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Kenya: Law & Practice
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KENYA

Law and Practice

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1. LEGAL SYSTEM

1.1 Legal System

As a Commonwealth country, Kenya's legal system descends from English common law.

Sources of Law

The Judicature Act, Chapter 8 of the Laws of Kenya, provides that the Judiciary shall be guided by the Constitution of Kenya, 2010 (the Constitution) and all Kenyan written laws, including Acts of Parliament. Where these are silent on a matter, the courts may turn to specific acts of parliament of the United Kingdom as listed in the Judicature Act, common law, the doctrines of equity, and statutes of general application in force in England on 12 August 1897. The courts are also guided by African customary law in certain civil matters insofar as the customary law is applicable and not repugnant to morality and justice or inconsistent with any written law.

The Constitution states that any law that is inconsistent with the Constitution is void to the extent of such inconsistency, and that any contravention of the Constitution is invalid. Furthermore, it states that the general rules of international law form part of the laws of Kenya, and any treaty or convention ratified by Kenya forms part of Kenya's law.

Hierarchy of the Courts

The court system in Kenya is divided into Superior Courts and Subordinate Courts.

The Superior Courts consist of the Supreme Court, the Court of Appeal, the High Court, the Employment and Labour Relations Court (the ELRC) and the Environment and Land Court (the ELC).

The Supreme Court is the highest court in Kenya, and it has both original and appellate jurisdiction. It has exclusive original jurisdiction to hear and determine disputes relating to the elections of the office of the President, and appellate jurisdiction to hear and determine appeals from the Court of Appeal on matters involving the interpretation or application of the Constitution or matters certified as being of general public importance.

The Court of Appeal handles appeals against decisions of the High Court, the ELRC, the ELC and any other court or tribunal as may be provided in statute.

The High Court has original and appellate jurisdiction in civil and criminal matters. It also has original jurisdiction to hear matters regarding the interpretation of the Constitution and matters regarding the Bill of Rights. Furthermore, the High court has supervisory jurisdiction over Subordinate Courts and any person performing a judicial or quasi-judicial function.

The ELRC and ELC are specialised courts of a similar ranking to the High Court and are established to hear matters regarding employment and labour relations matters and environment and land matters, respectively.

The Subordinate Courts consist of the Magistrates Courts, Kadhis' Courts, the Courts Martial, the Small Claims Court and any other court or tribunal established by statute. Kadhis' Courts determine issues of Muslim Law relating to personal law disputes – ie, personal status, marriage, divorce or inheritance.

Civil Proceedings

The value of the subject matter of a suit will determine which court has jurisdiction.

The Small Claims Court adjudicates on claims not exceeding KES1 million.

The Magistrates Court is divided into five divisions, with the following pecuniary jurisdiction:

- up to KES5 million – Resident Magistrate's Court;
- up to KES7 million – Senior Resident Magistrate's Court;
- up to KES10 million – Principal Magistrate's Court;
- up to KES15 million – Senior Principal Magistrate's Court; and
- up to KES20 million – Chief Magistrate's Court.

Any matter valued over KES20 million is determined by the High Court.

Criminal Proceedings

Magistrates Courts have original jurisdiction to hear criminal proceedings, except for capital offences, which are heard by the High Court.

2. RESTRICTIONS TO FOREIGN INVESTMENTS

2.1 Approval of Foreign Investments

Foreign investments in certain sectors require clearance from governmental agencies or parent ministries before the investor can commence the proposed investment activity, as follows:

- the production and supply of excisable goods and services, the importation of specified excisable goods or the supply of excisable services require clearance from the Kenya Revenue Authority and the Ministry of Finance;
- forest and mining resources require clearance from the Ministry of Environment and Natural Resources;
- energy and petroleum products require clearance from the Ministry of Energy; and
- investments in the tourism industry require clearance from the Ministry of Tourism.

There are further restrictions on shareholding by foreigners in companies undertaking business in aviation, construction, insurance, mining, engineering, private security and Information and Communications Technology, as well as listed companies.

Despite these restrictions, there are laws that seek to promote foreign investment in Kenya. The Foreign Investments Protection Act (Chapter 518) provides protection to approved foreign investments and foreign investors' properties, and allows for the repatriation of profits.

The Investment Promotion Act (No 6 of 2004) promotes investment through provisions that provide incentives to foreign investors and facilitate the obtaining of the requisite licences, as well as incentives. The benefits under the Act are available to foreign investors who seek to invest at least USD100,000 in Kenya.

There are conditions to the repatriation of foreign currency by foreign investors. The transfer should be by the holder of a certificate of an approved enterprise, and should be in the approved currency and at the prevailing exchange rate. In addition, transactions involving amounts of USD10,000 or more should be supported by adequate documentation, as the Central Bank of Kenya Guidelines on Foreign Currency require licensed commercial banks and financial institutions to ascertain the source of such funds.

Foreign investors departing or entering Kenya are allowed to carry up to KES500,000 and foreign currency equivalent to a maximum of USD4,286 (at the prevailing rate of USD1 = KES116.66) without having to declare at the point of entry or departure.

2.2 Procedure and Sanctions in the Event of Non-compliance

The sector-specific legislation provides the procedure for obtaining approval for investments requiring approval. This would typically involve following a prescribed application process, supplying documents and prescribed information, and paying a prescribed fee.

Where the requisite approvals are not obtained, this will usually constitute a criminal offence and the registered entity as well as its officer may be liable to a fine or a term of imprisonment, or both.

2.3 Commitments Required From Foreign Investors

In sectors with restrictions on shareholding (aviation, construction, insurance, mining, engineering, private security, ICT), foreign investors are required to ensure that the local content threshold is met, either at the time of applying for approvals or within a prescribed period of time.

The Companies (Beneficial Ownership) Regulations 2020 require companies to submit a beneficial ownership register with details of the natural person controlling a legal entity or on whose behalf a transaction is conducted. Non-compliant companies are liable to a fine of up to KES500,000 (approximately USD4,286) upon conviction.

2.4 Right to Appeal

A foreign investor may appeal against the decision of an administrative body if they are aggrieved by such decision, in accordance with the legislation either governing the particular sector or relating to public procurement.

3. CORPORATE VEHICLES

3.1 Most Common Forms of Legal Entities

Company Limited by Shares

A company limited by shares is a legal entity that is separate from its owner(s), which are the shareholders. A company is capable of owning assets and incurring liabilities that are separate and distinct from those of its members, entering into contracts, and suing and being sued separately.

The liability of the shareholders of the company is limited to their contribution to the assets of the company, up to the face value of shares held by the respective shareholders. A shareholder is liable to pay only the uncalled money due on the shares they hold.

A company limited by shares is required to have an authorised share capital, which represents the number of shares that the company can issue to shareholders.

The Companies Act 2015 provides for the formation of a company by a minimum of one shareholder.

Companies limited by shares can be either private companies or public companies. A private company is restricted in offering shares to the general public, and its shares are not freely transferable. On the other hand, a public company may offer its shares to the general public and is therefore able to raise its capital by listing its shares on the stock exchange.

Both private and public companies are required to have Articles of Association in place, which is the governing document that lays out the rules and regulations of the company.

Limited Liability Partnership (LLP)

The Limited Liability Partnership Act, 2011 provides for the formation of an LLP, which is a body corporate with a legal personality separate from that of its partners.

A partner is not personally liable for the partnership's obligations other than as a result of a wrongful act or omission by that partner. In addition, a partner is not liable for the wrongful act or omission of another partner.

An LLP may be governed by a partnership agreement/deed; in the absence of such a deed, the default provisions set out in the First Schedule to the Act will govern the partnership.

An LLP must have at least one manager, who must be resident in Kenya. Where the manager is a juristic person, the LLP must appoint another manager who is a natural person.

The minimum number of persons required for the formation of an LLP is two, but there is no maximum.

3.2 Incorporation Process

The incorporation processes for a company and an LLP both require prescribed documents to be filed with the Companies Registry, and a fee to be paid thereto. The Companies Registry will then proceed to issue a certificate of incorporation and the company or LLP will appear in the companies register, which is publicly maintained by the Companies Registry.

The process for a company is as follows:

- reservation and approval of a name by the Registrar of Companies;
- submission of a Memorandum of Association setting out – amongst other things – the names, addresses and occupation of the subscribers, the number of shares taken, the nominal value of shares taken, the class of shares taken and the rights (if any) attached to each class of shares;
- submission of its proposed Articles of Association – if no Articles of Association are submitted, the relevant model articles under the Companies Act will apply by default; and
- completion of various statutory forms, including Application for Company Registration Form, Notice of the Residential Address of the Directors and Statement of Nominal Capital.

The process for an LLP is as follows:

- submission of a letter requesting reservation of the proposed name to the Registrar of Companies; and
- filing a statement of particulars with the Registrar of Companies, signed by all the partners to be included in the partnership. The statement shall set out the name of that partnership, the nature of the business, the proposed registered office, the particulars of the partners, and the particulars of the manager.

The process of registering a company or LLP takes approximately two to three weeks.

3.3 Ongoing Reporting and Disclosure Obligations

Companies are subject to ongoing reporting and disclosure obligations, which are required to be filed with the Registrar of Companies on an interim or annual basis.

The following returns must be filed:

- notification of changes to the company's Articles of Association, the directors' particulars, the residential address of the directors of the company, the company's name or the location of the company's registered office;

- notification of cessation of office of directors;
- notification of any changes to the beneficial owners and/or their particulars;
- notification of any special or ordinary resolution passed by the company;
- returns of allotment of shares;
- notification of any new class of members of a company or variation of rights of members in any class of members;
- particulars of any charge created by a company registered in Kenya;
- annual returns;
- notification of change of accounting reference date; and
- annual financial statements of the company for each financial year, unless the company falls within the exemptions under the Companies Act.

3.4 Management Structures

Company

The management structure of a company typically comprises executive and non-executive directors, who are responsible for the management of the company. However, the Companies Act provides that the shareholders of a company can also be appointed as directors and form part of the management structure in their capacity as director and shareholder of the company.

LLP

Under the LLP legislation in Kenya, each partner is entitled to participate in the management of the partnership. However, the law requires the LLP to appoint at least one manager who is responsible for ensuring the LLP complies with the LLP legislation. Besides this legal requirement, the members of an LLP are generally free to determine the roles and obligations of each partner in their LLP agreement.

3.5 Directors', Officers' and Shareholders' Liability

Directors' Liability

The Companies Act provides that any provision that limits a director against liability for negligence, default, breach of duty or breach of trust in relation to the company is void. A company may only indemnify a director against any liability in connection with negligence, default, breach of duty or breach of trust in relation to the company out of the assets of the company. However, this indemnity does not cover any liability incurred by directors in defending civil or criminal proceedings against such director. In practice, most companies maintain directors' liability insurance to cover these costs.

The Companies Act further imposes criminal sanctions on directors for any offence committed under the Act, such as failure to file returns with the Registrar of Companies, failure to provide prescribed documents to the members of the company and contravention of any provision of the Act.

Shareholders' Liability

A company has a distinct legal personality from its shareholders. In this regard, the liability of a shareholder is limited to the amount unpaid on any shares held by the shareholder. However, the courts may disregard the separate legal personality of the company and hold the shareholders liable (ie, pierce the corporate veil) in instances where the shareholders have deliberately used the company as a vehicle to perpetrate fraud or deceit.

LLP

Like a company, an LLP also has a legal personality distinct from its members. In this case, the members are only liable for the amount contributed to the LLP. However, the partners may also agree to contribute to the assets of the LLP on its winding-up, beyond their individual contribution to the LLP. Courts may also pierce the corporate veil, as mentioned above.

4. EMPLOYMENT LAW

4.1 Nature of Applicable Regulations

Employment within the Kenyan private sector is primarily governed by the Employment Act (No 11 of 2007) as read together with its subsidiary legislation, the Employment (General) Rules, 2014. Where collective bargaining agreements and employers' organisations are present, the Labour Relations Act (No 14 of 2007) and the Trade Unions Regulations are also applicable. Additionally, the Labour Institutions Act (No 12 of 2007) establishes the various national labour institutions, and provides for their functions, powers and duties. The Work Injury Benefits Act (No 13 of 2007) and the Occupational Safety and Health Act (No 15 of 2007), together with their respective regulations, legislate on the injuries and illnesses suffered by employees during the course of their work. There is also the Employment & Labour Relations Court Act 2012 and the attendant subsidiary rules (the Employment & Labour Relations Court (Procedure) Rules 2016), which prescribe the manner in which the Labour Courts facilitate the resolution of any employment disputes.

The employment relationship is governed by an employment contract, which must be provided by an employer to an employee and must contain particulars prescribed by the Employment Act. The employment relationship is further governed by any existing collective bargaining agreements (in the case of unionised employees) and the Regulation of Wages Orders, which set industry-specific minimum standards that regulate the terms of employment.

4.2 Characteristics of Employment Contracts

Employment contracts or letters of appointment in Kenya are required to be in writing, indicating the period of engagement or number of working days for which the employee is contracted. While most contracts are often drafted in English, the law does require a translation to be provided to employees who may suffer from illiteracy or confusion.

The contract must indicate the details of the employment, including the job description, the place of work, leave allowances, pension plans, terms of renewal and termination, any details of an existing collective bargaining agreement that may bind the employer, and the remuneration payable. The contract should also indicate the probationary period of the employee, which should not exceed the recommended six-month period, with any extension required not going beyond a further six months.

With regards to the remuneration payable, the contract should set out whether this is inclusive or exclusive of a housing allowance – a mandatory provision under the Employment Act. In the event of a dispute, a failure to indicate whether or not the pay is consolidated in the contract will lead to an additional 15% provision from the wages payable to cater for the housing allowance.

Employers that have more than 25 employees are required to notify the Director of Employment of every vacancy within their organisation prior to undertaking their own recruitment process, in order to allow an opportunity for qualified unemployed persons to participate in the process, unless such an employer or the industry in which the employer operates is exempted under the Employment Act.

The various labour laws also recognise the existence of casual workers who operate on a periodic basis depending on the work available. Under the law, casual labourers ought to be paid at the end of each working day. Where the casual work continues for a period of 30 continuous working days, or where the labour required takes a period exceeding three months, it is no longer considered casual labour but is instead deemed a term contract.

4.3 Working Time

The working period for employees in Kenya is regulated by the various Regulation of Wages Orders. While the working hours are generally determined by the employer, the law mandates that normal working weeks should not have more than 52 working hours spread over six working days, and each employee is entitled to at least one rest day in every seven-day week. For night work, an employee is entitled to work no more than 60 hours a week.

Under the Regulation of Wages (General) Orders, when an employee works overtime, their remuneration is payable at 1.5 times the normal hourly rate. When the overtime hours fall on the employee's rest days or on public holidays, the wages are payable at twice the normal hourly rate. Where the employee's wages are not calculated on an hourly rate, the overtime payments due ought to be no less than 0.0044 times the employee's monthly wage.

Additionally, the regulations limit the amount of overtime an employee can work within two consecutive weeks:

- for night workers, no more than 144 hours of work can be undertaken in that period; and
- for all other adult employees, the limit has been set at 116 hours.

Leave days are calculated on the basis of the months worked by the employee: for every 12 months of consecutive work, an employee is entitled to 21 working days of leave. An employer is required to obtain the consent of an employee in order to space out the use of the annual leave days.

With regards to sick leave, an employee is entitled to a maximum of 30 days' sick leave with full pay and thereafter to a maximum of 15 days' sick leave with half pay in each period of 12 months' consecutive service. This is contingent on the production of a certificate of incapacity to work as soon as is reasonably practicable. However, access to sick leave is caveated under the law where the employee's gross negligence is the cause of the illness/injury.

Female employees are entitled to three months of maternity leave with full pay. The law allows for a further three months of leave where the mother suffers illness as a consequence of the pregnancy, provided a certificate of incapacity can be produced by the employee. The employer is required to ensure that the employee can return to their previous position of employment or a reasonably suitable alternative on terms that are not less favourable to the employee than she would have received had she not gone on maternity leave. Male employees, on the other hand, are only entitled to two weeks' paternity leave with full pay.

The Employment (Amendment) Act, 2021 also introduced pre-adoptive leave entitlement of one month for employees entering into an adoption arrangement with adoptive societies. The employee is required to provide 14 days' notice of the adoption society's intention to place the child into their custody in order to qualify for the entitlement.

The law also caters for compassionate leave within the Regulation of Wages Orders; employers have been given discretion to make the necessary arrangements with the employee to take up leave days from the annual leave days earned as at the time the leave is requested.

4.4 Termination of Employment Contracts

Employers with more than 50 employees are required to have a statement of the organisation's disciplinary rules reasonably accessible to each employee, specifying the conduct expected of them, the disciplinary process and the mechanisms for appeal or redress of their grievances in relation to their employment.

The Regulation of Wages (General) Orders mandate that where an employer deems an employee's work or conduct to be unsatisfactory but not worthy of immediate dismissal, they ought to issue a warning in writing, to be inserted into the employee's record. The employer is required to issue two warnings prior to summarily dismissing the employee after their third unsatisfactory act or omission. Where an employee goes 292 days without incident following the second warning, however, the employee's record of warnings shall be expunged.

As a minimum standard, employment contracts exceeding one month where wages are payable monthly are deemed to be terminable 28 days after the provision of notice of intention to terminate in writing by the employer. Alternatively, the employer may terminate the contract with immediate effect upon the payment of that month's wages in lieu of notice. Employers have discretion to extend the notice period in the course of their contractual negotiations, provided they meet the above-mentioned minimum standard.

All terminations must satisfy the procedural and substantive fairness test. This means that an employer must not only have a good reason for terminating an employee's contract of employment (the fact that a contract of employment provides for termination with notice is not reason enough) but must also follow the correct procedure in effecting the termination.

When declaring employees redundant, employers are required to notify the affected employees – or their union representative if they are unionised – of said intended redundancy in writing one month prior to the actual date of redundancy. During this 30-day period, the employer and the identified employees or union officials are to engage in consultations with the aim of mitigating the effects of the intended redundancy or possibly doing away with the redundancy all together. The employer is required by Section 40 of the Employment Act to show due regard to seniority in the time, skill, ability and reliability of each employee when deciding who ought to be declared redundant. The employee would need to pay off all the leave days not taken up by the employee and provide a severance package factoring in no less than 15 days' pay for every completed year of service.

If an employee is terminated after four consecutive weeks of work, employers are required to issue exiting employees with a certificate of service upon the termination of the employment. The certificate ought to include the details of the employer and employee, the period of employment, the nature of the work undertaken and any other accomplishments of the employee.

Where the employee dies during the subsistence of their employment contract, the employer is required to pay their next of kin the dues owed to them within 30 days of the submission of proof of capacity to receive the remuneration.

4.5 Employee Representations

Employees are entitled to representation by their trade union representative or such other elected employee representatives during disciplinary hearings where the employer is considering terminating the employee.

In addition, employers must inform and consult trade unions and the Labour Officer (a designated public official within the Ministry of Labour) where the employer is considering terminating an employee on grounds of redundancy.

Under the current laws, employees may not be represented by legal counsel during the course of their internal disciplinary hearings or consultations preceding termination on grounds of redundancy.

5. TAX LAW

5.1 Taxes Applicable to Employees/Employers

An employee is liable to pay income tax – commonly known as Pay As You Earn (PAYE) – on income earned or accrued in Kenya, or earned outside Kenya by a resident individual. A person is considered to be a resident if they have a permanent home in Kenya and were present for any time during a particular tax year, or if they have no permanent home in Kenya but were present in Kenya for at least 183 days in the tax year under consideration or have averaged 122 days in Kenya in the tax year and the previous two years.

PAYE is based on a graduated scale based on income brackets, with the lowest rate being 10% for monthly income exceeding USD205 and the highest rate being 30% for monthly income exceeding USD276. PAYE is withheld and remitted by the employer on a monthly basis to the Kenya Revenue Authority.

An employee will also contribute prescribed amounts to the National Hospital Insurance Fund (NHIF) and the National Social Security Fund (NSSF).

An employer is responsible for remitting PAYE to the Kenya Revenue Authority every month, and for remitting the employee's NHIF and NSSF monthly contributions.

5.2 Taxes Applicable to Businesses

Companies carrying on business in Kenya are subject to the following taxes.

Corporate Tax

The tax rate for a resident company is 30% on its taxable income. A company is resident if it is incorporated under Kenyan law or if the management and control of the company's affairs are carried out in Kenya, or if a company is declared as such by the Minister for Finance in the Kenyan Gazette. For non-resident companies with a permanent establishment in Kenya, the rate is 37.5% on its taxable income.

Permanent establishments include:

- a fixed place of business through which a business is carried on;
- a building site, construction, assembly or installation project or any supervisory activity, provided that the same continues for more than 183 days;
- the provision of services including consultancy services through employees or other personnel where those services continue for more than a period exceeding 91 days in any 12-month period, in aggregate;
- an installation or structure used for the exploration of natural resources, provided that such activity continues for a period of 91 days or more; and
- a dependent agent of a non-resident carrying out the non-resident's activities in Kenya,

including habitually concluding contracts or playing a material role in the conclusion of contracts that are routinely concluded without material modification.

Turnover Tax
This applies to resident persons including incorporated companies with an annual business turnover of between approximately USD8,500 and USD500,000. The applicable rate is 1% on gross turnover.

Minimum Tax
This applies to resident persons including incorporated companies and is payable where the instalment tax is lower than the minimum tax. The applicable rate is 1% on gross turnover. The application of this tax was suspended by the Kenyan High Court in September 2021 but the Kenya Revenue Authority has appealed against this decision.

Capital Gains Tax
This applies to transactions involving the sale of property, which includes land, buildings and shares of a company. The applicable rate is 5% on the net gain accrued.

Withholding Tax (WHT)
This is chargeable on dividends, royalties, management fees, professional fees for services rendered and interest on loans. The rates of WHT vary from 3% to 30%. A lower rate applies if a Double Taxation Treaty exists and is in force between Kenya and another nation.

Excise Duty
This is chargeable on excisable goods manufactured by a licensed manufacturer in Kenya, excisable services supplied in Kenya by a registered person (such as licensed activities undertaken by licensed institutions such as banks and insurance companies) and excisable goods imported into Kenya by a registered person, including motor vehicles but excluding motor cycles and duty-free motor vehicles under the East African Community Customs Act. Betting and gaming are subject to excise duty at the rate of 7.5% of the amount wagered or staked.

Value Added Tax (VAT)
This is chargeable on the supply of taxable goods or services made in Kenya, and on the importation of taxable goods or services into Kenya. The rate varies from 0% to 16%. VAT registration is mandatory for persons engaging in the supply of taxable supplies with a value of USD50,000 or more in a period of 12 months. Non-resident persons without a permanent establishment who qualify for VAT registration are required to appoint a tax representative for VAT compliance purposes.

Import (Customs) Duty
This is levied on imported goods. It ranges from 0% to 25%, and is payable by the importer. Machinery and inputs (excluding motor vehicles) imported by a licensed company for direct and exclusive use in oil, gas or geothermal exploration, development and distribution are exempt from the payment of import duty.

Stamp Duty
This applies to the purchase of property, which includes land and shares as well as financial instruments. The highest applicable rate is 4% of the value of the property in the transfer of land situated in an urban area. The Act provides for exemptions where the criteria set out in the Act are met.

Digital Service Tax (DST)
This is chargeable on the income of a non-resident person that is deemed to be derived from or that accrues in Kenya through the provision of services via the internet or an electronic network, including a digital marketplace. A digital marketplace is a platform that enables the direct

interaction between buyers and sellers of goods and services through electronic means. The applicable tax rate is 1.5% of the gross transaction value, and the tax is due at the time of the transfer of the payment for the service to the service provider. With effect from April 2021, VAT of 16% is payable on the digital service supplied. There are exemptions to DST.

5.3 Available Tax Credits/Incentives

Tax incentives include preferential corporate tax rates, capital allowances, tax exemptions and tax holidays.

Preferential Corporate Tax Rates

A corporate tax rate of 15% is available for:

- companies investing in the housing sector with an output of 100 residential units annually, subject to the approval of the Cabinet Secretary responsible for Land, Housing and Urban Development; for companies engaged in multiple activities that include housing, the rate of 15% applies proportionately to the extent of the turnover arising from the housing activity; and
- motor vehicle assemblers for the initial five years of operation. The reduced rate may be extended for another five years if local content targets are achieved.

Capital Allowances

Wear and tear allowances

These are charged on capital expenditure on machinery and equipment. The rate ranges from 12.5% to 37.5%.

Investment deductions

Investors are entitled to investment deductions on the cost of the construction of buildings, the acquisition of machinery, certain computer software and farm works.

For commercial buildings such as hotels, hospitals, buildings used for manufacture and petroleum and gas storage facilities, the rate is 50% in the first year of use and 25% per year on a reducing balance on the residual value. The buildings must be approved by the competent authority in order to qualify for the exemption.

For other commercial buildings and educational facilities, including student hotels, the applicable rate is 10% per year on a reducing balance basis. There is a 100% investment deduction allowance where the cumulative investment value for the preceding three years for buildings outside Nairobi and Mombasa Counties is at least USD17 million or USD2.142 million for the particular year of income.

For machinery, the applicable rates are as follows:

- 50% in the first year of use and 25% reducing balance on the residual value of machinery used in manufacturing hospital equipment, ships, aircrafts or machinery used in exploration or operations under a prospecting right;
- 25% per year on a reducing balance basis for vehicles and heavy earth moving equipment, computer and peripheral computer hardware and software, calculators, copiers and filming equipment for local licensed producers; and
- 10% per year on a reducing balance basis on furniture, fittings, telecommunication equipment and other machinery.

For the acquisition of an indefeasible right to use fibre optic cable by a telecommunication operator, the rate is 10% per year on a reducing balance.

For farm works, the applicable rate is 50% in the first year of use and 25% per year on a reducing balance on the residual value.

There is a 150% investment deduction on capital expenditure of at least USD50 million incurred on the construction of bulk storage and handling facilities for supporting the Standard Gauge Railway operations of a minimum of storage of 100,000 metric tonnes of supplies.

Special Economic Zones (SEZ)

These are specially designated geographical areas where business-enabling policies, integrated land uses and sector-appropriate on-site and off-site infrastructure are provided to support business. The Cabinet Secretary for Industry, Investment and Trade is empowered to designate SEZ.

The incentives for SEZ are as follows:

- 100% investment deduction on the cost of buildings and machinery for use in the SEZ;
- preferential corporate tax rate of 10% for the first ten years and 15% for the next ten years; and
- exemption from excise duty, customs duty, VAT and stamp duty.

Export Processing Zones (EPZ)

These are designated areas under the Export Processing Zones Act for the manufacture of goods for export. The incentives for EPZ are as follows:

- a ten-year corporate income tax holiday and a reduced 25% tax rate for the subsequent ten years and 30% thereafter;
- a ten-year withholding tax holiday on dividends and other remittances to non-resident parties;
- 100% investment deduction on new investment in EPZ buildings and machinery; and
- goods and services that are purchased by enterprises operating within EPZ are not subject to VAT, excise duty or customs duty.

Ease of Doing Business

The Investment Protection Act has established the Kenya Investment Authority, which is a one-stop shop for obtaining all requisite investment licences, approvals and exemptions. This is in a bid to improve the ease of doing business in Kenya.

5.4 Tax Consolidation

There are currently no mechanisms in place that allow for the registration of a group of companies as one entity for tax purposes. Each company is taxed separately and accounts for its losses separately. The transfer of tax losses within the group is not permitted.

5.5 Thin Capitalisation Rules and Other Limitations

Thin Capitalisation Rules (TC Rules) are contained in various sections of Kenya's Income Tax Act, and apply where:

- a non-resident entity controls a resident entity; and
- the non-resident entity (or associate of the non-resident entity) provides financial assistance to the related resident entity.

For the purposes of the TC Rules, "control" refers to when:

- a person has direct or indirect ownership of at least 20% of the voting rights in a company;
- a person has advanced a loan to another person that constitutes at least 70% of the book value of the borrower's total assets, save for a loan from an unrelated financial institution;
- a guarantee by a person constitutes at least 70% of the total indebtedness of the other person, save for a guarantee by an unrelated financial institution;
- a person has the power to appoint more than half of the board of directors or at least one

director or executive member of the governing board;
- a person owns or has exclusive rights over intellectual property on which another person wholly depends for the manufacture or processing of goods or articles or business;
- a person or their assignee supplies at least 90% of the purchases of the other person, and the Commissioner upon assessment deems influence on pricing or other conditions relating to such supply;
- a person or their assignee purchases at least 90% of the sales of another or influences pricing or conditions related to the sales; and
- a person deals or relates with another in a way the Commissioner deems to constitute control.

Where the above conditions are met, gross interest paid or payable to related non-resident persons in excess of 30% of earnings before interest, taxes, depreciation and amortisation (EBITDA) will be disallowed. Any income exempt from tax shall be excluded in the calculation of EBITDA.

Foreign exchange losses in respect of such portions of loans that exceed the allowed ratio shall not be a deductible expense.

5.6 Transfer Pricing

A company that has related party transactions is required to ensure that such transactions are at arm's length.

The Income Tax Act empowers the Commissioner to adjust profits accruing to a Kenyan resident where such a person enters into transactions with related non-residents and the transactions result in no realisation of profit, or less than the ordinary profits accrue to the resident person compared to a transaction that had been conducted by persons dealing at arm's length.

The Income Tax (Transfer Pricing) Rules, 2006 mirror the principles set out in the OECD Guidelines on transfer pricing. The rules require related parties to prepare a transfer pricing policy to justify the pricing arrangements; upon request, the parties should present the transfer pricing policy to the Revenue Authority.

5.7 Anti-evasion Rules

The thin capitalisation and transfer pricing rules are the key anti-evasion rules in Kenya.

In addition, the Income Tax Act provides that where they are of the opinion that the main purpose for which a transaction was effected was the avoidance or reduction of liability to tax, the Commissioner may direct that such adjustments as they consider appropriate are made to that transaction for tax purposes, to counteract the tax avoidance or reduction of liability to tax.

6. COMPETITION LAW

6.1 Merger Control Notification

The Competition Act 2010 (the Act) and the Competition (General) Rules 2019 (the Rules) deal with the control and notification of mergers in Kenya.

The term "merger" has a very broad interpretation under the Act and extends to any transaction that includes the acquisition of shares, business or other assets, whether inside or outside Kenya, that results in a change of control of a business, part of a business or an asset of a business in Kenya in any manner and includes a takeover.

The proposed acquisition of control of a target business, whether by way of an asset/business or an acquisition of shares by an acquirer, would constitute a "merger" under the Act and, depending on the thresholds, would require:

- no approval from or notification to the Competition Authority of Kenya (CAK);
- CAK exclusion (exemption); or
- prior approval from the CAK.

Failure to obtain a CAK exclusion (exemption) or approval where required would render the transaction void and of no legal effect. Furthermore, it is an offence to implement a merger in Kenya without prior CAK exclusion or approval where required; upon conviction, the liability is imprisonment of up to five years and/or a fine of up to KES10 million, as well as an additional financial penalty that may be imposed by the CAK of up to 10% of the preceding year's gross annual turnover of the undertakings in question.

Mergers that take place outside of Kenya and have no local connection are also not subject to notification to the CAK as they fall outside the scope of Kenyan merger control.

According to the Rules, the following notifiable mergers require the prior approval of the CAK:

- if the undertakings have a minimum combined turnover or assets (whichever is higher) in Kenya of KES1 billion, and the turnover or assets (whichever is higher) in Kenya of the target undertaking are above KES500 million;
- if the turnover or assets (whichever is higher) in Kenya of the acquiring undertaking are above KES10 billion and the merging parties are in the same market or can be vertically integrated (unless the transaction meets the COMESA Competition Commission Merger Notification Thresholds);
- in the carbon-based mineral sector, if the value of the reserves, the rights and the associated assets to be held as a result of the merger exceed KES10 billion; and
- where the undertakings operate in the COMESA region, if the combined turnover or assets (whichever is higher) of the merging parties do not exceed KES500 million, and two-thirds or more of the turnover or assets (whichever is higher) are generated or located in Kenya.

Mergers that need to be notified to the CAK but may be excluded or exempted by the CAK include if the combined turnover or assets (whichever is higher) in Kenya of the merging parties is between KES500 million and KES1 billion, or if the firms are engaged in prospecting in the carbon-based mineral sector, regardless of asset value.

The CAK does not need to be notified and no CAK approval is required if the combined turnover or assets (whichever is higher) in Kenya of the merging parties do not exceed KES500 million, or if the merger meets the COMESA Commission Merger Notification Thresholds and at least two-thirds of the turnover or assets (whichever is higher) are not generated or located in Kenya.

It is a criminal offence to implement a merger in Kenya contrary to the provisions of the Act, with penalties of up to five years' imprisonment and/or a fine of up to KES10 million, as well as a separate financial penalty that may be imposed by the CAK of up to 10% of the preceding year's gross annual turnover of the undertakings in question.

6.2 Merger Control Procedure

A merger filing may be done online on the CAK merger filing portal. The CAK usually acknowledges receipt of a merger filing within three days of receipt. The CAK has a 60-day turnaround time to decide merger filings where all relevant information has been submitted. In the case of exclusions/exemptions, the CAK has a 14-day turnaround time.

Merger filing fees are as follows:

- KES1 million in the case of undertakings having a combined turnover or assets between KES1 billion and KES10 billion;
- KES2 million in the case of undertakings having a combined turnover or assets between KES10 billion and KES50 billion; and
- KES4 million in the case of undertakings having a combined turnover or assets above KES50 billion.

6.3 Cartels

The Act prohibits agreements or combined practices that have as their object or effect the prevention, distortion or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya, unless the CAK has given an exemption.

Such agreements or practices include those that directly or indirectly fix purchase or selling prices or any other trading conditions, divide markets by allocating customers, suppliers, areas or specific types of goods or services, or involve collusive tendering.

6.4 Abuse of Dominant Position

A person (natural or corporate) has a dominant position in the market if they produce, supply, distribute or otherwise control not less than one-half of the total goods of any description that are produced, supplied or distributed in Kenya, or any substantial part thereof, or if they provide or otherwise control not less than one-half of the services that are rendered in Kenya or any substantial part thereof.

The following are examples of abuse of a dominant position:

- directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- limiting or restricting production, market outlets or market access, investment, distribution, technical development or technological progress through predatory or other practices;
- applying dissimilar conditions to equivalent transactions with other trading parties (thereby placing them at a competitive disadvantage);
- making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by their nature or according to commercial usage have no connection with the subject matter of the contracts; or
- abusing intellectual property rights.

Abuse of Buyer Power

Buyer power is generally defined as the influence exerted by an undertaking or group of undertakings in the position of a purchaser of a product or service to obtain more favourable terms from a supplier, or to impose a long-term opportunity cost including hard or withheld benefit which, if carried out, would be significantly disproportionate to any resulting long-term cost to the undertaking or group of undertakings. Any conduct amounting to abuse of buyer power is expressly prohibited. Abuse of buyer power contrary to the Act attracts a penalty of up to five years' imprisonment and/or a fine of up to KES10 million.

The CAK is empowered to conduct an inquiry into any matter relating to abuse of buyer power, and to investigate conduct that is alleged to constitute an abuse of buyer power. In determining cases related to abuses of buyer power, the CAK is required to take into account all relevant factors, including:

- the nature and determination of contract terms between the undertakings concerned;
- the payment requested for access to infrastructure; and
- the price paid to suppliers.

The Act currently provides a non-exhaustive list of conducts that amount to abuse of buyer power, which includes:

- delays in payment of suppliers without justifiable reason in breach of agreed terms of payment;
- unilateral termination or threats of termination of a commercial relationship without notice or with an unreasonably short notice period, and without an objectively justifiable reason;
- refusal to receive or return any goods or part thereof without justifiable reason in breach of the agreed contractual terms;
- transfer of costs or risks to suppliers of goods or services by imposing a requirement for the suppliers to fund the costs of a promotion of the goods or services;
- transfer of commercial risks meant to be borne by the buyer to the suppliers;
- demands for preferential terms unfavourable to the suppliers or demanding limitations on supplies to other buyers;
- reducing prices by a small but significant amount where there is difficulty in sustaining alternative buyers or reducing prices below competitive levels; or
- bidding up prices of inputs by a buyer undertaking with the aim of excluding competitors from the market.

The CAK may monitor the activities of a particular sector or undertaking that experiences or is likely to experience an abuse of buyer power and ensure compliance by imposing reporting and prudential requirements. The CAK may also require industries and sectors where incidences of abuse of buyer power are likely to occur to develop a binding code of practice. Agreements between buyers and sellers (which guide the CAK when investigating complaints relating to abuse of buyer power) are required to include the following:

- the terms of payment;
- the payment date;
- the interest rate payable on late payment;
- the conditions for termination and variation of the contract with reasonable notice; and
- the mechanism for the resolution of disputes.

The CAK may also take oral agreements into account.

7. INTELLECTUAL PROPERTY

7.1 Patents

Definition

A patent is an exclusive right to exploit an invention, and is granted in exchange for disclosure of the invention to the public. Patents give exclusive rights to the owner to prevent the manufacturing, use or selling of the protected invention. In order for a patent to be granted, the invention must meet the requirement of novelty, which means it must be new. It must also involve an inventive step that is not obvious to persons of ordinary skill in the particular field of the invention. Lastly, it must be industrially applicable and useful. Certain things are excluded from patenting, including:

- methods and schemes of doing business or for performing mental acts;
- scientific and mathematical formulas;
- methods of treatment of humans and animals;
- products that are solely processes of nature and have not been created by human intervention or participation; and
- inventions that violate public order or are contrary to morality, public health safety, principles of humanity and environmental preservation.

Length of Protection

A patent is valid for 20 years, after which the invention is no longer protected and can be exploited by anyone. During the initial period of 20 years, the patent must be renewed every year, or the protection will lapse.

Registration Process

In order to obtain a patent in Kenya, the applicant is required to conduct a search through the Kenya Industrial Property Institute (KIPI), which is the body corporate responsible for examining and granting patents in Kenya.

Once the necessary approval is granted, an application should be lodged through KIPI. The application should be accompanied by a full description of the invention, and should clearly illustrate the characteristics of the invention and identify the scope of the patent rights sought. The application is published in the Industrial Property Journal 18 months after the date of filing.

KIPI conducts an examination on the proposed patent for purposes of checking the patent's compliance with the requirements of the Industrial Property Act (IPA). Where a patent application is not accepted, the applicant will be informed by KIPI of the reasons for non-acceptance, and will be given an opportunity to rectify or update the application.

When an application is accepted, it is advertised in the Industrial Property Journal, after which a patent certificate is issued.

The application process attracts prescribed fees, which are payable at the commencement of every application phase.

As Kenya is a member state of the African Regional Intellectual Property Organization (ARIPO – a regional intergovernmental organisation mandated to grant patents on behalf of its members), it is possible to make regional filings for patent applications through ARIPO. International filings can be done under various treaties to which Kenya is a signatory, including the Paris Convention and the Patent Co-operation Treaty.

Enforcement and Remedies

There are various remedies available for patent infringement. A patent owner can institute legal proceedings at the Industrial Property Tribunal (IPT) established under the IPA. The IPA empowers the IPT to grant an injunction to prevent imminent infringement or prohibit the continuation of an ongoing infringement. The IPT may also direct the infringing party to pay damages to the patent holder. Other remedies include patent revocation and invalidation, which may be granted where the IPT is satisfied that the circumstances of particular proceedings warrant it and that infringement has been demonstrated.

The IPT also hears and determines appeals against decisions made by KIPI in relation to patent applications.

Appeals against decisions of the IPT may be filed at the High Court, with the possibility of an appeal to the Court of Appeal on matters of law.

7.2 Trade Marks

Definition

A trade mark is a distinctive word, logo or symbol used for purposes of identifying products in the form of goods and services with a particular producer, and distinguishing such products from those of another producer. Registration of a trade mark grants exclusive rights to the owner of the trade mark for use in product identification, and affords legal protection by giving the owner the ability to seek legal redress to restrict unauthorised use of the trade mark by third parties. The proprietor of a trade mark acquires rights for licensing the trade mark to third parties for commercial use.

Length of Protection

A trade mark registration is valid for ten years and is renewable thereafter for unlimited terms of ten consecutive years.

Registration Process

KIPI registers trade marks through national filings as well as international filings through the Madrid system.

Applications for registration commence with a search intended to check the availability and registrability of the intended trade mark. As trade marks are classified into various classes, identification of the class in which the trade mark is intended to be registered is a significant part of the application. Kenya applies the classification system outlined in the 11th edition of the Nice Agreement on the international classification of goods and services, which categorises goods and services into various classes and effectively harmonises the classification of goods and services worldwide.

The proposed mark must contain at least one of the following particulars:

- the name of a company, individual or firm, represented in a special or particular manner;
- the signature of the applicant for registration or some predecessor in their business;
- an invented word or invented words; or
- a word or words having no direct reference to the character or quality of the goods, and not being a geographical name or a surname according to its ordinary signification.

Applications submitted at KIPI are subjected to a similarity check to confirm whether the proposed trade marks are similar to existing and registered trade marks. Substantive examinations are also done to check for conformity with the Trademarks Act and Regulations.

Once approval is given at the examination stage, the trade mark is advertised in the Industrial Property Journal, inviting objections from third parties within 60 days of the advertisement. If no objections are made, a Certificate of Registration is issued.

If objections are raised, objection proceedings are commenced for determination by the Registrar of Trademarks. Decisions made by the Registrar of Trademarks may be appealed against by a dissatisfied party. A further appeal is available at the Court of Appeal on points of law only.

Foreign applicants are required to file applications for registration through a duly qualified agent, who should be an Advocate of the High Court of Kenya.

Recordation of Intellectual Property Rights

Pursuant to the provisions of the Anti-Counterfeit Act No 133 of 2008 and the Anti-Counterfeit (Recordation) Regulations 2021, intellectual property rights owners are required to record with the Anti-Counterfeit Authority (ACA) any IP rights that are attached to goods that are imported into Kenya. Importers of goods who are not the IP right owners are required to declare the particulars of the IP rights that apply to the goods they import into Kenya.

The importation into Kenya of any goods or items bearing IP rights such as a trade mark, trade name or copyright that has not been recorded with the ACA is an offence.

The recordation and declaration of IP rights is effected through the ACA's online portal.

The owner of an IP right may appoint an agent to act on their behalf in the recordation of IP rights.

An agent may be a member of a statutory professional body (Advocates, Certified Public Accountants, etc) or such other persons who meet the requirements set out by the Private Security Regulation Act 2016.

Enforcement and Remedies

Under the Trademarks Act, Chapter 506 Laws of Kenya, only registered trade mark proprietors can successfully make claims for trade mark infringement.

Enforcement of a trade mark can be done by the trade mark's proprietor in objector capacity by lodging opposition proceedings at KIPI against proposed trade marks that bear striking similarities to the objector's registered trade marks. A proprietor of an infringed trade mark may obtain an injunction barring further infringement or the unauthorised use of a trade mark, claiming an award for damages and even orders for delivery up and destruction of the offending products.

Other enforcement means include seeking cancellation of an offending trade mark, filing infringement and passing off proceedings.

Judicial decisions made pursuant to enforcement measures are subject to appeal at the High Court and further appeal at the Court of Appeal.

7.3 Industrial Design

Definition

Industrial designs are forms, patterns and shapes that give a special or unique appearance to a product of industry or handicraft.

In order to be eligible for protection, an industrial design must be new – ie, it must never have been disclosed to the public anywhere in the world. It must also strictly relate to the outward appearance of objects and not the method of its construction or its functionality.

Length of Protection

In Kenya, industrial design registrations are valid for a period of five years and can be renewed for two further terms of five years each.

Registration Process

Registration of industrial designs is undertaken at KIPI. The application for registration involves a search to establish whether the design is suitable for registration. Once the design is approved as having met the required conditions, an application is lodged and advertised for the invitation of objections within 60 days of the date of publication of the design.

If no objections are received, the registrar will proceed to issue a certificate of registration.

Enforcement and Remedies

The owner of an industrial design may institute legal proceedings in court for infringement. If it is proven that loss has been suffered due to the infringement, the court may award compensation by way of damages, or make an order for delivery of an account of profits. It is possible to obtain a temporary court order in the form of an injunction to prevent further infringement during the pendency of proceedings.

7.4 Copyright

Definition

A copyright grants legal protection for creations of original content in literary, musical, artistic and audiovisual works. To qualify for copyright protection, the literal, musical and artistic works must have been written down, recorded or otherwise reduced to tangible form. Registration gives the owner the following rights:

- to control the reproduction and distribution of any material form of the original work, including its translation;
- to claim authorship of the works;

- to object to unauthorised destruction and mutilation of the works;
- to communicate and broadcast the work to the general public; and
- transmission of the rights as movable property by way of assignment, licence or testamentary disposition, or by operation of law.

Length of Protection

Literary, musical and artistic content is protected for 50 years from the date of the author's death.

Audiovisual works are protected for 50 years following the year in which the work was either availed to the public or first published, whichever comes later.

Sound recordings are protected for 50 years from the year in which they are made.

Broadcasts are protected for 50 years from the end of the year in which they were first made.

Registration Process

The Copyright Act (No 12 of 2001) governs the use and application of copyrights in Kenya. The Kenya Copyright Board created under the Act is responsible for the registration of copyrights.

A successful registration process involves the provision of prescribed details through a prescribed application process and the payment of predetermined fees. The process concludes with the issuance of a Certificate of Registration after a rigorous verification process of the copyright by the Copyright Board.

Enforcement and Remedies

In the event of an infringement, a copyright holder is entitled to institute court infringement proceedings, and must prove the alleged infringement in order to obtain the desired legal relief.

Courts may issue preservation orders where it can be demonstrated that a party in possession of infringing documents is likely to destroy or mutilate the documents to frustrate the enforcement of legal reliefs.

7.5 Others

A trade secret is recognised and protected if it relates to information that is kept secret and is not readily available to categories of persons that would find the undisclosed information crucial for their trade, or if it relates to information that has commercial value and reasonable steps have been taken to keep the information undisclosed or a secret.

In Kenya, there is no specific statute that relates to the regulation of trade secrets. Trade secrets are protected by the application of common law and equity.

There are laws that contain provisions that can be invoked for the protection of trade secrets by virtue of such provisions recognising the right to privacy and the flexibility of parties to enter into contracts and create obligations defining the extent to which a party can deal with trade secrets arising from contractual relationships. Such laws include the Constitution of Kenya, the Law of Contract Act, the Contracts in Restraint of Trade Act and the Computer Misuse and Cybercrimes Act.

The owner of a trade secret does not have a claim against a party that independently discovers the trade secret. The rationale is that there would ordinarily be no agreement between such parties in relation to the trade secret or any binding confidentiality obligations. As long as a party discovers a trade secret independently and honestly, such party cannot be prevented from using the discovered information.

In view of the contractual obligation arising in an agreement to protect a trade secret, a trade secret owner would have a right to sue for breach of such agreement. Reliefs that may be claimed include compensation by way of damages for losses suffered as a result of a breach of agreement.

The length of protection of a trade secret varies depending on the choice of the owner of a trade secret, as may be defined in a non-disclosure agreement. In the absence of an agreement, consideration is placed on what would ordinarily constitute a reasonable period, depending on the factors unique to a particular case.

In relation to computer software and technology, the Computer Misuse and Cybercrimes Act of Kenya protects trade secrets that are embedded in computer systems. The Act makes the misappropriation of trade secrets a criminal offence that, if proven, attracts a penalty in the form of a fine or imprisonment. The Computer Misuse and Cybercrimes Act also prohibits electronic industrial espionage and subjects any violation of the provision to a penalty in the form of a fine or punishment by way of imprisonment. It is also a criminal offence in Kenya to engage in industrial espionage by way of burglary and theft.

8. DATA PROTECTION

8.1 Applicable Regulations

The main laws applicable to data protection in Kenya are the Data Protection Act No 24 of 2019 (DPA), the Data Protection (Registration of Data Controllers and Data Processors) Regulations 2021, the Data Protection (General) Regulations 2021 and the Data Protection (Complaints Handling and Enforcement) Regulations 2021.

The DPA was enacted to enforce Article 31 of the Kenyan Constitution, which requires that information relating to a person's family or their private affairs is not unnecessarily required or revealed. Article 31 seeks to safeguard against the infringement of the right to privacy, including privacy of communications.

Accordingly, the DPA regulates the processing of information, although such processing is limited to the personal data of natural persons. Juristic persons may not rely on the DPA to enforce their right to privacy.

Processing is defined to mean operations, whether automated or not, that include collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, use, disclosure by transmission, dissemination or otherwise making available, restriction, erasure or destruction.

8.2 Geographical Scope

The DPA applies to the processing of personal data by a data controller or data processor who is established or ordinarily resident in Kenya and processes personal data while in Kenya, or by a data controller or data processor who is not established or ordinarily resident in Kenya but is processing the personal data of data subjects located in Kenya.

A data controller is defined as a natural or legal person, public authority, agency or other body which, alone or jointly with others, determines the purpose and means of processing of personal data. A data processor is defined as a natural or legal person, public authority, agency or other body that processes personal data on behalf of the data controller.

8.3 Role and Authority of the Data Protection Agency

The main functions of the Data Commissioner are as follows:

- to oversee the implementation and enforcement of the DPA;
- to maintain a register of all data controllers and processors;
- to oversee data processing operations, inquiring through assessment whether data processors are processing information legally;
- to inspect entities to ensure compliance;
- to undertake research around the development of data processing; and
- to perform other incidental functions.

The Data Commissioner has the power to carry out audits to ensure compliance with the DPA and/or to conduct investigations on their own initiative or on the basis of a complaint by a data subject that their rights have been violated.

Registration of Data Controllers and Processors

The DPA and the Data Protection Registration Regulations require the mandatory registration of data controllers and data processors with the Data Commissioner, subject to them meeting the prescribed thresholds – ie, the data controller or data processor has an annual turnover or annual revenue of KES5 million or more, and employs more than ten people.

Enforcement Procedures

A data subject aggrieved by the conduct or decision of a data controller or data processor may lodge a complaint with the Data Commissioner, either orally or in writing. Upon receipt of a complaint, the Data Commissioner will have 90 days to conduct investigations and conclude the matter. For the purpose of the investigation, the Data Commissioner may summon a person to be examined orally, or summon such person to produce any necessary documentary and electronic evidence or sworn affidavit for the purposes of reaching an informed decision.

Where the Data Commissioner finds a person to have breached the provisions of the Act, they may issue either an enforcement notice or a penalty notice.

An enforcement notice directs a data controller or data processor to take appropriate remedial steps in respect of the breach within a specified timeline, which shall not be less than 21 days. Failure to comply with an enforcement notice is an offence for which, upon conviction, a person is liable to a fine not exceeding KES5 million or to imprisonment for a term not exceeding two years, or both.

On the other hand, a penalty notice requiring the person to pay an administrative fine may be issued, having taken the following into consideration, amongst other matters:

- the nature, gravity and duration of the breach;
- the intentional or negligent character of the breach;
- any action taken to mitigate the damage or distress suffered by the data subject;
- previous breaches;
- the degree of co-operation with the Data Commissioner; and
- whether such penalty is proportionate, effective and dissuasive.

The maximum financial penalty that may be imposed by the Data Commissioner is KES5 million or, in the case of an undertaking, up to 1% of the annual turnover of the preceding financial year, whichever is lower.

Any administrative action taken by the Data Commissioner may be appealed to the High Court.

9. LOOKING FORWARD

9.1 Upcoming Legal Reforms

Start-Ups

On 14 September 2020, the Senate published the Startup Bill, 2020 (Senate Bills No 1 of 2021), which seeks to provide a legal framework that fosters innovation and entrepreneurship by promoting an enabling environment for the growth and development of start-ups.

The Startup Bill provides for the establishment of the Kenya National Innovation Agency, which would:

- create partnerships among local and international business incubators;
- create online directories of start-ups and incubators; and
- register and certify start-ups and incubators.

The Startup Bill was passed by the Senate on 2 December 2021 and has now been referred to the National Assembly for further debate.

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CMS Daly Inamdar Advocates is an independent, full-service Kenyan law firm and the Kenyan member firm of CMS, a leading global law firm with 79 offices in 44 countries and more than 4,800 lawyers. The firm engages in corporate, commercial, property, litigation and arbitration practice, and has offices in Mombasa and Nairobi. The team comprises more than 40 experienced lawyers, several of whom are specialists in their fields. The firm's core practice areas are admiralty and maritime law, capital markets, company secretarial services, corporate and commercial law, energy, infrastructure and mining, employment, environmental law, finance, fintech and banking, foreign direct investments, insurance, intellectual property, litigation and dispute resolution, M&A, private client, property, and real estate and tax law.

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