

GENERAL OVERVIEW OF THE DEBTOR'S BANKRUPTCY PROCEEDINGS

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What is bankruptcy?

Bankruptcy is a legal proceeding initiated when a person is unable to repay their debts or obligations when they fall due. Bankruptcy offers an individual a chance to start afresh by pardoning debts that they declared at the time of entering into bankruptcy.

In Kenya, bankruptcy proceedings are governed by the Insolvency Act 2015 and its Regulations. The High court is vested with the jurisdiction to hear and determine bankruptcy matters.

The bankruptcy process

Section 32 of the Act states that a debtor may make an application in court for a Bankruptcy Order adjudging him bankrupt. The legal process commences when the debtor files a Bankruptcy Petition in court. A Bankruptcy Petition can either be filed by the debtor in their own capacity or by the advocate representing the debtor. The debtor presents the following documents to the Official Receiver for approval and confirmation that he has complied with the requirements of the Act:-

- a) Bankruptcy petition- Form No. 10
- b) Supporting Affidavit- Form No.8
- c) Application for bankruptcy trustee- Form No. 9
- d) Statement of Affairs- Form 11

Once the Official Receiver confirms compliance, the debtor makes a statutory payment of Kshs. 30,000/= to the Official Receiver, who then issues a Certificate of Compliance in relation to the petition.

The debtor proceeds to file all the aforementioned documents at the High court within his jurisdiction. The petitioner is required to pay court filing fees. The matter is then placed before the Deputy Registrar of the Court to confirm compliance for certification that it is ready for hearing before the Honourable Judge.

Prior to the hearing of the petition, the debtor is required to publish a Notice of the Bankruptcy Petition in one or more newspapers of the widest circulation to allow the Creditors file responses to the petition if need be. Under Section 34 of the Act, the matter then proceeds for hearing and the court makes a determination on whether or not the debtor should be adjudged bankrupt depending on the tabled evidence. The Bankruptcy Order is issued and debtor declared bankrupt for three (3) years.

Consequences of a bankruptcy order

Pursuant to Section 48 of the Act, once a Bankruptcy Order is made, all proceedings to recover the bankrupt's debts are stayed and the property of the bankrupt and the powers that the bankrupt would have exercised in respect of that property for the bankrupt's own benefit vest in the Bankruptcy Trustee. The Official Receiver or a licensed Insolvency Practitioner can be appointed as a bankruptcy trustee of the estate of the bankrupt.

Conduct of bankruptcy

Under Section 48(3), within thirty (30) days after the Bankruptcy Order is made, the Official Receiver should publish a notice advertising the order once in the Gazette; and once in the newspaper of wide-circulation.

Section 63 of the Act provides powers of the bankruptcy trustee which include powers to manage the bankrupt's estate or any part thereof, carry on the bankrupt's business (if any) for the benefit of the creditors; and assist in administering the bankrupt's estate in such manner and on such terms as the bankruptcy trustee may direct.

The Official Receiver convenes the first creditors' meeting in accordance to Section 52 of the Act. The Official Receiver may decide not to convene first creditors' meeting if within (14) days after sending the notice to the creditors no request has been received from creditors requesting for such a meeting. Subsequent creditors' meetings can be held depending on the outcome of the first creditors' meeting. The role of the creditors is primarily:

- 1) To attend meeting of creditors
- 2) Submit proofs of the debts of the bankrupt; and
- 3) Examine the bankrupt at those meetings

During the creditors' meeting, the bankrupt may present a composition in satisfaction of the debts due to the creditors. The creditors may accept the composition by passing a special resolution that contains terms of the composition. The creditors may vary the terms of the composition to be favourable to them. A composition is not binding until it is approved by the court. Upon approval by the court, the bankrupt and the Bankruptcy Trustee execute the deed of composition and the proposal becomes effective. The deed binds all the creditors in all respect as if they had each executed.

The Bankruptcy Trustee may, at any time before or after a bankrupt's discharge summon the bankrupt or other persons listed in Section 168(2) of the Act to appear before the trustee or the court. Public Examination of the bankrupt can be held any time before an absolute order for a bankrupt's discharge is made.

Completion of bankruptcy

The Bankruptcy Trustee distributes the bankrupt's estate according to the second schedule of the Act. A creditor must file a proof of debt form and the debt must be provable. On realizing the bankrupt's estate, the Bankruptcy Trustee gives notice of either declaring final dividends, stating that there is no dividends or further dividends will be declared. If there is surplus, the Bankruptcy Trustee pays the bankrupt.

A final creditors' meeting is held in accordance to Section 253(1) if the Bankruptcy Trustee is of the opinion that that the administration of the bankrupt's estate is complete. The creditors receive and consider the bankruptcy trustee's report of administration of the bankrupt's estate and determine whether the Bankruptcy Trustee should be discharged.

Discharge from bankruptcy

Pursuant to section 254 of the Insolvency Act, the bankrupt gets an automatic discharge after three (3) years; the bankrupt may also apply to be discharged earlier. However, a bankrupt is not automatically discharged if the Bankruptcy Trustee or a creditor has objected under Section 256 of the Act and the objection has not been withdrawn by the end of the three year period. The objection has no effect unless it is made in the manner and form prescribed by the Insolvency Regulations. The Bankruptcy Trustee then summons the bankrupt to be publicly examined before the court if the objection has not been withdrawn. Should the ground of objection be established, then the court is to quash the discharge.

Once the debtor is discharge, the bankruptcy proceedings are complete and the debtor is relieved of the debt obligations. The debtor is no longer legally required to pay the debts specified in their Statement of Affairs. Any creditor listed on the statement of affairs cannot legally undertake any action to recover their money.

Impact of bankruptcy

Once a debtor is declared bankrupt, they become subject to the following disabilities:-

- 1) The bankrupt cannot act as a director of a company, or take part in the management of a company except with the leave of court.
- 2) Under Section 99(2) (f) of the Constitution of Kenya 2010, a bankrupt person is disqualified from being a member of parliament
- 3) The bankrupt cannot act as an advocate under Section 32 of the Advocate's Act Cap 16 of the Laws of Kenya.

Conclusion

When a debtor is declared bankrupt and subsequently discharged, they are relieved from their liabilities owed to the creditors. This enables them to make a fresh start in life free from the burden of those debts and obligations. The bankruptcy process is meant to protect the genuine people who due to unfortunate circumstances, found themselves in debts. The bankrupt automatically gets discharged after three years whether the debt is paid or not, and if none of the creditors filed an objection to the discharge.