



FALQs

PART IV OF A VI PART SERIES
OF THE CORPORATE AND COMMERCIAL LAW
FREQUENTLY ASKED LEGAL QUESTIONS.

TRUSTS & JOINT VENTURES

1. What is a trust?

- A trust is the legal relationship created by a person (the settlor) by placing property under the control of a trustee for the benefit of a beneficiary or for a specific purpose.

2. How does one create a trust?

- Trusts are created through a written document which sets out the duties and powers of a trustee. This document can either be a settlement document or a declaration of trust.
- Thereafter a trust deed is drafted which contains the name of the trust, the objectives of the trust, the addresses of the trustees and the powers of the trustees.
- After the trust deed has been drafted and signed, it ought to be registered with the Registrar of Documents under the Registration of Documents Act. This entails the payment of stamp duty.
- Later, the trustees petition for incorporation from whence the trust becomes a body corporate capable of holding property, suing and being sued in its own name.

3. What is the difference between the registration of the trust deed and the incorporation of a trust?

- Registration of the trust deed means merely lodging of the trust deed together with any documents that may be required with the Registrar of Documents and paying the requisite stamp duty for the same. By then, the trust does not exist yet but only the trustees operating in their own name. Incorporation of a trust enables the trust to operate in its name.

4. What Laws govern trusts in Kenya

- Trustee Act, Chapter 167 of the Laws of Kenya [[the Act](#)]: This Act provides for the powers and duties of trustees and rules governing trusts in Kenya.
- Trustee (Perpetual Succession) Act, Chapter 164 of the Laws of Kenya: it provides for the incorporation of trusts and the operation of the trust as a separate legal entity upon incorporation.
- Perpetuities and Accumulations Act, Chapter 161 of the Laws of Kenya: it provides for when property or interest in property vests, voiding of conditions restraining alienation of property, rules on perpetuities such as duration and remoteness and rules on accumulation such as general restrictions on accumulation of income.

5. What are some of the ways in which trusts are used today?



- To enable property, particularly land, to be held for persons who cannot hold it for themselves, for example an infant who cannot hold legal title over land.
- To enable a person to make provisions for dependents privately. The most obvious examples are provisions made by a man for his illegitimate child. In doing so under a will, the same becomes open to the public as a will becomes a public document once a grant of probate has been issued upon his death. Secret trusts in this way help maintain discretion when so desired.
- To tie up property so that it can benefit persons in succession. An outright gift to a parent to pass to the child on the parent's death might not always do so but a gift to the parent to be held in trust for the parent's life with remainder to the child will ensure benefit to the child.
- To protect family property from waste. A person may feel the outright gift to a spouse or child will lead to its waste. Therefore, placing that property or money under a trust, to be paid either a limited portion with time or upon the happening of an event such as the child reaching a certain age may prevent wastage of property.
- To make a gift that will take effect in future.
- To make provision for non-human objects such as furtherance of education or for maintenance of a pet.

6. What are the broad categories of types of trusts?

- **Living/intervivos trust** – this type of trust is created while the settlor is alive and involves appointing trustees, developing a trust deed, and transferring assets to the trust. It involves some element of loss of control as the assets are vested in the trustees. The element of loss of control is less in the event of a declaratory trust, where the settlor declares himself as a trustee.
- **Testamentary trust** – this is a trust created in a will. The trust is set up in the will and it comes into effect upon the death of the testator (person who has written the will). The trustees can also be named as executors of the will which allows for continuity in the management of the estate of the testator.

7. How can trusts be Classified?

Trusts can be classified into several categories which are:

- Express trusts;
- Implied trusts;
- Constructive trusts;
- Charitable trusts;
- Trusts of imperfect obligation;
- Trusts of perfect obligation; and
- Secret trusts.

8. What are express trusts?

- They are also referred to as declared trusts.
- They are created by an express declaration of the person in whom the property is vested. This could be under a will, by way of a trust deed, under a document not under seal, or oral declarations. For this kind of trust to take effect, there has to be intention and conduct creating the trust.

9. What are implied trusts?

- They are also referred to as presumptive trusts or resulting trusts.
- These classes of trusts arise from the presumed intention of the owner of the trust property.

10. What are constructive trusts?

- These are trusts imposed by equity although it is neither the expressed nor implied intention of the settlor or the testator or the owner of the property.
- Equity will impose such a trust when it would be an abuse of confidence to allow the holder of the property to use it for his own benefit. An example of constructive trust can be found under Section 41 of the Law of Succession Act, Cap 160 of the Laws of Kenya which provides for property devolving upon a child or children to be held in trust.

11. What are charitable trusts and what are their advantages?

- Charitable trusts are just like normal trusts except here the beneficiary is not a defined group of persons or person but the society at large.
- It is the only trust that is exempted from fulfilling the certainty of objects.
- For a trust to qualify as a charitable trust, it ought to be charitable in nature, provide a public benefit and must be exclusively charitable which means it must not be profit earning.
- Charitable trusts have been used in the running of schools, churches, hospitals etc.

12. What are trusts of imperfect obligation?

- These are trusts not enforceable by beneficiaries or on the beneficiaries' behalf.
- For example, trusts to take care of a person's dog.
- Courts are reluctant to uphold such trusts because there is no certainty of object as the beneficiaries of these kind of trusts are not capable of enforcing the obligations under the trust deed.
- However, some trusts like taking care of someone's tomb have been allowed.

13. What are trusts of perfect obligation?

- These are trusts whose objects are specific and are capable of enforcement.

14. What is a secret trust?

- Usually when a person dies, his/her will becomes open to the public. Secret trusts are therefore used instead of wills to avoid the public scrutiny.
- A secret trust arises where a person wishes to make provisions for another but does not want others to know about it.

15. What are the types of secret trusts?

Secret trusts can be classified into two as follows:

- **Full secret trusts**

Full secret trusts are trusts whose obligations are fully concealed on the face of the will.

Their obligation is communicated to the legatee during the lifetime of the testator and the will transfers the property to the legatee without the mention of the existence of a trust.

For example, if property is given to "Y" absolutely and communication is made to "Y" by the testator during his lifetime that "Y" is to hold the property on a specified trust, and provided that "Y" accepts the trust, a full secret trust which is enforceable at equity will come into being.

- **Half secret trusts**

Half trusts arise where the will indicates or acknowledges the existence of a trust but the terms of the trust are concealed from the testator's will.

The property is transferred or held in trust according to the communication given by the testator during his lifetime.

For example, if "Y" is given property for which the purpose is communicated to him and which purpose he is aware of, a half secret will arise.

16. Who is a legatee?

- This is a person who is named in a will to receive personal property or real property.

17. What are the requirements of a secret trust?

- The testator must intend to subject the trustee to an obligation in favour of the beneficiary;
- The intention must be communicated to the trustee during the testator's lifetime; and
- The legatee must accept the obligation.

18. What are the certainties of a trust?

There are three certainties that are required for creation of a trust (see *Knight v Knight* (1840) 49 ER 58). These certainties are:

- **Certainty of words or intention**

The key test to establish whether the requisite intention is present is to consider whether the creator of the trust wanted someone to be under a duty to hold property for the benefit of another person. The use of the word 'trust' need not be present to show certainty of intention. However, when it is used, it may not show certainty of intention depending on the context. The court will look at the substance of the creator's intent to see if they wanted to impose an obligation or request the trustees do something. If it is merely a request, precatory words which express a wish but which are not binding will be evident, for example 'wishes', 'requests', 'confident'. The question of intention is assessed objectively, having regard to the opinion of the reasonable person.

- **Certainty of subject matter**

Trusts can be declared over all kinds of property, including intangible property such as covenants or debts. However, the subject matter must be clearly defined in the trust instrument.

The property must also be able to be identified such that if it cannot be identified, the trust will be void for uncertainty.

If there is an absence of certainty of subject matter, the consequences will depend on the kind of uncertainty. If the identity of the trust property is not certain, the trust cannot be attached to any property. Therefore, if part of a property is to be held in trust for a beneficiary, and the identity of the beneficiary is uncertain, the trustee will obtain the property absolutely. However, if it fails for uncertainty in the way the property is divided up between the beneficiaries, a resulting trust will occur as it is evident that the creator of the trust did not want to give the property to the trustee outright.



- **Certainty of objects**

The objects of a trust will depend on the type of express trust in question.

For fixed trusts, it must be possible to identify exactly who all of the beneficiaries are in order for the trustees to distribute the property correctly. This is known as the 'complete list test'. What this means is that a full list of all the beneficiaries must be able to be drawn up when the property is to be distributed, it is not necessary to draw up a complete list when the trust is created.

It is important to have certainty of objects so the trustees know who to consider when deciding how to distribute the trust property.

If no certainty of objects can be ascertained, the trustee will hold the property in trust for the settlor. If the trust is testamentary, the trustee will hold the property in trust for the benefit of those entitled to the residuary estate of the deceased.

19. What are the effects of uncertainties?

- With respect to certainty of words or intention, if an intention to create a trust cannot be derived, the words used in the instrument can cause the alleged trustee to take the property as the beneficiary;
- Where there is uncertainty of subject matter, the transaction will fail from the threshold;
- Where there is uncertainty of objects, there will be a resulting trust either in favour of the settlor, his estate if he is deceased, or in favour of the residuary legatee.

20. What is a condition subsequent?

- This is a condition which excuses contractual performance if some future event takes place or a situation arises.
- In trusts, it is a condition which if it is satisfied, the beneficiary is no longer entitled to the trust property; there must be certainty as to the condition from the outset of the trust.

21. What is a condition precedent?

- This is a condition whereby something must take place or a situation must arise prior to or before a party has a duty to perform.
- In trusts, it is a condition which must be satisfied before the property is distributed.

22. What is the nature of beneficiaries' interests?

The interests of beneficiaries are equitable and include the following:

- The right to apply for a receiver to be appointed over trust property;
- The right to apply for the court's sanction for unauthorized transaction;
- The right to apply for injunctions;
- Right to a charge on property bought partly with trust money;
- Right to join as dependants; and
- Right to sue the trustee in case of mismanagement of the trust property.

23. What are the principal duties of trustees?

- Must keep the trust property in a state of security. This means taking it into his or her possession, invest any surplus for the benefit of the beneficiaries and pay any debts;
- Keep proper accounts;
- When he or she invests, it must be either an investment authorized under Section 4 of the Trustees Act or in a manner authorised either by the will or the trust deed; and
- Must take advice from valuers, surveyors and other professionals in writing on whether the investment in question is satisfactory.

24. Is it possible to have shares held in trust for minors?

- Yes, it is.

25. What is the procedure for holding shares in trust for a minor?

- First, if the shares are in the settlor's name, they have to be transferred to the trustee through a transfer deed.
- Once the shares are in the name of the trustee, the trustee signs a declaration of trust acknowledging that he/she is holding the shares in trust for the beneficiaries.
- It is advisable that the settlor and the trustee enter into a trust agreement to ensure that the interests of the minors are better protected, and to make it clear that the settlor will act as the minor's guardian in case anything is needed from them as the beneficiaries.

26. What is a declaration of trust?

- This is a declaration by a registered shareholder (trustee) that they are holding shares on behalf of another (the beneficiary). It should be signed by both the trustee and beneficiary.

27. What factors may lead to a trust being challenged?

Trusts are not full proof and may be subject to challenge under certain circumstances, which may lead to them being declared void. The trust may be challenged under any of the following circumstances:

- **Lack of the three certainties of a trust** – a trust can only exist if three things are certain, these are the certainties of the intention of the settlor, certainty of the subject matter of the trust and certainty of the objects i.e., beneficiaries of the trust (*In Re Estate of Chadrakant Devchand Meghji Shah (Deceased) [2017] eKLR*). In the absence of these, the trust will fail.
- **The trust does not really intend to give up control of the assets** - in such a case, the trust is void, as a "sham", if the settlor creates a trust but intends, in reality, to retain control of the assets for his own benefit (for instance, get protection from creditors, protection from marital claims). The exception to this is the situation where the settlor is himself a trustee or one of the founding trustees.
- **Creation of a trust to avoid maintenance of dependants** – a trust may be voided if the settlor is creating a trust to put assets out of the reach of his family and dependants who are eligible to a share of such assets. The trust assets may be subject to claims by his family and dependants.
- **Creation of a trust to avoid a financial divorce claim** - in case the settlor has marital difficulties and is creating a trust to hide assets from his/her spouse, the trust may be voidable if he intends to defeat a financial claim on divorce.
- **Trusts to avoid creditors' claims** – in the event that the settlor has financial difficulties, the trust may be voidable if he becomes bankrupt or intends to put the assets beyond reach of creditors.

28. What are the advantages of setting up a trust in Kenya?

- Trusts protect assets against speculative litigation;
- They secure assets that are open to expropriation by any person or beneficiary who has no capacity to control the use of those assets;
- They enforce confidentiality especially where the settlor wants the beneficiaries' identities concealed;
- They promote continued administration of the settlor's estate upon his/her death through the trustee and for the benefit of the beneficiaries;
- They prevent the strict probate formalities, as long as the testator had capacity to create the trust;
- They are flexible as trustees can further invest the assets in their possession in authorized investments; and
- Trusts offer continuity as their life is not limited to that of the settlor or the trustee.



29. What are the disadvantages of trusts generally and specifically trusts in the Kenyan context?

- The trust regime in Kenya is not advanced enough to allow for adequate succession planning and protection of the settlor's assets for the benefit of the beneficiaries;
- There is a risk of unreliable trustees who mismanage the trust property to the detriment of the beneficiaries (See *Albert Kirega Karume & 2 others vs George Ngugi Waireri & 3 others* (sued as trustees of the Njenga Karume Trust) & 7 others [2020] eKLR);
- Once a trust is created and assets are transferred to the trustee, the settlor ceases to have control over the assets as control is transferred to the trustee;
- Trusts are considered to be corporate bodies and are therefore taxed at a considerably high rate.

JOINT VENTURES

30. What is a joint venture?

- A joint venture is a commercial collaboration in which two or more unrelated parties pool, exchange or integrate some of their resources with a view to achieving mutual gain. Often, joint ventures are established for a specific task.

31. What are the laws governing joint ventures?

- There is no particular law governing joint ventures in Kenya. However, depending on the form of the joint venture, the common laws applicable are the Limited Liability Partnerships Act No. 42 of 2011, the Partnership Act No. 16 of 2012, and the Companies Act No. 17 of 2015.

32. How do I register a joint venture?

- For one to register a joint venture, there has to be a duly executed joint venture agreement, with an aim of fulfilling the obligations and intent of the agreement. After the agreement has been signed, a private limited company may be incorporated under the Companies Act No. 17 of 2015 or a limited liability partnership is incorporated under the Limited Liability Partnerships Act.

33. How do I enter into a joint venture agreement?

- Identify the kind of business you would like to do;
- Select a good partner to do the business with;
- Sign a memorandum of understanding or a letter of intent highlighting the basis of the future joint venture agreement;
- Negotiate the terms of the agreement with the other party;
- Agree on the dispute resolution methods to be resorted to in case of any dispute – Remember, Alternative Dispute Resolution methods should be prioritized and litigation should be as a measure of last resort;
- Define the duties and obligations of each party.

34. What are the basic clauses of a joint venture agreement?

A joint venture agreement can contain quite a number of terms. However, the most basic terms for a joint venture agreement, and any other agreement for that matter, are as follows:

- Purpose and duration of the joint venture: the agreement should clearly define the intended activities under the joint venture. This could be a joint venture for one activity for a specified duration e.g., submitting a bid and implementing the project if successful, or implementation of a long-term development project or implementation of a long-term project to be terminated based on the terms indicated in the termination clause.
- Responsibilities of each party: the agreement should clearly indicate the role and obligations of each party and how risk is to be shared.
- Indemnity: this clause discusses how the parties will indemnify each other in case of warranties gone wrong, and in case a party bears costs that are supposed to be paid by the other party.
- Confidentiality: this is where parties are required to keep secret any information that they acquire at the time of the agreement and even after the agreement.

- Force majeure: this clause makes it clear that in case of any unforeseeable circumstances that might render the parties unable to perform their obligations under the agreement, then the agreement will naturally terminate without any party being liable for non-performance.
- Dispute Resolution: this stipulates what avenues of dispute resolution the parties will explore in terms of a dispute resulting out of the agreement. These avenues could be negotiations, arbitration, or going to court to have redress by way of adjudication.
- Termination: this clause discusses the circumstances and procedure in which the agreement will come to an end.

35. What are the forms of a joint venture?

- Project joint venture: this is where the purpose is defined and limited to the completion of the single project as per the joint venture agreement. It comes to an end upon completion of the project.
- Functional joint venture: this is one where companies come together because each has expertise in one area or the other, and they wish to create an interactive environment to do business.
- Vertical joint venture: this is between two business entities in the same supply chain where one produces certain goods but relies on the co-venture to supply raw materials. It ensures a reliable supply of raw materials thus tempering uncertainty.
- Horizontal joint venture: this is between two business entities producing the same goods or services. It is commonly used between local and foreign business where foreign businesses intend to enter the local market.

36. What is the difference between a joint venture and a partnership?

- A joint venture is often limited to one particular venture or limited ventures while a partnership is not.
- Joint ventures are formed for a specific period of time while partnerships are not.

37. What is the difference between a joint venture and a teaming agreement?

- The main difference between the two is that a teaming agreement identifies the prime contractor and the subcontractor relationship and discusses the roles of each in the agreement, while in a joint venture, the entity is looked at as the official entity without distinction of which company is the prime company and which one is the subcontractor (each party keeps its own legal identity).

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