

Kenya

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I. Summary

A. Types of Organizations

Kenya is a Commonwealth country with a common law system. There are four primary types of not-for-profit organizations (NPOs):

- Companies;
- Societies;
- Trusts; and
- NGOs.

Other not-for-profit legal forms, which are outside the scope of this Note due to their limited interaction with U.S. grant makers, include churches, political parties, and trade unions.

B. Tax Laws

Kenya exempts from corporate income taxes the income of certain NGOs carrying out specific types of activities. Unrelated business income is subject to tax under certain circumstances. Kenya also subjects certain sales of goods and services to VAT, with a fairly broad range of exempt activities. The tax laws confer only limited tax benefits on corporate donors and on individual donors.

II. Applicable Laws

- The Constitution of Kenya, 2010
- Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules [2006] (The status of these rules is yet to be determined in the light of the new constitution)
- [The Non-Governmental Organizations Coordination Act, Act No. 19](#) [1990]
- [The Non-Governmental Organizations Coordination Regulations](#) [1992]
- The Non-Governmental Organizations Council Code of Conduct [1995]
- The Companies Act, Chapter 486 of the Laws of Kenya [1959]
- The Societies Act, Chapter 108 of the Laws of Kenya [1998]
- The Trustees (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya [1981]
- The Trustee Act, Chapter 167 of the Laws of Kenya [1982]
- The Value Added Tax Act, Chapter 476 of the Laws of Kenya
- VAT (Remission) (Charitable Organizations) Order [1999]
- The Customs and Excise Act, Chapter 472 of the Laws of Kenya
- [The Income Tax Act, Chapter 470 of the Laws of Kenya](#) [1989]
- The Employment Act of 2007, Act No. 11 of 2007
- The Education Act, Chapter 211 of the Laws of Kenya [1980]

III. Relevant Legal Forms

A. General Legal Forms

Kenyan law creates four primary types of NPOs: NGOs, companies, societies, and trusts.

NGOs

The NGO Coordination Act defines an NGO as “a private voluntary grouping of individuals or associations, not operated for profit or for other commercial purposes but which have organised themselves nationally or internationally for the benefit of the public at large and for the promotion of social welfare, development, charity or research in the areas inclusive of, but not restricted to, health, relief, agriculture, education, industry and the supply of amenities and services.” [[NGO Coordination Act, s. 2, as amended by legal notice 11 of 1992](#)] Designation as an NGO confers certain tax benefits and imposes a series of regulations that are relevant to an equivalency determination.

In July 2006, the Ministry of National Heritage presented Sessional Paper No. 1 of 2006 to the Kenyan Parliament. The Sessional Paper, which subsequently was passed by the Parliament, [1] seeks to, inter alia: promote interaction between NGOs and the communities where they work in an effort to improve service delivery; integrate government and NGO policies to affect the “social and economic transformation” of Kenya; and involve the individual in NGO and government affairs.

Companies

A number of NPOs are registered as companies whose liability is limited by the guarantee of the members. [2] Under the Companies Act, a group or association of persons can incorporate as a private or public company. For companies limited by shares a private company requires at least two and no more than 50 shareholders. A public company requires at least seven shareholders.

Societies

Under the Societies Act, a society is "any club, company, partnership or other association of ten or more persons, whatever its nature or object, established in Kenya or having its headquarters or chief place of business in Kenya." (Societies Act, Section 2) A branch of a society also qualifies as a society. The definition specifically excludes trade unions, cooperatives, corporations, and certain other entities. A society's governing documents are called the Constitution or Rules of the Society. [Societies Act, s. 2] Societies are registered and regulated by the Registrar of Societies.

Trusts

A trust is an entity created to hold and manage assets for the benefit of others. Trusts can be established under the Trustees (Perpetual Succession) Act only for religious, educational, literary, scientific, social, athletic, or charitable purposes. [Trustees (Perpetual Succession) Act, Chap. 164, s. 3(1)] Charitable purposes may also be affected by forming a trust by way of a trust deed.

B. Public Benefit Status

An NGO is required to benefit the public at large and promote social welfare, development charity, or research in areas including, but not restricted to, health, relief, agriculture, education, industry, and the supply of amenities and services. [[NGO Coordination Act, s. 2, as amended by legal notice 11 of 1992](#)] Other NPOs [[3](#)] are not restricted to public benefit purposes.

IV. Specific Questions Regarding Local Law

The regulatory scheme for NPOs in Kenya is complex, combining substantive and procedural statutes, common law rules embodied in case law, and administrative practices. [See Sihanya, *The Regulatory Regime Governing NGOs in Kenya* (1996).] In addition, Kenyan legislation regulates an organization substantially through enforcement of the organization's founding documents. Within this context, the Note examines issues of local law relevant to equivalency determinations.

A. Inurement

NGOs

An NGO's constitution must prohibit the organization from distributing funds to members other than for legitimate reimbursement of expenses incurred in carrying out the organization's objectives. [NGO Coordination Regulations, 2nd Schedule, Section 4(a) and 4(b)] The documents must also stipulate rules for awarding contracts to members or officials. [[NGO Coordination Regulations, 2nd Schedule](#), Section 4(c)] However, the law does not specify particular language for these clauses.

Other NPOs

The Rules of a Society must stipulate the purpose for which funds can be used, and must prohibit distribution of funds to members. (Paragraph 11-First Schedule, Societies Act) However, Kenyan law does not specify particular language for these clauses.

Kenyan law does not require trusts or companies to prohibit inurement.

B. Proprietary Interest

NGOs

An NGO's constitution must prohibit distribution of assets to members and officials. [[NGO Coordination Regulations, 1992, 2nd Schedule](#), Paragraph 4(a) and 4(b)] However, the law does not otherwise address whether donors can retain a proprietary interest in their donations.

Other NPOs

Kenyan law does not explicitly require companies, societies, or trusts to prohibit proprietary interest.

C. Dissolution

NGOs

In the event of dissolution, whether voluntary or involuntary, the NGO must use its assets to pay creditors. Any surplus remaining must be transferred to an organization pursuing similar objectives. [NGO Coordination Regulations 1992, 2nd schedule, point 12]

Companies

When a company dissolves, its assets are applied, first, to statutory preferential payments, such as any outstanding taxes; second, to liabilities; and, third, to members, distributed according to their rights and interests in the company, unless the Articles of Association provide otherwise. [[Companies Act, s. 296](#)]

Societies

Under the Societies Act, a receiver is appointed to handle the dissolution of a Society. [Societies Act, Section 33] Heeding the Society's constitution, the receiver proposes a scheme for distributing the assets, which must be approved by the Minister. [Societies Act, ss. 33-34] The Act does not explicitly prohibit distribution of assets to members upon the Society's dissolution. Section 309-317 of the Companies Act applies to the dissolution of a society and Section 311 states that the priority in which debts are to be paid is the same as priority of payment of debts for companies being dissolved.

Trusts

The Minister can order an incorporated trust to be dissolved if it has ceased to exist or if its objectives have become incapable of fulfillment. Upon dissolution, the trust's land shall be transferred to the county council in whose area of jurisdiction the land is situated; if the land is not trust land, it shall be transferred to the government. The law does not provide for distribution of other assets. [[Trustees \(Perpetual Succession\) Act, s. 16\(2\)](#)]

Trusts not incorporated under the Trustees (Perpetual Succession) Act are dissolved in accordance with the law of equity.

D. Activities

1. General Activities

Generally, a legal entity, upon its establishment and (where required) registration, can undertake any legal activity.

2. Economic Activities

NGOs by definition are “not operated for profit or other commercial purposes.” [[NGO Coordination Act, s. 2](#)] However, the regulations do not bar an NGO from undertaking substantial economic activities in pursuit of its purposes.

Other NPOs can engage in economic activities consistent with their governing documents.

E. Political Activities

NGOs

An NGO cannot become a branch of, affiliated with, or connected with any organization or group of a political nature established outside Kenya and shall not dissolve itself except with the prior consent in writing of the Board obtained upon written application addressed to the Director and signed by three of the officers of the Organization. [[NGO Coordination Regulations \(1992\), paragraph 21\(1\) \(b\)](#) and (c)] An NGO can affiliate with a political organization *inside* Kenya, though the Government discourages this practice.

Companies

According to Kenyan common law, companies are free to engage in political or legislative activities if their governing documents permit it.

Societies

Most political parties are registered as societies. Other types of societies can engage in political activities if their governing documents permit it. [\[4\]](#)

Trusts

The trust deed stipulates the activities that the trust can engage in.

F. Discrimination

Kenya in general guarantees freedom of expression, association, assembly, and movement and bars discrimination on the grounds of gender, race, sex, pregnancy, marital status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth.[The Constitution of Kenya ss.26,-51] Furthermore, an NGO's activities must "ensure equality of opportunity for all regardless of nationality, ethnic background, gender, religion or creed." [NGO Council Code of Conduct, s. 10(c) [\[5\]](#)]

In February 2006, the 'Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) High Court Practice and Procedure Rules, 2006' were enacted by the Chief Justice. Where contravention of any fundamental rights and freedoms of an individual under sections 70 to 83 (inclusive) of the Constitution is alleged or is apprehended, an application may now be made directly to the High Court. These rules strengthen the ability of individuals to enforce fundamental rights and freedoms by clarifying the procedure to apply to the High Court under Section 84 of the Constitution. [[Constitution of Kenya \(Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual\) High Court Practice and Procedure Rules, 2006](#)] [\[6\]](#)

With regard to institutions of higher education, there are seven public universities established by Acts of Parliament and seventeen private universities. Discrimination on the grounds of ethnicity, sect, or creed is barred under the various public universities Acts. [\[7\]](#) Discrimination on the basis of religion when admitting students is also prohibited (Article 32 (3) of the Constitution)

Private universities are authorized to offer degrees, post graduate diplomas and certificates under the Universities Act Cap 210B [1986] and the Universities Rules 1989. Neither the Act nor the Rules expressly bar acts of discrimination in private universities and any public universities that may be established otherwise than by an Act of Parliament.

Likewise, the Education Act (Cap 211 Laws of Kenya) does not expressly prohibit discriminatory practices in primary and secondary educational institutions.

The Employment Act of 2007 also seeks to address the concept of discrimination in employment by espousing (i) the promotion of equality of opportunity in employment (ii) the elimination of discrimination in any employment policy or practice – (including against prospective employees: race, color, sex, ethnic origin, HIV status, disability, pregnancy) and (iii) the payment of equal remuneration for work of equal value. [Employment Act 2007, s 5]

G. Control of Organization

Kenyan law does not restrict other organizations or persons from controlling a Kenyan not-for-profit organization beyond stating that an NGO must be private and voluntary. Accordingly, a for-profit entity might establish an NPO and continue to control it. Likewise, a Kenyan NPO could be controlled or owned by an American grantor charity, which would have to be disclosed in the affidavit.

V. Tax Laws

A. Tax Exemptions

For its income to be exempt from income tax, an organization must have been established solely to relieve poverty or distress of the public, or to advance religion or education. In addition, the Commissioner of Income Tax must conclude that the income is expended either wholly within Kenya or in ways that benefit the residents of Kenya. [[Income Tax Act, 1st Schedule, Cap 470, paragraph 10 as amended by legal notice No. 6 of 2001](#)]

Income consisting of profits from a business is subject to an additional restriction. Such income is exempt from tax only if it meets the criteria in the previous paragraph *and* if one of the following is true:

- (a) the business is carried on in the course of advancing the organization's stipulated purposes; or
- (b) the business is conducted mainly by beneficiaries of those purposes; or
- (c) the gains or profits consist of rents (including premiums or similar consideration in the nature of rent) received from leasing land and attendant chattels.

[[Income Tax Act, 1st Schedule, Cap 470, paragraph 10](#)]

B. Deductibility of Charitable Contributions

As of January 2007, individuals and corporations generally can deduct any cash donations from their income tax to a charitable organization, provided the charitable organization:

- a. is registered or exempt from registration under the Societies Act or the Non-Governmental Coordination Act, 1990,
- b. its income is exempt from tax under the provisions above. [[Income Tax Act, sec. 15\(2\)\(w\)](#)]

The same applies to any project approved by the Minister of Finance. [[Income Tax Act, sec. 15\(2\)\(w\)](#)] Expenditures of capital nature by a person on the construction of a public

school, hospital, road or any similar kind of social infrastructure can be deducted as well with prior approval of the Minister. [[Income Tax Act, sec. 15\(2\)\(x\)](#)]

Furthermore, deductibility is permitted for expenditures on scientific research to advance the donor's business, including sums paid to approved scientific research institutes or universities, provided certain conditions are satisfied. [[Income Tax Act, sec. 15\(2\)\(n\)](#)]

C. Value Added Taxes

Under Regulation 30 of the NGO Co-ordination Regulations 1992, if an organization requires exemption from VAT on goods and services required to meet its objectives and on income-generating activities (or income for expatriate employees), an application must be made through the NGO's Board to the Minister for Finance.

"Social welfare services" provided by a charitable organization are VAT exempted, provided the organization satisfies two criteria:

- (a) It must be registered under the Societies Act or NGO Act, or exempted from registration by the Registrar of Societies or the NGO Co-ordination Board; and
- (b) Its income must be exempt from tax under the Income Tax Act and approved by the Commissioner of Social Services.

[VAT Act, 3rd Schedule, paragraph 7] Such services are not treated as taxable supplies, and no VAT is charged on them.

The VAT Act also exempts services to members performed by trade, professional, and labor associations, as well as educational, political, religious, welfare, and other philanthropic associations, provided that this shall not apply where any such services are rendered by way of business. [VAT Act, 3d Schedule, s. 16]. Certain foods are also VAT exempt. [VAT Act, Second Schedule]

Zero-rated supplies include gifts to registered societies or NGOs (or societies or NGOs exempt from registration) whose income is exempt from income tax if they meet certain criteria. [\[8\]](#) [VAT (Remission) (Charitable Organizations) Order (1999), s. 3 as amended by legal notice No. 50 of 2004; VAT Act, Fifth and Eighth Schedules] If the tax would exceed 500,000 Kenyan Shillings (Kshs.) (approximately US \$6,250), written approval must also be obtained from the Treasury. [VAT Act, Eighth Schedule, Part A, par. 9] If the goods are imported, purchased by, or consigned to an organization other than a charitable institution, the VAT Commissioner must be satisfied that they will be donated to a charitable organization. [\[9\]](#) [VAT Act, Eighth Schedule, Part A, par. 9] (1)(a)(b)(c) and 9 (3)(b)]

D. Import Duties

Gifts to charitable institutions are exempt from customs duties under the following circumstances:

(a) Goods donated or purchased for donation to a non-profit organization or government-approved institution for: their official use; free distribution to the poor and needy; use in medical treatment, education, religious or rehabilitation work; or other purposes approved by the government. [Customs and Excise Act, section 138(1)(c)]

(b) Certain goods, including some passenger motor vehicles, and office, audio and visual electronic equipment are excluded from the custom duties exemptions. Textiles, new and used clothing, footwear, and certain foods also are excluded from the customs duties exemption but a remission of the duty may be granted if the goods are donated or purchased for donation to registered homes for poor and needy persons. The remission is subject to ministerial approval. Remissions also may be granted when the goods are imported during periods of civil strife, national calamity or disaster as declared by law or where intended for use in officially recognized refugee camps in Kenya. [The Customs and Excise (Remission) (Charitable Organisations) Order 1999 as amended by Legal Notice 46 of 2004]

(c) The Treasury must approve any duty exemption that exceeds Kshs. 500,000. [Customs and Excise Act, 3d Schedule, s. 12]

E. Double Tax Treaties

There are no double tax treaties between the United States and Kenya.

VI. Knowledgeable Contacts

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Footnotes

[1] The Sessional Paper was developed by the Ministry in consultation with various stakeholders in the NGO sector. The intention is that the Sessional Paper contents will be reflected in a bill to be presented to Parliament for formal enactment. Although its contents currently may not be binding, the Sessional Paper serves as a useful indication

of the government's future policy in relation to the NGO sector. A summary of the contents of the Paper is briefly outlined in [Appendix A](#).

[2] It is also possible in Kenya to establish a company limited by shares; however, this is typically established to carry out for-profit trading activities.

[3] For purposes of this Note, the term "other NPOs" refers to those not-for-profit organizations that do not qualify as NGOs.

[4] However, no society in Kenya can affiliate with any political organization or group outside Kenya. [Societies Act, s. 11(1)(a)]

[5] This code is written and enforced by a statutorily established council of voluntary agencies. [NGO Coordination Act, ss. 23-24] The council can recommend the suspension or cancellation of an NGO's registration certificate. [Code of Conduct, s. 20(4)(b); NGO Coordination Act, s. 16]

[6] The constitution now provides under Article 22(1) that every person has the right to institute court proceedings claiming that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or is threatened. As of March 2011, the status of the above rules has yet to be established; however that Article further provides that the Chief Justice shall make rules providing for the above court proceedings (Article 22(3)).

[7] The following section is repeated verbatim in the various public university Acts:

Admission to the university as candidates for degrees, diplomas, certificates or other awards of the University shall be open to all persons accepted as being qualified by the Senate without distinction of ethnic origin, sect or creed and no barrier based on such distinction shall be imposed upon any person as a condition of his becoming or continuing to be, a professor, lecturer, graduate or student of the university or of his holding any office therein, nor shall any preference be given to, or advantage be withheld from, any person on the basis of ethnic origin, sect or creed.

[8] Exceptions: building materials, audio and audiovisual electronic equipment, spare parts, office furniture and equipment, stationery, textiles, clothing, certain foodstuffs, and certain motor vehicles. [VAT (Remission) (Charitable Organizations) Order (1999), s. 3]

[9] If the Minister of Finance concludes that it is in the public interest to do so, the Minister also has the discretion to remit, in whole or in part, VAT paid by NPOs or other institutions approved by the Government on goods funded by donation, for their official use or for the benefit of poor and needy persons. [VAT Act, s. 23(3)(f)(ii)] In practice, such rebates are very difficult to obtain.