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CM Navigator

Guiding Legal and Business Insights

A publication by CM ADVOCATES LLP

A Focus on

Wealth, Estate, Legacy & Lifestyle

EXCLUSIVE:

- Matrimonial Property in Kenya: Protecting Spousal Contributions and Securing Family Wealth
- Forced Heirship under Kenyan Law: Ensuring Fair Succession
- Pre- and Post-Marital Agreements in Kenya

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About
CM Navigator

CM Navigator is CM Advocates LLP's flagship thought-leadership publication designed to provide clear, practical, and forward-looking insights on legal and business issues shaping Kenya, the wider East African region, and global markets.

Each issue of CM Navigator:

1. Demystifies complex legal frameworks – translating statutes, regulations, and court decisions into business-oriented guidance.
2. Analyzes judicial and regulatory trends – highlighting how they impact families, entrepreneurs, corporates, and investors.
3. Explores emerging business issues – including cross-border trade, taxation, digital assets, ESG, corporate governance, compliance, and succession planning.
4. Offers actionable strategies – empowering clients to mitigate risks, unlock opportunities, and enhance competitiveness.
5. Bridges law and business – positioning CM Advocates LLP as both a trusted legal advisor and a strategic partner to clients.

The publication is designed for:

- Businesses and investors navigating regulatory, tax, and cross-border issues.
- Families and entrepreneurs planning for succession, asset protection, and intergenerational wealth transfer.
- Policymakers and professionals seeking comparative insights and global best practices.

Through CM Navigator, CM Advocates LLP reinforces its position as a regional leader in integrated legal and business solutions. The platform serves as a hub for thought leadership and practical insights, guiding clients through complex legal and business landscapes. By providing clear, forward-looking analysis on emerging developments, CM Navigator equips businesses to anticipate risks, identify opportunities, and make informed decisions, enabling them to navigate an increasingly dynamic and evolving environment with confidence.

These articles serve as a blueprint for business leaders seeking to build resilient organizations capable of thriving in dynamic environments.

Welcome to
CM Navigator

Clarity. Strategy. Foresight.

Welcome to this edition of CM Navigator, our flagship publication at CM Advocates LLP.

Through Navigator, we provide authoritative yet practical insights into the legal and business issues shaping Kenya, the East African region, and beyond.

Each issue is designed to bridge the gap between law and business, unpacking complex legal principles and regulatory frameworks while highlighting their real-world implications for families, entrepreneurs, corporates, and investors.

In this edition, we focus on family law, matrimonial property, forced heirship, succession, and estate planning. As family structures continue to evolve, with emerging trends such as blended families, cross-border assets, and increasingly complex financial portfolios, we explore the important legal considerations that individuals and families must address when planning for the future.

We also explore how these issues intersect with tax reforms, cross-border investment, digital assets, and ESG considerations, offering practical insights to help readers navigate the legal and financial dimensions of preserving and transferring wealth.

Our goal is to equip you with actionable strategies to safeguard your interests, unlock opportunities, and plan effectively in today's dynamic environment.

At CM Advocates LLP, we remain committed to guiding your success through clarity and foresight.

This issue is packed with inspiring articles and tips to keep you ahead of the legal curve. Enjoy!

Cyrus Maina

Managing Partner,
CM Advocates LLP

MATRIMONIAL PROPERTY IN KENYA – PROTECTING SPOUSAL CONTRIBUTIONS AND SECURING FAMILY WEALTH

Matrimonial property is one of the most critical aspects of family law in Kenya, with far-reaching implications for succession, family stability, business continuity, and investor confidence.

The Matrimonial Property Act, 2013 (MPA), read together with the Law of Succession Act (Cap. 160) and the Land Registration Act, 2012, provides the statutory foundation for defining, managing, and protecting property acquired during marriage.

Kenya's approach — grounded in the Constitution, statutory safeguards, and judicial interpretation — reflects both local socio-legal realities and global best practice, ensuring that spousal contributions, whether financial or non-financial, are given equal weight.

THE LEGAL FRAMEWORK

The MPA, 2013 provides clear provisions to protect spousal interests:

a) **Section 6** – Defines matrimonial property to include the matrimonial home(s), household goods, and property jointly acquired during marriage.
b) **Section 7** – Spouses own matrimonial property in proportion to their contribution, whether financial or non-financial.
c) **Section 12** – Prohibits the alienation of a matrimonial home without the consent of both spouses.

When read with the Law of Succession Act (Cap. 160) and the Land Registration Act, 2012:

- Surviving spouses retain their rightful share before estate distribution.
-
- Only the deceased's portion of matrimonial property devolves through succession.
-
- Homemaking, caregiving, and non-financial contributions are recognised as equal to financial contributions.

REGISTRATION OF MATRIMONIAL INTERESTS IN PROPERTY

The Land Registration Act, 2012 (Section 93) strengthens spousal protections:

Matrimonial property acquired during marriage is deemed to be jointly owned, even if registered in one spouse's name.

Spouses may register their interest on the title, giving notice to third parties.

Consent is mandatory for dealings in matrimonial property.

Registration provides certainty in real estate and financial transactions, protecting both families and investors.

CASE LAW:

a) ***Tabitha Wanjiku v Simon Gichanga Njuguna [2019] eKLR*** – a matrimonial home cannot be sold without spousal consent.
b) ***MWK v SKK & 5 Others [2018] eKLR*** – spousal rights are overriding interests in land, even without formal registration.

Matrimonial homes are often registered in joint tenancy, where the principle of jus accrescendi (right of survivorship) applies.

THE DOCTRINE OF JOINT TENANCY AND MATRIMONIAL HOMES

1. Matrimonial homes are often registered in joint tenancy, where the principle of jus accrescendi (right of survivorship) applies:
2. Upon the death of one spouse, the surviving spouse automatically becomes the sole owner, bypassing succession law.
3. This arrangement ensures immediate security for the surviving spouse, avoiding delays in estate administration.

This principle ensures that spouses cannot shield family assets from division by simply registering them under corporate structures.

However, it may disadvantage children or dependants, since the home passes outside succession and may not form part of the estate available for distribution.

COMPARATIVE INSIGHTS:

In England and Wales, courts frequently distinguish between joint tenancy and tenancy in common to ensure fairness in family provision claims.

In Kenya, while joint tenancy protects spousal rights, courts have warned that it should not be used to defeat dependants' claims under succession la
Couples should carefully structure ownership — joint tenancy secures the surviving spouse, while tenancy in common allows shares to pass through succession, balancing spousal and children's rights.

SHARES IN COMPANIES AND MATRIMONIAL PROPERTY

A complex but increasingly significant issue is whether shares held in companies constitute matrimonial property.

- ***Mereka v Mereka [2018] eKLR*** – the High Court held that shares registered in a company in the name of one spouse are not automatically matrimonial property. Instead, courts must look at the source of funds used to acquire the shares. If acquired with family resources or during the marriage, they may be considered matrimonial property.

However, courts also respect the separate legal personality of companies, and will not order direct transfer of shares if it violates company law.

Instead, equitable remedies such as compensation may be applied.

BUSINESS IMPLICATIONS:

Many family businesses are structured as private companies, with one spouse as the registered shareholder.

Courts are willing to "pierce the veil" where corporate structures are used to conceal matrimonial property.

Investors and families must therefore align corporate governance documents (shareholder agreements, trusts, and board structures) with matrimonial property law to avoid disputes.

Judicial Interpretation

Kenyan courts have consistently reinforced these protections:

a) ***Echaria v Echaria [2007] eKLR*** – contributions (financial and non-financial) must be proved to claim matrimonial property.
b) ***PNN v ZWN [2017] eKLR*** – non-financial contributions, such as homemaking and childcare, are recognised.
c) ***FIDA-K v Attorney General & Another [2018] eKLR*** – upheld the constitutionality of the MPA, recognising equality in property rights under Article 45(3).
d) ***Mereka v Mereka [2018] eKLR*** – clarified the treatment of company shares in matrimonial property disputes.

COMPARATIVE PERSPECTIVES

1. ***Pettitt v Pettitt [1970] AC 777 (UK)*** – indirect contributions such as home improvements create beneficial interests.
2. ***Van der Merwe v Road Accident Fund [2006] ZACC 4 (South Africa)*** – constitutional equality guarantees spousal property rights.

3. ***Mallet v Mallet (1984) 156 CLR 605 (Australia)*** – caregiving and homemaking contributions are as valuable as financial ones.
4. ***Murdoch v Murdoch [1975] 1 SCR 423 (Canada***) – led to reforms recognising domestic labour as a basis for family property rights.

POLICY RATIONALE

Protecting spousal contributions under matrimonial property law is both a legal and social necessity:

1. Prevents unfair disinheritance, particularly of women who provide non-financial contributions.
2. Upholds constitutional equality under Article 45(3).
3. Ensures continuity of family businesses and intergenerational wealth.
4. Aligns Kenya with global best practice and international conventions like CEDAW.

BUSINESS & INVESTMENT IMPLICATIONS

Matrimonial property rights have direct impact on:

- **Family businesses** – spouses' contributions must be factored into ownership and succession planning.
- **Real estate and secured lending** – lenders must verify spousal consent; registration provides certainty.
- **Corporate structuring** – shares held in companies may be classified as matrimonial property (Mereka v Mereka), requiring careful shareholder agreements.
- **Cross-border estates** – Kenyan matrimonial property law must be harmonised with foreign regimes.
- **Investor confidence** – clarity in law reduces disputes and promotes stability in land and corporate transactions.

KEY TAKEAWAYS

a) Matrimonial property law in Kenya values both financial and non-financial contributions. Registration of spousal interests protects families and investors.
b) Joint tenancy in matrimonial homes ensures survivorship but may bypass succession; couples must structure ownership carefully.
c) Company shares acquired with family resources may form part of matrimonial property (Mereka v Mereka).
d) Consent is mandatory before disposing of matrimonial homes.
e) Business continuity and investment planning require integration of matrimonial property rules with corporate and succession planning.

HOW CM ADVOCATES LLP CAN ASSIST

Our The Wealth, Estates, Legacy and Lifestyle (WELL) Practice Group offers end-to-end advisory and litigation services in:

1. Advising on matrimonial property rights under the MPA, 2013.
2. Registering spousal interests in land under the Land Registration Act.
3. Structuring family businesses, trusts, and shareholder agreements to align with matrimonial property law.
4. Drafting valid wills and Sharia-compliant wills that integrate matrimonial property rights into estate planning.
5. Advising on real estate and corporate transactions requiring spousal consent.
6. Representing clients in matrimonial property and succession disputes, including claims over shares in companies.
7. Offering cross-border planning solutions for families with multi-jurisdictional assets.

FORCED HEIRSHIP UNDER KENYAN LAW – ENSURING FAIR SUCCESSION

Forced heirship is a legal principle that restricts the freedom of a testator to distribute their estate entirely according to personal wishes, guaranteeing that certain close relatives—particularly spouses, children, and dependants—receive a protected portion of the estate.

In civil law jurisdictions (France, Spain, Italy, UAE), fixed shares are codified and unavoidable. In common law jurisdictions (England, USA, Canada, Australia), testamentary freedom dominates, but courts may intervene under “family provision” statutes to protect dependants.

Kenya has developed a hybrid model. It integrates statutory protections, constitutional guarantees, customary law, matrimonial property rules, and Sharia law. The system:

- Preserves autonomy during lifetime,
- Guarantees dependants’ protection after death, and
- Subordinates customary and religious practices to constitutional equality and dignity.

This balance makes Kenya a progressive and globally relevant jurisdiction for succession and estate planning.

LEGAL FRAMEWORK IN KENYA

Kenya does not codify forced heirship as a standalone doctrine. Instead, it emerges across statutes, constitutional principles, and judicial interpretation.

1. Law of Succession Act, Cap. 160 (LSA)

- **Intestate succession:** Sections 35–38 provide distribution formulas, creating a statutory form of forced heirship.
- **Testate succession:** Sections 26–28 allow courts to vary wills that exclude dependants.
- **Policy rationale:** Prevents destitution of family members, reduces disputes, and protects social stability.

2. Protection of Spouses and Dependent Children

Section 27 of the LSA ensures that spouses and dependants may claim “reasonable provision,” even against a will. Courts thus act as custodians of fairness, preventing unjust disinheritance.

3. Definition of Dependant

Section 29 includes:

- Spouses (current and former)
- Children (biological, adopted, stepchildren)
- Parents, grandparents, siblings, grandchildren,
- Any person wholly or partly maintained by the deceased.

This broad protection reflects Kenya’s African kinship ethos.

4. Equality of Children

- Popat v Popat & 3 Others [2021] KECA 106 (KLR): All children inherit equally, regardless of gender or birth circumstances.

- Anchored in Articles 27 and 53 of the Constitution, abolishing discriminatory customary rules.
- Aligned with the United Nations Convention on the Rights of the Child (UNCRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

5. Customary Law and Land Rights

Customary succession continues to influence rural land but is subject to constitutional safeguards.

- Article 63 of the Constitution: Recognises customary land tenure but requires equality.
- Isack M'inanga Kiebia v Isaaya Theuri [2018] eKLR: Customary trusts must be strictly proven; expectations are insufficient.
- Patrick Mbasa v Meshack Odhiambo [2020] eKLR: Registered ownership prevails absent clear evidence of trust.
- Courts thus preserve culture while enforcing equality.

6. Matrimonial Property and Forced Heirship

The Matrimonial Property Act, 2013 secures spousal contributions:

a) Section 6 – defines matrimonial property.
b) Section 7 – spouses own according to contribution (monetary and non-monetary).
c) Section 12 – bars disposal of matrimonial homes without consent.

In succession:

- Surviving spouses retain their rightful share first.
- Only the deceased's portion devolves under succession.
- Courts recognise caregiving and homemaking as equal contributions.

Case law interpretation:

a) ***Echaria v Echaria [2007] eKLR*** – clarified that spousal interest must be proved by contribution, direct or indirect.
b) ***PNN v ZWN [2017] eKLR*** – broadened recognition of non-financial contributions (domestic work, childcare, emotional support).
c) ***FIDA-Kenya v Attorney General [2018] eKLR*** – upheld the Act as constitutional, affirming equality in marriage under Article 45(3).
d) ***Tabitha Wanjiku v Simon Gichanga Njuguna [2019] eKLR*** – enforced Section 12, invalidating disposal of a matrimonial home without spousal consent.

These rulings demonstrate Kenya's alignment with global best practice (Canada, Australia), which value unpaid domestic labour in succession and property disputes.

7. Islamic Law (Sharia) Considerations

a) Governed under Part VII of the LSA.
b) Fatuma Athman Abud Faraj v Ruth Faith Mwawasi [2024] KESC 61 (KLR): Children born out of wedlock with acknowledged paternity are entitled to inherit under Muslim succession.
c) Courts harmonise Sharia with constitutional guarantees of equality, dignity, and child welfare.

8. Joint Tenancies and Survivorship

a) Joint tenancy: Survivorship (jus accrescendi) passes property automatically to co-owners.
b) Tenancy in common: Each share devolves under succession.

Estate planning must carefully distinguish the two to avoid unintended exclusions.

JUDICIAL TRENDS

Kenyan courts reinforce the principle that forced heirship protections apply after death, not during lifetime.

a) ***Oganga v Orangi [2023] KEELC 16348 (KLR):*** Parents enjoy absolute autonomy during lifetime.
b) ***Muriuki Marigi v Richard Marigi [1997] eKLR:*** Children cannot compel distribution of land before death.
c) ***Teresa Kwamboka Mauti v Ezekiel Nyarango [2022] eKLR:*** Courts condemned interference with parental ownership.

This mirrors comparative jurisprudence in the UK, Canada, and Singapore, which uphold lifetime proprietary autonomy.

INTERNATIONAL STANDARDS IN ESTATE PLANNING

- **Civil law jurisdictions (France, Italy, Spain):** Strict reserved portions for heirs.
- **Common law jurisdictions (UK, USA):** Testamentary freedom, moderated by family provision statutes.
- **Kenya's hybrid system:** Safeguards dependants while respecting autonomy.
- This hybrid approach provides predictability for cross-border families and investors.

EMERGING ISSUES IN SUCCESSION

- **Digital Assets:** Cryptocurrencies, NFTs, and online businesses are inheritable property.
- **Diaspora Estates:** Conflicts of law with forced heirship regimes abroad (e.g., France, UAE).
- **Estate Taxation:** Estate duty abolished in Kenya in 1982, but foreign inheritance taxes remain relevant.
- **Family Business Continuity:** Disputes risk destabilisation; trusts and shareholder agreements are vital.
- **Mental Health & Aging:** Courts increasingly issue curatorship orders under the Mental Health Act (Cap. 248).
- **ESG & Inclusive Succession:** Families integrate philanthropy, social impact, and sustainability into planning.
- **Sharia-Compliant Wills:** Provide predictability for Muslim families, harmonising Islamic law with constitutional principles.

KEY TAKEAWAYS

1. Kenya's hybrid succession law balances autonomy with mandatory protections.
2. Dependants are safeguarded; courts may override wills that exclude them unfairly.
3. Equality of children is guaranteed under the Constitution.
4. Customary claims must be proven; family expectations alone do not create rights.
5. Parental autonomy is protected during lifetime; forced heirship applies only posthumously.
6. Spousal contributions are safeguarded, including non-financial work.
7. Sharia-compliant wills give Muslim families legal and religious certainty.
8. Estate planning must be deliberate — wills, trusts, agreements, and cross-border structuring reduce disputes.

PRACTICAL ESTATE PLANNING STRATEGIES

- Draft compliant wills that account for dependants' rights.
- Prepare Sharia-compliant wills for Muslim clients.
- Use trusts and foundations for intergenerational wealth transfer.
- Structure property ownership carefully (joint tenancy vs tenancy in common).
- Include digital asset clauses in wills and trusts.
- Use prenuptial/postnuptial agreements to clarify expectations.
- Implement cross-border estate planning to prevent conflicts.
- Apply for curatorship/administratorship orders under the Mental Health Act.

HOW CM ADVOCATES LLP CAN ASSIST

Our Family Law, Probate and Estates Administration Unit offers end-to-end solutions, including:

- Advising on matrimonial property rights and succession.
- Drafting valid wills (including Sharia-compliant wills).
- Representing spouses and dependants in succession disputes.
- Structuring trusts, foundations, and corporate vehicles.
- Advising on land rights, including customary land.
- Managing cross-border estates and tax planning.
- Securing curatorship / administratorship for incapacitated persons.

Contact us at

Email : familyandprobate@cmadvocates.com

PRE- AND POST-MARITAL AGREEMENTS IN KENYA

INTRODUCTION

At CM Advocates LLP, we understand that marriage is both a personal commitment and a financial partnership.

Whether clients are entering into a first marriage, protecting inherited assets, or navigating the complexities of blended families, clear financial arrangements are essential to avoid disputes and protect family wealth.

Our Family Law, Probate and Estates Administration Unit offers sophisticated advice and bespoke drafting of pre-marital (prenuptial) and post-marital agreements, carefully tailored to the Kenyan legal framework and international best practices.

WHY PRE- AND POST-MARITAL AGREEMENTS ARE IMPORTANT

While these agreements may be sensitive to discuss, they are recognised globally as a proactive wealth management tool. They:

a) Protect inherited and pre-existing assets.
b) Clarify expectations during marriage and in the event of divorce, separation, or death.
c) Reduce the risk of litigation over property and maintenance.
d) Provide reassurance to spouses, children, and extended family members.

Such agreements are not merely defensive tools, but forward-looking instruments of family governance and wealth planning.

KENYAN LEGAL FRAMEWORK AND INTERNATIONAL CONTEXT

Kenya does not yet have a stand-alone Prenuptial Agreement Act, but agreements are recognized and enforceable under the Marriage Act, 2014, the Matrimonial Property Act, 2013, and judicial precedent. Courts will uphold agreements where:

a) Consent and full disclosure were present.
b) Fairness is maintained — agreements must not be unconscionable.
c) Public policy is not contravened.

We also advise international clients on cross-border enforceability. Our agreements are drafted with conflict of laws principles in mind, ensuring recognition in multiple jurisdictions where spouses may reside or hold assets.

1. Blended Families: Managing Complexity with Clarity

A blended family arises when one or both spouses bring children, assets, or obligations from prior relationships into the new marriage. Such families present unique legal and financial challenges that require careful planning.

Key Considerations for Blended Families:

a) Child protection: safeguarding inheritance rights of children from previous relationships through trusts, wills, and ring-fenced property settlements.
b) Extended family obligations: respecting customary or cultural expectations regarding ancestral land or family businesses.
c) Succession planning: balancing spousal entitlements under the Law of Succession Act (Cap 160) with children's rights and lineage-based claims.
d) Cross-cultural dynamics: addressing situations where spouses are of different nationalities, domiciles, or religious traditions.

2. Inherited Assets and Family Property

For many clients, the most sensitive issue is the treatment of inherited property. Under the Matrimonial Property Act, inherited property is generally excluded from matrimonial property, unless it has been substantially improved during the marriage.

We help clients to:

- Clearly separate nuclear and extended family inheritances from marital property.
- Protect family land, heirlooms, and businesses intended to remain in the family line.
- Structure family trusts to preserve wealth across generations while maintaining fairness between spouse and children.

3. Couples in Business Together

Where spouses also engage in joint business ventures, marital agreements should be integrated with corporate governance documents:

a) Shareholders' agreements: to address shareholding rights, dividend distributions, and buy-out mechanisms in case of separation or divorce.
b) Partnership agreements: clarifying profit-sharing, roles, and exit strategies in family partnerships.
c) Buy-sell arrangements: ensuring continuity of the business by setting out options if one party wishes to exit.

This multi-layered approach protects both the personal relationship and the viability of the enterprise.

OUR SERVICES

1. Initial consultation and risk assessment – reviewing assets, business structures, and family obligations.
2. Drafting and negotiation – preparing enforceable agreements and negotiating with counterpart counsel to achieve balance.
3. Integration with succession planning – coordinating agreements with trust deeds, wills, and corporate structures.
4. Dispute resolution – representation in court or arbitration if agreements are contested.
5. Advisory for high-net-worth and international families – guidance on structuring marital agreements across multiple jurisdictions.

OUR INTERNATIONALLY BENCHMARKED APPROACH

We benchmark against global best practices to ensure our advice is not only Kenya-compliant but also globally recognised.

OUR APPROACH INCLUDES:

1. Holistic wealth planning – integrating marital agreements with succession plans, trusts, estate structures, and corporate governance tools.
2. Bespoke drafting – tailored agreements that reflect the client's personal circumstances, cultural background, and international exposure.
3. Preventive structuring – agreements designed to minimise disputes and litigation risk.
4. Cross-border perspective – ensuring recognition in key jurisdictions where clients hold assets or citizenships.
5. Confidential and sensitive advisory – delivered with discretion, cultural awareness, and empathy.


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WHY WOMEN SHOULD PRIORITISE ESTATE PLANNING

As women continue to excel in business, leadership, entrepreneurship, and professional life, one important area still remains surprisingly overlooked: estate planning.

Many women work hard to build wealth, acquire property, raise children, support extended family, grow businesses, and create stability for themselves and the people they love. Yet, despite these significant achievements and responsibilities, estate planning is often delayed, deprioritised, or left entirely unaddressed.

This is a serious gap.

Estate planning is not reserved for the elderly, the ultra-wealthy, or those facing serious illness. It is a practical and necessary step for any person who owns assets, supports dependants, runs a business, or simply wishes to have a say in how his or her affairs are handled. More importantly, it is one of the most effective ways to protect themselves, their children, preserve wealth, and secure the legacy they are working so hard to build.

WHY DO MANY WOMEN DELAY ESTATE PLANNING?

In practice, many women approach estate planning with far less urgency than they apply to other areas of life. This is not because women are incapable of planning. Quite the opposite. However, estate planning is often postponed for several reasons:

1. Discomfort with the subject matter
Estate planning is often associated with death, incapacity, or misfortune, making it an uncomfortable subject to confront. Many people would rather avoid the discussion altogether.

2. Assumption that someone else will handle it
Some married women assume that succession planning is something their husbands will take care of, or that family assets will naturally pass in the right way when the time comes. Unfortunately, this is not always the case. Without proper planning, legal and practical complications can arise even in seemingly straightforward family situations.

3. Underestimating the value of their assets
Some women underestimate the value of what they own or the importance of formally planning for it. A woman may think she does not have “enough” wealth to require estate planning, yet she may own land, a home, a vehicle, shares, business interests, savings, insurance policies, pension benefits, or other assets of both financial and sentimental value.

4. Competing responsibilities and lack of time
Many women are simply busy. Between careers, caregiving, marriage, children, family obligations,

and everyday demands, estate planning is often pushed down the list until a crisis occurs. By then, the cost of delay can be significant.

WHY ESTATE PLANNING DESERVES SPECIAL ATTENTION FROM WOMEN

Estate planning matters for women for several key reasons:

1. **Without a plan, families may face delay and conflict**

The absence of an estate plan can lead to succession disputes, delays in accessing assets, uncertainty over the guardianship of minor children, and unnecessary family conflict.

2. **Marriage does not remove the need for personal planning**

A married woman may own assets in her sole name, jointly with a spouse, through a business, or through family arrangements. These interests still require clear planning and proper protection.

3. **Personal wishes need legal protection**

A woman may have specific wishes on how her children should be provided for, who should manage certain assets, and how family wealth should be preserved. Without proper legal structures, those wishes may not be honoured.

4. **Some women face greater vulnerability**

For single mothers, widows, divorced women, and women in blended families, estate planning is even more important because it provides clarity, protection, and control.

KEY ESTATE PLANNING TOOLS WOMEN SHOULD CONSIDER

Although the right structure will depend on each person's circumstances, there are two main estate planning tools that women should consider.

A Will is often the starting point. A properly drafted Will sets out how your assets should be distributed and can also appoint executors to administer your estate. For women with minor children, it can also express guardianship wishes, which is a critical aspect of family protection.

A Family Trust may be an excellent option where the goal is the long-term preservation of wealth, protection of assets, succession planning for family property, or structured provision for children and future generations. Trusts can be especially useful for women who own significant assets, have businesses, wish to provide for vulnerable beneficiaries, or want to ensure continuity and privacy in the management of family wealth.

Women should also review ownership structures, beneficiary nominations, insurance policies, retirement benefits, business interests, and other key assets to ensure that these align with their broader estate planning intentions.

The important point is not that every woman needs the same solution. The important point is that every woman should begin the process by consulting an Estate Planning lawyer (hyperlink to website).

ABOUT US

In the spirit of this year's International Women's Day theme, "**Give to Gain**," we believe that sharing practical knowledge empowers women to make informed decisions, protect what they have built, and secure the futures of the people they love.

The Wealth, Estates, Legacy and Lifestyle (WELL) Practice Group at CM Advocates LLP is dedicated to supporting individuals and families in putting in place clear, practical, and effective estate planning structures. We have the experience, resources, and expertise to advise on Wills, Family Trusts, wealth structuring, succession planning, and trust administration, and we are committed to delivering personalised, compassionate, and solution-oriented legal support.

If you are a woman thinking about how to protect your children, your assets, your business interests, or your legacy, this is your sign to begin. We would be pleased to guide you through the process and help you put in place the right estate planning tools for your circumstances.

For enquiries, please reach out to us at privatewealthlawyers@cmadvocates.com or law@cmadvocates.com.

Disclaimer
This article is for informational purposes only and should not be construed as legal advice.

CAN YOUR FAMILY BUSINESS SURVIVE WITHOUT THE FOUNDER?

Many family businesses are built around a remarkable founder. The founder knows the customers, approves major expenditures, resolves disputes, negotiates key contracts and often has the final say on virtually every business decision. This hands-on approach is often the reason the business succeeds in its early years. However, it can also become the business's greatest vulnerability.

A question every family business owner should ask is: ***If I stepped away from the business tomorrow, would it continue to operate successfully?*** If the answer is uncertain, the business may be overly dependent on the founder rather than the systems and structures needed for long term sustainability.

Becoming an institution is not something that happens automatically as a business grows. It requires deliberate planning and the establishment of structures that create accountability, preserve institutional knowledge and provide continuity across generations. Some of the most important of these structures are discussed below.

A) GOVERNANCE STRUCTURES

As businesses grow, decision making can no longer remain concentrated in one individual. One of the most important steps in building an institution led business is establishing effective governance structures. This may include a board of directors, an advisory board or management committees that provide oversight and strategic direction.

Governance structures help ensure that major decisions are made through a structured process rather than personal discretion. They also provide accountability, independent perspectives and continuity during leadership transitions. Most importantly, governance ensures that the success of the business does not depend entirely on the founder.

B) A CLEAR SUCCESSION PLAN

Many family businesses delay succession planning because discussions about leadership transitions can be uncomfortable. However, succession planning is not about replacing the founder but about preparing the business for continuity.

A succession plan should identify future leaders, outline transition timelines, define leadership development pathways and establish contingency plans in the event of unexpected circumstances. The strongest businesses are those that develop leaders long before they need them.

C) FAMILY CONSTITUTION

As families expand, differing views on ownership, management, dividends and future direction often emerge. A family constitution can help address these issues by documenting the family's vision, values, governance principles and expectations regarding participation in the business.

A family constitution provides a framework for decision making and helps align family members around a common purpose. It also helps establish clear processes for handling family related matters and business related decisions, ensuring that each is addressed through the appropriate channels.

D) SHAREHOLDERS' AGREEMENT

Ownership disputes are among the most common causes of conflict in family businesses. A well drafted shareholders' agreement provides clarity on key issues such as voting rights, transfer and transmission of shares, dividend policies, exit mechanisms and dispute resolution procedures.

By establishing clear rules in advance, businesses can reduce uncertainty and minimize the risk of disagreements escalating into disputes that affect operations. A shareholders' agreement serves as a critical safeguard for preserving both family relationships and business stability.

E) PROFESSIONAL MANAGEMENT STRUCTURES

Many founder led businesses rely heavily on informal processes, personal relationships and the founder's direct involvement in day-to-day operations. While this approach may work in the early stages, it often becomes difficult to sustain as the business grows and becomes more complex. Institution led businesses, on the other hand, invest in professional management structures that allow the business to operate efficiently regardless of who is in charge.

This begins with clearly defined roles, reporting lines, performance expectations and decision making authority. Employees should understand who is responsible for what, how decisions are made and who is accountable for outcomes. By reducing reliance on informal arrangements, the business becomes more resilient, scalable and better equipped to navigate leadership transitions.

For family businesses, professional management also requires establishing a clear **family employment policy**. One of the most common sources of tension in family enterprises is uncertainty around the involvement of family members. A family employment policy can set objective criteria for joining the business, promotions, compensation and performance evaluation. This helps ensure that positions are filled based on merit and competence rather than family relationships.

Family businesses should also recognize the value of engaging trusted professional advisors. As the business grows, relying solely on the founder's experience and judgment may no longer be sufficient. Professionals such as accountants, company secretaries, lawyers and business advisors can provide specialized expertise, independent perspectives and strategic guidance that strengthen decision making and support long term growth.

F) DOCUMENTED POLICIES AND PROCEDURES

One of the risks in many founder led businesses is that critical information and experience are concentrated in a single individual. Key customer relationships, supplier arrangements, operational procedures and strategic decision making processes are often based on personal knowledge rather than documented systems. While this may work when the founder is actively involved, it can create significant challenges during a leadership transition.

Institution led businesses reduce this risk by documenting key policies, procedures, workflows and operational practices. By capturing institutional knowledge and embedding it within the organization, the business is able to maintain consistency and ensure continuity even when key individuals leave or retire. A business that documents and puts proper systems in its operations is less reliant on any one person and is better positioned to adapt, grow and thrive over the long term

G) ESTATE PLANNING STRUCTURES

For many family businesses, succession is not only about who will manage the business, but also who will own it. Without proper planning, the transfer of ownership can create uncertainty and disputes among family members, and even threaten the long term viability of the business. Family trusts, wills and other estate planning structures can help ensure that ownership transitions occur in a clear and orderly manner that is consistent with the founder's wishes.

These structures provide certainty by setting out who will inherit ownership interests, how ownership rights will be exercised and how important decisions affecting the business will be made. Effective estate planning helps preserve the business for future generations by protecting key assets, maintaining continuity of ownership and reducing the risk of disputes. By addressing ownership and succession issues early, families can help ensure that the business remains a lasting source of value.

CONCLUSION

The true test of a successful family business is not whether it thrives under the founder's leadership. It is whether it can continue to thrive after the founder steps aside. Creating an institution led business requires deliberate effort. It involves putting governance structures in place, documenting processes and creating frameworks that support continuity.

While these steps may seem unnecessary when the founder remains actively involved, they are often the difference between a business that survives one generation and a business that endures for many. Ultimately, the goal is not to reduce the founder's importance, it is to ensure that the founder's vision, values and legacy continue to guide the business long after they are no longer at the helm.

ABOUT US

The Family Business Services Practice Group at CM Advocates LLP is dedicated to supporting individuals and families in putting in place clear, practical and effective governance and estate planning structures. Our services include:

a) Family Governance & Constitutions: Family councils, advisory boards and charters tailored for multinational operations.
b) Succession & Leadership Planning: Transparent leadership transitions, next-generation coaching and succession planning across borders.
c) Decision-Making & Conflict Management: Consensus protocols, mediation, shareholder agreements and international dispute resolution.
d) Corporate Structuring: Family holding companies, trusts and corporate structures aligned with global compliance and business growth.

For enquiries, please reach out to us at law@cmadvocates.com

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FAMILY EMPLOYMENT POLICY: A KEY CORPORATE GOVERNANCE TOOL FOR FAMILY BUSINESSES

INTRODUCTION

One of the most common governance challenges in family businesses is the question of whether, when, and how family members should be allowed to work in the business.

In many family businesses, there is an assumption that family membership automatically entitles one to employment, promotion, leadership, or influence within the business. While this may appear harmless at first, it can quickly create operational inefficiencies, resentment among non-family employees, conflict between family members, and a weakening of professional standards.

A well-drafted Family Employment Policy helps address this issue by setting clear rules on the involvement of family members in the business. It ensures that the business is not treated as an automatic employment safety net for every family member, but as a professional enterprise that requires competence, accountability, discipline, and merit.

WHAT IS A FAMILY EMPLOYMENT POLICY?

A Family Employment Policy is a formal governance document that sets out the terms upon which family members may join, work in, be promoted within, be compensated by, or exit the family business.

It answers critical questions such as:

1. Who qualifies to work in the family business?
2. What education, experience, or skills must a family member have before joining?
3. Must a family member gain external work experience before entering the business?
4. Will family members be paid market-based salaries?
5. What are the reporting structures of family members?
6. How will performance be reviewed?
7. Are family members entitled to automatic promotion?
8. What happens if a family member underperforms?
9. Can family members who do not wish to work in the business remain passive owners or beneficiaries?
10. How will disputes relating to employment be resolved?

A strong Family Employment Policy makes it clear that family members may be welcome in the business, but they must earn their place in it.

WHY FAMILY BUSINESSES NEED A FAMILY EMPLOYMENT POLICY

Family businesses are not ordinary businesses. They operate at the intersection of ownership, family relationships, management, inheritance, reputation, and legacy. Without clear governance structures, these overlapping roles can take a toll on the business.

A parent may struggle to distinguish between being a founder and being a mother or father. A child may assume that ownership automatically means executive authority. A sibling may feel entitled to the same salary as another sibling, even where their roles, qualifications, and contributions differ significantly. Non-family employees may feel that their growth is limited because senior positions are reserved for relatives, regardless of merit.

This is where a Family Employment Policy becomes invaluable. It introduces clarity where emotion often dominates.

The International Finance Corporation's Family Business Governance Handbook notes that many family businesses find it difficult to attract and retain talented non-family managers where such managers believe that key senior positions will always be reserved for family members. It recommends clear and fair employment policies for both family and non-family employees to help keep strong employees motivated and aligned with business growth.

Similarly, family business advisory literature recognises that employment policies help family members understand their relationship to the business and clarify expectations for both family and non-family employees.

THE RISKS OF HAVING NO FAMILY EMPLOYMENT POLICY

Where a family business does not have a clear employment policy, several risks may arise, including:

1. Entitlement-based employment
Relatives may be hired simply because they are family members, rather than because they possess the qualifications, experience, temperament, discipline, or competence required for the role.

2. Nepotism and perceived unfairness
Non-family employees may lose motivation where they believe that family members receive preferential treatment, higher pay, lighter workloads, or faster promotions.

3. Conflicts of interest in supervision
Where a family member reports directly to a parent, sibling, spouse, uncle, aunt, cousin, or other relative, performance management can become difficult. Feedback may be softened, disciplinary action may be avoided, and professional accountability may be compromised.

4. Poor succession outcomes
A family member may be placed in a leadership position without adequate preparation, external exposure, mentorship, or demonstrated competence. This can weaken the business and place the family's wealth at risk.

5. Family conflict
Family members working in the business may resent those who do not, while those outside the business may feel excluded from information, decision-making, or ownership benefits. Those inside the business may also feel overburdened. Without clear rules, the family and the business begin to wrestle in the same room, and usually, both leave bruised.

CONCLUSION

A Family Employment Policy is an important corporate governance tool because it provides a clear framework for managing family involvement in the business while preserving merit, fairness, and accountability.

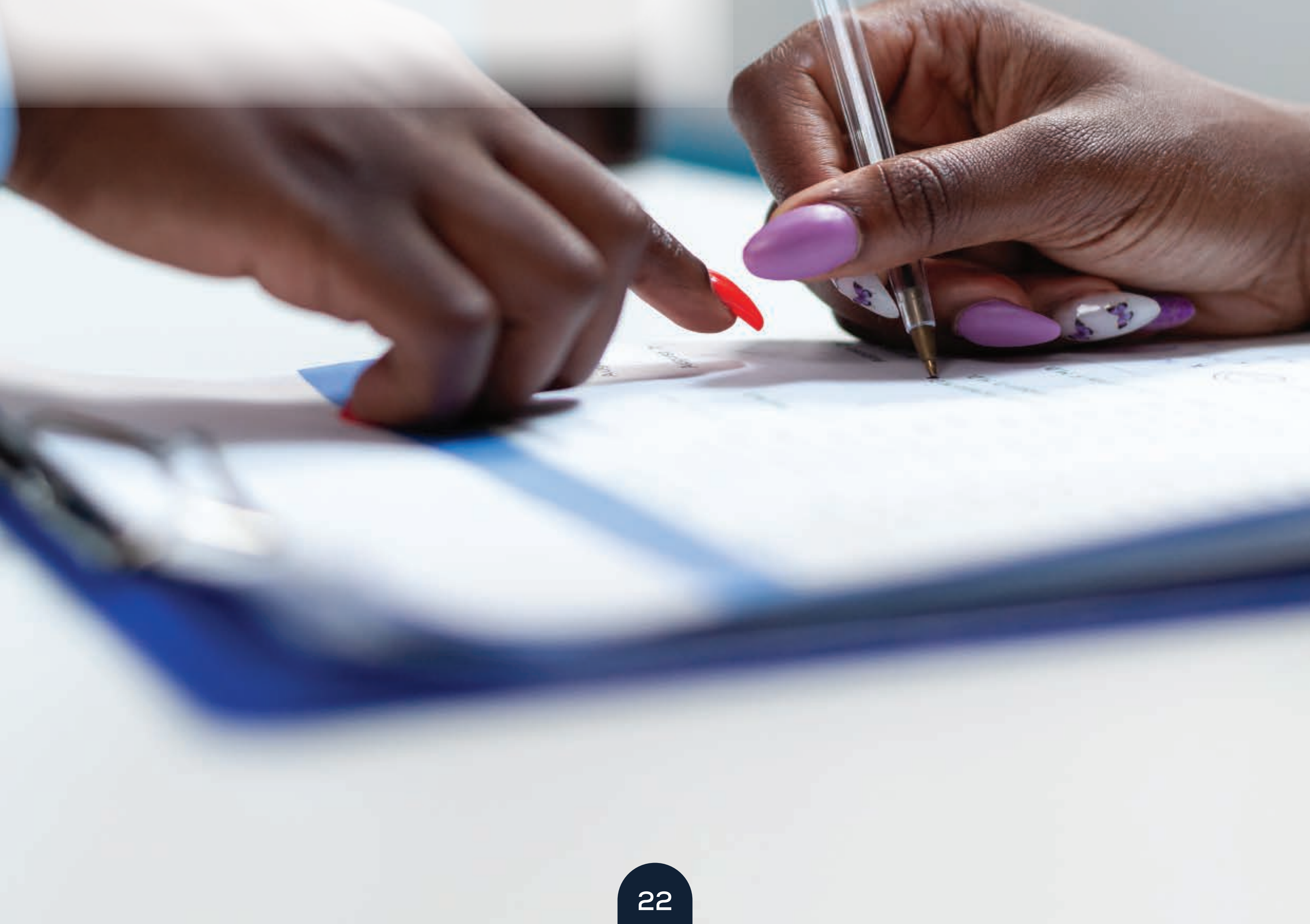
Family businesses have the potential to grow beyond successful enterprises into enduring legacies. However, many fall short not because of a lack of opportunity, ambition, or capacity, but because they continue to rely on informal structures, undocumented arrangements, and "jua kali" methods of governance.

As family businesses grow, so must the systems that support them. Corporate governance tools such as Family Employment Policies, Family Constitutions, Shareholder Agreements, Board Charters, and succession frameworks can help professionalise the business, regulate family participation, minimise conflict, and strengthen decision-making. Similarly, estate planning tools such as Family Trusts and Wills can support continuity, asset protection, orderly succession, and the creation of generational wealth.

A well-structured family business is better placed to survive leadership transitions, protect family wealth, attract professional talent, and preserve harmony across generations. The earlier these tools are put in place, the stronger the foundation for long-term continuity and growth.

The **Wealth, Estates, Legacy and Lifestyle (WELL) Practice Group** at CM Advocates LLP has extensive experience advising family businesses and high-net-worth individuals on the establishment of robust and effective corporate governance and succession planning tools, including Family Trusts, Family Constitutions, Shareholder Agreements, and related governance frameworks.

For assistance in structuring, strengthening, or future-proofing your family business, please contact our team at privatewealthlawyers@cmadvocates.com.



HOW THE NJENGA KARUME TRUST CASE SHAPED FAMILY TRUST LAWS IN KENYA

THE STRATEGIC ROLE OF FAMILY TRUSTS

The Trustees (Perpetual Succession) (Amendment) Act, 2021 and the Perpetuities and Accumulation (Amendment) Act, 2022 have significantly modernised Kenya's legal framework on trusts. These changes were informed and, in some respects, accelerated by decisions arising from disputes such as the Njenga Karume Family Trust litigation, which illuminated governance and accountability gaps.

Kenya now recognises family trusts, the oversight role of enforcers, and dynasty trusts that may exist in perpetuity. This positions Kenya as a competitive jurisdiction for wealth structuring and succession planning. Properly drafted family trusts enable high-net-worth families, entrepreneurs, and diaspora investors to preserve wealth, protect assets, reduce disputes, and provide intergenerational governance continuity.

THE NJENGA KARUME TRUST CASE

Njenga Karume, a businessman and politician, established a family trust to manage his estate. After his death in 2012, disputes arose between trustees and beneficiaries regarding mismanagement of the trust fund, failure to render accounts, exclusion of heirs from decision-making, and conflicts of interest.

The beneficiaries petitioned the High Court, which intervened under Section 42 of the Trustees Act. The result of this was that the trustees were removed and replaced. The Court applied the equitable principle from the landmark case of Letterstedt v Broers (1884), which holds that the welfare of beneficiaries must override the settlor's choice of trustee where trust administration is undermined.

The case reinforced that beneficiaries' interests are paramount, trustees must act with transparency and accountability, and courts have wide supervisory jurisdiction to intervene where trust governance fails.

LEGAL FRAMEWORK FOR TRUSTEE REMOVAL IN KENYA

Trustee removal is governed by both statute and equity:

1. Trustees Act (Cap. 167), which empowers the High Court to remove and appoint trustees.
2. Law of Succession Act (Cap. 160), which applies where trustees are also executors or administrators.
3. Trustees (Perpetual Succession) (Amendment) Act, 2021, which introduced family trusts and recognised the role of enforcers.

4. Perpetuities and Accumulation (Amendment) Act, 2022, which abolished the common law rule against perpetuities, allowing trusts to family exist indefinitely.
5. Common law and equity, particularly the principle in *Letterstedt v Broers (1884)*.

Grounds for removal include misconduct, breach of fiduciary duty, incapacity, neglect, conflict of interest, or an irretrievable breakdown of trustee–beneficiary relations. Removal can occur through express provisions in the trust deed by order of the High Court.

COMMON LAW AND EQUITY: THE PRINCIPLE FROM LETTERSTEDT V BROERS (1884)

Courts of equity have long exercised supervisory jurisdiction over trusts to protect beneficiaries.

The case of *Letterstedt v Broers (1884)*, decided by the Privy Council, is the leading authority. It established that:

> "The central consideration in trustee removal is the welfare of beneficiaries and the proper execution of the trust.
> Removal does not require proof of fraud; persistent friction, lack of confidence, or a breakdown in trustee–beneficiary relations is sufficient.
> Although the settlor's choice of trustee should be respected, it will be overridden where necessary to safeguard the trust where the trustees are in breach of their fiduciary duties."

Kenyan courts have consistently applied these principles, including in the Njenga Karume Trust case. This ensures Kenyan jurisprudence remains aligned with international trust law and equity, balancing settlor autonomy with the beneficiaries' right to effective trust administration.

ENFORCERS (OR PROTECTORS) IN FAMILY TRUSTS

The 2021 reforms introduced protectors or enforcers as independent oversight authority within family trusts. An enforcer is typically appointed under the trust deed to monitor trustees and ensure compliance with the trust's objectives. An enforcer can be likened to a 'watchdog', for proper administration of the trust. Depending on the trust instrument, enforcers may hold powers to remove or appoint trustees, approve significant trustee decisions, demand accounts and audits, ensure the trust adapts to any changes in laws, and intervene where beneficiaries are minors or incapacitated, only in a supervisory capacity.

The inclusion of enforcers aligns Kenya with international best practice in trust jurisdictions such as Jersey, Guernsey, and the Cayman Islands. Their role adds a layer of accountability that reduces the risk of disputes escalating into litigation.

DYNASTY TRUSTS AND PERPETUITY

A dynasty trust is a perpetual family trust designed to preserve and manage assets across multiple generations. In Kenya, dynasty trusts are particularly effective for holding ancestral land, family businesses, real estate portfolios, and consolidated investments.

In Kenya, the Perpetuities and Accumulations (Amendment) Act, 2022 disapplies the rule against perpetuities to family trusts, allowing them to exist indefinitely. Families can now establish structures that ensure wealth and governance continuity for centuries.

Dynasty trusts offer:

a) Protection against fragmentation of family wealth by preventing repeated subdivision of assets.
b) Protection from legal claims, for example where a beneficiary is involved in divorce proceedings.
c) Governance stability for family enterprises, supported by the trustees and the enforcer if appointed.
d) Intergenerational continuity, aligned with global private wealth practices.
e) Long-term legacy building, ensuring ancestral assets, family values, and philanthropic objectives endure.

These trusts are now among the most powerful estate planning tools in Kenya, combining perpetuity with professional governance to preserve harmony and prosperity across generations.

PRACTICAL IMPLICATIONS

Families can now establish robust family and dynasty trusts that can exist perpetually, thereby safeguarding wealth and minimising the risk of disputes. The use of independent trustees, together with the appointment of enforcers, enhances accountability and transparency.

Trustees must recognise that their duties are subject to heightened scrutiny. Maintaining global standards of transparency, accountability, and diligence is essential to avoiding breach of trust or liability.

For practitioners, drafting modern family trust deeds requires integrating trustee removal mechanisms, enforcer provisions, and perpetuity clauses, while also benchmarking the instruments against evolving international standards.

KEY TAKEAWAYS

1. The Njenga Karume Trust case exposed governance weaknesses in family trusts.
2. The 2021 and 2022 reforms introduced modern solutions: family trusts, enforcer appointments, and dynasty trust that exist perpetually.
3. Courts applying principles from *Letterstedt v Broers and Njenga Karume* case continue to prioritise beneficiaries' welfare above settlor preference especially where the trustees are in breach of their fiduciary duties.
4. Kenya is now positioned as a credible hub for private wealth management in Africa, comparable to leading international jurisdictions.

CONCLUSION

Kenya's evolving trust law framework empowers families, entrepreneurs, and investors with access to sophisticated, globally aligned wealth planning structures.

While the ability to remove trustees remains a vital safeguard in cases of fiduciary breach, today's legal landscape places equal emphasis on proactive governance. By incorporating mechanisms such as enforcer appointments and perpetual dynasty trusts, families can foster transparency, enhance continuity, and uphold accountability across generations.

Today, family trusts in Kenya are no longer limited to succession planning. They are versatile, enduring vehicles for safeguarding family wealth, maintaining internal harmony, and providing stability through life's transitions. Whether used to consolidate family assets, provide for future generations, or reinforce family values, a well-structured trust is a powerful tool for sustainable and resilient estate planning.

Families are therefore encouraged to consider establishing a family trust as a lasting strategy for protecting their legacy and securing intergenerational prosperity.

Wealth, Estate, Legacy & Lifestyle

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