

Personal Estate and Succession Planning in Kenya

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Introduction

Until an emergency or an unexpected event occurs, the majority of us postpone important personal matters as our mindset is that it can always be done later - there are other more immediate things to focus on. The unexpected Covid-19 crisis has brought into sharp focus the necessity for families to consider putting into place effective estate and succession planning. The frailties of life are all too evident and critically the risks and complications arising within families and family owned businesses from a lack of planning will be costly and is likely to result in significant loss in value of family assets.

To begin with, we would recommend that you devote time to review and update your personal documentation and carry out your estate and succession planning given that there could be a number of issues to be thought out carefully with your family.

For example, is your medical insurance cover appropriate for your family's current requirements; are all your documents such as title deeds, pension plan, life policy, shareholdings, investment documentation, passport and other identification documents in safe custody and in order?

You may have various local and overseas bank accounts; will the ability to operate these accounts be hampered in the event of death or disability and how and to whom will these important assets devolve in the event of death? Which laws will apply to a foreign asset and will these assets be shared between your immediate family if at all?

Do you have a will in place which sets out your wishes on the preferred distribution of your local and overseas assets to your preferred beneficiaries? If you have assets in multiple jurisdictions, how do you determine which country's succession laws would apply to your estate?

As you consider putting your house in order, we have identified in this Legal Alert some key legal issues to consider in the Kenya context, as well as in connection with multi-jurisdictional estate planning and applicable estate planning mechanisms.

Not Having a Will: Intestacy Provisions in Kenya

The general position in Kenya is that if an individual domiciled (domicile is a legal term of art) in Kenya dies without making a valid will (dies intestate), his immediate next of kin would need to apply to Court for letters of administration, failing which the Public Trustee would apply for letters of administration. The estate would be distributed in accordance with the fixed order of priority of beneficiaries set out in the Law of Succession Act of Kenya (the Act). For example, if a person dies, his or her spouse would become entitled to a mere life interest (and therefore there is no absolute ownership) in the deceased's estate and on the spouse's death the deceased's children would become entitled to the estate equally. In addition, in the case of a widow who re-marries, she would lose her life interest and it would vest in the deceased's children equally.


If the deceased had no spouse and no children then on his death, the estate would vest in the deceased's father. If he was not alive, then it would vest in the deceased's mother. If the mother is not alive then the estate would vest in the deceased's siblings and their children. If none of them is alive, the order of priority continues to the next immediate kin as prescribed in the Act. The distribution priority is summarised below. It is likely to be the case that the distribution waterfall is not appropriate for a family.

Intestacy in Kenya

Surviving spouse	<ul style="list-style-type: none">• Life interest in the estate (and for a widow, life interest ceases on re-marriage)• Absolute interest to children equally
No spouse	<ul style="list-style-type: none">• Estate to children equally
No spouse or children	Estate to: <ul style="list-style-type: none">• Father• Mother• Siblings and their children• Half-brothers or half-sisters and their children• Relatives up to sixth degree• Estate devolves to State if no relatives

Importance of a Will

We anticipate most families would not wish to be subject to the rigid rules of entitlement under the Act and a family would require distribution of assets on death to occur on terms which are reflective of the unique requirements of the relevant family. In this case, it would be prudent to make a will which will set out the wishes of the will maker (testator) and makes provision for the family and other persons whom the testator may wish to benefit in a manner which reflects the aims and wishes of the family.



A will would typically include provisions relating to the division and distribution of assets between the beneficiaries, whether a beneficiary will receive his entitlement upon reaching a certain age or upon an event happening, whether a beneficiary should receive a life interest (the right to enjoy an asset for lifetime only) or absolute interest, what is to happen on remarriage of a spouse and so on. In the case of minor children, you could expressly provide whom you wish to act as their guardian. The class of assets available to be allocated is clearly important to consider and could also include assets like airline points and digital assets and assets which may be available contingently. Examples of digital assets are cryptocurrency and mobile money accounts such as m-pesa.

The good news is that, with a will, there is great flexibility and the testator can by and large set out his wishes as he deems appropriate and which best suit the requirements of his family.

However, a will which is not drafted without taking proper advice may be weak and might have interpretational issues which may lead to disputes. There are other considerations to take into account which an adviser can guide you on. These include:

- a. **Dependents:** the category of persons known as “dependents” have the right to challenge your will should you not make provision for them in your will. Dependents would include a wife, former wife and children. It would also include certain categories of family members you have maintained in your lifetime. The rights granted to a “dependent” can cause significant damage if these rights are carefully evaluated. Therefore, simply cutting out a “dependent” must be thought through to ensure that your will is not challenged resulting in loss and embarrassment;
- b. **Joint assets:** certain assets would not form part of your estate, such as jointly owned assets. Where assets are held by two persons as “joint tenants” as opposed to “tenants-in-common”, then on the death of one joint tenant, the assets vest in the survivor automatically. Assets held as joint tenants do not form part of the probate process as they vest in the survivor absolutely. The probate process in Kenya, which if not contested, takes approximately 12-18 months to complete. During this time your loved ones would not be able to deal with your assets including bank accounts held in your own name. As part of your planning, you may consider holding a joint bank account with a family member so that while the probate process is ongoing the family can have access to the funds; and
- c. **A Will Trust:** your circumstances may require that it would be prudent for a trust be set up under your will, for example, where you have minor children. Under a will trust you could appoint trustees and give them power to invest the minors’ inheritance and use income from the inheritance to pay for the minors’ education, health and wellbeing. You could provide that each minor on attaining majority age would receive equal proportions from your estate. Alternatively, the trustees can be given criteria as to what age the minors should receive their full inheritance such as at the age of 21 or later. Trustees may be given discretionary powers under a will trust so that they can make decisions based on the testator’s wishes. A will trust can also be set up for persons with disabilities or special needs or elderly parents who would need help in managing their finances. It would also be suitable where for example assets comprise of shares in a successful business and the testator feels his family would not be able to manage and operate the company. The point to note is that with careful planning there are a number of options available to a family in connection with succession planning and the preservation of the family capital.

Sharia'h Law

Sharia'h law applies in Kenya with respect to distribution of the estate of a person who is of Muslim faith. A Muslim can therefore consider making lifetime gifts to certain family members who may receive less proportion from his estate on death. It enables one to effectively plan his estate by, for example, setting up a trust in his lifetime so that certain assets vest in the trust and do not form part of his estate on death. Certain assets can also be held as joint tenants so they do not form part of the deceased's estate. There are various solutions that a legal adviser can give based on a person's circumstances again with the aim of avoiding family disputes and preserving wealth.

Multijurisdictional Estate

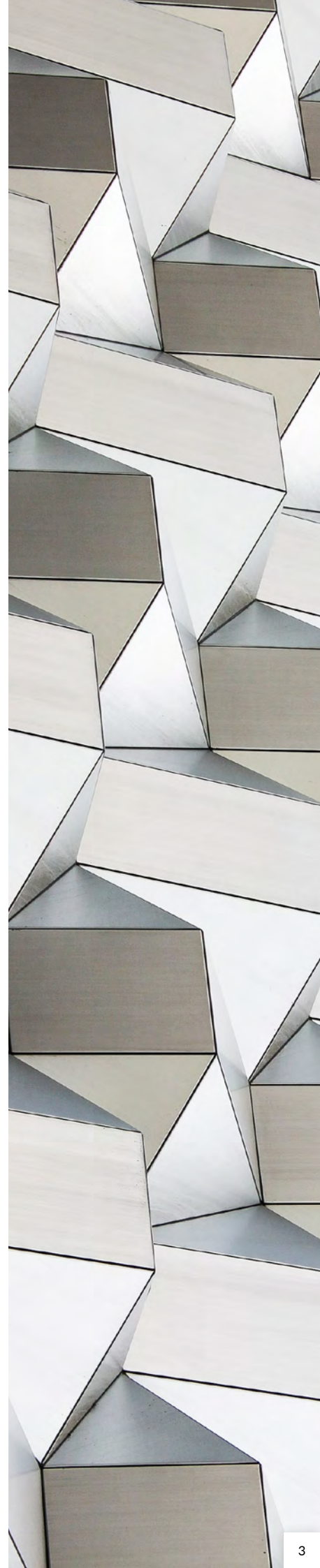
Where you have assets in several jurisdictions, it would be necessary to consider the laws of the various jurisdictions and whether separate wills are needed for each jurisdiction. In some jurisdictions like the UK, inheritance tax is payable in respect of a deceased's estate depending on the value of the estate. As such, advice should be obtained on how to minimise tax. In some cases, you would need to consider the circumstances of your beneficiary such that if they are living in the UK or the USA, their tax obligations would increase when they receive their inheritance. Some planning around such a case can be considered so as not to increase their tax burden or importantly expose the estate to foreign taxes and/or foreign reporting like to the Inland Revenue Service of the USA.

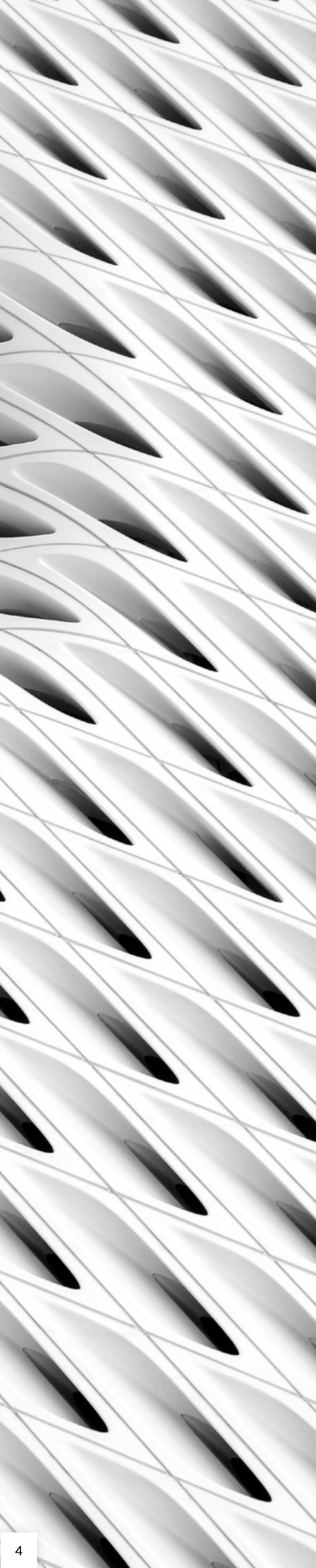
In the UAE, Sharia'h law may automatically apply to the estate of a deceased owning assets in the UAE. However, a non-Muslim can make a will setting out his wishes and such a will has to be registered at the DIFC Wills Service Centre. If this is not done, then Sharia'h law can apply to one's assets in the UAE irrespective of a person's faith.

The country of domicile also becomes an important factor to consider, particularly when one has lived and worked in more than one country and has assets in several of them. In Kenya, the laws of succession applies to all immovable property of a person in Kenya, whether or not that person is domiciled in the country. However, the laws of succession of the country of the person's domicile would apply to the person's movable property. It would accordingly be important to establish domicile so as to be aware which country's law would be applicable in relation to succession and inheritance.

Setting up a Lifetime Trust

While planning your estate you may need to consider whether it is appropriate to your circumstances to set up a trust in your lifetime and transfer some of your assets into the trust during your lifetime and/or after your death. The trust can be set up in an offshore jurisdiction or locally in Kenya and your adviser would be best placed to advise on which jurisdiction would suit your circumstances. The advantages of a local trust are that they may not be as expensive as certain offshore trust providers.





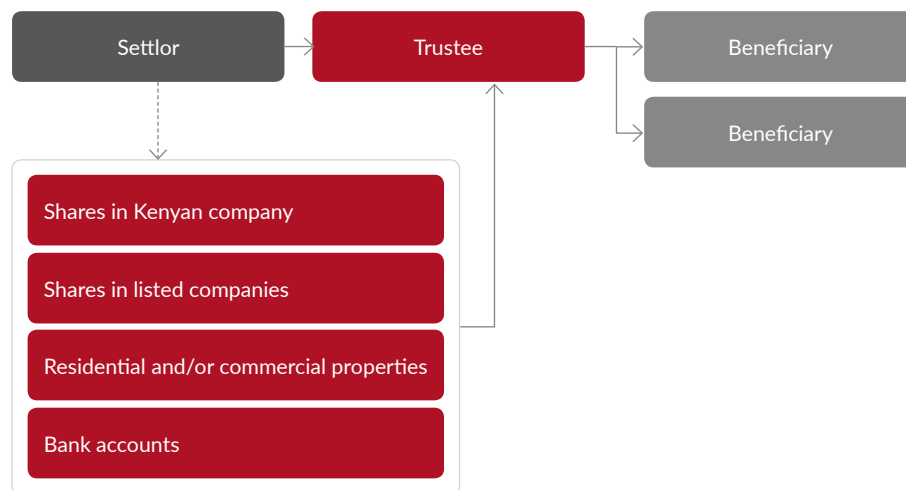
Trusts can be extremely useful instruments in planning long term for the ownership of assets including business assets. If there is some tax planning undertaken, then the tax implications of setting up a lifetime trust can be mitigated in terms of long term succession planning for a family.

When a trust is set up, the person transferring his assets into the trust during his lifetime (the settlor) would transfer ownership of the assets into the trustees of the trust. The trustees would then hold the assets for the benefit of the beneficiaries of the trust. The major advantage of such a trust is that no probate (and therefore no court process to follow on death) will be required on death as the assets will have been transferred in your lifetime. This would reduce the chances of disputes, ensure there is continuity of ownership and no delays in terms of use of assets. Beneficiaries can be identified as named persons or as category of persons, such as children and grandchildren. There are several types of trust structures and an experienced adviser can guide on which would best suit your needs. Discretionary trusts are popular where the settlor appoints trustees who he knows will exercise their discretion fairly based on the changing circumstances and needs of the different family members. As a safeguard, a settlor can appoint a protector of the trust who is a person who he trusts, who knows the family well, who can supervise the trustees and ensure the trustees carry out their duties properly. During the lifetime of the settlor, the settlor can be a protector and he can be a beneficiary as well.

Some of the advantages of a properly created trust are:

- a. the settlor can use it as a wealth management and succession planning tool such that the trustees would invest and manage the assets and would make distributions of income to the beneficiaries based on the beneficiaries' needs. The financial needs of the beneficiaries would thus be taken care of;
- b. the assets that have been transferred during the settlor's lifetime belong to the trust such that on the settlor's death there is no requirement of probate in relation to those assets. As mentioned earlier, the probate process in Kenya takes approximately 12-18 months, where a will is not contested. If a will is contested the process would take much longer. During this time your loved ones would not have access to your assets;
- c. any disgruntled dependant or creditor would not be able to claim against the assets vested in the trust as they do not form part of the settlor's estate on his death; and
- d. on a divorce, the assets vested in the trust would not be subject to matrimonial proceedings and thus would not be subject to division.

Illustration of a local Kenyan trust holding Kenyan assets



Conclusion

Effective estate and succession planning is important as it gives you control of how you would want your assets and wealth to be distributed and held including in the case of a trust on a long term basis. An adviser can give effective solutions depending on your circumstances to achieve your wishes. Whether your circumstances are simple or complex, at the very minimum it is important to have your will in place.

Key contacts

Should you require more information, please do not hesitate to contact:



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