KENYA'S LAW OF TRUSTS: NEED FOR ENHANCEMENT

A Trust can broadly and traditionally be defined as a legal obligation/relationship that exists between a Settlor, a Trustee and a Beneficiary. These parties can either be individuals or legal entities. Under a Trust arrangement, the Settlor transfers legal ownership of assets to the Trustee, to hold for the benefit of the Beneficiaries.

Trusts are created through a written document which sets out the duties and powers of a Trustee. This can either be a settlement document or a declaration of Trust. Thereafter, a Trust Deed is drafted which contains inter alia; the name of the Trust, the objectives of the Trust, addresses of the Trustees and powers of the Trustees.

Trust Law in Kenya

As with most common-law countries, Kenya is to a large extent dependant on laws that are founded on the Laws of England. Trusts in Kenya are created under the Trustees Act or the Trustees (Perpetual Succession) Act. There are however, other statutes that affect the operation of Trusts in Kenya such as the Income Tax Act and the Tax Procedures Act.

Whilst there are many forms of Trusts globally, the laws in Kenya predominantly lean towards common law on ordinary Trusts which establish a basic Settlor, Trustee and Beneficiary relationship, with a legal framework for the operation of public and private Trusts. For instance, the Trustees (Perpetual Succession) Act, which governs the incorporation of Trusts, provides for incorporation of Trustees appointed for any religious, educational, literary, scientific, social, athletic or charitable purposes or the Trustees of a pension fund or provident fund. Furthermore, the Trustees Act still refers to the Laws of England when setting out investments to be made by Trustees.

Compared with other economies around the world, the Trusts regime in Kenya is not flexible enough to accommodate more advanced relationships between Settlors and Beneficiaries. Therefore, in their current state, Kenyan Trusts fail to provide an adequate planning and succession vehicle particularly for family assets, and also do little to eliminate the fears of "loss of control" and "rogue Trustees". Moreover, the traditional set up of a Trust in Kenya bestows far more discretion on the Trustee than a Settlor would desire. This is because the Settlor loses legal ownership of the assets placed under Trust while the Beneficiary is not in control of such assets during the operational stages of the Trust.

Trusts in Other Jurisdictions

As highlighted above, a Trust is a concept that is historically borrowed from and founded in English common law. However, several economies have modified their laws on Trusts in order to accommodate the needs of Settlors and their Beneficiaries.

A good example to consider is the Special Trust Alternative Regime (STAR Trusts). This is a Trust concept adopted in many fast-growing economies which over and above the normal Trust set up, provides for more administrative rights for the Settlor and accommodates another party to the Trust known as a Protector, for purposes of safeguarding the interests of the beneficiaries. Other examples of Trusts accommodated in other jurisdictions are Hybrid Trusts, which have discretionary characteristics and fixed characteristics based on the wishes of the Settlor.

Based on the diverse and flexible Trust arrangements available in other jurisdictions, these Trusts provide and support more efficient structures for families to hold and plan their family assets in a more secure, flexible and beneficial manner. This has therefore led to Settlors opting for Trust arrangements in other countries outside of Kenya.

Unfortunately, the perception with most of the populace and government agencies in Kenya is that Trusts are set up for purposes of tax planning. However, this is far from the case. Trusts are ideal for managing family assets and offer the following benefits: -

- Ensure the smooth transfer of assets to one's Beneficiaries by avoiding costs that would be associated with probate such as legal fees on determining validity of a will,
- A Trust arrangement confers a significant level of protection for the Beneficiary assets since the legal ownership is held by the Trustees who are bound by the Trust Deed while the beneficial ownership rests with the Beneficiaries,
- Trusts are flexible and Trustees can further invest the assets in their possession in authorized investments.Furthermore, in a revocable trust, the objects of the trust document can be amended to suit current circumstances in the best interests of the Beneficiaries,
- A Trust offers continuity and its life is not limited to the life of the Settlor depending on how it is structured.As such it offers a smooth transition in the event of the demise of the Settlor.

The Way Forward

As Kenya progresses in improving and modernizing its laws as has been witnessed from recent trends, it is imperative for Kenya to revise and update its Law of Trusts to not only match other developed economies but also meet the needs of users of such arrangements and accommodate more advanced Trust structures. In addition, an adequate support system is required for persons looking to establish Trusts. This is not only from a legal point of view but a professional perspective so as to ensure that the gap between legal provisions and actual implementation is bridged.

In conclusion, it is important to note that Trusts are liable for taxes under the current tax regime in Kenya unless expressly exempted. For this reason, Trusts remain an untapped area of potential growth for the Kenyan economy. Noting the recent move by Kenya's government to grant amnesty on taxable income earned outside Kenya, a better legislated Trust regime would prove enticing for local asset/estate planning as compared with offshore planning.