



LAW OF TRUSTS AND REGISTRATION UNDER THE TRUSTEES (PERPETUAL SUCCESSION) ACT

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Trust Law in Kenya as with most common-law countries, is to a large extent dependent on common law on ordinary Trusts which establish a basic relationship between a settlor, trustee and beneficiary. Compared with other economies around the world, the Trusts regime in Kenya is not flexible enough to accommodate more advanced relationships between settlors and beneficiaries, facilitating the setting up of Trusts for effective and adequate succession and tax planning of family affairs and assets. Under Kenyan Law, the trustees have far more discretion than a settlor would prefer. As a result, the Trust structures in Kenya are predominantly used by charitable organisations and religious institutions.

A Trust is essentially a legal relationship that exists between a Settlor (creator of the trust), a Trustee (a protector of the trust) and a Beneficiary. These parties can either be individuals or legal entities. Under a Trust arrangement, the Settlor transfers legal ownership of assets to the Trustee, to hold for the benefit of the Beneficiaries

Trusts are created through a written document (this can either be a settlement document or a declaration of trust) which sets out the duties and powers of a Trustee

Trusts in Kenya are created under the Trustees Act or the Trustees (Perpetual Succession) Act (Cap.164 of the Laws of Kenya) (Act).

Trusts are subject to other statutes that affect the operation of Trusts in Kenya such as the Income Tax Act and the Tax Procedures Act.

A Trust having been established by way of a Trust deed ought to be stamped and then registered at the Lands Registry under the Registration of Documents Act (Chapter 285 of the Laws of Kenya). The process of registration of the Trust deed pursuant to CAP 285 establishes it as an unincorporated Trust which does not have any distinct legal personality of its own.

The implication of an unincorporated trust is that the Trust can only own property, enter into contracts or do any other thing in the name of its trustees but not in its own name, that is in the name of the Trust. An unincorporated Trust does not have a separate legal existence of its own separate from its trustees. This poses a challenge when there are a change of trustees either by application of Law or under the provisions of the Trust deed, as changes are required to be individually noted on every ownership document

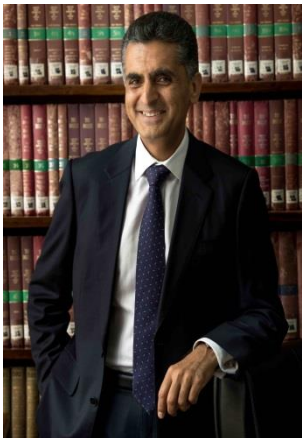
The most common mistake in formation of Trusts in Kenya is not following up registration under the Trustees (Perpetual Succession) Act (Act). The Act governs the incorporation of Trusts and provides for a defined structure on operations of Trusts and Trustees duties.

The registration under the Act accords a Trust as a separate legal status and is able to own property in its own name, enter into contracts and do any other thing in its own name. The Trust would upon registration under the Act have a separate and distinct legal identity.

Section 3 (1) of the Act provides, inter-alia, that the trustees who have been appointed by any body or association established for any religious, educational, literary, scientific, social, athletic or charitable purpose or who have constituted themselves for any such purpose may apply in under the Act, for incorporation a corporate body.

Section 4 of the Act provides that upon issuance of the certificate of incorporation (under the Act) ,it shall confer and vest in the body corporate(now incorporated as a result of issuance of certificate) all movable and immovable property and any interest therein belonging to or held by any person or persons for the benefit of the trust concerned.

Should you have any queries or need any clarifications, please do not hesitate to contact Vikram C Kanji at A B Patel & Patel Advocates, Mombasa.



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