



Drawing the Line

Properties Subject and Not Subject to Succession in Kenyan Law

The death of an individual often triggers the legal process of succession, where the deceased's property is identified, administered, and distributed according to the Law of Succession Act (Cap. 160) of Kenya. However, not all assets held by the deceased are subject to succession. Some pass independently through mechanisms such as survivorship, nomination, or trusts. Others, by virtue of legal structures—such as company ownership or foreign property—fall outside the jurisdiction of succession law altogether.

Recognizing the distinction between property that is subject to succession and that which is not is critical for proper estate planning, probate proceedings, and avoidance of future disputes. This article outlines the key categories of excluded property, explains the rationale for their exemption, and highlights the legal principles that govern their devolution. By drawing this legal boundary, we provide clarity on what forms part of a deceased's estate—and what the law treats differently.

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1. Nominee-Designated Property (e.g., pensions, insurance, gratuities)

Nominee-designated property refers to benefits such as life insurance proceeds, pension payouts, and gratuities where the deceased had named a specific individual or individuals to receive them upon death. These benefits are governed by statutes such as the Insurance Act and various pension laws, which recognize nomination as a legally binding mechanism. Once a valid nomination has been made, the benefits automatically accrue to the nominee and do not become part of the deceased's free property subject to succession under the Law of Succession Act.

2. Joint Tenancy Property

In a joint tenancy, two or more people own property together with equal rights and a critical feature known as the right of survivorship.

When one joint tenant dies, their interest in the property passes automatically to the surviving joint tenant(s), bypassing the process of succession. This process is guided by the Land Registration Act and not the Law of Succession Act.

This rule applies to various types of jointly held property, including land, houses, and bank accounts.

3. Trust Property

Trust property is any asset held by the deceased in the capacity of a trustee for another person or entity.

The legal title may be in the name of the deceased, but the beneficial interest belongs to the beneficiary of the trust. Accordingly, the death of the trustee does not make the property part of their personal estate. Instead, the trust property must be administered in accordance with the trust deed or terms of the trust.

The law treats a trustee as a fiduciary, not an owner in their own right. Thus, where a deceased person was acting as a trustee—say for a minor, a family trust, or a charitable purpose—those assets are held in fiduciary capacity and pass to the succeeding trustee, not to the heirs of the deceased.

4. Company Assets (Owned by the Company, Not the Shareholder)

While a shareholder may own shares in a company, the assets owned by the company—such as land, vehicles, or bank accounts—belong to the company as a separate legal entity. The death of a shareholder does not transfer ownership of the company's assets to their personal estate. Only the shares owned by the deceased form part of the estate and are subject to succession.

This principle stems from the landmark case of ***Salomon v Salomon & Co Ltd [1897] AC 22***, which established the doctrine of corporate personality. It has been affirmed under Kenyan company law that a company exists in law as a distinct entity from its shareholders. Therefore, heirs inherit shares (and with them, certain rights like dividends or voting), but not direct ownership

or control of the company's property unless otherwise provided.

5. Gifts Inter Vivos (Lifetime Gifts)

A gift inter vivos is a gift made during the donor's lifetime, with the clear intention that it takes effect immediately and irrevocably. Once a gift inter vivos is complete—i.e., it has been accepted and transferred—it no longer forms part of the donor's estate and cannot be reclaimed through succession. The legal presumption is that the donor gave it freely and with the intention of parting with ownership.

7. Life Interest Property (During Life of the Life Tenant)

Under Section 35 and 36 of the Law of Succession Act, a surviving spouse in an intestate estate is granted a life interest in the deceased's free property (if there are children).

This means the spouse is entitled to use the property during their lifetime, but does not own it absolutely. The reversionary interest passes to the children or other heirs only upon the spouse's death or remarriage (if female).

During the period of the life interest, the property is held in abeyance/trust and is not subject to distribution among the final heirs. The administrator of the estate must preserve the property in trust for the children who are the ultimate beneficiaries.

8. Gifts in Contemplation of Death (Donatio Mortis Causa)

A gift in contemplation of death, also known as donatio mortis causa, is a special type of

gift made by a person who anticipates imminent death under Section 31 of the Law of Succession Act.

It differs from a gift inter vivos in that it takes effect only if the donor dies from the anticipated peril. The gift must be made in contemplation of death, be conditional upon death, and involve delivery of the subject matter (or documents of title) to the donee. If all conditions are met, the gift passes outside of the estate and is not subject to succession proceedings.

9. Ademption of Property (Doctrine of Ademption)

The doctrine of ademption arises when specific property that has been bequeathed in a will is no longer part of the estate at the time of death. If the testator disposes of or loses the property before death, the gift is said to have "adeemed," and the intended beneficiary receives nothing in its place. Thus, no succession takes place over that item, as it is no longer part of the estate.

Conclusion

In succession matters, not all property forms part of the deceased's estate, as certain assets pass outside the purview of the Law of Succession Act due to legal, contractual, or customary exclusions. A clear understanding of these exceptions is essential for effective estate planning and for avoiding unintended disputes among beneficiaries.