

REGISTERING A BRANCH OF A FOREIGN COMPANY IN KENYA



INTRODUCTION

A branch of a foreign company is established when a new location, division, department, or office is set up in another jurisdiction as part of a foreign legal entity. Such entity would be set up and organized to conduct the business and promote the objects of the foreign company in the other jurisdiction. A branch is an extension of the foreign company which means it does not have legal identity separate from the foreign company. A branch would therefore have the same directors, be governed by the same constitutive documents and be subject to the foreign company's policies and procedures.

A foreign company wanting to set up in Kenya can do so by either registering a **branch office** or by incorporating a

subsidiary. In contrast to a Branch, a subsidiary has a distinct legal identity separate from the foreign company which would in such a case be the parent company; whereas the Branch is part of the foreign company. For illustrative purposes, a subsidiary would be a child while a Branch would be a limb.

This article shall highlight the steps to be followed when registering a branch and touch on various issues a foreign company should bear in mind when registering a branch.

1. STEPS TO BE FOLLOWED WHEN REGISTERING A BRANCH OFFICE IN KENYA

a) Name search and reservation it is mandatory to search and reserve the name to establish that the name isn't

similar to an existing local company. It is worthwhile to note that such company can also use an alternative name from its corporate name as stipulated by **section 977 of the Companies Act 2015**. This implies that such company can use a corporate name different from its registered name overseas for purposes of carrying business here in Kenya. Further it is important to note that use of an alternative name doesn't affect any rights or obligations of the company or make any legal proceedings brought against the company defective.

b) Providing all the relevant incorporation documents from the country-of-origin. The foreign company's incorporation certificate or registration certificate must be provided along with the Constitution, a list containing the names of its directors and shareholders and their personal details and any other relevant information/documents.

It is important to note that all documents from a foreign jurisdiction must be certified and notarized by a duly registered Notary Public. Additionally, and any document in a foreign language must be translated into English by an authorized institution.

c) Registered office– A branch office should have a physical office and postal address in Kenya. This is primarily for ensuring that the entity has an address for service.

d) Appointment of a local representative- A branch is required to have a local representative. The local representative shall be answerable for all acts and matters relating to the

operations of the branch company here in Kenya. It is important to mention that such local representative can either be a citizen or non-citizen.

THE KEY DUTIES OF A LOCAL REPRESENTATIVE;

- i. Monitoring the activities of the company and ensuring that it is compliant with the statutory requirements;
- ii. Organizing for filing of any document with the registrar of companies e.g notice of change of address;
- iii. Maintaining the registered office here in Kenya and ensuring that it is kept open for any communication and notices that may be served; and
- iv. Any other relevant duty in relation to the operations of the company

2. TAXATION OF A BRANCH

Upon successful registration of a foreign branch and subsequent issuance of **Certificate of Compliance** by the Registrar of Companies, the branch is required to register with the Kenya Revenue Authority (KRA) and procure a Personal Identification Number (PIN). **Section 5(1) b of the Income Tax Act** classifies a Branch as a permanent establishment. Presently, all income generated in Kenya by a Branch, net of allowable expenses, is taxed at the rate of **37.5% (non-resident)**.

It is also important for a foreign company wanting to set up office in Kenya to inquire into whether the

foreign jurisdiction and Kenya have any double taxation agreements to properly establish the tax exposure on the profits of the foreign company.

3. EXPATRIATE EMPLOYEES AND THE IMMIGRATION CONSIDERATIONS

Many a time, a Branch may deploy expatriate employees to the branch office to assist with setting up or to otherwise implement the foreign company's organization structure, knowledge or organizational culture in the workplace. A branch office which has in their employ foreign nationals must address the immigration issues posed by having a work force consisting of foreign nationals.

The foreign company will need to ensure that their expatriate employees procure the requisite permits, such as the

employment work permit (class D permit) and in certain instances the **Kenya Dependent's Pass (KDP)** for the employee's immediate family members e.g spouse, children under the age of 21 years and any other eligible dependants.

CONCLUSION

Foreign companies must note that Section 974 of Companies Act 2015 requires that any foreign company doing business in Kenya must be registered. It is therefore important that whether such registration is as a branch or a subsidiary, the legal status of the entity contracting or doing business in Kenya be compliant to avoid a scenario where a contract is cancelled or a foreign company is unable to enforce performance of a contract.



HOW WE AT CM ADVOCATES CAN ASSIST YOU:

- ◇ Procure a Registered Office;
- ◇ With the services of a Local Representative
- ◇ Comprehensive advisory and establishment of a branch office in Kenya
- ◇ Tax advisory services
- ◇ Procure the relevant work permits for the non-Kenyan local representatives and expatriate employees as well as their dependents
- ◇ Draw the requisite contracts with the branch's employees and Local Representative
- ◇ Undertake due diligence on property and negotiate as well as register a lease or sale agreement to procure premises in Kenya
- ◇ We also offer employer of record (EOR) as well as payroll services for employees of such branch company
- ◇ Conducting immigration audits to ensure that organisations are and remain compliant with the immigration requirements and regulations; and
- ◇ Any other related issue thereof.

Disclaimer: *This alert is for informational purposes only and should not be construed as legal advice.*

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