



LEGAL ALERT

FAMILY TRUSTS IN KENYA: WHY THEY MAY BE BETTER THAN A WILL.

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Estate planning is the process of preparing, during one's lifetime, for the management and disposal of assets in the event of death or incapacitation. It involves determining how property will be transferred to heirs, while also minimising uncertainties, disputes, and administrative delays. In Kenya, wills remain the most commonly used estate planning tool due to their relative simplicity and statutory recognition. However, family trusts are an increasingly popular alternative, particularly for individuals seeking privacy, asset protection, intergenerational wealth preservation, and tax efficiency.

WILLS VS FAMILY TRUSTS

Wills

A will is a formal declaration of a person's wishes regarding the distribution of their assets upon death. It may be oral or written and is governed by the Law of Succession Act. Wills are affordable, flexible, and provide legal certainty, reducing the risk of disputes among beneficiaries. However, they must comply with strict drafting and attestation requirements, and they take effect only upon the death of the testator. All wills must go through probate a public process that can invite third-party interference and creditor claims.

Family Trusts

While a family trust on the other hand is created by a **settlor** (the Founder of the Trust) by transferring his or her assets to a private trust and placing them under the control of a **trustee** for the benefit of their named **beneficiaries**. The settlor can be retained as settlor, beneficiary or trustee of the trust. In Kenya, family trusts are legally recognized under the Trustees (Perpetual Succession) (Amendment) Act, signed into law on 7th December 2021. They can be registered or incorporated by any person, whether individually or jointly, for purposes of estate planning or management.

Section 3C of the Trustees (Perpetual Succession) Act defines a family trust as either living or testamentary, and as being partly charitable or non-charitable. It must be created for the planning or management of a personal estate, in contemplation of other beneficiaries whether such beneficiaries are related or unrelated to the settlor, and whether they are living or unborn. A family trust must be established for the preservation or creation of wealth for future generations, and it must operate strictly as a non-trading entity. Significantly, the law expressly provides that a family trust is not invalid merely because the settlor or joint settlors are also beneficiaries.

Through this framework, a settlor is able to transfer assets to trustees, ceasing to be the legal owner, while the trustees become the legal owners and the beneficiaries hold beneficial ownership. This structure enables the protection, preservation, and structured transfer of wealth across generations.



ADVANTAGES OF TRUSTS OVER WILLS.

While both wills and family trusts serve as estate planning tools, they differ significantly in their nature, operation, and effect. A trust is generally more private, as it does not require public court proceedings or invitations for objections, unlike a will, which must go through the probate process a public procedure that may open the succession to interference by third parties. Unlike wills, trusts do not require the lodging of probate proceedings in court, and once created, they can be administered without court intervention. The process of creating a trust is relatively straightforward and is not bound by restrictive formal requirements, whereas a will must strictly comply with statutory drafting and attestation requirements, failure of which may render it invalid. Trusts also offer a legal and secure means of protecting assets from creditors or from claims in divorce proceedings, while creditors may freely participate in probate proceedings and have debts settled from the estate of the deceased. Another key distinction lies in their duration and timing. A trust can exist across multiple generations, particularly where it is designed as a living trust, which takes effect during the settlor's lifetime. In contrast, a will only becomes operative upon the death of the testator and ceases to have effect once all the assets have been distributed to the beneficiaries. Trusts are therefore uniquely suited to preserving and growing family wealth for the benefit of several generations, while wills typically only benefit the immediate succeeding generation.

FORMS OF FAMILY TRUSTS

Subject to the provisions of the Trustees act, Family trusts are of two types, living and testamentary trusts.

A **Living Trust** is created during the settlor's lifetime and takes effect as soon as it is properly funded. It allows the settlor to retain access to and control over the assets, while setting out instructions for their management and distribution after death. Living Trusts can be revocable, allowing changes during the settlor's lifetime, or irrevocable, which generally cannot be altered once established. One of the main advantages of a Living Trust is that it can help avoid the probate process, thereby preserving privacy and reducing delays in transferring assets to beneficiaries.

A **Testamentary Trust**, on the other hand, is created within a will and only comes into effect upon the death of the testator. It is often used to manage inheritances for minors or vulnerable dependants, with distributions tied to specific ages, milestones, or conditions. While it does not avoid probate and becomes irrevocable once in effect, it offers the benefit of court oversight, ensuring that assets are safeguarded and distributed in line with the testator's wishes.

TAX EXEMPTIONS OF A TRUST IN KENYA

Trusts in Kenya can offer significant tax advantages, particularly for individuals and families seeking to preserve and transfer valuable assets in a cost-effective manner. A duly registered family trust enjoys legal recognition and may qualify for several statutory exemptions under Kenyan law. These exemptions include:

Capital Gains Tax (CGT)

Paragraph 58 of the First Schedule to the Income Tax Act exempts the transfer of title to immovable property to a registered family trust from Capital Gains Tax. This means that, in certain family trust arrangements, property can be transferred into the trust without incurring CGT liabilities.



Income Tax

Paragraph 36(g) of the First Schedule to the Income Tax Act provides an income tax exemption where an individual gains from the transfer of property, including investment shares, if such transfer or sale is made for the purpose of transferring the title or the proceeds into a registered family trust.

Stamp Duty

Section 52(2)(b) of the Stamp Duty Act exempts from stamp duty a conveyance or transfer in favour of a registered family trust established for charitable purposes, or to trustees of such a trust. Further, Section 117(h) of the Act provides a general exemption from stamp duty for transfers to a registered family trust.

Collectively, these tax exemptions can lead to substantial savings on transactions involving property and investments, making trusts a strategic tool for asset protection, succession planning, and tax efficiency.

PROCEDURE FOR THE REGISTRATION OF A TRUST IN KENYA

In Kenya, the incorporation of a trust is facilitated through the Business Registration Service (BRS), primarily via the eCitizen platform. The process is as follows:

1. Registration of an eCitizen Account

The applicant must first create and activate an eCitizen account, as the application for incorporation is submitted through the BRS online portal (manual.brs.go.ke).

2. Application for Incorporation

The application is lodged online through the BRS system, accompanied by the required information and documentation. These include:

▮ Proposed Name of the Trust

The name must end with the words "Registered Trustees".

▮ Objects or Purpose of the Trust

The objectives must be clearly outlined, demonstrating the intention to incorporate the trust. Objectives should not be offensive or contrary to law.

▮ Duly Filled Incorporation Form (Form TR1)

This prescribed form is available on the BRS platform.

▮ Petition for Incorporation of the Trust

Executed by the parties and commissioned before a Commissioner for Oaths.

▮ Trust Deed

Duly stamped and registered under the Registration of Documents Act (RDA), serving as the constitution of the trust.

▮ Statement of Funding

If funded by donors: a statement of donor funding.

If self-funded: a letter of commitment from the trustees.



▮ **Title Documents of Trust Assets**

Proof of ownership of assets or property belonging to the trust, with a current search where applicable.

▮ **Financial Status Documentation**

Documentary proof such as financial statements.

▮ **Minutes Appointing Trustees**

▮ **Brief Summary of the Trust**

At least one page describing the trust.

▮ **Common Seal Design**

Diagrammatic representation showing the intended outlook of the trust's seal upon incorporation.

▮ **Curriculum Vitae of Trustees**

▮ **Identification Documents**

Certified copies of the ID, KRA PIN, and passport-sized photographs of the settlor, trustees, beneficiaries, and any enforcers.

Should you have any questions on this legal alert, please do not hesitate to contact us,



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