



Restrictions on Foreign Ownership and Investment in Kenya

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RESTRICTIONS ON FOREIGN OWNERSHIP AND INVESTMENT IN KENYA

Introduction

The legal position of aliens in Kenya is subject to various statutory enactments including some constitutional provisions.¹ These comprise the Kenyan Citizenship Act, 1963, as amended;² the Immigration Act, 1967, as amended;³ and the Aliens Restriction Act, 1973, as amended.⁴ These laws affect aliens in matters of citizenship, immigration, property ownership, business and trade, nationalization of business enterprises, marriage extradition and culpability in criminal and civil matters.

Under articles 87-98 of the Constitution of Kenya, 1969, as amended,⁵ any person who is not a citizen of Kenya by birth or naturalization is an alien. Although article 75 of this Constitution guarantees the right to own property of any description without interference by the Kenyan Government, aliens are, however, restricted in their full enjoyment of the right to own property by various laws governing alien rights including those cited above.

Restrictions on foreign investments

Kenya has employed a long-standing, stable and positive approach towards foreign private investment. The Government of Kenya only plays an indirect and supporting role to ensure a buoyant and viable economy. This Governmental role is by and large fulfilled through its development and financial institutions such as the Industrial and Commercial Development Corporation, the Industrial Development Bank, and the Development Finance Company of Kenya. Import substitution was the central industrial policy until about the dawn of the 1980s. Since then, government policy has been focused on resource-based and export industries.

The primary law on foreign investments in Kenya is the Foreign Investments Protection Act, 1964, as amended.⁶ However, incentives are also available through other statutory enactments.⁷

¹ For details see C.Mwalimu **The Kenyan Legal System: An Overview** 54-62 & 122-123 (1988)

² 5 **Laws of Kenya**, Ch. 170 (rev. 1988)

³ **Id.** Ch. 172 (rev. 1984)

⁴ **Id.** Ch. 173 (rev. 1985)

⁵ 1 **Laws of Kenya** (rev. 1992)

⁶ 15 **Laws of Kenya**, Ch. 518 (rev. 1990)

⁷ These include the Investment promotion Center, 1986 as amended, 14 **Laws of Kenya**, Ch. 485 (rev. 1987); The Investment Disputes Convention Act, 1966 as amended, 15 **Laws of Kenya**, Ch. 522 (rev. 1967); the Restrictive Trade Practices, Monopolies and Price Control Act, 1989 as amended, **Id.**, Ch. 504 (rev. 1990); and the Export Processing Zones Act, 1990 as amended, **Id.** Ch. 517

Regimes concerning restrictions on foreign ownership and investment under Kenyan law are spread over a wide field as examined below. These include corporations and other business matters, foreign exchange regulations, taxation, land laws and also constitutional provisions on expropriation and compensation.

Priority areas and restrictions.

Priority areas

Certain investment projects are considered of great benefit to the economy of the country. These, among other things, pertain to projects that, first, lead either to earnings or savings of foreign exchange. Second, that result in gains of technical knowledge for Kenya. Third, that increases economic wealth and employment of the country. Fourth, that use or has the potential to use local materials and other local resources and finally that promote diversification of the economy.

Restrictions

In general, large utilities and infrastructure are considered exclusively reserved for the public sector though there are no specific provisions in utilities legislation that exclude or prohibit foreigners from owning or investing in these forms of property. There are no other sectors or regions in Kenya that are reserved for Kenyans only to the exclusion of foreign investors nor are there requirements for local participation in any foreign owned property or investment. However, foreign investment is generally discouraged in agriculture if it involves large-scale land ownership. But Kenyan participation in investment projects is encouraged and may be a factor in the granting of incentives.⁸

The Foreign Investments Protection Act

The Foreign Investments Protection Act protects certain approved foreign investments. Section 3 requires foreigners to submit an application to the responsible minister for a certificate to invest in an approved enterprise. From the very beginning, therefore, the right of the foreign investor is minimally restricted. He must secure a certificate of investment which can be denied or approved based on the minister's discretion, a condition also applicable to local investors. Second such a certificate must relate to an approved enterprise (a condition also applicable to local investors). By implication, therefore, there are enterprises which may not be open to private investment whether by local or foreign investors such as utilities or large-scale agricultural projects that occupy large segments of land.

Only once the minister is satisfied that the enterprise will further economic development or will benefit Kenya can he issue a certificate of investment. The certificate states the name of the holder; the nature and description of the enterprise; and the amount of foreign assets to be invested in

(rev.1991)

⁸ For details, see *African Tax Systems: Kenya* (Secs.A & B (Supp. 1995))

terms of capital or loans, foreign currency to be invested and any other relevant information. The certificate can be amended if future events warrant, for example, death of the original holder, change of ownership and/or extension of periods of grant of certificate. The investor must also comply with the Exchange Control Act, 1950, as amended.⁹

To the extent that constitutional provisions on the compulsory acquisition of a private foreign enterprise and compensation have been incorporated into the Foreign Investments Protection Act as part of this Law, it is palatable to examine the issue of expropriation and compensation as a sub-heading under this Statute and not as a distinct category. According to section, no approved enterprise or any property and no interest in or right over such enterprise or property can be expropriated except if it is consistent with the Constitution of Kenya on the compulsory acquisition of property whether foreign or otherwise. In such a case, the government must pay full and prompt compensation as required by section 75 of the Constitution reproduced in full as scheduled to the Act.

Furthermore, section 8A of the Act supplements and reinforces section 8 when it states that any proceeds realized from the sale of foreign assets that are not transferrable out of Kenya under the authority of section 7 of this Law, are to be invested in *government securities* for a period of five years. However, first the income from *government securities* in which the proceeds are invested may be transferred out of Kenya under the same terms and conditions as interest transferred under paragraph (c) of section 7 of this Law. Second, the capital may be transferred out of Kenya at the end of five years on the same terms and conditions as other funds as provided for in section 7 of the Act. The responsible minister is vested with rule-making powers to further carry out the aims and purposes of the Act.

Section 75 of the Constitution of Kenya: Protection from Deprivation of Property

Expropriation and compensation

The Constitution guarantees that no property or interest can be expropriated except under the following conditions:

- (a) the compulsory acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, zoning or development of any property in such a manner as to promote public benefit;
- (b) the necessity is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
- (c) provision is made by the law on compulsory acquisition for the prompt payment of full compensation.

⁹ 4 **Laws of Kenya**, Ch.113 (rev. 1988), **infra note 13**

Moreover, every person having an interest or right in or over property which has been expropriated has *a right of direct access to the High Court of Kenya* to pursue these remedies:

- (i) the determination of his interest or right;
- (ii) the legality of the expropriation;
- (iii) the interest or right;
- (iv) the amount of any compensation to which he is entitled; and
- (v) to obtain prompt payment of the compensation.

But the Kenyan legislature can pass a law that adversely affects the right of direct access to the High Court. Such access could be made indirectly through a tribunal first or other authority and then on appeal to the High Court.

Notwithstanding these guarantees against expropriation without full and prompt compensation, this same section of the Constitution reserves and protects the authority of the government to do precisely this (expropriation) in the following cases:

- (a) in satisfaction of any tax, duty, rate or other appropriate charges on imports;
- (b) as a penalty for breach of the law whether under civil process or following conviction for a criminal offence under any laws of Kenya;
- (c) as an incident of a lease, tenancy, mortgage, charge, bill of sale, pledge or contract;
- (d) in the execution of judgments or order of a court in proceedings for the determination of civil rights or obligations;
- (e) in circumstances where it is reasonably necessary to do so because the property is in a dangerous state or injurious to the health and welfare of human beings, animals or plants;
- (f) in consequence of any law on limitation of actions; or
- (g) as may be necessary for the purposes of any examination, investigation, trial or inquiry or in the case of land for purposes of carrying out work relating to soil conservation, agriculture or other purposes as determined by the government as long as such work or purpose is not shown to be unreasonably justifiable in a democratic society.

Section 75 of the Constitution also grandfathers the validity of any law in Kenya that contains any provisions on expropriation if it is:

- (a) expropriation of enemy property;
- (b) expropriation of property of a deceased person, a person who is mentally ill or unsound mind, a person below 18 years old, or to administer such property/ interest of beneficiaries;
- (c) expropriation of property of a person decreed bankrupt or a corporation in liquidation for its administration to benefit creditors or/ and any other person entitled to the interest; and
- (d) expropriation of property which is subject to a trust in order to vest property in the trustees under an instrument creating the trust or by a court order giving effect to this trust.

Finally section 75(7) of the Constitution stipulates that nothing in any law or performed under the authority of any law shall be held to be inconsistent with or in contravention of section 75 to the extent that the law in question makes provision for the expropriation of property/interest or right where they are vested in a corporation for public purposes. To receive constitutional protection, however, no private money can be invested in it other than money provided by the legislature through appropriations.

Restrictions on foreign ownership and investment in agriculture

A series of legislation govern agriculture and other related matters in Kenya. However, the primary law appears to be the Agriculture Act, 1963, as amended.¹⁰ The Act constitutes an effort

¹⁰ 10 **Laws of Kenya**, Ch.318 (rev. 1986). Others include the Agricultural Produce (Export) Act, 1923 as amended, **Id.** Ch.319 (rev.1979); The Agricultural Produce (Marketing) Act, 1936 as amended **Id.** Ch.320 (rev.1983); the Crop Production and Livestock Act, 1926 as amended, **Id.** Ch.321 (rev.1977); the Agricultural Finance Corporation Act, 1969 as amended, **Id.** Ch.323 (rev.1991); the Plant Protection Act, 1937 as amended, **Id.** Ch.324 (rev.1979); the Noxious Weeds Act, 1945 as amended, **Id.** Ch.325 (rev.1985); the Seeds and Plants Varieties Act, 1975 as amended, **Id.** Ch.326 (rev.1991); the Canning Crops Act, 1958 as amended, **Id.** Ch.328 (rev.1980); the Coconut Industry Act, 1923 as amended, **Id.** Ch.331 (rev.1983); the Coconut Preservation Act, 1915 as amended, **Id.** Ch.332 (rev.1983); the Coffee Act, 1960 as amended, **Id.** Ch.333 (rev.1979); the Cotton Act, 1989 as amended, **Id.** Ch.335 (rev.1990); the Dairy Industry Act, 1958 as amended, **Id.** Ch.336 (rev.1984); the National Cereals and Produce Board, 1985 as amended, **Id.** Ch.338 (rev.1986); the Pyrethrum Act, 1964 as amended, **Id.** Ch.340 (rev.1991); the Sisal Industry Act, 1952 as amended, **Id.** Ch.341 (rev.1991); the Tea Act, 1961 as amended, **Id.** Ch.343 (rev.1991); the Wheat Industry Act, 1952 as amended, **Id.** Ch.344 (rev.1972); the Fertilizers and Animal Foodstuffs Act, 1967 as amended, **Id.** Ch.345 (rev.1977); the Pest Control Products Act, 1983 as amended, **Id.** Ch.346 (rev.1977); the Irrigation Act, 1966 as amended, **Id.** Ch.347 (rev.1986); the Stock and produce Act, 1933 as amended, **Id.** Ch.355 (rev.1982); the Meat Control Act, 1972 as amended, **Id.** Ch.356 (rev.1977); the Agricultural Development Corporation Act, 1965 as amended, 12 **Laws of Kenya**, Ch.444 (rev.1991); the Branding of Stock Act, 1907 as amended, 11 **Laws of Kenya**, Ch.357 (rev.1972); the Cattle Cleansing Act, 1937 as amended, **Id.** Ch.358 (rev.1972); the Prevention of Cruelty to Animals Act, 1962 as amended, **Id.** Ch. 360 (rev.1983); the

on the part of the Kenyan Government to promote and maintain a stable agricultural base for the country. The Act also deals with matters of conservation of soil, its fertility as well as various ways to stimulate the development of agricultural land based on accepted practices of good land management and husbandry. It does not contain any provisions restricting foreign ownership or investment in agriculture.¹¹

The Coffee Act

Section 21 of the Coffee Act stipulates that no planter or farmer of coffee can sell, roast or export coffee without a permit from appropriate authorities. All coffee in Kenya is sold to the Coffee Board of Kenya. It is the Board which in turn sells, roasts or exports coffee. It is possible, however, to obtain exemptions in specific cases.

The Cotton Act

Section 19 of the Cotton Act contains similar provisions as those found in section 21 of the Coffee Act. Under section 19 of the Cotton Act, only the Cotton Board can license a person to sell raw cotton, cotton lint or cotton seed. Furthermore, only the Board can permit anyone through a license to purchase raw cotton from any grower other than a ginner. In addition, only the Board can grant a ginning license for anyone to carry out the business of ginning raw cotton. Therefore, without a license from the Board no individual can carry out such activities.

The Tea Act

Limitations concerning coffee and cotton placed on the individual to operate such businesses are also found in section 15 of the Tea Act. Therefore, from time to time, the Tea Board of Kenya could prohibit the export of manufactured tea, unless such exports complied with any conditions that may be stipulated by a permit issued by the Board. The Tea Board of Kenya is the controlling authority.

The Wheat Industry Act

Section 3 of the Wheat Industry Act vests control of marketing and the distribution of wheat,

Hide, Skin and Leather Trade Act, 1987 as amended, **Id.** Ch.359 (rev.1988); the Pig Industry Act, 1966 as amended, **Id.** Ch.361 (rev.1991); the Uplands Bacon Factory Act, 1946 as amended, **Id.** Ch.362 (rev.1984); the Kenya Meat Commission Act, 1950 as amended, **Id.** Ch.363 (rev.1990); the Animals Diseases Act, 1965 as amended, **Id.** Ch.364 (rev.1989); the Fisheries Act, 1989 as amended, **Id.** Ch.378 (rev.1991); the Government Fisheries Protection Act, 1902 as amended, **Id.** Ch.379 (rev.1977); the Trout Act, 1948 as amended, **Id.** Ch.380 (rev.1983); the Forests Act, 1942 as amended, **Id.** Ch.385 (rev.1982); the Timber Act, 1971 as amended, **Id.** Ch.386 (rev.1972) and the Wildlife (Conservation and Management) Act, 1976 as amended, **Id.** Ch.376 (rev.1985).

¹¹ **But see** *supra* note 8

flour and wheat feed in the responsible Minister. The Minister also relies upon and benefits from the counsel and advice of the Wheat Board of Kenya. Under section 3 of this Law, no wheat can be exported other than through agencies appointed by the Minister. In addition, the local marketing and distribution of imported wheat can only be carried out through similar agencies appointed by the Minister.

The Fertilizers and Animal Foodstuffs Act

Sections 3-4 of the Fertilizers and Animal Foodstuffs Act contain restrictions on the import, manufacture, sale and sterilization of food stuffs. No person can import, manufacture, compound, mix or sell any product which is not approved by section 19 of the Act. Rule-making powers are vested in the Minister to further prescribe rules and regulations concerning the import, manufacture and sale of agricultural products covered by this Law. A permit must precede any business transaction.

The Government Fisheries Protection Act

Section 7 of the Government Fisheries Protection Act requires the registration of fishing vessels that ply any Kenyan fishery waters. Evidence of registration is a certificate. Sections 11-13 of the Act pertains to the licensing of foreign fishing vessels. These seriatim provide that no foreign fishing vessel can attempt to fish or participate in fishing operations in Kenya fishery waters without a license. Such a license is procured under section 12 of the Act by submitting an application to the Director. A foreign fishing license is valid on such terms and conditions as may be specified in it and for as long as stipulated therein. The responsible Minister can prescribe other forms of licenses which may cater to both local and foreign fishing vessels. Licensing mechanisms and other permit regimes are also in place as set forth in the Law. This Law also prohibits the acquisition, winning, trade or export business of pearls or pearl-related shell fish from the fishery waters, shores, banks in or about the territorial waters of Kenya without a permit.

The Timber Act

Sections 7 and 8 of the Timber Act contains restrictions on the use of grade names and on exports of timber respectively. An export permit is required.

The Wildlife (Conservation and Management) Act

Section 10 of this Act requires a permit for anyone to prospect for minerals in national parks. Similarly, making commercial movies in or about national parks is prohibited without a license. There are also restrictions on aircraft flights over national parks, except in the case of an emergence according to sections 11-12 of the Act. Unlicensed hunting is also prohibited under section 22 of this Law. Sections 39-48 deal with Kenyan trophies which are considered to be government property. Consequently, a permit is required for the export or import of trophies. Only if and where

they have been declared eligible for the export or import trade can such transactions take place according to section 40 of the Act. In any case, such permissible items can only be shipped to and from Kenya through regularly approved customs entry and exit points. A certificate is also required to export any trophies that are considered government property. Even a transfer of a trophy is only valid if it is evidenced by a certificate according to sections 44-46 of the Act. Additional powers are vested in the Minister to proscribe, prohibit or control any other matter within the purview of this Law according to section 47 of the Act.

Restrictions of foreign ownership and investment in the banking industry

A number of legislative enactments govern matters of banks and banking, other financial institutions and related industries in addition to the Exchange Control Act, examined below.¹²

The Central Bank of Kenya Act

The Act established the Central Bank of Kenya. The principal object of the Bank is to regulate the issue of notes and coins; supervise and oversee banks and other related financial institutions; assist in the development and maintenance of a sound credit and banking system in Kenya; and generally ensure a suitable banking and financial environment for the orderly and balanced economic development of the country. The Bank is also responsible for the external stability of the Kenyan currency. It also serves as a banker and financial adviser to the Government of Kenya according to section 4 of this Law. The unit of currency of Kenya is the Kenyan Shilling which is divided into 100 cents. Twenty Shillings equals one Kenyan Pound.

The external relations of the Bank are governed by sections 26-33 of the Act. The foreign investor should read these provisions in conjunction with the relevant portions of the Exchange Control Act on the role of the Central Bank in exchange control transactions. Section 26 requires the Bank to maintain a reserve of external assets equivalent to not less than four months of imports as recorded in the past three years. The reserve consists of gold, convertible foreign exchange in the form of demand or time deposits with foreign central banks or authorized agents outside Kenya, documents and instruments that are customarily used for payments or transfers in international transactions, notes or coins and convertible marketable securities.

¹² These include the Central Bank of Kenya Act, 1966 as amended, 14 **Laws of Kenya**, Ch.491 (rev.1984); the Banking Act, 1989 as amended, **Id.** Ch.488 (rev.1991); the Building Societies Act, 1956 as amended, **Id.** Ch. 489 (rev.1988); the Kenya Post Office Savings Bank, 1978 as amended, **Id.** Ch.493B (rev.1990); the East African development Bank, 1984 as amended, **Id.** Ch.493A (rev.1985) and the African Development Bank, 1964 as amended, **Id.** (rev.1967)

The Exchange Control Act

The Exchange Control Act ¹³ confers powers, imposes duties and prescribes restrictions on transactions in gold, currency, payments, securities, debts, import, export, transfer and settlement of property according to the preamble to this Law. A permit is required to deal in gold and foreign currencies. The foreign investor can only buy, borrow, sell or lend gold or foreign currency from authorized dealers, invariably banks, other financial institutions or their duly authorized agents. All payments inside and outside Kenya are subject to the Exchange Control Act according to sections 7-9 of this Law. These include compensation deals. Section 4 of the Act controls foreign currency. There are over 54 foreign currencies that are recognized legal tender for purposes of foreign exchange. The functions of the responsible Minister under the Act are largely exercised by the Central Bank of Kenya.¹⁴

Under section 7 of this Law, unless one has permission from the Bank, no person in Kenya can make any payment to or for the credit of any other person resident outside Kenya. Second, no person in Kenya can make payments without permission from the Bank to or for the credit of another person resident outside Kenya by order or on behalf of that person. Finally, no person can place any sum of money to the credit of any person resident outside Kenya without permission.¹⁵ However, where a person who is resident outside Kenya has paid a sum of money in or towards the satisfaction of a debt due to a person resident in Kenya, the last stated point above is not applicable to prohibit the acknowledgment or recording of the payment.

With respect to payments made outside Kenya, unless one has prior approval from the Bank, no person resident in Kenya can make any payments outside Kenya to or for the credit of another person resident outside the country according to section 8(1) of the Act. However, nothing in section 8(1) prevents anyone, according to section 8(2), from:

...doing anything otherwise lawful by any person with any foreign currency obtained by him in accordance with Part II of this Law [which regulates transactions in gold and foreign currencies] or retained by him with the consent of the Bank....

Similarly, a permit from the Bank is required for a person in Kenya to make any payments to or for the credit of another person or entity outside Kenya as a consideration or in association with, first, the receipt by any person of a payment made outside Kenya and second, the transfer to any

¹³ **Supra** note 9

¹⁴ **Hereafter**, the Bank

¹⁵ The Act refers to **Scheduled Territories**. According to the First Schedule to this Act, **Scheduled Territories** simply means the territory or territories that comprise Kenya. Outside such scheduled territories means outside Kenya, apparently a relic from the time when Kenya formed part of the East African Community

person or creating of a right in favor of any person (whether present or future and whether vested or contingent) to receive a payment outside Kenya or to acquire property which is outside Kenya. But, nothing in this particular provision prohibits making payments to such entities consistent with the terms and conditions under a permit issued by the Bank according to section 9 of the Act. The Exchange Control Regulations which form a part of the Act also contain additional regimes regulating currencies and other monetary instruments of exchange that are peculiar to deals by foreign and international investors.

Import and Export

Provisions on import and export that may affect the foreign investor are contained in sections 23-25C of the Foreign Exchange Act. These include payments for imports and exports. According to section 23 of this Law, a permit is required from the Bank to import notes of a class which are or have at any time been legal tender in East Africa or any part of East Africa; any other notes as may be specified by order of the Bank, namely notes issued by a bank or notes of a class which are or have at any time been legal tender in any territory; any certificate of title to a security including a certificate which has been cancelled and any document certifying the destruction, loss or cancellation of any certificate of title or security. In any case, it is a condition of the permit by the Bank that the application and the permit itself for payment of goods to be imported will include, first, the price paid or to be paid for the goods by the importer as indicated in the application for foreign exchange allocation and the license. Second, that the price included is the best price quoted on the market taking into account the quality and quantity of the goods in the country of origin. Finally, that the quality of the goods will correspond to the description indicated in the application and the license. The quality must be consistent with the standard required by the Kenya Bureau of Standards.

By the same token, there are similar provisions that apply to exports that may affect the foreign investor as set forth in section 24 of the Exchange Control Act. A permit is required from the Bank in order to export notes of a class which are or have at anytime been legal tender in Kenya or in any other foreign territory; postal orders; gold; certificate of title to a security or coupon; a policy of insurance; a bill of exchange or promissory note expressed in terms of currency other than that of Kenya payable otherwise than within Kenya; a document to which section 6 applies (such as travellers' checks) that are not issued by an authorized dealer or in pursuance of a permit by the Bank; and any other document certifying the destruction, loss, or cancellation of any of these documents and such articles exported on the person of a traveller or in a travellers luggage as may be prescribed by the Bank.

Similarly, the payment for all other exports is prohibited without a permit from the Bank. The Commissioner of Customs and Excise must also certify that the payment for the goods is to a person resident in Kenya. He also must certify that the payment is or will be executed in such a manner as prescribed in relation to the goods of that class or description. In addition, he also must certify that the goods are being exported or will be exported to a destination in that territory and that payment will be made no later than three months subsequent to the date of exportation. The

Commissioner must also certify that the amount of the payment that is to be made is an appropriate return for the goods. Finally, he also must certify that arrangements are, in all the circumstances satisfactory in the national interest. But the Bank has authority to alter the period of three months to a longer or shorter period depending on the circumstances of the case. It is important to remember that all this information must be reflected in the export or import documents and licenses. The period of three months could be proscribed completely. The Commissioner of Customs and Excise has authority to require the person making entries of goods for export to deliver to the collector or other appropriate person together with the entry to also include a declaration, signed by the person as the Commissioner may designate. The Commissioner can hold or bar the export of goods outside Kenya until such a declaration has been made in the prescribed form.

The withholding of payments for exports or any other delaying tactics to meet payment obligations for exports are prohibited. Under section 25A of the Act, no person resident in Kenya can do anything which involves or is in association with or preparatory to a delay or the withholding of any payment by a person resident outside Kenya to an authorized dealer when such a payment is due. Furthermore, no authorized dealer can aid, abet or do any act which contravenes this Law with respect to payments for exports and imports in a manner consistent with the Act. The person cannot delay the sale of specified local or any other currency to pay for the exports or imports through the Bank. Currency transactions with the Bank must be made within 48 hours for the export and import trade. It is a criminal offence to violate the Law. For anyone resident in Kenya punishable on conviction with incarceration not in excess of ten years or a fine not in excess of three times the value of the payments that are delayed or withheld.

Section 25B deals with documents of title to the goods exported under section 25(1) of the Act. Such documents are made to the order of an authorized dealer assigned to receive payment. Thereafter, the documents of title are deposited with the authorized dealer who is a party to the declaration made to the Commissioner of Customs and Excise. The authorized dealer is by and large the person's bank or the Central Bank which will be entitled to receive the specified currency on behalf of the person exporting the goods. In addition, any person resident in Kenya who renders prescribed services to a person resident outside Kenya must be paid in the specified currency. According to section 25C of the Act, the amount paid must be commensurate with the nature and quality of services rendered.

The Exchange and Control Regulations also subject customs laws on import and export to the Exchange Control Act. As such reference to prohibited imports and exports without a permit in the Customs and Excise legislation alludes to proscription by the Foreign Exchange Control Act. Declarations are matters of customs control. They effectively regulate and monitor compliance with the Law. Any goods prohibited from the import or export trade by the Act cannot enter or leave the country. The Regulations also require a traveller who lives in Kenya or enters Kenya to abide by customs and immigration rules and regulations enforced by the appropriate officials. If they ask him to declare whether or not he has anything in his possession which is prohibited from import or export into Kenya without a prior permit, the person must comply. The officers can compel the person to

produce whatever article he has with him that may be the subject of regulation by the Act. Customs and immigration officials also have power of search and seizure of any luggage, person or article to ascertain that the traveller is in compliance with the Exchange Control Act. Female travellers can only be searched by female officers.

Duty to collect certain debts

Except with a permit from an appropriate authority in Kenya, no person resident in Kenya (who has a right whether present or future and whether vested or contingent) can receive any specified currency or receive from any person resident outside Kenya a payment in Kenyan shillings according to section 26 of the Act. Furthermore, such a person cannot delay payment in the specified currency. But the person to whom the debt is owed cannot demand payment earlier than customary in the normal course of business. It is also a permissible practice to receive specified currency on payment in Kenyan shillings pursuant to this section.

Duty not to delay the sale or import of goods

Under section 27 of the Act, where a permit has been granted subject to conditions in an application or declaration or statement in connection with the sale of goods outside Kenya, or that the currency has been obtained in or by any person resident in Kenya with respect to this sale, then, except with the permit from the Bank, no person resident in Kenya connected with this transaction can delay the sale beyond the ordinary cause of trade. Second, the sale must be completed based on the documents as originally approved by the Bank. These same conditions are equally applicable to imports entering Kenya. If the goods have not been sold or imported as indicated within the stated time frame or if no time is prescribed or such other reasonable time as the Bank may prescribe or it appears to the Bank that the goods cannot be sold or imported as indicated, the Bank may grant permission to any other authorized person resident in Kenya and direct him what to do with the goods.

Section 28 of the Act vests power in the Bank to demand restitution in a manner it deems fit in cases where a person has made a prohibited transaction whether it be payment, offer or cause to be offered any specified currency to a dealer not authorized and disposal of currency or property illegally transacted. Other supplemental provisions are found in section 29 of the Act.

Sections 30 and 31 deal with the transfer of annuities and settlements between persons both inside and outside Kenya. These can only be done with the permission of the Bank. Without a permit from the Bank, no person resident in Kenya can transfer to a person resident outside Kenya or who is to be a nominee for a person resident outside Kenya any right to the sums of money secured in an insurance policy. Under section 31 of the Act, a permit is required from the Bank for any person resident in Kenya to settle any property other than by a will so as to confer an interest in the property on any person who at the time of the settlement is resident outside Kenya.

Corporations, especially foreign corporations

Section 32 together with the Second Schedule govern corporations, in particular foreign corporations. These provisions require that where a person resident in Kenya is served with a written notice by the Bank concerning a foreign corporation, such a person must comply. The notice may contain certain conditions applicable only to these companies. For example, the Bank may require the foreign corporation to:

- (a) furnish to the Bank such particulars as to its assets and businesses as may be mentioned in the notice to the person resident in Kenya;
- (b) sell or procure the sale to an authorized dealer of any gold or specified currency mentioned in the notice, being gold or a specified currency which it is entitled to procure the sale;
- (c) declare and pay any dividends as may be mentioned in the notice to the person resident in Kenya;
- (d) realize any of its assets mentioned in the notice in such a manner as may be also stipulated in the notice; and
- (e) refrain from selling, transfer or performing any act which affects its rights or powers in relation to, any such securities as may be mentioned in the notice.

A permit is required from the Bank for a person resident in Kenya to turn over control of a local corporation to a foreign company. However, the law does not prohibit the sale of securities authorized to be dealt with on any recognized stock exchange in Kenya if the sale takes place pursuant to an agreement entered into in the ordinary course of business on that exchange. Furthermore, no person resident in Kenya can without a permit from the Bank lend money or securities to a corporation transacting business in Kenya if such a corporation is under foreign ownership or control. A bona fide mistake or lack of knowledge of such foreign ownership or control absolves one from liability.

A foreign corporation under the Second Schedule to the Act is deemed to be so if it is not incorporated under the laws of Kenya and in which any of the following are absent:

- (a) the corporation is by any means controlled directly or indirectly by persons resident in Kenya;
- (b) that more than half of its money which on liquidation would be received by holders of share or loan capital directly or indirectly by persons resident in Kenya;
- (c) that more than half of the assets which on liquidation would be available for

distribution following the payment of creditors would be received directly or indirectly by persons resident in Kenya; or that

- (d) more than half of the interest payable on its loans and loan capital if any; or of the dividends payable on its share capital if any; or of the dividends payable on its share capital if any which is not preferred share capital is received directly or indirectly by or for the benefit of persons resident in Kenya.

However, exemptions are possible to any of part of the Act.

Section 34 of the Law deals with escrow accounts, better known in Kenya as blocked accounts. A permit is required from the Bank for any person to make payments or place any sum of money to the credit of any person outside Kenya in an escrow account. In addition, permission is also required from the Bank for any authorized dealer, bank, or other financial institution to make any payment concerning the sale of gold or any specified currency to any foreign corporation. The Bank can direct that any sums payable first be credited to an escrow account only. Escrow or blocked accounts are further regulated by the Third Schedule to the Act.

The Banking Act

Banks and banking are controlled by the Banking Act. A number of provisions are relevant to an examination of restrictions on foreign ownership and investment in Kenya.

Section 3 of the Act requires that, a license be secured prior to any banking operations or other financial arrangements including the mortgage business. Licenses are granted pursuant to secs.4-9 of the Act. This portion also covers locations of banks and mergers. They all require prior approval of the appropriate Minister. The Act also considers as prohibited practices the use of advances, credits and guarantees which exceed 100% of the bank's capital and unimpaired reserves according to sec.10 of the Act. However, this provision is not applicable to transactions with a public entity or to transactions between banks or between branches of a bank or to the purchase of or advances made against clean or documentary bills of exchange or documents of title to goods to which a person outside Kenya is entitled as payment in an export or import transaction.

Sections 11-16 contain further restrictions with respect to trade and investments in certain areas for example, advances for the purchase of land, deposit taking, ownership of share capital in another institution and other restrictions on dividends, advances, credits and guarantees. These restrictions are equally applicable to local and foreign banks operating in Kenya. In particular sec.12 of the Act states that:-

"An institution shall not in Kenya;

- (a) engage alone or with others in wholesale or retail trade, including the import or export trade, except in the course of the satisfaction of debts due to it and any trading interest carried on by an institution at the commencement of this

Act shall be disposed of by the institution within such time as the Central Bank may allow;

- (b) acquire or hold, directly or indirectly, any part of the share capital of, or otherwise have a beneficial interest in, any financial, commercial, agricultural, industrial or other undertaking where the value of the institution's interest would exceed in the aggregate 25% of the capital and unimpaired reserve".

However, an institution may take an interest in such undertakings to satisfy a debt due to it. Where, the bank does this, it shall dispose of the interest within the time frame that may be specified by the Bank. Second, a share holding in any corporation established for the sole purpose of promoting development in Kenya and approved by the Minister is exempted from sec.12 of the Act. This means foreign banks are not precluded nor restricted from participating in banking business of developmental corporations. But all banks are precluded from purchase or acquisition of any land or any interest or right in such land, except as may be reasonably necessary for the purpose of conducting their business, for housing or providing amenities for its staff according to sec.12 (c) of the Banking Act. Even to this sub-section, however, there are exemptions. For example, this sub-section does not prevent a bank or other financial institution to lease part of any building which is used for conducting its business. Second, it also does not preclude a bank or other financial institution from securing a debt on the land. In the event of default in payment of the debt, the bank can hold on to the land for as long as determined by the Bank. Third, it does not prevent such institutions from acquiring land for its own development.

Section 43 of the Act is also pertinent to foreign banks. Under this section, the Minister may in writing and subject to such conditions as he deems fit authorize a foreign bank to open a representative office in Kenya. The Minister also must approve the place of such an office. He may also require the representative office to furnish other relevant information. Failure to comply with the terms and conditions in the permit may result in closure of the office if repeated warnings for corrective action are not heeded. The Act in general contains other restrictions on both local and foreign banks if they operate in Kenya. As above examined, these include restrictions on ownership of share capital of an institution under sec.13 of the Act. Under this section, no person other than another institution, the government of Kenya or the government of a foreign sovereign state, a state corporation as defined by the State Corporation Act or a foreign corporation which is licensed to carry on the business of an institution in its country of incorporation can hold, directly or indirectly, or otherwise have beneficial interest in more than 25% of the share capital of any institution. Section 14 of this Law, also requires that no institution other than a mortgage finance corporation can make loans or advances for the purchase, improvement or alteration of land, so that the aggregate amount of those loans or advances exceeds 25% of the amount of its total deposit liabilities. However, the Central Bank could authorize an institution to exceed the 25% mark up to a maximum of 40% in the case of a bank and 60% in the case of other financial institution. This section also does not prevent an institution from accepting a security over land for a loan or advance made in good faith for any other purpose. Sec. 16 of the law contains restrictions on deposit taking. Therefore, no person other than an institution which holds a valid license can invite or accept deposits in the course of carrying on the business of deposit-taking.

Section 20 of the Act also contains restrictions on dividends. Under this section, no institution incorporated in Kenya can pay any dividends on its shares or make any other form of distribution to its shareholders until all its capitalized expenditure (including preliminary expenses, share-selling commission, brokerage, amount of losses incurred and items of expenditure not represented by tangible assets) has been written off and provision has been made for bad debts consistent with sub-section (2) of sec.20 of this Law. Under, this sub-section every institution must make provision for bad loans before any profit is declared. Furthermore, every institution must also ensure that the provision made for these negative aspects of the institution's business is adequate compliance with the guidelines by the Bank.

Under sec.34 of the Act, the Bank enjoys power to intervene in the management of any bank or other financial institution where the institution fails to meet its financial obligations or when it falls or fails including its obligations to pay any depositor. Second, where the institution is under a resolution for its winding up, based on an auditor's report. Finally, where the Central Bank has determined based on its own investigation that, such a course of action is necessary in the interests of the institution, its depositors and creditors. The Central Bank also has power to liquidate any bank or other financial institution under sec.35 of the Act. Banks can only increase their charges as permitted by the Minister.

Truly evident is the overwhelming power of the Bank and the Minister in regulating banks and other financial institutions. However, the Banking Act does not extend to transactions covered by the Post office Savings Bank Act established and constituted under a statute of an identical name; the Agricultural Financial Corporation also established under a similarly designated statute and registered cooperatives under the Societies Act alluded to below. But the Cooperative Bank of Kenya is within the scope and purview of the Banking Act.

4. **The Building Societies Act.**

The Building Societies Act is concerned with the business of mortgages and purchase of real estate properties. Building societies are banks or financial institutions that specialize in mortgage lending, financing and other similar transactions. As above seen from the Banking Act, unless a banking institution is specifically designated as a Building Society in Kenya it cannot engage or carry out mortgage lending and financing. Building Societies are also under the jurisdiction of the Bank of Kenya and the Minister.

All Building Societies must be registered. They operate under annual licenses unlike the indefinite nature of permits of other banks. Sections 75-76 regulate foreign mortgage corporations, better known in Kenya as building societies. These **seriatim** require as follows:-

- "(1) A building society registered or incorporated outside Kenya, the rules of which:-
 - (a) contain substantially the same matters which in case of building societies to be registered in Kenya are required by sec. 10 to be set out; and

- (b) contain no provision which is incompatible with any provision of this Act; and
- (c) expressly authorize the society to carry on business outside the country in which it is registered or incorporated, may apply for registration under this Act.
- (2) An application shall be in the prescribed form and shall be accompanied by:-
 - (a) a copy of its rules and a copy of the certificate of registration or incorporation, each certified in such manner as may be prescribed, and if they are not written in the English language, certified translations of them; and
 - (b) a statement of the [location where it is situated] and the postal address of its registered or chief office in the country of its registration or incorporation; and
 - (c) a statement of the situation and of the postal address of its head office in Kenya; and
 - (d) a copy of its latest annual statement and account; and
 - (e) a statement of the names and addresses of the directors."

The Registrar may allow or reject registration under sec.9 of the Act, with respect to the names of mortgage companies. Notwithstanding certain specific sections directly relevant to foreign mortgage companies, the whole Act must in general also be considered applicable to them whether they are registered under sec.75 or under sec.6 of this law which deals with general registration. Section.76 is also specifically tailored to foreign mortgage companies that are registered under sec.75 of the Act. This section stipulates that the foreign mortgage company or building society must do the following:-

- (a) maintain an office and a postal address in Kenya;
- (b) keep in English separate records and books of account with of its business in Kenya. These records and books must be kept at the society's principal place of business in Kenya;
- (c) prepare in English a separate account and statements of its business in Kenya. These separate account and statements must be in the form required in the case of any building society registered in Kenya with such modifications as may be permitted by the Registrar as well as a consolidated account and statement;
- (d) show in all its advertisements and announcements and on all documents issued by it the place where it was originally registered or incorporated.

However, it is possible under secs.75 and 76 for the Minister to exempt a foreign mortgage company from all or any portion of the Act. A detailed regime of building societies **regulations** also form part of this Law.

IV: RESTRICTIONS ON FOREIGN OWNERSHIP AND INVESTMENT IN BUSINESS

The primary enactment to start a business in Kenya is the Companies Act, 1962 as amended.¹⁶ This is a very detailed legislation that covers all aspects of corporate law other than cooperatives and taxation which are regulated separately.

1. The Companies Act.

All corporations in Kenya, whether local and/or foreign operate under the Act. Foreign companies carry on business in Kenya under secs.365 to 375 of the Law. These provisions also apply to foreign companies that prior to this Law operated a place of business within Kenya. But it excludes companies that carry on business under the Building Societies law examined above. A foreign company will not be considered as operating a business in Kenya predicated only on the fact that the firm is transacting business in Kenya through an agent at his enterprise.

For a foreign company to legally start a business in Kenya sec.366 of the Act, requires the company within 30 days of establishment to deliver to the Registrar the following:-

- (a) a certified copy of the charter, statutes or memorandum and articles of the corporation or other instruments constituting or defining the constitution of the company, and if the instrument is not written in English, it must be presented in a certified English translation;
- (b) a list of the directors and secretary of the corporation containing pertinent information as required;
- (c) a statement of all subsisting charges created by the company inside and outside Kenya;
- (d) the names and postal addresses of a person or persons resident in Kenya authorized to accept service of process or any notices required to be served on the corporation;
- (e) the full address of the registered or principal office of the company.

¹⁶ 14 **Laws of Kenya**, Ch.486 (rev.1978). Others include the Registration of Business Names Act, 1951 as amended, **Id.** Ch.499 (rev.1990), the Transfer of Business Act, 1930 as amended, **Id.** Ch.500 (rev.1979); the Trade Licensing Act, 1968 as amended, **Id.** Ch.497 (rev.1990); the Essential Supplies Act, 1958 as amended, **Id.** Ch.502 (rev.1990); the Insurance Act, 1987 as amended, **Id.** Ch.487 (rev.1988); the Mining Act, 1940 as amended, 11 **Laws of Kenya**, Ch.306 (rev.1987); the Petroleum (Exploration and Production) Act, 1986 as amended, **Id.** Ch.308 (rev.1986); the Trading in Unwrought Precious Minerals Act, 1933 as amended, **Id.** Ch.309 (rev.1987); the Diamond Industry Protection Act, 1949 as amended, **Id.** Ch.310 (rev.1991); the Gold Mines Development Loans Act, 1952 as amended, **Id.** Ch.311 (rev.1984); the Industrial and Commercial Development Corporation Act, 1955 as amended 12 **Laws of Kenya**, Ch.445 (rev.1983); the Kenya Tourist Development Corporation Act, 1965 as amended 11 **Laws of Kenya**, Ch.382 (rev.1988); the Tourist Industry Licensing Act, 1968 as amended, **Id.** Ch.381 (rev.1990); the Export Processing Zones Act, 1990 as amended, 15 **Laws of Kenya**, Ch.517 (rev.1991); the Hotels and Restaurants Act, 1972 as amended, 14 **Laws of Kenya**, Ch. 494 (rev. 1986); the State Reinsurance Corporation Act, 1970 as amended, **Id.** Ch.485 (rev.1972); the National Construction Corporation Act, 1972 as amended, **Id.** Ch.493 (rev.1986); the Scrap Metal Act, 1959 as amended, **Id.** Ch.503 (rev.1972); the Standards Act, 1974 as amended, **Id.** Ch.496 (rev.1981); the Trade Description Act, 1979 as amended 15 **Laws of Kenya**, Ch.505 (rev.1980); the Hire Purchase Act, 1970 as amended, **Id.** Ch.507 (rev.1982); the Weights and Measures Act, 1988 as amended, **Id.** Ch.513 (1988); the Factories Act, 1951 as amended, **Id.** Ch.514 (rev.1972) and many others.

Other necessary information includes the names, address, occupation and nationality of those associated with the running of the company. In the case of the corporation itself, its name, registered principal office and postal address. Any changes made to the status of the corporation or persons involved with it must also be included as part of the particulars furnished to Kenyan authorities.

According to sec.367, where a foreign corporation has timely delivered to the registrar of companies in Kenya documentation stipulated in sec.366 above, the registrar will then certify under his hand that the company has complied with the Act. Consequently, the registrar will issue a certificate. The certificate constitutes **prima facie** evidence that the corporation is registered as a foreign company transacting business in Kenya under this Act. In possession with this certificate the foreign corporation then enjoys the same powers and privileges as a local company in such matters as holding land in Kenya. It is important for the foreign company to remember that if there are any changes in its status, for example, its charter, statutes or memorandum of association, its directors, secretary, or any other particulars such as changes in addresses of the principal office or the office in Kenya, these changes must be reported within sixty days to the registrar according to sec.368 of the Act.

The foreign company is also subject to Part IV of the Act. This portion of the Law deals with registration of charges on property created or acquired by it according to secs.369-370 of this enactment. Every year the company must make out a balance sheet showing profits and/or loss. If the company is a holding company, it also must include group accounts and other supporting documents that are a common feature of a company's general meeting. These documents must also be registered. The foreign company must also state the country of incorporation in every prospectus inviting subscription for shares or debentures in Kenya. It must also indicate every place in which it does business. It must also show and print in all of its literature including letter heads and brochures the name of the corporation and the original country of incorporation according to sec.371 of the Act. The foreign company must also state the names and nationality of its directors. Service of process to such a corporation will be based on the information provided to the registrar in keeping with sec.372 of this Law. Where the foreign corporation ceases business in Kenya, it must give notice to the registrar. The registrar will then strike its name off the register if within three months there is no response from the company to the registrar's inquiry. Penalties are prescribed for lack of compliance under sec.374 of the Act.

2. The Registration of Business Names Act

Every firm or corporation that has a place of business in Kenya whether local or foreign must also be registered under the Registration of Business Names Act. Section 5 in particular applies to foreign companies. It states that where a firm has a place of business or intends to operate in Kenya for its own benefit or as a trustee or nominee by another person or corporation or as an agent of such foreign firm, they must be registered. The foreigner should also be familiar with the Trades Licensing Act, the Transfer of Business Act and the Import, Exports and Essential Supplies Act, all cited above.

3. **The Mining Act.**

Section 7 of the Mining Act contains classes of land that are excluded for prospecting and mining whether by a foreign or local company.

4. **The Petroleum, Unwrought Precious Metals and the Diamond Industry.**

The Petroleum (Exploration and Production) Act regulates negotiations and resulting petroleum agreements between the Kenyan government and oil companies. These agreements deal with exploration, development, production and transportation of petroleum products.

All petroleum that exists in its natural condition in strata lying within Kenya and the continental shelf is vested in the government of Kenya. However, the law recognizes the private rights of anyone in petroleum whether secured by virtue of any written law or having been granted or recognized as vested in such a person according to sec. 3 of the Act. A permit is required to carry out petroleum operations under sec. 4 of the Act, while the responsible Minister is vested with wide powers in these matters under secs.4 & 5 of this Law. Petroleum operations are carried out pursuant to the terms and conditions contained in the petroleum agreements between the government and the contractor. An extensive regime of subsidiary legislation in the form of regulations accompany the Act.

Transactions in unwrought precious metals are only permissible with a license to a dealer or banker according to the Trading in Unwrought Precious Metals Act. Precious metals include gold, silver or metal of the platvoid group in the manufactured state. Such deals can take place only during the day from Monday to Saturday. Transactions are prohibited at night and on Sundays according to sec.9 of the Act.

The Diamond Industry Protection Act also contains similar provisions as those found in the Trading in Unwrought Precious Metals Act with identical restrictions on six day trading excluding Sundays and night business. Permits and licenses are all mandatory to deal in diamonds including the import and export trade.

5. **The Trade Licensing Act and the Alien Restriction Act**

The Trade Licensing Act prohibits an alien from conducting business in an area designated by the Minister as "**not a general business area**" or trading in any part of the country. Section 3 of the Alien Restriction Act empowers the Minister responsible for internal security to impose an order or other restrictions prohibiting aliens from engaging in any activity he specifies. These orders, however, are imposed only when a state of war exists between Kenya and another country, during a state of emergency and where there is an actual or perceived or imminent danger to the welfare of the country.

V: RESTRICTIONS ON FOREIGN OWNERSHIP AND INVESTMENT IN COMMUNICATIONS.

There are a number of legislative enactments that govern matters of communications in Kenya. These include the Kenya Posts and Telecommunications Corporation Act, 1977 as amended ¹⁷;the Kenya Broadcasting Corporation Act, 1989 as amended ¹⁸;the Telegraphic Press Messages Act, 1934 as amended ¹⁹;the Broadcast Receiving (Apparatus) Act, 1965 as amended ²⁰;the Films and Stage Plays Act, 1963 as amended ²¹;the Books and Newspapers Act, 1960 as amended ²² and the Kenya Literature Bureau Act, 1980 as amended ²³.

1. The Kenya Posts and Telecommunications Corporation Act.

The Kenya Posts and Telecommunications Act established and constituted a public corporation of a similar name that superseded the now defunct East African Posts and Telecommunication Corporation. The Corporation enjoys a monopoly over postal services in the country pursuant to sec.22 of the Act, an exclusive right to provide telephone services under sec.59 of the Act and exclusive privilege with respect to telegraph services under sec.70 of the Act. It is also the authority that provides licenses to operate any radio communication station or acquire or possess radio communication apparatus. The corporation further provides licenses to sell or lease or hire or otherwise dispose of any radio communication apparatus as required by sec.86 of the Act.

2. The Kenya Broadcasting Corporation Act.

The Kenya Broadcasting Corporation Act created the corporation of the same name to assume governmental control and functions of producing and broadcasting programs by audio sound and/or television. The Act also controls broadcast receiving sets, licensing of dealers, repairers and importers of broadcast receiving sets as well as other matters incidental to communications. The Corporation enjoys a monopoly over matters of radio and television broadcasting and transmission in Kenya

¹⁷ 12 **Laws of Kenya**, Ch.411 (rev. 1978)

¹⁸ 6 **Laws of Kenya**, Ch.221 (rev.1990)

¹⁹ 15 **Laws of Kenya**, Ch.512 (rev.1983)

²⁰ 6 **Laws of Kenya**, Ch.224 (rev.1972)

²¹ **Id.** Ch.222 (rev.1980)

²² 4 **Laws of Kenya**, Ch.111 (rev.1980)

²³ 6 **Laws of Kenya**, Ch.209 (rev.1981)

according to secs.8-14 of the Act. Control of receiving sets for wireless and television broadcasts, and licensing of dealers in and repairers of such sets is also vested in the corporation. Foreigners should also be aware of the Broadcast Receiving (Apparatus) Act in matters of ownership of communications business in Kenya. This legislation requires licenses to operate any receiving sets for wireless, radio and television broadcasts as well as licenses for dealers and repairers of such sets and apparatus according to secs.4-18 of the Apparatus Law.

3. **The Films and Stage Plays Act.**

The Films and Stage Plays Act controls the making and showing of movies, licensing of stage plays, theaters, movie houses and other related matters of the entertainment industry. A filming license is mandatory to make commercial movies in Kenya pursuant to secs.4-10 of the Act. But it is the Board of Censors established under sec.11 of this Law which enjoys ubiquitous powers over movies and the entertainment industry in general. The Board is vested with authority to examine every film and poster of any description submitted to it. It then determines whether and if so in what fashion, the movie or poster should be approved for exhibition. Notwithstanding the Act, the Board may decide to approve a movie or poster for exhibition to the public without having examined it first according to sec.15 of this Law. The Board of Censors will then issue a certificate of approval after it has examined the movie or poster according to sec.16 of the Act. The Board is also the rating authority. It issues ratings in three categories, namely **for adults only, unsuitable for children under 16 yrs and unsuitable for children under 10**. The Board could also just certify a movie with conditions attached to it before being viewed by the general public. The Board enjoys the monopoly to approve or certify any movie or poster prior to show time under secs.12 & 13 of the Act. In order to perform a stage play, one must secure a license under secs.19-23 of the Act. Furthermore, licenses are required to operate theaters and movie houses in keeping with secs. 24-28 of the Act.

V: RESTRICTIONS OF FOREIGN OWNERSHIP AND INVESTMENT IN SECURITIES.

A limited number of legislation deal with securities in Kenya. Important among them are secs.10-47 of the Exchange Control Act, alluded to above²⁴; the Capital Markets Authority Act, 1989 as amended²⁵; the Government Securities Act, 1963 as amended²⁶ as well as specific sections of various enactments that vest authority in public entities to deal or invest in securities.

Transactions in securities are primarily controlled by the relevant portions of the Exchange Control Act. Under sec.10 (1) of the Act, a permit from the Central Bank is required for a person in Kenya to

²⁴ *Supra notes 9 & 13*

²⁵ 14 *Laws of Kenya*, Ch.485A (rev.1990)

²⁶ 12 *Laws of Kenya*, Ch.421 (rev.1964)

issue any security registered or to be registered in the country. However, registration can only take place when the following conditions are complied with:-

- (a) neither the person to whom the security is to be issued nor the person if any for whom he is to be a nominee is resident outside Kenya;
- (b) prescribed documentation is produced to the person issuing the security concerning residence of the party to whom it is to be issued and that of the person if any, for whom he is to be a nominee.

Securities are defined in sec.2 of the Act to denote shares, stock, bonds, notes other than promissory notes, debenture stock units under a unit trust scheme and shares in an oil royalty. A permit is required from the Bank to transfer securities registered in Kenya. In order for the transfer to be effective, however, the following requirements must be met:-

- (a) neither the transfer nor the person, if any, for whom he is a nominee is resident outside Kenya;
- (b) the transferor delivers to the transferee at or before the time of the transfer the prescribed declarations as to his residence and of the person, if any for whom he is a nominee; and
- (c) neither the transferee, nor the person, if any, for whom he is to be a nominee is resident outside Kenya;
- (d) except where the security is registered in Kenya, otherwise than in a subsidiary register, the Bank is satisfied that the requirements of para (c) above noted have been complied with.

But, neither the transferee nor his agent shall be deemed to have committed an offence by reason only that the requirements of para (a) above have not been complied with, unless the transferee, or his agent knew or had reason to believe that these requirements were contravened. Second, neither the transferor, nor his agent can be considered as having committed offenses under this part by reason only that any of the requirements of paras (c) and (d) have not been met unless in the case of non-compliance of para (c), the transferor or his agent knew or ought to have known that these requirements were not satisfied.

Under sec.11 (2) of the Act, a permit is required from the Bank for a security or securities to be registered in Kenya or to be transferred outside the country, particularly if either the transferor or the transferee or the person if any, for whom the transferor or transferee is or is to be a nominee is resident in Kenya. In addition, unless a permit has been secured from the Bank, no coupon can be transferred in Kenya if either the transferee or the party, if any, for whom he is to be a nominee is resident outside Kenya. Finally, unless, one has a permit, one cannot carry out any activity pertaining to securities in Kenya including an association with or an act preparatory to the transfer of any coupon outside Kenya, if either the transferor or the transferee of the person if any, for whom the transferor or transferee is or is likely to be a nominee is resident in Kenya.

A coupon under sec. 2 of the Act means a coupon that represents dividends or interest on a security. A permit from the Bank is also a prerequisite to issue any bearer certificates or coupons or to alter any document that becomes a bearer certificate or coupon for any person in Kenya whether resident to any person outside Kenya. In addition, except with a permit from the Bank, no person resident in Kenya can secure or carry out any activity with respect to a security which is registered in Kenya. Such a security is not transferrable by means of bearer certificate either. Nor can such a security be replaced by a security registered outside Kenya. Similarly, no certificate of title to any other security can be issued outside Kenya in substitution for or in addition to a certificate of title representing this security. Nor can a certificate of title be issued outside of Kenya to replace one which is or has been lost or destroyed in Kenya. All these activities require the permission of the Bank.

A permit from the Bank is required under sec. 14 of the Act for person resident in Kenya perform any act with the intention of securing the payment outside of Kenya of capital moneys on a security registered in Kenya. In the same token, a permit must be obtained from the Bank to ensure that in the case of certificate to a security in Kenya, capital moneys payable on this security are paid outside Kenya. Where a certificate of title to a security is involved, capital moneys cannot be paid without producing the certificate to the person making the payment. The Bank must also give permission to authorities who maintain registers of securities in Kenya. These registers contain entries of such particulars as the name of the holder or dealer of a security, any security or its parts and/or relevant address outside Kenya. But is important to note that, permission from the Bank is predicated on the fact that nothing done with respect to a security, whether it be a certificate, payment of capital moneys, entries into registers and other related matters, that no such action is prohibited by the Act. Whether the Bank is aware or unaware of the breach in law at the time when the permit is obtained is immaterial. The overriding purpose under this section is to prevent fraud and other forms of misrepresentation or deceit. Finally, except with the permission of the Bank, no registrar concerned with matters of securities can perform any act in relation to the register which he recognizes or gives effect to any act appearing to him to have been done with the intent to violate secs. 13 and 14 of the Act pertaining to substitution of securities and certificates outside Kenya and payment of capital moneys outside Kenya.

Section 16 of the Act regulates holders of securities and their nominees. First, where the holder of a security is a nominee and the party for whom he is a nominee is resident outside Kenya or where the holder of a security is not a nominee and is resident outside Kenya, then except with the permission of the Bank, no person resident in Kenya can perform any act whereby the holder becomes his nominee with respect to the security. Second, unless one has as permit from the Bank, a person resident in Kenya for whom the holder of a security is a nominee can not perform any action whereby the following occur:-

- (a) the holder being a person resident outside Kenya holds the security otherwise than his nominee or;
- (b) the holder not being a person resident outside Kenya holds the security as a nominee for a person resident outside Kenya.

Third, when the holder of a security is a nominee, then except with the permission of the Bank, neither he, if he is resident in Kenya, nor any other person resident in Kenya through whose agency the exercise of all or any of the holder's rights with respect to the security are controlled shall:-

- (a) do any act whereby he recognizes or gives effect to the substitution of another person as the person from whom he directly receives his instructions unless both the previous instructor and the substitute were immediately prior to the substitution resident in Kenya and not elsewhere; or
- (b) do any act whereby he ceases to be a person bound to give effect to the instructions of another person in relation to the security, unless the person who instructed him is resident in Kenya and not elsewhere.

Fourth where the holder of a security is not a nominee and is resident in Kenya, then except with a permit from the Bank, he shall not carry out any action whereby he becomes the nominee of another person with respect of the security, unless that other person is resident in Kenya and not elsewhere. Finally, no person resident in Kenya can perform any act or be in association with or do anything preparatory to any transaction outside Kenya **vis-a-vis** sec.16 of the Act.

Sections 17 & 18 regulate depositing certificates of title representing securities. These two sections deal with all types of securities except two types. The first is a security which is registered in a primary and not in a secondary or subsidiary register and on which none of the dividends or interest are payable when and where a coupon is presented. The second type is any other security prescribed by Kenyan authorities. A certificate of title to a security must at all times be deposited with an authorized depository unless the Bank indicates otherwise. It is irrelevant whether the person who holds the certificate, directly or indirectly is resident inside or outside the country, or is held on his behalf inside or outside Kenya. Nothing in this Law can prohibit the performance of any act to comply with the requirements of authorized depository custody set forth in sec.17 (1) of the Act. It is important to remember that no transaction in securities takes place without prior authorization from the Bank.

In order to part with any depository's certificate of title or coupon that is required under sec.17(1) of the Act to be in the custody of an authorized depository, the authorized depository must also have permission from the Bank to do so. However, sec.17(2) & (3) of the Act especially sub-section (3) does not prohibit an authorized depository to carry out the following activities:-

- (a) from parting with the certificate of title or coupon to or the order of another authorized depository. But he can only do so, where and if the other authorized depository will receive instructions from the same person or party in relation to the certificate;
- (b) from parting with a certificate of title to obtain payment of capital moneys payable on the security to the person entrusted with the payment and/or
- (c) from parting with a coupon in the ordinary course of business for collection.

It is also the law under sec.17(4) that no capital moneys, interest or dividends can be paid in Kenya

on any security without permission from the Bank. However, such payment could be made to or to the order of an authorized depository who has the custody of the certificate of title to that security. This sub-section of sec.17 should be interpreted and applied liberally so as not to put undue restrictions on the manner in which any such lawfully paid capital moneys, interest or dividends may be redeemed by parties lawfully entitled to receive them.

An authorized depository is also prohibited from certain actions under sec.17(5) of the Act. Except with the permission of the Bank, he cannot substitute one person for another as the person from whom he receives instructions with respect to a certificate of title or coupon. However, he can make such a substitution if he has received unrefutable proof and necessary documentation that any such transaction will not give effect to a deal prohibited by the Act. Under sec.17(6) of this Law, where a certificate of title for the time being is required to be in the custody of an authorized depository, but is not in his custody, then except with a permit from the Bank, no person in this country and no person resident there can **outside Kenya buy, sell or transact or carry out any other action** which affects the rights, powers and duties in relation to the security as prescribed by this Law. According to sec.17(7) unless, one has prior authority from the Bank, no person in Kenya or foreigners just resident there can in the case of a certificate of title with coupons (whether attached to or separate coupon sheets) detach any of the coupons other than in the ordinary course of business relating to collection.

Except with a permit from the Bank, the authorized depository does not part or destroy the certificate of title or any coupons that belong or correspond to the certificate of title. But he can do so consistent with the process set forth in sec.17(3)(ii) & (iii) above cited. Alternatively, he can perform any action whereby he recognizes or gives effect to the substitution of another as the person from whom he receives instructions. But where the person from whom an authorized depository receives instructions in relation to any certificate of title becomes bankrupt in Kenya or dies, then sec.18(2) is not applicable or operative to prohibit the authorized depository from recognizing the trustee in bankruptcy or personal representatives as the person entitled to give instructions in relation to the certificate of title. According to sec.18(3) of the Act, the authorized depository must place all capital moneys, dividends or interest on the security received by him to the credit of the person by whose authority he received them. But he shall not permit any part of the sums received to be dealt with unless permission has been secured from the Bank.

Section 19 of the Act governs deals in unique securities. This section requires the Minister to direct the application of sec.18 to these securities if in his opinion there are circumstances that make it necessary or expedient to do so. He may direct that this section be equally applicable to those securities on which capital moneys, dividends or interest are payable in a specified currency. Alternatively the directive may extend to cases where the holder has an option to require payment of any capital moneys, dividends or interest on it in a specified currency. This section also stipulates that except with a permit from the Bank, no person in Kenya and no person resident in Kenya can outside Kenya, transfer, or do anything that affects his rights or power in relation to any security to which this section applies.

Section 20 validates issue of certain securities and/or their transfers. Under this section, the title of any person to a security for which he has given value or a transfer and the title of all persons claiming through or under him are valid. It is irrelevant that the transfer or the issue of the security was because of the residence of any person concerned with the transaction. However, the law prohibits any person from benefiting from such transfers or issue of securities if they had prior knowledge or notice that the transaction is one not permissible under the Law. But it is also possible under sec.20(2) of the Act that the Bank could validate any prohibited action and render it valid with respect to any transfer or issue of a security **only** if a permit from a lawful authority has been secured. Section 20 does not absorb anyone from liability and prosecution for any offence done under the Act.

Sections 44-47 of the Act contain special provisions that may adversely affect foreign ownership and investment in Kenyan securities including their expropriation by the government. Section 44 vests power in the responsible Minister to issue directives to preclude any person without a permit from creating a charge in the sale or transfer or other adverse action on any securities that have been characterized as marketable Kenyan securities to the outside world. The Minister also has authority under this section to direct that the owner of any securities of this class shall in such a manner and within such period as the Minister prescribes, make a return to the Minister providing relevant particulars. For purposes of this section, a person who mortgages or pledges a security is considered to have created a charge on that security.

Under the authority of sec.44, the Minister can also transfer securities and vest them in himself. As long as his directive is in place and in his opinion such expropriation is necessary to strengthen the economic position of Kenya, he can require compulsory transfer of any security to himself on behalf of the Kenyan government. In such a case he must offer a fair price which also will be contained in the directive. The price though predicated on his discretion should not be less than the market value of the securities on the date the directive is issued. However, where the Minister has under a directive and as required by law in sec.44 (1) transferred to himself securities in which returns had been made prior to the date of making the order, the price of the securities will be based on the market value of prior orders and not any subsequent order or directive which may be issued with respect to the same securities. Where the securities are transferred to the Minister, they become vested in him free from any encumbrances such as mortgages, pledges or other charges. Thereafter, he deals with them in a manner he deems fit. The owner of securities transferred to the Minister must then ensure that documents are transferred or executed based on the directions of the Minister including registration in the register of securities. Where securities are transferred to the Minister the person making such a transfer also has a duty to ensure that dividends or interest on such securities that become payable or due subsequent to the directive of the Minister to have the securities transferred to him or where in the case of securities payable to bearer are delivered based on this transfer any coupons representing dividends or interest are not delivered with the security, the reduction in the price payable shall be based on the discretion of the Minister. But, where the price calculated in the directive in relation to any security is prior to any dividend or prior to any interest, sec.44(4) on transfer of securities to the Minister shall not be applicable to that dividend or interest or to any coupon representing it.

A certificate signed by the Minister or his agent that specific securities are those of a class transferrable to the Minister under sec.44 constitutes **prima facie** evidence of registration of such securities according to sec.44 (5) of the Act. It is possible for the responsible Minister to divest himself of the securities transferred to him. Such divestiture must, however take place before the complete package of information and measures specified in sec.44(3) (b) have passed to the Minister. This includes documents relating to the transfer of title to the securities. A security under sec.44 does not include an annuity nor a life insurance policy or any other contract entered into with an insurance company to secure in future the payment of any capital sum or sums or of an annuity according to sec.44(7) of the Act.

Finally, sec.47 states that where the Minister is satisfied that due to changes in the external or internal position of a foreign country, action is being, or is likely to be taken that is detrimental to Kenya's economic position, the Minister has authority to impose retaliatory actions on the foreign country. He also has authority under this section to prohibit generally or specifically any actions by persons in the business with respect to any such foreign country or individual.

2. Securities Under the Foreign Investments Protection Act

In part sec.8A of the Foreign Investments Protection Act, 1964 as amended ²⁷ also deals with any proceeds realized from the sale of foreign assets by virtue of the expropriation authority of the government under sec.8 of this Law examined earlier. The government of Kenya or any other person are barred from the transfer of these proceeds out of Kenya by sec.7 of this same Law. Such proceeds must be invested in government securities for a period of five years. However, the income from government securities in which the proceeds are invested may be transferred out of Kenya under the same terms and conditions as those affecting the transfer of interest under para (c) of sec.7 of the Foreign Investments Protection Act. Second, the capital also may be transferred out of Kenya at the end of five years on the same conditions as other funds also in the manner provided for by sec.7 of this Law.

3. The Capital Markets Authority Act

The Capital Markets Authority Act is relevant to restrictions on ownership and investment in securities. It is this Act which provides a detailed regime and interpretation of what constitutes capital markets, securities and investments in them, brokers, mutual funds, quotation of securities, interest in securities, underwriting, securities exchange, stock markets and stock exchanges, shares and unit trusts. Capital markets in Kenya are the responsibility of the Capital Markets Authority established and constituted under secs.5-18 of the Act. These sections deal with its establishment and membership, meetings and procedures, seal and execution of documents, objectives of the authority, its powers,

²⁷ 15 Laws of Kenya, Ch.518 (rev.1990), *supra* note 6

functions and duties as well as other related matters for the better regulation of capital markets in Kenya.

Section 18 of this Law established the Investor Compensation Fund. It is this Fund which compensates investors who suffer pecuniary losses due to failures of licensed brokers or dealers to meet their contractual obligations. Secs.19-22 pertain to securities exchanges. Under sec.19 of this Law, no person can carry on a business as a Securities Exchange or hold himself out to provide or maintain a stock market unless he has secured the approval of the Capital Markets Authority. An application for securities exchange approval is required under sec.20 of the Act. Secs.23-30 deal with securities industry licenses. No person can carry on a business as a broker, dealer or investment advisor, unit trust, mutual fund or their representatives without a license secured under sec.23 of the Act. An application for a license is filed under sec. 24 of this Law, renewed and revoked under secs.25 and 26 of the Act. As a result, the Capital Markets Authority maintains a register of license holders under sec.27(1) of this Law. Corporations as brokers and dealers are further required to comply with sec.29 of the Act applicable only to them. However, sec.29(2) of this Law stipulates that in granting licenses to a broker or dealer or to an individual under this Law, the Authority must satisfy itself of the following:-

- (a) that the applicant is a citizen of Kenya;
- (b) that he is of sound mind, without any other disability of incapacity that would legally disqualify him to hold any such license;
- (c) is of sound financial standing;
- (d) is a member of the securities exchange approved under this Law;
- (e) has satisfied such minimum entry requirements and passed such examination as may be prescribed by law;
- (f) has lodged security in such sum as may be determined by the Authority, or an equivalent bank guarantee with the securities exchange of which he is a member.

However, there are exemptions to these requirements under sec.30 of this Law. The following dealers are exempted:-

- (a) a person whose business is dealing in securities only through the holder of a dealer's license for his own account;
- (b) a manager or trustee under a unit trust scheme;
- (c) any bank within the meaning of the Banking Act, 1989, above examined;
- (e) an investment advisor whose dealings in securities are identical to his business as a manager of a portfolio of securities on behalf of a client; or
- (g) any other person that the Minister may by regulation exempt, consistent with the objective of promoting the development of orderly, fair and efficient capital markets in Kenya.

Sections 31 and 32 pertain to securities transactions and registers, while sec.33 prohibits insider

trading including offenses prescribed by the Act together with appellate process and procedure set forth in secs.34 and 35 respectively. According to sec.31, no licensed person, broker or dealer can trade in listed securities outside the securities exchange of which he is a member, unless he has been exempted by the Capital Markets Authority. Second, no licensed person, broker, dealer or otherwise can trade in listed securities in violation of any rules that may be put in place by the Authority, especially as these relate to clearance, settlement, payment, transfer or delivery of securities. Third, no licensed person, broker or dealer shall effect any transaction in a margin account in a manner contrary to requirements adopted by the Authority. Fourth, no such licensed person, broker or dealer can lend or arrange for the lending of any securities carried for the account of any customer without a customer's written consent. Neither can he borrow or arrange to borrow, using the securities carried for the account of any customer as collateral with the written consent of the customer. Fifth, no licensed person, broker or dealer can effect any transaction in or induce or attempt to induce the purchase or sale of any listed security by manipulation, deception or other manipulative device or contrivance. Sixth, no person holding shares in a public corporation listed on an approved securities exchange can sell such shares except in accordance with and in compliance with the trading procedures adopted by such securities exchange. Finally, no person can directly or indirectly and in connection with the purchase or sale of any security do the following:-

- (a) employ any devious scheme or device to defraud;
- (b) participate or engage in action, practice or course of business which operates or would operate as a fraudulent mechanism to deceive any person private or public;
- (c) misrepresent or make any untrue statements of any materials fact or/and
- (d) omit or deliberately or recklessly omit to state a material fact that is necessary for any person to be misled whether by actions, words or deeds.

VII: RESTRICTIONS ON FOREIGN OWNERSHIP AND INVESTMENTS IN KENYA WITH RESPECT TO TRANSPORTATION

Legislation governing matters of transportation in Kenya can be sub-divided into three main categories of sea, land (roads and railways) and air.

The primary legislation affecting sea lanes and other forms of merchant shipping in Kenya is the Merchant Shipping Act, 1967 as amended²⁸. Railway transportation is controlled by the Kenya

²⁸ 11 **Laws of Kenya**, Ch.389 (rev.1989). Others include the Maritime Insurance Act, 1968 as amended, **Id.** Ch.390 (rev.1970); the Kenya Ports Authority Act, 1978 as amended, **Id.** Ch.391 (rev.1979); the Carriage of Goods by Sea Act, 1926 as amended, **Id.** Ch. 392 (rev.1983); the Maritime Zones Act, 1989 as amended, **Id.** Ch.371 (rev.1991) and the Continental Shelf Act, 1975 as amended, 9 **Laws of Kenya**, Ch.312 (rev.1977). With respect to inland waters, the following are relevant, namely, the Water Act, 1952 as amended, 11 **Laws of Kenya**, Ch.372 (rev.1972); the Lakes and Rivers Act, 1930 as amended, 12 **Laws of Kenya**, Ch.409 (rev.1983) and the Ferries Act, 1936 as amended, **Id.** Ch.410 (rev.1962)

Railways Corporation Act, 1978 as amended ²⁹ while aviation, air transportation and freight are subject to the Civil Aviation Act, 1977 as amended.³⁰ Pertinent legislation for road transportation include the Traffic Act, 1954 as amended ³¹; the Transport Licensing Act, 1938 as amended ³²; the Public Roads Toll Act, 1984 as amended ³³; the Public Roads and Roads of Access Act, 1920 as amended ³⁴ and the Insurance (Motor Vehicles Third Party Risks) Act, 1946 as amended ³⁵.

A: Sea/Maritime/Water Transportation.

Kenyan maritime law is primarily based on British common law principles, but modified in the light of emerging rules and norms of international law pertaining to the law of the sea.

1. The Merchant Shipping Act.

The Merchant Shipping Act regulates the orderly development of merchant shipping. There are specific provisions that apply to foreign maritime vessel operation in Kenya that may restrict investments in this area.

All Kenyan ships must be registered and licensed under secs.3-77 of the Act, unless exempted. To register a ship as a Kenyan ship, the proprietor or agent must be:-

- (a) resident in Kenya;
- (b) a corporation, incorporated under Kenyan law, whose principal place of business is in Kenya;
- (c) the Government of Kenya; or
- (d) "a body corporate which is incorporated, registered or established in Kenya under any written law and which the Minister by notice in the Gazette has declared to be so qualified in respect of any specified ship which he has by the same notice declared to be subject to the jurisdiction of Kenya" according to sec.3(2) of the Act.

²⁹ **Id.** Ch.397 (rev.1986)

³⁰ **Id.** Ch. 394 (rev.1987)

³¹ **Id.** Ch.403 (rev.1988)

³² **Id.** Ch.404 (rev.1979)

³³ **Id.** Ch.407 (rev.1989)

³⁴ **Id.** Ch.399 (rev.1962)

³⁵ **Id.** Ch.405 (rev.1989)

The Minister enjoys power to exempt any ship from registration as above-noted. Once the registration process is complete, a certificate is issued under secs.16-24 of this Law. A ship or share in it can be transferred under secs.25-32 of the Act. Such transfers must also be registered and appropriate certification issued. Mortgages of ships and/or shares in them are acquired under secs.33-44 of the Act. It is mandatory for the ship to have a name pursuant to sec.45 of the Act. For a customs official to grant clearance, the master of the ship must declare the nationality and flag of the ship according to secs.65-67 of the Act. A ship can be forfeited under sec.68 of the Act.

Foreign owned vessels are licensed under secs.76-77 of the Act. All ships whether in bound into Kenya or outbound to sea, must have a certificate of competence and seaworthiness as required by secs.78-81 of the Act. Seamen and crew are engaged pursuant to secs.88-91 of this Law. However, crew of foreign ships registered either within or outside Kenya are separately covered by sec.90 of the Act. A certificate based on the agreement with the master of the ship will then be issued under secs.92-95 of the Act. According to sec. 95 of this Law:

"Where the master of a Kenya ship engages a seaman at a port outside Kenya in which there is a consular officer, the provisions of this Act respecting agreements with the crew made in Kenya shall apply subject to the following modifications:-

- (a) in any such port, the master shall engage the seaman before some officer performing functions equivalent to those of a shipping master or before the consular officer; and
- (b) the master shall request the officer to endorse upon the agreement an attestation to the effect that the agreement has been signed in his presence, and otherwise made as required by this Act".

Under sec.168 of this Law, where in any matter relating to a ship or to a person belonging to a ship there appears to be a conflict of laws, then if there is in this Act any provision on the subject, that expressly applies to the ship or person, then the case shall be governed by such provision. But if on the other hand, there is no such provision, the case shall be governed by the law of the port at which the ship was registered. In order to discharge crew aboard a Kenya ship in a foreign port, the master of the vessel must issue a certificate of discharge in accordance with secs.171-172 of the Act. Other provisions dealing with the crew in foreign ports are found in secs.173-185 of the Act.

Passengers ships are governed by secs.186-188 of this Law. These cover their regulation, offenses and other related matters. Safety provisions are found in secs.189-238 of the Act. These **inter-alia** pertain to appointment of surveyors and the **right of inspection**; record of inspections and certificates; the International Convention Respecting Load Lines of 1960 as an integral part of Kenyan Law; the International Convention for the Safety of Life at Sea, 1960 also as a part of Kenyan law; inspection of ships; issue of certificates of safety and seaworthiness; cargo and passenger ships within the meaning of these two international instruments.

According to sec.204 of the Act, however, no passenger ship that is registered in a country to which the safety convention is not applicable and no cargo ship registered at 500 gross tonnage or more can proceed or attempt to proceed to sea on an international voyage from a port or place in Kenya until the ship has complied with this Act concerning safety and a Kenya ship. But the Minister has authority to clear a ship to which this section applies if he satisfied:-

- (a) that there are no passengers carried on the ship;
- (b) that the amount of cargo carried is not a danger to the safety of the ship while on its voyage;
- (c) that the hull, boilers, machinery and equipment of the ship are in good condition and sufficient to complete the contemplated voyage and
- (d) that the radio installations are in good condition and sufficient to complete such a voyage.

Section 225 of this Law stipulates that, the Minister can request the government of a country to which the Load Line Convention applies that he issues a load line certificate for an international load line ship of that country. However, he can only do so if, he is satisfied that the ship has complied with the Kenyan Merchant Shipping Act in the same manner as a Kenya ship. Thereafter, the Minister will issue a certificate evidencing his approval and consent. The Minister is also vested with rule-making powers to further give effect to the international conventions and the issuance of certificates. A surveyor has authority under secs.226-227 of this Law to board a ship at any place in Kenya which is considered a Load Line Convention Ship not registered in Kenya. Once aboard, he can demand to see the load line certificate and inspect every aspect of its cargo to ensure its compliance with the Convention.

Sections 296 and 297 of this Law deal with reciprocal jurisdiction over foreign ships. These two sections **se riaticum** require that:-

- "296. (1) Where the law of a foreign country provides, in terms extending to ships registered in that country while they are in Kenya or before or after they have been in Kenya, or while they are at sea, that a court, the registrar, a customs officer, a shipping master, a surveyor or some other officer or functionary in or of Kenya may or shall execute any request, exercise any right or authority or perform any duty or act in relation to those ships or to their owners, masters or crews, the court, registrar, customs officer, shipping master, surveyor or other officer or functionary may or shall, as the case may be, execute that request, have that right or authority and perform that duty as if the power to so act were conferred by this Act;
- (2) Where the law of a foreign country provides, in terms of extending to Kenya ships while they are in that country or before or after they have been in that country or while they are at sea, that a court or authority of that country may or shall, in relation to

Kenya ships or to their owners, mates crews, execute any request, exercise any right or authority or perform any duty or act, which this Act makes or purports to make, confer, impose or direct to be done of, upon or by that court or authority, then all things done by that court or authority, in form pursuant to this Act, that can be related to that law shall be deemed to have been done by force of that law."

However, in the case where the Merchant Shipping Act of Kenya permits, authorizes, requires or directs any such court or authority to act in a manner considered to be permissive only, such actions of the court or authority will be considered to have been valid for the purposes of this Act.

Section 297 of this Law requires that, where it appears to the Minister that the government of a foreign country desires that specific portions of the Merchant Shipping Act of Kenya not applicable to its ships be deemed pertinent and there are no specific sections of the Act that cater to this contingency, then the Minister has authority under this section to generally extend application of the whole Act to those ships as if they were Kenya ships. He can also prescribe other directives or regulations he deems fit to render them applicable.

2. **The Maritime Zones Act.**

The Maritime Zones Act ³⁶ consolidates the law relating to territorial waters and the continental shelf of Kenya. It may adversely affect foreign ownership and investment in this sector. It delimits the exclusive economic zone of Kenya consistent with emerging norms and rules of international law on the law of the sea. It also provides for the exploration, exploitation, conservation and management of the resources in the maritime zones. The breadth of the Kenya's territorial waters is 12 nautical miles in consistent with **the United Nations Convention on the Law of the Sea done at Montego Bay on Dec. 10 1982** ³⁷ according to sec.3 of the Act. Kenya like many coastal nations around the world has established and delineated an exclusive economic zone to which foreign ownership is precluded. Secs.4 and 5 **seriatim** provide as follows:-

- "4. (1) There shall be an exclusive economic zone of Kenya;
- (2) Subject to subsections (3) and (4), the exclusive economic zone shall comprise those areas of the sea, seabed and sub-soil that are beyond and adjacent to the territorial waters, having as their limits a line measured seaward from the base lines, low water lines or low tide elevations described in the First Schedule, every point of which is 200 nautical miles from the point on the base lines, low water marks or low tide

³⁶ **Supra note** 29, Ch.371 (rev.1991). **See further** the Continental Shelf Act 1975, **Id.** Ch.312 (rev.1977) which vests all existing rights relating to the continental shelf and natural resources therein, thereon, thereunder and all such rights as may from time to time hereafter by right, treaty, grant, usage, sufferance or other lawful means become exercisable by the government or appertain to Kenya shall be vested in the Government of Kenya.

³⁷ 21 **ILL.M.** 1245;1261 (1982)

elevations...

5. Kenya shall within the exclusive economic zone exercise sovereign rights with respect to the exploration, exploitation, conservation and management of natural resources of the zone..."

Such exercise of rights in the exclusive economic zone with respect to exploration, exploitation, conservation and management of the natural resources include the production of energy from tides, water currents and winds, regulation, control and preservation of the marine environment, establishment and use of artificial islands and offshore terminals, installations, structures and other devices and authorization and control of scientific research. However, sec.6 of the Act preserves the rights of other states. It stipulates that subject to any international conventions and to any other written laws concerning transportation and communication by sea or air, all states enjoy rights of navigation and over-flight, laying of submarine cables and pipelines and other lawful uses of the seabed recognized by international law in the exclusive economic zone. Issues of jurisdiction or any matter arising under the Act are determined by Kenyan courts.

A. Inland Water Transportation

None of the legislation cited above discriminates in favor of Kenyans or restricts from ownership and/or investment in this sector.

B: Railway Transportation

Railways transportation is governed by the Kenya Railway Corporation Act, 1978 as amended ³⁸. This law does not contain any provisions precluding foreigners from ownership or investment in this sector.

C: Road Transportation

None of laws cited above on road transportation prohibit or restrict foreigners from ownership or investments in this area.

D: Air/ Civil Aviation Transportation

The law that controls air or civil aviation in Kenya is the Civil Aviation Act, 1977 as amended ³⁹. It does not restrict foreign ownership and/or investment in the civil aviation industry.

³⁸ 12 **Laws of Kenya**, Ch.397 (rev.1986)

³⁹ **Id.** Ch.394 (rev.1987)

VIII: RESTRICTIONS ON FOREIGN OWNERSHIP AND INVESTMENT IN UTILITIES

It has been noted that:-

"Utilities and infrastructure are exclusively reserved for the public sector. There are no other sectors or regions in Kenya reserved for nationals to the exclusion of foreign investors nor are there local participation requirements."⁴⁰

However, it should be noted that existence of Boards, Authorities, State Corporations or other public corporations in any sector invariably suggests the overwhelming control of a particular area by the Kenyan government. Control may also be direct or indirect or in such a way that ubiquitous presence of the government by implication discourages private ownership and investment both foreign and domestic. Utilities legislation in Kenya include the Kenya Posts and Telecommunications Corporation Act, above examined ⁴¹; the Electric Power Act, 1920 as amended ⁴²; the Electric Supply Lines Act 1914, as amended ⁴³; the Kerio Development Authority Act, 1978 as amended ⁴⁴; the Lake Basin Development Authority Act, 1980 as amended ⁴⁵; the Tana and Thi Rivers Development Authority Act, 1982 as amended ⁴⁶; the Ewaso Ng'iro South River Basin Development Authority Act, 1989 as amended ⁴⁷ and the Ewaso Ng'iro North River Basin development Authority Act also of 1989 as amended ⁴⁸. None of these laws expressly restrict foreigners from ownership and private foreign investment in this area.

⁴⁰ **Supra** notes 8 & 11

⁴¹ **Supra** note 18

⁴² 9 **Laws of Kenya**, Ch.314 (rev.1986)

⁴³ **Id.** Ch.315 (rev.1983)

⁴⁴ 12 **Laws of Kenya**, Ch.441 (rev.1991)

⁴⁵ **Id.** Ch.442 (rev.1990)

⁴⁶ **Id.** Ch.443 (rev.1991)

⁴⁷ **Id.** Ch.447 (rev.1990)

⁴⁸ **Id.** Ch.448 (rev.1990)

IX: RESTRICTIONS OF FOREIGN OWNERSHIP AND INVESTMENT/OTHER ASPECTS.

1. Land/real estate and other property Laws

To the extent that the law pertaining to land and other real estate property in Kenya with respect to alien rights seems to be consistent to the position I examined in my work of 1988, we have herewith inserted in this section relevant portions of that work.⁴⁹

A: Origin of Property Laws

Jackson notes concerning the origins of Kenyan property laws as follows:-

"The Land Law of Kenya is a history of its development from customary law to modern statute law. But, this development and the advent of independence has brought its problems. There are in Kenya, two systems of substantive law, three systems of conveyancing and five systems of registration...There are in fact, twenty-nine statutes to say nothing of subsidiary legislation embracing the subject of land law in Kenya, either specifically applied or of general application. The substance of the Land Law of Kenya is bulky and complex and finding its whereabouts more difficult still...".⁵⁰

The main law that governed the transaction in movable and immovable property in Kenya had been the Indian Transfer of Property Act of 1882⁵¹ Land transactions today, however, are controlled by a number of legislative enactments discussed below. Immovable property relative to succession is governed by the Law of Succession Act, 1981 as amended⁵² which regulates testate and intestate succession and the Equitable Mortgages Act, 1909 as amended.⁵³ These statutes are discussed in the passages that follow.

⁴⁹ **Supra note 1**

⁵⁰ **Id.** at 54

⁵¹ The text of the Indian Transfer of Property Act, 1882 is reproduced in Group 8 of the Orders in Council and Acts applicable to Kenya as contained in 15 **Laws of Kenya** 2-76. This law appears to continue to regulate certain aspects of leases in Kenya.

⁵² 5 **Laws of Kenya**, Ch.160 (rev.1982), **infra note 63**

⁵³ 9 **Laws of Kenya**, Ch.291 (rev.1982)

C. Restrictions of Alien Rights to Own Property

Under the Land Control Act of 1967 as amended ⁵⁴ all transactions in land are void unless carried out with the consent of the Land Control Board of the area. Sec.9 of this law therefore provides that:-

In deciding whether to grant or refuse consent in respect of a controlled transaction, the Land Control Board shall...refuse consent in any case in which the land or share is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not a citizen of Kenya...

The President of Kenya, however could exempt any land transaction or any person from all the provisions of this Law via publication of a notice in the government gazette... Aliens may also benefit from sec.3 of the Government Lands Act of 1915 as amended⁵⁵, which enables the President of Kenya to alienate land for any purpose...

D. Leases

Under Kenyan law absolute or complete ownership of land is vested in the state, which has authority to confer initial allotments for a term not exceeding ninety-nine years. Kenyan law on leases is contained in the following three acts:-

1. The Government Lands Act...

Under sec.3 of this Law the President of Kenya has power to alienate land for any purposes. The president's power is delegated to the Commissioner of Lands who exercises his powers for and on behalf of the president as required by sec.5 of this Law. Sec.10 of this Law specifies that the Commissioner of Lands may grant leases for two plots for a term not exceeding ninety-nine years. This Law also regulates the disposal and sale of agricultural land.

2. The Registered Land Act...

Dispositions of land leases are registered under secs.34-37 of this Law.⁵⁶ Evidence of registration is a document signed by the registrar. This law also contains provisions for periodic tenancies in agricultural lands.

⁵⁴ 9 Laws of Kenya, Ch.302 (rev.1989)

⁵⁵ 8 Laws of Kenya, Ch.280 (rev.1984)

⁵⁶ 9 Laws of Kenya, Ch.300 (rev.1989)

3. The Registration of Titles Act...

Under sec.40 of this Law, ⁵⁷ any lease for a period of more than twelve months must be registered. However, any lease of land for less than twelve months is valid even without registration under sec.41 of this Law. Implied covenants and other conditions to be performed by the lessee and lessor are also set out in sec.42 of this Law and also in the first Schedule.

As indicated above, the Indian Transfer of Property Act, 1882 also contains provisions on leases.

E. Other Relevant Legislation which may Affect Alien Rights of Property Ownership.

1. The Rent Restriction Act.

The Rent Restriction Act of 1959 as amended ⁵⁸ regulates the relationship between landlord and tenant of dwelling houses. This law also lays down conditions upon which the tenant may be ejected from the premises. No distress for rent may be levied by the landlord except as authorized by the rent tribunal. This law also allows subletting of premises for six months with the written consent of the landlord.

2. The Distress for Rent Act

The Distress for Rent Act of 1938 as amended ⁵⁹ contains rules and regulations governing distress for rent.

3. The Landlord and Tenant (Shops, Hotels and Catering Establishments) Act

The Landlord and Tenant (Shops, Hotels and Catering Establishments) 1965 as amended ⁶⁰ protects tenants of shops, hotels and catering establishments. Some provisions which may affect alien rights to property ownership in Kenya are also contained in the Wakf Commissioner's Act of 1951 as amended ⁶¹ which deals with endowments and charitable dispositions of property under Islamic law. Yet other provisions are contained in the Trustees (Perpetual Succession) Act of 1923 as

⁵⁷ 1920 as amended, 8 **Laws of Kenya**, Ch.281 (rev.1982)

⁵⁸ 9 **Laws of Kenya**, Ch.296 (rev.1982)

⁵⁹ **Id.** Ch.293 (rev.1982)

⁶⁰ **Id.** Ch.301 (rev.1972)

⁶¹ 4 **Laws of Kenya**, Ch.109 (rev.1981)

amended.⁶²

F. Gifts and the Law of Succession

Testate and intestate succession as well as the administration of estates are regulated by the Law of Succession Act.⁶³ Under sec.4 of this Law, succession to all immovable property in Kenya is governed by the laws of Kenya irrespective of a person's domicile at the time of death, while succession to a person's movable property is governed by the laws of a person's domicile at the time of death.

1. Wills

Wills are also governed by the 1981 Law of Succession. Under sec.5 of this Law, any person who has no disability, that is, who is not a minor or a person of unsound mind or who has no other legal disabilities, may make a will to dispose of real and personal property. The will may be oral or written. However, oral wills are valid only if made in front of two witnesses and the testator dies within three months of making the oral will. The exception is an oral will made by a member of the armed forces or merchant marines, such wills are valid if made during active duty, notwithstanding that the serviceman died after three months from the date, the oral will was made. Oral wills, however, are subjected to the terms of the written will.

The validity of a written will depends on its having been signed or marked by the testator or some other person authorized by him. The signature must appear to express an intention by the testator to legally execute the will. Wills are revoked, rescinded, altered or varied under secs.17-21 of the 1981 Law. All testamentary dispositions are void if made in violation of the rules against perpetuities, remoteness and accumulation. **(The rule against perpetuity relates to any limitation or condition which could take away or suspend the power of alienation of property for a period beyond the life or lives in being and 21 years thereafter; the rule against remoteness deals with want of close connection between a wrong and the injury which prevents the injured party from claiming compensation from the wrongdoer; accumulation relates to the increase by continuous or repeated conditions. Illustration of accumulation occurs when an executor or other trustee masses the rents, dividends and other income which he receives, treats it as capital, invests it, makes new capital of the income derived therefrom, invests that and so on and so on)**

Sec.25 of the Law of Succession Act of 1981 and the Fourth Schedule of this Law, which governed the rules on perpetuities, remoteness or accumulation have been repealed by the Perpetuities

⁶² 5 Laws of Kenya, Ch.164 (rev.1981)

⁶³ Supra note 53

and Accumulation Act, No.6 of 1984 as amended ⁶⁴ which now regulates the avoidance of future interests in property on grounds of remoteness and also matters dealing with accumulations of income from property. The 1984 Law also repealed the Pensions Trust Funds (Validation) Act and sec.11-18 of the Transfer of Property Act, 1882 of India, which as seen from above controlled transactions in movable and immovable property.

G. Limitation of Actions

Actions on the recovery of land are governed by sec.7 of the Limitation of Actions Act, the limitation period in these actions being twelve years from the date the action accrued. Actions for the recovery of arrears of rent or damages in respect to such rent is six years from the date the arrears became due, while actions to recover principal sums of money secured by mortgages on land or other immovable property are also limited to twelve years from the date when the right to recover the money accrued. The periods of limitation are extendable, however, if the person involved is under some legal disability."⁶⁵

2. Taxation

There are in excess of eleven pieces of legislation that deal with matters of taxation in one form or the other.⁶⁶ Taxation laws of Kenya are like its land laws, numerous and complex. Here below is an highlight of some of these laws that may adversely affect ownership of property and investment by foreigners.

A. Introduction

Like its legal system Kenyan taxation laws are by and large based on the British system. Historically, income tax has always been targeted at those with higher incomes. Since independence, however, the tax base of Kenya has been widened to include both progressive rate personal income tax and also other broadly based indirect taxes. Their implementation over the years, however appears **ad-hoc**.

⁶⁴ **Id.** Ch.161 (rev.1985)

⁶⁵ **Id.** at 54-60

⁶⁶ **See generally, supra notes, 8 & 11 African Tax Systems: Kenya** (Supp. 1995) at B1-B24. These include the Income Tax Act, 1974 as amended, 13 **Laws of Kenya**, Ch.470 (rev.1986); the Customs & Excise Act, **Id.** Ch.472 (rev.1991); the Telecommunications Tax Act, 1980 as amended, **Id.** Ch.473 (rev.1981); the Refinery...Tax Act, 1982 as amended, **Id.** Ch.474 (rev.1983); the Air Passengers Service Act, 1970 as amended, **Id.** Ch.475 (rev.1989); the Value Added Tax Act, 1989 as amended, **Id.** Ch.476 (rev.1991); the Hotel Accommodation Tax Act, 1971 as amended, **Id.** Ch.478 (rev.1989); the Entertainment Tax Act, 1951 as amended, **Id.** Ch.479 (rev.1990); the Stamp Duties Act, 1958 as amended, **Id.** Ch.480 (rev.1982); the Local Manufacturer's (Export Compensation) Act, 1974 as amended, **Id.** Ch.482 (rev.1987); the Estate Duty Act, 1963 as amended, **Id.** Ch. 483 (rev.1964); the Second Hand Motor Vehicles Purchase Tax Act, 1963 as amended, **Id.** Ch.484 (rev.1991)

Pay-As-You-Earn (PAYE), for example was introduced in 1966/67 to ensure a reduction of personal allowances. The revision of child allowances also facilitated the effective reduction of personal and child deductions to turn the system around to one based on relief. The Kenyan Income Tax Department is the enforcement arm and controlling authority.

In similar manner as other African countries, corporations and individuals in Kenya are taxed under the same Income Tax Act noted above. Special rules apply to the calculations of income of persons who carry out certain economic activities, for example mining operations, farming and others. Variant rates of tax apply to resident and non-resident corporations. Wide-ranging mechanisms to withhold taxes are applied to the income of a non-resident in Kenya. But certain tax concessions are available to encourage foreign investments.

B. Taxation of Business Income

Non resident corporations are taxed differently. A non resident corporation is one not incorporated under Kenyan law. Alternatively, a non resident or foreign corporation is one whose management and control are exercised outside Kenya in the applicable year of assessment. Income tax is levied on all the income of non resident corporations which has accrued in or is derived from Kenya.

1. Concept of Income

To be taxable in Kenya, income must have accrued in or be derived from or considered to have been derived from Kenya. Income includes any amount received or accruing by way of business profits, employment, services rendered, rental income, dividends, interest, income from agricultural activities, royalties, pensions or annuities, provident or individual retirement fund, management and professional fees, fees for appearance on the lecture circuit, performing or assisting at any entertainment or sporting events and gains on investment shares. There are special provisions for foreign corporations involved in farming, insurance corporations and mining.

2. Examples of Rates of Taxes

The corporate tax for a non resident corporation with a permanent establishment in Kenya with an accounting period between July 1, 1994 and June 30 1995 has been increased to 2.5% A summary of the rates is as follows:-

Foreigners (Non-Residents with no permanent establishment)

Dividends:10%

Interest:12.5%

Royalties:20%

Management and professional fees:20%

Other fees:20%

Rent or premiums paid on use of property:30%

Pensions or annuities:5%

**Foreigners (Non-Resident Corporations
with a permanent establishment):42%**

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