

**J.B. Ong'anya & Co.
Advocates**

The Newsletter

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Ownership of Land in Kenya: The Non-Citizens Scenario

Introduction

On 27th August 2010, the current Constitution of Kenya was promulgated, hence, repealing the previous Constitution (also referred to as the Independence Constitution¹). The purpose of the Constitution was to protect, guide, address or provide mechanism that the State and its citizens should interact, not to mention addressing historical activities that breached or violated other people's rights, and, in this case, matters falling under acquisition and use of land. The Constitution is prospective in nature but in certain instances it applies retrospectively more so when addressing issues of land injustices.

Owing to the historical injustices that emanated during the colonial period, and post-colonial, there was an urgent need to strengthen the issue of land rights. Therefore, the drafters of the Constitution did provide Property Rights under the Bill of Rights; thus, under Article 40 of the Constitution, which is further addressed separately under Chapter 5 of the Constitution.

Ownership of Land

The Constitution provides that the land is divided into Public, Private, and Community land. Non-citizens are equally allowed to hold land but that will only be through a lease lasting not more than ninety-nine years. In addition, even where the lease provides more than ninety-nine years, the lease will be read to mean ninety-nine years.

On the onset, one would presume then due to the Separate Liability and Ownership based on Principles that establish business entities, then a non-citizen would use a business entity such as a Company or a Trust to hold land in Kenya as a freehold. However, the Constitution, under that Chapter, defines companies as Citizens and Non-citizens too. For instance, if foreigners are the shareholders, they cannot own property as a freehold in the Republic of Kenya.

Public Land: The National or County Government can allocate Public Land to the non-citizen on certain terms, however, the allocation of the land will be based on a lease which shall be in line with the language of the Constitution.

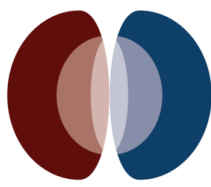
Controlled Land: Non-citizens are not allowed to own land that is within twenty-five kilometers from the inland border of the Republic of Kenya or that within the first and second row of water high mark of the Indian Ocean. Interestingly, there are exceptions, and can only be waived through the approval of the Cabinet Secretary. It is partly clear that the approach is equally in tandem with the United Nations Convention on the Law of the Sea on issues touching on research.

It is important to note that not even companies held by foreigners can acquire a license without approval, that includes Trusts or being given the land as a gift.

In this part, **Controlled Land** will not be used by non-citizens on the following basis: transfer, lease, licence, charge, exchange, partition or other disposal of or dealing with any controlled land.

Use of a Nominee: The Companies Laws of Kenya were recently amended to require that every Nominee will have to disclose the Beneficiary Owner.

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Shareholding in Kenya: Non-Citizen Scenario

Introduction

The Companies Act No. 17 of 2015 (the “Companies Act”) had introduced a new requirement that a foreigner who intends to register a company in Kenya, should give at least 30% of the shares to a citizen of the Republic of Kenya. After extensive deliberations on the impact of the provision towards Foreign Direct Investment, the provision was amended by deleting that requirement. However, that does not mean that a foreigner has the freewill to form any business entity and become a sole shareholder.

According to other laws of the Republic of Kenya, that particularly fall under the Financial Institutional Sector, either directly under the supervision of the Central Bank of Kenya or Capital Markets Authority.

The Capital Markets Authority

Foreign Investor: The Capital Markets Authority (the “CMA”) through its Regulations, it provides that an Issuer will reserve at least 25% of its listed or shared intended to be issued under Initial Public Offering or Follow Public Offering for local investors. Local Investors refers to citizens of the East African Community Member States. The reserved shares can be allotted to Foreign Investors after approval by the CMA.

Ownership of a Derivative Exchange: At least one of the owners of a Derivative Exchange will be a Citizen of the Republic of Kenya, and at any time, at least 15% the paid-up equity share capital of the company shall be held by the Citizen(s).

Mining Act

Large Scale and Strategic Mining: In the event of large scale and strategic mining, the Government of Kenya will have the right to 10% free carried interest in the share capital.

On small scale operations, the licensing will only be issued to citizens of Kenya or company whereby 60% of the shares are held by a Kenyan.

A mineral dealing company that has 60% of the shares held by Kenyans will be issued with an operation license.

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