



Projects & Infrastructure

Power Guide:
Kenya

ONE REGION
ONE VISION
ONE ALN

Introduction

This Power Guide has been prepared by ALN Kenya | Anjarwalla & Khanna (ALN Kenya) and provides an overview of Kenya's power sector. The aim of this

guide is to provide useful information to investors and stakeholders on legal aspects of the industry, such as applicable regulatory standards and tariffs.

Governing Law



- The Constitution of Kenya, 2010
- Statutes:
 - Energy Act, 2019
 - Public Private Partnerships Act, 2021
 - Public Procurement and Asset Disposal Act, 2015
- Other laws, regulations and policies including:
 - Land Act, 2012
 - Public Finance Management Act, 2012
 - National Construction Authority Act, 2011
 - Environmental Management and Co-ordination Act, 1999
 - Income Tax Act (Cap. 470 Laws of Kenya)
 - Companies Act, 2015
 - The Energy (Electricity Licensing) Regulations, 2012
 - National Transmission Grid Code
 - National Distribution Code
 - Feed-in-Tariffs Policy, 2021
 - Renewable Energy Auctions Policy, 2021
 - Policy on Licensing of Geothermal Greenfields
 - National Energy Policy, 2018
 - Government Support Measures Policy, 2018

Institutional Framework

Energy and Petroleum Regulatory Authority (EPRA)



EPRA is responsible for regulating the energy sector with the exception of the licensing of nuclear facilities. Its functions include issuing licenses and permits for all undertakings in the energy and petroleum sectors, proposing regulations to the Cabinet Secretary, and enforcing compliance with sector regulations.

Kenya Electricity Generating Company Limited (KenGen)



KenGen is a state corporation involved in generation of the electricity consumed in Kenya. KenGen currently generates the majority of the electricity consumed in Kenya.

Kenya Electricity Transmission Company (KETRACO)



KETRACO is the system operator in Kenya. Its mandate is to plan, design, construct, own, operate and maintain the high voltage electricity transmission grid and regional power interconnectors that form the backbone of the National Transmission Grid

Geothermal Development Company Limited (GDC)



GDC was established to fast track the development of geothermal resources in Kenya. It is mandated to drill steam wells, provide steam for the generation of electric power, manage geothermal reservoirs and enter into steam supply contracts with Independent Power Producers.

Kenya Power and Lighting Company Limited (KPLC)



KPLC is currently the sole licensed electricity distributor in Kenya. As the off-taker, KPLC purchases power from all power generators for onward transmission and distribution to consumers.

Ministry of Energy



The Ministry is in charge of creating energy policies (e.g., Feed in Tariff policies) and setting the strategic direction for the growth of the energy sector.

Rural Electrification and Renewable Energy Corporation (RREC)



RREC is established under the Energy Act and mandated to amongst other things: accelerate the pace of rural electrification across the country and develop, promote, and manage the use of renewable energy (excluding geothermal).

Energy and Petroleum Tribunal



The Tribunal is an independent statutory tribunal set up under the Energy Act to hear and determine disputes and appeals arising under the Energy Act, 2019 and the Petroleum Act, 2019.



Power Purchase Agreement (PPA) Between the Independent Power Producer (IPP) and Off-taker (KPLC)

- The operating term of a PPA is typically 20 - 25 years from the Commercial Operation Date.
- Typical tariff structures include Capacity Charges (based on availability of the plant), Energy Charges (based on net electrical output delivered), and/or Fuel Charge.
- Take or pay structures are typically utilized for renewable projects where Deemed Generated Energy Payments are made during curtailment by the Off-taker. The Deemed Generated Energy Payments are paid if the grid availability falls below the guaranteed levels as specified under the PPA.
- Tariff structures for small biomass, biogas and small hydro power projects not exceeding 20MW are subject to a Feed-in-Tariffs (FIT) Policy.
- A PPA typically provides for payment within 30 days after receipt of invoice by the KPLC.
- Amounts are payable in a foreign currency. However, the Government is very keen to develop local currency PPAs.
- Adjustments to the tariff will be possible upon the occurrence of a Political Event (including a Change in Law and Change in Tax). Further, the escalable component of the tariff will be adjusted for inflation.

Local Shareholding Requirements

Currently there are no restrictions on ownership of shares by foreign investors in a project company and no local equity participation requirements for the project company. However, there are various

restrictions relating to land ownership by foreigners in Kenya which have an impact on the land ownership arrangements for power projects.

Feed-in-Tariffs (FIT) System

- FIT System is governed by the FIT Policies, the Renewable Energy Auction Policy and the Policy on Licensing of Geothermal Greenfields.
- FIT Policies are published by the Cabinet Secretary for Energy and Petroleum pursuant to discretionary powers under the Energy Act. The first FIT was published in March 2008 and revised in January 2010, December 2012 and again in January 2021.
- A standard tariff, as provided for in the FIT Policy, is applicable during the duration of the project and

is based on the renewable energy source and project size. This applies to small-scale biomass, biogas and small-hydro projects (of up to 20 MW) (i.e., for projects below 10MW: biomass USD 0.095/kWh, biogas USD 0.095/kWh, hydro USD 0.09/kWh).

- The operations & maintenance (O&M) component of the tariff is not fixed over the term of the project as it is subject to indexation in accordance with the Consumer Price Index (CPI), i.e. the US or Kenyan CPI.

- Renewable energy projects are contracted based on installed capacity, i.e. large renewable projects (> 20MW installed capacity) and small renewable projects (< 20MW installed capacity).
- A standardised PPA is used for small renewable projects (< 20MW). For larger renewable projects (> 20MW and all solar and wind power projects) a standardised PPA is used as a basis of negotiations with the KPLC.
- The KPLC guarantees priority purchase, transmission and distribution of all electrical energy supplied by small renewable projects only (0.2-10MW). The applicability of a guarantee of purchase for larger projects is subject to terms negotiated under a PPA
- Capacity charges shall not be payable for projects procured under the 2021 FIT Policy.

Payments to Off-taker

IPP typically pay liquidated damages for:

- delay in reaching the Commercial Operations by stipulated date; and/or
- failing to meet availability thresholds during operations of the plant.

Credit Enhancements and Security Arrangements

- No sovereign guarantees are provided by the Government of Kenya.
- The Government may issue a Letter of Support covering political risk events. This is dependent on the nature of the project. The FIT Policy clarifies that all small renewable projects shall not require any form of security or guarantee including Government Letters of Support.
- Partial risk guarantees and political risk insurance have been developed for the Kenyan market by the World Bank, Multilateral Investment Guarantee Agency (MIGA), International Development Association (IDA), Africa Development Bank (AFDB) and African Trade Insurance Agency (ATI).

Key Approvals/Licenses Required to be Procured.

- PPA approval by EPRA is required before execution: EPRA shall, amongst other things, review and approve tariffs set in the PPA to ensure they are just and reasonable.
- Electricity Generation License issued by EPRA.
- Registration of the IPP and contractors with the National Construction Authority.
- Environmental Impact Assessment (EIA) License issued by the National Environmental Management Authority.
- Development permission and approval of building plans with respect to the buildings on site by local county council.

Governing Law and Dispute Resolution

- PPAs and the Government of Kenya Letter of Support are governed by Kenyan law.
- Kenya is a party to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, 1965 (ICSID Convention) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958 (New York Convention). Arbitral

awards obtained under the ICSID Convention, but do not require registration to be enforceable. All other awards will be enforceable under the New York Convention upon registration with the High Court. However, enforcement of awards obtained under the New York Convention 1958 may be subject to further challenge under section 37 of the Arbitration Act (Act No. 4 of 1995), which has

similar and additional grounds as Article V of the New York Convention.

Power Sector Experience

ALN Kenya has extensive power experience and works on landmark transactions in the country and increasingly in East Africa. In particular, ALN Kenya has unique on the ground experience in infrastructure and energy deals in Kenya and other African jurisdictions. ALN Kenya has strong business and

regulatory relationships enabling a concise understanding of structuring a deal in light of potential economic, political and financial risk. ALN Kenya has handled more than 15 of the largest power deals in Kenya.



Turkana Wind Power Project: Acting for the sponsors of the 300MW Turkana wind power project, the largest power generation project in Kenya on all aspects of the project.

Moreover, ALN Kenya acted as Finnfund's, IFU & Vestas sole counsel in the sale of their shares in the Lake Turkana Wind Power Limited (LTWP) in Kenya.

ALN Kenya has been Project Counsel on this unique project since its inception and has worked closely with Finnfund, IFU & Vestas and the rest of the sponsors and shareholders in achieving the critical milestones of financial close and commercial operation.



Berkley Energy: Acting for Berkeley Energy as lead counsel in relation to its acquisition of stake of a portfolio of brownfield and green field power generating assets owned by Tozzi Green S.p.A in Madagascar including: the Sahanivotry and Maronasetta projects totalling 15MW; the 44MW Mahitsy project; the proposed Tsinjoarivo project; the 70MW Talaviana project; the 3.4MW Sahanivotry Dam project; the 1.1MW Sahanivotry Down project and a number of other early stage solar and hydro projects.



Triumph Power Thermal Power Plant: Acting for Triumph Power, on its development of an 81MW thermal power plant in Athi River, Kenya, advising on corporate structure, construction contracts, the O&M and EPC agreement, and the project's debt financing.



Kipeto Wind Project: Acting for Africa Infrastructure Investment Fund, General Electric and the International Finance Corporation, sponsors of a 100MW wind powered generation facility in Kipeto, Kajiado, the second largest wind project in Kenya.



Frontier Energy: Acting for Frontier Energy, in connection with its proposed acquisition of a majority stake in the 50MW Loodariak wind power project in Ngong, Kajiado County.



Mpeketoni Wind Farm Project: Acting for Elicio NV and International Finance Corporation among others, the sponsors of a 90MW wind powered generation farm in Mpeketoni, Lamu on the coast of Kenya, including reviewing and negotiating the power purchase agreement on a take or pay basis with the KPLC and advising on various equity, land, management and regulatory matters.



Tozzi Green International Development Kenya: Acting for Tozzi Green in connection with their proposed acquisition of a 40MW solar photovoltaic project located in Witu, Lamu County and a 40MW Solar PV Power Plant in Kibwezi, Makueni County.



Menengai Geothermal Power Project: Acting for the sponsors on three separate geothermal power projects in Menengai in the Great Rift Valley, which in the aggregate will generate 100MW and cost approximately USD 250 million.



Globeleq: Acting for Globeleq as lead co-counsel in relation to various aspects of the development of a 40MW solar PV project at Lagobaya, Malindi, Kilifi County. This project is considered one of the fore running, utility-scale solar PV projects to be developed under the Feed-in-Tariff Policy in Kenya.



Solid and Liquid Waste Processing Project: Advising Black Energy on the structuring and setup of a proposed public private partnership with the Government of Kenya for the management and processing of solid and liquid waste generated in Nairobi for use in the production of electrical energy.



Development of Independent Power Project: Advising (as part of a team of international advisers) Kenya's Ministry of Energy on a World Bank funded project relating to the development of an independent power project in Kenya with particular interest in geothermal power.



Export Financing for KenGen: Acting for HSBC Bank in connection with a USD 21 million Sinosure-supported export financing for KenGen for the acquisition, installation and commissioning of two geothermal well drilling rigs and associated equipment.



Equity Investment in SolarNow: Acting for Novastar Ventures East Africa Fund in relation to an equity investment in SolarNow, a Ugandan distributor of quality solar home systems to rural markets.



Bagasse Cogeneration Plant Project: Acting for Proparco, a leading emerging market development fund, on its financing of Kenya's first bagasse cogeneration plant, developed by Mumias Sugar, Kenya's largest sugar producer.

Key Contacts



Aryn Mussa | Partner
Head of Projects & Infrastructure



Nairobi, Kenya



amyn.mussa@aln.africa



+254 (0) 703 032 000



Ian Gaitta | Partner



Nairobi, Kenya



ian.gaitta@aln.africa



+254 (0) 703 032 000

About ALN Kenya

African Law Firm of the Year – Large Practice - African Legal Awards 2020, 2017, 2016, 2015, 2013

ALN Kenya | Anjarwalla & Khanna (ALN Kenya) is East Africa’s largest full-service law firm. We were founded in 1954, and as Kenya has evolved and developed, so have we. We now employ over 100 lawyers and have expanded our footprint to Dar es Salaam, Tanzania and Dubai, UAE, making us the first African firm to be licensed in UAE. Along the way we have established trusted partnerships with our clients, working alongside them as an extension of their own businesses to guide and advise.

In response to the market and as more clients asked us to take care of cross-border deals, in 2004 we founded ALN, an integrated alliance of the preeminent full-service corporate law firms in 14 African countries and the UAE, to give us the agility and expertise to operate locally and across the pan African business and economic environment. Our clients can call upon specialists that span the legal spectrum, and as Africa is propelled on to the world stage, ALN lawyers combine their global perspective with local expertise to help clients navigate new territories and capitalise on future opportunities.

Our firm has developed specialist expertise in the following areas: Banking, finance and insolvency;

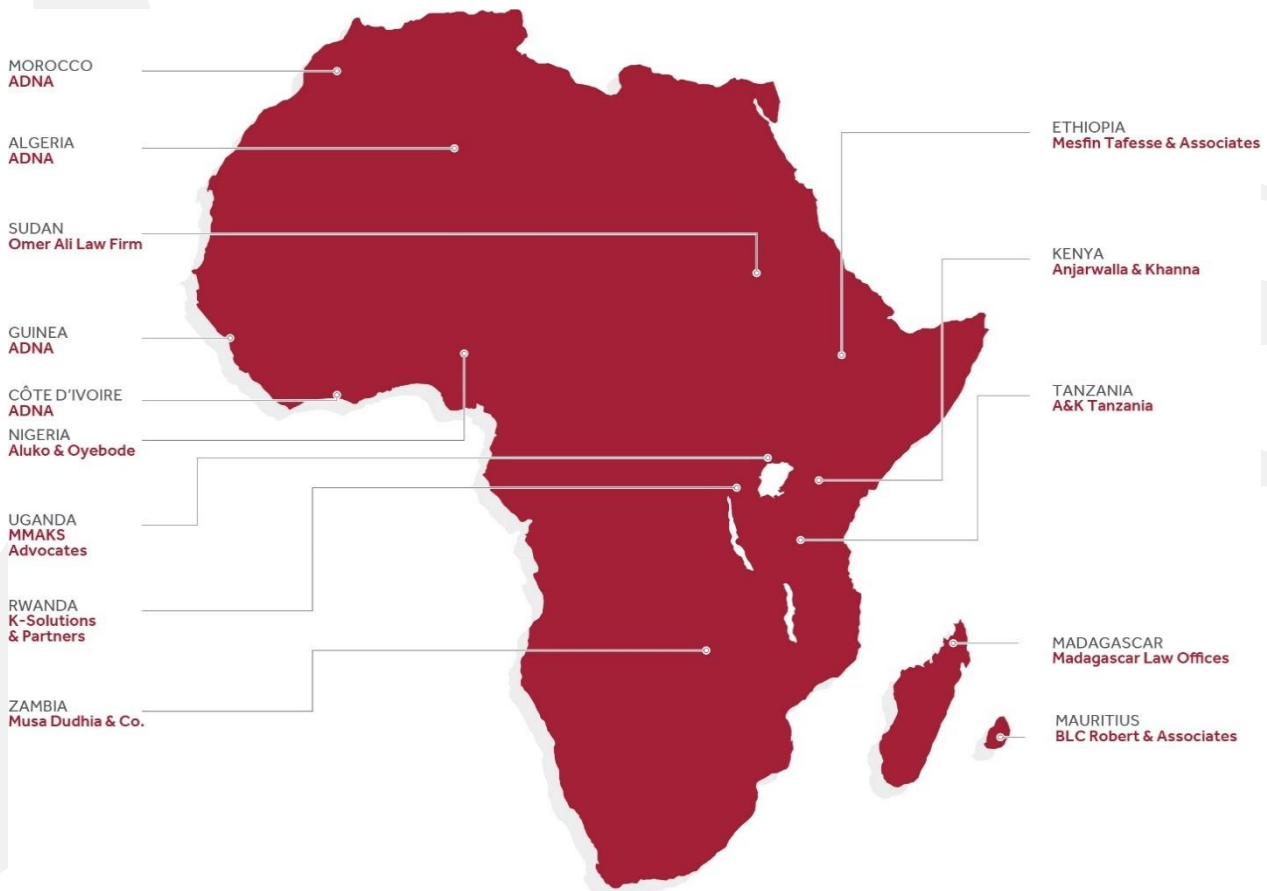
Corporate M&A; Capital markets; Commercial; Competition; Dispute resolution; Employment; Forensics, risk and compliance; International trade ; Private clients; Projects and infrastructure; Real estate and construction; and Tax.

Our expertise has been recognised by a number of award bodies. We won the African Law Firm of the Year - Large Practice award at the African Legal Awards, five times since these awards were launched in 2013, including in 2020. In recognition of our CSR and Pro Bono work, we won the CSR, Diversity, Transformation and Economic Empowerment award at the African Legal Awards 2021.

In addition, the firm was named Kenya Law Firm of the Year at the Chambers Africa Awards 2023 and 2021, Law Firm of the Year in Kenya at the IFLR Africa Awards 2022 for the third time since the launch of the awards in 2020, and Large Law Firm of the Year 2021 at the Law Society of Kenya Nairobi Branch Legal Awards for the third time since the launch of the awards in 2018. The firm is currently ranked first in Kenya by various international legal directories, including Chambers Global, IFLR1000 and Legal 500.



About ALN



ALN is an integrated alliance of the preeminent full-service corporate law firms in 14 African countries: Algeria, Côte d'Ivoire, Ethiopia, Guinea, Kenya, Madagascar, Mauritius, Morocco, Nigeria, Rwanda, Sudan, Tanzania, Uganda and Zambia. ALN also has a regional office in Dubai, UAE, which serves as a gateway to the Gulf region and beyond.

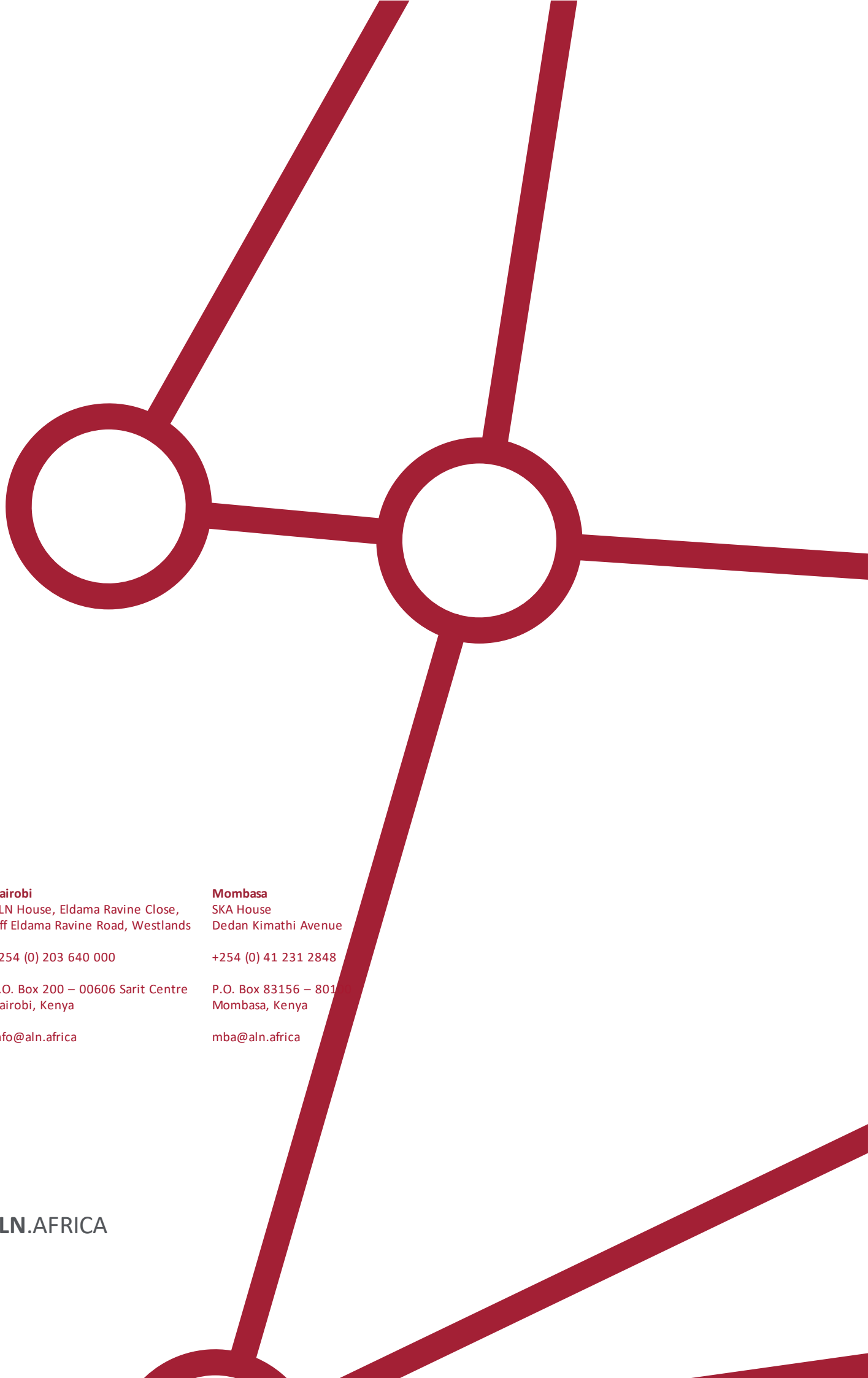
Vision

ALN seamlessly connects the African continent. It brings its global expertise, continental reach and deep local know-how to help its clients navigate the multitude of opportunities and risks in Africa, holistically combining legal, tax, regulatory and commercial advice.

Mission

ALN is dedicated to its clients' success. ALN achieves this by providing world class legal, tax and regulatory advice in a commercial context. ALN's lawyers are aware of the trends and events shaping the continent, deeply networked and respected in their communities as thought leaders and opinion shapers. ALN's lawyers have a Pan African mindset, are down to earth, pragmatic, responsive, innovative and relentlessly determined.





Nairobi

ALN House, Eldama Ravine Close,
Off Eldama Ravine Road, Westlands

+254 (0) 203 640 000

P.O. Box 200 – 00606 Sarit Centre
Nairobi, Kenya

info@aln.africa

Mombasa

SKA House
Dedan Kimathi Avenue

+254 (0) 41 231 2848

P.O. Box 83156 – 801
Mombasa, Kenya

mba@aln.africa

ALN.AFRICA