LATHAM & WATKINS LLP

Taking Security in Africa

A Comparative Guide for Investors

Kenya

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About This Guide

In light of Africa's sustained economic growth over the last two decades, the continent has become an increasingly attractive destination for investment.

However, to a foreign investor, assessing legal risk requires an understanding of the laws and legal systems particular to the jurisdictions in which the investment is being made. The many different legal systems of the continent's 54 countries and regional blocs can be challenging to navigate. Africa's complex legal systems and the limited information about how those systems apply to foreign investments are often seen as obstacles to investment.

This guide provides an overview of the types of assets over which security can be taken, the different types of security, as well as the related procedures for the perfection and enforcement of such security in Africa. With contributions from leading local law firms, we focus on eight of the most active jurisdictions for foreign direct investment: Egypt, Ethiopia, Ghana, Kenya, Mauritius, Nigeria, South Africa, and Uganda.

This Kenya chapter was prepared with the help of Kenyan firm Anjarwalla & Khanna LLP (ALN Kenya).

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Types of Security Interests

What categories of assets are typically provided as security to lenders in Kenyan financings?

Security can generally be taken over all assets including the below classes of assets:

Shares

Security over shares in a Kenyan company can be taken by way of a charge or deposit of share certificates:

- **Charge:** Security over shares can be taken by way of a fixed or floating charge.
- **Deposit of share certificates:** Where shares have not been dematerialised, security can be taken over such shares by depositing the relevant share certificates together with a blank share transfer form and a memorandum setting out the terms of the deposit and rights of enforcement with the secured party.

Typically, a pledge is used only in the case of certain movable assets and the pledgee (i.e., a lender) retains the possession of the goods until the pledgor (i.e., the borrower) repays the entire debt amount. In case there is default by the borrower, the pledgee has a right to sell the goods in their possession and adjust the proceeds towards the outstanding debt. A pledge is the actual or constructive delivery of possession of an asset by way of security. A pledge may also confer a power of sale. Since a key feature of a pledge is that the creditor takes possession of the asset, a pledge can only be taken over assets which are transferable by delivery of possession. Shares are abstract and hence not capable of a pledge unless they pertain to shares in a listed company (e.g., they also include bearer shares and debt securities).

Bank Accounts

Security over the deposits in a bank account can be taken by way of a fixed or floating charge. An assignment of receivables can also be coupled with security over a bank account when receivables are anticipated to be paid into an account and where they are assigned to the security holder as assignee by the entity entitled to receive such receivables.

Land

Security can be taken over land by way of a formal or informal charge.

- Formal charges are created when the parties enter into a formal charge in the prescribed form under the land laws in Kenya — principally, the Land Act (Cap.280, Laws of Kenya) and Land Registration Act (Cap.300, Laws of Kenya) and the associated regulations. Formal charges require registration and perfection at the relevant Land Registry to take effect as formal charges.
- Informal charges are created in two key ways: (i) when parties enter into a written contract, the effect of which is for the landowner to undertake to charge their property; or (ii) when a document of title or other instrument which evidences ownership is deposited with a secured party. Note that formal charges entered into but which are not perfected or duly registered in accordance with the land laws take effect as informal charges.

Contractual Rights and Receivables / Book Debts

Security can be granted over contractual rights by way of a fixed or floating charge or through a legal or equitable assignment in receivables or book debts. Creation of security in each case is predicated on the condition that there is nothing in the relevant contract that prohibits the granting of such security.

In the case of a legal assignment, notice of the security interest should be given to the counterparty of the underlying contract. The failure to give notice to a counterparty does not invalidate the assignment, but it may affect the priority of the assignment.

Insurance Proceeds

Security over proceeds from an insurance policy can be taken by way of an assignment of the relevant insurance contract. Typically, the chargee/assignee taking the benefit of the security is noted on the insurance policy as a co-insured or first loss payee in case of an insurance payout.

Types of Security Interests

Authorisations and Licences

Security can be taken over authorisations and licences by way of a fixed or floating charge or an assignment, in each case provided that there is nothing in the relevant contract, license, or authorisation that prohibits the granting of such security or assignment thereof.

Many authorisations and licences (such as oil mining licences, mining permits, electricity generation and distribution licences and rights under petroleum agreements) are considered to be personal to the beneficiary or licence holder and therefore will prohibit the holder from assigning, charging or otherwise encumbering such authorisation or licence without the prior consent of the relevant issuing authority..

Intellectual Property

Typically, security is taken over trademarks, copyrights, and other intellectual property by way of a fixed or floating charge.

Tangible Assets

Security in the form of a fixed or floating charge or a pledge may be taken over personal property such as stock. The Movable Property Security Rights Act (Cap.499A, Laws of Kenya) (MPSRA) provides a legal framework for dealing with security rights in movable assets and which are registered at the Collateral Registry.

Securities can also be taken over ships and aircraft. A ship mortgage created by a company is registrable with the Companies Registry and the Kenya Maritime Authority. For an aircraft, the aircraft mortgage is noted on the certificate of registration, which is issued by the Kenya Civil Aviation Authority (KCAA) and may be registered at the International Registry of Mobile Assets (and the Companies Registry, if the chargor is a company registered in Kenya). It is important to note that the MPSRA does not apply to security rights in these assets (i.e., ships or aircraft).

Can security be taken over future assets?

Yes, security can be taken over future assets. Sector restrictions may apply to assets of certain types of companies, such as insurers and statutory corporations. The MPSRA states that a security can be taken over all the borrower's movable assets whether present or future. In the case of future assets, the security right is only created when the grantor acquires title to the asset or the power to encumber the asset and the asset will be charged at this point.

Are there any restrictions on who can legally grant and/or hold a security interest?

Generally, any person with legal title to an asset can grant security over it. Similarly, any person can hold a security interest. However, certain restrictions exist on who can legally grant and/or hold a security interest. The powers of a company or its directors on behalf of the company to borrow or issue security on behalf of the company may be limited by the company's memorandum and articles of association, and in some cases may be limited altogether. Similarly, parent and holding companies can provide collateral and guarantees for loan financing to their subsidiaries, provided that they will derive some commercial benefit for so doing.

Subject to certain exceptions, the Companies Act (Cap.486, Laws of Kenya) prohibits public companies from providing financial assistance for the purpose of, or in connection with, purchasing or subscribing for their own shares or the shares of their holding company if it is a private company limited by shares. This assistance includes the granting of loans, guarantees, or security. The company and any officer who is found guilty of providing unlawful financial assistance is liable to a fine.

Furthermore, companies undergoing formal insolvency face certain prohibitions in that it is only the liquidator and administrator who can create security. Where the property of an insolvent company is already charged, the liquidator or administrator requires the consent of the secured party or court approval to create security over property that is already subject to a fixed charge.

Similarly, where an individual has been declared bankrupt and their property is vested with the bankruptcy trustee, the bankrupt individual cannot create security over their property or enter into any binding contracts. Where any additional security is created over property already charged, the bankruptcy trustee needs approval from the secured party or court approval.

Types of Security Interests

Are security trustees or security agents recognised under Kenyan law? If so, do any steps need to be taken to ensure the enforceability of a security trustee's or a security agent's right in the secured property?

Security trustees and security agents are recognised under Kenyan law, and a trustee or agent may be appointed to hold security for the benefit of lenders and other secured parties. Where a security trustee or security agent is validly appointed, no additional steps are required for the trustee or agent to be recognised under Kenyan law. Provided that the security granted in their favour has been properly perfected, their rights in respect of the relevant security interest are enforceable.

What about third-party security?

Under Kenyan law, a person or entity can generally grant security over its assets to secure the obligations of a third party. For a company, the ability to grant security over its assets to secure the obligations of a third party may be affected by provisions in its memorandum and articles of association and commercial benefit concerns.

On the issue of commercial benefit, directors of a company are under a duty to act in the best interests of the company, and this includes commercially. It is anticipated that each transaction a company enters into generally is for its commercial benefit. Where the companies in a third-party security are related, commercial benefit is considered in the resolutions. The board and shareholder resolutions will capture that the directors and shareholders have considered the third-party security and concluded that it is in the best interest of the creating company. Where the companies are not related, it is usually common to enter into a commercial benefit agreement. Lack of commercial benefit can be used as basis for challenging a transaction or security, hence the significance in ensuring it is catered for.

For a public company or a company connected to a public company, a shareholders' resolution approving the granting of security over the company's assets to secure the obligations of a third party is required.

Perfecting Security Interests and Priority

Are there any asset-specific perfection requirements?

Shares

Registration: For shares that are listed on the Nairobi Securities Exchange and have been dematerialised, security over those shares should be registered in accordance with the provisions of the Central Depositories Act (Cap.485C, Laws of Kenya) by the delivery to the chargee of a prescribed securities pledge form. This requirement is in addition to the normal process of registering the charge at the Companies Registry and the Collateral Registry. The pledgor is required to hand over a duly completed and signed securities pledge form to the Central Depository Agent (the CDA). The CDA will then verify the instructions and signature of the pledgor, and the pledgor will deliver the signed securities pledge form to the pledgee. The pledgee is required to send the securities pledge form to the Central Depository and Settlement Corporation (the CDSC) via a CDA. The CDSC will record the security interest and freeze the relevant shares in the chargor's account. This additional process is not required in respect of a floating charge over listed shares.

In certain instances, the Registrar may issue a letter confirming that the charge is not registrable due to factors including, but not limited to: (i) the prohibition by a court of competent jurisdiction in dealing with the security; and (ii) where there is a duplication in the issuance of the certificate representing the security. In such a case, the company secretary of the chargor should undertake not to allow the chargor to deal with the shares and note the charge in the chargor company's register of members.

Where security is by way of a memorandum of deposit of shares or pledge, the following additional steps are usually taken:

- **Deposit of share certificates:** The terms of the deposit, enforcement rights, and rights to return of the shares upon satisfaction of the underlying debt should be set out in a memorandum of deposit, accompanying the share certificate. The chargor must deliver the relevant share certificates (and accompanying memorandum of deposit) and a signed but undated share transfer form to the chargee. Notice of the deposit of share certificates may be filed at the Collateral Registry created under the MPSRA in order to bind third parties.
- **Power of attorney:** The chargor grants and delivers an irrevocable power of attorney to the chargee, which allows the chargee to legally transfer the secured shares pursuant to the enforcement rights in the memorandum of deposit.
- **Director resignation letters:** Signed and undated letters of resignation from each of the directors of the company are required.
- **Statutory declaration:** The directors' letters of resignation must be accompanied by a declaration confirming that they are resigning voluntarily.
- **Board resolutions:** Certified copies of board of directors' resolutions approving the memorandum of deposit or pledge of shares.

Bank Accounts

In the case of a fixed charge, the secured party takes or retains control over the charged accounts. This prevents the chargor from withdrawing monies from, or otherwise dealing with, the charged accounts without the consent of the chargee. With a floating charge, the chargor is permitted to retain control of the charged accounts unless and until the charge converts into a fixed charge following the occurrence of a specified event as set out in the account charge documents.

For an all asset debenture creating security over bank accounts, unless the debenture contains an express prohibition against the creation of subsequent charges ranking in priority to or equal with the floating charge and the subsequent chargee has notice of the restriction, any later fixed charge created by the borrower, even in favour of a person who has notice of the floating charge, will rank in priority unless the floating charge had crystallised and the later chargee had notice of crystallisation before the later charge was created.

Perfecting Security Interests and Priority

Land

Charge: The charging instrument must be in the prescribed form. Third-party consent may be required prior to creation of such a charge in certain cases, including, for example, charges over matrimonial property, leasehold property, land leased from the Kenya Railways or the Kenya Ports Authority or agricultural land (requires consent from the Land Control Board established under the Land Control Act (Cap. 302, Laws of Kenya)).

A charge over land must be registered at the relevant Lands Registry to take effect as a formal charge. A notice of such charge may be filed at the Collateral Registry to make note of the security over any movables on the land (if the chargor is a company, then such charge must also be registered at the Companies Registry). There is no applicable time limit for registration at the Lands Registry, although formal charges are only effective upon registration, and the priority between charges is determined by the date of registration. Registration will be carried out once the Registrar receives the original copy of the charging instrument duly stamped and endorsed with the requisite stamp duty, the completed prescribed form, and a nominal fee per document and per title.

On 27 April 2021, the Ministry of Lands, in consultation with the National Lands Commission and other stakeholders, established a digital land registration platform called Ardhisasa. Its aim is to put an end to manual land transactions, which were often tedious, time consuming, and prone to corruption.

To effect the transition to the digital platform, the Ministry of Lands has been digitising and harmonising land records for all properties in Kenya. As part of the process, property owners are required to surrender their existing titles in exchange for new titles under the new harmonised system once the titles have been gazetted by the Ministry of Lands for purposes of conversion. Once the conversion process in respect of a title is completed, all processes pertaining to transactions that deal with that land (including the registration of a charge) are done via Ardhisasa. Any party wishing to use the platform is required to create and register an account.

A charge created by a company registered under the Companies Act should also be registered at the Companies Registry. Unlike registration at the Lands Registry, where no time periods apply, a charge must be registered at the Companies Registry within 30 days from the date of its creation. Where the charge has been created outside Kenya, it ought to be registered within 21 days of being received in Kenya. Failure to register the charge within the prescribed period will render the charge void as against any creditor, liquidator, or administrator of the company. If the prescribed time has lapsed, the secured party may seek court approval to register the charge out of time. Typically, the court will require a justification for late registration.

Deposit of title deeds: The grantor of the security interest is required to deposit the relevant title deeds with the secured party. This is done where an informal charge has been created as discussed above.

Contractual Rights and Insurance Proceeds

At common law, notice of a legal assignment usually must be given to the counterparty of the underlying contract. In the case of an assignment of insurance proceeds, this means giving notice to the relevant insurer. Typically, the failure to give notice to a counterparty in a legal assignment does not invalidate the security assignment but makes it an equitable security interest, and priority issues are determined in accordance with the principles of equity.

This position, however, has changed following the enactment of the MPSRA. Once a security interest is registered under the MPSRA, the interest is deemed binding on all third parties who are not parties to the assignment agreement, under the third-party effectiveness concept. Third-party effectiveness is a concept in the MPSRA under which security interests or rights in assets become effective against third parties when a notice of such security interests or rights is lodged at the Collateral Registry, without the need for third parties to be issued with actual notice of such security interests or rights. In our view, the third parties who may otherwise be entitled to notice become bound by the security registered under the MPSRA. The MPSRA is statutory law, and this takes precedence over common law.

Perfecting Security Interests and Priority

Authorisations and Licences

Provided any necessary consent from the relevant issuing authority has been obtained, the assignment can be perfected in the same manner described above. Notably, even if the consent of the relevant issuing authority is not required to create security over the relevant authorisation or license, consent may still be required to effect a transfer of such authorisation or license upon an enforcement.

Intellectual Property

As with other contractual rights, the licensor may be notified of any assignment of rights under an intellectual property license agreement. These securities may require registration under the Companies Act and the MPSRA. An assignment of IP rights may also require registration at the Kenya Industrial Property Institute, which is the regulatory body governing registration of IP rights. It should be noted that, the same analysis as described above applies here with respect to notices and registration under the MPSRA. Once registration is procured under the MPSRA, notice requirements under common law for assignments fall away given the express provisions in the MPSRA on third-party effectiveness.

Personal Property

Charge: The charge must be registered at the Collateral Registry by the chargee filing a notice. There is no time limit within which such a notice may be filed, but priority of enforcement among creditors is determined by the date of registration. The chargee is required to share the registration notice with the grantor within 10 working days after receipt of the registration notice from the registrar. Failure to provide the registration notice within the stipulated timeline may upon conviction attract a fine not exceeding KES 5,000 (less than USD 35). This registration must be renewed every 10 years.

Pledge: No registration is required. However, to perfect the security, the pledgor must deliver possession of the relevant personal property to the pledgee. Possession can be actual or constructive (e.g., where keys to a safety deposit box in a bank are handed over to the pledgee). The pledgor will retain ownership of the personal property and will only regain physical possession once they have discharged their debt obligations. If the pledgor defaults on payment, the pledgee has the contractual right to sell the property to satisfy the debt.

Mortgage: The process of perfecting a mortgage over personal property is the same as that outlined above.

Ships and aircraft: For aircraft, a security interest is noted on the certificate of registration issued by the KCAA and registered at the International Registry of Mobile Assets and the Collateral Registry (and the Companies Registry if the chargor is a company registered in Kenya). For ships and shares in ships, the security interest must be registered under the Merchant Shipping Act at the Kenya Maritime Authority.

What are the fees, costs, and expenses associated with creating and perfecting security in Kenya?

Stamp Duty

Charges over land: Stamp duty is payable at the rate of 0.1% of the amount secured by the principal security document. If the security is supplemental — i.e., it is granted by the same party in favour of the same lender to secure the same facilities as the principal security — then stamp duty is payable at the nominal rate of KES 200 (less than USD 2). If the security is created by a different party other than the one providing the principal security, stamp duty is payable at a rate of 0.05 % of the secured amount.

Charges over movable property: Pursuant to the MPSRA, the Stamp Duty Act (Cap.480, Laws of Kenya) was amended to remove the requirement to stamp security over movable assets (both tangible and intangible). This means that one can now apply to the Collector of Stamp Duty for an exemption from stamp duty for security instruments under the MPSRA.

Assignments and guarantees: Stamp duty is payable at the nominal rate of KES 200 (less than USD 2).

Perfecting Security Interests and Priority

Registration Costs

Lands Registry: The registration fee for charges is KES 500 (about USD 4).

Companies Registry: The registration fee for charges ranges from KES 2,000 (about USD 16) to KES 14,000 (about USD 108), depending on the amount secured by the charge.

Collateral Registry: No charges apply for the registration of securities. The registration is completed online and is instant.

Registry of Ships: The registration fee for a mortgage over ships depends on the gross registered tonnage (GRT) of the ship. For vessels of 50 GRT or more, the registration fee for an initial and only mortgage is USD 350. The registration fee for each additional mortgage is USD 250. The registration fee for a notice of intended mortgage is USD 100.

KCAA: Security instruments over an aircraft are registered with the KCAA, and no registration fee is applicable. However, if the aircraft is owned by a company, then the instrument has to be registered with the company's registry, and payment of registration fee will be as discussed above.

Can security over the same asset be granted to two creditors? If so, how will priority be determined?

A person can grant security over the same asset to two or more creditors.

In the case of security over land, unless otherwise provided under the charge document, priority among creditors is determined by the date of registration. The creditor who is registered first has priority over the other creditors.

In the case of security over other types of assets, priority among creditors is determined either by the date of creation (if both of the competing securities are not registered) or the date of registration (if one or both securities are registered). Importantly, the Insolvency Act (Cap.53, Laws of Kenya) provides that the priority of a floating charge will be determined by security registered first at the Collateral Registry.

Creditors may also enter into a security sharing agreement in which they agree to disregard priority as determined by the date of registration and instead agree to prioritize their securities in the manner provided in the security sharing agreement.

Enforcement of Security

Outside the context of bankruptcy or insolvency proceedings, what steps should a secured party take to enforce its security interest?

Enforcement of a debenture can be by way of receivership or administration. In order for a debenture to be enforced by way of administration, the debenture must be a qualifying floating charge. A qualifying floating charge is a charge that (i) is created over the whole or substantially the whole of the property of the chargor; and (ii) contains provisions empowering the chargee to appoint an administrator. A receiver is appointed under the terms of the debenture and derives their powers from the debenture document that appointed them. As a result, powers of sale, leasing, or other remedial powers are dependent on the terms of the debenture. Once appointed, an administrator derives their powers from the debenture that appointed them.

In the case of a charge over shares, a chargee enforces their security by completing the share transfer form under a power of attorney granted to them by the chargor at the time of perfection to transfer the shares to themselves or a nominee. The chargee must then stamp the share transfer form and notify the Companies Registry of their newly acquired interest in the shares. Finally, the company secretary of the company must register the charge or its nominee in its register of members.

Enforcement of a charge over land is governed by the Land Act and the Land Registration Act. The chargee can commence enforcement proceedings only if the chargor has been in default for a month or more. The chargee must then serve notice upon the chargor to cure the default. If the default has not been remedied within two months (or three months, where there has been a payment default), the chargee may then:

a. sue for the amount due under the charge;

b. appoint a receiver of the income from the charged land;

c. lease the land, or, if the charge is of a lease, sublease the land;

d. take possession of the charged land; or

e. sell the land by private contract or public auction.

However, remedy (a) is not applicable where the land is considered to be customary or community land. The notice to carry out the remedies set out in (b) through (e) is prescribed in the Land Registration General Regulations, 2017. In addition, the chargee is required to make an application to the court for an order to exercise the rights under (d).

If the chargee elects to sell the land by private contract, it must give the chargor 40 days' notice. A sale by auction requires the auctioneer to give the chargor 45 days' notice and to advertise the sale publicly. In either case, the chargee must obtain a "forced sale valuation" of the land. The chargee is under a legal duty to achieve the best price reasonably obtainable at the time of sale. A rebuttable presumption that the chargee is in breach of their duty will arise if the price at which the land is sold is 75% or below the market value.

For a security over ships, the Merchant Shipping Act confers a statutory power of sale which may only be exercised under a certificate of sale issued by the Registrar.

For pledges, it is normal practice, as derived from common law, for a pledge holder to stipulate in the pledge the right of the pledge holder to sell the pledged security upon default of the chargor.

Are any governmental or other consents required in connection with an out-of-court enforcement of security?

Land Control Board consent is required for any lease or sale of agricultural land. Otherwise, no consent is required for out-of-court enforcement of security under Kenyan law.

If a creditor has taken security over land by way of a deposit of title, they must obtain permission from the court prior to possessing or selling the secured land.

Are there any restrictions on who can enforce a security interest over assets located in, or governed by the laws of, Kenya?

There are generally no such restrictions.

Insolvency/Bankruptcy Proceedings

Overview

Insolvency in Kenya is governed by the Insolvency Act (Cap.53, Laws of Kenya) (the Insolvency Act).

This section deals with bankruptcy and insolvency law with an emphasis on incorporated companies. This section does not cover the insolvency of statutory corporations, banks, or insurance companies, which are subject to special insolvency legislation pursuant to the laws that regulate the licensing of such institutions.

The liquidation of a company under the Insolvency Act can be classified in two main categories: voluntary liquidation and involuntary liquidation. In a voluntary liquidation, the process is commenced by the members and/or directors who by resolution decide to wind up the operations of a company. If the company is not solvent, the liquidation is a voluntary liquidation by the creditors. In an involuntary liquidation, the company is liquidated following an application to the court seeking to have it liquidated.

Members' voluntary liquidation: The members of the company in a general meeting shall appoint one or more liquidators for the purpose of liquidating the company's affairs and distributing its assets.

Upon appointment of the liquidator, all powers of the directors cease, except in so far as the company in general meeting or the liquidator sanctions their continuance. Only an insolvency practitioner is eligible for appointment as a liquidator. Insolvency practitioners are persons licensed by the Official Receiver to undertake assignments under the Insolvency Act. To become a licensed insolvency practitioner, one must meet the requirements set out under the Insolvency Act and the Insolvency Regulations, 2016.

As soon as practicable after the liquidation of the company's affairs is complete, the liquidator shall prepare an account of the liquidation showing how such liquidation has been conducted and how the company's property has been disposed of. Within 30 days of preparing the account, the liquidator shall convene a general meeting of the company and a meeting of the creditors. The liquidator shall ensure that the notice for the meeting is published once in the Kenya Gazette, once in at least two newspapers circulating in the company's principal place of business, and on the company's website, and specify the time, date, place, and purpose of the meeting. Within seven days after the meeting, the liquidator shall lodge with the Registrar a copy of the account together with a return giving details of the holding of the meeting and of its date.

Creditors' voluntary liquidation: The creditors and the company may nominate an authorised insolvency practitioner to be liquidator for the purposes of liquidating the company's affairs and distributing its assets.

As soon as practicable after the liquidation of the company's affairs is complete, the liquidator shall prepare an account of the liquidation showing how such liquidation has been conducted and how the company's property has been disposed of. The liquidator shall convene a general meeting of the company by publishing at least 30 days before the meeting an advertisement, once in the Kenya Gazette, once in at least two newspapers, and on the company's website, specifying the time, date, place, and purpose of the meeting. Within seven days after the meeting, the liquidator shall lodge with the Registrar a copy of the account together with a return giving details of the holding of the meeting and of its date.

Liquidation by court: A company may be wound up by petition to court if:

- the company is unable to pay its debts as they fall due;
- a special resolution is passed by the company that it be liquidated by the High Court;
- at the time at which a moratorium for the company ends, any voluntary arrangement does not have effect in relation to the company;
- except in the case of a private company limited by shares or by guarantee, the number of members is below two;
- being a public company that was registered as such on its original incorporation, (i) the company has not been issued with a trading certificate, and (ii) more than 12 months have lapsed since it was so registered;

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- the company fails to commence its business within a year of its incorporation or suspension of its business for one year or longer;
- the court decides that it is just and equitable to wind up the company; or
- the Attorney General makes an application to wind up the company.

Winding-up or insolvency registers

The Insolvency Act obligates the Official Receiver to maintain a public register of undischarged and discharged bankrupts, debtors subject to current summary instalment orders, and persons admitted to (and discharged from) the no-asset procedure.

There is no express provision in the Insolvency Act that obligates the Official Receiver to maintain a register of insolvent companies. However, the Official Receiver's office maintains a register for companies in insolvency as a matter of policy.

Are "company rescue" or reorganisation procedures available?

Yes, such procedures, in particular administration and company voluntary arrangements, are available under the Insolvency Act.

Pre-Insolvency Moratorium

The Insolvency Act was amended in 2021 to allow for a pre-insolvency moratorium for financially distressed companies. Directors are required to file documents in court stating why a moratorium is desirable. If granted, the initial moratorium will be in effect for 30 days and can be extended for a further 30 days.

While a moratorium is in effect, creditors including suppliers and landlords are prevented from taking any enforcement action against the company and its assets without the consent of the monitor or the court.

The moratorium will not be available to companies that are under administration or liquidation, or in cases in which an administrative receiver has been appointed. Additionally, companies which have had a moratorium in effect or have been subject to a company voluntary arrangement (CVA) during the 12 months prior to the application date do not qualify for the moratorium.

Administration

A company is put under administration when an administrator is appointed over it. An administrator may be appointed by the court, by the holder of a qualifying floating charge, or by the company or its directors. However, an administrator is an officer of the court whether they are appointed by the court or not, and they are only appointed as such if they are a qualified insolvency practitioner.

An administration order will be issued if the court is satisfied that the company is or is likely to become unable to pay its debts (upon satisfaction of the cash flow and balance sheet tests) and that the administration order is reasonably likely to achieve the objective of administration.

The main objectives of administration are to: (i) maintain the company as a going concern, (ii) achieve a better outcome for the company's creditors than would occur if the company were liquidated; and (iii) realise the property of the company in order to make a distribution to the secured or preferential creditors. The administrator will usually develop a plan of action to rescue the company while the administration order is in effect and will act in the best interest of all the company's creditors.

Once an administration order is made, a moratorium comes into effect, and a creditor may only take steps to enforce a security with the consent of the administrator or with the court's approval. However, an application for the liquidation of the company cannot be made, and any pending application for liquidation will be suspended.

Company voluntary arrangements (CVAs):

- A CVA is a voluntary arrangement, compromise, or scheme of arrangement between a company and its creditors that is lodged in court as a proposal to take effect as a voluntary arrangement. The CVA takes effect upon its approval by court and binds every creditor and member of the company.
- The directors of a company may make a proposal to the company and to its creditors for a voluntary arrangement which will allow the company to enter into a composition in satisfaction of its debts or a scheme for arranging its financial affairs. Only an authorised insolvency practitioner can be appointed to monitor such an arrangement. Such a proposal

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can be made by an administrator if a company is in administration or by a liquidator if the company is in liquidation.

- When a company enters into a CVA, a moratorium takes effect. The company is restricted from obtaining further credit and/or paying its liabilities during the moratorium. A creditor will also be required to seek the court's approval to enforce its security over the company's assets or commence proceedings against the company.

Will the commencement of insolvency proceedings against a grantor of security affect the ability of a secured party/creditor to enforce the security interests granted to it by that company?

Yes, it will in certain instances. In a liquidation, a secured creditor can still enforce its security but is accountable to the liquidator for any surplus realised from the sale of the assets. The surplus must be remitted to the liquidator, who will distribute it in accordance with the priority stipulated in the Insolvency Act. In an administration, there is a statutory moratorium in place, and the secured party needs to seek approval of the court or seek consent of the administrator in order to enforce their security. Similarly, where a CVA has taken effect and has been approved, it binds all creditors, including secured creditors. A secured creditor wishing to enforce their security would need court approval.

Are there any preference periods, clawback rights, or preferential creditors' rights that creditors should be aware of?

Preferential creditors' rights: Preferential creditors under the Insolvency Act include, in order of priority: (i) reasonable costs of the liquidation/administration; (ii) wages and salaries; (iii) government taxes; and (iv) unsecured creditors (whose debts abate in equal proportions if the funds are not enough to cater for unsecured debts). It is important to note that for unsecured creditors, the Insolvency Act mandates that 20% of the realisations from the sale of property subject to a floating charge be set aside for their benefit. In some instances, this 20% realisation could favour the unsecured creditor over the secured creditor, more so where the 20% is sufficient to fully settle the unsecured creditor's debts. The Insolvency Act was amended in 2021 to allow for a floating charge holder to make an application to disapply the 20% realisation on the grounds that the rights of the floating charge holder will be harmed. Upon the application, the court may disapply the 20% realisation or allow the 20% realisation on certain conditions.

Clawback rights: Where a company is threatened by a formal insolvency process, certain transactions that were entered into by the company before the start of the insolvency may be challenged under the Insolvency Act. The procedures set out for challenging such reviewable transactions are meant to protect the equal distribution of the proceeds of insolvency among the company's creditors. Such reviewable transactions include:

- **Preference transactions:** Where a company enters into transactions that prefer certain creditors over others, thereby giving them an advantage over the other creditors, a preference is deemed to arise. These transactions have to be entered into within two years immediately preceding the date when the company went into formal insolvency. The Insolvency Act states that a company gives a preference to a person if: (i) the person is one of the company's creditors or a surety or guarantor for any of the company's debts or other liabilities; and (ii) the company does any act or allows an act to be done that (in either case) has the effect of placing the person in a position that, if the company were in insolvent liquidation, is better than the position the person would have been in had that act not been done. The definition of "preference" in the Insolvency Act does not expressly state that the preference has to be fraudulent.
- **Transactions at an undervalue:** A transaction is deemed to be at an undervalue if the company is not receiving any valuable consideration or the value being received is considerably lower than the consideration the company is giving for the transaction. These transactions have to be entered into within two years immediately preceding the date when the company goes into formal insolvency.

Insolvency/Bankruptcy Proceedings

- **Extortionate credit transactions:** A transaction is deemed to be extortionate if: (i) it occurs within the last three years before a company's insolvency, (ii) the transaction required the company to make exorbitant payments without any valuable return; or (iii) it otherwise grossly contravened ordinary principles of fair dealing.

Floating charges: Floating charges over a debtor's assets created within one to two years of the presentation of a winding-up petition may be invalidated unless the chargee was solvent immediately after the creation of the charge. There is an exception such that the invalidation of a floating charge will not affect a creditor's ability to claim amounts of cash paid to the chargee (plus interest at the prescribed rate) subsequent to, and in consideration of, the creation of the charge.

Can debt owed by a company to a creditor be contractually subordinated to debt owed by that company to another creditor? Are contractual subordination provisions that are agreed among creditors legally recognised on the insolvency or bankruptcy of the company?

Debt owed by a company to a creditor can be contractually subordinated to debt owed to other creditors, and contractual subordination is typically recognised under Kenyan law in the event of insolvency.

How is priority among secured parties determined on the insolvency of the debtor?

Priority is based on the date of registration of the security interest at the relevant registries. Priority may also be subject to any intercreditor arrangements between the secured creditors. Creditors holding security by way of a floating charge will rank after preferential creditors.

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