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PART 2

IN CONVERSATION WITH:

NASRA NANDA

C.E.O.
Kenya Green Building Society (KGBS)

IN THIS ISSUE

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CM PROPERTY DIGEST: AN EXCLUSIVE INTERVIEW WITH NASRA NANDA, CEO OF THE KENYA GREEN BUILDING SOCIETY (KGBS) - PART 2

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CM PROPERTY DIGEST: Leading Sustainable Change in Kenya's Built Environment with Nasra Nanda.

Welcome back to CM Property Digest, your source for insightful discussions on Africa's real estate and built environment. We explore key trends in sustainable design, urban innovation, and construction that are shaping Kenya's property landscape, while highlighting the leaders driving change.

Today, we're excited to feature Nasra Nanda, an influential advocate for sustainable architecture and **CEO of the Kenya Green Building Society (KGBS)**. Nasra's leadership extends to her role as **Chair of the Africa Regional Network at the World Green Building Council (WGBC)**, where she drives initiatives promoting green building practices across the continent. Furthermore, she is an **Honourable Member of the County Assembly in Nairobi city**.

Her work has led to significant milestones, including Kenya's achievements at *COP28* and *the first IFC EDGE Green Government office certification in Africa*. A passionate champion of policy integration and community development, Nasra's efforts are shaping Kenya's future through sustainable, inclusive design.

From our last conversation in our February issue, Stella spoke with Nasra on advancing real change through sustainable built environments. The discussion highlighted KGBS's role in inclusive urban development, policy advocacy, green building certification, and Nairobi's Climate Change Act. Key topics included affordable housing, locally sourced green materials, and community-driven solutions.

We're now thrilled to bring you **Part 2** of this inspiring interview—diving even deeper into innovation, climate resilience, and the future of green cities in Kenya.

STELLA: How can sustainable built environments address social equity and inclusion?

MS. NASRA: Sustainable built environments play a critical role in advancing social equity and inclusion by ensuring that urban development is accessible, affordable, and beneficial to all segments of society. At KGBS, we advocate for:

- ***Affordable, Inclusive and Sustainable Housing*** – Ensuring sustainability standards are integrated into affordable housing projects, reducing energy costs for low-income communities.
- ***Community Participation*** – Involving local communities in urban planning to ensure developments reflect their needs and priorities.
- ***Climate Resilience for Vulnerable Populations*** – Implementing passive cooling, flood mitigation, and nature-based solutions in informal settlements.
- Job Creation in the Green Economy – Training local workers in green construction techniques and sustainable material use.

By embedding these principles, sustainable urban development can bridge social inequalities and promote shared prosperity.

STELLA: What role do communities play in maintaining green buildings and spaces?

MS. NASRA: Communities are essential stakeholders in ensuring the long-term success of green buildings and public spaces. Their roles include:

- ***Ownership & Stewardship*** – Encouraging community-led management of green spaces to foster environmental responsibility.
- ***Behavioral Change & Energy Efficiency*** – Promoting sustainable practices such as water conservation, waste separation, and responsible energy use.
- ***Citizen Engagement in Urban Governance*** – Participating in local decision-making processes to ensure sustainability goals are upheld.
- ***Community-Based Maintenance Models*** – Establishing cooperatives or resident associations to oversee infrastructure and ensure continued compliance with green standards.

By empowering communities, green developments become more than just projects—they evolve into self-sustaining ecosystems that enhance well-being, restore dignity, and create a platform for prosperity.

STELLA: How can urban development projects balance affordability with sustainability?

MS. NASRA: Balancing affordability with sustainability requires smart design, innovative financing, and policy alignment. KGBS promotes and/ or strives to support the following approaches:

- ***Passive Design & Low-Cost Sustainable Materials*** – Utilizing locally available, climate-responsive materials that reduce operational costs.
- ***Green Financing & Incentives*** – We are now in the process of intentionally working on investment in green bonds, tax incentives, and subsidies to offset initial green building costs.
- ***Scalable, Incremental Housing Models*** – Allowing for phased construction that integrates sustainability improvements over time.
- ***Public-Private Partnerships (PPPs)*** – Collaborating with governments, private investors, and NGOs to share costs and risks.
- ***Circular Economy Integration*** – Reducing costs by repurposing construction waste and utilizing recycled materials.

By implementing these strategies, urban development can be both economically viable and environmentally responsible, ensuring sustainability does not become a privilege but a standard.

STELLA: How do you measure the environmental and social impact of a sustainable building?

MS. NASRA: At KGBS, we measure the environmental and social impact of sustainable buildings through a combination of quantitative performance metrics and qualitative assessments. Some of the key areas of evaluation include:

- ***Energy Efficiency*** – Reduction in energy consumption compared to conventional buildings, measured in kWh per square meter.
- ***Water Efficiency*** – Reduction in potable water consumption, use of rainwater harvesting, and greywater recycling.
- ***Carbon Footprint Reduction*** – Embodied and operational carbon emissions reduction in line with Kenya's NDC commitments.
- ***Material Circularity*** – Use of low-carbon, recyclable,

and locally available materials to promote circular economy principles.

- ***Indoor Environmental Quality*** – Impact on occupant health, ventilation, daylighting, and air quality monitoring.
- ***Social Inclusion*** – Contribution to affordable and accessible housing, job creation in the green economy, and community engagement.
- ***Resilience and Climate Adaptation*** – Use of passive design, flood mitigation strategies, and disaster resilience measures.

KGBS also uses rating tools such as EDGE (Excellence in Design for Greater Efficiencies) certification and LEED (Leadership in Energy and Environmental Design) rating systems to benchmark and verify impact.

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STELLA: Can you share examples of successful green building projects and their outcomes?

MS. NASRA: KGBS and its members have been involved in several impactful green building projects and initiatives that demonstrate real outcomes:

- ***Acorn Green Student Housing*** – Certified EDGE Advanced, this project is Kenya's first green bond-financed student accommodation development. It has reduced energy use by 35% and water consumption by 40% while offering affordable, climate-responsive housing for students.
- ***Jenga Green App*** – KGBS in partnership with FSD Kenya developed in digital tool that connects developers, architects, and suppliers to verified green materials and solutions, making sustainable construction more accessible.
- ***Nairobi City County Governor's Office***, Africa's first IFC EDGE Green Government office. This was an impactful project because it demonstrated leadership in action.

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STELLA: What metrics are used to evaluate the long-term sustainability of a built environment?

MS. NASRA: Some of the following key performance indicators (KPIs) can be used to evaluate the long-term sustainability of a project:

1. **Operational Carbon Footprint** – Monitors CO_2 emissions from building operations.
2. **Social Impact Metrics** – Evaluate affordability, accessibility, and community well-being.
3. **Biodiversity & Ecosystem Services** – Assesses how the project integrates green spaces, urban forests, and ecosystem-based design approaches.

Contributor Information

IN CONVERSATION WITH:

NASRA NANDA

C.E.O.
Kenya Green Building Society (KGBS)

Nasra Nanda is a dynamic leader at the intersection of sustainability, governance, and urban development. As the CEO of the Kenya Green Building Society (KGBS), she is driving the transformation of Kenya's built environment, championing green building standards, and integrating ESG principles into real estate. Her influence extends beyond Kenya as the Chair of the Africa Regional Network of the World Green Building Council, where she works to accelerate sustainable development across the continent. In addition to her advocacy, Nasra serves as a nominated member of the Nairobi City County Assembly, using her legislative role to push for policies that promote climate resilience and inclusive urban growth. Passionate about creating impact at both grassroots and policy levels, she is at the forefront of shaping a future where sustainability is not just an ideal, but a reality for all.

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INTERVIEWER:

STELLA ORENGO

Legal Expert | Dispute Resolution Specialist | Gender & Sustainability Advocate | Director & Co-Founder

With over 14 years of post-graduate experience, Stella Orengo is a highly skilled legal practitioner specializing in pre-disputes and appropriate dispute resolution mechanisms, family law, legal drafting, and sustainability practice. She is adept at crafting strategic legal solutions that prevent, manage, and resolve conflicts while ensuring compliance with legal and regulatory frameworks.

As a gender practitioner, she has a strong focus on gender analysis, reporting, and training, working to integrate gender-responsive approaches into legal and policy frameworks. Her expertise extends to sustainability, where she advises on ESG compliance, responsible business practices, and legal mechanisms that promote environmental and social impact.

In addition to her legal practice, Stella Orengo is the Director and Co-Founder of Bio-Climate Solutions Limited, a firm offering bespoke ESG and sustainability advisory services. Through this platform, she provides tailored solutions that help businesses and institutions embed sustainability into their operations, governance, and strategic planning.

Passionate about transformative legal practice and sustainable development, she combines legal acumen with a commitment to social and environmental impact, making her a trusted advisor in both corporate and public interest matters.

UNDERSTANDING REGISTRATION OF CORPORATIONS UNDER SECTIONAL PROPERTIES ACT NO. 21 OF 2020

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ESTABLISHMENT OF CORPORATIONS

The Sectional Properties Act No. 21 of 2020 (the Act) was enacted into law on the 11th of December 2020. This enactment in law was a confirmation to the provisions of the constitution of Kenya 2010, the Land Act No. 6 of 2012 and the Land Registration Act No. 3 of 2012 and was in the interest of ensuring that land in Kenya is used in a manner that is equitable, efficient, productive and sustainable.

The Act provides for division of buildings into units and issuance of sectional titles owned by individual homeowners as well as ownership of the common property in the building by all the unit owners. The Act requires that a Sectional plan related to the units is prepared and registered by the surveyor and upon registration of the sectional plan, a corporation, named "The Owners, Sectional Plan No. [plan number]", is automatically established, consisting of the unit owners and there is no requirement for registration under the Companies Act (2015).

In instances where a corporation is not automatically registered, one is required to fill out an application form detailing the registered Sectional Plan Registration Number and the details of the units and owners. The duly filled form SP7 is submitted on the Ardhisasa Portal under the Sectional Properties tab for registration together with the list of names on the sectional plan. This form can be lodged by either an Advocate or the developer. Once the corporation is registered, the registrar issues a certificate of registration.

The documents/Details Required for the purpose of the application include:

a) Parcel Number;
b) Sectional Plan Number;
c) Corporation Location & Address;
d) Developer Ardhisasa details;
e) Signed by-laws;
f) Endorsed plan document;
g) Ardhisasa details of the following officials:
    i. Chairperson;
    ii. Vice chairperson;
    iii. Treasurer; and
    iv. Secretary

MANDATE OF CORPORATIONS

Corporations are responsible for enforcing the by-laws, control, management and administration of the units and the common property and for all matters the management company previously was responsible for.

Corporations have a board management that is constituted as provided by the by-laws of the corporation and is required to meet once every year for an Annual General Meeting.

The voting rights of each owner of the corporation are to correspond to the unit factors the unit owner owns over the parcel of land.

TRANSITIONS OF MANAGEMENT COMPANY TO CORPORATION

In the case where there is an existing management company, upon completion of the registration of a corporation, the existing management company transfers all assets and liabilities to the corporation as soon as the conversion process is complete and in any case within one year from the date of registration of the corporation.

These transfers are done based on the laws governing the ownership of those assets and liabilities. The management company will then be wound up as per the Companies Act and Regulations.

EXEMPTIONS FROM CORPORATIONS

Certain developments are exempted from the provisions of the Act with regard to issuance of sectional titles and in this instance, such developments will still have management companies incorporated under the Companies Act and a corporation will therefore not apply.

Excluded developments include: –

i) Where it is expressly stated that reversionary interest belongs to the developer or lessor or management company and not as trustee.
ii) Where the property comprises of large mixed-use development and phase development where it is stated by written agreement that reversion shall be retained by the developer or the management company.
iii) Where there exist projects of strategic national importance, substantial transactions and special economic zones which by their nature renders it impractical to relinquish reversionary interest.

In conclusion, the Act has established a comprehensive structure that makes sectional unit ownership, acquisition and maintenance easier. It is now possible for purchasers to have control to ownership of property by having independent titles and to have the corporation manage the estate's operations.

THE ROLE OF IRREVOCABLE FAMILY TRUSTS IN PROPERTY PROTECTION

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INTRODUCTION

For individuals and families looking to safeguard their wealth and legacy, an irrevocable family trust stands out as one of the most robust tools available. However, to achieve effective property protection, one must go beyond simply establishing a trust.

Strategic consideration must be given to the structure of the trust, the nature of the trust (revocable vs. irrevocable), the powers conferred on the Board of Trustees, and the specific powers that remain subject to the Settlor's approval (if any).

When correctly structured, these elements create a solid foundation for asset protection—shielding property from civil claims, creditor enforcement, and even matrimonial disputes. For your personal or family properties, leveraging a living irrevocable family trust is a wise and proactive step in protecting your estate from unnecessary exposure.

IRREVOCABLE TRUSTS IN KENYA

A trust is created when a **Settlor** (the person establishing the trust) transfers ownership of assets—such as land, houses, or investments—into a trust. These assets are then managed by **Trustees** for the benefit of designated **Beneficiaries**.

An **irrevocable trust** is one that cannot be revoked by the Settlor or Trustees once it has been constituted. It may only be amended in accordance with the provisions set out in the trust deed. This permanence provides the trust with a high degree of **stability**, **structure**, and l**ong-term security**, making it a preferred structure for asset protection and succession planning.

Irrevocable trusts are governed under Section 3A of the **Trustees (Perpetual Succession) Act, Cap 164**, which provides as follows:

"3A. IRREVOCABLE TRUSTS

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."

Based on the above and for clarity, the trust deed must indicate whether the nature of the trust is **revocable** or **irrevocable**.

KEY PARTIES IN A TRUST

- **Settlor:**
  The individual who creates the trust and transfers ownership of property to it. In cases of jointly owned

assets—such as marital homes—both spouses can act as joint Settlors.

- **Trustee:**
  Either an individual or a corporate trustee, appointed to manage the trust assets in accordance with the trust deed.

- **Beneficiaries:**
  The persons or entities for whose benefit the trust is established—commonly children, spouses, or other dependants.

- **Enforcer *(optional)*:**
  A separate party appointed to supervise the Trustees and ensure that the trust is being administered in line with the Settlor's intentions.

The trust deed is the legal instrument that governs the trust. It defines the roles and responsibilities of the Trustees, the rights of the Beneficiaries, and any limitations or powers retained by the Settlor.

WHY YOU SHOULD PLACE YOUR PROPERTIES IN AN IRREVOCABLE FAMILY TRUST?

Establishing an irrevocable living family trust is a proactive, strategic decision for individuals and families who wish to protect, preserve, and control the management and distribution of their wealth in a robust manner. Unlike revocable trusts, an irrevocable trust cannot be altered or revoked at the discretion of the Settlor once constituted, except in accordance with strict provisions of the trust deed. This permanence is precisely what makes irrevocable trusts such a powerful asset protection tool.

Here are the key advantages of incorporating an irrevocable living family trust:

1. **Enshrinement and Enforceability of the Settlor's Wishes**
   With an irrevocable trust, the Settlor's intentions are preserved and protected from alteration. Once assets are transferred to the trust and the terms are set, the trust operates independently of any future influence, even from the Settlor themselves. This ensures that the distribution of assets follows the original wishes of the Settlor, regardless of external pressures, family disputes, or changes in personal relationships. The structure guarantees the integrity of your estate plan over time.

2. **Protection from Creditors and Civil Claims**
   Assets held in an irrevocable trust are no longer considered personal property of the Settlor. As a result, they are shielded from creditor claims, business liabilities, and civil suits.

   Section **3F(3)(c) of the Trustees (Perpetual Succession) Act** reinforces this protection by explicitly barring Settlor's creditors from attaching trust assets, provided the trust was not established with the intent to defraud. Whether facing insolvency, litigation, or unforeseen personal liabilities, the trust protects your family's most valuable assets from external attack.

3. **Shielding Assets in Matrimonial Property Disputes**
   An irrevocable trust is a strong buffer in matrimonial property disputes. Since the assets are no longer under the Settlor's legal ownership, they generally fall outside the scope of division in the event of divorce or separation. This makes it an essential estate planning tool for individuals seeking to ring-fence inherited, ancestral, or pre-marital property for the benefit of their children and long-term lineage, especially in blended or complex family structures.

4. **Avoidance of Probate and Court Delays**
   When assets are transferred to an irrevocable trust during the Settlor's lifetime, they cease to form part of the Settlor's estate upon death. This effectively removes the need for probate or letters of administration, ensuring that the Beneficiaries receive their inheritance promptly and privately. This eliminates the risk of delays, legal battles, or interference from estranged family members or undisclosed heirs, while preserving family harmony and legacy continuity.

5. **Tax Efficiency and Cost Savings**
   In Kenya, all types of registered family trusts offer significant tax advantages when duly registered:

   - ***Stamp Duty Exemption:*** Under ***Section 52(2)(b) of the Stamp Duty Act***, the transfer of property to a registered family trust is exempt from stamp duty (2% or 4% depending on location).

   - ***Capital Gains Tax Exemption:*** As per ***Paragraphs 36(g) and 58 of the First Schedule to the Income Tax*** Act, no CGT is payable on property transferred to a registered family trust.

   This results in substantial savings when compared to other forms of property transfer, making irrevocable trusts both legally efficient and financially prudent.

6. **Continuity in Case of Incapacity**
   If the Settlor becomes incapacitated due to illness, age, or unforeseen circumstances, the trust continues to operate seamlessly. Trustees remain fully empowered to manage the trust assets according to the deed, ensuring uninterrupted care for the family and continued adherence to the Settlor's instructions. Successor Trustees can step in when needed ensuring uninterrupted trust operations and safeguarding the family's financial well-being.

CONCLUSION

In today's unpredictable environment, safeguarding your assets and protecting your family's legacy calls for more than just good intentions—it requires the right legal structure. While revocable trusts do offer stability and flexibility, they carry inherent risks. Because they can be altered or cancelled by the Settlor, there are limited instances where courts may compel a revocation, or where such a trust may be challenged as Settlor-controlled and therefore a sham, especially in contentious legal disputes.

Setting up an irrevocable family trust provides far greater certainty. Once constituted, it cannot be arbitrarily revoked or manipulated. This makes it significantly more resilient in the face of creditor claims, matrimonial property disputes, or external pressure. It ensures that your wishes are preserved, your loved ones are protected, and your wealth remains intact—secure from delays, interference, and unnecessary exposure.

Given the complexities involved, consulting an experienced estate planning lawyer is crucial in navigating the process of setting up, funding, and managing an irrevocable family trust.

By taking proactive steps today, you can ensure your family's security, privacy, and financial stability for generations to come. Do not leave your legacy to chance—establish a living family trust today.

CONTACT US TODAY

The Wealth and Private Clients team at **CM Advocates LLP** prides itself in having a wide variety of resources, skills and experience on matters estate planning, wealth management and trust administration within the East African Region. We offer an edge to our clients based on our legacy of having structured, re-structured, amended, and incorporated several forms of trusts and therefore well capable of guiding you through the process of creating a valid family trust.

Should you have any questions regarding the subject of establishing a family trust, or related topic, please do not hesitate to contact us at ***law@cmadvocates.com*** .

Disclaimer
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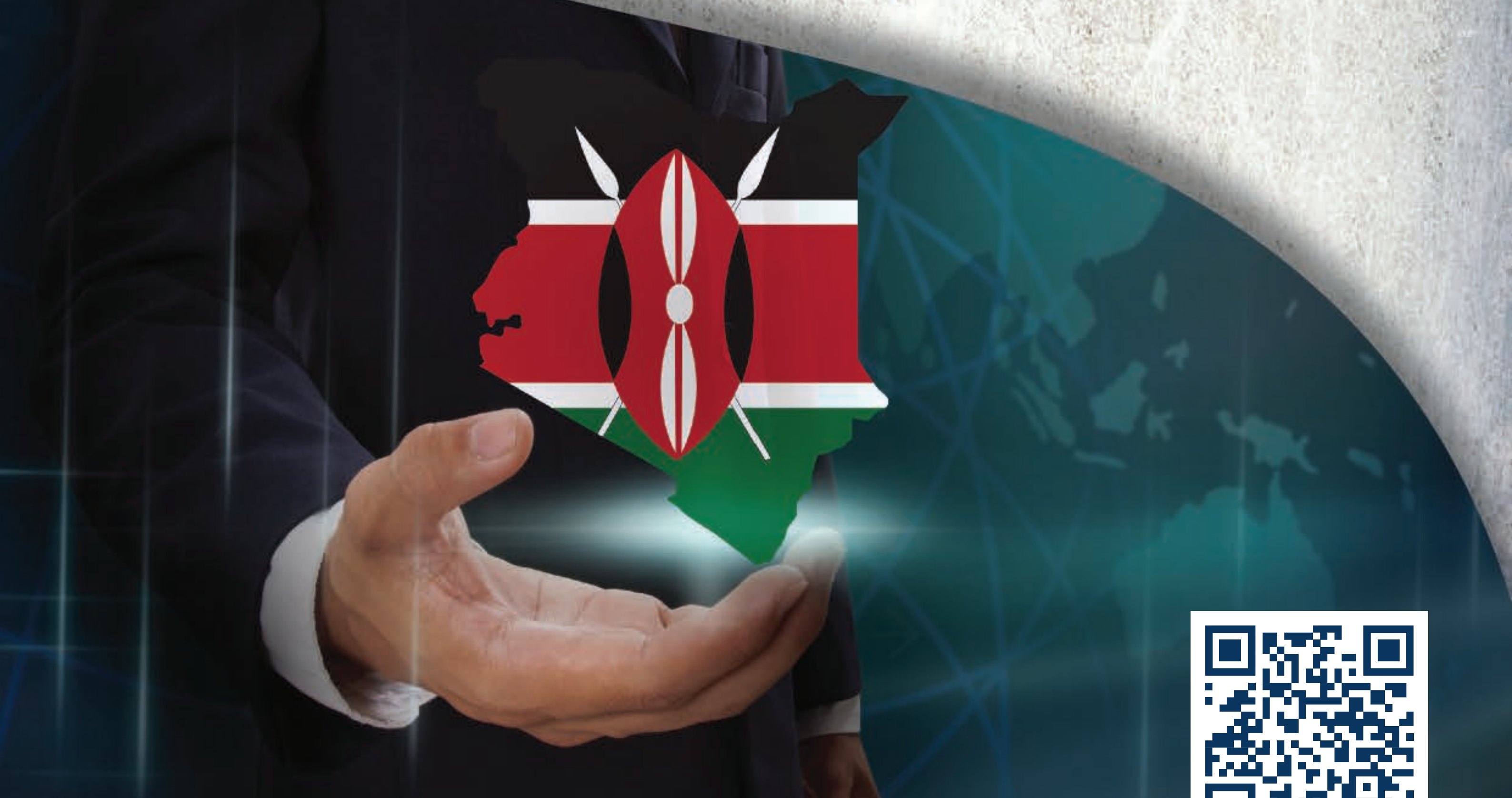

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A COMPREHENSIVE GUIDE TO ESTATE PLANNING FOR EXPATRIATES IN KENYA: NAVIGATING LEGAL, FINANCIAL, AND CROSS-BORDER CONSIDERATIONS

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INTRODUCTION

Estate planning is a critical yet often overlooked aspect of financial management, especially for expatriates living and working in Kenya. As an expat, you may have assets spread across multiple countries, face complex tax regulations, and need to navigate unfamiliar legal systems. Without a well-structured estate plan, your loved ones could encounter significant challenges in accessing or inheriting your assets. This guide provides a comprehensive overview of estate planning for expatriates in Kenya, helping you protect your wealth and ensure your wishes are honoured.

UNDERSTANDING THE IMPORTANCE OF ESTATE PLANNING FOR EXPATRIATES

Estate planning is not just for the wealthy, it is a vital process for anyone who wants to safeguard their assets and provide for their family's future. For expatriates, the stakes are even higher due to the complexities of cross-border legal and financial systems. Key reasons to prioritize estate planning include:

a) **Asset Protection:** Ensuring your assets are distributed according to your wishes, regardless of where they are located.
b) **Tax Efficiency:** Minimizing inheritance taxes, capital gains taxes, and other liabilities that may arise in Kenya or your home country.
c) **Family Security:** Providing for your dependents and avoiding lengthy legal disputes or disputed probate processes.
d) **Legal Compliance:** Adhering to Kenyan laws while addressing the requirements of your home country's legal system.

KEY COMPONENTS OF AN EXPATRIATE'S ESTATE PLAN

A robust estate plan for expatriates in Kenya should include the following elements:

A well-structured estate plan ensures that your assets are protected and distributed according to your wishes. For expatriates in Kenya, this process involves several key components, each playing a crucial role in securing your financial legacy.

At the heart of any estate plan is a ***will***, a legal document that dictates how your assets should be distributed upon your passing. Expatriates must ensure that their will complies with Kenyan law and, if necessary, consider drafting a separate will for assets held in their home country. Clearly specifying beneficiaries and appointing a trusted executor can help streamline the inheritance process and prevent legal disputes.

For those with substantial wealth or complex financial holdings, ***trusts*** offer an effective means of protecting and managing assets. Establishing a trust can help beneficiaries avoid the often lengthy and costly probate process while ensuring that minor children or dependents are financially provided for. Additionally, trusts serve as a safeguard against creditors or potential legal challenges.

Another crucial aspect of estate planning is assigning ***power of attorney*** to a reliable individual who can make financial or medical decisions on your behalf if you become incapacitated. Expatriates must ensure that this designation is legally recognized both in Kenya and in their country of origin, ensuring continuity in asset management and healthcare decisions.

In addition to drafting wills and trusts, it is essential to regularly review ***beneficiary designations*** on life insurance policies, retirement funds, and other financial instruments. These designations often override instructions in a will, making it vital that they align with the overall estate plan to prevent unintended discrepancies in asset distribution.

Tax considerations are another critical factor for expatriates managing assets across borders. Understanding ***inheritance tax laws*** in Kenya and any applicable tax obligations in one's home country is essential to avoid unnecessary financial burdens on beneficiaries. Exploring double taxation agreements can help prevent being taxed twice on the same assets, and seeking guidance from a tax advisor ensures that the estate plan is structured for maximum tax efficiency.

NAVIGATING KENYAN LEGAL REQUIREMENTS

Kenya's legal system has specific requirements for estate planning, and expatriates must ensure compliance to avoid complications. Key points to consider:

a) **Probate Process:** In Kenya, the probate process can be lengthy and complex. Having a valid will can streamline the process.
b) **Intestate Succession:** If you die without a will, Kenyan law will determine how your assets are distributed, which may not align with your wishes. In accordance with the Kenyan Law of Succession Act, the distribution of immovable property located in Kenya, as well as movable property (irrespective of their location) belonging to a person domiciled in Kenya, shall be governed by Kenyan succession laws.
c) **Property Ownership:** Expatriates who own property in Kenya must ensure their ownership documents are in order and that the property is included in their estate plan.

CROSS-BORDER CONSIDERATIONS

Expatriates often have assets in multiple countries, which adds layers of complexity to estate planning. To address these challenges:

i. **Coordinate with Legal Advisors:** Work with estate planning lawyers in both Kenya and your home country to ensure your plan is cohesive and legally sound.
ii. **Understand Jurisdictional Differences:** Laws governing wills, trusts, and inheritance vary widely between countries. Ensure your estate plan accounts for these differences.
iii. **Plan for Currency and Liquidity Issues:** Consider how currency fluctuations and liquidity constraints might impact the distribution of your assets.

PRACTICAL STEPS FOR EXPATRIATES IN KENYA

To create an effective estate plan, follow these steps:

1. **Assess Your Assets:** Compile a detailed inventory of your assets, including property, bank accounts, investments, and personal belongings.
2. **Consult Professionals:** Engage a qualified estate planning lawyers, tax advisors, and financial planner for advice.
3. **Draft and Update Documents:** Prepare or update your will, trusts, and other legal documents to reflect your current circumstances.
4. **Communicate with Family:** Discuss your estate plan with your family to ensure they understand your wishes and know where to find important documents.
5. **Review Regularly:** Life changes such as marriage, divorce, or the birth of a child may require updates to your estate plan.

COMMON PITFALLS TO AVOID

Delaying estate planning can leave your family unprotected, leading to legal and financial complications. Ignoring local laws may result in costly disputes, while failing to include digital assets such as online accounts and cryptocurrencies can create access issues. Additionally, poor tax planning could burden beneficiaries with unexpected liabilities. A well-structured estate plan ensures compliance, protects assets, and secures your family's financial future.

CONCLUSION

Estate planning is a vital process for expatriates in Kenya, ensuring that your assets are protected and your loved ones are provided for. By understanding the legal, financial, and cross-border considerations involved, you can create a comprehensive estate plan that meets your unique needs. Start today by consulting with professionals and taking the necessary steps to secure your legacy. After all, a well-crafted estate plan is one of the greatest gifts you can leave for your family.

HOW WE CAN HELP YOU

At CM Advocates LLP, our seasoned team of estate planning lawyers is dedicated to helping you secure your legacy and protect your loved ones. We offer a comprehensive range of services tailored to meet your unique needs, including:

- Drafting and reviewing of wills.

- Creating and registering family trusts.
- Preparing powers of attorney.
- Assisting with probate and administration of estates.
- Resolving disputes among beneficiaries.
- Providing urgent court applications to access deceased accounts for emergencies (e.g., school fees or medical expenses).
- Negotiating, drafting and reviewing agreements and registering expatriates' property at the Lands Registry.
- Support with procuring new work permits and renewals, passes, and general immigration advisory services.

Whether you're based in Kenya or abroad, our team is readily accessible to provide personalized assistance through email, phone, WhatsApp, or video conferencing. Let us help you plan with confidence and peace of mind.

THE PHRASE 'SUBJECT TO CONTRACT' AND ITS LEGAL IMPLICATION IN AGREEMENTS

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The phrase 'subject to contract' is a common phrase in various transactional documents relating to commercial agreements especially at the initial stages of negotiation, for example in Letters of Offer and Term Sheets. Essentially, the use of this phrase means that an offer has been made on an item on sale by a buyer which has been accepted by the seller and the parties have set out the terms on which they wish to enter a contract or to carry out the transaction.

Consequently, the use of the phrase has led to the emergence of disputes on the legal implications of its use and for which aggrieved parties have sought legal recourse from the Courts. This Article seeks to interrogate the position established by various Courts on this matter in regard to the legal implication of the phrase 'subject to contract' in agreements.

The restriction imposed by the use of the phrase 'subject to contract' is legally sound and the basis of the same can be traced back to the case of ***Chinnock v The Marchioness of Ely 4 DE G J&S 638*** where Lord Westbury, LC at ***646***, observed that under Common Law:

> ***"As soon as the fact is established of the final mutual assent of the parties to certain terms, and those terms are evidenced by any writing signed by the party to be charged or his agent lawfully authorized, there exist all the materials, which this Court requires, to make a legally binding contract. But if to a proposal or offer an assent be given subject to a provision as to a contract, then the stipulation as to the contract is a term of the assent, and there is no agreement independent of that stipulation."***

Similarly, in the case of ***Rose and Frank Co. v J.R Crompton and Brothers Ltd (1923) 2 KB 261***, the Court held that there was nothing wrong in having clauses in an agreement to the effect that parties agree not to be bound in law but subject to a contract being drawn up.

This position has been upheld by the local courts such as ***East African Fine Spinners Limited (in receivership) & 3 others v Bedi Investments Limited [1994] Eklr***. In this case the Judge observed that where a person accepts an offer 'subject to contract', it means that the matter remains in negotiation until a formal contract is entered into and executed. Until that contract is executed there is no contract between the parties which could be enforced by an order for specific performance or mandatory injunction.

From the above it is clear that the use of the term 'subject to contract' is a strong indication that where the parties did not intend that an enforceable obligation arise before the execution of a formal document, the parties are not bound to perform the contract. Therefore, where one has a proposal or agreement drawn up in writing and expressed to be subject to a formal contract being prepared, it means that such proposal or agreement is subject to and is dependent upon a formal contract being entered into.

However, it is important to note that, contrary to the traditional position stated in the aforementioned cases, recent jurisprudence has indicated that the rule of 'subject to contract' does not apply in a blanket manner. The High Court of Kenya, in the case of ***Eldo City Limited v Corn Products Kenya Ltd & another [2013] eKLR*** delivered a landmark ruling, highlighting the exception to the general rule of 'subject to contract'. Justice Mabeya observed that:

> "***It is trite law that in deciding disputes, it is the court's duty to give effect to the intention of the parties. The parties' intention is discernible from the documents and conduct of the parties.***"

The Court relied on the English case of ***Smith vs Cook (1891) AC 297 at 303*** where it was held that:

> ***"The duty of the court is to give the natural meaning to the language of the deed unless it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed."***

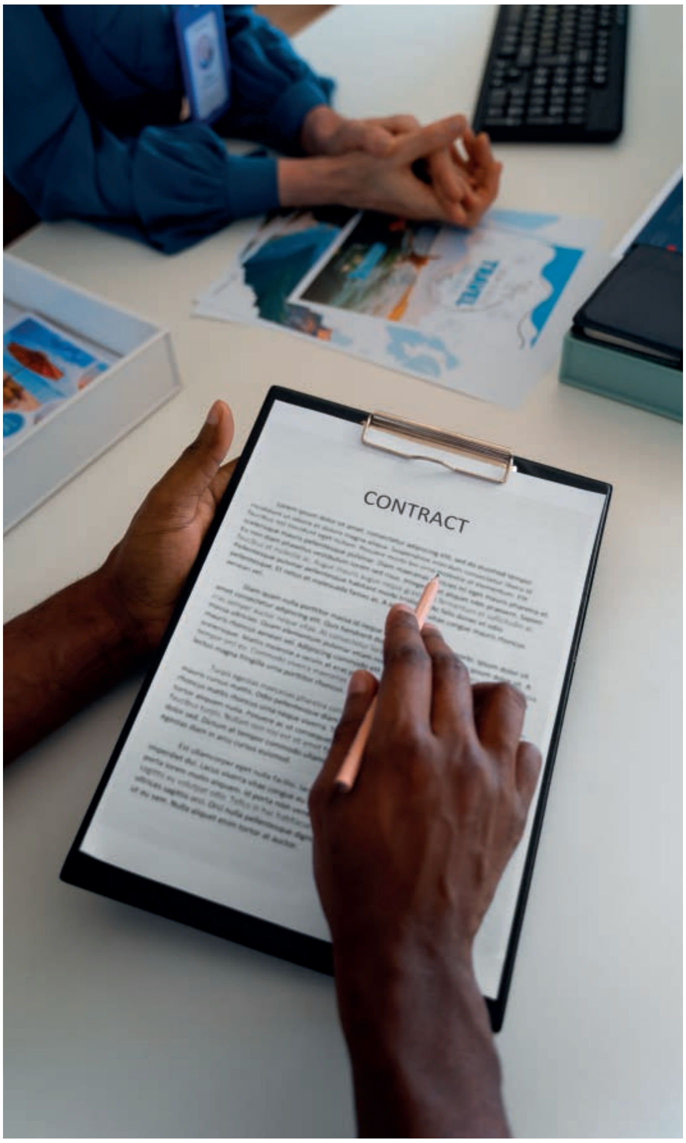
The Court further relied on the case of RTS Flexible ***Systems Ltd v Molkerei Alois Muller GmbH & Co KG [2010] UKSC 14*** where the Supreme Court of the United Kingdom considered whether using the phrase 'subject to contract' during contract negotiations prevented an enforceable contract from being formed. In that case, the Court held that whether or not there was a binding contract in place could be established by considering the communication, by words and by conduct, between the parties and assessing whether it led to the objective conclusion that the parties intended to create legal relations and whether the parties had agreed on all terms essential to form a contract. The Honourable Judge in this case quoted ***Investec Bank (UK) Ltd v Zulman and another [2010] EWCA Civ 536*** where the Court cautioned against putting too much weight behind the phrase 'subject to contract' and held that it is the parties' intention that matters. Therefore, the use of the phrase 'subject to contract' will not of itself determine whether or not a contract exists as it is the intention of the parties that matters and which intention is inferred through their conduct.

In light of the above, the question that begs is how Courts determine the intention of the parties. In the case of ***Storer v Manchester City Council [1974] 1 W.L.R. 1403***, Lord Denning M.R. observed that:

> ***"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying: "I did not intend to contract" if by his words he has done so. His intention is to be found only in the outward expression which his letters convey. If they show a concluded contract that is enough."***

The Court concluded its holding by observing that to uphold the position that a party can pull out of a transaction when there is already mutual assent among the parties will not be prudent in the world of commerce. The Court added that such freedom to pull out of a transaction should be limited up to a point the parties are still negotiating and, once all terms have been agreed and settled, that freedom should then be taken away. If such a principle is not upheld then, for example in agreements for sale, mischievous parties with no intention of selling their property may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage, which action should not be encouraged or tolerated.

In conclusion, in as much as the use of the phrase 'subject to contract' is intended to mean that the terms of agreement remain in negotiation until a formal contract is entered into, this rule does not apply in a blanket manner. Courts have intervened to prevent mischief by parties in the use of the phrase 'subject to contract' and in cases of dispute Courts look at the intention of the parties.



THE 5 DS OF TAX PLANNING IN REAL ESTATE

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INTRODUCTION

Tax planning is a crucial aspect of real estate investment, enabling property owners and investors to legally minimize tax liabilities while maximizing financial gains. In Kenya, tax evasion (deliberate non-compliance) and tax avoidance (using loopholes to bypass taxes) are both illegal. However, effective tax planning allows individuals and businesses to structure transactions within the legal framework to optimize their tax burden.

The **5 Ds of Tax Planning**—Dodge, Defer, Divide, Deduct, and Disguise—offer structured approaches to managing real estate-related taxes. This article explores these principles and their application in real estate investment and management.

1. DODGE (AVOIDING UNNECESSARY TAXES LEGALLY)

Tax dodging in this context does not mean evasion but rather using legal strategies to avoid excessive taxation. Proper structuring of transactions can help reduce tax liability. This can be effectively achieved by:

- **Utilizing exemptions and reliefs:** Some real estate transactions qualify for tax exemptions, such as first-time homebuyer incentives.
- **Entity structuring:** Investors can register real estate under Real Estate Investment Trusts (REITs) or limited liability companies to benefit from favourable tax treatment.
- **Asset transfers:** Transferring property through legal structures like trusts or holding companies can minimize stamp duty and capital gains tax.

2. DEFER (POSTPONING TAX LIABILITIES FOR FUTURE BENEFITS)

Deferring tax allows investors to delay tax payments to a later period, usually when tax rates might be lower or when offsetting losses is possible. This can be achieved by:

- **Capital gains deferral:** Instead of selling a property outright and paying capital gains tax (CGT), investors can use instalment sales or structured buyouts to spread tax liability over several years.
- **Depreciation claims:** Real estate investors can claim depreciation to reduce taxable income annually, delaying tax obligations while improving cash flow.

- **Capital Gains Tax (CGT) Deferral through Reinvestment:** While Kenya does not have a direct equivalent of the 1031 Exchange, investors can reinvest proceeds from a property sale into another qualifying asset within structured investment vehicles such as Real Estate Investment Trusts (REITs) or under specific capital reinvestment arrangements, potentially deferring CGT obligations.

3. DIVIDE (SPLITTING INCOME OR OWNERSHIP TO REDUCE TAX BURDEN)

Dividing ownership or income allows taxpayers to distribute tax liabilities strategically, ensuring that tax burdens are shared across individuals or entities with lower tax obligations.

- **Spousal ownership:** Holding property in a spouse's name if they are in a lower tax bracket can help reduce overall tax exposure.

- **Family trusts:** Transferring property to a trust allows for strategic income distribution among beneficiaries, reducing the overall tax rate.

- **Business partnerships:** Structuring real estate investments as partnerships ensures that tax obligations are split among multiple stakeholders, preventing excessive taxation on a single entity.

4. DEDUCT (MAXIMIZING ALLOWABLE TAX DEDUCTIONS)

Tax deductions allow investors to lower taxable income by deducting eligible expenses.

- **Mortgage interest deductions:** Homeowners and investors can deduct mortgage interest paid on loans used to acquire property. In a case where the investor or homeowner is employed, they may get mortgage interest relief on their salaries, effectively lowering their tax obligation.

- **Capital allowances:** While depreciation is not an allowable tax deduction, KRA allows capital deductions at varying rates when utilized in setting up real estate for business purposes e.g., hospital buildings, educational buildings, hotels.

- **Repair and maintenance costs:** Proper classification of expenses as repairs (fully deductible) rather than capital improvements (which must be depreciated) can optimize deductions.

- **Property management expenses:** Costs related to real estate management, including agent fees and legal services, are tax-deductible.

5. DISGUISE (STRUCTURING TRANSACTIONS TO MINIMIZE TAX IMPACT)

Disguising, in tax planning, refers to structuring transactions in a way that legally minimizes tax exposure while remaining compliant.

- **Leasing vs. buying:** Leasing property instead of purchasing can provide operational tax benefits, especially for businesses. This includes lease payments that are tax deductible against taxable income, avoiding Capital Gains Tax and Stamp Duty on sale of property. Leasing is also beneficial for cashflow management as less capital is required upfront, allowing businesses to allocate funds to other investment opportunities while still benefiting from property use

- **Convertible loan structures:** Instead of outright selling, structuring transactions as loans that convert into equity later can provide tax advantages. This strategy defers tax obligations until the conversion into equity occurs, thereby enhancing cash flow management.

- **Utilizing nominee agreements:** Investors can hold property under nominee agreements to optimize tax exposure while maintaining legal ownership rights. However, such structures must comply with Kenyan laws in order to be viable.

CONCLUSION

The **5 Ds of Tax Planning**—Dodge, Defer, Divide, Deduct, and Disguise—are essential tools for managing tax liabilities in real estate investments. While strategic tax planning is encouraged, it is important to note that both tax evasion and tax avoidance are illegal in Kenya. The key to effective tax planning lies in **compliance**, **transparency**, and **strategic structuring** to optimize tax obligations without violating the law.

Real estate investors and property owners should work with tax professionals to ensure that they leverage tax benefits legally while avoiding risks associated with non-compliance. By applying these principles, investors can maximize returns while maintaining tax efficiency.

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