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A REVIEW OF BANKRUPTCY LAW AS AN EFFECTIVE MECHANISM FOR DEBT RECOVERY IN NIGERIA

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ABSTRACT

According to the legislation on Bankruptcy in Nigeria, a proceeding can be initiated at the instance of either the creditor or the debtor if there has been act of bankruptcy committed by the debtor. The law equally sets out the procedure for initiating bankruptcy proceedings while providing for instances where the bankrupt is disqualified from holding certain positions.

This Paper reviews the Bankruptcy law in Nigeria while juxtaposing the current position against the laws of the United Kingdom and United States of America on Bankruptcy. The question arises as to whether the law on bankruptcy can be said to be an effective method of debt recovery in Nigeria. This paper majorly advocates for an amendment of certain provisions of the *Bankruptcy Act* to reflect



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current economic realities, and equally recommends expunction of *section 17(5)* of the Act. Primary data deployed are legislations, and judicial precedents,. Also, secondary data obtained from published books, journals, and articles were used in the course of conducting this research. .

Key words: *Bankruptcy; Debt; Creditor; Official Receiver, Debt Recovery*

INTRODUCTION

Debt recovery is a situation where a loan remains unpaid and the creditor is left with the option of getting a third party to assist in collecting the money.¹ Debt recovery is related to the debtor's inability to liquidate his pecuniary liabilities. Bankruptcy is an aspect of insolvency. However, it is limited to personal insolvency rather than corporate insolvency. It is imperative to emphasise the difference between insolvency and bankruptcy.

Insolvency is the condition of being unable to pay debts as they fall due or in the usual cause of business.² Insolvency is said to be a wider term which considers other measures such as composition or voluntary assignment in dealing with the property of a debtor who is unable to pay his debt.³ Insolvency as a term is applicable to not only a natural person, but also an artificial person created by law. What therefore is Bankruptcy? It is a process by which a debtor's property is administered in a way as to ensure all his creditors are fairly treated in relation to the debt he owes them.⁴

Bankruptcy is "*a proceeding by which the State takes possession of the property of a debtor by an officer appointed for the purpose, and such property is realised and subject to certain priorities, distributed rateably among persons to whom the debtor owes money or has incurred pecuniary liabilities.*"⁵

¹ www.debt.org

² Black's Law Dictionary 2nd Pocket Edition 2001

³ J.P. Credit "Creditors' Remedy" Van Cowyer Unitrend Industries Ltd. 1970. P. 37

⁴ A.R. Ayeni. Bankruptcy, Liquidation, Executorships and Trusteeship Law and Account (2003) Printech Press Ltd Ado-Ekiti. P.1.

⁵ Halsbury's Laws of England (3rd Edition), Vol. 2 p.250



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Bankruptcy is said to be initiated either at the instance of the creditor or voluntarily by the debtor himself.⁶ According to Okany,⁷ Bankruptcy has three objectives:

1. To create a strategy for treating creditors equitably and justly by the debtor in respect of the distribution of available property. In other words, the moment a claim of bankruptcy is established against a debtor in a court of competent jurisdiction, all the creditors who file in proof of the debt will partake in sharing the debtor's estate⁸ ;
2. To enable a fresh start for the debtor by creating a medium whereby he is freed of his debts;
3. To make an inquiry into the acts responsible for the insolvency and through the information gathered, hopefully prevent others from accumulating debts without ability to pay off.

The Bankruptcy law is embodied in the *Bankruptcy Act, 1979 Cap 30, Laws of the Federation, 1990*. Notable also, is that this branch of law is governed by common law principles. Bankruptcy petition can either be involuntary or voluntary. It is involuntary when it is initiated by the creditors "to force the debtor to declare bankruptcy or to be legally declared bankrupt."⁹ Where the proceeding is said to be initiated by the debtor himself, it is voluntary.¹⁰ *Section 1* of the Bankruptcy Act provides for acts of bankruptcy:

"A debtor commits an act of bankruptcy in each of the following cases-

a. if a creditor-

- (i) *has obtained a final judgment or final order against him for any amount, and execution thereon not having been stayed, has a bankruptcy notice served on him, and*
- (ii) *does not, within fourteen day after service of the notice, comply with the requirements of the notice or satisfy the court that he has a counter-claim, set-off or cross demand which equals or exceeds the*

⁶ Section 1 of the Bankruptcy Act Cap 30 LFN 1990

⁷ Okany M.C. Nigerian Commercial Law (1992) p.694-695. AFRICANA-FEP PUBLISHERS LTD.

⁸ M.I. Anushiem The State of Nigerian Bankruptcy Legislation

⁹ Black's Law Dictionary Op cit at p. 60

¹⁰ Ibidem



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amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained or the proceedings in which the order was obtained

- b. if execution against him has been levied by seizure of his goods under process in an action, or proceedings in the court, and the goods have either been sold or held by the bailiff for twenty-one days;*
- c. if he files in the court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself.”*

From the above provision, a bankruptcy can only commence where there had been a previous civil proceeding where the creditor must have obtained a final judgment against the debtor. Without this foundation, it is impossible to initiate a bankruptcy proceeding, except it is a voluntary proceeding.

THE CONCEPT OF A DEBTOR

A debtor is said to be a person who owes a debt or the performance of an obligation to another known as the creditor; one who may be compelled to pay a claim or demand¹¹. He is someone against whom an involuntary petition is filed or who files a voluntary petition.¹² A debtor entails any individual who at the time the act of bankruptcy was done¹³:

1. was ordinarily resident in Nigeria; or
2. ordinarily resided in Nigeria within one year before the presentation of the petition ; or
3. has a dwelling house in Nigeria; or
4. has a place of business in Nigeria; or
5. was carrying on business personally in Nigeria or by means of an agent or manager; or
6. was a member of a firm or partnership of persons who carried on business in Nigeria.

¹¹ Definition retrieved from legal-dictionary.thefreedictionary.com on the 9th August, 2019

¹² Ibidem

¹³ S.4 (1) (d) Bankruptcy Act



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Being ordinarily resident in Nigeria means the person must “habitually stay” in Nigeria.¹⁴ A resident of Nigeria is not limited to Nigerians only as even foreigners that ordinarily reside in Nigeria can have bankruptcy proceedings instituted against them.¹⁵ Any individual who has contractual capacity may have bankruptcy petition presented against him with some qualified exceptions.

PARTNERSHIPS

S.102 of the Act provides “Any creditor whose debt is sufficient to entitle him to present a bankruptcy petition against all the partners of a firm may present a petition against one or more partners of the firm without including the others.”

CORPORATIONS

S.108 provides against issuing a receiving order against any incorporated company. A company or corporation can therefore not be made bankrupt. An insolvent company can however be wound up in accordance with the provisions of the CAMA,¹⁶ *Companies Proceeding Rules, Companies Winding Up Rules and the Investments and Securities Act of 2007*. *Section 123* however empowers a corporation through any of its authorized officers to commence bankruptcy proceedings against other persons.

DECEASED PERSONS

S.109 provides that, while a deceased person cannot be made bankrupt, a creditor of a deceased person who incurred a debt in his lifetime and whose debt would have been sufficient to support a petition for bankruptcy where he to be alive, may present a petition for the order of administration in bankruptcy of the estate of the deceased debtor. This petition may be served on the personal representatives of the deceased person. In an instance where the bankruptcy proceeding commenced before the death of the deceased person, “the proceedings in the matter shall, unless the court otherwise orders, be continued as if he were alive.”¹⁷

Minors¹⁸, while generally lacking contractual capacity except in respect to contract of necessities and contract for their benefit, are disqualified from bankruptcy proceedings.

Other categories of persons disqualified from bankruptcy proceedings are:

¹⁴ Okany Op cit at p. 697

¹⁵ Ibidem

¹⁶ Part XV of the Companies and Allied Matters Act, CAP C20 LFN 2004

¹⁷ Section 100

¹⁸ These are persons under 21 years of age lacking contractual capacity both under the common law and in accordance to the provisions of Infants Relief Act of 1874



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1. An insane person who may have bankruptcy proceedings instituted against him if he incurs a debt consequent upon a contract of necessities.¹⁹
2. An alien is an individual or body corporate not a native of Nigeria. An alien can only be subject to bankruptcy in Nigeria in accordance with the provisions of *s.4(1) (d)* of the Bankruptcy Act as earlier discussed.

COURT'S JURISDICTION

S. 251(1) (j) of the Constitution of the Federal Republic of Nigeria, 1999 gives the Federal High Court power in respect of matters relating to bankruptcy and insolvency. This power was initially vested in the former Federal Revenue Court.²⁰ Section 3 of the Bankruptcy Act provides that the court may on presentation of a petition to it, make a receiving order for the protection of the estate of a debtor, where it is ascertained that he committed an act of bankruptcy.

PETITION BY THE DEBTOR

As noted earlier, a debtor may on his own present a petition to the court, against himself. In doing so, he requests not only for a receiving order to be made concerning his estate, but also to be adjudged bankrupt by the competent court. *Section 8(1)* provides that the petition presented by the debtor must allege in the fact of the debtor's inability to pay his debts. *Subsection 3* prevents the presented petition from being withdrawn without leave of the court. The court may refuse to make a receiving order if it is not satisfied that the net assets for division among the unsecured creditors will be sufficient to pay a dividend of 15 per cent, or if the court considers for other sufficient cause that no order ought to be made. Sufficient cause includes but not limited to cases of non-attendance of the debtor in court on the day of hearing, or the absence of material book of account, or any fraud or misconduct not amounting to fraud by the debtor in relation to his affairs.²¹

CREDITOR'S PETITION

Section 4(1) provides that "a creditor shall not be entitled to present a bankruptcy petition against a debtor unless-

¹⁹ Achike O. (1985) Commercial Law in Nigeria p. 427

²⁰ S.230(2) of the Constitution of the Federation of Nigeria, 1975

²¹ Okany Op cit at page 700



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- (a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join the petition, the aggregate amount of debts owing to the several petitioning creditors is not less than ₦ 2000;
- (b) the debt is a liquidated sum, payable either immediately or at some certain future time;
- (c) the act of bankruptcy on which the petition is grounded has occurred within three months before the presentation of the petition;
- (d) the debtor is originally resident in Nigeria, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling house or place of business, in Nigeria, or has carried on business in Nigeria, personally or by means of an agent or manager, or is or within the same period has been a member of a firm or partnership of persons which has carried on business in Nigeria by means of a partner or partners or manager.” (look at s.99 unsecured creditor)

subsection 1(a) fails to justify the present economic reality as the amount stipulated, while adequate in 1979 appears a mockery 40 years later

PETITION PROCEDURE

As long as they are not inconsistent with the provisions of the Act, the rules and practice of court applicable in ordinary federal high court proceedings are applicable in Bankruptcy proceedings.²² A creditor’s petition must be subjected to verification through an affidavit deposed to by the creditor or someone else acting on his behalf having knowledge of the facts and served on the debtor in the same manner as a writ of summons.²³ The following shall be required by the court at the hearing:

- a. the debt of the petitioning creditor;
- b. the service of the petition; and
- c. the act or acts of bankruptcy.

²² Section 96

²³ Section 7(1)



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Upon satisfaction with the proof of the above, the court may make a receiving order “in pursuance of the petition.”²⁴ The court may however dismiss the petition if the petitioner fails to prove any of the aforementioned issues; or if it is dissatisfied that the assets left to be divided among the unsecured creditors, upon payment of all costs, charges and expenses and preferential debts shall be sufficient to pay a fifteen percent dividend. The court may refuse to grant the order if it is satisfied the debtor is able to pay his debt or it considers any other cause sufficient not to grant the order.²⁵

The court may stay or dismiss the petition where it is convinced that the bankruptcy act relied on is failure of the debtor to comply with a bankruptcy notice to pay, secure or compound for a judgment debt or sum ordered to be paid, the court may stay or dismiss the petition on the ground of a pending appeal from the judgment order.²⁶ It should be noted that the debtor may exercise the prerogative to deny being indebted to the petitioning creditor to such an amount as to justify the petitioner presenting a petition against him. This may lead the court to stay proceedings for the period of time as may be required for trial of the disputed debt.²⁷ The debtor may be required to give to the petitioner security for payment of any debt which may be established against him in due course of the law, and of the costs of establishing it.

THE RECEIVING ORDER

A Receiving Order, which is an interim order may subsequently be made by the court upon presentation of a bankruptcy petition premised upon the fact that the debtor has committed an act of bankruptcy.²⁸ The purpose of the Receiving Order is to protect the estate pending a set time for the meeting of the creditors and their determination of the debtor’s affairs. An Official Receiver is thereupon constituted the receiver of the debtor’s property.²⁹ *Section 72(1)* provides that the Registrar of Companies is saddled with the responsibility of performing the duties assigned to the Official Receiver.

²⁴ Section 7(2)

²⁵ Section 7(3)

²⁶ Section 7(4)

²⁷ Section 7(5)

²⁸ Section 3

²⁹ Section 10



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The Receiving Order serves to place the properties of the debtor under the control of the Official Receiver rather than deprive the debtor of his ownership rights in respect of his property.³⁰ Its essence is to place the property under the Official Receiver's control until the determination of the petition. The property is preserved for equitable distribution among the creditors and the debtor would have no access to the control or possession of the property.

In a similar vein, the Order prevents all the debtor's creditors from instituting an action or obtaining a remedy from the court without the seeking leave of the court. The court may thereupon grant such leave on such terms as it may impose.³¹ In *Re Smith, Ex Parte Mason*³², the court held that if, before the making of the Receiving Order, the debtor was occupying the premises, and the Official Receiver takes possession of the premises after the order, the debtor continues to be the occupier, rather than the Official Receiver. The case underlines the fact that the debtor's estate remains unaltered after the receiving order is made.³³

THE OFFICIAL RECEIVER

According to the provisions of s.73(3), an Official Receiver is a trustee in bankruptcy whose duties relate both to the debtor's conduct and to the administration of his estate. The duties are highlighted below:

DUTIES IN RELATION TO THE CONDUCT OF THE DEBTOR³⁴

1. conduct of public examination of the debtor;
2. investigation of the debtor's conduct and reportage to the court, in instances where the debtor commits an offence under the bankruptcy law or which would justify the court's refusal suspension or qualifying an order for his suspension;
3. assistance in the prosecution of any fraudulent debtor as directed by the Attorney-General of the Federation.

³⁰ Okany Op cit p.702

³¹ Section 10

³² (1893) 1. Q.B. 323

³³ Okany Op cit

³⁴ Section 74



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DUTIES IN RELATION TO THE DEBTOR'S ESTATE³⁵

Inter alia, the Official Receiver has the following duties:

1. summon and preside over the first meeting of creditors;
2. issuance of forms of proxy for use at meeting of creditors;
3. report to the creditors as to any proposal which the debtor may have made with respect to the mode of liquidating his affairs;
4. to act as trustee during the vacancy in office of trustee;
5. to act as interim receiver of the debtor's estate pending the appointment of a trustee, and as manager where no special manager has been appointed.

POST-RECEIVING ORDER

Upon the issuance of the order by the court, a general meeting of all the creditors is facilitated in order to consider whether a scheme of arrangement or a proposal for a composition should be arranged or if the debtor be adjudged a bankrupt.

A composition is an instance where the debtor undertakes to pay a certain sum to the creditors while a scheme of arrangement is a situation where the debtor makes available his property to be administered by a trustee. The proposal for the composition or the scheme of arrangement must be submitted within 7 days of submission of his statement of affairs. In the case of *Re Blucher (Prince), Ex parte Debtor*,³⁶ the proposal must be signed by no other person but the debtor himself, not his solicitor or his agent.

A debtor may be adjudged bankrupt by the court in the following circumstances:

1. if he fails to submit a statement of affairs in accordance with the provisions of *section 16*;
2. if there is a default in installmental payments in accordance with scheme of arrangement or composition in *section 18*, or the court's approval was obtained by fraud, the court, may with the approval of the official receiver or trustee or any creditor may adjudge the debtor bankrupt;³⁷

³⁵ Section 75

³⁶ (1931) 2 Ch.70

³⁷ Section 23(3)



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3. if the creditors at the first meeting consequent upon the making of the receiving order resolve to adjudge the debtor bankrupt, or pass no resolution at the first meeting.³⁸

A bankrupt can apply to the court for an order of discharge to be issued by the court.³⁹ This is relevant particularly owing to the many embarrassing experiences he is subjected to by reason of the fact that he is an undischarged bankrupt.

THE DEBTOR'S STATEMENT OF AFFAIRS

The Statement of Affairs is the second stage of the bankruptcy proceedings and it is an imperative stage in the proceedings. The Statement of Affairs is submitted by the debtor and it includes⁴⁰

1. particulars of the assets, debts and liabilities of the debtor within or outside Nigeria;
2. security held respectively by the creditors and the dates they were given;
3. details of any property the debtor holds in his name or under any of his alias or by his wife or children, or by any person in trust for him or them, with full particulars as to the manner and date of its being acquired;
4. any further or other information as may be required or as the official receiver may require.

The statement must be submitted within 7 days from the day of the order where the debtor initiated the petition, and 14 days from the day of the order where the creditor initiated the petition.⁴¹ Failure of the debtor to produce a statement of affairs without any reasonable cause may lead to his punishment for contempt of court.⁴²

THE PUBLIC EXAMINATION OF THE DEBTOR⁴³

Upon the making of a receiving order, it is mandatory for the court to hold a public sitting on an appointed date for the purpose of examining the debtor in relation to

³⁸ Section 20

³⁹ Section 28(1)

⁴⁰ Section 16(1)

⁴¹ Section 16(2)

⁴² Section 16(3)

⁴³ Section 17



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his conduct, property or dealings. This serves to determine why the debtor has failed to meet his financial obligations.⁴⁴ The debtor is put on oath for the purpose of the examination. A creditor or his approved agent either of whom have tendered proof have the right to question the debtor in respect of his affairs and his inability to pay his debt.⁴⁵ Equally, the official receiver and the court reserve the right to question the debtor and he is obligated to answer the questions.⁴⁶

The Act however forbids a legal practitioner from representing the debtor or take part in his examination.⁴⁷ This is contrary to *s.36(6)(c)* of the *Constitution of the Federal Republic of Nigeria, 1999* which guarantees the right of any Nigerian to be defended by a legal practitioner of his choice. *Section 17(5)* of the Bankruptcy Act is not only inconsistent with the provisions of the Constitution but should be expunged as its inconsistency with constitutional provisions renders it void. *Section 1(3)* of the Constitution provides; “*if any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail and other law shall to the extent of its inconsistency be void.*” The judicial stance on this is evident from the precedent set in the case of *Uzodimma v C.O.P.*⁴⁸ In this case, the appellant was deprived of his right to a legal practitioner in accordance with the provisions of *section 28* of the *Area Court Edict* and *section 390* of the *Criminal Procedure Code* which disallowed a legal practitioner has no right of audience before the court. The Supreme Court declared that each of the aforementioned sections is a nullity.⁴⁹ It follows therefore that, the Constitution being the most supreme law of the land binds “all authorities and persons”⁵⁰ in Nigeria voids the *s.17(5)* of the Bankruptcy Act. *S.17(5)* should therefore be expunged from the Act and the Federal High Court should cease desist from upholding the provision thereby disallowing the debtor from having legal representation.

ADJUDICATING ORDER

An adjudicating order is made where the debtor fails to make a composition or a scheme. It is also made in a situation where the court has no basis for rescinding

⁴⁴ The examination must hold after the expiration of the time for submission of the debtor’s statement of affairs and must be as quickly as possible,

⁴⁵ Section 17(4)

⁴⁶ Section 17(5)(6)

⁴⁷ Section 17(5)

⁴⁸ (1982)3 NCLR 325

⁴⁹ Retrieved from Group4hub.blogspot.com on the 10th of August, 2019

⁵⁰ Section 1 of the CFRN 1999



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the receiving order. The purport of the adjudicating order is to declare the debtor bankrupt. The order is made inter alia consequent upon the application of any of the creditors, or the official receiver. Upon the grant of the order, a notice of the order must be published in the Gazette and advertised in 2 newspapers. The notice must state the bankrupt's details such as the name, address and description. Other information include the date of the adjudication, and the name of the trustee. The consequences of the adjudication order are listed below.

THE DISABILITIES OF AN ADJUDGED BANKRUPT

The following are the numerous disqualifications a bankrupt is subjected to by virtue of the provision of *section 126(1)* of the Act:

1. election to the office of President, Vice-President, Governor or Deputy Governor;
2. election to, sitting or voting in the National Assembly or State Assembly;
3. election to, sit, or vote in, any local government council;
4. act or appointment to sit or vote on any governing board of any statutory corporation/body;
5. act or appointment as a justice of peace;
6. act or appointment as a trustee of a trust estate;
7. admission to practice any profession for the time being regulated by law or on his own in partnership or in any other form or association (other than as an employee) with any other person.

BANKRUPTCY PROCEEDING AN EFFECTIVE MEANS OF DEBT RECOVERY?

In determining whether bankruptcy proceeding against an individual is an effective means of recovering debts owed by him, it is imperative to first consider the purport of the Nigerian law on bankruptcy. According to the long title of the Bankruptcy Act, *"It is an Act to make provisions for declaring as bankrupt any person who cannot pay his debts of a specified amount and to disqualify him from holding certain elective and other public offices or from practicing any regulated profession (except as an employee)."*



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From the long title of the Act, it is clear the law is designed to determine ways a debtor may be adjudged bankrupt and in a similar vein, disqualify him from attaining certain positions with the exception of being an employee. According to Nwobike,⁵¹ bankruptcy proceedings are punitive in nature and by therefore resorted to in order to “ensure that persons who cannot meet their financial obligations are disqualified from holding public offices, occupying managerial positions and practicing regulated professions, except they are engaged as employees.

Despite the intent of the Act, the law is equally designed to, through a cumbersome process, assist creditors recover amounts owed them by the debtor. Whether creditors however effectively recover the debts is a separate issue. There are two cases in which bankruptcy proceeding can be deployed for the purpose of debt recovery:⁵²

1. where a final judgment has been obtained by a creditor but the judgment sum remains, wholly or partly, unliquidated (whether or not execution has been levied); and
2. where the creditor has not obtained a final judgment against the debtor but bases his claims on a debt arising from a contract, promise or breach of trust.

Bankruptcy has not proven to be an effective means of recovering monies owed the creditor for the following reasons:

1. The creditors involved in debt recovery have cause to be discouraged from pursuing recovery with a bankruptcy proceeding principally because it is quite ponderous and the creditor is prone to losing interest with the amount of paper work and the ubiquitous court involvement in every stage of the proceeding.
2. A bankruptcy proceeding cannot be initiated independently without a preceding primary action. The debtor’s obligation would have been established in a separate action in order to present a bankruptcy petition.⁵³

⁵¹ Nwobike J. “Whether bankruptcy and winding up proceedings are veritable tools for debt recovery in Nigeria.” Article retrieved from www.inclawfirm.com on the 15th of August, 2019

⁵² Nwobike at p. 12

⁵³ Eghobamien Osaro 2016 Perchstone & Graeys Publication retrieved from www.mondaq.com on the 17th of August, 2019



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3. While the scope of the law is punitive against the debtor, it does little to compel him to adhere to the terms of the scheme or composition. There are instances where the debtor defaults in making due installmental payment in accordance with the composition or scheme.⁵⁴ This will in essence jeopardize the plan of the creditor to recover his money. However, the debtor is adjudged bankrupt as a result of the default. This does little to commit the debtor to pay his outstanding debt in any case. While there are bankruptcy offences punishable with imprisonment of 12 months and a fine of N200, default in payment does not qualify as an offence.⁵⁵
4. There appears to be a dearth of cases on bankruptcy leaving room to doubt the efficacy of the law itself.

NIGERIA AND THE UNITED KINGDOM

The United Kingdom has a robust jurisprudence on Bankruptcy as far back as 1542 when Henry VIII signed the *Act of Parliament 34 & 35* which was a criminal Act directed against men who incurred expenses and then ran off.⁵⁶ Decided cases on Bankruptcy in Nigeria are rare. The only reported case before the enactment of the *1979 Bankruptcy Act* is *Halliday v Alapatira*⁵⁷ where the court held that English statutes on bankruptcy were not in force in Nigeria.

1. A debtor may apply to make himself bankrupt online⁵⁸ in the United Kingdom. Nigeria's bankruptcy policy has not evolved to accommodate current technological trends.
2. £5000 is the minimum amount you have to owe your creditors in order for them to apply for bankruptcy. In Nigeria, the minimum amount which justifies the creditors' application for bankruptcy is the sum of ₦2000.
3. While the Nigerian Bankruptcy Act makes residency within Nigeria a criteria for having a bankruptcy petition issued against the debtor, in the

⁵⁴ Section 23(3)

⁵⁵ Section 129(1)

⁵⁶ The Early History of English Bankruptcy University of Pennsylvania Law Review 1919 Vol 67.No.1 at page 1

⁵⁷ (1881) 1 N.L.R 1

⁵⁸ Information retrieved from www.gov.uk Guide to Bankruptcy on 17th August, 2019



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UK, it is possible to declare yourself bankrupt even if you live outside UK apart from the European Union or Denmark.⁵⁹

4. The UK Bankruptcy Law is codified under Part IX of the Insolvency Act, 1986 which also provides for companies winding up; while Nigeria's law is a stand alone law which deals strictly with Bankruptcy matters.
5. All bankrupts' details are entered into a public record book known as the Individual Insolvency Register to reflect details of current bankruptcies or the ones that ended 3 months before.⁶⁰ Nigeria has no such register.
6. A bankrupt is usually discharged at the end of 12 months even if no payment was made to his creditors. However, where the official receiver is of the view that a bankrupt is being dishonest, the court can subsequently make a bankruptcy restriction order. Discharge of a bankrupt in Nigeria is not subject to effluxion of time. It is rather dependent on either the court's discretion or the bankrupt, on his own volition applying to court for a discharge order.⁶¹
7. UK Bankruptcy proceedings are not based on the need to establish the debtor's obligation in a separate action. It is sufficient for the creditor to merely allege that the debtor owe him money which he is unable to pay.

NIGERIA AND THE UNITED STATES OF AMERICA

The legislation which regulates bankruptcy is the *Bankruptcy Code of 1978* with a later amendment in 2005.⁶² To qualify for bankruptcy in America, the debtor in question may be an individual, a partnership or a corporation as provided under chapter 7 of the Code. This a departure from what obtains in Nigeria where the Act is principally designed for natural persons.

Notably, chapter 7 of the American Code allows a bankrupt to start afresh by giving him an opportunity to liquidate his debts, especially where his income is limited⁶³. This enables a situation where the debtor's properties such as cars and

⁵⁹ ibidem

⁶⁰ www.insolvencydirect.bis.gov.uk

⁶¹ Section 28

⁶² Bankruptcy Abuse Prevention and Consumer Protection Act 2005

⁶³ www.uscourts.gov



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houses are sold to pay off his debts. The law however allows him to file a schedule which allows him exempt some of his property from creditors' claims.⁶⁴ The bankruptcy law in Nigeria is designed to be punitive. Also, chapter 13 of the Code gives the bankrupt a soft landing where he is reluctant to lose all his property under chapter 7. The former provides him with the alternative of filing a repayment plan while allowing him to keep his property. Nigeria has a similar arrangement with a scheme or composition.

Chapter 13 is said to be a reorganization bankruptcy. In America, a case trustee is appointed to administer the case and liquidate the debtor's assets which were not exempted.⁶⁵ A pre-counseling session is required by law to before bankruptcy petition is filed in the United States. The purpose of the counseling is to provide sessions on budget analysis, financial management and also possibilities on alternatives to bankruptcy. Upon the completion of the counseling, a credit counseling certificate is issued to the debtor and it is one of the documents included in the bankruptcy petition. Nigeria has no such pre requisites neither does the Bankruptcy Act seeks to consider an alternative to bankruptcy.

CONCLUSION

The Nigerian law on bankruptcy is riddled with excessively tasking procedure with the tendency to discourage any serious-minded creditor from considering it as an option for debt recovery. To pursue this line of debt recovery, the creditors must have obtained a final judgment in their own favour against the defendant before presenting a bankruptcy petition. The law and procedure on bankruptcy is equally punitive with the mindset of disqualifying an adjudged bankrupt from a wide range of opportunities. The Act has gathered dust since its enactment as creditors hardly recourse to it, if at all. This begs the issue of its impact as a debt recovery tool. In a similar vein, certain provisions of the Act beg for amendment if it is to be a workable law in present day Nigeria. Predictably, the National Assembly has not worked its way to amending it.

While it appears to be a law designed to secure the creditors' interest, contemplation of other jurisdictions has shed light on the fact that there are apparently better ways of satisfying the creditors' need to have their debt repaid. Equally, bankruptcy proceedings should seek to balance the interest of both parties especially where the debtor submits himself to the process.

⁶⁴ § 522(b)

⁶⁵ 11 U.S.C. §701, 704



FPI 2019 SCHOOL OF MANAGEMENT STUDIES 10TH NATIONAL CONFERENCE

RECOMMENDATIONS

1. The amendment of *s.17(5)* to accommodate the involvement of lawyers in the bankruptcy hearing.
2. The subsequent amendment of *s. 4(1)(a)* to reflect present economic realities. This is because a debt of ₦2000 can easily be repaid without a bankruptcy petition.
3. A proposed amendment of the law with an aim of simplifying the procedure for instituting a bankruptcy petition. Petitions should not be dependent on a preceding final judgment against the debtor.
4. Nigeria should borrow a leaf from the United Kingdom which ironically serves as a veritable source for a substantial part of its laws. A bankrupt in the United Kingdom is discharged from bankruptcy at the end of 12 months without punitive measures except where he has defaulted in law. This is a worthy practice and the Nigerian bankruptcy framework need not be completely focused on punishing a debtor without subjecting the option of unhooking him from the stigma of bankruptcy on the whim of the court.