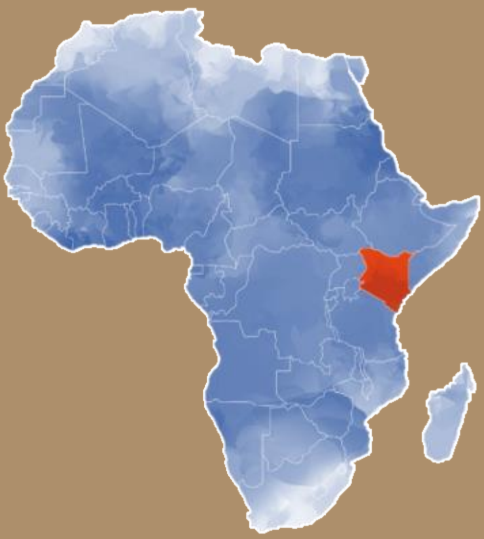
GHR RECHTSANWÄLTE

GHR ***beyond*** - Africa Edition

1st Issue - December 2022

Kenya

GHR beyond is our informative newsletter on intercontinental topics. In the Africa Edition, we provide concise information once a quarter on important key figures of a destination country in Africa and what entrepreneurs should consider from here to there and from there to here. In this edition we want to put the flashlight on Kenya.



Contents

Overview

In 2021, Switzerland imported a total of about 13,500 tonnes of goods from Kenya with a total value of about CHF 95 million, while exports to Kenya amounted to about 870 tonnes and a total value of about CHF 99 million.

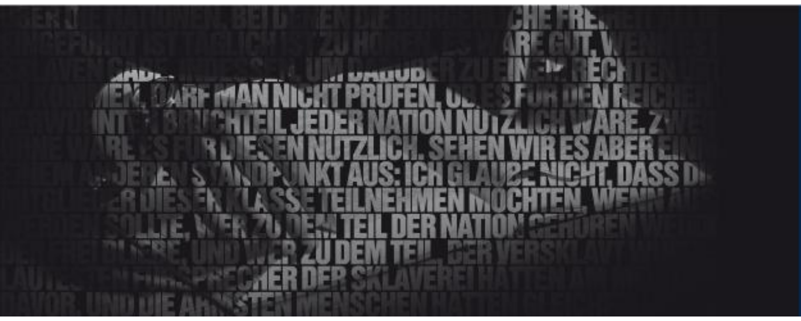
Major import goods from Kenya are flowers (approx. CHF 33 million), coffee, tea and spices (approx. CHF 40 million), other plant-based foodstuffs (approx. CHF 5 million) and precious stones and metals (approx. CHF 11 million). Major exports to Kenya are pharmaceuticals (approx. CHF 59 million), fertilizers and other chemical products (approx. CHF 6 million), machinery and other instruments (approx. CHF 12 million).

About 800 Swiss nationals live in Kenya, while about 1,400 Kenyan nationals live in Switzerland.

Kenya plays an important role in the political stability of East Africa. It is the leading economy in East Africa. Due to its economic potential, Kenya is one of the "African lioness states" in the Swiss Federal Council's Sub-Saharan Strategy 2021-2024.

Although Kenya's economy has diversified, around 75% of the population still works in agriculture. The expansion of digital services (IT services) is a particular focus of support - Kenya has ambitions to position itself as a regional digital hub for East Africa.

A double taxation agreement between Switzerland and Kenya is currently being negotiated - the date of a possible entry into force is not known. There is also currently no investment protection agreement.



To Kenya from Switzerland

Kenya offers many opportunities for Swiss SMEs that would like to become active in Kenya or are already active there. However, it should not be forgotten that Kenya has a different legal system, which is only comparable with that of Switzerland to a limited extent. In the following, we will address some key issues under Kenyan law that Swiss companies should definitely take a closer look at.

Foreign Direct Investment

Kenya welcomes foreign investment but does not have a wide-ranging suite of special incentives for investors from abroad. The limited incentives that are available are through special export-led schemes.

Foreign investment is actively encouraged in all sectors of the economy. However, there are certain ownership and control restrictions, and authorisations that are applicable in specific sectors, including banking, insurance, mining, telecommunications and market intermediaries such as brokers, fund managers and investment banks.

Taxes

Income is taxed in Kenya if it is accrued in or is derived from Kenya, irrespective of the tax-residence of the business vehicle. Income earned outside Kenya may also be taxable in Kenya in the case of employment income earned outside Kenya by a Kenyan resident individual and in the case of business income where a Kenyan resident person carries on their business partly in Kenya and partly outside Kenya.

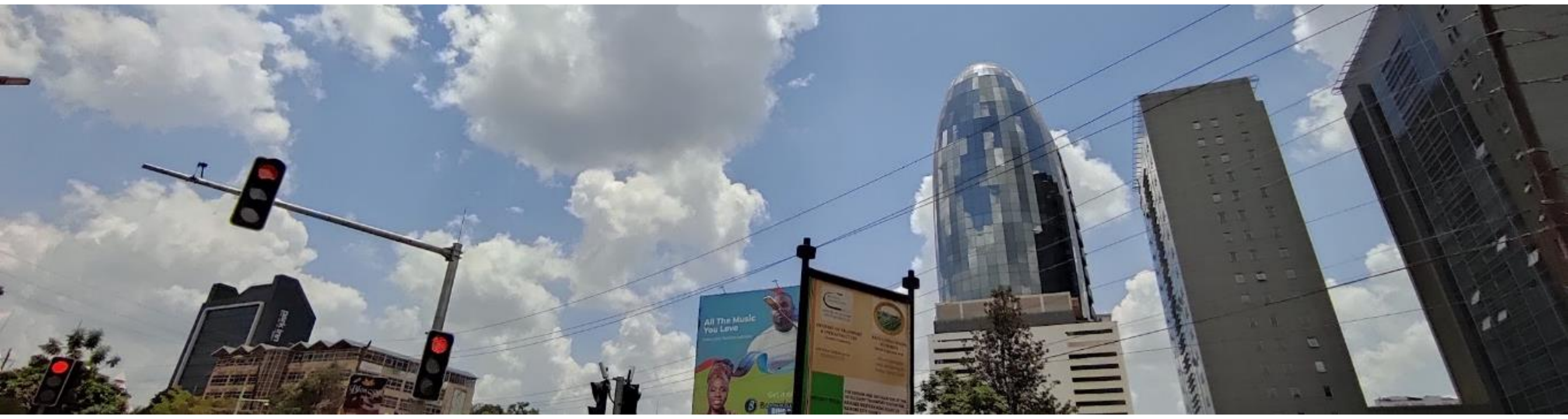
A company that is tax-resident in Kenya is taxed on its business profits at 30%, while a company which is not tax-resident in Kenya but has a permanent establishment in Kenya is taxed on its profits at the rate of 37.5%.

Withholding tax (WHT) is applied to a wide range of payments made to both residents and non-residents such as management, technical or professional fees; royalties; consultancy and agency fees; and insurance and reinsurance premiums paid to non-resident (excluding premiums with respect to aviation insurance). The WHT rate on payment of dividends to non-residents is 15% (and 5% for Kenya residents) and on payment of qualifying interest is 15%. Other withholding taxes apply on management fees, royalties and other service payments to non-residents.

The Value Added Tax Act, 2013 imposes VAT on various supplies of goods and services in Kenya including business carried out over the internet or an electronic network including through a digital marketplace. The 2022 amendment of the Value Added Tax Act, as entered into force on 1 July 2022, additionally caused a change of VAT treatment of exported services from exempt to standard rated (16%), save for the exportation of taxable services in respect of business process outsourcing, which is now zero rated.

Land

Restrictions are applicable to companies holding (by lease or purchase) agricultural land. More importantly, a company that has an ultimate beneficial owner shareholder that is not a Kenyan citizen may not acquire agricultural land (unless a specific presidential exemption



is granted). Security can be taken over land by way of deposit of title deeds with the secured party or a charge.

Charges on land must be in a prescribed form. Third-party consent may be required prior to creation of the charge in certain cases, such as charges over leasehold property or agricultural land. A charge must be registered at the applicable Lands Registry and is only effective upon registration. The charge over land must also be registered at the Companies Registry if the chargor is a company registered in Kenya. Charges created by a foreign company with a place of business in Kenya and over assets situated in Kenya, must be registered at the Companies Registry within 21 days.

> ***The main consideration of the Department of Immigration in issuing work permits is whether the presence of the foreigner will be of benefit to Kenya.***

Relocation

Foreign employees must obtain work permits before starting work in Kenya. Immigration laws in Kenya make it obligatory for an employer to obtain the appropriate work permit (or special pass) on behalf of each foreign national intending to work in the country.

Under the Immigration Act, 2011, any person who employs a foreign national in a capacity in which the foreign national is not authorised to be employed commits an offence. The main consideration in issuing work permits is whether the presence of the foreigner will be of benefit to Kenya. In 2019, the Department of Immigration introduced a national policy which seeks to reserve Kenyan jobs for Kenyan nationals to ensure that the economy of Kenya should be manned by trained and competent citizens.

Recognition of Foreign Law

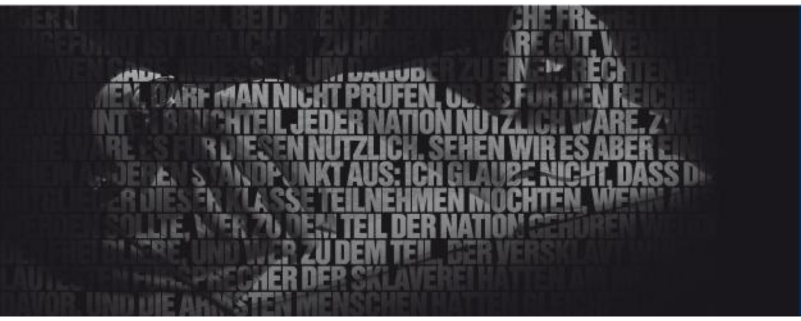
Contracts made under foreign law are recognised and are enforceable in Kenya. Foreign judgments are enforceable under the principle of reciprocity. To be enforceable, the foreign judgment must originate from a country with which Kenya has a reciprocal recognition agreement (such agreement has though not be concluded between Kenya and Switzerland). The recognition of foreign judgments is not automatic and is only accepted on a case-by-case basis upon consideration by the High Court. The New York Convention is applicable to the recognition of international arbitration awards, including grounds for the refusal to recognise and enforce such awards.

Enforcement

The terms of the security document will typically set out the enforcement procedure when a debenture or charge is used to create a security interest. For charges relating to land, a chargee may take several enforcement actions such as suing for the amount due, appointing a receiver of the income from the property, lease the land, take possession of the land; or sell the land by private contract or public auction,

Various insolvency processes such as administration and company voluntary arrangements are similarly available in respect of companies in financial distress.

In Kenya, the most common form for dispute resolution is litigation through the judicial system. The High Court of Kenya has unlimited original jurisdiction to hear and determine all civil matters including all commercial disputes.



To Switzerland from Kenya

Switzerland, as a guarantor of stability and with a small but comparatively prosperous market, offers an attractive location for foreign companies to establish their operations in Europe. In the following, we will address some key issues under Swiss law that Kenyan companies should definitely take a closer look at. In this issue, we focus on tax issues that arise for a Kenyan-owned company in Switzerland, as well as on Swiss residence and work permits for Kenyan nationals.

Foreign Direct Investments

Switzerland welcomes foreign investors and currently does not impose any restrictions on foreign direct investment. Kenyan companies can establish or take over a company in Switzerland.

Companies limited by shares (Ltd.) or limited liability companies (LLC) are suitable for a foundation or takeover, as they allow (indirect) control by the owner. The Swiss limited liability company is capital-based and represents a widespread type of company. The limited liability company can, but does not have to be, personalised and is a widespread type of company for smaller enterprises, unless a Swiss LLC is preferred to a Swiss Ltd. for reasons of foreign tax law. The minimum capital of a GmbH is CHF 20,000, while an AG must have a minimum capital of CHF 100,000, of which at least 50% must be paid in.

Corporate Taxes in General

Legal entities whose registered office or actual administration is in Switzerland are subject to unlimited tax liability in Switzerland. Legal entities whose registered office is abroad but which have certain economic connections in Switzerland (e.g. capital, sources of income) are subject to limited tax liability.

Taxes are levied at the federal, cantonal and communal levels. Federal taxes are regulated uniformly throughout Switzerland. In contrast, each of the 26 cantons has its own tax law. Accordingly, significant differences in the tax burden are possible depending on the place of residence or registered office of the company (e.g. profit tax between 11.7-21.6% depending on the registered office of the company).

In addition to the direct taxes mentioned above, the Swiss tax system also has indirect taxes. The most important indirect tax is VAT, which currently amounts to 7.7%. It is only levied on domestic services and imports, but not on exports (goods or services).

About Withholding Tax in Particular and the Obstacle of Having no Double Taxation Agreement

The withholding tax is a tax levied by the Confederation at source on the income from movable capital assets. Designed as a safeguard tax, the withholding tax is intended to induce the recipient of the taxable performance to declare the income generated and to be charged with the tax.

The purpose of the tax also justifies the amount of the withholding tax - 35% of the movable capital income.

The main case of application of the withholding tax is dividend income. In addition, withholding tax is levied on winnings from money games, certain insurance benefits and interest from bonds. No tax is levied on interest from individual loans, guarantees or sureties.

If withholding taxes are duly declared, they are generally refunded to residents. However, a refund to foreign recipients of services is only possible if a double taxation agreement ("**DTA**") exists between Switzerland and the respective country of residence and provides for a full or partial refund. Double taxation agreements avoid double taxation of both individuals and legal entities with international connections by allocating the right of taxation to one state.

It is to be hoped that as the economic links between the countries grow, a DTA between Switzerland and Kenya will also be concluded.

There is currently no DTA between Switzerland and Kenya. Therefore, for example, withholding taxes cannot be reclaimed in whole or in part from Kenyan parent companies or owners resident in Kenya. It is to be hoped that as the economic links between the countries grow, a DTA will also be concluded, since in the current context for a Kenyan parent company the withholding tax does not represent a safeguard tax due to the lack of reclaimability, but a final tax. The resulting overall tax burden makes Swiss companies held directly by persons domiciled or resident in Kenya economically unattractive. The establishment of an activity structure of a Kenyan company therefore also requires careful planning and preparation from a tax perspective.

Relocation of Kenyan Nationals with Gainful Activity

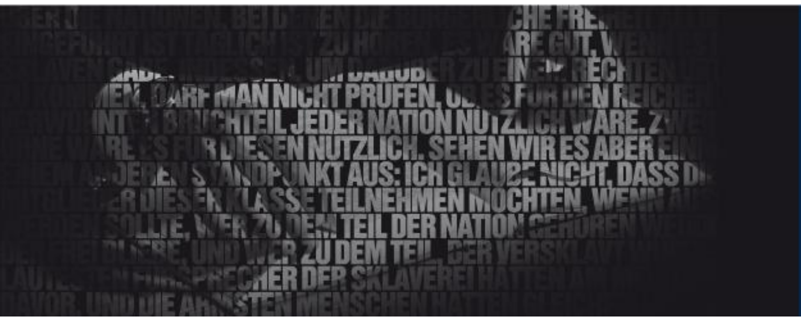
Residence in Switzerland requires a residence permit if it lasts longer than three months. If the stay in Switzerland is combined with gainful employment, a work permit is also required. For certain nationals, private individuals and activities, however, the permit requirement already applies upon entry or commencement of the activity.

In any case, residence in Switzerland requires the transfer of the centre of life to Switzerland.

Kenyan nationals are considered third-country nationals outside the EU/EFTA. The admission of Kenyan nationals for gainful <u>employment</u> is a purely elite immigration. Only managers, specialists and other qualified workers are admitted. Admission is only granted if it is in the interest of the economy as a whole and a corresponding application has been submitted by the future Swiss employer. Further requirements for the granting of a work permit are proof of compliance with the working and salary conditions customary in the sector and in the locality, the residential situation and the possibility of successful integration into the Swiss labour market and social environment. In addition, proof is required that the position in question could not be filled by a Swiss national or a national of an EU/EFTA member state (so-called priority of nationals). If the above requirements are fulfilled, a residence permit with a quota can be applied for.

The taking up of <u>self-employment</u> by a third-country national requires proof of effective self-employment. Furthermore, it must be proven that the financial means from earned income and assets are sufficient to cover the operating and living costs. A detailed business plan must be submitted with the application. The self-employed activity must also be in the interest of the economy as a whole (e.g. creation of jobs), and the self-employed person must fulfil the personal requirements (e.g. integration into the social environment, proof of living situation, etc.). Self-employment is also subject to a quota.

Depending on the initial situation, Kenyan nationals must integrate in Switzerland. The integration criteria include knowledge of a national language at the place of residence or employment. The authorities can oblige the applicant to acquire the relevant language skills during the stay.



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How it is in Practice

Knowing the legal requirements for intercontinental business relations is only one side of the coin. It is at least as important to get involved in local everyday life and to be able to deal with the particularities and customs.

We met Joel Lehmann for an interview and asked him about his impressions. Joel Lehmann is Managing Director of the EQUAM Foundation in Zurich and co-owner of Infospective Research Ltd. in Nairobi.

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May you introduce yourself to our readers?

I am a 43 year old healthcare data and quality specialist, small business owner, family man and lover of philosophy and social psychology (amongst many other things of course).

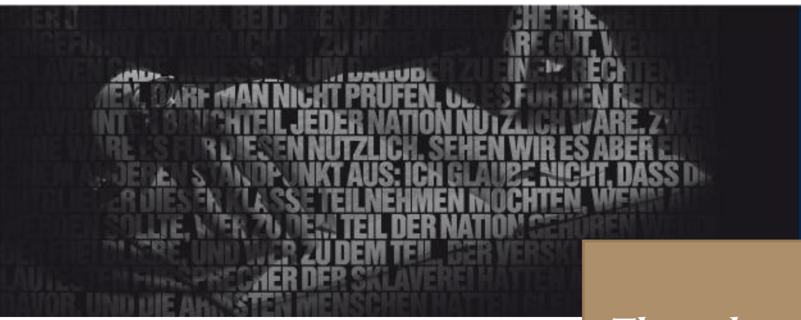
What do you do and how did you come to build the bridge between Switzerland and Kenya?

My main job is as Managing Director of the EQUAM Foundation, a small Swiss non-profit organisation with a big impact, which awards quality certifications in outpatient healthcare - especially for GP practices - in Switzerland. We also support innovations in quality promotion. On a part-time basis, I provide freelance support to healthcare stakeholders in Switzerland on the topic of "patient-reported data" and am involved in Value-Based Healthcare (VBHC).

I lived in Nairobi from 2007-2019. I met my Kenyan wife at the University of Fribourg during my studies, and luckily she convinced me to move to this exciting metropolis immediately after graduation. In 2013 - after working for a large market research company for a few years - I founded the consulting firm Infospective Research Ltd. and continue to support its development and growth. Infospective Research Ltd. is also about the use of data in healthcare and increasingly about the integration of the patient perspective. So far, we have mainly focused on data on the African continent. In the near future we would like to offer our services also for clients in Europe, where we see a need for good quality, yet affordable data analytics and visualization.

What do you particularly like about this activity, where do you see the greatest opportunities?

I like the complexity of the health system and that there is a lot of potential for improvement everywhere - especially for people with a cooperative attitude. The situation in Kenya and in Switzerland is not as different as most people (especially here in Switzerland) think. I particularly like the fact that I can support the philosophy of the VBHC in both countries in parallel and implement it in an explorative way. I see the greatest opportunities in the cross-fertilisation and cross-learning on how to optimally use limited resources and intelligent data analysis for high-quality health care.



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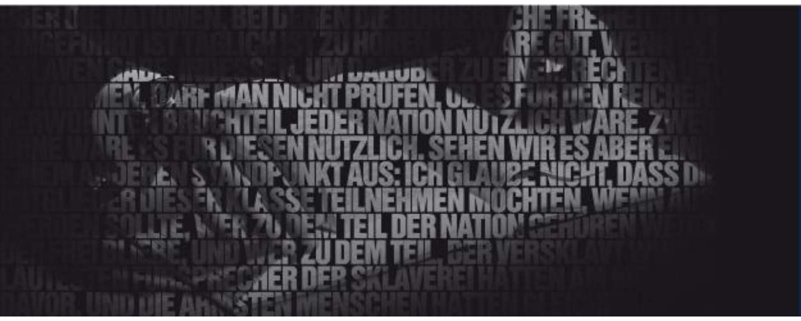
> ***The talent and motivation I experience in both countries is at eye level and offers high combination potential with added value.***
>
> *Joel Lehmann*

Where do you see the biggest challenges and potential for improvement?

We need better cooperation at eye level. In Switzerland, my experience is that "cooperation" with a country on the African continent is understood as "we have to help because we are more developed in Switzerland and can therefore do it better and know better". This understanding is rarely expressed explicitly, but it resonates as an implicit basic assumption in conversations and projects - consciously or unconsciously. This underlying assumption is wrong and an expression of structural racism. The talent and motivation I experience in both countries is at eye level and offers high combination potential with added value. In Switzerland, continuity is perhaps a somewhat more developed asset, while in Kenya, adaptability is better developed.

What do you think is important to bear in mind when doing business between Switzerland and Kenya?

If you work in the field of specialised services - as I do - you will certainly notice the huge difference in wages. In Kenya, you often get very good value for money, especially when it comes to data, for example - a topic that is quite neutral in terms of language. Therefore, I think we will start exporting (remote) services to Switzerland in the near future. In Kenya, however, there are some annoying tax hurdles, such as a withholding tax of 20% on services purchased from abroad or the obligation to levy Kenyan VAT on exported services, which was only introduced in mid-2022 and has made Kenyan services for foreign customers 16% more expensive from one day to the next. Such laws reduce Kenya's attractiveness as a business location for international services. However, I think this will correct itself in one way or another in the future.



Each issue of *GHR beyond* is intercontinental, but also very local. We always prepare content with one of our local partners, with whom we collaborate on legal issues with local relevance. We sincerely thank our partners for this tremendous effort and the opportunity to build intercontinental bridges with local expertise on this side and the other.

This edition of *GHR beyond* - Africa Edition has been produced by the following authors and law firms. Please contact the authors at any time if you have any questions or require further information on a particular topic.

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For content related to Kenyan law

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