

## **SPECIAL ISSUE**

*Kenya Gazette Supplement No. 93 (National Assembly Bills No. 23)*



REPUBLIC OF KENYA

# ***KENYA GAZETTE SUPPLEMENT***

**NATIONAL ASSEMBLY BILLS, 2021**

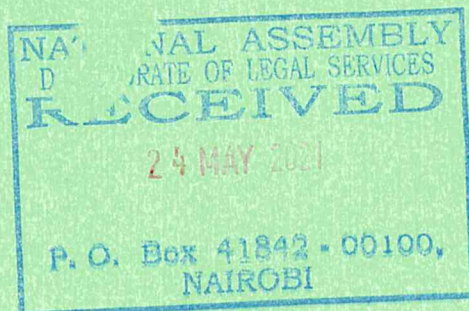
**NAIROBI, 12th May, 2021**

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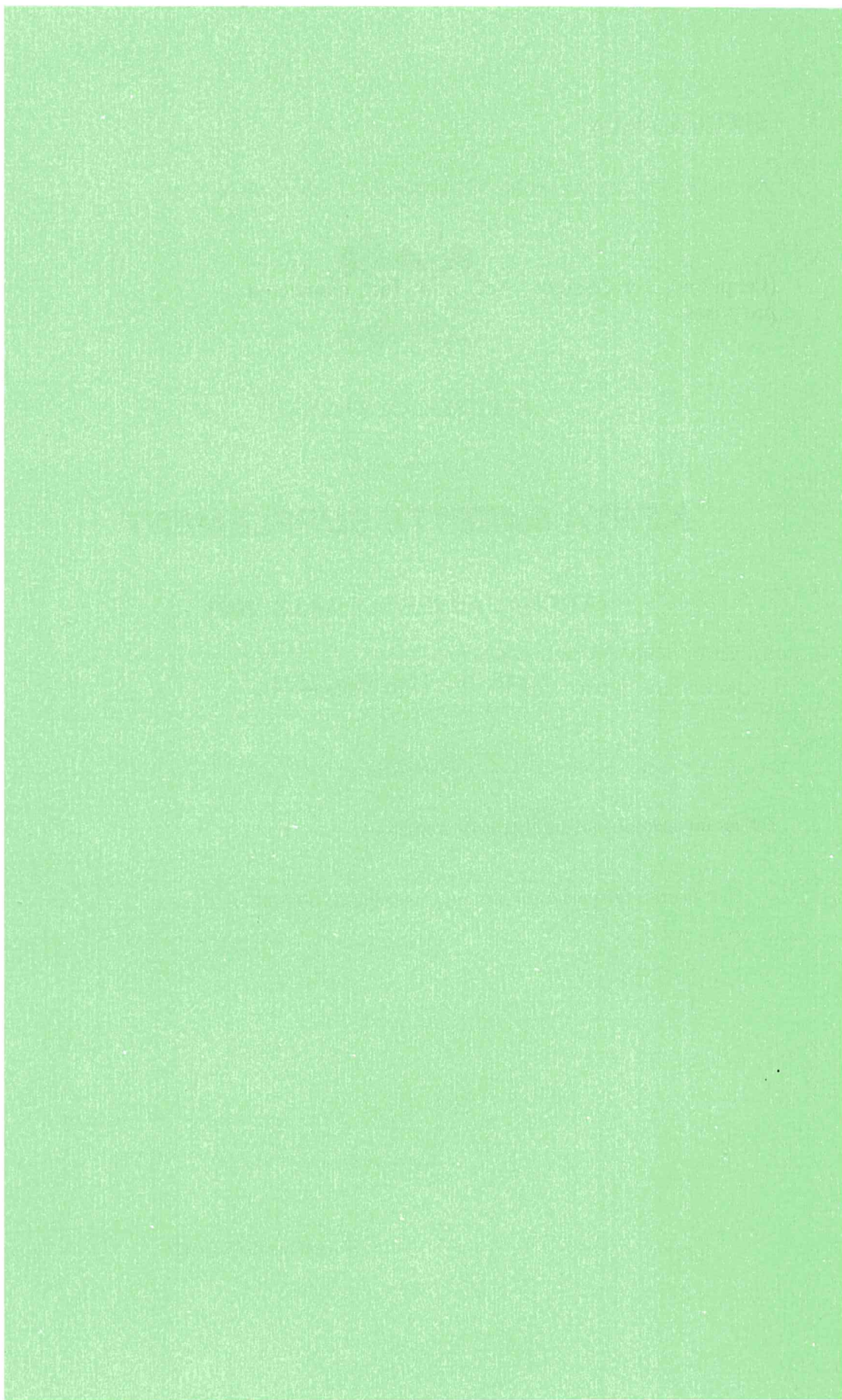
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# THE TRUSTEE (PERPETUAL SUCCESSION) ACT, 2021

## A BILL for

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 by the settlor or the beneficiaries in the absence of the settlor, to monitor the administration of the trust for the benefit the beneficiaries;

“family trust” has the meaning assigned to it under section 3C 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) by deleting the words “religious, educational, literary, scientific, social, athletic or charitable” appearing in subsection (1);

(b) by deleting the word “minister” appearing in subsection (1) and substituting therefor the words



“Principal Registrar”.

- (c) by deleting the word “minister” appearing in subsection (2) and substituting therefor the words “Principal Registrar”.

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) are beneficial to the community in Kenya or elsewhere;
- (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 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.

Adding property to a trust.

(2) A family trust shall be—

- (a) made in contemplation of other beneficiaries other than the settlor, 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 multiple 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.

**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 legally entitled to the property which was



the subject of the declaration.

(3) The trustee shall not acquire a better 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 are can be separated, the court may declare that the trust is valid with regard to the purpose which is lawful.

(4) 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.

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) There may be appointed under the terms of the trust, an enforcer.

(2) The function of an enforcer shall be to enforce the terms of the trust.

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

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

(5) Without prejudice to the generality of subsection (4), 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.

5. Section 5 of the principal Act is amended by deleting the word “Minister” wherever it appears and substituting therefor the words “Principal Registrar”.

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

Amendment of section 8 of Cap. 164.



words “Principal Registrar”.

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 by deleting the word “Minister” wherever it appears and substituting therefor the words “Principal Registrar”.

Amendment of  
section 16 of Cap.  
164.

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.



### **MEMORANDUM OF OBJECTS AND REASONS**

The principal object of this Bill is to enable accumulation of generational wealth for the benefit of multiple generations. It makes provision for and defines the various types of trusts, including charitable trusts and non-charitable purpose trusts. Additionally, the Bill makes new provisions for enforcers of a trust.

Further, the Bill proposed to amend the provisions on incorporation of trustees to recognise that trusts are registered with the Principal Registrar of Documents and not the Minister.

#### **Statement of delegation of legislative powers and limiting fundamental rights and freedoms**

The Bill does not contain any provision limiting any fundamental rights or freedoms.

#### **Statement on the Bill concerning county governments**

The Bill does not concern county governments in terms of Article 110(1) (a) as it does not affect the functions and power of county governments as set out in the Fourth Schedule.

#### **Statement that the Bill is a money Bill, within the meaning of Article 114 of the Constitution.**

The enactment of this Bill shall not occasion additional expenditure of public funds.

Dated the 22nd April, 2021.

GLADYS WANGA,  
*Member of Parliament.*



*Section 3 of Cap. 164 which it is proposed to amend—*

(1) Trustees who have been appointed by any body or association of persons established for any religious, educational, literary, scientific, social, athletic or church the trustees of a pension fund or provident fund may apply to the Minister in the manner provided in this Act for a certificate of incorporation of the trustees as a corporate body.

(2) If the Minister, having regard to the extent, nature and objects and other circumstances of the trust concerned considers incorporation expedient, he may grant a certificate accordingly, subject to such conditions or directions generally as he thinks fit to insert in the certificate, and particularly relating to the qualifications and number of the trustees, their tenure and avoidance of office, the mode of appointing new trustees, the custody and use of the common seal, the amount of movable or immovable property which the trustees may hold, and the purposes for which that property may be applied.

(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.

*Section 5 of Cap. 164 which it is proposed to amend—*

5. Application for incorporation

(1) An application to the Minister 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 Minister 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.

*Section 6 of Cap. 164 which it is proposed to amend—*

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



Minister, 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 Minister 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 Minister 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 Minister by the trustees of the names and addresses of the trustees at the end of each such period.

*Section 8 of Cap. 164 which it is proposed to amend—*

*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 Minister to vary any of the conditions or directions contained in the certificate, and the Minister, 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.

*Section 13 of Cap. 164 which it is proposed to amend—*

*13.Common seal*

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

*Section 16 of Cap. 164 which it is proposed to amend—*

*Change of name and dissolution*

(1) The Minister 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 Minister 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, 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 subsection shall not apply where such corporate body is wound up under the provisions of section 33 of the Societies Act (Cap. 108).

*Section 17 of Cap. 164 which it is proposed to amend—*

#### Regulations

The Minister 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.



