

# RENEWABLE ENERGY PROJECTS IN KENYA: LAND STRUCTURING

JAMES KAMAU AND  
NDOLO MALITI, NAIROBI



**Introduction**  
In Sub-Saharan Africa, Kenya is at the forefront of renewable energy use, with the industry regulator, the Energy Regulatory Commission, stating that renewable energy accounts for a significant portion of the overall energy consumed in the country.

According to Kenya's development blue print, popularly known as Vision 2030, the country has singled out energy

as one of the tools through which it will transform itself into a technologically advanced, middle-income country, providing a high quality of life to its citizens by 2030. The national electricity utility company, Kenya Power & Lighting Company, estimates that Kenya's electricity demand will rise to approximately 15,000 MW by that time.

Against this backdrop, Kenya had an ambitious plan to reach 5,000 MW of installed capacity

by 2017, up from 1,765 MW in 2013. The Government planned to use private sector capital to attain this target and has so far achieved an installed capacity of 2,333 MW. This presents a significant opportunity that could result in handsome returns for private sector investors.

## Land structuring

Land rights are central to renewable energy projects and therefore as a starting point, private sector investors will need

to understand the land regime in Kenya. We have seen projects experience considerable delay and even collapse because of lack of attention paid to acquisition of the requisite land rights. The importance of land rights cannot be over-stated as the bankability of a power project is contingent upon, among other factors, the availability of adequate land for all the project components (including the substation, where applicable) and that such land rights will remain in place throughout the

term of the offtake agreement—the power purchase agreement (PPA). Where the term of the PPA is renewable, the applicable land rights should also be secured for the same term.

In Kenya, land rights may be acquired through lease or purchase.

A lease involves a contractual arrangement registrable at the relevant land registry under which the land owner conveys a leasehold interest in the land to the project company for a specific term. The term of the lease would be the aggregate of the feasibility study period (if applicable), the construction period and the commercial operations period. If the term of the PPA has provision for extension, the lease should also contain appropriate legally enforceable provisions to the benefit of the project company.

The main costs in respect of a lease option are lease payments and stamp duty, which is charged at 2% of the highest annual rent.

Some of the risks under a lease structure include the threat of early termination by the land owner, and in cases of renewal of the PPA term, refusal by the land owner to renew the lease upon expiry on commercially acceptable terms. To avoid this, it is recommended that the lease be registered against the title and contain appropriate provisions, including, without limitation, that (i) the land owner will only be

permitted to terminate the lease for material breach and after the project company has been afforded a reasonable opportunity to remedy such breach; and (ii) the project company will be given the right of renewal through an appropriate legally enforceable renewal clause. This would call for careful drafting of the lease.

A purchase, on the other hand, involves the project company buying the project land and having it transferred to its name. If the project company has non-Kenyan shareholders, the land tenure would be leasehold for a term not exceeding 99 years. While this structure is more capital intensive (due to the front-loaded cost of the land purchase and stamp duty—charged at either 2% or 4% of the value assessed by the government valuer), it presents less risks compared to a lease.

Besides the project site, the project company may, in certain cases, require land rights in respect of the transmission lines. Such rights would typically be obtained through easements.

## Conclusion

Given the centrality of land to any power project, the land rights acquisition process must be carefully managed in order to avoid delays or disruption to the project.

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