

NAVIGATING CORRUPTION IN KENYA

*INSIDE PERSPECTIVES FROM NORDIC
COMPANIES ON DEALING WITH CORRUPTION IN
KENYA*



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Despite operating in an environment rife with corruption, Nordic companies maintain optimism in doing business in Kenya

Corruption remains a persistent challenge for numerous African countries. Recent macroeconomic events, including the global economic downturn, supply chain constraints, raised inflation and interest rates as well as the effects caused by Russia's attack on Ukraine, have led to economic pressure on many emerging economies in Africa and around the world. Additionally, conflicts and security challenges in the region have weakened institutions and reduced the capacity of states to fight against corruption. Consequently, the capital outflow from Africa has resulted in staggering losses of over 2 trillion USD in the last five decades¹. In response, several African governments have implemented legislative measures to tackle this issue and curb these harmful losses.

Kenya stands out as one of the leading and fastest growing economies in Sub-Saharan Africa, with an economy valued at 110.35 billion USD as of 2021. However, it is estimated that due to corruption, the country experiences a significant loss of revenue. Annual losses are estimated at between 6-6.5 billion USD, equivalent to 5.5 per cent of the country's GDP².

This report is based on interviews that were conducted in November 2022, assessing the impact of corruption on Nordic businesses in Kenya. The study relies on an interview-based survey conducted with 36 Nordic companies in Kenya, receiving responses from 23 participants, resulting in a 64 per cent response rate. The main objective of this report is to provide an inside perspective and understanding of the impact of corruption on Nordic companies in Kenya and to offer insights into suggested approaches for mitigating its effects.

Despite the corruption-related challenges, Kenya remains an attractive regional hub, with Nordic businesses maintaining a positive outlook towards conducting operations within the country. There is a growing sense of optimism amongst the Nordic businesses that the Kenyan government's measures to curb corruption are having a positive effect on the business climate. This optimism has been strengthened by the growth of international trade over the last decade and the increased presence of international actors. Most respondents of the survey are also responsible for other markets in the region and are using Kenya as a base for their East African expansion.

¹ Ndikumana K. Boyce, 2022, On the Trail of Capital Flight from Africa- The Takers and the Enablers, <https://peri.umass.edu/images/CapFlightAfrica-5-28-21.pdf>
² Understanding the economic cost of corruption in Kenya study, <https://theconversation.com/understanding-the-economic-cost-of-corruption-in-kenya-98255>



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EXECUTIVE SUMMARY

The interviewed Nordic companies have shared experiences of encountering corruption across a wide range of activities in Kenya. The most prevalent setting thereof seems to be while engaging with public institutions at various stages. The bulk of corruption cases that the interviewed companies have faced is connected to the following four main types:

1. Harassment by public institutions
2. Procurement fraud
3. Payment process
4. Permit and approval process

These areas are outlined in detail throughout this report and exemplified with case studies. In summary, different mitigation strategies are presented.

Most companies interviewed have clearly established routines and a readiness to prevent exposure to corruption in a structured way. The most common strategies to tackle corruption emerging from the survey data are to:

1. Establish routines (Codes of Conduct) and readiness for corruption.
2. Ensure that due process is followed, leaving no gaps in licensing, permits, and processes.
3. Avoid dealing with sectors/industries that have a high propensity for corruption.
4. Carefully selecting transportation routes to avoid known risk areas.
5. Deal with the market through experienced partners.

Many Nordic companies refrain from directly engaging in business with Kenyan or East African governments, counties, and parastatals. Instead, many Nordic companies have opted to engage primarily within the private sector or with the government and public sector through partnerships with local private entities. The use of third parties is expressed as a means of avoiding any direct contact with corruption attempts or situations, leveraging on the partners' experience, and with clearly communicated rules of engagement and instructions to work the local market by the book.

The majority of the companies are positive toward Kenya as a base for business in East Africa. The positive elements of the market circle around fairly well-functioning institutions, business-friendly policies, access to talent, a stable political climate, freedom of expression, a rapidly growing market and the possibility of creating a positive impact. Many companies also witness a positive trend from government institutions specifically to combat illicit practices, e.g., corruption.

KENYA AS A REGIONAL HUB

The interviewed Nordic companies describe Kenya as the natural hub for business in East Africa and increasingly for the wider continent. All the interviewed companies have a regional responsibility or plans for regional expansion out of their base in Nairobi. The region covered is most often East Africa, with Uganda, Tanzania, and Ethiopia mentioned as the most promising nearby markets covered from Kenya. A few interviewees cover a wider region, such as Sub-Saharan Africa or even the whole continent.

Many factors work in favour of Kenya as a business hub. The overall sentiment in the country is described as business-friendly with a high entrepreneurial spirit. Taxation is, at least on paper, relatively predictable. The legislation is open to foreign labour, investors, and establishments. The logistics are covered by major sea and airports, with a comparatively straightforward customs process.

The Kenyan and East African markets are growing. They are seeing an increasing presence of international commercial companies establishing their presence. Nairobi is increasingly popular among foreign experts as a liveable city. The large presence of international organisations enables a wide service offering.

However, problematic areas remain, and the aim of this report is to highlight issues within corruption, where it is encountered, how it presents itself, and what methods and strategies the companies use to counter its negative effects.

The issues presented are all based on direct experiences as they have been described by Nordic companies interviewed in November 2022. In no way is it a comprehensive and fully covering description of the business landscape in Kenya. It is also important to note that the interviews were done shortly after the general election in 2022. The content of this report is, therefore, not a reflection of any work that the current government has engaged in or reforms they have initiated.

THE STRUCTURE OF CORRUPTION

Several respondents have painted a rather gloomy picture of the overall structure of how government institutions and authorities are being run and influenced top down. On every level of government, from the highest office downwards, a complex web of personal ties, allegiances and dependencies determines individual appointments and holders of office within government and in the parastatal companies. Respondents note that several of their public counterparts are indeed loyal to their position and to their contribution to a transparent Kenyan society. However, there is also an impression among the respondents that the system allows and even promotes actions that are beneficial for certain individuals at the expense of society and the rule of law at large.

The survey respondents have identified the Kenya Revenue Authority (KRA) and the Judiciary as the key institutions that demonstrate the largest improvement potential.

The KRA serves as the primary government agency responsible for assessing, collecting, and accounting for tax revenues in Kenya. The authority issues business permits and import permits and determines fees and levies applicable to businesses operating in the country. Nordic companies have encountered difficulties across all of these processes, as will be outlined further in this report.

The Judiciary has struggled to uphold the rule of law and to hold perpetrators accountable, particularly in high-profile cases involving businesspeople and politicians. This has left many business owners with a sense that perpetrators can evade legal consequences by paying bribes.

The involvement of the political establishment in commercial projects in Kenya is also a source of concern. Lawmakers are perceived to pass legislation that benefits themselves and engage in corrupt practices and thereby disadvantaging business owners that adhere to transparent and compliant modes of business. This state of affairs has contributed to a reluctance among some Nordic companies to invest and commit fully in Kenya, as the playing field appears to be tilted against them.

AREAS AND CASE STUDIES OF EXAMPLES OF CORRUPTION

Nordic businesses operating in Kenya face various forms of corruption with differing levels of severity. In some instances, the disruptions caused by public institutions have compelled businesses to contemplate ceasing operations in Kenya and relocating to other African countries. The following are risk areas pointed out by the respondents and deep dives into cases faced by Nordic businesses in Kenya:

HARASSMENT BY PUBLIC INSTITUTIONS

In the course of importing construction equipment through the Mombasa Port or JKIA Port, local officers have, on multiple occasions, held materials hostage for some of the Nordic businesses surveyed. These goods were deliberately delayed to extort money from the company as a means of gauging the company's level of desperation or eagerness to have its materials released.

During the actual construction phase, the approach is more direct, with city council officials and KRA personnel showing up to harass the companies. "Inspectors" from the City Council and KRA arrive unannounced with various claims, seeking to identify ways to invent fees, unearth "forgotten documents," and locate "approvals" and other formal documents to request bribes.

Some of the delays caused by hindering construction projects can result in losses to the firm, especially when delaying milestones result in the company/contractor facing penalties.

Case - Nordic businesses subjected to harassment by government officials

Specific examples of harassment of government officials for construction projects include:

- City council officials appeared and arrested the local site manager and main contractor as a tactic to lure the non-local managing director (MD) to the site. The motive behind this approach is to intimidate and scare the MD into conceding to their demands.
- During the reported encounter, city council officials appeared with a team of local police officers with a high conflict level from the onset to intimidate the gathered site workers. The local site workers, who understand the risks associated with protesting against the police, have low incentive to resist the intimidation tactics and will push the management to comply with demands to get out of a highly uncomfortable situation.

The eventual outcome of these confrontations is typically a balancing act between the cost of delays and the amount demanded. Nordic companies' managing directors typically have clear instructions and no corruption policies from their headquarters regarding how to proceed in such situations. However, it is one thing to make decisions from a desk outside of Kenya and entirely different to confront intimidation from people who exhibit no regard for the rule of law.

PROCUREMENT FRAUD

The procurement process for government projects is often perceived as flawed in Kenya. Winning certain tenders typically requires an additional fee of approximately 10 per cent to secure a favourable outcome. However, even after such a fee is paid, there is no guarantee of being awarded the tender.

Kickbacks, in the form of facilitation fees, have already been integrated into the procurement process. In some instances, procurement processes commence with monetary exchanges whereby all interested parties are obligated to pay the 10 per cent fee, whether they are willing to or not.

Furthermore, within the tendering process, third parties are inevitably involved and occasionally cause disruptions by demanding inflated invoices from businesses seeking to participate in the tender process. As a result, these businesses are often compelled to make down payments, which in turn serve as kickbacks to the third party and the individuals responsible for issuing the tender.

Case – Nordic businesses required to make a down payment in order to be awarded a tender

One of the cases reported involved a scenario in which a third party, who had already won a tender, approached a Nordic business with a proposition to use them as a front to take over the tender. As part of the arrangement, a significant down payment was proposed, with a portion of the funds intended as a kickback to the third party and the officials involved in issuing the tender.

The Nordic business was made to understand that the only way to secure the tender was to comply with these demands. The company refused to participate in the suggested setup and subsequently lost the tender.

PAYMENT PROCESSES

In order to receive payment from parastatals, it is often necessary to provide an upfront bribe. This bribe serves as an inducement for the invoice to be expedited and prioritised in the next payment cycle. The amount requested as a bribe is often proportional to the value of the invoice in question, with larger invoices attracting higher demands for bribes. This practice undermines the integrity of the payment process and creates an uneven playing field for businesses seeking to receive payment for services rendered to parastatals.

Case – Nordic businesses required to make payments in order to receive payment for their invoices

One Nordic business was requested to make an additional payment to ensure payment of its invoice. The amount demanded was significant, and thus, the request was considerable. However, the business chose to decline the request and had to acknowledge the payment as a bad debt. Given the uncertainty surrounding legal recourse against political institutions, writing off the bad debt was deemed a more practical solution for the client.

PERMITS AND APPROVAL PROCESSES

Most fields of business require a specific business permit for a company to be allowed to initiate operations. The business license requirement comes into force after the company is registered, and costs have already started to accumulate for staff, offices, and procurements. The business permit is

specific per industry and includes input from expert authorities such as medical, environmental and similar. To obtain permits to conduct business operations in Kenya, individuals often encounter obstacles that result in demands for additional payments to facilitate the intended transactions.

The importation of goods through the two major ports of entry in Kenya, namely Mombasa and JKIA, is particularly susceptible to interest from customs officials. KRA and port officials may cause delays in the release of goods until additional fees are paid. Port officials may cite the lack of required permits for the importation of goods into the country.

During the transportation of goods across county borders, local police officers, in collusion with county officials, may demand additional fees from businesses to grant permits for the transportation of goods. The amount of the demanded fee is dependent on the value of the goods being transported.

Case – Nordic businesses compelled to pay additional levies to transport goods across counties

Several Nordic businesses have reported instances of facing coercion by local police and county officers, who demanded payment of additional levies to allow the transportation of goods across county borders. Routine stops along major highways and roads have been established, with county officials inspecting the goods being transported. They would assess the value of the goods and request licenses before allowing them to pass the border.

If the officials determined that the goods were of high value or were intended for an international recipient, they would demand additional levies and clamp the vehicles until the local MD or management paid the requested amount. In situations where it is difficult for the officials to communicate with the transporters' supervisors, they would be more willing to ask for petty bribes on the roadside. In some instances, they would make telephone calls through the drivers' cell phones, leaving no evidence of their identities. If they noted that the conversation involved a legal representative or a person of authority from the driver's local management, they would typically end the call and release the driver.

LESSONS ON HOW TO AVOID DEALING WITH CORRUPTION IN KENYA

Nordic businesses generally have a high level of preparedness to do business in Kenya and avoid engaging in corruption. Some of the ways in use include:

1. Establishing internal protocols, Codes of Conduct and other rules of engagement to set clear expectations for internal and external counterparts. This is partly to protect the company, but also mentioned explicitly as a way to protect individuals, including whistleblowers, from corrupt practices. Project officers within companies are often subjected to attempts to engage in corrupt activities, particularly if they are local employees and well-known within the business network. Culprits may pressure and threaten these individuals to engage in corrupt deals and, in some cases, go to great lengths to show that they are serious in their threats.
2. Seeking legal advice and ensuring that due process is being followed to reduce the exposure to gaps in licensing, permits and processes. Any mistake or missing paperwork can lead to long lead times when recognised and rectified. Such gaps can also be exploited by officials that offer fast-tracking of formalities at a cash payment to the individual rather than to the authority.
3. Deliberately selecting segments of the market and business partners with whom they conduct business to avoid corruption or being embroiled in illegal procedures, mainly by:
 - a. Sticking to private sector counterparts rather than public institutions
 - b. Opting for open tenders where they can compete based on their competence and quality. Nordic businesses specifically mentioned avoiding participation in tenders where Chinese competitors were present, as they are perceived to be more willing to engage in rule-breaking practices.
4. Choosing alternative transportation routes to avoid disruptions caused by local police and county officials. Cargo delivery by train is seen as the best alternative to avoid harassment while transporting goods across county borders.
5. Dealing with the market at an arms-length distance. Collaborating with vetted local partners to participate in tenders on their behalf with clearly communicated rules of engagement and instructions to work the local market by the book.

A few of the companies elaborated on the way that they wished they could push back every corruption attempt by legal means, and through their actions show that they would fight all the way through the court system. They were aware of the fact that they might lose the individual battle but, in the end, win the overall war. However, the time and monetary resources required for such an approach are insurmountable for most Nordic businesses on the market.

CORRUPTION REMAINS A REALITY FOR TOP GOVERNMENT AGENDA TO FIGHT

Corruption remains prevalent in Kenya, with its manifestations evolving, particularly following the adoption of the decentralized form of government in 2013. Corruption appears to be more prevalent at the county level, with the transference of functions to the counties. In 2015, the former administration of President Uhuru Kenyatta classified corruption as a national security threat and acted by suspending government officials accused of corrupt practices. These efforts resulted in an improvement in Kenya's corruption perceptions index, increasing from 27 to 32 points during his ten-year tenure on a scale from zero (highly corrupt) to 100 (very clean). The current administration of President William Ruto has made commitments to continue the fight against corruption, including efforts to de-politicize and ensure the independence of the judiciary.

Despite ongoing efforts, the battle against corruption in Kenya remains a work in progress. Nevertheless, survey respondents remain optimistic that the country is taking steps in the right direction to address this issue. The government agencies tasked with implementing anti-corruption measures pose the most significant threat to combating corruption. Recent changes in the leadership of the KRA are seen as a positive step in tackling corruption within the agency.

The fight against corruption is fought on all levels. From the day-to-day business decisions within companies operating on the local market to supporting structures such as the Trade Promotion agencies and Embassies of the Nordic countries. The main responsibility, however, and the key to changing the culture long term lies within Kenyan society's political level and public bodies.

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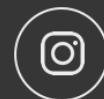
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