Noella Lubano
Partner | noella@oraro.co.ke

SAVE ME TOO!:

RESCUE OPTIONS AVAILABLE FOR INDIVIDUALS UNDER THE INSOLVENCY ACT, 2015

In the previous edition of this publication under the article entitled *Save Me!*, we looked at rescue options under the Insolvency Act, 2015 (**the Act**) for companies under financial distress. In this article, aptly entitled *Save Me Too!*, we turn to look at rescue options available under the Act for individuals under financial strain.

Prior to 2015, the bankruptcy of a natural person was a matter regulated by the Bankruptcy Act (Cap. 53) Laws of Kenya (**the Bankruptcy Act**) which is now repealed. Having been enacted during colonial days, the Bankruptcy Act was one of the many statutes that Kenya inherited from the British, and as such, reflected the British legislative process alongside the way of living, far put out from the realities of post-independence Kenya. Moreover, the Bankruptcy Act was an archaic law, having been enacted in 1930 and was thus out of step with current times and arguably did little to resolve the insolvency situation of natural persons, with there being no rescue measures available to reduce the obligations of the insolvent person.

Then came 2015 and the coming into force of the Act, an instrument intended to resolve this lacuna. The Act provides elaborate provisions as to who may apply for bankruptcy, the various rescue measures available and the protections available to both debtors and creditors alike. This article thus lends itself to discuss the nuances and salient features of the Act, particularly as applicable to debtors.

Who may apply for Bankruptcy?

The Act at Part III provides the details of how bankruptcy of natural persons is to take place. Part III of the Act focuses on the procedure of bankruptcy, and it begins by setting out the various classes of people entitled to make an application for bankruptcy and the prerequisites to making the application. An application for bankruptcy can be a product of the creditors, the debtor, or a supervisor to a voluntary arrangement approved by the Court.

Creditor's Application

A creditor may only make an application if the amount owed by the debtor has reached the prescribed bankruptcy level, which currently stands at KES. 250,000. Before making this application, the creditor

must show that the debtor has consistently defaulted in making payments. Essentially, the yardstick is to show that the debtor is experiencing a cashflow/technical insolvency, that is, he or she is unable to pay their debts as and when the same fall due. One way of proving inability to pay is the debtor's failure to make good the statutory demand and twenty-one (21) days have lapsed since the notice was last issued. Equally, a person may prove inability to repay the debt where the debtor is unable to satisfy a Court decree.

In dealing with a creditor's application, the Court will not grant the Orders for bankruptcy unless it can be shown that the debt is due and owing and the debtor has not taken any steps to remedy the default, or that the debtor has no reasonable prospects of paying the amount when it becomes due. Further, the Court will dismiss an application if it can be shown that the debtor has made an offer to secure or compound a debt, that the acceptance of the offer would have warranted the dismissal of the application or that the offer has been unreasonably rejected.

Alternatives to Bankruptcy

The Act has signalled a transformative shift from the previously draconian procedure of bankruptcy to a more versatile system of protection, otherwise referred to as rescue measures. The Act provides alternatives to bankruptcy that a debtor may opt to invoke to protect his interests. These options are discussed in detail below.

Voluntary Arrangement

The voluntary arrangement takes the form of a scheme where the debtor makes a proposal to the creditors to settle the debt within a set period under specific terms. The debtor may prepare the proposal based on the performance of his business, or any such contingent funds that he may be hopeful of. Thus, if the debtor makes a quarterly income, he may propose to pay the creditors a percentage of the income at every interval when the income is realised. In the proposal, the debtor must identify a supervisor, who should be a qualified insolvency practitioner.

During the pendency of the voluntary arrangement, the Court may stay execution, actions, or any legal proceedings against the debtor or bring to a halt any recovery proceedings, prohibit distress from being levied on the debtor's property or stop any proposed sale of the debtor's properties.

To commence a voluntary arrangement, the debtor must make an application in Court for an interim Order. To obtain an interim Order, the debtor must meet the requirements under section 306 (1) of the Act which are:

- The debtor intends to make a proposal under the relevant provisions of the Act
- On the day of the making of the application the debtor was an undischarged bankrupt or was able to make an application for the debtor's own bankruptcy
- No previous application has been made by the debtor for an interim Order during the twelve (12) months immediately preceding that day
- The supervisor designated under the debtor's proposal is willing to act in relation to the proposal

After the making of an interim Order, the supervisor is required to make a statement on the viability of the proposal, whether a meeting should be convened between the debtor and the creditors and the date and time when such a meeting should be convened. Once the meeting is convened, the creditors have three (3) options available to them - one is to adopt the proposal as it is; the other is to adopt the proposal but make modifications to it at which point the debtor has the choice to either accept or reject the modifications; and lastly lies the option to reject the proposal altogether. If the proposal has been approved, an application will then be made to Court for approval upon which the proposal takes effect officially.

The interim Order offers significant protection to the debtor as was highlighted in the case of *Rajendra Ratilal Sanghani v Schoon Ahmed Noorani (2018) eKLR* where the Court stated:

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"As pointed out earlier, proceedings of this nature afford the debtor a certain amount of freedom. Just by example, upon grant of an interim Order any proceedings (including execution or other legal process) may only be begun or continued against the debtor or the debtor's property with the sanction of the Court. An undeserved application should be disallowed at once if its clear motive is to attain a collateral objective of granting protection to an undeserving debtor. So, for instance, a debtor who is neither an undischarged bankrupt or is able to make an application for his own bankruptcy should not be allowed to use the process to avoid his/her obligations or as a stalling device."

Instalment Order

This is an Order made by the Official Receiver requiring the debtor to pay the amounts owing in instalments, in full, or in a manner that the Official Receiver considers satisfactory. This application may be made by the debtor or by a creditor with the debtor's consent. The application must be accompanied with a proposed appointment of a supervisor who should be a qualified insolvency practitioner.

The instalments are to be paid within a period not exceeding three (3) years, or if satisfied and with the consent of the supervisor, for an extended period not exceeding five (5) years. During the subsistence of the instalment Order, no action or proceedings may be instituted against the debtor's assets subject to the instalment Order without the approval of the Official Receiver, and the debtor defaults in the instalments.

No-Asset Procedure

A debtor may make an application to the Official Receiver for admission to a no-asset procedure by showing that he or she has no realisable assets, and that their debts are not less than KES. 100,000 and not more than KES. 4,000,000. In addition, the debtor must show that he or she has not previously been admitted to this scheme and that they have not been previously adjudged bankrupt.

As soon as practicable after receiving an application from a debtor for entry to the no-asset procedure, the Official Receiver is required to send a summary of the debtor's assets and liabilities to each known creditor of the debtor. Once a debtor has made this application, there are restrictions as to the amount of credit he or she may subsequently borrow and applications for such credit facilities must be accompanied by notifications of the debtor's status.

Upon admission to the no-asset procedure, the Official Receiver is required to notify all the creditors and to make a publication in the manner prescribed by the insolvency regulations. No creditor should take steps to recover from a debtor who has been admitted to the no-asset procedure. A debtor is discharged from the no-asset procedure after the lapse of twelve (12) months. After the expiry of the said period, all debts that were owing before the debtor was admitted to the no-asset procedure become extinguished.

Conclusion

The Act has been termed as debtor-friendly in that it aims to protect debtors before adverse steps are taken against them. In this regard, it bears to note that where a debtor can demonstrate that he has taken steps to pay the debt, or make proposals towards payment of the debt, the creditors would have an uphill task in Court in trying to prove that the person should be adjudged bankrupt.

Conversely, if it can be shown that the debtor has not taken any steps to remedy the default, and the creditors have carefully taken steps to act within the statutory parameters, then disproving the creditor's entitlement to the Orders sought becomes difficult. The Act therefore works in favour of whichever party is able to properly invoke its provisions.