UGANDA'S LAWS ON TRUSTS AND THE CASE FOR REFORM

Thanks to social media influence in Uganda, it is not uncommon to hear about "trust fund babies." Essentially, children born into wealth that guarantees their future financial needs. On the face of it, they have no need to work or earn.

The reality in the Ugandan context, however, is that "trust fund babies" might be more virtual than real. Not for the lack of "children born with a silver spoon in their mouth", but because our laws constrain the optimal use of trusts as a wealth preservation tool.

Background

The law on trusts in Uganda is a collection of outdated laws, going back to the pre-independence era, namely: the Trustees Act, Cap 270, the Trustees Incorporation Act, Cap 271 and the Trust Corporations (Probate and Administration) Act, Cap. 269. The only amendment since the 1950s has been the addition of the beneficial ownership disclosure requirement, which requires a trust with a beneficial owner to keep a register of the beneficial owners and their particulars. This amendment requires a trust, acting through its trustees, to notify and share a copy of the register of beneficial owners with the Minister of Lands, Housing and Urban Development (the "Minister"). Considering that this requirement was introduced as a result of pressure on Uganda in 2022, to get off the Financial Action Task Force's grey list, it does not address the pending overhaul of the trust law to align with existing realities.

There have been various attempts to reform the law on trusts, such as the Trusts Bill, 2017, which sought to consolidate and reform Uganda's trust laws, repeal existing laws, and codify the principles of common law and equity relating to trusts. The most recent initiative was the issuance of a paper on the reform of Uganda's trust laws by the Uganda Law Reform Commission in 2023, which also held a consultation with stakeholders. However, to date, these efforts have not yielded results. The lack of urgency in creating a relevant legal framework on trusts is telling of our appreciation of trusts, and their benefit to our economy.

Understanding Trusts

A trust is a legal arrangement with a person (the settlor), transferring legal title to assets he owns to another person or body (the trustee), to hold for the benefit of one or more people (the beneficiaries). A trust is essentially a contractual relationship, and the terms of the trust are usually set out in a written instrument, known as the trust deed. Trusts have their origin in English law and have historically been used as vehicles to hold property for successive generations within a family. The use of trusts has evolved over time to accommodate charitable trusts and more commercial uses, such as investment purposes (unit trusts and pension trusts fall under this) or as security structures (such as security trustees that hold collateral on behalf of lenders), as well as trusts that simply carry on business or trade.

Although trusts may seem like distant legal arrangements, they are more embedded in our everyday commercial dealings than we often realize. In Uganda, trusts are commonly used where a person holds land or company shares in trust for someone else.

Types of Trusts

There are two types of legally recognized trusts in Uganda. These are, an incorporated trust and an unincorporated trust. An incorporated trust is one that is registered with the Ministry of Lands, Housing and Urban Development (the "Ministry of Lands") and has separate legal personality and perpetual succession. On the other hand, an unincorporated trust is entirely premised on the contract between the settlor and trustees and lacks legal personality.

Pros and cons of Incorporation

Each of the above types of trusts have their pros and cons, and adopting either would depend entirely on the purpose of the trust and the assets it intends to hold.

Unincorporated trusts

Due to the lack of a separate legal personality, unincorporated trusts have several limitations, such as the inability to hold assets in the name of the trust. Assets of an unincorporated trust are registered in the names of all trustees, thereby creating challenges in case of death or incapacity of one of the trustees.

The rule against perpetuities also applies to unincorporated trusts. This rule is a legal principle designed to prevent property from being held under the indefinite control of a person long after they have ceased to exist. It ensures that future interests in property must vest within a specified period, known as the perpetuity period. Under common law which also applies to Uganda, the perpetuity period is the lifetime of the last surviving beneficiary of the trust assets plus 21 years. In some countries, the perpetuity period is codified and restricted to a particular number of years, such as 80 years, as is the case in Kenya.

On the upside, an unincorporated trust is easy to set up (drawing up of a trust deed), and there is no registration involved. This offers privacy of the terms of the trust since there is no regulatory supervision and less tax scrutiny.

Incorporated trusts

Incorporated trusts have the benefits that come with being a separate legal person. They can hold assets such as land, shares, and securities in the trust's name. As a result of perpetual succession, an incorporated trust can exist for multiple generations until it is dissolved by the trustees or the Minister.

The downside of incorporated trusts however, is the registration process which, like the law, is not up-to-date or transparent. For this reason, many people opt to register a company limited by guarantee instead, even where there is no intention of making profit or adopting the shareholder-director governance model.

Advantages of Trusts

In comparison to companies which are commonly used as vehicles for investment, business, and wealth management, trusts offer numerous advantages, which go beyond succession planning.

Trusts enable the consolidation of assets into one fund from which all named beneficiaries can derive value, preventing fragmentation and pre-mature dissolution of estates. They allow for creditor remoteness, such that if assets are transferred to a trust, neither the creditors of the settlor nor those of the beneficiaries can access the assets. Trusts also work well in situations where one intends to pass property to a minor who does not have legal capacity to hold it. When a trust is created, the said minor acquires a beneficial interest allowing then to benefit from the property despite not having a legal interest.

Additionally, trusts offer privacy, due to the ability to obscure the ownership of property. Whereas, like companies, there is a requirement to disclose the beneficial owners of the trust to the Minister, access to this information by the public is restricted.

Adoption of trusts in Uganda

The use of trusts for succession planning or wealth preservation beyond institutional settings remains limited in Uganda. Whereas blame can be allocated to law makers, our cultural attitudes towards wealth accumulation and preservation also play a significant role. Modern monetary systems have existed in Uganda for only about a century, which helps to explain the limited transfer of wealth via trusts. Additionally, communal forms of property ownership common in many Ugandan communities make it difficult to establish trusts over such property.

However, with an ever-growing economy, and increasing accumulation of wealth, there is an emerging preference for trusts as an estate management tool, as opposed to the distribution of assets among successors. This is not just by high-net-worth individuals but by ordinary Ugandans too. Therefore, as the needs of society evolve, so must the legal framework.

Proposed Reforms

An overhaul of the existing trust laws is long overdue and attempting to list all the proposed reforms would require far more space than this article allows. Nonetheless, we highlight a few key proposals.

Firstly, the registration of trusts would be better placed with the Uganda Registration Services Bureau (URSB), as opposed to the Ministry of Lands. Whereas historically trusts were registered for purposes of owning land, hence justifying the oversight role of the Ministry of Lands, this has since changed. A trust should qualify for registration despite not owning land, but for purposes of holding other types of assets. URSB being fully digitized and having proven efficient, would easily adopt the registration process.

Secondly, Uganda Revenue Authority should move to adopt the payment of trust registration fees. This payment is currently catered for under the "Miscellaneous" category of the Ministry of Lands and yet trusts hold assets beyond land.

Thirdly, the Ministry of Lands and the Administrator General, who is also the Public Trustee, should play an active role in educating the public about trusts, their relevance, application and the registration process. A comparison can be made with the movable property registry that was set up by URSB in 2019. The URSB team carried out several training and awareness sessions regarding the registry because it made a significant difference in the financial sector, and improved access to credit.

A distinction should also be made in the regulation of family trusts, charitable trusts and trusts set up by religious, academic or scientific institutions, as the distinctions in their objectives and operations require specific regulation. For example, under Kenyan law, family trusts cannot be trading entities, and non-charitable purpose trusts need not have specified beneficiaries, although they must have a specific purpose.

Lastly, financial institutions ought to revise their treatment of unincorporated trusts. Unincorporated associations such as clubs and investment groups have been able to obtain bank accounts globally, however, for unincorporated trusts it remains a challenge in Uganda. While acknowledging that unincorporated trusts have no registered name, a bank account can be opened in the names of "A, B and C as Trustees of XYZ Trust", as is the case in Kenya. This creates a distinction between a generic joint account held in the individual capacities of the trustees and a bank account held in trust.

Conclusion

Wealth creation and wealth preservation go hand in hand, and trusts are one of the best vehicles to enable wealth preservation. This places an important mandate on the Uganda Law Reform Commission and the Parliament to give trusts due consideration, not only to align with the country's economic goals, but for the benefit of future generations.

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