Kenya

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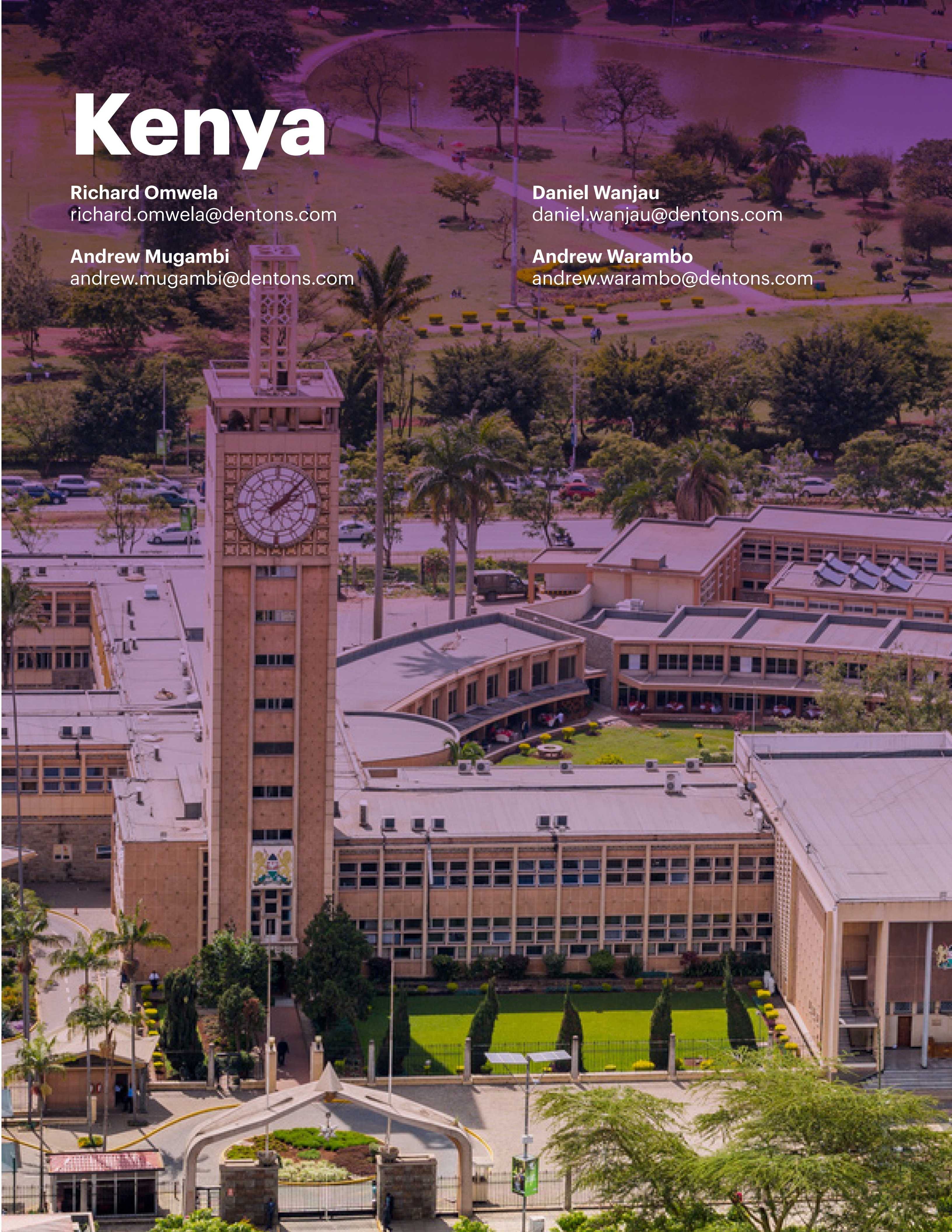

1.0 OVERVIEW

The Constitution of Kenya 2010, which was promulgated in August 2010, created a devolved two-tier system of government comprising of a national government and 47 political and administrative counties.

Only the national government may impose income tax, value added tax, customs duties and other duties on the import or export of goods, and excise duty. County governments, on the other hand, may only impose entertainment taxes, property rates and any other taxes they are authorized to charge pursuant to an Act of Parliament.

Functions such as the registration of business entities are only undertaken by the national government. County governments, however, have power to issue and charge for certain licenses such as business permits and fire safety clearance certificates. The government fees payable for business permits and fire certificates are dependent on the nature of the business the person is engaged in, the size of the office premises the person occupies and the number of employees. The said permit and certificate are renewable annually.

2.0 LEGAL SYSTEM

Kenya's legal system is based on English common law with the primary sources of law being the Constitution of Kenya 2010, Acts of Parliament, the common law, doctrines of equity as well as statutes of general application in force in England in 1897. In making their determinations, Kenyan courts may make inference to African customary law in civil cases to the extent that it is not repugnant to justice and morality, or inconsistent with any other written law to do so.

3.0 TAXATION AUTHORITIES

The Kenya Revenue Authority (KRA) is the agency in charge of the collection and receipt of all revenue on behalf of the Kenyan government. In performing this function, it has the responsibility of administration and enforcement of all laws relating to revenue.

4.0 BUSINESS VEHICLES

Foreign entities wishing to conduct business in Kenya may choose to operate in various forms. The most common types of business vehicles in Kenya are companies, branches of foreign companies and partnerships.

4.1 Limited liability companies

The Companies Act, 2015 (Companies Act) provides for various types of companies, including private and public companies. The liability of shareholders in companies that undertake commercial activities is typically limited to their shares. Companies limited by guarantee do not have shares or shareholders but are owned by guarantors who agree to pay a set amount of money to the company's debts should the company be wound up. Such entities are often involved in charitable or social activities (not-for-profit organizations).

Limited liability companies may have a single shareholder and a single director. There are a few restrictions on foreign ownership of certain business in Kenya. These include:

i. Aviation: 51% of the voting rights, in the case of a body corporate or a partnership, must be held by the state or a citizen of Kenya or both

ii. Insurance: A minimum of one-third of the controlling interest in an insurer, whether in terms of shares, paid-up share capital or voting rights must be held by citizens of a partner state of the East Africa Community; or a partnership whose partners are all citizens of a partner state of the East African Community; or a body corporate whose shares are wholly owned by citizens of a partner state of the East African Community; or is wholly owned by the government of Kenya

iii. Telecommunications: A firm licensed to provide communication services as an operator or service provider is required to ensure that by the end of the third year from the date of the issuance of a license, or earlier as the case may be, and thereafter for the duration of the license term, that it has no less than 20% ownership and control by Kenyan persons, howsoever achieved.

4.2 Branches of a foreign company

Registering a branch of a foreign company in Kenya does not create a separate legal entity from the foreign company. The registration is a requirement for companies incorporated outside Kenya that intend to operate in Kenya as foreign companies.

Branches must have a local representative resident in Kenya, who may be a citizen or a non-

citizen. The local representative is answerable for the doing of all acts, matters and things that the company is required to do by or under the Companies Act and is personally liable for a penalty imposed on the company for a contravention of, or failure to comply with, the Companies Act.

4.3 Limited liability partnerships (LLPs)

LLPs combine some of the features of a traditional partnership with the advantage of limited liability. LLPs have a separate legal identity from their members, but are transparent for tax purposes, meaning partnership income is flowed out and taxed in the hands of the individual partners.

5.0 FINANCING A CORPORATE SUBSIDIARY

5.1 Equity financing

Companies can raise capital by issuing shares. There are no prescribed minimum or maximum share capital requirements for a private company limited by shares except for certain regulated sectors, such as banks and insurance companies.

5.2 Debt financing

5.2.1 Thin capitalization

A company is deemed to be thinly capitalized where it is under the control of a non-resident person alone or together with four or fewer other persons, and the highest amount of loans at any time during the year exceeds three times the sum of the company's revenue reserves and the issued and paid-up capital of all classes of shares.

For a thinly capitalized company, interest expenses on that part of the loan that exceeds the 3:1 debt to equity ratio will not be deductible for tax purposes. In addition, realized foreign exchange losses on loans will be deferred (not treated as tax deductible) until the company's state of thin capitalization ceases to exist. Thin capitalization provisions do not apply to financial institutions as licensed under the Banking Act.

5.2.2 Deemed interest

A Kenyan-resident entity that is foreign-controlled and has an interest-free loan from a non-resident entity will be subject to deemed interest provisions. Such a company will be required to compute an amount of deemed interest and disallow it in its tax computation. The amount of deemed interest will also be subject to withholding tax at the rate of 15%.

5.3 Stamp duty

Currently, there is no stamp duty on authorized share capital at the point of incorporation. Stamp duty is chargeable at the rate of 1% on any increase of a company's authorized share capital and on the transfer of shares. The specific stamp duty implications arising from debt financing will depend on the nature of the debt instrument.

6.0 CORPORATE INCOME TAX (CIT)

All income accrued or derived in Kenya by any person (individual or body corporate), whether resident or non-resident, is subject to tax. The whole profit of a business carried on partly within and partly outside Kenya by a resident company is deemed to accrue in or be derived from Kenya and is therefore taxable in Kenya at the resident CIT rate of 30%.

Where a non-resident person carries on business in Kenya through a permanent establishment (PE), the income attributable to the PE will be considered to be income accrued in or derived from Kenya. The tax adjusted business profits of the PE will be subject to tax at the non-resident CIT rate of 37.5%.

Other rates of CIT are as tabulated below:

Entity	CIT rate
Newly listed companies	
≥20% share capital listed	27% (rate applies for 3 years after listing)
≥30% share capital listed	25% (rate applies for 5 years after listing)
≥40% share capital listed	20% (rate applies for 5 years after listing)
Export Processing Zone enterprise	
First 10 years	10%
Next 10 years	25%
Special Economic Zone (SEZ) Enterprises, Developers and Operators	
First 10 years of operation	10%
Next 10 years	15%
Companies whose business is local assembly of motor vehicles	15% for the first 5 years of operations (This reduced rate may be extended for another 5 years if local content targets are achieved.)
Companies that construct at least 100,000 residential units	15% for that year of income
Companies engaged in business with the government of Kenya under a Special Operating Framework Agreement	To the extent provided for under the Agreement

6.1 Computation of taxable income

6.1.1 Taxable base

A taxpayer is subject to tax on its profits from carrying on its business. Taxable profit is generally considered to be its revenues less its deductible expenses.

6.1.2 Deductions

Taxpayers are permitted to deduct expenditures incurred in a year of income that are wholly and exclusively incurred for the purposes of producing income.

6.1.3 CIT reporting

Both subsidiary companies and branches are required to file a Self-Assessment Return (SAR) no later than the last day of the sixth month following the end of a year of income. The SAR is to be completed in prescribed form. Where there is no tax due for a year of income, a nil return must still be filed. SARs are filed on KRA's online portal.

6.1.4 Tax losses

Tax losses are an allowable deduction in the year in which they arise and can be carried forward for nine years. Generally, there is no carry back of tax losses except in the case of the extractive industries; that is, for entities involved in mining or petroleum operations.

7.0 CROSS-BORDER PAYMENTS

7.1 Transfer pricing

Transactions between Kenyan resident persons and their non-resident related parties must be carried out on an arm's length basis. Kenyan transfer pricing legislation also applies to transactions between a Kenyan branch and its head office or any other non-resident related parties.

A Kenyan resident company that operates in a preferential tax regime that transacts with a related resident company that is not operating in a preferential tax regime must also adhere to the arm's length principle. In this context, a "preferential tax regime," with respect to an item of income or profit, means any legislation, regulation or administrative practice that provides a preferential rate of taxation to such income or profit, including reductions in the tax rate or the tax base. An SEZ entity is one such example.

7.2 Withholding taxes on payments to residents and non-residents

The general withholding tax rates are summarized below.

Nature of payment	Resident rate (%)	Non-resident rate (%)
Dividends	5%	10%
Interest (including deemed interest)	15%	15%
Bearer instruments	25%	25%
Government bearer bonds with a maturity over 2 years	15%	15%
Royalties	5%	20%
Management or professional fees, including training fees	5%	20%
Contractual fees – Building, civil and engineering works	3%	20%
Rent – Immovable property	N/A	30%
Property other than immovable property	N/A	15%
Commissions paid to brokers by insurance companies	5%	20%
Commissions paid to agents and other persons by insurance companies	10%	20%
Insurance premiums paid to non-resident insurance companies	N/A	5%
Demurrage paid to non-resident shipping lines	N/A	20%

Dividends paid to a resident company that controls 12.5% or more of the share capital of the company paying the dividend are exempt from withholding tax. A reduced rate of 5% applies to dividends paid to citizens of the East African Community and a reduced rate of 15% applies to consultancy fees paid to citizens of the East African Community.

Kenya has more than 10 double taxation treaties (DTTs) in place and has also expressed its intention to sign the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting. The countries with which Kenya currently has DTTs in force include: the United Kingdom, Germany, Canada, Denmark, Norway, Sweden, Zambia, India, France, South Africa, Iran, South Korea, Qatar, and the United Arab Emirates.

The DTTs provide for lower withholding tax rates in some instances. Any reduced rates of tax provided for under a DTT will not apply automatically, but rather will be subject to the limitation of benefits provisions in the Kenyan Income Tax Act.

8.0 PAYROLL TAXES

8.1 Pay As You Earn (PAYE)

Business entities are required to deduct and account for PAYE from all emoluments (cash and non-cash) paid or provided to employees. Kenyan residents are taxable on their worldwide employment income. PAYE applies based on a graduated scale with tax rates ranging from 10% to 30%.

Employers are required to deduct and submit to the KRA the tax due on the amounts they pay to their employees as wages. The employer is required to submit the tax deducted and file, on or before the ninth day of each month following the month of wage payment, a return indicating the amount of tax deducted from each employee's income. Employers must also account for a number of statutory deductions on a monthly basis, as discussed below.

8.2 National Social Security Fund (NSSF)

Any person who employs one or more employees must register with NSSF as a contributing employer. Employees are required to register as members of the NSSF as well. There are no registration costs. Upon registration, the employer is required to make monthly contributions of 6% of the pensionable income of the employee up to a maximum of KSh$2,160 in respect of all registered employees. Employees also contribute an equal amount to that contributed by the employer.

8.3 National Hospital Insurance Fund (NHIF)

Employers are also required to register with the NHIF and to deduct and account for monthly contributions to the NHIF for each employee based on their monthly income. There are no registration costs.

The contributions are based on a graduated scale and range from KSh$150 up to a maximum contribution of KSh$1,700 per month.

8.4 National Industrial Training Authority (NITA) levy

All employers are required to pay the NITA levy at a monthly rate of KSh$50 per employee.

8.5 National Housing Development Fund (NHDF) levy

The Finance Act, 2018 introduced an NHDF levy, which is aimed at financing the government's affordable housing agenda. The introduction of the NHDF levy has been challenged in court and the levy is still yet to take effect as of January 1, 2019.

9.0 INDIRECT TAXES

9.1 Value-added tax (VAT)

VAT in Kenya is charged on the supply of taxable goods and services and on the importation of goods or services into Kenya. A registered person who makes taxable supplies, including standard rated and zero rated supplies, is eligible to recover input tax, while a person who makes exempt supplies is not able to recover the input tax incurred in the production of those supplies.

Persons whose turnover of taxable supplies is or is expected to be KSh$5 million or more in a 12-month period must register for VAT.

Supplies fall within the following categories:

i. Zero rated supplies which are taxable at the rate of 0%

ii. Standard rated supplies are taxable at a rate of 16%

iii. Exempt supplies on which there is no VAT

iv. A reduced rate of 8% applies to petroleum products.

A registered person in Kenya is required to file and make VAT payments no later than the 20th day following the month of the supply.

The time of supply for VAT purposes is the earlier of:

i. The date on which the goods are delivered or services performed

ii. The date a certificate is issued by an architect, surveyor or any other person acting as a consultant in a supervisory capacity

iii. The date on which the invoice for the supply is issued

iv. The date on which payment for the supply is received, in whole or in part.

9.2 Excise duty

Excise duty is imposed under the Excise Duty Act, 2015 on the local manufacturing or the importation of certain commodities and the provision of excisable services. Excisable goods include items such as bottled water, soft drinks, cigarettes, alcohol, fuels, and motor vehicles. Excisable services on the other hand include mobile cellular phone services, fees charged for money transfer services, and other fees charged by financial institutions.

10.0 TAXATION OF CAPITAL GAINS (CGT)

Effective January 1, 2015, CGT is applicable on the transfer of property situated in Kenya including land and shares. CGT is applicable on the whole gain accruing to a person on transfer of property situated in Kenya, whether or not the property was acquired before or after January 1, 2015.

The chargeable gain is taxed at the rate of 5% and is not subject to further taxation. The obligation to account for CGT is on the transferor. The chargeable gain is computed as the difference between the transfer value of the property (i.e., selling price) and the adjusted cost base of the property to the transferor.

Effective January 1, 2016, gains on transfers of securities traded on any securities exchange licensed by the Capital Markets Authority is not subject to CGT.