya. Kenyan residents are taxable on their worldwide employment income, whereas a non-resident is taxable on Kenyan source employment income.

Progressive tax rates are levied on personal income with the highest tax rate being 30%.

Cash and non-cash benefits are taxable on the higher of the cost incurred by the employer or the fair market value. The taxable value is added to the emoluments for tax purposes.

VAT

VAT is levied on the supply of taxable goods and services made or provided in Kenya by a taxable person in course of or furtherance of business. The general VAT rate is 16%. The VAT rate in respect of exports and other essential goods is 0%. Commercial rent is subject to VAT at the standard rate of 16%.

Registration is compulsory where the turnover of taxable supplies is or is expected to be KES 5million or more in a 12 months' period.

Excise Duty

Excise Duty in Kenya is managed and administered under the Excise duty Act 2015. Excise duty is imposed on the local manufacture or the importation of certain commodities and services. Excisable commodities include items such as bottled water, soft drinks, cigarettes, alcohol, fuels, and motor vehicles. Excisable services include mobile cellular phone services, fees charged for money transfer services, and other fees charged by financial institutions.

HR/ Labour Law

Employment law

The provisions regulating employer/employee relationships are laid out in the Employment Act. For factory workers, factory wages and conditions of employment, the Act is the binding law.

The employer/employee relationship stems from the agreement signed between an employer and an employee. A responsible officer of the company (e.g. the manager) may represent an employer in this agreement.

The agreement usually contains:

- The terms of reference for the employee detailing their specific duties and responsibilities

- The terms of employment, including hours of work, salary and other benefits, period of paid leave and

- other entitlements
- The respective rights and obligations of both employer and employee.

The minimum period of annual leave is 21 days per annum. Maternity leave is three months and paternity leave is two weeks. The employment agreement can, however, vary this upwards.

An employment agreement may either specify the period for which it's applicable or may set no period, but instead lay out the situations in which it may be terminated or deemed terminated.

Trade unions are formed to safeguard and champion the interest of either party. The employees' trade unions represent members in negotiating and concluding Collective Bargaining Agreements (CBA) with employers and in industrial disputes flowing from go-slows and strikes inter alia.

Social security

The National Social Security Fund provides Social Security for workers and self-employed persons and their dependents. Rates differ depending on the individual earnings of the employed person.

The employee contribution shall be drawn directly from his salary and wages while the employers' contribution shall come directly from the employer.

Health Insurance

The National Hospital Insurance Fund (NHIF) is a state parastatal which provides limited inpatient medical insurance cover at accredited health facilities to eligible members from both the formal and informal sectors. For those in the formal sector, the employer is required to deduct from the salary and remit contributions for all employees, both permanent and casual. For those in the informal sector and retirees, membership is open and voluntary.

For registration, a copy of the Certificate of Incorporation/Registration, PIN, physical location and employee details are required.

Members under the voluntary category pay KES 500 per month (KES 6,000 per annum). For those in formal employment, contributions are based on their income.

Insurance policies can be taken out from a number of national operating insurance companies.

Pension

Depending on the sector there may be an obligatory pension fund. The premium is paid directly to the pension fund. The age the pension starts varies depending on the future mortality rates, but is currently 65 years.

Payroll

When starting a business and employing staff, the company must register with the tax authorities. Pay As You Earn (PAYE) is paid monthly to the tax authorities. The process of registration is through the iTax system of the KRA.

Visa and work permits

A Visa is required by all persons, other than Kenyan citizens, wishing to enter Kenya. Applications for visas are submitted to the Immigration Department. Visitors may be issued with a visa on arrival at a port of entry into Kenya provided that they are in possession of a valid passport or other travel documents acceptable to the Government.

The most important documents needed are:

- Visa application form;
- Passport size photograph of the applicant;
- Valid passport/travel document showing validity of at least 6 months; and
- Medical referral letter from a hospital or a doctor for medical cases.

People from outside Kenya must apply for a work permit before taking up employment.

Contact us

The information provided in this guide cannot be exhaustive and we recommend anyone considering doing business in Kenya should seek professional advice from our member firm before making any business or investment decision.

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