

JAMES OKETCH
& COMPANY ADVOCATES



LAW

SHERIA

SHERIA TODAY

AN INTRODUCTION TO
DOING BUSINESS IN
KENYA



James Oketch
Managing Partner

FOREWORD

We prepared this guide in response to queries received by people and organisations seeking to carry out business and invest in Kenya.

It has been compiled by our team of lawyers who specialize in the specific relevant areas of law, for your comments, records and perusal.

For further information or specific assistance, please do not hesitate to contact us.

The contents of this guide are for reference only and should not be considered as a substitute for detailed legal advice. It is correct as of August 2023.

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Firm Background

We are a full-service law firm located in Nairobi, Kenya. Creative and innovative problem solving is at the heart of what we do. We practise and give advisories in relation to all aspects of the law. However, we specialize in commercial law, technology and innovation practice.

We are also proud members of the Euro American Lawyers Group (EALG) which has members in Europe, Africa, America among other jurisdictions. Each member has their own unique attributes and knowledge of their local market as well as substantial experience representing client with cross-border legal needs.

The Euro-American Lawyers Group (EALG) was founded in 1985 on the premise that law firms can best serve their clients' interests overseas by co-operating with like-minded firms who have local knowledge of and immediate access to the legal system operating in their own jurisdictions.

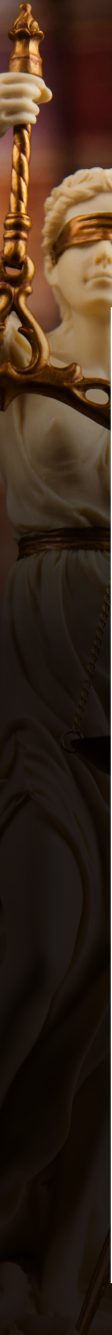


EALG

All of the group's members, each with their own unique attributes and knowledge of their local market, have substantial experience representing clients with cross-border legal needs. Their common aim is to guide our clients through the challenges of global business and provide them with excellent, personalized legal services. Through the Euro-American Lawyers Group (EALG), cross border clients can discuss their transactions with someone who understands the particular country's business culture and who can provide the legal expertise and services they require wherever they do business.

James Oketch and Company Advocates is the only Euro-American Lawyers Group (EALG) member from the African continent. With this international affiliation and experience, our services continue to transcend the Kenyan and continental borders, assuring our clients of solutions encompassing both local and international facets.

We are committed to resolving disputes in the most efficient and cost-effective manner. At James Oketch and Company Advocates, we are focused on providing solutions that are practical and commercially viable.



The firm has built close-knit partnerships with a wide range of clients drawn from different segments of the private sector, financial institutions, state corporations and related agencies. It also encompasses national and county governments, domestic and foreign investors, universities as well as regulatory bodies in various industries.

Our mission

Our mission is to provide dynamic, comprehensive and expert business services while calibrating ourselves as a center point for all our clients.



1. Introduction



1.1. Background

Kenya is a vibrant country located in East Africa with its capital city being Nairobi. English and Swahili are the country’s official languages.

Its currency is the Kenyan Shilling (KES) wherein (1USD=142KES and 1EURO=154KES) and has a population of approximately fifty-four (54) million people.

The country has a multi-party-political system whose hallmark is a parliamentary democracy. The Parliament of Kenya is a bicameral house consisting of the National Assembly and the Senate. Kenya’s general elections take place every five (5) years, with the last one taking place on 9th August 2022.

Kenya is also a major trade hub through its port cities of Mombasa and Lamu which serve as doorways to land-locked countries in the region including Uganda, Rwanda and Burundi.

Kenya has always been the major regional hub for business and trade throughout East and Central Africa. It is a member of the East African Community (EAC), which is an economic trading bloc currently comprising the economies of Kenya, Rwanda, Tanzania, Uganda, Burundi, the Democratic Republic of Congo and South Sudan.





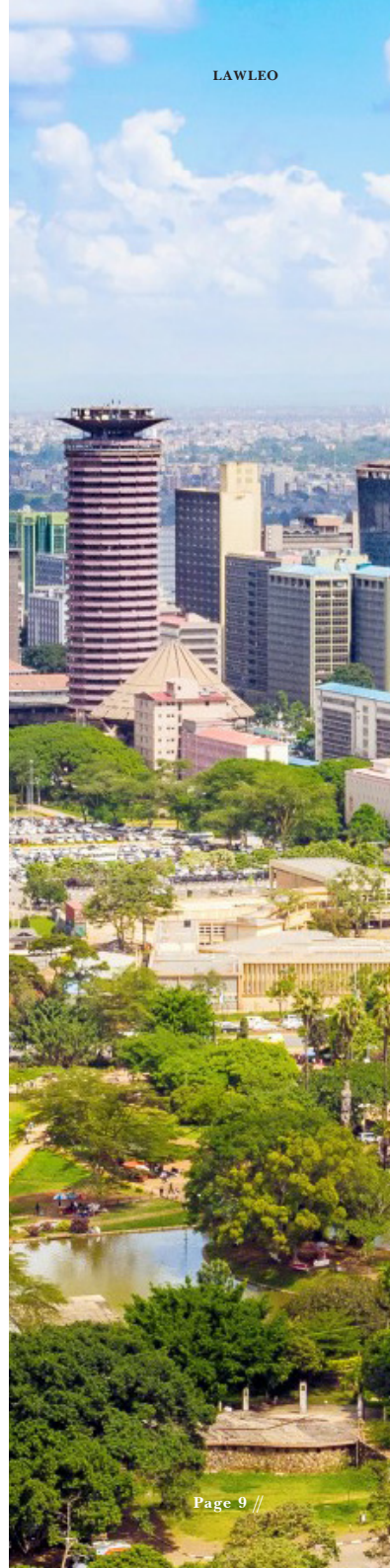
1.2. Kenya as a Trade and Investment Hub

The country's capital, Nairobi, has already made a name for itself as a regional hub for trade, commerce, innovation and technology. Now, plans are underway to take the city to the next level; that of becoming a global financial hub. In addition, Nairobi is a major continental tech hub. Popularly known as "Silicon Savannah", the city's tech ecosystem hosts many innovation hubs and hundreds of startups.

In living up to its "Silicon Savannah" name, Kenya built a smart city, Konza City (Konza Technopolis) which is a key flagship project of Kenya's Vision 2030 economic development portfolio. This project seeks to have Konza as a world-class city, powered by a thriving information, communications and technology (ICT) sector, superior reliable infrastructure and business friendly governance systems.

We have advised various startups within the technological space who have gone on to commercialize their innovations. We have also given advisories for startups in the Fintech industry in relation to novel areas of the law in Kenya relating to data security, data protection and compliance in relation to Neo Banks in Kenya.

We have also undertaken trainings on behalf of clients on steps to be taken to comply with personal data protection laws as well as the data ethics framework on how to use data appropriately and responsibly. Additionally, we have acted for several digital lenders in relation obtaining and acquiring the requisite Central Bank of Kenya licenses. Kenya's launch of the Nairobi International Financial Centre (NIFC) was a step forward in making Nairobi a financial hub shows the country's openness as an economy and its confidence in its own ability to compete on the world stage.





The center, which has been in the works since 2014, is meant to help direct international investment in Kenya and Africa at large, enabling companies and investors to take advantage of trade and investment opportunities. It aims to raise more than \$2 billion in investments by 2030.

While the Nairobi International Financial Centre (NIFC) is an investment and job-creation tool, it demonstrates that Kenya is ready to embrace new technology and is ready to be connected to the global economy. Nairobi joins Casablanca, Cape Town, Mauritius, and Johannesburg as International Financial Centres in the continent. Examples of International Financial Centres outside Africa are New York City, London, Shanghai, and Hong Kong.

Additionally, Nairobi is also the global headquarters of the United Nations Environment Programme (UNEP). UNEP seeks to provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations. UNEP works across all Global Environment Facility focal areas, with dedicated GEF technical teams in Biodiversity, Capacity Development, Climate Change Adaptation, Climate Change Mitigation, Chemicals & Waste, International Waters and Land Degradation.

The United Nations Office for Project Services (UNOPS) will move to Nairobi, which is also the headquarters of the UN in the southern hemisphere. A self-financing entity, UNOPS has had its Africa Regional Office housed under the same roof of its global headquarters in Copenhagen, Denmark, but often implements projects in crisis-hit countries across the continent especially those at war or recovering from conflict. It acts as a project implementer for other UN agencies or programmes and charges them a fee for providing infrastructure, procuring supplies and managing UN projects especially those aligned to SDGs.



Furthermore, the United Nations Human Settlements Programme (UN-Habitat) is mandated by the UN General Assembly to promote socially and environmentally sustainable towns and cities. UN-Habitat is the focal point for all urbanization and human settlement matters within the UN system.

The headquarters of the UN-Habitat Secretariat are located in Nairobi, Kenya. UN-Habitat works with partners to build inclusive, safe, resilient and sustainable cities and communities. UN-Habitat promotes urbanization as a positive transformative force for people and communities, reducing inequality, discrimination and poverty.

In line with the Mid-Term Plans of Kenya's Vision 2030, UN-Habitat continues to focus on providing support to human settlements and sustainable urbanization priorities of the Government of Kenya within the context of several frameworks including:

Kenya's 'Big Four Agenda for Transforming Kenya, which focuses on provision of affordable housing; the Implementing Strategy for The New Urban Agenda in Kenya (2016-2036); and the Habitat Country Programme Document for Kenya 2018-2021, a critical tool for mobilizing resources targeting implementation of programmes and projects at the national and county levels.



1.3. Foreign Investment

Kenya is Africa's seventh largest economy and foreign investment is encouraged by the Government. The Investment Promotion Act (No. 6 of 2004) established a statutory body known as the Kenya Investment Authority (KenInvest) whose main objective is to promote investments in Kenya. KenInvest is responsible for facilitating the implementation of new investment projects, providing after-care services for new and existing investments, as well as organising investment promotion activities both locally and internationally.

The European Union (EU) is one of Kenya's biggest markets where it sends roughly one-fifth of all its exports. Kenya's main exports to the EU are agricultural products, including vegetables, fruits and the country's famous tea and coffee. More than 70% of Kenya's cut flowers are destined for Europe.

In June 2023, Kenya signed an Economic Partnership Agreement with the European Union (EU) that will guarantee duty-free access for its farm produce into its biggest export market. Beyond trade, the agreement is designed to stimulate investments and manufacturing.

HS	Description	Oct-Dec 2020 KES(Billion)	Oct-Dec 2021 KES(Billion)	Oct-Dec 2022 KES(Billion)	Growth %
09024000	Other black tea (fermented) and other partly fermented tea	30	34.2	42	23%
06031100	Fresh Roses	14.2	14	12.8	-12%
27101921	Kerosene type jet fuel	3.4	6.3	8.1	30%
26140000	Titanium ores and concentrates	2.9	6	6.4	5%
09011100	Coffee, not roasted; not decaf- feinated	4.4	5.3	6	14%
06031900	Other fresh Cut flowers and flower buds of a kind suitable for bouquets or for ornamental purposes, fresh, dried, dyed, bleached, impregnated or otherwise prepared.	3.7	4.8	4.7	-2%
15119030	Palm oil and its fractions, whether refined or not, but not chemically modified. Palmolein, RBD	82	3.9	4.2	8%
30049000	Other medicaments, containing antimalarial active principles described in Subheading Note 2 to this Chapter	3	2.8	3.4	21%
08026200	Macadamia nuts Shelled fresh or dried, whether or not shelled or peeled	2.2	3	2.9	-3%
28362000	Disodium carbonate	1.3	1.6	2.8	76%

Source:Kentrade

HS	Description	Oct-Dec 2020 KES(Billion)	Oct-Dec 2021 KES(Billion)	Oct-Dec 2022 KES(Billion)	Growth %
27101931	Gas oil (automotive, light, amber for high speed engine	22.7	40.1	63.1	57%
27101220	Motor Spirit (gasoline)	19.5	39.9	39.7	-1%
15111000	Kerosene type Jet Fuel	5	14.1	23.7	68%
10019990	Other Wheat and meslin	10.3	12.4	22.7	82%
30049000	Other medicaments, containing antimalarialactive principles described in Subheading Note 2 to this Chapter	8.4	16.8	12.2	-27%
72083900	Other flat rolled products of iron or non alloy steel, of a width of 600 mm or more, hot rolled, not clad, plated or coated, in coils, not further worked than hot rolled: Of a thickness of less than 3 mm	8.7	12.3	10.9	-11%
10063000	Semi milled or wholly milled rice, whether or not polished or glazed	5.5	7.2	7.4	3%
27101942	Residual fuel oils (marine, furnace and similar fuel oils) of a 'Kinematic vis- cosity of 180 centistokes	2.9	5.3	6.8	27%
27111300	Liquefied: Butanes	3.9	8.5	6.7	-21%

Of the top 10 import source/countries, Russian Federation had the greatest percentage

ORIGIN	Oct-Dec 2020 KES(Billion)	Oct-Dec 2021 KES(Billion)	Oct-Dec 2022 KES(Billion)	Growth %
UNITED ARAB EMIRATES	30.9	56.1	118	111%
CHINA	98.9	122.4	110.7	-10%
INDIA	47.5	62.7	47.3	-25%
UNITED STATES OF AMERICA	12.9	21.8	24	10%
MALAYSIA	10.7	41.1	22.2	-46%
JAPAN	23.9	27.4	22.5	-19%
SAUDI ARABIA	14	35.2	21.6	-39%
RUSSIAN FEDERATION	12.7	2.1	17.7	744%
SOUTH AFRICA	9.5	10.8	13.9	28%
UGANDA	8.1	10.3	10.4	1%

Source:Kentrade

Top 10 countries that Kenya exported to in Q2

ORIGIN	Oct-Dec 2020 KES(Billion)	Oct-Dec 2021 KES(Billion)	Oct-Dec 2022 KES(Billion)	Growth %
UGANDA	19	26.3	24	-9%
NETHERLANDS	14.2	15.4	18.4	19%
PAKISTAN	12.9	16.2	17.5	8%
UNITED STATES OF AMERICA	13	15	16.8	11%
TANZANIA	9	14.6	15.2	4%
UNITED KINGDOM	124	12	10.4	-13%
UNITED ARAB EMIRATES	6.6	9.2	9.3	0%
RWANDA	7.1	10.8	9.1	-16%
CHINA	3.5	6.7	6.8	2%
EGYPT	5.3	5.5	5.6	2%

Source: Kentrade

At the same time, there are certain restrictions that typically apply to foreign investors such as under the Constitution of Kenya, 2010, a person who is not a citizen may hold land on leasehold tenure only, and any such lease, however granted, shall not exceed ninety-nine (99) years. For purposes of this requirement, a body corporate shall be regarded as a citizen only if the body corporate is wholly owned by one (1) or more citizens; and property held in trust shall be regarded as being held by a citizen only if all of the beneficial interest of the trust is held by persons who are citizens.

Moreover, the Land Control Act (Cap 302 Laws of Kenya), prohibits non-citizens or a private company whose members are not citizens from owning agricultural land.

Other restrictions would apply for regulated sectors such as the financial services sector and information, communication and technology sector. These regulations are in the form of the required licenses including licenses from the Central Bank of Kenya for banks, from the Insurance Regulatory Authority for insurance companies and from the Communications Authority of Kenya for telecommunication companies.

Kenya made steps to remove various restrictions in different industries. For instance, Kenya reviewed its National ICT policy, which required all operators in the ICT Sector in Kenya to have at least 30% substantial local shareholding. The same was untenable especially for large multinational ICT companies. The requirement negatively affected the levels of foreign direct investment in the sector which is essential considering the rising consumer demand in this sector. Effective August 2023, the government removed the 30% equity requirement in a bid to promote increased investment in this sector.

Kenya has the opportunity to become a continental leader in fintech and dramatically boost financial inclusion by enhancing the existing ecosystem, British underwriter Prudential Plc announced plans to set up its Africa headquarters in Nairobi.

Additionally, TheCityUK, which offers financial and related services, signed a Memorandum of Understanding (MoU) with the Nairobi International Financial Centre. Africa: The Big Deal, an Africa-focused database, shows Kenya among Africa's tech startup ecosystems been breaking month-on-month fundraising records, since November 2021.

Global tech giants made concerted efforts to tap into Kenyan talent and business opportunities.

Google opened a tech hub in Nairobi as part of its KES 115.5 billion Africa investment. Google is investing in its first-ever African product development hub in Nairobi as part of the tech firm's KES 115.5 billion investment on the continent over the next five years. This will increase access to cheap and fast internet, support local entrepreneurs and SMEs and help non-profit organisations.

Microsoft launched one of two Africa Development Center (ADC) sites in Nairobi, for its upcoming Product Development Center—the company's first such facility in Africa.

Giant financial payment solutions firm Visa also launched in the city, with one of its six (6) global Innovation Hubs, while Amazon, which has chosen Cape Town as its continental hub, also expressed intent to launch an Amazon Web Services (AWS) local zone in Kenya.

Real estate firm Knight Frank named Nairobi the only city in Africa that made the top forty-five (45) global cities that posted growth in 2021, in its latest Prime Global Cities Index.



The GTC Complex in Westlands, Nairobi.

2. The Legal System In Kenya

The legal regime in Kenya is primarily hinged on the Constitution of Kenya 2010 as well as legislations arising from Acts of Parliament and international legal instruments pursuant to Articles 2 (5) and 2 (6) of the Constitution. The legal system in Kenya therefore, is anchored on:

- a) The Constitution of Kenya 2010;
- b) Statutes, including statutes of general application that were in force in England;
- c) English case law and common law and doctrines of equity;
- d) African customary law – this only applies in civil cases where one or more parties are subject to it, mostly in succession, divorce and matrimonial proceedings;
- e) Kenyan case law; and
- f) Foreign ratified laws not inconsistent with the Constitution of Kenya.



3. Establishing A Business

In Kenya, most foreign business have established their presence and operate through either incorporated subsidiaries or through branch offices.

We have discussed in detail the reason and features of each of the options below:

3.1. Establishing a subsidiary

Subsidiaries can be set up in Kenya as:

(a) Private companies – a private company is a company that restricts the right to transfer its shares, limits the number of shareholders to fifty (50) (excluding employees) and prohibits offers to the public of its shares and debentures. This is the most common type of company used by foreign investors to conduct business in Kenya.

(b) Public companies – these are normally used where a company is to be quoted on the Nairobi Securities Exchange (NSE) and for the purposes related to the control of dealings in agricultural land in Kenya as the law prohibits private companies not fully owned by Kenyan citizens from holding agricultural land.

(c) Companies limited by guarantee – such companies do not have share capital. Rather, members undertake to pay a specific amount towards the company's debts in the event of liquidation of the company. A company limited by guarantee is typically preferred to carry out not-for-profit activities.

(d) Unlimited companies – these are private or public companies which do not limit the liability of members. These are hardly used for business due to the lack of limited liability.



For the reasons set out above, we have only considered the establishment of a private company for purposes of establishing a subsidiary. The process of incorporating private companies is relatively straight-forward as it is done via the Business Registration Service (BRS) online registration portal known as e-Citizen portal. The features of a subsidiary are as follows:

(i) Separate legal personality – On incorporation, the company would be constituted as a body corporate with separate legal personality from its members, having perpetual succession and capable of exercising all the functions of an incorporated company such as the capacity to enter into contracts in its own name and sue or be sued.

(ii) Limitation of members' liability – the liability of a member of a company would be limited to any amount unpaid on the shares issued to the particular member by the company.

(iii) Ownership – a private company limited by shares is required to have a minimum of 1 shareholder and a maximum of 50 with no restriction on the number of shares that each shareholder may hold. Therefore, another company may be a sole shareholder of the subsidiary and hold all the shares of the company. There is also no prescribed minimum share capital of a private company and there is currently no requirement to provide evidence of having paid up for the shares at the time of incorporation. There is generally no restriction on company having 100% foreign shareholding other than for limited number of regulated sectors such as banks, insurance companies etc.

(iv) Management – governance of a private company is typically through board of directors and shareholders general meetings.

Board of directors – a private company must have at least 1 director who is a natural person or a corporate director. There are no unusual restrictions as to who may be appointed a director. In particular, there is no requirement that a director should be a resident or citizen of Kenya. The directors are normally responsible for the day to day management of a company subject to and in accordance with the regulations set out in the Articles of Association of the company or any other constitutional of the company.

Members general meetings – shareholders of a company generally act and participate in the governance of the company through general meetings.

(v) Capacity of the company – unless specifically restricted under the articles of association, the objects of a company are not restricted meaning that a company may undertake any possible activity.

Generally, the advantages of a private company limited by shares include:

- **Limited liability:** the liability of members is limited to the amount, if any, unpaid on the shares respectively held by them. However, whilst the directors will generally not be liable for the obligations of the company, there are limited circumstances in which they can assume personal liability.
- **Control:** the articles of association normally provide a framework for control. The rights of members can be classified differently with different rights including voting rights. The articles may also set out other specific rights of governance in relation to the management and operation of the company.

- **Ring-fencing of risks of offshore company:** this option ring-fences the risk of the parent company in Kenya as a subsidiary will be a separate and distinct legal personality from the parent company. Therefore, the parent company will not be responsible for the liabilities of the subsidiary. The main disadvantage of a private company limited by shares is the reporting requirements under the Companies Act including the requirement to file annual financial statements, directors reports and auditors reports with the Registrar of Companies.

3.2. Branch Office/ Foreign Company

A foreign company may register a branch in Kenya by filing certain documents and information with the Registrar of Companies under the Companies Act. The term ‘foreign company’ is defined under the Companies Act as a company incorporated outside in Kenya.

The main features of a branch office are as follows:

- (a) **Separate legal personality–** a branch office would not be a separate legal person from its foreign company is established.

(b) Ownership and governance– a branch office would be owned and controlled in accordance with the constitutional documents and the laws of the jurisdiction where it is established. The number of shareholders would also depend on the number existing in the foreign company’s country of incorporation.

(c) Governance and management – internal governance and management would depend on the constitutional documents of the foreign company and the laws of its jurisdiction.

However, a foreign company is required to appoint a legal representative in Kenya who shall be responsible for doing all acts, matters and things which the foreign company is required to do under the Companies Act for compliance purposes. There is no specific criterion on who may be appointed as a local representative but he/she is usually required to be a resident person. The local representative would be deemed to be an officer of the foreign company in Kenya and may be personally liable to fines imposed on the foreign company for non-compliance under the Companies Act.



(d) Capacity – a registered branch office would have the same capacity to enter into contracts, hire employees and generally carry on business subject only to any restrictions under its constitutional documents or law of its jurisdiction of incorporation.

(e) Objects – the branch can only carry on the activities set out in the foreign company’s constitutive documents.

(f) Publication of financial statements – a branch must file the foreign company’s financial statements at least once every calendar year and at intervals of not more than 15 months (in the prescribed form as per the laws of its place of origin) together with a statutory declaration verifying the copies of such statements.

The main advantages of this option include:

(i) A key advantage of this option is the fact that the branch will be part of the same organization as the offshore parent company. It can therefore trade under the same name and it can apply the same reporting and organizational structures as the offshore parent company.

(ii) Another advantage is that it is easy to set-up and wind-up a branch in Kenya as compared to a subsidiary. It is therefore ideal for foreign companies who intend to operate in Kenya for short term engagements or projects.



The main limitations and disadvantages of this option are:

- (i) A foreign company would be required to file its annual financial statements with the Registrar of Companies.
- (ii) The branch will be deemed to be an extension of the offshore foreign company. As such there will be no ring-fencing of risks and the parent company will be liable for the actions of the branch offices.
- (iii) The foreign company would be required to pay tax on repatriated income for the year of income at the rate of 15% in addition to income tax of 30%.

3.3. Establishing a Partnership

Though not a very common vehicle used by foreign entities, another common business vehicle is a partnership which is three-pronged with general, limited and limited liability partnerships. The limited liability partnership model embodies the advantages of both companies and partnerships to the effect that the business is a separate entity from the partners thereby cushioning their personal assets. A limited liability partnership has fewer and less stringent requirements.



4. Running The Business – Key Considerations

4.1. Employment

(a) General

Operating a business demands the presence of employees as they are the cogs that move the wheels. The Employment Act forms the substratum of them all as it lays out the fundamental elements that must be adhered to with respect to the irreducible minimums of an employment contract, the benefits the employee is to enjoy, disciplinary processes, termination procedures and so forth.

Other legislation augments the same by canvassing other particular aspect such as joining and participation in union activities under the Labour Relations Act as well as the standards of safety and reasonable working conditions as cast under the Occupational Safety and Health At, 2007.

Employment related issues are primarily governed by the Employment Act, 2007 (the Employment Act) which sets out the fundamental rights of employees, the basic terms and conditions of employment and other related matters. The Employment Act applies to fixed term, permanent, temporary employees.

Under the Employment Act, at as a minimum, employees are entitled to:

- Twenty-one (21) days annual leave in addition to public holidays and rest days
- Sick leave thirty (30) days with full pay and fifteen (15) days with half pay

- Three (3) months maternity leave for female employees
- Two (2) weeks paternity leave for male employees
- One (1) month pre-adoptive leave
- At least one (1) rest day
- Normal working hours of not more than fifty (52) hours spread six (6) days of the week and sixty (60) hours for persons employed for night work. Overtime is payable for any excess hours worked.

Concerning foreign employees employed in Kenya, a Class D entry permit (work permit) is required for non-citizens offered specific employment by a specified employer in Kenya. It is a requirement that such foreign employee must be in possession of skills or qualifications not available in Kenya and their engagement in that employment will be of benefit to Kenya. Work permits are generally issued for two (2) years with subsequent renewals for two (2) years at a time. The Kenya Citizenship and Immigration Act currently provides for a maximum cumulative number of five (5) years. A work permit application must be sponsored by an employer who is registered in Kenya. Thus, there are nine (9) different work permit categories:

- i. **Class A permit** - issued to persons who intend to engage, whether alone or in partnership, in prospecting for minerals or mining in Kenya and who have obtained or are assured of obtaining any prospecting or mining right licence and have sufficient capital or resources for the purpose.
- ii. **Class B permit** - issued to those who intend to engage in the business of agriculture and animal husbandry in Kenya and who have

acquired permission to hold an interest in land in Kenya and have sufficient capital and resources for the said purpose.

iii. **Class C permit** - issued to members of a prescribed profession who intend to practise that profession, whether alone or in partnership, in Kenya and who possess the prescribed qualifications and have sufficient capital or resources for the purpose.

iv. **Class D permit** - issued to persons offered specific employment by a specific employer, and who are qualified to undertake that employment.

v. **Class F permit** - issued to persons who intend to engage, whether alone or in partnership, as a specific manufacturer in Kenya and have obtained or are assured of obtaining any licence, registration or other authority or permission as may be necessary and have sufficient capital and resources for the said purpose.

vi. **Class G permit** - issued to investors in specific trade, business or consultancy.

vii. **Class I permit** - issued to persons who are members of societies approved by the Government and engage in religious and charitable activities.

viii. **Class K permit** - issued to persons who are not less than 35 years old; have an assured annual income that is derived from a source other than employment, occupation, trade, business or profession and being an income that is derived outside of Kenya but remitted in Kenya; derived from a property, pension or annuity payable from sources in Kenya; or derived from sufficient investment capital to produce such assured income that will be brought into and invested in Kenya; and undertakes not to accept paid employment of any kind.



ix. **Class M permit** - issued to persons granted refugee status or any spouse of such refugee who intends to take up employment or engage an occupation, trade, business or profession. The alternative employment mechanism that many foreign employees have started to adopt is that of employing consultants/independent contractors. The labour laws in Kenya does not expressly regulate the independent consultant relationship. However, the Courts have made interpretations on the same on a case-to-case basis. Such kinds of engagement are typically governed by the terms and conditions of the consultancy agreements. However, this option should be considered with care as there is always an impending risk of misclassification whereby the courts or the Kenya Revenue Authority (KRA) classify the consultant as employee exposing the employer to backdated liabilities with respect to the consultant.

We are also aware of some foreign organization not wishing to have a physical presence in Kenya or who have operations in Kenya and employ employees through employers of record (EOR) or private employment organisations (PEOs). With this option, the employees are directly employed by EORs/PEOs to provide services to the foreign entity but all matters relating to the employee including payroll, tax, employment contracts, onboarding and termination of the employee are managed by the EOR/PEO. This option should be explored with caution especially when an entity has no physical presence in Kenya as it is likely to lead to permanent establishment risks.

Most foreign entities use EORs (Employer Of Record) which serve as third party/intermediaries of the employer for tax purposes, pay roll management, employee contracts, employee onboarding and termination of employees. EORs are popular for remote work organisations, are cost effective.

Noting the unequal bargaining power present in an employment relationship, the Kenya's Employment and Labour Relations Court in conjunction with the legislation in place have safeguarded the rights and freedoms of employees.

In relation to termination of employees by the employer, the Employment Act provides that an employee may be terminated due to poor performance, incapacity, redundancy and misconduct. Please note that an employer cannot terminate an employee at will (without cause). In all cases, the employer must have a valid and justifiable reason for termination and must follow the legal procedure before terminating an employee.

(b) Employer's Obligations

(i) Records

Under the Employment Act, an employer is required to keep the following records:

- Sexual harassment policy – mandatory for employers with more than twenty (20) employees
- Employment contracts
- Changes in employment contracts
- Pay slips/statements
- Record of rest days
- Annual leave records
- Maternity/paternity leave records
- Sick leave records
- Where an employer provides housing, details of accommodation provided, where salary is not consolidated, details of housing allowance paid to the employee
- Register of employees
- Disciplinary policy and records

(ii) Taxes and Statutory Deductions

An employer is required to deduct and remit the following statutory deductions:

- Employment tax (PAYE)
- Social security (NSSF) contributions – this is contributed by both the employee and the employer
- National health insurance (NHIF) contributions
- Housing levy – 1.5% of employer gross salary and matched the employer
- Industrial levy – this is paid by the employer without deduction from employee. The amount payable is 600 per annum for each employee

4.2. General licenses and other continuing regulatory requirements

Entities carrying on business are required to have in place the following licenses and registrations:

(a) Tax (PIN) registration: This is done once the company is registered and is done via the Kenya Revenue Authority (KRA) website. At least one of the directors of the company must be registered with KRA as a taxpayer and must have an individual PIN in order to generate a separate PIN for the Company.

(b) Registration for Value Added Tax: VAT registration should be undertaken when the company has or is about to commence business as there are monthly filing obligations with respect to VAT which commence on the 20th day of the month following the month of first registrations.

(c) Registration of pay as you earn (PAYE): This registration should be done when the Company has or is about to engage employees as there is a monthly filing obligation which would commence on the 10th day of the month following the month of first registration.

(d) NHIF registration: This registration should be done when the Company has or is about to engage employees as there is a monthly filing obligation which would commence on the 1st day of the month following when a deduction to an employee's salary is made.

(e) NSSF registration: This registration should be done when the Company has or is about to engage employees as there is a monthly filing obligation which would commence on the 15th day of the month following when a deduction to an employee's salary is made.

(f) Annual business permit: This is obtained in the relevant county government where the company has business operations. The application should be done once the company has identified and obtained business premises in Kenya.

(g) Industrial training registration: This should be done after engaging employees.

(h) Annual workplace registration: This should be done once a company has obtained business premises.

(i) Registration as a data controller/processor: Under the Data Protection Act, 2019 a person who has more than ten (10) employees and a turnover of KES 5,000,000 is required to register before processing personal data. Please note that mandatory registration applies for entities operating in certain sectors regardless of annual turnover.



5. Taxes

5.1. Income tax

The Income Tax Act (Cap 470 Laws of Kenya) (ITA) provides that all income of a person (resident or non-resident) which is accrued in or derived from Kenya is taxable in Kenya. Therefore, all such income of a subsidiary or a branch is taxed in Kenya. However, the rate of tax and the allowability of expenses or obligations for deduction of withholding tax differs between a subsidiary and a branch office. Income tax rate is 30% for both a branch and subsidiary. Dividends distributed to a non-resident shareholder is subject to 15% withholding tax in the case of a subsidiary and 15% for repatriated income in the case of a branch.

1.5% digital services tax applies on income from a business carried out over internet or an electronic network including through a digital market place. Services subject to such tax include electronic data management e.g., website hosting, file sharing and cloud storage.

Withholding tax is deducted on certain payments made to resident and non-resident persons. The rate of tax ranges from 3% to 30% and is dependent on the service provided and the residency of the service provider. Where a double taxation agreement is in place, the rates of the agreement will be applicable. Payments subject to withholding tax include dividends, interests, royalty, management and professional fees paid to a resident or non-resident person. However, a branch office is typically not required to account for withholding tax on payment of interest, royalties or management or professional fees paid to the non-resident person.

Transactions between a resident related party and a non-resident related party are subject to transfer pricing rules and should be conducted at arms length basis. Entities are required to prepare a transfer pricing policy. Transfer pricing rules also applies to transactions between a branch and its parent company or other offices of the parent company.

15% capital gains tax (CGT) apply on the gain arising from the sale or transfer of property. CGT does not apply on transfer of shares which are listed on NSE or internal restructuring within a group which does not involve transfer of property for a third party and have existed at least 24 months before the restructuring.

Individuals who are resident in Kenya are subject to tax on their world wide income. The employer is required to deduct and remit the tax. The rate of tax is graduated and ranges from 10% to 35%.

5.2. Indirect taxes

Indirect taxes such as value added tax (VAT), Custom and Excise Duty apply to a subsidiary and a branch. 16% VAT is charged on a taxable supply made by a registered person in Kenya. This applies to both a subsidiary and branch office. Registered entities can claim input VAT incurred on purchases subject to the restrictions provided under the VAT Act.

Excise duty is levied on the manufacture, importation and supply of certain goods and services. Custom duty is imposed on the importation of goods usually ranging from 0% (raw materials), 10% (intermediate goods) and 25% (finished goods). Higher rates apply for specific goods.

6. Other Considerations

6.1. Regulation of Competition

Competition Law, which includes the fields of mergers, acquisitions, and takeovers, in Kenya is regulated by the Competition Act No. 12 of 2010 and the Competition (General) Rules, 2019 which are enforced by the Competition Authority of Kenya and the Competition Tribunal.

The Competition Act prohibits restrictive trade practices in Kenya and it prohibits agreements between undertakings, decisions by associations of undertakings, decisions by undertakings, or concerted practices by undertakings that have as their object or effect the prevention, distortion, or lessening of competition in trade in any goods or services in Kenya, or a part of Kenya unless they are exempt under the Competition Act. The same canvases undertakings in both horizontal and vertical relationships. Similarly, the abuse of dominant power is also prohibited under the Act.

However, the Act makes provision an exemption to prohibition on restrictive trade practices whereby an undertaking may apply for the exemption in respect of any category of agreement, decision, or practice that is considered to be restrictive trade practice but there must be a compelling and exceptional reasons for the exemption to be granted by the Competition Authority and the exemptions do not extend to abuse of dominant power.



6.2. Intellectual Property

Intellectual property in Kenya is regulated by the:

- (a) Constitution of Kenya 2010;
- (b) Property Act, 2001 – patents, utility models and industrial designs;
- (c) Trademarks Act, (Cap 506) – trade marks;
- (d) Copyright Act, (Cap 130 Laws of Kenya) - copyright in literary, musical and artistic works, audio-visual works, sound recordings, broadcasts;
- (e) Anti-Counterfeit Act, 2008 – prohibits trade in goods that are the result of counterfeiting any item that bears an intellectual property right, and includes any means used for purposes of counterfeiting;
- (f) Seeds and Plant Varieties Act (Chapter 326 of the Laws of Kenya)- regulates transactions in any part of a plant which is or is intended to be used for propagation and includes any seed, seedling, corm, cutting, bulb, bulbil, layer, , root, runner, scion, set, split, stem, stock, stump, sucker, plantlet, tuber so used or intended to be so used, including provision for the testing and certification of seeds.

We have given advisories to various companies both local and international in relation to their copyright, trademark and other IP rights. The firm has also given advisories to various leadings artists and creatives in relation to their Intellectual Property rights.

6.3. Data Protection

The Data Protection Act (the DPA) was enacted into law in 2019 to make provision for the regulation of the processing of personal data. To operationalize the DPA, the first ever data protection commissioner was appointed in 2020 and enabling regulations namely the Data Protection (General) Regulations, the Data Protection (Registration of Data Controllers and Data Processors) Regulations, and the Data Protection (Compliance and Enforcement) Regulations were enacted in 2021.



The DPA has an extraterritorial effect i.e. it applies to both resident and non-resident persons processing personal data of individuals located in Kenya. Please note that the DPA only applies to data relating to natural persons and not to data relating to juristic (corporate) persons.

The DPA and the regulations set out the obligations of the data controllers and data processors which include ensuring compliance with data protection principles and ensuring they have a legal basis for the processing of personal data. Other specific obligations of data controllers/data processors include:

(a) Issuance of privacy notices to data subjects with sufficient information on processing activities;
 (b) Registration is required for entities with more than 10 employees and turnover of more than KES 5 million. Mandatory registration applies for controllers/processors in the following sectors:

- canvassing political support among the electorate;
- crime prevention and prosecution of offenders (including operating security CCTV system);
- gambling;
- operating an educational institution;
- health administration and provision of patient care;
- hospitality industry firms but excludes tour guides;

- property management including the selling of land;
- provision of financial services;
- telecommunications network or service provider;
- businesses that are wholly or mainly in direct marketing;
- transport services firms (including online passenger hailing applications); and
- businesses that process genetic data.

(c) Maintaining a data protection policy and data retention policy;

(d) Implement appropriate technical and organization measures to ensure security of personal data;

(e) Have in place mechanisms to enable individual rights;

(f) Report any personal data breaches to the Data Protection Commissioner and the data subjects (where necessary);

(g) Ensure appropriate safeguards are in place for transfers of personal data outside Kenya;

(h) Have in place contracts with third parties with appropriate data protection provisions; and

(i) Conduct data protection impact assessment where a processing operation is likely to result in high risk to the rights and freedoms of a data subject, by virtue of its nature, scope, context and purposes.



We have advised various companies in relation to data protection, collection and retention policies, privacy and access rights and also advised various online platform companies on software and technology related intellectual property rights such as BigEye Limited, as well as hospital and healthcare facilities especially on data protection compliance in Kenya.

6.4. Environmental Considerations

Environmental considerations in the context of running businesses. The the Constitution of Kenya provides one of the fundamental rights as the right to a clean and healthy environment and guarantees the protection of the environment for present and future generations. Under the Constitution a clean environment as a claimable right.

The main legislation in relation to the environmental matters is the Environmental Management and Coordination Act, 1999 (EMCA). EMCA establishes the appropriate legal and institutional framework for the management of the environment and for matters connected therewith and incidental thereto. There are a couple of licenses that are required under EMCA depending of the nature of business activity being undertaken by a person.

Additionally, Kenya took bold steps during the COP27 Conference/Summit to reaffirm its commitment to lowering the carbon footprint with the following significant developments:

- Creation of the State Department for Environment and Climate Change under the Ministry of Environment, Climate Change and Forestry. The creation of this office is intended to underlie the government’s commitment to protecting Kenya from the adverse effects of climate change.
- Drafting of the Climate Change (Amendment) Bill 2023 and the Carbon Credit Trading and Benefit Sharing Bill 2023 which seek to regulate carbon trading and facilitate equitable benefit sharing.

- The Natural Resources (Benefit Sharing) Bill, 2022 (the Natural Resources Bill) which seeks to provide a legislative framework for the establishment and enforcement of a system of benefit sharing in natural resource exploitation. The said Bill will regulate emissions reduction purchase agreements and arrangements with project participators in carbon projects, implementation of projects in natural resources including water projects and renewable energy projects.

- Publication of the draft National Green Fiscal Incentives Policy Framework (Green Fiscal Policy) which seeks to steer Kenya’s economy onto a desired low-carbon climate-resilient green development pathway through a variety of fiscal and economic mechanisms. Green fiscal reforms can help shift consumption patterns, generate additional revenue, drive private investment in projects and programs that adopt climate-friendly production mechanisms. The policy sets out how the government Ministries, Departments and Agencies can enhance mobilization of climate Finance from all sources: private, public, multi-lateral agencies, bilateral, philanthropic, and within each of these key sectors:





i. **Transport Sector:** The policy seeks to encourage incentives for electric vehicles. The government will provide incentives for import, manufacture and assembly of electric and hybrid motor vehicles, electric motorcycles and their spare parts. This will be necessary to support the transition toward low-emission and clean transport systems. Options include tax incentives for electric vehicles, and the operationalization of a feebate system. The Government will shift to procurement of electric vehicles over the medium term.

ii. **Expansion of e-mobility infrastructure.** The government will provide incentives to develop and expand infrastructure that supports e-mobility and non-motorized transport. We recently acted for Autopax Limited, one of the leading Electric Vehicle (EV) companies in Kenya who collaborated with Saic GM Wuling Automobile Company Limited (SGMW), a leading automotive manufacturer from Liuzhou, Guangxi, China; in an Engineering Services and Partnership Agreement for production of Electric Vehicles for the Kenyan market.

iii. **Energy sector:** To promote the growth of the renewable energy sector – the Government has made bold statements within the draft policy, which it seeks to pursue, including the provision of targeted incentives for private investment in geothermal electricity generation and other productive uses. The fiscal incentives envisage concessional funding and public support for early-stage investments in geothermal resource assessments, enabling private investment where geothermal is most promising.

6.5. Dispute Resolution

The most prominent dispute-resolution mechanism in Kenya is litigation through the Kenyan court system. Pursuant to the same, the Kenyan court system is segmented into two whereby there are the Higher Courts consisting of the Supreme Court of Kenya, the Court of Appeal, the High Court, the Environment and Land Court (ELC), and the Employment and Labour Relations Court (ELRC). The subordinate courts consist of the Magistrate Court, Court Martial, the Kadhis Court, and the Small Claims Court.

Our courts have improved access to justice through an e-filing platform accessible across the country.

The Kenyan bench and Judiciary are slowly becoming a jurisprudence powerhouse in Africa and the global south. Just recently in 2022, Kenya’s courts made determinations touching on the threshold and requirements for amendments to be done to a Constitution. The Supreme Court also made various pronouncements in relation to our country’s presidential elections which were held in August 2022.

When it comes to access to justice we have the Small Claims Courts’ jurisdiction is limited to disputes whose subject matter does not exceed KES. 1,000,000/- (7,082.15 USD) while the Magistrate Courts’ jurisdiction extends to matters where the subject matter is valued at Kshs 20,000,000/- (141,643.06 USD). The Small Claims Court is the most recent of Courts and was established to reduce case backlog and quicken dispute resolutions where the value of the subject matter is relatively low.

The High Court hears and determines appeals from the Magistrates Court and other Tribunals as well as quasi-judicial bodies. It also has unlimited original jurisdiction regarding civil matters and has various divisions including the Constitutional and Human Rights Division, Criminal Division, and the Commercial and Tax Corruption Division. The Employment and Labour Relations Court and Environment and Land Court are specialized courts with equal status to the High Court save for their jurisdictions being limited to employment and labour relations and environment and land matters respectively.

The Court of Appeal then hears and determines appeals from the High Court, the Employment and Labour Relations Court, and the Environment and Land Court. The Supreme Court hears and determines appeals originating from the Courts of Appeal. However, at the Supreme Court the appeals must be certified as matters of general public importance. The Supreme Court also addresses itself on cases involving the interpretation or application of the Constitution.





Alternatives to litigation are in the Constitution of Kenya under Article 159(2) to include reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms. The Civil Procedure Act (Chapter 2 of the Laws of Kenya) equally requires Courts to promote alternative dispute resolution mechanisms.

The Arbitration Act, 1995 modeled on the United Nations Commission on Trade Law (UNCITRAL) Arbitration Rules governs arbitration in Kenya. There are also the recent Arbitration Rules, 2020 which guide on the procedural aspects of arbitration. Guiding on the same are international instruments including the International Center for Settlement of Investment Disputes Convention and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958.

The Nairobi Centre for International Arbitration then serves as the dispute resolution service provider on domestic and international arbitration but parties are at liberty to choose their preferred forum for arbitration.

Concerning mediation, it is an alternative dispute resolution method gaining traction fast particularly due to the court-annexed mediation programme where the High Court screens through cases and may recommend a case to court-annexed mediation. The mediator then guides parties through the not more than 60-day process towards settlement, which may be extended by the Court.

As has been stated, Kenya is also guided by international instruments on arbitration to which effect awards granted thereto are enforceable in Kenya albeit with consideration to various conditions such as public policy. In a similar vein, foreign judgments are also enforceable in Kenya but only if there is a reciprocal recognition between Kenya and the concerned country.



7. Winding up a Business

The law does not provide for term of business. Generally, the Companies Act, 2015 and the Insolvency Act, 2015 are the laws which govern the dissolution of companies in Kenya. A company registered under the Companies Act that no longer wishes to carry on business in Kenya may either apply to the Registrar of Companies to strike off the company from the register or voluntarily liquidate its affairs in accordance with the Insolvency Act.

The striking off option is typically the most preferred options for most companies as the process is straight forward, less public and less costly as compared to the option to voluntarily liquidate. We have set out below a summary of each process.

7.1. Process of Striking off a company from the Register

For a company to be struck off the register, the following process must be complied with:

(a) Company’s resolution – the shareholders of the company are required to pass a resolution to dissolve the company and to specifically authorize the directors of the company to make the application to strike off the company on behalf of the company. This resolution will accompany the application to be made to the Registrar.

(b) Application – Once the directors of the company have been authorized to file the application, the directors shall make an application to strike off the company from the register in Form CR 18. This form should be dated and signed by all the directors of the company (or a majority of them). This application is lodged on e-citizen portal using any of the directors/company secretary’s account.

A copy of the application should be sent to the relevant persons within 7 days.

(c) Publication on the Kenya Gazette – Once the Registrar is satisfied with the information provided, the Registrar shall publish a notice stating that the Registrar may exercise the power to strike off the company and invite any person to show cause why the name of the company should not be struck off the register.

(d) Striking off – If there will be no objections to the strike off within 3 months of publication of the notice, the Registrar may, in his sole discretion, strike off the name of the company from the register. Once the Company is struck off, the Registrar should publish a gazette notice that the company has been struck off. Once this notice is published, the company shall stand dissolved. Henceforth, the Company ceases to exist and it may not do anything whatsoever in its name.

7.2. Process of members' voluntary liquidation of a company

(a) Notice to holder of any qualifying floating charge – before passing a resolution for voluntary liquidation, the company is required to give notice of the resolution to the holder of any qualifying floating charge in respect of the company's property (if any) in accordance with the Insolvency Act.

(b) Resolution of members - after expiry of 7 days from the date on which the notice was given or if the person to whom the notice was given has consented in writing to the passing of the resolution, the company shall pass a resolution (special resolution) to voluntarily liquidate the company. The voluntary liquidation of a company commences when the resolution for liquidation is passed and therefore on and after the voluntary liquidation of a company, the company shall cease to carry on its business, except as necessary for its beneficial liquidation. However, the corporate status and corporate powers of the company continue to have effect until the company is dissolved.

(c) Directors Statutory Declaration - where a proposal is made to liquidate a company voluntarily, the directors of the company may at a directors' meeting make a statutory declaration to the effect that:

i. they have made full inquiry into the affairs of the company; and

ii. having done so, they have formed the opinion that that the company will be able to pay its debts in full, together with interest at the official rate, within such period (not exceeding twelve months from the commencement of the liquidation) as may be specified in the declaration.

Such a declaration shall be made within the five weeks immediately preceding the date of the passing of the resolution for liquidation, or on that date but before the passing of the resolution and shall include a statement of the company's assets and liabilities as at the latest practicable date before the making of the declaration. Within 14 days after the resolution is passed, the company shall lodge the copy of the declaration with the Registrar for registration.

(d) Publication of notice to liquidate - within 14 days of passing a resolution for voluntary liquidation, the company shall publish a notice setting out the resolution in the Kenya Gazette, at least two newspapers circulating in the area in which the company has its principal place of business in Kenya and on the company's website (if any).



(e) Appointment of a liquidator - under the Insolvency Act, in a members' voluntary liquidation, the company in a general meeting shall appoint one or two liquidators (must be an eligible insolvency practitioner) for the purpose of liquidating the company affairs. Once the liquidator is appointed, all the powers of directors cease.

(f) Final meeting of the company - once the liquidation of the company affairs is complete, the liquidator shall:

i. prepare an account of the liquidation showing how it has been conducted and how the company's property has been disposed of; and

ii. convene a general meeting of the company for purpose of laying before it the company's accounts and giving an explanation thereof.

(g) Lodging a copy of the accounts with the Registrar and dissolution - within 7 days after the meeting, the liquidator shall lodge with the Registrar a copy of the account together with a return giving details of the holding of the meeting and of its date. The Registrar of Companies dissolves the company after 3 months from the date of receipt of the final accounts of the company by removing its name from the register of companies.

A branch office can be closed down by an application by the local representative in the prescribed form. The local representative must lodge the application at least one month after the branch ceases its operations.





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