

Understanding Bankruptcy

Insights from Insolvency Act of Kenya

Issue 1

Introduction

The legal meaning of a bankrupt according to the Insolvency act is a debtor who has been adjudged bankrupt after an application for bankruptcy in Court and has not been discharged from bankruptcy.

In this issue, we will address the basics of bankruptcy. Specifically, we will look into the application for bankruptcy and when a court adjudge a person bankrupt.



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Who can be adjudged bankrupt?

- Natural Persons
- Trustees in a trust
- Partners of a general partnership
- Members of an unincorporated body.

Who can apply for a bankruptcy order?

- A debtor.
- A creditor.

What should be the physical location of a person against whom a bankruptcy order has been applied for in Kenya?

- They must be domiciled in Kenya meaning that Kenya is considered their permanent residence or home country under the law, or
- Not domiciled in Kenya but physically present in Kenya at the time the application is made, or
- If within three years from when the Application is made, was a resident of Kenya or carried business in Kenya.

N/B It is important to note that once a bankruptcy application has been made, the same cannot be withdrawn unless with outright leave of The Court to which the Application is made.

What are the options of a Court when a bankruptcy application has been made?

- Dismiss the Application.

- Stay the proceedings in the event that some part of the insolvency laws have not been complied with.
- Make a bankruptcy order as the case may be.

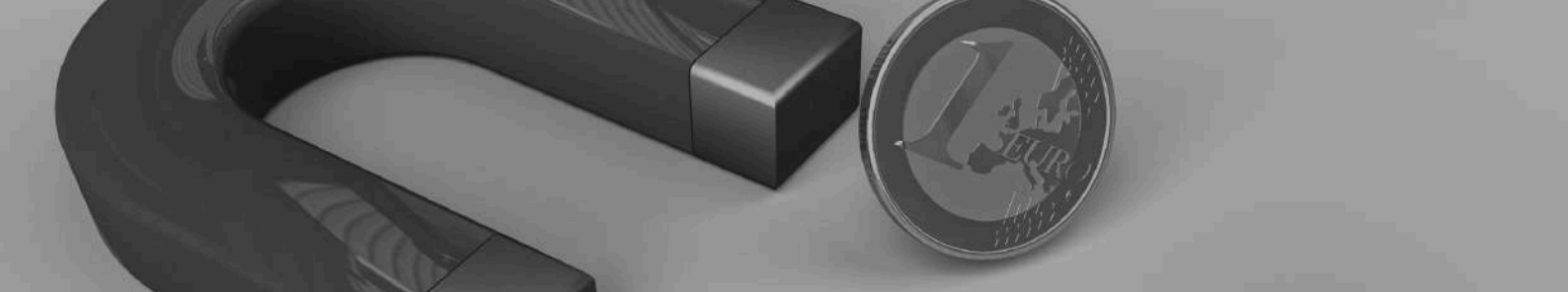
At what point can a creditor apply for a bankruptcy order against a debtor?

- When there is debt owed, and the debt exceeds the bankruptcy level being 250,000 Kenyan Shillings.
- The debtor is unable to pay.
- There is no arrangement for repayment.
- If in the case of an unsecured creditor, they can be paid if liquidation is given a chance.
- If there are no future or current prospects of repayment.
- If there is no application made by the debtor to set aside the statutory demand.

At what point can a debtor be deemed to have no prospects of paying the owed debt?

- If the debt repayment is not immediate, then a demand for repayment has been issued but not sorted, complied with, or set aside within 21 days.
- If debt repayment is immediate, a demand has not been complied with for 21 days or set aside, and if there is a judgment for execution issued, the execution is returned unsatisfied.





What are the characteristics of the Statutory demand?

- Issued by a creditor to a debtor.
- It lasts for 21 days before execution.
- must contain the amount owed.
- Overstatement of the amount owed does not invalidate it unless the debtor rightly disputes by notifying the creditor.
- The debtor must state the period of notification of the amount owed.

N/B- An Application for bankruptcy is usually made after 21 days after a demand, however, it may be made earlier if there is a high possibility of the debtor's property, or its value being reduced during that period. The said Application must contain a statement to that effect.

Normally, a secured creditor need not to apply to court to realise sums owed. However, a secured creditor can apply to court when:

- They are willing to give up their secured asset in case of a bankruptcy order so that all creditors can benefit.
- They are only making an application for the unsecured part of the debt owed which is to be treated as a separate debt.

When can a court of law dismiss a Bankruptcy Application?

- If by considering the assets and liabilities of the debtor, it is satisfied that the debtor can pay the amount owed.
- If the debtor makes an offer to secure the debt owed by providing a collateral or security.
- If by the creditor accepting the offer, the debt owed would have been resolved.
- If the creditor unreasonably refused to accept the offer.

N/B- A bankruptcy application can be amended to include or remove more creditors. This is because some of the creditors may be paid and this should not necessarily mean that the Application should fail.

-A creditor who has applied for bankruptcy cannot proceed to seize the assets of the debtor even in the existence of another court order to that effect. Only with the order of the current Court to which a bankruptcy order has been made can the debtor seize the said assets. The Court makes such an order only if other creditors will not be unjustifiably affected.



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