

# A Year in Review – Looking back at the legislative developments of 2018

## A Handshake to Kick Start the Legislative Agenda

Following a tumultuous August election and re-run in October 2017, the political impasse that ensued threatened to take the country over a cliff edge. Then on March 9 2018 a surprise reconciliatory meeting between President Uhuru Kenyatta and opposition leader Raila Odinga that culminated in a symbolic “handshake” on the steps of Harambee House reset the national narrative.

However, precious legislative time had been lost resulting in a 44% (206 from 368) drop in the number of gazetted legislation when compared to the 2017 record. There were however some noteworthy legal developments which we recap in this article.

## Agriculture

The importance of the agricultural sector to the Kenyan economy cannot be overstated. According to the Kenya National Bureau Statistics (KNBS) 2018

Statistical Abstract, 28.3% of GDP activity is attributable to agriculture. Of the five main Kenyan exports (being tea, horticulture, clothing, coffee and titanium) tea is Kenya’s biggest export with 2018 exports estimated value at KES 135 billion.

With these figures in mind a notable development in the tea industry is the introduction of the Tea Bill, 2018 that seeks to establish a Tea Regulatory Authority of Kenya whose mandate will include the

licensing of tea dealers, processors, brokers, factories and their agents.

If passed then the industry could be said to be coming full circle given that the previous parastatal authority was privatized in 2000 to form the Kenya Tea Development Authority owned by the Kenyan tea farmers.

## Aviation

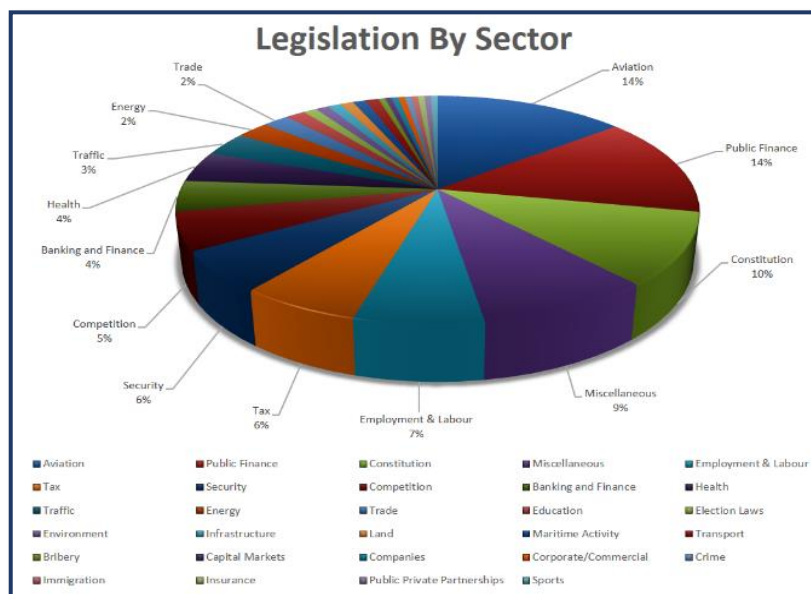
Aviation continues to attract legislative attention, resulting in the enactment of 29 new pieces of regulations in 2018.

The new legislation is part of the Kenya Civil Aviation Authority Airspace Master Plan 2015

- 2030 (the **Master Plan**) to upgrade all its practices in line with ICAO Aviation System Block Upgrade initiative (the **ICAO Initiative**).

According to the Master Plan the

next set of legislative changes will be in 2023 therefore the next 4 years should be muted on the legislative front. This however does not mean the industry will not continue to grow in significance. The Government is investing to ensure every county has an operational airstrip, in addition Kenya now benefits from direct flights from Nairobi to JFK which should open up the country to further commerce.



## Further Tightening on Corporate Governance & Money Laundering

Responding to concerns about Kenya's vulnerability to money laundering and financial fraud the government has been implementing various anti-money laundering and governance measures to strengthen corporate governance structures in Kenya

In March, the Central Bank of Kenya published guidance on the steps banks should be taking when conducting money laundering and terrorism financial risk assessments.

In addition, the government made amendments to the Proceeds of Crime and Anti-Money Laundering Regulations requiring reporting institutions to implement policies and procedures to address risks associated with: non-face-to-face transactions and dealing with new and current clients.

Finally, in June a Capital Markets (Amendment) Bill was introduced seeking to expand embezzlement related offences and ensure that it is now explicit that administrative enforcement action can be taken against key employees of listed companies.

## Cyber Crime & Data Protection

The Computer Misuse and Cybercrimes Act that came into effect on 30 May 2018 sought to create specific computer and cybercrime offences. However, on 30 May 2018 the Bloggers Association of Kenya (BAKE) obtained a high court order suspending most of the Act. BAKE successfully argued that most of the offences did not have a 'mens rea' (intention of the offender) element; and that some of the words used to create the offence were vague or undefined and therefore ineffective or subject to abuse. The matter is still in court.

Also earlier in the month (25 May) EU General Data Protection Regulations came

into effect across all EU countries. The Regulations seeks to better protect the use of personal data and protect the right to privacy for EU residents. The Regulations were significant due to their extrajudicial reach therefore may affect Kenyan businesses and individuals if they obtain or process EU residents personal data.

## Kenya's New Coinage

Kenya's 2010 Constitution sought to promote unity among all Kenyans and provided that all notes and coins should bear images that symbolise Kenya and not any individual.

Therefore, images on the 1, 5, 10 and 20 shilling have been changed from bearing former presidents images to that of wildlife and the old coins will be phased out of the market.

## Digitizing the Land Registry & Landmark Decision on the Applicability of VAT on Sale of Commercial Premises

Just like the Companies Registry, the Land Registry commenced the process of digitizing all its records in 2018. The intention by the Ministry of Lands is for all records to be digitized and for all applications such as the transfer of ownership, valuation requests and registration of land documents to be done for online.

At present because the digitization process is not complete only some land files are available on the online platform. However, applicants are required to conduct searches online and if the file has not been digitized a physical search at the Registry will be required.

Finally, in November the High Court issued a judgment declaring that VAT is not applicable on the sale of commercial premises. The judgement was based on a claim that the sale of a commercial property was captured by the exemption provided under the First Schedule of the VAT Act 2013 that is: it was the 'supply by way of sale, renting, leasing, hiring, letting

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of land or residential premises'. It was the purchaser's view that the definition of 'land' would include commercial premises. The court agreed with this interpretation. Kenya Revenue Authority has appealed the decision and the matter is pending in court.

## Immigration

In May 2018, the Department for Immigration sought to address a perceived influx of illegal foreign workers in Kenya. It is reported that the Cabinet Secretary (C.S.) for Interior and Coordination of National stated "We have not cleaned up our systems on immigration. Our official records show there are 34,000 foreigners working in Kenya... the real figure is... probably over 100,000. [This] Means there are people doing jobs that Kenyans can do, coming through the back door". The Ministry therefore initiated an operation to verify the work permits held by foreigners. Following the completion of the verification exercise there have been no reported mass deportations.

In December, the C.S. also directed that work permits applications should be made from the country of origin as opposed to the current situation where the applications are being made once the worker arrives in Kenya. This directive has not yet been implemented.

## Trade, Treaties & Taxes

Based on the last KNBS 2016 Foreign Investment Survey the UK is the largest investor in Kenya; therefore, with Brexit scheduled for 29 March 2019 it was necessary to get some clarity on the expected trading relationship between Kenya and the UK post Brexit.

In her 2018 August tour of Kenya, UK Prime Minister Theresa May gave assurances that Kenya would retain its duty free quota access to the UK market.

From a trade perspective, the process for ratification of treaties is likely to change if proposed amendments to the Treaty Making and Ratification Act are passed. The amendments seek to include Senate oversight in the ratification process in addition to the current scrutiny undertaken by the National Assembly and the Cabinet. If passed it is expected that the process of ratification will take longer given the need for the agreement to go through both houses of parliament.

Finally, the controversial Finance Act, 2018 was assented to in September 2018. The Act implemented various increase in taxes perhaps the most disputed was the VAT on fuel 16% which following political pressure was reduced to 8%.

## 2019 Outlook

Since its unveiling in 2017, the Big Four Agenda has taken up considerable space in policy and regulatory dialogue in Kenya. However, with the political instability the country faced in the first quarter of 2018 this did slow down the legislative agenda.

It is expected that 2019 will see concerted efforts by the government to introduce legislation, regulations and tax incentives to set the foundation for the implementation of the Agenda.