

AFRICA RISK CONSULTING**Country briefing – Kenya****28 August 2013****1 Summary**

The deputy president, William Ruto's trial is to begin next month at the International Criminal Court (ICC). There is still uncertainty about scheduling. China's silence on the ICC accusations prompts President Uhuru Kenyatta's state visit. The government suspends mining licences and orders land audit, both of which are likely to make foreign investors nervous. A fire at Jomo Kenyatta International Airport (JKIA) highlights Kenya's infrastructure deficit which will require sustained expenditure of almost \$4 billion per year.

International Criminal Court hearings to begin in September

Deputy president **William Ruto** is to face the **International Criminal Court (ICC)** in person on September 10. The ICC indicted both Ruto and the president, **Uhuru Kenyatta** in January 2012 for their role in allegedly orchestrating violence in the aftermath of the 2007 elections in which 1,500 people were killed and some 600,000 displaced. There is uncertainty about the scheduling and political impact of the trial. There are currently no applications to push back the date of the hearing. Once the court begins to hear witness testimonies, further postponements to allow legal discussions are likely.¹ President Kenyatta's trial is due to begin on 12 November at which point the two trials are likely to be staggered drawing the process out further. The Kenyan constitution does not permit the president and his deputy to be absent from the country at the same time. Ruto's legal team has requested a schedule whereby the ICC hears his case for two weeks and then Kenyatta's for two. It is possible that they will run concurrently - one in the morning and one in the afternoon - but this depends on the availability of translators and will not be clear until November.² The ICC is yet to respond.

¹ Source, journalist, Nairobi

² Ibid

It is difficult to determine how strong the case against Ruto is. The prosecution is reported to have between 30 and 40 witnesses. Separately, the prosecution continues to investigate cases of alleged witness interference or threats.³ Kenyatta may use the opportunity of Ruto's trial - and his absence from **Nairobi** - to remove his coalition partner with whom he has significant political disagreements, notably over devolution.⁴ If this were to happen, there would be the question of how Ruto would take revenge for such betrayal and whether he has the political capital to remove his party from the coalition. The ICC trial is already having an impact on Kenyan politics with Kenyatta's choice of **China** for his maiden overseas state visit. China has maintained a pragmatic silence over the ICC prosecution's allegations, and the visit may be a direct response to **United States** president **Barack Obama's** decision not to visit Kenya during his visit to Africa in June and July.

Taxes and land reforms raise red flags for businesses

The private sector welcomed the election of president Kenyatta seeing him as pragmatic and economically literate.⁵ However, since he assumed office business has raised a number of concerns about the sanctity of contracts and the stability that the business community seeks. The government has increased taxes, cancelled contracts in the mining sector and has announced plans to reform land leases.

Mines secretary **Najib Balala** announced on 5 August that the government had suspended mines commissioner **Moses Masibo** and revoked 40 mining licences.⁶ The ministry had awarded the affected licences between January and May which were for prospecting, exploration and mining. The government acted after several irregularities were discovered. Most of the licences were awarded when parliament was dismissed despite the constitutional requirement that it approve all concessions. In July, **International Monetary Fund** officials complained that the government had denied them access to scrutinise current mining agreements.⁷

³ Source, journalist, Nairobi

⁴ Source, oil executive, London

⁵ Ibid

⁶ Bloomberg, 6 August 2013

⁷ Business Daily, 21 July 2013

Cortec Mining Company, which had its licence suspended, has threatened to take its case to the **International Chamber of Commerce in France**.⁸ Cortec, owned by **Pacific Wildcat Resources**, had reported Balala to the **Ethics and Anti-Corruption Commission** for demanding a \$915,248 bribe in a letter dated 29 July, and claims the suspension of its licence is political.⁹ A government panel led by lawyer **Mohamed Nyaoga** is to probe all contracts awarded since 2003 and report within two months. The government had announced the previous week that it was introducing more stringent approval procedures including environmental assessments to improve transparency in the mining sector. At the same time, the ministry said that a proposed bill before cabinet would raise royalties in the sector. Royalties on gold rose from 2.5% of gross sales to 5%, while titanium and niobium rose from 3% to 10%. Royalties on coal are now 8% and on diamonds 12%. Drilling charges will also increase tenfold to \$91.54 for the first 50 metres. Kenya's mining sector is relatively small, with only 20 licences considered active.

Kenyatta has established a standalone mining ministry even though mining represents less than 1% of economic output. Kenyatta's stated aim is to increase the size of the sector to broaden the economic base.¹⁰ The ministry said in June it planned to repeal a 35% local ownership law passed in 2012, and replace it with a 10% "free carry" investment by the government so that the government will hold a stake in all mining companies without incurring operational or capital costs.¹¹

Cabinet secretaries have cancelled other contracts signed just before or after the political transition. Labour secretary **Kazungu Kambi** stopped the **National Social Security Fund (NSSF)** from awarding contracts and ordered a due diligence audit into those awarded since February.¹² These include the construction of the **Hazina Trade Centre** in **Nairobi**, and the most recent phase of the **Nyayo-Embakasi** housing programme. The government awarded these contracts in February to

⁸ The Star, 8 August 2013

⁹ East African Business Week, 11 August 2013

¹⁰ Bloomberg, 6 August 2013

¹¹ This Is Africa, 3 June 2013

¹² Daily Nation, 18 August 2013

Chinese company **M/S China Jiangxi International Kenya Ltd.** Kambi sacked NSSF managing trustee **Tom Odongo** in July.¹³

Land ownership has a long-standing domestic political sensitivity but the government appears to be targeting foreign owners. Land reform was a key tenet of the 2010 constitution, which gives the government the authority to expropriate and sell land that has not been fully utilised, reducing foreign leases from 999 to 99 years. The **National Lands Commission (NLC)** issued a 30 day notice to foreign landowners to declare their assets as part of a review of land leases.¹⁴ Kenya's **Truth, Justice and Reconciliation Commission (TJRC)** published its report in May, cataloguing historical human rights abuses and economic injustices from December 1963 to February 2008. The report concludes that historical grievances over land constitute the single most important driver of conflicts and ethnic tension in Kenya, particularly in **Coast** and the **Rift Valley**. The report criticised Kenyatta for improperly acquiring government land in **Upper Hill, Nairobi**, and Ruto for purchasing in 2001 land in **Ngong Forest**, which was sold later that same year to the **Kenya Pipeline Company**. The constitution has not triggered a massive expropriation of foreign owned land, but the 30 day warning suggests that the NLC is picking up the pace of reform.

Airport fire highlights infrastructure deficit

A fire that destroyed the international arrivals hall at **Jomo Kenyatta International Airport (JKIA)** on 7 August highlighted concerns about Kenya's infrastructure and the cost of doing business.¹⁵ The fire forced the closure of the region's largest airport, the main destination for tourists and business visitors, and the main conduit to international markets for its main agricultural exports - flowers and vegetables. Flights, both passenger and cargo, were temporarily rerouted. Following the incident, President Kenyatta accelerated the five-year multimillion dollar expansion at the airport that recently got underway, with a fourth terminal and second runway planned. Two Chinese firms, **Anhui Construction Engineering** and state owned **China National Aero-Technology International Engineering Corporation** are expected to complete work on the terminal by the end of the year.

¹³ ibid

¹⁴ ibid

¹⁵ AP, 7 February 2013

The fire highlights the lack of planning and investment in Kenya's dilapidated infrastructure sector. JKIA was designed to handle 2.5m passengers in the late 1970s and now serves 5.5m. Kenyatta placed infrastructure at the heart of his legislative agenda following his election in March 2013. According to the **World Bank's** 2010 African Infrastructure Country Diagnostic, Kenya's infrastructure deficit will require sustained expenditure of almost \$4 billion per year over the next ten years. At just over 20% of GDP, this presents a significant economic challenge.¹⁶ Oil executives have highlighted the lack of transport infrastructure in the north as an impediment to the commercial viability of oil deposits.¹⁷ Reforms to the energy sector will also be necessary to ensure a reliable electricity supply and keep business costs down [see **ARC briefing July 2013**]. The slow response of authorities to the fire highlights how small budgets and outdated equipment have hollowed Kenya's public sector services. Local media reported in July that Nairobi County does not have a single working fire engine, having auctioned off three in 2009 after defaulting on a \$1,000 repair bill.¹⁸ Private company G4S played a significant part in the response.

Governance of the infrastructure sector also needs reform. Responsibility for Kenya's airports is divided between the **Kenya Civil Aviation Authority (KCAA)** which is supposed to regulate the sector and the **Kenya Airports Authority (KAA)** which is responsible for the security and maintenance of airports. Sources report that KCAA has neither the will nor the capacity to be an efficient watchdog. The KAA has not refurbished its airports to match demand. Kenya's infrastructure deficit presents a deterrent to would-be investors. **Ethiopian Airlines** has long vied with **Kenya Airways** for supremacy in East Africa and its hub in **Addis Ababa** is a much more efficient airport. **Fastjet**, the low cost airline started by **British** businessman **Stelios Haji-Ioannou**, chose **Dar-es-Salaam** rather than Nairobi as its base. Flights to **Johannesburg** begin next month.

¹⁶ World Bank, 2010

¹⁷ Source, oil executive, London

¹⁸ Daily Nation, 12 July 2013

Security at airport compromised in short term

The fire will increase the risk of security incidents at JKIA in the short term. Passengers report chaos in the temporary terminal established to process passengers. The maelstrom of passengers makes it difficult for officials to determine who has checked in, raising concerns about security.

Implications

William Ruto's trial at the ICC will begin as scheduled in September; the schedule beyond that and its political implications are less certain. However, a period of political limbo and increased tensions between Ruto and Kenyatta towards the end of the year is likely. This will slow decision making in the government. The Chinese state and state-backed firms will use this uncertainty to increase its role in Kenya as it continues its efforts to extend its diplomatic and economic influence in **East Africa**.

The government actions over contracts risk scaring foreign investors. The international mining sector is in the doldrums, so the Kenyan government cannot afford to have Kenya be seen as an unstable investment destination. Fears over the sanctity of contracts are contagious and could soon create uncertainty in other areas of business, including the oil and gas sector. Foreign companies in the Rift Valley and the Coast are most vulnerable to expropriation and should comply with the audit and prepare a strategy to face a more aggressive NLC.

Companies operating in Kenya need to carefully assess the implications of Kenya's infrastructure deficit on their operations and include it in all crisis management planning. The risk that poor government services poses to otherwise highly successful private sector business operating to international standards is high. The JKIA underlines the very wide gap between Kenya's liberalised private sector and its public sector. This imbalance is likely to remain until the Kenya's state sector feels the full effect of the institutional renewal that the roll out of the new constitution has unleashed.



Passenger handling capacity at JKIA will remain restricted for weeks if not months as the temporary terminal remains insufficient to process passengers. The damage will, in the short term, have a detrimental impact on Kenya's economy, coming as it does just before the tourist high season.