

## THE OFFICE OF THE OFFICIAL RECEIVER IN INSOLVENCY

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Question: "What services can one get from the Office of the Official Receiver in Insolvency?"

There is very high likelihood that the person next to you may almost-confidently give an unrelated response or may draw a blank. Been there, heard that. In any event, if Official Receiver would 'receive' anything, it would be a debtor's assets and proof of debt from creditors.

So let me explain:

### History

The establishment of the Office of the Official Receiver in Kenya dates back to before the Bankruptcy Ordinance of 1925 (as it was then). This Ordinance was complimentary to the English Bankruptcy Act, 1914. Under this Ordinance the duties of the Official Receiver were limited to a natural debtor's conduct and administration of a natural debtors/bankrupt's estate. It prescribed as follows, in relation to the Official Receiver:

"There shall be an official receiver of debtors' estates for the Colony and as many deputy official receivers as may be required from time to time who shall have jurisdiction in such areas as may be specified. The official receiver and the deputy official receivers shall be appointed, be removable by and be under the general authority and directions of the Governor and they shall also be officers of the court. A deputy official receiver shall have the same powers, rights and duties within the area for which he is appointed as an official receiver under this Ordinance"

Subsequently, the Bankruptcy Act, Cap. 53 was enacted and whose date of commencement was 3rd September, 1930. Similar to the Bankruptcy Ordinance of 1925, the Bankruptcy Act focused the OR's duties on individual insolvency. However, the Companies Act, Cap 486 complements the establishment of the OR under the Bankruptcy Act and expands duties of the OR under Section 230 as:

"For the purposes of this Act so far as it relates to the winding up of companies by the court, "official receiver" means the official receiver attached to the court for bankruptcy purposes. Any such officer shall, for the purpose of his duties under this Act, be styled the official receiver."

As an office established under the Bankruptcy Act, the OR has for a long time been a department under the Registrar-General in the Office of the Attorney General & Department of Justice.

Currently, the OR is, for the purpose of performing the functions imposed and exercising the powers to be conferred on the Official Receiver by or under the Insolvency Act or any other Act, incorporated as a corporation sole with the corporate name "Official Receiver in Insolvency" established under Section 703 of the Insolvency Act, 2015. The Act grants the OR all the characteristics of a corporation sole.

Organizationally, the OR is one of the core departments under the Business Registration Service (BRS). BRS is a Semi-Autonomous Government Agency under the Office of the Attorney General & Department of Justice; established under the Business Registration Service Act, 2015. The other departments under BRS are the Companies Registry, the E-Collateral Registry (Movable Property Security Rights) and the Hire Purchase Registry.

## **Regulation of insolvency**

The OR, as the administrator of the Insolvency Act, is the regulator of insolvency within the territory of Kenya. That is to say that parties to insolvency proceedings are under duty to give notice of those proceedings to the OR. For example, where a creditor or a debtor intends to file any insolvency application/petition under the Act, that person is required to lodge a copy of the same with the OR. Similarly, where the High Court issues any orders in relation to the said application/petition the orders must also be served upon the OR.

As such, the OR maintains a register of all insolvency proceedings commenced, being undertaken and concluded within the Republic of Kenya. A member of the public may request to peruse the register during office hours and upon payment of the requisite fees. In this regard, the OR publishes insolvency statistics on <https://brs.go.ke/office-of-the-official-receiver>

Based on this insolvency register the OR is able to advice on the insolvency status of an individual or an entity. This is done through a process called 'issuance of Certificate of No-Insolvency'. The certificate confirms whether or not a subject (entity or individual) is subject to any type of insolvency proceedings.

The Insolvency Act empowers the OR, in relation to natural debtors, to sit in a quasi-judicial capacity and admit an applicant to the No-Asset Procedure (NAP) or Issue a Summary Installment Order (SIO). The effect of the OR's pronouncement is that creditors may not enforce debts against such debtors except under the provisions of the Insolvency Act.

The OR also has the mandate regulate Insolvency Practice in Kenya and supervise Insolvency Practitioners. An Insolvency Practitioner is an individual, being a member of the Law Society of Kenya (LSK) or the Institute of Certified Public Accountants of Kenya (ICPAK), who is authorized to be appointed to undertake insolvency assignments in accordance with the Insolvency Act. This authority is granted by the OR who is vested with powers to grant or refuse to grant an Insolvency Practitioner's License in Kenya; or revoke a license. A list of all current insolvency practitioners may be issued to any person upon request and payment of requisite fees.

It is worth noting that the OR in the capacity of regulator has undertaken various measures including legislative reforms to promote a robust insolvency regime in Kenya and one that conforms with best practices. Through these interventions, Kenya made significant improvements under the World Bank's Ease of Doing Business index.

As an office established under the Insolvency Act, the OR is mandated to collect and remit to the exchequer statutory fees prescribed under the Act. These fees are collected upon lodgment of notices and applications or as fees earned for conducting insolvency assignments.

## **Insolvency issues**

For purpose of this article a debtor (unless specified) refers to both a natural person, an incorporated entity and an unincorporated entity that is unable to pay debts on demand.

The OR wears more than one hat; and is not only the regulator of insolvency practice in Kenya but also a practitioner in insolvency matters whether by undertaking insolvency assignment or participating in court proceedings on behalf of debtors. The OR has acted as: a Liquidator for companies undergoing liquidation process, an Administrator, as a Receiver over a debtor's estates (Bankruptcy Act (repealed), a Bankruptcy Trustee, and as a Supervisor under the No-Asset Procedure (NAP), Summary Installment Order (SIO) and Individual Voluntary Arrangement (IVA). These appointments have been in relation to pension schemes, insurance companies, financial institutions, companies registered under the Companies Act.

In undertaking insolvency practice, the OR has the distinctive capacity of acting as the first office-holder where no an order has been issued against a debtor but no Insolvency Practitioner has been appointed in that assignment or a vacancy has occurred for any other reason. It is therefore mandatory that notice of such events are served upon the OR as soon as possible.