PN/09: Trusts

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This is not a legal document. It is a basic guide on certain trustees, what an incorporated trust is, how one is created, the benefits and disadvantages, and the regulatory requirements for perpetual succession to property and for connected purposes therewith under the Trustees (Perpetual Succession) Act and other enabling Acts (where applicable).

The guide will be relevant to you if you are a Trustee or a trust practitioner.

These practice Notes were prepared by the Joint Liaison Committee "JLC" comprising of members of The Business Registration Service, Law Society of Kenya- Nairobi Branch, Institute of Certified Secretaries and Trust Practitioners.

1. What are Trusts?

A trust is a relationship in which a Settlor/Donor/Founder (the person who creates a trust and transfers property) gives another party a trustee the right to hold and manage property whether real or personal and whether by legal or equitable title for the benefit beneficiaries (i.e. some person(s) of whom the trustee may be one of them) or for some object permitted by law.

Trusts can be categorized into two; Private Trusts and Public Trusts. Private trusts are those that are formed by private individuals for personal purposes such as personal estate planning whereas public trusts are mainly formed for a partly or exclusive public service such as philanthropy or religious reasons. Trusts can be further categorized from their nature into two categories, revocable and irrevocable trusts.

All trusts are deemed irrevocable unless the trust deed contains an express power of revocation or where such an express power has not been exercised during the lifetime of the Settlor/Donor/Founder. An **Irrevocable Trust** once created cannot be changed or terminated without the beneficiary's consent or by the order of a court whereas a **revocable trust** can be altered or canceled depending on the wishes Settlor/Donor/Founder.

Trusts are commonly used for estate planning, asset protection, charitable giving, and ensuring that assets are distributed according to the Settlor/Donor/Founder's wishes.

The trust must also have beneficiaries. However, if the beneficiaries are not in existence at the time of setting up the trust, they can be described as a class.

In the case of a family trust, the settlor can act as a sole trustee or they can appoint others to act as trustees. Provided that where the settlor is a sole trustee, they have named other beneficiaries other than themselves

2. Incorporation of Trusts

What types of Trusts can be incorporated under the Company Registry?

a) Charitable trusts

A charitable trust must exist principally or exclusively for the following reasons —

(i) the relief of poverty

(ii) the advancement of education

(iii) the promotion of religion

(iv) the promotion of human rights and fundamental freedoms

(v) the protection of the environment

(vi) other purposes for the benefit of the general public or a section of the public.

Charitable trusts in Kenya are required to be discretionary, that is to say, the trustees have the discretion to determine how to manage the assets of the trust, and how and when to distribute the trust's income or assets for purposes of fulfilling the designated charitable purposes. This includes the power of the trustee to defer the benefits to any charity or other beneficiary of the trust for a period not exceeding the duration of the trust.

b) Non- Charitable Purpose Trust

A non-charitable purpose trust may be created to carry out a specific purpose or objective that may be considered partly charitable or not charitable. Non-charitable purpose trusts are often established for **private purposes** and may not have identifiable beneficiaries. It is also required that the trust deed must provide for the disposition of surplus assets of the trust upon its termination.

c) Family Trust

Family trusts are set up for the management, protection, or planning of personal estate or the creation of wealth for generations. Family trusts can be partly charitable or non-charitable. They could also be living that is created during the lifetime of the settlor or testamentary that comes into effect after the settlor's death. A family Trust shall be a non-trading entity. A settlor may be a beneficiary in a family trust but shall not be a sole beneficiary.

What is the effect of incorporating a registered trust?

Incorporation of a trust is the process of establishing a trust as a body corporate by the name described in the certificate with-

(a) perpetual succession

(b) distinct separate legal personality from the trustees capable of entering into contracts, owning property, suing, and being sued in its own name

What is a trust deed?

A trust deed is a legal document that establishes a trust and outlines how assets should be managed and distributed by the trustee according to the wishes of the person(s) creating the trust, known as the settlor in the case of a family trust or founder in the case of a charitable trust. In simple terms, it's like an instruction manual for the trustee (the person or institution managing the trust) to ensure that the assets are used and passed down as intended to benefit chosen beneficiaries.

What are the salient features of a trust deed?

- **Identity of settlor:** The settlor is the person who creates the trust and sets the goals of the trust and should provide their capacity to form the trust.

- **Settlor’s/Founder’s Objectives**: The person who creates the trust and sets the goals of the trust, such as asset protection, family support, charitable giving, or legacy building. The trust deed reflects these objectives, ensuring they’re at the core of the trust’s purpose.

- **Appointment of Trustee(s):** Trustees are appointed to manage the trust assets responsibly. Trustees should act with care, skill, and loyalty to the trust. The deed should specify trustee roles, allowing them to carry out duties, invest assets, and make distributions per the settlor’s wishes.

- **Beneficiary Identification**: Beneficiaries are the people or entities the trust intends to benefit. The beneficiaries need to be clearly identified (by name or class) and that their interests are transparent. This includes details on who can receive assets, income, or other benefits, ensuring compliance with the settlor's wishes.

- **Trust Fund or Assets:** The deed details the assets placed in trust, whether cash, property, or investments. These assets must be legally transferred into the trust and documented for clarity, providing transparency in asset ownership and management.

- **Distribution Guidelines**: These outline how and when assets or income are distributed to beneficiaries. Trust should provide clear, specific instructions to prevent ambiguity, such as age-based or event-triggered distributions, or distributions at the trustee’s discretion.

- **Duration of the Trust:** Some trusts are meant to last a set number of years, while others may last indefinitely or until a specific condition is met. According to the Perpetuities and Accumulations Amendment Act which came into effect on March 21, 2022, stipulates that a family trust can have an indefinite term. The Trust Deed should provide a clear statement of the trust's lifespan in the deed to ensure compliance with Kenyan laws and settlor intentions.

- **Trustee Powers:** The deed should outline powers granted to trustees, like investment authority, the power to make distributions, and possibly the ability to adjust terms under specific conditions. In the Deed, trustee powers should be clearly defined to avoid conflicts and ensure fiduciary duties are met.

- **Amendment and Termination Clauses:** These provisions set out how the trust deed can be amended or terminated. It allows flexibility to adjust the trust if circumstances or beneficiary needs change, ensuring that changes still align with the trust's original goals.

Must trusts own property before incorporation?

A trust must have assets or the subject matter.

Who can incorporate trusts?

Any person or body of persons who have constituted themselves for the purpose of forming a trust may apply to the Registrar for a certificate of Incorporation this includes the founders, trustees, enforcer, settlor or advocate.

Choosing the name of a trust

The name provided should not be identical to an already reserved name or to the name of an already existing incorporated trust.

What documents are required for the incorporation of a trust?

Before incorporating a trust it's important to appreciate that for a trust to be valid three certainties have to be presents and they include-

(a) Certainty of intention this means that it must be clear that the settlor/founder/donor had the intention to create a trust.

(b) Certainty of subject matter means that a trust must have assets or the subject matter which must be described with sufficient certainty, otherwise the trust fails.

(c) Certainty of objects ideally the objects of a trust are its beneficiaries. A trust without beneficiaries fails. Where there is more than one beneficiary, the class of beneficiaries must be ascertainable.

To incorporate a Trust in line with the certainty test, the following information is required by the Registrar-

1. Proposed name which must have the word 'Registered Trustees' at the end;
2. Objects or purpose of the trust;
3. A duly completed application for incorporation in the prescribed form (Form TR1) (available on brs.go.ke); containing List of Trustees, Settlor, Registered address, List/ description of beneficiaries, list of initial enforcers (if any), List of properties/ assets
4. A Petition to have the trust incorporated (the document must be commissioned by a Commissioner for Oaths);
5. Duly Registered trust deed (registered under RDA with the Ministry of lands);
6. Statement of donor funding/commitment (Not required for family trusts);
7. Title deed belonging to the trust or one registered in the name of all trustees on behalf of the trust or other documents of asset or property ownership. (Not required for private trusts)
8. Current search indicating ownership position of assets listed (in case 7 is applicable);

9. Financial statement of the trust or one in the name of all trustees on behalf of the trust
10. For a charitable Trust the bank statements of all the trustees
11. Minutes appointing the Trustees;
12. Brief Summary of the Trust (should not exceed 1 Page);
13. Curriculum vitae of the trustees or employees (Not required for private trusts);
14. Diagrammatic representation of the common seal;
15. Certified copies of ID, KRA Pin and passport photos of the Settlor, Trustees, beneficiaries and enforcers if any.

Certificate of Incorporation

The Certificate of Incorporation is conclusive evidence that the requirements of the Trustees Perpetual Succession Act CAP 164 have been complied with at the time of incorporation and that the Trust has been duly incorporated under the Act as at the date mentioned in the Certificate of Incorporation.

How much does BRS charge to incorporate a Trust?

The fee for incorporation of a trust is 10,050/- provided that the deed has first been stamped and registered at the Registry of Documents

Recording of documents, Searches, and provision of copies

Any person may inspect the register of trust and get copies of any public document relating to the trust upon payment of Kshs. 500/-

3. Event Driven Filings

Appointment or change of trustees

The trustees shall upon completion of the appointment of new trustees file with the Registrar details of the new trustees as provided for in the deed of amendment of the trustee or the constitution as the case may be. Every application for the recording of a certificate of appointment or change of trustees shall be in Form B in the Schedule.

The Application shall be accompanied by –

1. Minutes bearing the seal of the trust
2. A copy of the Certificate of Incorporation
3. A copy of the trust deed
4. Copies of ID card for Kenyans or residents and Passport Bio data page for non-kenyan
5. Passport photos

Annual Returns

Annual returns for trust shall be made within one month after the expiration of the date of incorporation.

Change of Name

A trust may change its name by a resolution or other means provided in the trust deed.

The trustee(s) shall notify the Registrar of the change of name by submitting a notice of change of name, Form A, accompanied by the Resolution, and pay the appropriate statutory fee.

The applicant shall be required to surrender the Initial Original Certificate, or where a change of name has already taken place, the current certificate of change of name.

A change of name will be effective once the Registrar confirms its availability and issues the trustees with a certificate of change of name.

6. Dissolution

A trust may be dissolved (or terminated) through specific conditions outlined in the trust deed or by following legal principles if such provisions are absent. Below is an outline of how this works:

a) Dissolution by Terms in the Trust Deed

Many trust deeds contain specific terms or conditions under which the trust can be dissolved, such as upon reaching a certain date, depletion of the trust fund/assets, fulfilling the trust's purpose, or under the discretion of the trustee or settlor.

If the settlor/founder has specified a mechanism or conditions for dissolution, these must be followed precisely to ensure that the dissolution aligns with their original intentions.

b) Dissolution by Consent of Beneficiaries

Under the rule in Saunders v. Vautier (a common law principle recognized in Kenya), if all beneficiaries are of legal age, mentally capable, and agree unanimously, they can demand the dissolution of the trust and the distribution of its assets, even if this goes against the settlor's instructions.

This option is available only if all beneficiaries are adults and legally competent; minors or those lacking mental capacity cannot consent, meaning the trust would remain active in such cases.

c) Dissolution by Court Order

The High Court of Kenya has the authority to dissolve a trust if it finds justifiable reasons to do so. This can include cases where the trust's purposes are no longer achievable, have been fulfilled, or where the trust becomes impractical or unlawful to continue.

An application for dissolution may be made by the settlor, trustee, or beneficiaries if they believe the trust can no longer effectively serve its purpose or if there are legal issues within its structure.

Grounds for Dissolution include:

i. **Impossibility of Purpose:** If it becomes impossible to achieve the trust's purpose, the court may order its dissolution.

ii. **Illegality or Contrary to Public Policy:** If the trust's operations become illegal or counter to public policy, the court may intervene.

iii. **Changed Circumstances:** If circumstances have significantly changed since the trust's establishment, rendering its original purpose obsolete or impractical, the court may permit its termination.

d) Dissolution by Trustees with Powers of Termination

If the trust deed grants trustees explicit powers to terminate the trust, they may do so according to those terms. This can include distributing the assets to beneficiaries or reallocating them as instructed in the deed.

The trustees must act in the best interests of the beneficiaries and cannot dissolve a trust without following the conditions laid out in the deed or obtaining court authorization if those powers are limited.

7. Requirement for lost certificate of incorporation.

The trust's representative i.e trustee or settlor should publish a notice in two newspaper of nationwide circulation in Kenya (with a note that anyone with an objection to notify the Registrar with reasons within 60 days of the Notice(trusts@brs.go.ke) and publish a notice in the Kenya Gazette informing the public of the lost certificate.

The trust's representative (trustees) or settlor should submit a request for a replacement Certificate of Incorporation through the BRS manual platform, to the registry, stating:

- The circumstances under which the Certificate of Incorporation was lost.
- Efforts made to locate the original Certificate of Incorporation.

Accompanied by

1. A declaration or affidavit by the trustees-

(a) explaining how the Certificate of Incorporation was lost, misplaced, or destroyed, which must be commissioned by the Commissioner for Oaths or a Magistrate.

(b)_ declaring any pending legal or financial claims

2. A Police Abstract

3. Resolution signed by all or the majority of the trustees which should also confirm that the replacement request is not meant to amend or vary the original terms of incorporation.

4. Copy of the Kenya Gazette notice

5. Extracts of the notice in the newspaper capturing the date the notice was published

6. Certified copy of the lost Certificate of Incorporation

7. ID copy of the registered trustees

8. Payment of the prescribed fee

Registry

If all conditions are met, the Registrar of Companies issues a replacement Certificate of Incorporation (noting it is a duplicate) with a unique reference number.

The registry should update its records to reflect that a replacement Certificate of Incorporation was issued and flag the original certificate as invalid if found later.

The Registry shall maintain an updated list of all the trusts that have been issued a replacement Certificate of Incorporation.

Review of this Practice Notes

The practice note shall be reviewed once the Act has been repealed.

Effective Date

The practice notes shall come into effect from 5th February 2025.

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