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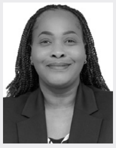
Expert Analysis Chapter

Q&A Chapters

Kenya



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1 Overview

1.1 What are the main trends/significant developments in the project finance market in your jurisdiction?

While the increased costs of construction materials and fuel characterised the significant increase in the cost of project construction in 2023, 2024 saw additional reliance on debt financing to undertake key projects in Special Economic Zones (SEZs) and real estate development. Additionally, we saw increased engagement in Public-Private Partnerships (PPPs), which are prospected to offer practical solutions to Kenya's robust infrastructure demands.

1.2 What are the most significant project financings that have taken place in your jurisdiction in recent years?

In recent years, Kenya has seen significant project financings across various sectors, reflecting its ambitious infrastructure and development goals. The Government of Kenya undertook the improvement of the Kenol-Sagana-Marua highway at an estimated cost of KES 10 billion, financed by the African Development Bank (AfDB) (https://kenha.co.ke/kenol-sagana-marua-highway-improvement/). The project stands to open access to the central and eastern regions of Kenya.

Kenya, alongside Ethiopia and South Sudan, continues to collaborate on an ambitious infrastructure project known as the LAPSSET Corridor Program (Lamu Port, South Sudan, Ethiopia Transport Corridor. Information is available at: https://www.lapsset.go.ke/#1461328919259-f69cd27c-5029), which consists of seven key infrastructure projects in the three countries including the port, railways, highways, airports, pipelines, airports and resort cities. The first phase (https://www.businessdailyafrica.com/bd/opinion-analysis/columnists/complete-lapsset-highways-to-hasten-north-kenya-development--4135254) of the Lamu Port is complete and includes facilities to export livestock, while the Isiolo/Moyale highway is operational with certain economic benefits accruing. The LAPSSET project directly impacts about 10 counties in Kenya and is set to foster growth in the larger Eastern Africa region and the continent as a whole.

The Dongo-Kundu Bypass, funded by the Kenyan Government and Japan International Cooperation Agency (JICA) at a cost of KES 30 billion is now open. The project consisting of the construction of the Mwache and Mteza bridges spans approximately 17.5 kilometres and is critical to easing congestion around Mombasa and enhancing connectivity of the surrounding areas. (https://www.standardmedia.co.ke/coast/article/2001508784/businesses-and-tourism-reap-big-from-sh30b-dongo-kundu-bypass#google_vignette).

Construction of the 60,000-seater Talanta Sports City Stadium, which is part of Kenya's preparations for the 2027 Africa Cup of Nations (AFCON), is underway. The project is aimed at providing world-class facilities for sports development in the country (https://nation.africa/kenya/sports/other-sports/kenya-s-afcon-2027-dream-alive-as-talanta-sports-city-works-begin-4542168).

The Limuru Road Bypass project, which is funded by the Kenya Government at an estimated cost of Kshs. 2.8 billion, involves upgrading two key roads to ease traffic congestion, improve connectivity, and support the growing Nairobi metropolitan area (https://kura.go.ke/news/kura-confident-on-the-dualling-of-limuru-road-to-bolster-development/14430/).

Dubbed Northlands City, the ambitious real estate project to develop an 11,800-acre mixed use development, is underway at an estimated cost of KES 500 billion. The city is set to host residential (https://northlandsheights.co.ke/), industrial and commercial units to accommodate approximately 270,000 people. The city follows key privately managed cities under development Tatu City (https://www.tatucity.com) and Konza Technology City (https://konza.go.ke/projects/).

2 Security

2.1 Is it possible to give asset security by means of a general security agreement or is an agreement required in relation to each type of asset? Briefly, what is the procedure?

In Kenya, a general financing agreement would be used either in the form of a loan agreement or facility agreement. Security documentation would vary depending on the type of security a financier has opted to obtain. For instance, where the assets of a company include movable assets such as machinery and motor vehicles, the financier would have a charge by way of debenture registrable in the Companies Registry.

On the other hand, where the security was to be over immovable property, for example, land and/or buildings, then Kenyan law requires that a charge be created over these particular immovable assets and be registered in the Lands Registry. Third-party securities in the form of guarantees would entail the preparation of a separate security document. Moreover, for movable property, there is an additional requirement of registering the security online, by filing an Initial Notice under the Movable Property Security Rights, Cap. 499A.

2.2 Can security be taken over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground)? Briefly, what is the procedure?

Yes. In the case of a company, requisite board resolutions would need to be obtained from the company borrower authorising the creation of the security. A charge document would be prepared, securing the financial obligations of the borrower to the financier. This charge would then be executed by all the parties in the presence of an advocate. Thereafter, the stamp duty, based on the amount secured, would be paid to the Commissioner of Domestic Taxes. In cases where the charge involves agricultural land, the consent of the relevant land control board would have to be sought and obtained. Further, where the charge involves leasehold property, the consent of the lessor would need to be obtained. Where the charge is over a property belonging to a married individual, the consent of the spouse would be obtained. The charge would thereafter be submitted for registration at the relevant Lands Registry.

Where the charge is created by a company, the charge would also have to be registered in the Companies Registry. If the proposed security is already charged to another financier, the consent of the financier is required. An Inter-lenders Agreement or a Security Sharing Agreement will be required in such circumstances to govern the relationship between the various lenders.

2.3 Can security be taken over receivables where the chargor is free to collect the receivables in the absence of a default and the debtors are not notified of the security? Briefly, what is the procedure?

Security can be taken over receivables. It is the practice in Kenya to either have a charge over the receivables or have a deed of assignment created over such receivables. Financiers are usually advised to place an obligation on the borrower to notify the debtors of such security. The financier will also be required to file an Initial Notice online at the Movable Properties Securities Registry (MPSR).

2.4 Can security be taken over cash deposited in bank accounts? Briefly, what is the procedure?

When a customer places a deposit with a bank, the deposit represents a loan made to the bank. The bank is the debtor, and the customer is the creditor. It had generally been recognised by legal practitioners that there was no difficulty in a bank taking a charge over a cash deposit it held. It has generally been accepted that, with regard to a fixed deposit, the secured party must take control over the charged accounts and prevent the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without consent from the chargee. The bank is also required to file an Initial Notice under at the MPSR, as noted under question 2.3 above. Where the borrower is a company, the charge instrument should also be registered in the company's records at the Companies Registry.

2.5 Can security be taken over shares in companies incorporated in your jurisdiction? Are the shares in certificated form? Briefly, what is the procedure?

Yes. Shareholders (especially those of private companies) are usually granted share certificates in respect of the shares they own. Where a company holds shares in another company and it wishes to offer these shares to a financier as security, then a charge may be prepared over these shares and registered in the Companies Registry. It should, however, be noted that a company cannot create security over its own shares. In the case of shares owned by a natural person, it has been the practice in Kenya by most financial institutions to require the borrower to surrender the relevant share certificate to the financial institution. In addition, the borrower is required to execute a blank share transfer form and give the financial institution authorisation to transfer the shares to any person in the event of default. The lender is required to file an Initial Notice at the MPSR concerning the security.

2.6 What are the notarisation, registration, stamp duty and other fees (whether related to property value or otherwise) in relation to security over different types of assets (in particular, shares, real estate, receivables and chattels)?

The following are the charges payable in respect of a charge:

1. Security documents are required to be prepared by an advocate and legal fees chargeable at the rate set out in the Advocates Remuneration Order are applicable. Attestation fees would also be payable to any advocate witnessing the execution of the security documents.
2. The stamp duty payable is based on the amount secured by the charge or debenture at the rate of 0.1%, which is a fixed rate regardless of the type or sequence of security. For example, the stamp duty payable on a charge, further charge or debenture is the same rate of 0.1% of the principal amount. In the case of a guarantee or a deed of assignment, the stamp duty payable is the nominal amount of KES 200 with an additional KES 20 for each counterpart copy.
3. Bank charges – these vary from one lender to another.
4. Lessor's consent (if the relevant property is leasehold) – this varies from lessor to lessor.
5. Land Control Board Consent (if the property is agricultural) – KES 1,000. In addition, the Land Control Act, Cap. 302, provides that: an allowance of KES 500 inclusive of lunch shall be paid to each unofficial member of a land control board for every meeting which he attends; an allowance of KES 1,300 inclusive of lunch shall be paid to each unofficial member of a provincial land control appeals board for every meeting which he attends; and a mileage allowance at prevailing government rates shall be paid to unofficial members of a land control board.
6. Registration fees at the Lands Registry (if security is over immovable property) – KES 1000.
7. Registration fees on the digital registry, Ardhi Sasa – KES 1000.
8. Filing fees at the Companies Registry (if the chargor is a company) – KES 2,000 to KES 14,000.
9. Filing fees at the MPSR (if the security is over immovable property) – no fee is payable; however, upon registration of the Initial Notice, a search can be carried out at a cost of KES 500 to verify registration of the Initial Notice.

2.7 Do the filing, notification or registration requirements in relation to security over different types of assets involve a significant amount of time or expense?

A day or even more time may pass before securities are registered at a Lands Registry, provided that the necessary stamp duty has been paid, rates, consents, and clearances have been obtained, and the security documents have been properly executed and consented to (where applicable). However, there have been cases where it has been unable to discover a property file associated with a certain property, which typically results in a major delay in the registration procedure. It should be mentioned that the time varies from registry to registry based on the typical level of activity at that specific registrar. Executive Orders have also been used to close certain registries in order to make room for critical changes in other registries, such as digitising records or reorganising the registries. It has been our experience that registration at the Companies Registry would take approximately one week.

2.8 Are any regulatory or similar consents required with respect to the creation of security over real property (land), plant, machinery and equipment (e.g. pipeline, whether underground or overground), etc.?

The Land Control Act requires that the consent of the relevant Land Control Board be obtained in cases where the land is agricultural.

The Matrimonial Property Act, Cap. 152, prohibits the alienation in any form of matrimonial property during the subsistence of a marriage without the consent of both spouses by way of sale, gift, lease, mortgage or otherwise.

Where the title is a lease from the Kenya Railways Corporation (KRC), for example, in some coastal areas of the country, the consent of the KRC is required to charge the property. Where securities are to be shared between financiers, the existing financier must give consent for its collateral to be shared with another financier of the same borrower.

Where the property tenure is a leasehold, the consent of the lessor is required. Where a property is managed by a management company and the terms of the lease provide for their consent, consent is also required.

3 Security Trustee

3.1 Regardless of whether your jurisdiction recognises the concept of a "trust", will it recognise the role of a security trustee or agent and allow the security trustee or agent (rather than each lender acting separately) to enforce the security and to apply the proceeds from the security to the claims of all the lenders?

Yes. Security trustees are recognised in syndicated financing transactions in Kenya. Since this would be a contractual issue, the terms of any agreement between the parties that acknowledge this role will be obligatory on them.

3.2 If a security trust is not recognised in your jurisdiction, is an alternative mechanism available (such as a parallel debt or joint and several creditor status) to achieve the effect referred to above which would allow one party (either the security trustee or the facility agent) to enforce claims on behalf of all the lenders so that individual lenders do not need to enforce their security separately?

The terms of the specific instrument would stipulate the enforcement process of the security default, as stated in question 3.1 above.

4 Enforcement of Security

4.1 Are there any significant restrictions which may impact the timing and value of enforcement, such as (a) a requirement for a public auction or the availability of court blocking procedures to other creditors/the company (or its trustee in bankruptcy/liquidator), or (b) (in respect of regulated assets) regulatory consents?

Unless otherwise specified in the charge instrument, charges rank in the order in which they are registered. The remedies that a charge may pursue in the event of default are outlined in the Land Act. The chargee may serve the chargor with a written notice to pay the amount owed if the chargor defaults on interest or any other periodic payment due under any charge for more than one month. Within 90 days of the notice being served, if the chargor does not comply, the chargee may:

1. sue the chargor for any money owed under the charge;
2. nominate a receiver of the charged land's income;
3. lease the charged land or, in the event that the charge is of a lease, sublease the land;
4. take control of the charged land; or
5. sell the charged land.

If the chargee chooses to nominate a receiver, they must first serve the chargor with a notice in the required format and wait 30 days after the date of the notice's delivery before making the appointment.

If a chargee decides to use their authority to sell the charged land, they must, in addition to the 90 day-notice, serve the chargor with a notice to sell in the required format and wait at least 40 days after the date of the notice to sell before finalising any contracts for the sale of the charged land. It is necessary to serve the notice to multiple individuals, including:

1. the National Land Commission, if the charged land is public land;
2. the holder of the land over which the lease has been granted, if the charged land is a lease;
3. a spouse of the chargor who had given the consent;
4. any lessee and sub-lessee of the charged land or of any buildings on the charged land;
5. any person who is a co-owner with the chargor;
6. any other chargee of money secured by a charge on the charged land of whom the chargee proposing to exercise the power of sale has actual notice;
7. any guarantor of the money advanced under the charge;
8. any other person known to have a right to enter on and use the land or the natural resources in, on, or under the charged land by affixing a notice at the property; and
9. any other persons as may be prescribed by regulations, and shall be posted in a prominent place at, or as near as possible to, the charged land.

A chargee must ensure a valuer does a forced sale valuation prior to invoking the right of sale. Comparable interests in property of the same character and quality are being sold on the open market for a price that should not be 25% less than the price at which the charged land is being sold.

Upon the lapse of the 40 days' notice, the auctioneer appointed by the chargee is required to issue another 45-day notice of the sale of the charged property.

A private contract at market value or a public auction with a reserve price may be used for the sale if a chargee or receiver is granted the right to do so. If a sale is to take place by public auction, the chargee is responsible for making sure that the terms governing land auctions and tenders are, as closely as possible, adhered to in relation to that sale and that the sale is publicly advertised in a way that would attract the attention of those who might be interested in bidding for the charged land.

With the court's approval, a chargee using the power of sale may buy the property. Unless the chargee convinces the court that selling the charged land to them is the most advantageous course of action, the court will not grant leave. The following priority sequence will govern how the purchase money obtained by a chargee who has used the power of sale is applied:

1. first, to settle all outstanding debts related to the charged land, including rates, rentals, taxes, levies and other amounts. According to the Rating Act, any land rates owed on a particular piece of land will be charged against that land and will take precedence over other charges;
2. second, in clearing any outstanding debt or other encumbrance that was the purpose for the sale;
3. third, in covering all reasonable charges and expenses that were rightfully incurred and related to the sale or any attempted sale;
4. fourth, to settle the amount advanced under the charge or the portion that is still owed, interest, costs, and any other money owed under the charge, including any money paid to a receiver for the charged land; and
5. fifth, to settle any further charges in priority order, with the remainder, if any, of the money so received going to the person who was entitled to settle the charge immediately prior to the sale.

4.2 Do restrictions apply to foreign investors or creditors in the event of foreclosure on the project and related companies?

The procedure and considerations outlined in question 4.1 above are also applicable.

5 Bankruptcy and Restructuring Proceedings

5.1 How does a bankruptcy proceeding in respect of the project company affect the ability of a project lender to enforce its rights as a secured party over the security?

The Insolvency Act, Cap. 53, provides that if the property of a bankrupt is subject to a charge, the creditor who holds the charge may choose either of the following options:

a) to realise the property by having it sold (but only if the creditor is entitled to do so under the terms of the charge);
b) to have the property valued and prove in the bankruptcy as an unsecured creditor for the balance due (if any) after deducting the amount of the valuation; or
c) to surrender the charge to the bankruptcy trustee for the general benefit of the creditors and prove in the bankruptcy as an unsecured creditor for the whole debt.

The bankruptcy trustee may at any time, by notice, require a creditor who holds a charge over a bankrupt's property:

i) within 30 days after receipt of the notice, to choose one of the options above; and
ii) if the creditor chooses option b) or c), to exercise the chosen option within that period.

A creditor who fails to comply with the notice is taken to have surrendered the charge to the bankruptcy trustee under option c) for the general benefit of the creditors, in which case the creditor may prove as an unsecured creditor for the whole debt.

Additionally, the Insolvency Act stipulates that the trustee of a bankrupt company may petition the court for an order allowing the trustee to sell any property that is secured. The bankruptcy trustee may sell the property as though it were not secured, but only if it is convinced that doing so will benefit the bankrupt's creditors more generally.

5.2 Are there any preference periods, clawback rights or other preferential creditors' rights (e.g. tax debts, employees' claims) with respect to the security?

The following order of precedence governs the payment of obligations owed by an individual declared bankrupt or by a business in liquidation, according to the Insolvency Act:

a) The costs associated with filing for bankruptcy or liquidation will come first.
b) The debts listed below will be prioritised second:
   - all employee wages or salaries related to services rendered to the bankrupt or company during the four months prior to the start of the bankruptcy or liquidation;
   - any holiday pay payable to employees on the termination of their employment before, or because of, the commencement of the bankruptcy or liquidation;
   - any compensation for redundancy owed to employees that accrues before, or because of, the commencement of the bankruptcy or liquidation;
   - amounts deducted by the bankrupt or company from the wages or salaries of employees to satisfy their obligations to other persons (including amounts payable to the Kenya Revenue Authority in accordance with the Income Tax Act);
   - any reimbursement or payment provided for or ordered by the Industrial Court under the Labour Institutions Act, Cap. 234 to the extent that the reimbursement or payment does not relate to any matter specified in the Labour Relations Act, Cap. 233 in respect of wages or other money or remuneration lost during the four months before the commencement of the bankruptcy or liquidation;
   - amounts that are preferential claims under sections 175(2) and (3);
   - all sums that, according to the priority set by this subparagraph, a buyer must pay a seller as part of the purchase price of products, as stipulated by any other written legislation; and
   - all sums that, according to the priority set by this subparagraph, a buyer must pay a seller as part of the purchase price of products, as stipulated by any other written legislation.
c) The following debts will have third priority:
   - tax deductions made by the bankrupt or company under the "pay as you earn" rules of the Income Tax Act;
   - a non-resident withholding tax deducted by the company under the Income Tax Act; and
   - a resident withholding tax deducted by the company under the Income Tax Act.

5.3 Are there any entities that are excluded from bankruptcy proceedings and, if so, what is the applicable legislation?

No entities are excluded from bankruptcy/insolvency proceedings. However, institutions such as banks and insurance companies have special proceedings entailing regulatory supervision by the Kenya Deposit Insurance Corporation (KDIC) and the Insurance Regulatory Authority (IRA), respectively.

5.4 Are there any processes other than court proceedings that are available to a creditor to seize the assets of the project company in an enforcement?

The Movable Property Security Rights Act (MPSR) Cap. 499A, provides for remedies of a secured creditor as per section 65(3).

If the grantor does not comply within the time period indicated in the notification after the date of service of the notification, the secured creditor may:

1. sue the grantor for any payment due and owing under the agreement;
2. appoint a receiver of the movable asset;
3. lease the movable asset;
4. take possession of the movable asset;
5. sell the movable asset; or
6. pursue any of the remedies.

The Land Act, Cap. 280, provides similar remedies to a chargee in the event that a chargor defaults. The statute gives a clear procedure to be followed in such circumstances. If a chargor fails to pay interest or any other periodic payment due under any charge and continues to be in default for one month, the chargee may serve on the chargor a notice, in writing, to pay the money owing. If the chargor does not comply within three months after the date of service of the notice, the chargee may:

1. sue the chargor for any money due and owing under the charge;
2. appoint a receiver of the income of the charged land;
3. lease the charged land, or if the charge is of a lease, sublease the land;
4. enter into possession of the charged land; or
5. sell the charged land.

5.5 Are there any processes other than formal insolvency proceedings that are available to a project company to achieve a restructuring of its debts and/or cramdown of dissenting creditors?

No, there are no other processes of this nature available. To this extent, companies can only enter into private contractual negotiations, which may then introduce new payment plans.

The Insolvency Act establishes qualifying requirements for companies that may or may not enter into *moratoria* under voluntary debt repayment agreements. For eligible companies who wish to enter into such arrangements, a procedure is followed. The directors shall:

a) prepare:
    i) a document setting out the terms of the proposal; and
    ii) a statement of the company's financial position containing such particulars of its creditors and of its debts and other liabilities and of its assets as may be prescribed by the insolvency regulations for the purposes of this section, and such other information as may be so prescribed; and
b) unless a provisional supervisor has already been appointed in respect of the proposal, appoint as its provisional supervisor an authorised insolvency practitioner who has consented to supervise it. After preparing the proposal and statement and, if appropriate, making the appointment, the directors shall submit the proposal and statement to the provisional supervisor for consideration and comment. The directors shall then vote on the proposal.

5.6 Please briefly describe the liabilities of directors (if any) for continuing to trade whilst a company is in financial difficulties in your jurisdiction.

Such directors could be imprisoned if found guilty. Additionally, courts have the authority to disqualify directors as per section 218 of the Companies Act. Cap. 486 states that a judge must, should such directors be found guilty, declare someone ineligible to serve as a director or secretary of a company that has ever gone bankrupt if it is satisfied, upon application, that the individual is or has been a director or secretary of that company, either during or after that time, and in a situation where the individual's actions as a director or secretary of that company, either separately or in conjunction with their actions as a director or secretary of any other company or companies, render them unfit to take part in the management of the Company.

6 Foreign Investment and Ownership Restrictions

6.1 Are there any restrictions, controls, fees and/or taxes on foreign ownership of a project company?

No. The government provides the right for foreign and domestic private entities to establish and own business enterprises and engage in all forms of remunerative activity. However, a company whose shareholders are not Kenyan cannot own agricultural land, freehold land or leasehold property whose term exceeds 99 years. There are also restrictions as to foreign shareholding in the banking, insurance, mining, construction and telecommunications industries.

In an effort to encourage foreign investment, the government repealed some regulations that imposed little foreign ownership limitation for firms listed on the Nairobi Securities Exchange, allowing such firms now to be 100% foreign owned, as reported by the United Nations Conference on Trade and Development (UNCTAD) World Investment Report 2016. In 2015, the government established regulations requiring that Kenyans own at least 15% of the share capital of derivatives exchanges, through which derivatives such as options and futures can be traded. When the Companies Act came into force in 2015, foreign companies seeking registration in Kenya were required, under section 975(2)(b) of the Act, to ensure that by the time they are making the application for registration, at least 30% of their shareholding is held by a Kenyan citizen. However, this requirement has since been repealed by section 85 of the Finance Act, 2016.

6.2 Are there any bilateral investment treaties (or other international treaties) that would provide protection from such restrictions?

No, there are no such treaties with such protection provisions ratified by Kenya. In the recent past, Kenya has received an improvement in Foreign Direct Investment. Foreign investors seeking to establish a presence in Kenya generally receive the same treatment as local investors, and multinational companies make up a large percentage of Kenya's industrial sector. Through its official bilateral trade promotion agency, Kenya Investment Authority (KenInvest), Kenya has been viewed favourably by the international trade community. According to the UNCTAD's Global Enterprise Registration Network, the KenInvest site makes Kenya highly regarded, having earned a perfect rating on the information portal. Further, before any laws touching on foreign investment are passed, there are substantive reviews and deliberations by stakeholders. As there is no bilateral treaty protecting investors from harsh trade restrictions, investors are made to feel secure by Kenya's local arrangements and foreign investment policies. However, Kenya has signed 21 bilateral investment treaties, 12 treaties with investment provisions, and 20 investment related instruments. This shows the commitment that Kenya has in advancing foreign investment.

6.3 What laws exist regarding the nationalisation or expropriation of project companies and assets? Are any forms of investment specially protected?

There are no laws regarding the nationalisation and expropriation of project companies or assets. The Constitution protects the right to private property, under Article 40, save in the case where such property needs to be compulsorily acquired for public benefit. Section 8 of the Foreign Investments Protection Act, Cap. 518, provides that no foreign enterprise of property thereto shall be compulsorily acquired, expropriated, nationalised or subjected to any other measures, direct or indirect, having an effect equivalent to expropriation or nationalisation, except for a purpose which is in the public interest, on a non-discriminatory basis, in accordance with due process of law, and against prompt and full compensation. Any compensation that may need to be made under the Act shall be done at current commercial rates and shall be settled at freely convertible currencies.

7 Government Approvals/Restrictions

7.1 What are the relevant government agencies or departments with authority over projects in the typical project sectors?

In Kenya, the relevant government agencies or departments with authority over projects in the typical project sectors include, among others:

1. The Attorney General of Kenya, as the Kenyan Government's legal adviser.
2. The ministry in charge of land, housing and physical planning is concerned with land matters and the user of various parcels of land.
3. The ministry in charge of the environment alongside the National Environment Management Authority (NEMA) for environmental impact assessments and regulation of projects with potential environmental impacts.
4. The ministry in charge of water resources alongside the Water Resources Authority for projects relating to projects that relate to water resource management and use.
5. The ministry in charge of finance and treasury alongside the Directorate of Public-Private Partnerships, where the project being undertaken is a PPP.
6. The ministry in charge of labour together with the Directorate of Occupational Health and Safety in relation to safety, health and welfare of workers and all persons lawfully present at workplaces.
7. The Energy and Petroleum Regulatory Authority (EPRA), Kenya Power and Lighting Company (KPLC), Kenya Electricity Generating Company Plc (KenGen), Geothermal Development Company (GDC), and Rural Electrification and Renewable Energy Corporation (REREC) alongside the ministries in charge of energy, mineral extraction projects and mining in general, whose role is coordination of the energy and mining sectors.
8. The Kenya Urban Roads Authority (KURA), the Kenya Rural Roads Authority (KERRA), and Kenya National Highways Authority (KENHA) liaising with the ministry in charge of transport and infrastructure.
9. The Kenya Investment Authority (KenInvest), whose role is to assist and facilitate investments in Kenya. Its main functions are to promote investments in Kenya by local and foreign business enterprises.
10. The Business Registration Service (BRS), which deals with the registration of business entities in Kenya.
11. The National Construction Authority (NCA), which regulates all construction works and licenses contractors to undertake such works in Kenya.
12. Respective county governments in which locality the project is situated.

7.2 Must any of the financing or project documents be registered or filed with any government authority or otherwise comply with legal formalities to be valid or enforceable?

Project and financing documents must be stamped in accordance with the applicable stamp duty. A considerable number of mega projects that require project financing typically involve development projects that impact heavily on the community. For project agreements that relate to PPPs, they require approval from the Directorate of Public-Private Partnerships and the Attorney General. Accordingly, government agencies are usually involved in an oversight role. Since project financing consists of a long string of contractual deals, lawyers ensure all paperwork regarding payment of duty is completed to the end.

7.3 Does ownership of land, natural resources or a pipeline, or undertaking the business of ownership or operation of such assets, require a licence (and if so, can such a licence be held by a foreign entity)?

In the case of land and/or immovable property, an owner is usually provided with a document of title, and this could either be a Grant, a Certificate of Title, Certificate of Lease, a Title Deed or a Lease. There is a restriction on foreign ownership of freehold land, leases exceeding 99 years and agricultural land. These leases can, however, be renewed with the expiry of the 99-year period. The Constitution, the Mining Act and the Petroleum (Exploration and Production) Act all provide that natural resources in the form of minerals and petroleum belong to the Government of Kenya. An interested party may obtain a prospecting right or licence from the government in respect of such natural resources. There are currently no restrictions on foreign ownership of companies intending to undertake such businesses. To undertake a business in Kenya, the business entity would need to apply for a single business permit, from the respective county government, in addition to the licences that may be required in the particular economic sector. KenInvest will process and grant approvals of new investment once proposals are submitted in a prescribed application form. Proof of company registration must also be attached to the application.

7.4 Are there any royalties, restrictions, fees and/or taxes payable on the extraction or export of natural resources?

Yes. There are applicable fees which one must pay to obtain a mining licence or a petroleum exploration licence. One must obtain a licence from the relevant authorities to be permitted to export extracted minerals or petroleum out of Kenya. Mineral right holders will be required to pay royalties for various minerals according to prescribed rates set by the Cabinet Secretary. For example, the Mining Act, Cap. 306 provides that: "*The holder of a mining permit shall… (h) pay royalties, fees, mining taxes and charges.*" The royalties payable under the Mining Act shall be distributed as: (a) 70% to the national government; (b) 20% to the county government; and (c) 10% to the community where the mining operations occur. Moreover, there is the National Resource (Benefit Sharing) Bill of 2022, which if passed will establish formulae in which proceeds from exploitation of natural resources shall be shared by the mining companies, national government, county governments and local communities. This role shall be under the scope of the Benefit Sharing Authority.

7.5 Are there any restrictions, controls, fees and/or taxes on foreign currency exchange?

Kenya does not operate a fixed exchange rate against any foreign currency. Therefore, the exchange rate between the Kenyan Shilling and any other currency is determined by market forces, subject of course to interventions from time to time by the Central Bank of Kenya (the CBK). The CBK and the commercial banks usually publish the exchange rates applicable on a day-to-day basis.

7.6 Are there any restrictions, controls, fees and/or taxes on the remittance and repatriation of investment returns or loan payments to parties in other jurisdictions?

Kenya does not have exchange control laws in force since the repeal of the Exchange Control Act in December 1995. However, the CBK Act, Cap. 491 establishes the CBK. Under the CBK Act, the CBK is empowered to formulate and implement the monetary policy in Kenya.

According to Central Bank Circular No. 12 of 1996, "Revised Foreign Currency Transaction Guidelines to Authorised Banks", commercial banks were assigned a monitoring role by the CBK and each commercial bank is required to submit returns to the CBK on a regular basis. Foreign currency is freely repatriable from Kenya, provided there is written evidence of an underlying business transaction and the respective bank handling the repatriation is satisfied as to the genuineness of the transaction. However, for any amount equivalent to USD 500,000 or more, the CBK has requested that a commercial bank first consult with them as to the amount and purpose of the remittance. This is stated to be for statistical purposes. For any amount below the equivalent of USD 10,000, commercial banks are not required to obtain any documentary evidence to back the transaction, although in certain cases banks will nonetheless seek an explanation.

The Foreign Investments Protection Act provides that a foreign national who proposes to invest foreign assets in Kenya may apply to the Cabinet Secretary in charge of finance, for a certificate that the enterprise in which the assets are proposed to be invested is an approved enterprise. The Cabinet Secretary shall consider every application made and, in any case in which he is satisfied that the enterprise would further the economic development of or would be of benefit to Kenya, he may in his discretion issue a certificate to the applicant. The holder of a certificate may, in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing rate of exchange:

a) the profits, including retained profits which have not been capitalised, after taxation, arising from or out of his investment in foreign assets, provided that any increase in the capital value of the investment arising out of the sale of the whole or any part of the capital assets of the enterprise or revaluation of capital assets shall not be deemed to be profit arising from or out of the investment for the purposes of the Foreign Investments Protection Act;
b) the capital specified in the certificate as representing and being deemed the fixed amount of the equity of the holder of the certificate in the enterprise for the purpose of this Act, provided that:
   - where any amendment or variation is made in the amount of the said capital, the amended or varied amount shall be substituted for the original amount; and
   - no additional amount or sum shall be added to the capital specified in the certificate (as amended or varied) to represent any increase in the capital value of the investment since the issue of the certificate or since the last amendment or variation of the certificate; and
c) the principal and interest of any loan specified in the certificate.

7.7 Can project companies establish and maintain onshore foreign currency accounts and/or offshore accounts in other jurisdictions?

Yes, they can.

7.8 Is there any restriction (under corporate law, exchange control, other law or binding governmental practice or binding contract) on the payment of dividends from a project company to its parent company where the parent is incorporated in your jurisdiction or abroad?

No, there is no such restriction subject to the compliance with Kenyan taxation legislation.

7.9 Are there any material environmental, health and safety laws or regulations that would impact upon a project financing and which governmental authorities administer those laws or regulations?

Yes. The Environmental Management and Co-ordination Act, Cap. 387 (the EMCA) requires a project proponent to carry out an Environmental Impact Assessment (EIA) study and submit a project report "before financing, commencing, proceeding with, carrying out…or causing to be financed, commenced, proceeded with, carried out…" any undertaking of certain projects, including mining, activities out of character with their surroundings, and major changes in land use.

The EMCA requires the owner of premises or the operator of a project to take all reasonable measures to mitigate any undesirable effects not contemplated in the EIA study report and shall prepare and submit an environmental audit report on those measures to NEMA annually or as NEMA may in writing require. NEMA is established under section 7 of the EMCA with the mandate, *inter alia*, to coordinate and supervise environmental matters and serve as the principal government institution for the implementation of environmental policies.

The EMCA provides that no owner or operator of any trade or industrial undertaking shall discharge any effluents or other pollutants into the environment without an effluent discharge licence issued by NEMA. The EMCA defines "effluent" to mean "gaseous waste, water or liquid or other fluid of domestic, agricultural, trade or industrial origin treated or untreated and discharged directly or indirectly into the aquatic environment".

In line with Sustainable Development Goals No. 13 on climate action, foreign investment companies that set up in Kenya are required to strictly adhere to environmentally friendly practices for realisation of sustainable development.

Additionally, the Occupational Safety and Health Act, Cap. 236, through the Directorate of Occupational Health and Safety, requires the registration of all workplaces to ensure the compliance by respective employers of the safety, health and welfare of workers and all persons lawfully present at workplaces; in this instance, those undertaking projects.

7.10 Is there any specific legal/statutory framework for procurement by project companies?

This is governed by the Public Procurement and Asset Disposal Act (which establishes procedures for efficient public procurement and for the disposal of unserviceable, obsolete or surplus stores, assets and equipment by public entities) and the Public Private Partnership Act (which provides for: the participation of the private sector in the financing, construction, development, operation, or maintenance of infrastructure or development projects of the government through concession or other contractual arrangements; and the establishment of the institutions to regulate, monitor and supervise the implementation of project agreements on infrastructure or development projects).

8 Foreign Insurance

8.1 Are there any restrictions, controls, fees and/or taxes on insurance policies over project assets provided or guaranteed by foreign insurance companies?

There are no restrictions against insurance policies over project assets provided or guaranteed by foreign insurance companies. There may be Value-Added Tax (VAT) implications as the provision of insurance by a foreign company may be deemed to be an imported service.

8.2 Are insurance policies over project assets payable to foreign (secured) creditors?

Yes, they are.

9 Foreign Employee Restrictions

9.1 Are there any restrictions on foreign workers, technicians, engineers or executives being employed by a project company?

Such workers would need to apply for and obtain visas (where applicable) and any requisite work permits. Work permits and visas are issued under different classes by the Department of Immigration. The general guiding principle for issuance of work permits by the government is that these should be issued to foreign workers, technicians, engineers, or executives only where the tasks cannot be undertaken by qualified Kenyans. Even where the work permits are issued to foreigners, there is a general expectation by the government that there should be knowledge transfer before the lapse of the work permit, so that Kenyan citizens ultimately take over such roles.

10 Equipment Import Restrictions

10.1 Are there any restrictions, controls, fees and/or taxes on importing project equipment or equipment used by construction contractors?

There are no restrictions on importing project equipment. Applicable customs duty would, however, be payable. The Import Declaration Fee was lowered from 3.5% to 2.5% for all imported goods. Goods and services for the construction of infrastructure works in industrial and recreational parks of 100 acres or more in Nairobi, Nakuru, Kisumu, Mombasa and Eldoret are VAT-exempt.

10.2 If so, what import duties are payable and are exceptions available?

The Excise Duty Act, Cap. 472 contains an extensive list of excisable goods and services. In terms of exceptions, the Excise Duty Act, Cap. 472 also contains quite an extensive list of the institutions and persons that enjoy exemptions in respect of various items as indicated in the respective Acts.

11 *Force Majeure*

11.1 Are *force majeure* exclusions available and enforceable?

Yes. These would need to be specified in the relevant contracts. Payment obligations do not ordinarily fall within the scope of *force majeure* clauses. The Supreme Court in *Kwanza Estates Limited v. Jomo Kenyatta University of Agriculture and Technology (Petition E001 of 2024) [2024] KESC 74 (KLR) (6 December 2024) (Judgment)* placed emphasis on the importance of specifically providing for *force majeure* clauses in order for parties to rely on them.

12 Corrupt Practices

12.1 Are there any rules prohibiting corrupt business practices and bribery (particularly any rules targeting the projects sector)? What are the applicable civil or criminal penalties?

The Constitution of Kenya 2010, which is the grundnorm of the country, as per Chapter 6 provides for leadership and integrity of state officers, for state officers and public officials involved in major projects are required to work with integrity.

This chapter required that all state officers and public officials are required to take an oath of office before assuming office and conduct themselves ethically. Further, the chapter provides for financial probity of state officers. Any officers found to have been engaged in unethical or corrupt business practices are, under the Constitution, prohibited from holding such offices in the future. There is also the Leadership and Integrity Act Cap. 185C (the LIA), which is a statute that gives effect to the provisions of Chapter 6 of the Constitution discussed above.

Under the LIA, a public official may be submitted for civil or criminal proceedings if an investigation reveals that the officer has committed an offence.

In addition, the Ethics and Anti-Corruption Commission (created under the Ethics and Anti-Corruption Cap. 7H), the Attorney General for civil proceedings, the Director of Public Prosecutions for criminal matters, or any other suitable authority may be consulted with the problem under section 43.

According to section 49 of the LIA, if it is established that a state officer obtained property in violation of the Act, the officer may file an appeal, forfeit the property, or have it held in trust for the nation by the Commission or an agent designated by the Commission until it is disposed of legally. The Commission may further mandate that the state official pay the government a sum, including interest, that it deems appropriate considering the government's losses. This order will be considered a decree under the Civil Procedure Act.

The LIA also establishes several offences and punishments. According to section 47, for instance, "any person who has been found guilty of an offence under this Act for which no penalty is expressly provided shall be liable on conviction to a fine not KES 500,000, or to imprisonment for a term not exceeding three years, or to both".

The prevention, investigation, and punishment of corruption, economic crime, and associated offences are outlined in the Anti-Corruption and Economic Crimes Act, Cap. 65. Under this Act, there are numerous offences, and there are penalties for each of them. In addition to maximum prison terms of three to 10 years, penalties range from fines of KES 300,000 to KES 2,000,000. Government representatives are also bound by the Public Officer Ethics Act, which governs how public officers should behave while doing their duties. The Act aims to improve public officers' ethics by establishing a code of conduct and ethics and mandating financial disclosures from specific public officials. If a person is found to have obstructed or interfered with another person's performance of their obligations under this Act, they will be held accountable under the Act and could face a fine of up to KES 5,000,000 or up to five years in jail.

The objective of the Anti-Bribery Act, Cap. 79B, was to prohibit, investigate, and punish bribery. To avoid bribery and corruption, the Act also requires public and private organisations to establish policies that are suitable for their size, scope, and mode of operation. Furthermore, anyone with information or suspect of bribery must notify the Ethics and Anti-Corruption Commission within 24 hours after becoming a state official, public official, or anyone in a position of power in a public or private organisation. Additionally, the Act levies fines on public or private institutions and people proven to have engaged in bribery.

The Proceeds of Crime and Anti-Money Laundering Act, Cap. 59A, governs the sources and application of funds in commercial undertakings, including projects, and prohibits money laundering or the acquisition and use of proceeds of crime.

13 Applicable Law

13.1 What law typically governs project agreements?

Project agreements are typically governed by contracts, save in the case where one of the parties is the government, a state corporation or a county government, in which case provisions of statutes such as the Constitution, the Government Contracts Act, Cap. 25, the State Corporations Act, Cap. 446, the County Governments Act, Cap. 265, Public Private Partnerships Act, Cap. 430 and the Public Procurement and Disposal Act, Cap 412C, The Housing Act, Cap. 117, National Construction Authority Act, Cap. 118, Energy Act, Cap. 314, the Law of Contact Act, Cap. 23 and respective regulations would need to be considered.

13.2 What law typically governs financing agreements?

Financing agreements are typically governed by the Constitution under Chapter 12 on Public Finance (if public money is being used to finance the projects), the Law of Contract, common law and statutes such as the Public Finance Management Act, Cap. 412A, Public Private Partnerships Act, Cap. 430, Banking Act, Cap. 488, the Companies Act, Cap. 486, Movable Properties Security Rights Act, Cap. 499 A, and Insolvency Act, Cap. 53.

13.3 What matters are typically governed by domestic law?

Contracting parties are at liberty to choose the governing law with respect to their respective contracts. That notwithstanding, parties are required to adhere to laws within the Kenyan jurisdiction. Particularly, laws governing immovable property, natural resources, taxation and employment. In addition, permits, consents and approvals with respect to various aspects of the project are governed by domestic laws.

14 Jurisdiction and Waiver of Immunity

14.1 Is a party's submission to a foreign jurisdiction and waiver of immunity legally binding and enforceable?

A party's submission to a foreign jurisdiction and waiver of immunity is legally binding. The Courts have pronounced themselves in *Talaso Lepalat v. The Embassy of the Federal Republic of Germany & 2 Others [2014] [2015] KEHC 7093 (KLR)*.

15 International Arbitration

15.1 Are contractual provisions requiring submission of disputes to international arbitration and arbitral awards recognised by local courts?

Yes, they are pursuant to the Arbitration Act, Cap. 49 and the Investment Disputes Convention Act, Cap. 522.

15.2 Is your jurisdiction a contracting state to the New York Convention or other prominent dispute resolution conventions?

Yes, it is. Kenya has also enacted the Investment Disputes Convention Act, Cap. 522, which gives legal sanction to the provisions of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Disputes involving matters that are criminal in nature are not generally arbitrable under local law.

15.3 Are any types of disputes not arbitrable under local law?

Disputes involving matters that are criminal in nature are not generally arbitrable under local law.

15.4 Are any types of disputes subject to mandatory domestic arbitration proceedings?

No, they are not.

16 Change of Law / Political Risk

16.1 Has there been any call for political risk protections such as direct agreements with central government or political risk guarantees?

Kenya has had no recent call for political risk protections for companies investing in Kenya. Generally, letters of undertaking and guarantees are the two most common commitments that the government formally issues to guarantee payments. The Public Finance Management Act and the Public Private Partnerships Act, read together with the Constitution of Kenya, recognise financial guarantees by the government subject to specified conditions prescribed thereunder.

17 Tax

17.1 Are there any requirements to deduct or withhold tax from (a) interest payable on loans made to domestic or foreign lenders, or (b) the proceeds of a claim under a guarantee or the proceeds of enforcing security?

Interest to be paid on loans from foreign lenders for the purposes of investing in the energy or water sectors, or in roads, ports, railways, or aerodromes, are exempt from tax. Further, instruments (including charges, debentures and guarantees) executed with respect to the transactions relating to loans from foreign sources received by investors in the infrastructure (energy, roads, ports, water, railways, and aerodromes) development sector shall be exempted from the provisions of the Stamp Duty Act, Cap. 480. However, for companies not falling in the above bracket, Kenya imposes a withholding tax at the basic rate of 3% to 30% *per annum*. The Income Tax Act prescribes how to compute withholding tax on deemed interest.

17.2 What tax incentives or other incentives are provided preferentially to foreign investors or creditors? What taxes apply to foreign investments, loans, mortgages or other security documents, either for the purposes of effectiveness or registration?

Both fiscal and non-fiscal incentives are available in Kenya. The Kenya Revenue Authority implements the issuance of the fiscal (tax) incentives in collaboration with other regulators and facilitators, such as the Capital Market Authority and the Export Processing Zones Authority, Special Economic Zones Authority, among others, as provided under the Capital Markets Act, Cap. 485A, Income Tax Act, Cap. 470, Stamp Duty Act, Cap. 480, and Export Processing Zones Act, Cap. 517.

18 Other Matters

18.1 Are there any other material considerations which should be taken into account by either equity investors or lenders when participating in project financings in your jurisdiction?

Equity investors and/or lenders should undertake due diligence investigations on a particular project and/or project company before advancing any funds. The due diligence exercise should cover the legal and financial status of the companies that the investors or lenders would be contracting with.

Further, due diligence should extend to the nature of projects invested in. Each project financing has its own unique structure. For example, many financiers shy away from funding road construction projects because of their high income return risks. Realistically, demand/traffic risk is often unavoidable.

Financiers should, as need be, conduct their own traffic projections to be in a good position to assess this risk involved in financing these projects as opposed to relying on traffic projections done by project companies. This balancing of information is crucial in the steering of mega projects.

18.2 Are there any legal impositions to project companies issuing bonds or similar capital market instruments? Please briefly describe the local legal and regulatory requirements for the issuance of capital market instruments.

In Kenya, project companies that issue bonds or other capital market instruments are subject to legal restrictions. The Capital Markets Act lays out the regional legal and regulatory requirements for the issuance of capital market instruments. According to the Capital Markets Act, unless a person has a valid licence issued under the Act or under its authority, they are not allowed to operate as a stockbroker, derivatives broker, manager of a real estate investment trust (REIT), trustee, dealer, investment adviser, fund manager, investment bank, central depository, authorised securities dealer, or authorised depository, or to represent themselves as doing so. However, Part III, Regulation 11 of the Capital Markets (Public Offers, Listing and Disclosures) Regulations of 2023 permits foreign corporations to issue bonds within the East African Community.

19 Islamic Finance

19.1 Explain how *Istina'a, Ijarah, Wakala* and *Murabaha* instruments might be used in the structuring of an Islamic project financing in your jurisdiction.

Istina'a – In Islamic finance, *Istina'a* is generally a long-term contract whereby a party undertakes to manufacture, build or construct assets, with an obligation from the manufacturer or producer to deliver them to the customer upon completion. The purchase price can be paid in a lump sum or is payable on the achievement of various milestones throughout the constructions/manufacturing period. This instrument may be used in the manufacturing industry and also in infrastructure projects.

Ijarah – This contract represents a transaction in which a known benefit (usufruct) associated with a specified asset is sold for a payment. In the course of this sale of usufruct, ownership of the asset is not transferred – the bank maintains ownership of the asset. An *Ijarah* may be used in a construction project where the financier would be involved in the construction of the development, then subsequently lease out the property to the end consumer, with the end consumer's last instalment being used as the amount required to purchase the property.

Wakala – Describes an agency or a delegated authority where a principal appoints the agent to carry out a specific job on behalf of the principal. *Wakala* agreements are agency agreements where the principal and the agent share in the profit and risk of loss of investment. Any guarantee on minimum return is not *Shari'ah*-compliant. This can be used where a company acts as the agent for a financier or lender by investing the funds from that financier or lender. The company may choose to invest the funds in different projects, and profits and losses would be shared equally by both parties.

Murabaha – It is often referred to as "cost-plus financing" and frequently appears as a form of trade finance based upon letters of credit. In its simplest form, this contract involves the sale of an item on a deferred basis. This could be used to finance the movable assets that may be used in a project, for example, motor vehicles.

19.2 In what circumstances may *Shari'ah* law become the governing law of a contract or a dispute? Have there been any recent notable cases on jurisdictional issues, the applicability of *Shari'ah* or the conflict of *Shari'ah* and local law relevant to the finance sector?

The Constitution is the supreme law of Kenya. Islamic finance products, on the other hand, are to be governed by *Shari'ah*. Article 170 (5) of the Constitution states that the jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhis' courts. As such, the jurisdiction of the Kadhis' court does not extend to contractual relations.

The Kadhis' Courts Act further reiterates this point by providing that a Kadhis' court shall have and exercise jurisdiction over the determination of questions of Muslim law relating to personal status, marriage, divorce, or inheritance in proceedings in which all the parties profess the Muslim religion. The Judicature Act provides the sources of law in Kenya which include the Constitution, written laws, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on 12 August 1897, and African customary law. It should be noted that *Shari'ah*, Islamic or Muslim law is not referred to in the Judicature Act.

Therefore, although a contract may be prepared in accordance with *Shari'ah*, the governing law will be Kenyan, as Kenya does not recognise *Shari'ah* law as governing contracts in Kenya. To our knowledge, there have not been any notable cases to date over jurisdictional matters pertaining to *Shari'ah* law.

19.3 Could the inclusion of an interest payment obligation in a loan agreement affect its validity and/or enforceability in your jurisdiction? If so, what steps could be taken to mitigate this risk?

Islamic finance prohibits the charging or payment of interest. Consequently, Kenya, in an attempt to regulate Islamic banking operations and products, made slight changes to its Banking Act. Initially, the Banking Act only made reference to "interest".

The Banking Act was subsequently amended in 2008 by adding the phrase "or a return in the case of an institution carrying out business in accordance with Islamic law" when referring to interest chargeable on a savings account. It would be interesting to see what Kenyan courts would determine in cases where an interest payment obligation was included in a loan agreement that is meant to be *Shari'ah*-compliant.

In the English case of *Dunlop Pneumatic Tyre Co Ltd v. New Garages & Motor Co Ltd [1915] AC 79*, the Court held that, generally, the inclusion of an interest payment obligation in a loan agreement would not affect its validity and/or enforceability unless that interest payment obligation is deemed a penalty offending the rules laid down in that particular case. With the common law doctrine of precedent, this position may have a bearing in future transactions in Kenya if *Shari'ah* law changes to allow charging or payment of interest.

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