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**THE TRUSTEE (PERPETUAL SUCCESSION)
(AMENDMENT) ACT, 2021**

No. 13 of 2021

Date of Assent: 7th December, 2021

Date of Commencement: 23rd December, 2021

AN ACT of Parliament to amend the Trustee (Perpetual Succession) Act and for connected purposes

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Trustee (Perpetual Succession) (Amendment) Act, 2021.

Short title.

2. The Trustee (Perpetual Succession) Act (hereinafter referred to as the “principal Act”) is amended in section 2 by inserting the following new definitions in the proper alphabetical sequence—

Amendment of section 2 of Cap. 164.

“charitable trust” means a trust established under section 3B;

“Cabinet Secretary” means the Cabinet Secretary responsible for matters relating to lands;

“discretionary trust” means a trust where the beneficiaries or the benefits of the trust become ascertainable once the trust deed sets-out the criteria or at the discretion of the trustees;

“enforcer” means the settlor or any other person, body or association of persons who is appointed or replaced by the settlor or the beneficiaries in the absence of the settlor, to monitor the administration of the trust for the benefit of the beneficiaries;

“family trust” has the meaning assigned to it under section 3D of this Act;

“Principal Registrar” has the meaning assigned to it under the Registration of Documents Act;

Cap.285

“Non-charitable purpose trust” means a trust which is established under section 3J.

3. The principal Act is amended in section 3 by—

Amendment of section 3 of Cap. 164.

(a) deleting subsection (1) and substituting therefor the following new subsection—

(1) Any person or body of persons who have lawfully constituted themselves for the purpose of forming a trust may apply to the Principal Registrar for a certificate of incorporation.

(b) by deleting subsection (2) and substituting therefor the following subsections—

(2) The Principal Registrar shall within sixty days of receipt of an application for incorporation of a trust, grant or reject the application.

(2A) Where an application is rejected, the Principal Registrar shall give written notice to the applicant and the notice shall state the reason for rejecting the application.

(2B) Where an application for incorporation is approved by the Principal Registrar, he or she may grant a certificate accordingly, subject to such conditions or directions.

4. The principal Act is amended by inserting the following new sections immediately after section 3—

Insertion of new sections into Cap. 164.

Irrevocable trusts.

3A. (1) Unless a trust contains an express power of revocation, it shall be deemed to be an irrevocable trust.

(2) A trust shall be deemed to be irrevocable if an express power of revocation has not been exercised by the settlor during the lifetime of the settlor.

Charitable trusts.

3B. (1) A charitable trust is a trust formed for the exclusive purpose of the relief of poverty, the advancement of education, religion or human rights and fundamental freedoms, or the protection of the environment or any other purpose beneficial to the general public.

(2) A trust shall be deemed to be charitable if—

(a) the charitable objects may be pursued in Kenya or elsewhere;

- (b) the objects are beneficial to the general public or a section of the public;
- (c) the trust is discretionary; and
- (d) the trustee has power to defer distribution of the assets of the trust to any charity or other beneficiary of the trust for a period not exceeding the duration of the trust.

Non-Charitable
Purpose trust.

3C. (1) A non-charitable trust may be created for a specific purpose notwithstanding the absence of any beneficiary.

(2) A non-charitable purpose trust becomes valid if—

- (a) the purpose, whether partly charitable or not, for which the trust is created is specific, capable or fulfilment and is not illegal; and
- (b) the terms of the trust provide for the disposition of surplus assets of the trust upon its termination.

Family Trust.

3D. (1) A family trust is a trust, whether living or testamentary, partly charitable or non-charitable, that is registered or incorporated by any person or persons, whether jointly or as an individual, for the purposes of planning or managing their personal estate.

(2) A family trust shall be—

- (a) made in contemplation of other beneficiaries, whether such intended beneficiaries are directly related to the settlor or not, or are living or not;
- (b) made for the purpose of preservation or creation of wealth for generations; and
- (c) a non-trading entity.

(3) Notwithstanding sub-section (2), a family trust shall not be invalid for reason that the Settlor or joint Settlers are also beneficiaries to the trust.

Adding property to a trust.

3E. (1) Subject to the terms of the trust, a trustee may accept from any person any property to be added to the trust property.

(2) Where the settlor declares a trust in respect to a property which he does not own at the time of the declaration, no rights or duties shall arise under the trust instrument at the time of constitution of the trust and the trust shall be deemed to come into existence at the time the settlor becomes beneficially or legally entitled to the property which was the subject of the declaration.

(3) The trustee shall not acquire a better title to the trust property than the settlor or transferor of had immediately before the transfer of the disposition.

Validity of a trust.

3F. (1) A trust shall be valid and enforceable in accordance with the terms of the trust.

(2) A trust is invalid if—

- (a) it is created for a purpose or purports to do anything which is illegal in Kenya;
- (b) it has no identifiable or ascertainable beneficiary;
- (c) it is established by duress, fraud, misrepresentation or in breach of a fiduciary duty;
- (d) the terms are so uncertain as to render performance impossible; or
- (e) if the settlor had no legal capacity to create the trust.

(3) Notwithstanding that a trust is created voluntarily, and is effected without

consideration, a trust shall not become void by virtue of—

- (a) the settlor's bankruptcy;
- (b) liquidation of the settlor's property; or
- (c) proceedings or a suit against the settlor by his or her creditors.

(4) The Court may declare a trust to be void where it is proven that the trust was made for fraudulent purposes, including to evade creditors of the settlor.

(5) Subject to subsection (2) (d), where some purposes of the trust are invalid but other purposes are not—

- (a) in case the purposes cannot be separated, the trust shall be invalid;
- (b) in case the terms can be separated, the court may declare that the trust is valid with regard to the purpose which is lawful.

(6) Where a trust is partially invalid, the Court may declare what property is to be held subject to the trust and what property is not.

(7) The provisions of subsection 2 (b) do not apply to a trust established under section 3C.

Beneficiaries of a trust

3G. (1) A beneficiary of a trust shall be identifiable or ascertainable in reference to a class or relationship with another person, whether living or dead.

(2) Subject to subsection (1), the terms of a trust may expressly provide for the addition or exclusion of a person in a class of persons eligible to be beneficiaries of the trust.

(3) The terms of a trust may impose an obligation or condition on a beneficiary to the trust.

Class of
beneficiaries.

3H. (1) Where a trust is created in favour of a class of persons—

- (a) the class shall be deemed to close when it is no longer possible for any person to become a member of that class; and
- (b) where the interests in a class relate to income, and no member of the class exists, the income shall be accumulated and retained until the member of the class comes into being.

Disclaimer of
beneficial interest.

3I. (1) Subject to the terms of the trust, a beneficiary may disclaim his or her interest or any part of it, where or not he has received any benefit from the trust.

(2) A disclaimer shall be in writing addressed to the trustees.

Enforcers.

3J. (1) An enforcer may be appointed in accordance with the terms of the trust.

(2) The functions of an enforcer shall be to—

- (a) enforce the terms of the trust;
- (b) inquire into the status of implementation of the trust;
- (c) require the trustee to take remedial action, where there is breach of the terms of the trust;
- (d) report to the settlor or the beneficiaries any financial or other breaches by the trustees; and
- (e) pursue legal action against the trustees, whether criminal or civil.

(3) The enforcer may act in the place of the Trustees during the hearing and determination of any suit under subsection (2).

(4) A person shall not perform both the functions of an enforcer and a trustee.

(5) An enforcer shall have access to any documents, accounts or information necessary for the performance of his or her functions.

(6) Without prejudice to the generality of subsection (5), an enforcer may request for—

- (a) accounts of the trust;
- (b) the trust instrument;
- (c) any other documents that are used by the trustees.

(6) An enforcer shall not—

- (a) derive directly or indirectly any profit by reason of his appointment:

Provided that a reasonable fee, and any reasonable expenses, may be paid out of the trust;

- (b) enter into any dealings with a trustee in relation to trust property.

(7) An enforcer may resign in writing, addressed to the trustees.

(8) The trustees shall notify the Principal Registrar, in writing, of a change of enforcers at least thirty days from the date of the notice under subsection (7).

5. Section 5 of the principal Act is amended—

- (a) by deleting the word “Minister” wherever it appears and substituting therefor the words “Principal Registrar”;
- (b) in subsection (1) by deleting the words “or by any conditions or directions inserted by the Minister under subsection (2) of section 3”; and
- (c) by deleting subsection (2).

Amendment of
section 5 of Cap.
164.

6. Section 6 of the principal Act is amended by deleting the word "Minister" wherever it appears and substituting therefor the words "Principal Registrar".

Amendment of section 6 of Cap. 164.

7. Section 8(1) of the principal Act is amended by deleting the word "Minister" and substituting therefor the words "Principal Registrar".

Amendment of section 8 of Cap. 164.

8. Section 13 (1) of the principal Act is amended by deleting the word "Minister" and substituting therefor the words "Principal Registrar".

Amendment of section 13 of Cap. 164.

9. Section 16 of the principal Act is amended—

Amendment of section 16 of Cap. 164.

(a) by deleting the word "Minister" wherever it appears and substituting therefor the words "Principal Registrar";

(b) in subsection (2) by deleting the words—

"whereupon any land vested in it shall escheat—

(a) if the land is trust land, to the county council in whose area of jurisdiction the land is situated;

(b) if the land is not Trust land, to the Government;

Provided that this shall not apply where such corporate body is wound up under the provisions of section 33 of the Societies Act (Cap 108).

10. The principal Act is amended in section 17 by deleting the word "Minister" and substituting therefor the words "Cabinet Secretary."

Amendment of section 17 of Cap. 164.



