



THE REPUBLIC OF KENYA

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THE TRUSTEES (PERPETUAL SUCCESSION) ACT

CHAPTER 164

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CHAPTER 164

TRUSTEES (PERPETUAL SUCCESSION) ACT

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SCHEDULES

CHAPTER 164

TRUSTEES (PERPETUAL SUCCESSION) ACT

[Date of commencement: 31st May, 1923.]

An Act of Parliament to provide for the incorporation of certain trustees for the purpose of perpetual succession to property and for purposes connected therewith

[Act No. 12 of 1923, Gazette Notice 1603 of 1955, Gazette Notice 1605 of 1955, Legal Notice 173 of 1960, Legal Notice 172 of 1960, Act No. 25 of 1959, Legal Notice 2 of 1964, Act No. 19 of 1964, Act No. 2 of 1980, Legal Notice 67 of 1981, Act No. 19 of 1985, Act No. 22 of 1987, Act No. 13 of 2021.]

1. Short title

This Act may be cited as the Trustees (Perpetual Succession) Act.

[Act No. 2 of 1980, s. 3.]

2. Interpretation

In this Act, unless the context otherwise requires—

"charitable trust" means a trust established under section 3B;

"Cabinet Secretary" means the Cabinet Secretary responsible for matters relating to lands;

"constitution" means the rules, regulations, terms and documents relating to the objects of a trust and regulating the affairs thereof and the appointment of trustees and other officers thereof;

"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;

"Non-charitable purpose trust" means a trust which is established under section 3J;

"pension fund" means a fund established under trusts subject to the law of Kenya, in connection with an undertaking or combination of undertakings carried on wholly or partly in Kenya, being a fund which the main purpose is—

- (a) the provision of superannuation allowances on retirement to persons employed in the undertaking or combination of undertakings in connection with which the fund is established; or
- (b) the provision of pensions during widowhood to the widows of persons who are or who have been so employed and of periodical allowances to or in respect of children of those persons; or
- (c) the assurance of capital sums on the death of persons who have been so employed,

whether or not the fund has been approved and registered pursuant to and for the purposes of the Income Tax Act (Cap. 470);

"Principal Registrar" has the meaning assigned to it under the Registration of Documents Act (Cap. 285);

"provident fund" means a fund whether or not approved and registered pursuant to and for the purposes of the Income Tax Act (Cap. 470), which is established under an irrevocable trust and which is established by or on behalf of an employer with the principal object of providing for the payment of lump sums to his employees in respect of their service with him upon their leaving that service after a specified period thereof, or to any of the dependants, or to the estate, of any of those employees on their death while in that service;

"trustees" includes a sole trustee.

[Act No. 2 of 1980, ss. 3 and 4, Act No. 19 of 1985, Sch., Act No. 22 of 1987, Sch., Act No. 13 of 2021, s. 2.]

3. Incorporation of trustees

(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.

(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.

(3) The trustees shall thereupon become a body corporate by the name described in the certificate, and shall have perpetual succession and a common seal, and power to sue and be sued in their corporate name and, subject to the conditions and directions contained in the certificate, to hold and acquire, and by instruments under the common seal to convey, transfer, assign, charge and demise any movable or immovable property or any interest therein now or hereafter belonging to, or held for the benefit of, the trust concerned in the same manner and subject to such restrictions and provisions as trustees might so do without incorporation.

[G.N. 1605 of 1955, Sch., L.N. 173/1960, Sch., Act No. 2 of 1980, s. 5, Act No. 19 of 1985, Sch., Act No. 22 of 1987, Sch., Act No. 13 of 2021, s. 3.]

3A. Irrevocable trusts

(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.

[Act No. 13 of 2021, s. 4.]

3B. Charitable trusts

(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.

[Act No. 13 of 2021, s. 4.]

3C. Non-Charitable Purpose trust

(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 of 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.

[Act No. 13 of 2021, s. 4.]

3D. Family Trust

(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 settlors are also beneficiaries to the trust.

[Act No. 13 of 2021, s. 4.]

3E. Adding property to a trust

(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.

[Act No. 13 of 2021, s. 4.]

3F. Validity of a trust

(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 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.

[Act No. 13 of 2021, s. 4.]

3G. Beneficiaries of a trust

(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.

[Act No. 13 of 2021, s. 4.]

3H. Class of beneficiaries

(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.

[Act No. 13 of 2021, s. 4.]

3I. Disclaimer of beneficial interest

(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.

[Act No. 13 of 2021, s. 4.]

3J. Enforcers

(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).

[Act No. 13 of 2021, s. 4.]

4. Property to vest in body corporate

The certificate of incorporation shall vest in the body corporate 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.

[Act No. 2 of 1980, s. 6.]

5. Application for incorporation

(1) An application to the Principal Registrar for a certificate under this Act shall be in writing, signed by the person or persons making it, and shall contain the several particulars specified in the Schedule, or such of them as shall be applicable to the case.

(2) The Principal Registrar may require such declaration or other evidence in verification of the statements and particulars in the application, and such other particulars, information and evidence, if any, as he may think necessary or proper.

[G.N. 1605 of 1955, Sch., L.N. 173/1960, Sch., Act No. 13 of 2021, s. 5.]

6. Appointment of trustees

(1) Before a certificate of incorporation is granted the trustees shall have been effectually appointed or constituted to the satisfaction of the Principal Registrar, and where a certificate of incorporation has been granted vacancies in the number of trustees shall from time to time be filled so far as is required by the constitution of the trust concerned, or by any conditions or directions inserted by the Principal Registrar under subsection (2) of section 3, by such legal means as would have been available for the appointment of new trustees if no such certificate had been granted, or otherwise as shall be required by those conditions or directions.

(2) The appointment of every new trustee shall be certified by, or by the direction of, the trustees to the Principal Registrar upon the completion of the appointment.

(3) Within one month after the expiration of each period of one year after the grant of a certificate of incorporation a return shall be made to the Principal Registrar by the trustees of the names and addresses of the trustees at the end of each such period.

[G.N. 1603 of 1955, Sch., G.N. 1605 of 1955, Sch., L.N. 172/1960, Sch., L.N. 173/1960, Sch., Act No. 2 of 1980, s. 7, Act No. 13 of 2021, s. 6.]

7. Certificate to be evidence of compliance with requirements

A certificate of incorporation so granted shall be conclusive evidence that all the preliminary requirements of this Act in respect of the incorporation have been complied with, and the date of incorporation mentioned in the certificate shall be deemed to be the date at which incorporation has taken place.

8. Variation of conditions in certificates

(1) The trustees in respect of whom a certificate of incorporation has been granted under this Act may apply to the Principal Registrar to vary any of the conditions or directions contained in the certificate, and the Principal Registrar, after calling for such evidence and information as he may require, may, if he is satisfied that it is proper so to do, by order vary the conditions or directions to such extent as he shall think fit, or may refuse to vary them.

(2) Where any conditions or directions are varied by order made under subsection (1), the variation shall take effect as from the date of the order.

[Act No. 25 of 1959, s. 2, Act No. 2 of 1980, s. 8, Act No. 13 of 2021, s. 7.]

9. Recording of documents, and provision of copies

(1) The Principal Registrar of Documents, appointed under the Registration of Documents Act (Cap. 285), shall keep and record in a register kept for that purpose the applications, orders and other documents lodged or given under the provisions of this Act, together with a duplicate of every certificate of incorporation issued under this Act.

(2) Any person, on completion of the prescribed form and on payment of the prescribed fee, may require to be given a copy of any such document, certified under the hand of a Registrar appointed under the Registration of Documents Act (Cap. 285).

[Act No. 25 of 1959, s. 3.]

10. Enforcement of conditions of certificate

All conditions and directions inserted in any certificate of incorporation shall be binding upon and performed or observed by the trustees as terms of the trust concerned.

[Act No. 2 of 1980, s. 9.]

11. Fees

Every application for a certificate of incorporation under this Act and every such certificate shall be charged with the prescribed fee.

[Act No. 25 of 1959, s. 4.]

12. Gifts to vest in corporate body

After the incorporation of any trustees pursuant to this Act, every donation, gift and disposition of movable or immovable property, or any interest therein, theretofore lawfully made (but not having actually taken effect) or hereafter lawfully made by deed, will or otherwise to or in favour of the trust concerned, or the trustees thereof, or otherwise for the purposes thereof, shall take effect as if it had been made to, or in favour of, the corporate body or otherwise for the same purposes.

[Act No. 2 of 1980, s. 10.]

13. Common seal

(1) The common seal of the corporate body shall have such device as may be approved by the Principal Registrar, and until a common seal is provided the seal of some person may be authorized by the Principal Registrar for use as the common seal of the corporate body.

(2) Any instrument to which the common seal of the corporate body has been affixed, in apparent compliance with the regulations for the use of the common seal referred to in section 3, shall be binding on the corporate body, notwithstanding any defect or circumstance affecting the execution of the instrument.

[G.N. 1603/1955, Sch., L.N. 172/1960, Sch., Act No. 13 of 2021, s. 8.]

14. Petition to decide question whether person is a member of a corporate body

(1) When any question arises as to whether a person is a member of a body incorporated under this Act, any person interested in that question may apply by petition to the High Court for its opinion thereon.

(2) Notice of the hearing shall be given to such persons and in such manner as the court shall think fit, and any opinion given by the court on an application under this section shall be deemed to have the force of a declaratory decree.

15. Searches

Any person desiring information may apply in person at the Principal Registry of Documents and, on completion of the prescribed form and on payment of the

prescribed fee, may inspect the register relating to the document mentioned in the form.

[Act No. 25 of 1959, s. 5.]

16. Change of name and dissolution

(1) The Principal Registrar may, if he is satisfied that the circumstances of the case so justify, order that the name of a corporate body be changed.

(2) The Principal Registrar may, if he is satisfied that a corporate body in respect of which a certificate of incorporation has been granted under this Act, has ceased to exist or that the objects for which it was established have become incapable of fulfilment, order that it be dissolved.

[Act No. 19 of 1964, Sch., Act No. 2 of 1980, s. 11, Act No. 13 of 2021, s. 9.]

17. Regulations

The Cabinet Secretary may make regulations for the purpose of regulating any matter or thing to be done under this Act, including the specifying of fees and the prescribing of forms, and generally for the better carrying out of the provisions of this Act.

[Act No. 25 of 1959, s. 5, Act No. 13 of 2021, s. 10.]

SCHEDULE

[Section 5, Act No. 2 of 1980, s. 12.]

The objects and constitution of the trust concerned, together with the date of, and parties to, every deed, will or other instrument, if any, creating, constituting or regulating it.

A statement and short description of the property or interest therein which at the date of application is held or intended to be held by the trustees.

A statement as to whether the trust concerned is a society registered or exempted from registration under the Societies Act (Cap. 108), or is incorporated under the Companies Act (Cap. 486), together with the relevant certificate of registration, exemption or incorporation.

The names and addresses of the Trustees.

The proposed title of the corporate body, of which title the words "trustee" and "registered" shall form part.

The proposed device of the common seal.

The regulations for the custody and use of the common seal.
