

Kenya

Foreign Investments Protection Act (1964)

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Foreign Investments Protection Act

[Preamble]

An Act of Parliament to give protection to certain approved foreign investments and for matters incidental thereto.

[Act No. 35 of 1964, Act No. 6 of 1976, Act No. 7 of 1988, Act No. 6 of 1994, Act No. 8 of 2009.]

Article 1. Short title

This Act may be cited as the Foreign Investments Protection Act.

Article 2. Interpretation

1) In this Act, unless the context otherwise requires:

“approved” in relation to any enterprise, foreign currency, period, sum or amount means any enterprise, currency, period, sum or amount specified in the relevant certificate issued under section 3;

“foreign assets” includes foreign currency, credits, rights, benefits or property, any currency, credits, rights, benefits or property obtained by the expenditure of foreign currency, the provision of foreign credit, or the use or exploitation of foreign rights, benefits or property, and any profits from an investment in an approved enterprise by the holder of a certificate issued under section 3 in relation to that enterprise;

“foreign national” means a person who is not a citizen of Kenya, and includes a body corporate not being a body incorporated in Kenya;

“the Minister” means the Minister for the time being responsible for finance.

2) For the avoidance of doubt it is hereby declared that assets shall not cease to be foreign assets by reason of their being assets in some other part of the Commonwealth, and that currency shall not cease to be foreign currency by reason of it being in Kenya as well as in some place outside Kenya, so long as, in the case of currency, the relevant sum originates from outside Kenya.

Article 3. Foreign investors may apply for and be granted certificates

1) A foreign national who proposes to invest foreign assets in Kenya may apply to the Minister for a certificate that the enterprise in which the assets are proposed to be invested is an approved enterprise for the purposes of this Act.

2) The Minister shall consider every application made under subsection (1) and in any case in which he is satisfied that the enterprise would further the economic development of, or would be of benefit to Kenya, he may in his discretion issue a certificate to the applicant.

3) [Repealed]

4) Every certificate shall state:

a. the name of the holder;

b. the name and a description of the enterprise;

c. the amount of the foreign assets invested or to be invested by the holder of the certificate in the enterprise divided as between:

i. capital, being deemed to be a fixed amount representing the equity of the holder in the enterprise for the purposes of this Act and which shall be expressed in the certificate in, and shall for the purposes of this Act be in, either Kenya currency or the relevant foreign currency; and

ii. any loan, which may be expressed in, and may for the purposes of this Act be in, either Kenya currency or the relevant foreign currency;

d. the foreign currency invested or to be invested;

e. [Repealed]

f. such other matters as may be necessary or desirable for the purposes of this Act.

5) If the foreign assets have not yet been invested a conditional certificate shall be issued stating, in addition to the details specified in subsection (3), the period in which they shall be invested.

Article 4. Amendment of certificate

The Minister may amend a certificate granted under section 3:

a. in any case in which he is satisfied that some other foreign national has succeeded to the interest in the enterprise of the holder of the certificate, by substituting for the name of the holder the name of his successor:

Provided that the Minister shall not substitute the name of any person who has acquired the interest of the holder by the expenditure, directly or indirectly, of assets other than foreign assets;

b. in any case where an interest in the enterprise passes to any other person on the death of the holder;

c. in any case where the name of the enterprise is altered, by substituting the name as so altered;

d. in any case in which new foreign assets are invested or are to be invested in the enterprise by the holder, or the holder has withdrawn or been paid, in accordance with this Act, any part of his investment by varying the approved amount in either Kenya currency or the relevant foreign currency in accordance therewith;

e. in any case where the investment consists of the acquisition of shares or stock of a body corporate, and new shares or stock are;

f. with the written consent of the holder of the certificate, by varying the approved foreign currency;

g. by extending the period during which foreign assets are to be invested; and

h. subject to these foregoing provisions and to the written consent of the holder, in such other manner as may be necessary or desirable.

Article 5. Foreign assets to be brought in during approved period

If, at the time at which a certificate is issued under this Act, any foreign assets or part thereof to which the certificate relates have not been invested in the approved enterprise, they shall be so invested within the approved period, and, if not so invested within that period, the certificate shall be deemed to have been revoked.

Article 6

[Repealed]

Article 7. Transfer of profits, etc.

Notwithstanding the provisions of any other law for the time being in force, the holder of a certificate may, in respect of the approved enterprise to which such certificate relates, transfer out of Kenya in the approved foreign currency and at the prevailing rate of exchange:

a. the profits, including retained profits which have not been capitalized, after taxation, arising from or out of his investment in foreign assets:

Provided that any increase in the capital value of the investment arising out of the sale of the whole or any part of the capital assets of the enterprise or revaluation of capital assets shall not be deemed to be profit arising from or out of the investment for the purposes of this Act;

b. the capital specified in the certificate as representing and being deemed to be the fixed amount of the equity of the holder of the certificate in the enterprise for the purpose of this Act:

Provided that:

i. where any amendment or variation is made in the amount of the said capital under the provisions of section 4, the amended or varied amount shall be substituted for the original amount; and

ii. no additional amount or sum shall be added to the capital specified in the certificate (as amended or varied) to represent any increase in the capital value of the investment since the issue of the certificate or since the last amendment or variation of the certificate; and

c. the principal and interest of any loan specified in the certificate.

Article 8. Compulsory acquisition

No approved enterprise or any property belonging thereto shall be compulsorily taken possession of, and no interest in or right over such enterprise or property shall be compulsorily acquired, except in accordance with the provisions concerning compulsory taking of possession and acquisition and the payment of full and prompt payment of compensation contained in section 75 of the Constitution and reproduced in the Schedule to this Act.

Article 8A

[Repealed]

Article 8B. Special arrangement for investment promotion and protection

1) The Minister for Finance may, from time to time, by notice in the Gazette declare that the arrangement specified in the notice, being arrangements made with the Government of any country with a view to promoting and protecting the investments of that country in Kenya, shall have effect according to its tenor.

2) A notice under this section may be amended or revoked by a subsequent notice and an amendment or revoking notice may contain such transitional provision or termination date as the Minister may consider necessary or expedient.

9. Regulations and directions

The Minister may make regulations or give directions generally for the better carrying out of the purposes of this Act and prescribing the manner in which applications shall be made for certificates under this Act, and the information which shall accompany those applications.

Schedule

[Section 8.]

The Constitution of Kenya

75(1). Protection from deprivation of property

1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied, that is to say:

a. the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

b. the necessity therefore is such as to afford reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and

c. provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for:

a. the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

b. the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to any matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter.

3) The Chief Justice may make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred on the High Court by subsection (2) or exercisable by the other tribunal or authority for the purposes of that subsection (including rules with respect to the time within which applications or appeals to the High Court or applications to the other tribunal or authority may be brought).

4) [Repealed]

5) [Repealed]

6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) or (2):

a. to the extent that the law in question makes provision for the taking of possession or acquisition of any property:

i. in satisfaction of any tax, duty, rate, cess or other impost;

- ii. by way of penalty for breach of the law, whether under civil process or after conviction of a criminal offence under the law of Kenya;
 - iii. as an incident of a lease, tenancy, mortgage, charge bill of sale, pledge or contract;
 - iv. in the execution of judgments or orders of a court in proceedings for the determination of civil rights or obligations;
 - v. in circumstances where it is reasonably necessary so to do because the property is in a dangerous state or injurious to the health of human beings, animals or plants;
 - vi. in consequence of any law with respect to the limitation of actions; or
 - vii. for so long only as may be necessary for the purposes of any examination, investigation, trial or inquiry or, in the case of land, for the purposes of the carrying out thereon of work of soil conservation or the conservation of other natural resources or work relating to agricultural development or improvement (being work relating to such development or and except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society; or
- b. to the extent that the law in question makes provision for the taking of possession or acquisition of:
- i. enemy property;
 - ii. property of a deceased person, a person of unsound mind or a person who has not attained the age of eighteen years, for the purpose of its administration for the benefit of the persons entitled to the beneficial interest therein;
 - iii. property of a person adjudged bankrupt or a body corporate in liquidation, for the purpose of its administration for the benefit of the creditors of the bankrupt or body corporate and, subject thereto, for the benefit of other persons entitled to the beneficial interest in the property; or
 - iv. property subject to a trust, for the purpose of vesting the property in persons appointed as trustees under the instrument creating the trust or by a court or, by order of a court, for the purpose of giving effect to the trust.

7) Nothing contained in or done under the authority of any Act of Parliament shall be held to be inconsistent with or in contravention of this section to the extent that the Act in question makes provision for the compulsory taking possession of any property or the compulsory acquisition of any interest in or right over property where that property, interest or right is vested in a body corporate, established by law for public purposes, in which no moneys have been invested other than moneys provided by Parliament.

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