

Kenya

Chamber of commerce:

Ufanisi House
Haile Selassie Avenue
PO Box 47024
Nairobi
Kenya

Tel: +254 2 220866

Fax: +254 2 340664

Email: kncci@arcc permanent.org

Professional body:

The Law Society of Kenya
PO Box 77219
Parliament Road
Nairobi
Kenya

Tel: +254 2 255 558

Fax: +254 2 445 793

Website: www.lawafrica.com/Lsk/



Recent changes in Kenyan corporate finance legislation

Hamish Keith and Paul Muthaura
Daly & Figgis Advocates
Nairobi

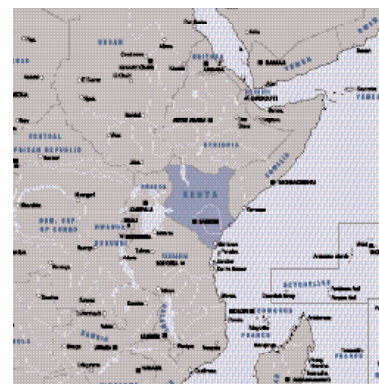
The statutory provisions governing corporate finance and securities transactions underwent their last substantial change in mid-2002, and have for the most part remained relatively unchanged in 2003 and early 2004. Those 2002 amendments sought to refine, clarify and fill in the existing capital markets rules and regulations, and were promulgated in close succession to one another by the Capital Markets Authority (the Authority) pursuant to its mandate under section 12 of the Capital Markets Act (the CMA). In chronological order, the relevant new regulations were:

- Legal Notice 60 of 2002, Capital Markets (Securities)(Public Offers, Listing and Disclosure) Regulations 2002, dated May 3 2002;
- Legal Notice 125 of 2002, Licensing Requirements (General) Regulations 2002, dated July 19 2002 (which also reviewed the relevant fees chargeable for various industry licenses and the issue of certain capital markets instruments);
- Legal Notice 126 of 2002, Takeovers and Mergers Regulations 2002, also dated July 19 2002; and
- Legal Notice 134 of 2002, Foreign Investors Regulations 2002, dated August 2 2002.

Sections 47 and 376 of the Companies Act (the CA) – relating respectively to Kenyan companies and foreign companies – requiring any prospectus relating to the issue of shares or debentures to the public to be in compliance with the disclosure provisions under the CA, continue unchanged. Section 30(A)(1) of the CMA imposes a similar prohibition on the issue of securities to the public (or a section of the public) without the Authority's approval of the relevant information memorandum. These requirements were subsequently reiterated under the new 2002 regulations both by regulation 56 of the Capital Markets (Licensing Requirements)(General) Regulations 2002 and regulation 9 of the Foreign Investors Regulations 2002, casting an even wider regulatory net over the issue and marketing of securities to the public in Kenya.

Given that there did not exist under the CA, CMA or any other primary legislation a definition of what constituted an offer to the public, carrying over these prohibitions into the new 2002 regulations required a clearer definition as to what constitutes an offer to the public. Therefore, in a move which has raised questions as to the validity of the Authority making law through subsidiary legislation, the Authority has, in pursuance of its power to formulate rules, regulations and guidelines, purported to provide definitions of both offers to the public and private offers.

Under regulation 5 of the Capital Markets (Securities)(Public Offers, Listing and Disclosure) Regulations 2002, an offer to the public is where, to the extent that the offer is made to persons in Kenya, it is made to the public and furthermore, an offer which is



made to a section of the public – whether selected as members or debenture holders of a body corporate, or as clients of the person making the offer, or in any other manner – is to be regarded as made to the public.

Regulation 21(1) of the Public Offer Regulations stipulates that an offer of securities shall be regarded as a private offer, and accordingly shall be deemed not to be an offer to the public in Kenya if:

- the securities are offered to not more than 100 persons;
- the securities are offered to the members of a club or association (whether or not incorporated) and those members can reasonably be regarded as having a common interest with each other and with the club or association and in what is to be done with the proceeds of the offer;
- the securities are offered to a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer;
- the securities are offered in connection with a bona fide invitation to enter into an underwriting agreement with respect to them;
- the securities are of a private company and are offered by that company to: (a) members or employees of the company; (b) members of the families of any such members or employees; or (c) a restricted circle of persons whom the offeror reasonably believes to be sufficiently knowledgeable to understand the risks involved in accepting the offer;
- the minimum subscription for securities per applicant is not less than KSh100,000 (\$1,291);
- the securities result from the conversion of convertible securities, and a prospectus relating to the convertible securities was approved by the Authority and published in accordance with these regulations;
- the securities of a listed company are offered in connection with a takeover scheme approved by the Authority; or
- the securities are not freely transferable.

Elsewhere, the Takeovers and Mergers Regulations 2002 now provide a clearer regime governing the acquisition of effective control and the merger of listed public companies. These regulations are triggered by the acquisition of shares of a listed public company that, together with any shares already held (including those held by associated and related companies), would result in control of the exercise of 25% of the votes attached to the ordinary shares of a listed public company. These regulations are quite separate from the provisions of the Restrictive Trade Practices, Monopolies and Price Control Act, which, as per section 27, is directed at regulating: (i) mergers between two or more independent enterprises engaged in manufacturing or distributing substantially similar commodities, or engaged in supplying substantially similar services; or (ii) takeovers of one or more such enterprises by another such enterprise, or by a person who controls another such enterprise.

The Foreign Investors Regulations 2002, in addition to the prohibition under regulation 9 detailed above, also provides clear guidelines on the quantum of foreign investor participation in locally listed public companies.

All the above regulations must be carefully considered in structuring any corporate finance initiatives in Kenya. It is hoped that, with the government's policy on promoting inward investment, these hard and fast rules will give way to a more flexible regulatory regime. This will allow for the merits of a transaction to be judged on a case-by-case basis, thereby reducing the attendant expenses and stifling regulation governing corporate finance activity.

Corporate and commercial

Recommended firms

Kaplan & Stratton

Anjarwalla & Khanna Advocates

Daly & Figgis Advocates

Walker Kontos Advocates

Hamilton Harrison & Mathews

Kaplan & Stratton

Described by some competitors as “the biggest firm in Kenya” and “the firm I respect most,” Kaplan & Stratton is without doubt the market leader for financial law in Kenya. With 14 partners and eight associates, the firm forms part of both Lex Mundi and Lex Africa, the international legal frameworks. The firm has recently added to its fee-earning potential, hiring associates Leila Macharia and Njomo Kamau.

Oliver Fowler heads the firm's corporate and commercial drive. Fowler is an enormously respected individual, described to our researchers as “extremely clever” and “well regarded and technically extremely good”. Despite recent downturns in the overall volume of business, Kaplan & Stratton has managed to stay busy with advice on various matters to, among others, Barclays Bank of Kenya, Citibank and CFC Bank. As well as these, the firm has also provided advice to East African Breweries Limited/Diageo, Bayer/Aventis, the Unga Group and Kenya Airways.

Key contact

Richard Harney

Leading lawyer

Oliver Fowler

Anjarwalla & Khanna Advocates

Atiq Anjarwalla is recommended as a fine lawyer at this firm, which maintains offices in both Nairobi and Mombasa. Anjarwalla & Khanna Advocates is one of Kenya's largest law firms and achieved this distinction

through a 2001 merger. This size advantage permits the firm to engage with bigger clients in a way that smaller law firms may not be able to. It provides a comprehensive range of financial law services.

Leading lawyer

Atiq Anjarwalla

Daly & Figgis Advocates

Daly & Figgis Advocates employs six partners and 10 associates. Hamish Keith is recommended, particularly for his capital markets work. Despite the generally acknowledged slowdown in the market, Daly & Figgis has managed to maintain a good client, list which sports internationally recognized names such as Vodafone and Coca-Cola. The firm has also provided advice to Lafarge Group Cement Division, NIC Bank, Safaricom, the Aga Khan Fund for Economic Development and the International Finance Corporation, Nairobi.

Partners in the firm have been involved in a slew of deals. Among others, they have acted in the floatation and rights issues of Barclay's Bank of Kenya, the Air Kenya initial public offering, the first Kenyan IPO and Nairobi Stock Exchange listing of a London Stock Exchange listed company, as well as various mergers, paper issues, acquisitions and divestitures.

Key contact partner

Hamish Keith

Leading lawyer

Hamish Keith

Walker Kontos Advocates

Michael Kontos is one of five partners at Walker Kontos Advocates, and is described as a lawyer who maintains a "good commercial mind without compromising on quality". Kontos also employs four associates at this firm which is regarded as being in the ascendant.

A high standard of capital markets work has earned the firm an impressive client list, which includes Mabati Rolling Mills, Stanbic Bank Kenya, Total Kenya and Barclays Bank of Kenya. The firm also recently advised a consortium of banks, including the Standard Chartered Bank, in connection with a \$13 million bond issue by Mabati Rolling Mills. It has also advised Total Kenya on a \$17 million rights issue and acted for Stanbic Bank Kenya and Barclays Bank of Kenya on a \$52 million bond issue.

Other clients advised by the firm include Royal Insurance Company of East Africa, PricewaterhouseCoopers, ABN AMRO, Siemens Communications, Kencell Communications and NIC Bank. The firm also advised I&M Bank in connection with \$9 million-worth of loans granted by Proparco (a subsidiary of AFD) for projects in Kenya. The firm conducts business in English, French, Greek and Italian.

Key contact partners

Michael Kontos
Alexandra Kontos
Peter Mwangi
Collins Namachanja

Leading lawyer

Michael Kontos

Hamilton Harrison & Mathews

With three partners joining the practice in the last year, Hamilton Harrison & Mathews has been aiming to bolster its corporate commercial department, especially for project finance work, capital markets work and privatizations. These arrivals bring the count of attorneys up to nine partners and seven associates. As well as this, the firm employs some 80 support staff. The corporate commercial practice is headed by Richard Omwela, a lawyer described as the "commercial man" by a competitor. Despite the market slowdown, Omwela continues to advise on paper issues, privatizations and potential initial public offerings.

Recent clients include Standard Chartered Bank Kenya Ltd, a firm that Hamilton Harrison advised during the recent \$6 million financing of Mt Elgo Orchards. The firm also advised Standard Chartered during a securitization involving the Kenya Pipeline Corporation. Other clients of the firm include the Commercial Bank of Africa, Giro Commercial Bank and Stanbic Bank Kenya.

Key contact partners

Hannah Gitonga
Richard Omwela
Paras V Shah

Leading lawyer

Richard Omwela