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Capital markets regulation

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Companies in Kenya have traditionally used banks for financing, which is usually secured over assets of the company (usually, land and business). However, companies have recently started using more sophisticated financing sources, particularly syndications of financial institutions and from the capital markets, by issuing commercial paper and bonds. Some larger companies (including state corporations) have also considered listing shares (by way of initial public offerings, rights issues or secondary floatation) on the Nairobi Stock Exchange (the NSE) as a means of raising equity.

The primary legislation governing the capital markets in Kenya is the Capital Markets Act (the CMA), and the subsidiary regulations made under this Act. These regulations have been in force since 2002, and few changes have been made since then. The Capital Markets Authority (the Authority) is, however, considering a review of the regulations.

The CMA prescribes that no person may offer its securities for subscription or sale to the public or a section of the public in Kenya unless, before the offer, it publishes an information memorandum and files a copy of it with the Authority. Companies have the option of raising finance from the Main Investment Market Segment, the Alternative Investment Market Segment or the Fixed Income Securities Market Segment (for corporate and treasury bonds). Shares or bonds can be traded on the NSE.

The listing of bonds or shares on the NSE is regulated by the Capital Markets (Securities) (Public Offers, Listing and Disclosures) Regulations 2002 (the Listing Regulations).

The Listing Regulations require a company seeking approval for offering securities to the public to publish a prospectus, to issue the prospectus free of charge to the members of the public, and to ensure that the prospectus complies with the detailed provisions set out in the Listing Regulations.

The Listing Regulations also set out in detail the eligibility requirements for a company to issue securities, which vary according to the type of security being offered and the market segment on which the securities are to be listed.

The Authority considers any applications for approvals of offers of securities to the public, taking into consideration any comments from the NSE.

To apply for the listing of securities on the NSE, a company is required to appoint a sponsoring stockbroker and notify the NSE.

The NSE has its own listing rules. It is through the sponsoring stockbroker that all applications, presentations and ancillary matters will be presented to the NSE.

The Listing Regulations do not apply to private offers (which are defined in the Listing Regulations), or to securities offered by the government or by entities that are not companies.

The most recent addition to legislation relating to listed shares in Kenya is the Central Depositories Act (the CDA). Under the CDA, a securities exchange can prescribe that a listed security is immobilized. Immobilized securities can only be dealt with using a securities account opened with a central depository (to date, only the Central Depository and Settlement Corporation has been approved as a central depository under the CDA). The central depository is authorized under the CDS to appoint central depository agents (stockbrokers, banks and so on), through whom some functions are carried out. The NSE has immobilized shares of all companies listed on the NSE. Partly due to this, trading of shares on the NSE has become more efficient, and trading volumes have increased.

The Companies Act (which has remained mostly unchanged and is still largely based on the Companies Act 1948 of England) requires a company to issue a prospectus for the purposes of offering shares or debentures to the public. The prospectus must comply with the criteria set out in this Act. At the time of writing, the government is considering reviewing the entire Companies Act.

The Capital Markets (Foreign Investors) Regulations 2002 (the Foreign Investors Regulations) define a foreign investor as "any person who is not a local investor or an east African investor". A listed company is required to reserve at least 25% of its ordinary shares for investment by local investors in the issuer or listed company. The shares to be reserved should be the percentage of the ordinary shares already listed on the securities exchange. A listed company would have to immediately report to the NSE all transactions that would result in the percentage of ordinary shares held by foreign and east African investors reaching 70% or more.

When the acquisition of shares in a listed company results in the purchaser acquiring effective control of the company, the purchaser must comply with the Capital Markets (Takeovers and Mergers) Regulations 2002, which set out the procedure to be followed in the case of such acquisitions. These regulations set out in detail the various thresholds for acquiring effective control. Procedures for applying for an exemption from these regulations is also prescribed.

Competition legislation in Kenya is contained in the Restrictive Trade Practices Monopolies and Price Control Act, which attempts to control monopolies and takeovers. Any transaction that results in a takeover or merger requires the consent of the minister of finance.

Corporate and commercial

Recommended firms

Tier 1

Kaplan & Stratton

Tier 2

Anjarwalla & Khanna Advocates

Daly & Figgis

Hamilton Harrison & Mathews

Tier 3

Iseme Kamau & Maema Advocates

Walker Kontos Advocates

Tier 4

Oraro & Company

Kaplan & Stratton

“They have a good depth, a good number of experts and they have a greater capacity for work.” On the strength of such accolades, and after another good year, Kaplan & Stratton remains alone in the top tier, despite being given “a good run for their money by other firms”. Rival practitioners highlight the strength in the firm’s expertise and say that “it is their capacity that leaves them unrivalled”. Peers also note that the practice is consistently seen on the large transactions during a troubled period of economic hardship and political unrest.

From among the team, Oliver Fowler was mentioned most frequently as a leading lawyer by commentators, one rival acknowledging that he is “very well respected in the commercial field” and another stating that “his experience comes in handy when you are negotiating with him”. Clients and peers also picked out Richard Harney as a leading lawyer.

For M&A work in particular the practice remains “largely unchallenged” according to market observers. Among the litany of deals, Kaplan & Stratton acted as Kenyan counsel to the Fairmont Hotel group on the acquisition of Lonrho Hotels, and advised the Commercial Bank of Africa on its purchase of First American Bank of Kenya, the jurisdiction’s largest indigenous bank takeover to date. In a further standout transaction, Kaplan & Stratton took the helm as the firm was instructed to advise a large manufacturing company on a possible investment in Ethiopia through the government privatization programme.

Clients previously advised by the firm include Crédit Agricole Indousuez, East African Breweries, Diageo, Kenya Airways, Xerox and Nation Media Group.

Leading lawyers

Oliver Fowler
Richard Harney

Key contact partner

Richard Harney

Anjarwalla & Khanna Advocates

One peer noted that “Anjarwalla has the expertise that would match Kaplan & Stratton”. According to general consensus among peers and clients, though, Anjarwalla & Khanna Advocates remains slightly shy of the capacity of the top tier this year. This “up-and-coming firm” includes the “fine lawyers” Atiq Anjarwalla and Karim Ajarwalla, and as mentioned above, it is one of the firms giving Kaplan & Stratton a good run for its money.

Holding the mantle of being Kenya’s only regional firm, with offices both in Nairobi and Mombasa, the “well-known” Anjarwalla & Khanna has generated considerable business emanating from outside Kenya in the past 12 months. In fact, *IFLR1000* respondents noted that one of the significant developments in Kenya over the past year has been the advent of clients using Kenyan firms for central and east African transactions. Rand Merchant Bank was one such client, which turned to Anjarwalla for advice on a \$14 million revolving letter of credit and loan facility for the financing of oil products.

Anjarwalla also landed a role advising Standard Chartered Bank as mandated lead arranger in connection with a secured syndicated term and revolving Kenya shilling and US dollar loan facility to Safaricom. This \$150 million financing marked one of the largest financings in Kenya’s history for a loan to a private company.

The mergers and acquisitions arena, meanwhile, saw the firm acting for East African Cables, a company listed on the Nairobi stock exchange, on its acquisition of a majority stake in a manufacturing company in Tanzania. At the time of writing, Anjarwalla was also acting for the target Carbacid Investments in connection with a takeover by British Oxygen Corporation on a cash and share basis.

Anjarwalla also boasts considerable project finance credentials, which over the past year were in evidence in its instruction to advise Grain Bulk Handlers in connection with a \$12 million project financing with Proparco and lenders Standard Chartered Bank.

Leading lawyers

Atiq Anjarwalla
Karim Anjarwalla

Key contact partners

Karim Anjarwalla
Sonjal Sejal

Daly & Figgis

Established in 1899, 20-lawyer firm Daly & Figgis continues to be at the forefront of commercial activity in Kenya. This well-respected practice is led by Hamish Keith, described by one rival practitioner as “one of the best lawyers in the country”.

In one of the headline-grabbing deals of the year, Daly & Figgis advised Safaricom and Vodafone Kenya in relation to a \$163 million term and revolving finance loan, which represented the largest such transaction in Kenyan history. The firm also guided Woodside Kenya on all regulatory aspects of the establishment of the Kenyan branch of Woodside Energy to carry out its offshore oil prospecting activities. In a further corporate transaction, Daly & Figgis advised both the purchaser and the target on Excel’s acquisition of Tibbet & Britten.

The capital markets arena saw the Nairobi practice assist Scangroup on the subscription of up to 9 million new ordinary shares and offer for sale of up to 60 million fully paid and issued ordinary shares, while an insolvency mandate saw Keith and Zul Alibhai handle the winding-up of Supreme Furnishers’ Kenyan subsidiary.

At the time of writing the firm was working alongside Simmons & Simmons’ Italian office to advise a syndicate of Italian banks on a facility provided by it to the Ventaglio Group. Other clients that the firm has assisted recently include the Lafarge Group, the British Oxygen Group, the International Financial Corporation, SCAS-Delmas Vieljeux and Pfizer.

Leading lawyer

Hamish Keith

Key contact partner

Hamish Keith

Hamilton Harrison & Mathews

Another long-standing player in the market, Hamilton Harrison & Mathews has had a successful year in the corporate and commercial sphere, and this has not gone unnoticed by market commentators. According to one rival practitioner “they have picked up some good deals”. The “young and aggressive” Paras Shah was commended by contemporaries, with Richard Omwela cited as a leading lawyer in Kenya.

Over the past 12 months, capital markets work has been a particularly fertile area for the firm. On the equity side in particular, there have been significant developments, with three initial public offerings (IPOs) launched after the government’s authorization of tax breaks for companies going public. Partners Richard Omwela, Paras Shah and Hannah Gitonga oversaw the IPO in Kenya Electricity Generating Company (Kengen). The deal, worth \$140 million, saw Hamilton Harrison & Mathews advise on the country’s largest-ever IPO, in which the Kenyan government sold 30% of its shares in the largest generation company in Kenya by way of an offer on the Nairobi stock exchange.

In a unique transaction for east and central Africa, the firm advised Sheltam Rail and the Rift Valley Railways consortium, after they were granted the 25-year concession of Kenya and Uganda railways, on concession documentation, project finance and corporate advice. The deal was worth \$125 million.

Other notable clients to have benefited from the firm’s expertise include Standard Chartered Bank Kenya, PricewaterhouseCoopers, the Kenyan government, Giro Commercial Bank, Kenya Shell, Coca-Cola East Africa and the World Bank.

Leading lawyers

Richard Omwela
Paras Shah

Key contact partners

Richard Omwela
Paras Shah

Iseme Kamau & Maema Advocates

Another of the veteran players in the Kenyan market, Iseme Kamau & Maema is recognised as being a “good firm” when it comes to corporate dealings. Although not quite as visible on the market’s big-ticket transactions as some of its rivals the firm picks up its fair share of work, and market commentators were forthcoming in their praise for the practice. The focus of the firm continues to be in the areas of bank lending, project finance, mergers and acquisitions and insolvency.

At the time of writing the firm was acting for Barclays Bank Kenya in relation to the preparation of security documentation in respect of banking facilities granted to one of its corporate clients for the development of a multipurpose shopping complex. Iseme Kamau & Maema has also been advising ICICI Bank – the largest private bank in India – on setting up a representative office in Kenya worth \$48 million. It has also provided advice to the Capital Markets Authority in relation to the proposed Capital Market (Registered Venture Capital Companies) Regulations, and teamed up with South African firm Sonnenberg Hoffmann Galombik to advise a multinational bank on the tax implications of introducing new systems in its operations.

Other deals have seen the firm advise Kenya Commercial Bank on the \$6 million financing of a project to set up a new hospital in Nairobi, and assisting Pillar Amusement Parks in relation to the \$15 million acquisition of shares in a company owning a large tract of land in Nairobi for the purpose of constructing 700 town houses. Hewlett Packard East Africa also called on Iseme Kamau’s services when setting up a regional office through the

acquisition of a local business, and Aloha selected the firm when it required advice on setting up a company for the purposes of acquiring three restaurant businesses in Nairobi.

Among the firm’s bank lending highlights, in September 2005 it advised Kenya Commercial Bank on the preparation of security documentation in respect of banking facilities granted to a local flower farming company, and advised Investments & Mortgages Bank and Fina Bank on two facilities to corporates seeking to acquire land in Kenya.

Leading lawyer

James Kamau

Key contact partner

James Kamau

Walker Kontos Advocates

IFLR1000 respondents showed considerable respect for Walker Kontos advocates, believing them to have the capacity and indeed the expertise to handle a number of deals, as well as – most importantly – complex transactions. Rivals picked out Alexandra Kontos as “one of the best lawyers in the country” and Michael Kontos as being “very good and pleasant to deal with,” adding top-end expertise to a deep team of strong lawyers.

Among the year’s highlights, the firm acted as Kenya counsel in connection with a \$54 million syndicated loan to an international and multinational group of companies, represented the lenders in the granting of a \$12.5 million syndicated project finance to a large grain handling facility in Kenya, and advised on the restructuring of a Kenyan bank to allow for regional acquisition.

Noted for its work in the banking arena, Walker Kontos is also “highly respected in the M&A field”. Closing in October 2005, the firm acted for the State Bank of India in relation to the acquisition of a majority interest in Giro Commercial Bank. And at the time of writing, the firm was also guiding an international investor through the \$15 million acquisition of a major retail chain. In other work, the practice acted for Celtel Kenya in relation to the issue of \$85 million-worth of secured medium-term notes for listing on the Nairobi Stock Exchange.

Walker Kontos is part of the Africa Legal Alliance with Deneys Reitz (South Africa), an alliance for cooperation in transactions involving relevant African jurisdictions.

Leading lawyers

Alexandra Kontos
Michael Kontos
Peter Mwangi

Key contact partners

Alexandra Kontos
Michael Kontos
Collins Namachanja

Oraro & Company

Although recognised more for doing commercial litigation work, Oraro & Company wins its debut appearance in the *IFLR1000* rankings after a healthy deal roster and positive recommendations from the market. Interviewees described the firm as being “very good,” and name partner George Oraro is cited as “one of the best lawyers in the country”.

While most of the Oraro & Company’s instructions, and their details, are confidential, we are able to report that the firm has been especially active in finance work, where it is usually found acting for lending banks. Among the highlights, George Oraro provides regular structured finance and securitization advice to Barclays Bank Kenya, Standard Chartered Bank and

Diamond Trust Bank Kenya, while Pamela Ager acts in the same capacity for Commercial Bank Kenya.

Oraro and Ager teamed up, meanwhile, to advise Diamond Trust and Kenya Commercial Bank in relation to intended rights issues, and the capital markets practice also receives frequent instructions from the Capital Markets Authority and the Nairobi Stock Exchange.

Leading lawyer

George Oraro

Key contact partners

Pamella Ager

George Oraro

John Ougo