

Investing in Kenya: Regulatory and Ownership Restrictions



Subject to a few regulatory restrictions and restrictions on the extent of foreign ownership, some of which are outlined below, there are no substantial limitations on joint venture arrangements between foreigners and nationals. A foreign company may register a branch company in Kenya and there are generally no restrictions on a company registering in Kenya even if all the shareholders are foreigners.

No Exchange Control

There are no exchange control laws in Kenya. The *Central Bank of Kenya Act* however, provides that for every payment made:

- (i) in Kenya to or for the credit of a person outside Kenya; or
- (ii) outside Kenya to or for the credit of a person in Kenya; or
- (iii) in Kenya (other than a payment for a current transaction) between a resident and non-resident,

such payment must be effected through an authorised bank. Any contrary mechanism would require approval from the Central Bank. An authorised bank under the Act is a specified bank licensed by the Central Bank of Kenya to transact foreign exchange business. In practical terms, this effectively captures all institutions with banking licenses.

Accordingly, transactions that involve the disbursement of loans to or the subscription of

shares in a Kenyan entity would arguably fall foul of this provision.

Specific Ownership Restrictions:

Land

Foreigners may only hold land on the basis of leasehold tenure. Leases granted to non-citizens may not exceed a period of 99 years.

Dealings in agricultural land are controlled in Kenya by the *Land Control Act*. Consent must be obtained from the Land Control Board for any transaction involving the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land. Consent will not be given to non-Kenyan citizens for any such transactions (save in the case of a mortgage or charge created in favour of a non-Kenyan lender). However, a non-Kenyan citizen may apply for a presidential exemption from the application of the Act, although in practice this method is exercised in the most exceptional of circumstances in which there are significant public interest considerations.

Broadly defined, agricultural land is any land that is not within a municipality, township or market or is gazetted as such (but excludes land in such areas which by reason of any specific restriction on its use, the land may not be used for agricultural purposes).

Limits on ownership of a financial institution

Only banks, financial institutions, the Government of Kenya, foreign governments, state corporations, foreign companies licensed to operate as financial institutions in the relevant country and non-operating holding companies approved by the Central Bank, may hold more than 25% of the share capital of a financial institution.

Insurance

The *Insurance Act* restricts the registration of insurers. No person shall be registered as an insurer unless that person is a body corporate incorporated under the *Companies Act* and at least one-third of the controlling interest, (whether in terms of shares, paid up share capital or voting rights, as the case may be), are held by (i) citizens of Kenya or (ii) a partnership whose partners are all citizens of Kenya or (iii) a corporate body whose shares are wholly owned by citizens of Kenya or is wholly owned by the Government.

Capital Markets

Under the *Capital Markets (Foreign Investors) Regulations*, every legal entity that offers securities to the public or listed company shall reserve at least 25% of its ordinary shares for investment by local investors in the issuer or listed company. Local investors include investors from the East African Community partner states.

Mining

Currently there is a requirement of 35% local equity participation for all mineral rights. A mineral dealer's permit shall only be issued to Kenyan citizens or in the case of a legal entity, only where 60% of the shareholders are Kenyan citizens. A new *Mining Bill* has been presented to Parliament for discussion.

The new Bill provides for the Cabinet Secretary to prescribe limits on local equity participation. It remains to be seen what these are. Preference is however, to be given to local products. The holder of a mineral right shall in any dealings in minerals give preference to the maximum extent possible to materials and products made in Kenya, to services offered by Kenyan citizens and to companies or businesses owned by Kenyan citizens.

Communications

A subscription management services provider cannot enter into contractual arrangements with a foreign multi-channel satellite provider unless the foreign provider has landing rights in Kenya. The subscription management services licensee is required to have minimum local equity participation of 20%.

Engineering

A foreign firm may only be registered as an engineering consulting firm if the firm is incorporated in Kenya and a minimum of 51% of its shares are held by Kenyan citizens. Individuals may only be registered as professional engineers if they are resident in Kenya and hold a valid working permit.

Architecture

In order for architects to practice as limited liability companies, all the architects must be registered in Kenya and have met certain requirements including having had a minimum of one year of professional experience in Kenya to the satisfaction of the Board of Registration of Architects and Quantity Surveyors or have satisfied the Board that they have otherwise acquired an adequate knowledge of Kenya building contract procedures.

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