

Evaluating the Law and Procedure of Receivership in Uganda

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ABSTRACT

This article evaluates the law and procedure of receivership in Uganda. The article revealed that for creditors to recover any debt from the debtor in case of default in payment, creditors can appoint a receiver who will manage the property of the debtor to realize the debt. A receiver is appointed either through debentures, an instrument that takes effect when a receiver accepts the appointment in writing, or through court which is specified in the court order. It is in this wise that the article calls for increased public awareness of receivership through sensitization of the public by creating public seminars on receivership law and procedure, these will in return increase their knowledge of the law and procedure of receivership since receivership is one of strategy to deal with financially distressed companies or persons. More so, the qualification of a person to be appointed as a receiver should not be limited to only the professional qualification of a lawyer or accountant, but rather the receiver's character and reputation to be put into consideration which will limit the appointment of fraudulent receivers since professionalism alone does not guarantee a smooth process of receivership.

Keywords: Appointment, Duties, Law and Procedure, Liabilities, Receivership

INTRODUCTION

The major aim of setting up a business is to generate profit which is achieved through the selling of goods in the business. Though this is not easily achieved as such, the company may encounter financial hardship in the process, which may force it to secure some loans and mortgage its property as collateral for the loan secured[1].

The purpose of the loan is to revamp the company back to profitability but this may not materialize and leave the company in losses and cannot fulfill its obligation of paying back the loan as agreed. This calls for the charge holder to appoint a receiver if the charging document confers to him such powers[2]. The debenture holders of these companies defaulting can appoint receivers if the charging document confers those powers to go to court to exercise their inherent jurisdiction (powers) to put the company under receivership. A receiver is a disinterested person or entity appointed by a court, corporation, or other person, for protection or collection of property that is the subject of diverse claims. In Uganda, the principal laws governing insolvency are the Insolvency Act of 2011, Companies Act, and Mortgage Act of 2009 which were a replica of English law that was adopted from Britain by virtue

of **Sec. 15** of the 1902 Order in Council[3]. Receivership has been regarded in Uganda as a strategic tool for financially distressed companies. Many business firms are placed under the company's statutory management in the hope of restoring them to their normal course of business of profitability and ensuring debt recovery. This however has not yielded the result and almost all these cases end up in liquidation[4].

Corporate failure in Uganda is caused by incompetence and inexperience in managing the business and this is a major cause. Part XIII of the Insolvency Act 2011[5] provides that a receiver should be a qualified professional, with the competence and experience to prevent avoidable corporate failure. Companies, however still came to an end even after signs of failure have been identified and thus a receiver is appointed to help reverse the situation. A receiver works to restructure the company, managing assets to bring the company into recovery from its failure, though in due process, a receiver can liquidate certain assets but the rationale of his appointment is to bring back the company into its normal course of business. This is sometimes not an easy task, thus there may be a

change in due course, and in the end company's assets are sold to realize the debt incurred to fulfill the debtors' obligations. This necessitated the

The Concept of Insolvency and Insolvency Law

The principal legislation governing insolvency law in Uganda are the Insolvency Act, the Companies Act, and the Mortgage Act. Other closely related laws include but not least the Civil Procedure Act and the related regulations that's to say the insolvency regulation and mortgage regulations, among others, which were all replicas of the United Kingdom Laws. Insolvency in Uganda is principally governed by the Insolvency Act and insolvency regulations. The Act expressly repealed the old insolvency laws that is to say the bankruptcy Act, Deeds of Arrangement[6]. Insolvency entails the inability of a person, that is to say, an individual or a company, to pay her debts as and when due. Thus a person goes into bankruptcy whereas a company goes into winding up or liquidation[7]. Modern insolvency has combined both individual and corporate into one consolidated law and to this effect, the Insolvency Act defines insolvency as including bankruptcy [5]. Thus, the inability to pay debts when due is preferred as the best definition of insolvency. In Uganda, the inability to pay debts is the basis of the commencement of both individual and corporate insolvency. The Insolvency Act sets out the nature of what amounts to the inability to pay debts. Inability to pay occurs when the debtor fails to comply with a statutory demand served on the debtor, it also occurs when the execution issued against the debtor in respect of judgment debts has been returned unsatisfied in whole or in part. Inability to pay debts further occurs when all or substantially the property of the debtor is in the possession or control of a receiver or some other person enforcing a charge over the property[8]. The Insolvency Act requires a petition for bankruptcy or liquidation on the ground of inability to pay with leave of court and only when satisfied that a prima facie case of inability to pay debts has been made out[5]. Therefore, the balance of proof is on the creditor. Thus Polack[9] observed that the court held in the case of *Re Expanded Plugs Ltd* that for fully paid-up members to establish that they have tangible interest in the winding up, they must show a prima facie probability of surplus assets remaining after the creditors have been paid for distribution among shares. Similarly, Halliday[10] observed that in the case of *Re Medipharm publication (Nig) Ltd*, a petition was lodged asking the court to wind up the company, it was shown that the company was destitute, having a normal capital of BP 100, had no assets, and could not meet its routine obligations. The court granted the winding-up order. Individual

present article that evaluates the law and procedures of receivership.

insolvency commences when a bankruptcy order is made. Corporate insolvency commences where there has been a validly entered resolution for voluntary liquidation of the debtor company or in case of liquidation by the court, upon presentation of the petition for liquidation[3]. The insolvency law has been relevant both historically and today due to the economic importance of credit as a tool of capitalism. It follows therefore that whereas credit (money) is very important in the rescuing of every business entity, inability to pay such debts may result in a person being declared insolvency and some of the factors that result in individual or corporate failure to pay their debts are business misfortune, general economic recession and people's tendency that they are better off in business than they are hence resulting into miscalculations of their capacity to repay[11]. Other instances of corporate failure have been attributed to embezzlement, negligence, and mismanagement by those who control the business owing to their breach of duty of care to the company, late payments to the business from its debtors, or in some instances due to the fact that the other businesses on which the company relied for credit or its supplier is the financial distress[12]. Other aspects of insolvency occur due to technological changes that outdate some lives of businesses and failure to stand stiff competition. It is against this background that the law of insolvency was developed and has been evolving over time. Thus the objectives of modern insolvency law are to provide an orderly and fair procedure for handling the affairs of the insolvents by ensuring that creditors receive an equal and equitable distribution of assets of the debtor's estate, which thereby forms the basis and fundamental principle of "pari passu" (equal distribution) in insolvency law[13]. The principle of "pari passu" is a ratable distribution that marks off the rights of creditors in winding up from their pre-liquidation entitlements. It therefore operates to ensure that creditors of the same priority receive equal percentage returns from the insolvent person's estate. The principle of first come first serve gives to that of orderly realisation of assets by the liquidator or Trustees for the benefit of all unsecured creditors and the distribution of the net proceeds in equal proportions. The principle in general is confined to the assets of the Debtor and does not affect creditors having rights in RCM (secured creditors). The effect of these rights in a row is to substantially reduce the corpus of assets available for unsecured creditors[14].

The Importance of Insolvency in Economic Development

The fundamental purpose of insolvency is to protect the debtor who is declared bankrupt from harassment by creditors. Thus, in early years a debtor who had failed to pay his/her debts as they fell due, would probably be sold off into slavery. The law however ignored the important reality that a debtor may accumulate debts and eventually become bankrupt out of reasons beyond his control[15]. Therefore, the realisation of this fact and the successful fight against slavery formed the basis for the development of insolvency law that provided for the attachment of a struggling debtor's assets to settle all his creditors and thereafter, the debtor would be legally discharged from all other outstanding liabilities that still stood as unsettled. This is what is now called the bankrupt's new lease of life since the debtor is now free to work himself back into a productive, and profitable life and can accumulate property without fear and pressure of his or her old creditors[16]. Thus, it is important to note that insolvency proceedings are meant to benefit all creditors. All creditors interested in the payment of the claim is required to register the claim with a receiver or liquidator. This is regardless of whether or not he took active participation in the appointment of the receiver or liquidator. Upon

receipt of the claims, the receiver will be required to pay the creditors by their order of priority out of the assets of the company[17].

Insolvency proceedings provide the only opportunity in law to investigate the entire operations of a company from the date of its incorporation to the date of the winding-up order. The purpose of the investigation is to establish the existence of any fraud during the incorporation or operations of the company. The procedure works is the company's officers accountable for any crimes that might have been committed and concealed behind the corporate veil[18]. Thus, insolvency acts as a means of promoting responsible and accountable corporate governance.

Insolvency proceedings provide a mechanism for identifying unviable trading partners in the economy. Normally, it is the inefficient and/or irrelevant firms that will go bankrupt leaving efficient firms to remain as players in the economy[19]. This procedure therefore ensures that only those firms that are worthy to trade can remain to trade in the economy. This helps ride the economy of the unwanted firms and provides a true reflection of the relevant traders in the economy.

Manner of Appointment of a Receiver

A receiver is a person appointed to take possession of the property that is subject to/of a charge and he/she is authorized to deal with it primarily for the benefit of the holder of the charge. There are two types of receivers, that is to say, the receiver appointed by the court and the receiver appointed by a debenture holder under the terms of a debenture

deed[20]. Therefore the Insolvency Act also emphasizes the appointment of the receiver under any document or by the court in the exercise of a power to make such appointment given by any Act or rule of court or in the exercise of its inherent jurisdiction[5].

Receiver Appointed Under Terms of a Debenture Deed

The debenture deed is one way in which a receiver may be appointed to take control and manage the property. Usually the debenture holder would provide that the receiver would take into custody the property of a company (the whole property or the part charged with the instrument)[21]. These provisions are designed to ensure that debenture holders have sufficient information about the financial position of a company after the appointment of a receiver. Thus, a receiver must be appointed according to such terms of the debenture which usually requires the appointment to be made in writing[22]. In a decided case, the first defendant on 5th Nov, 2003 while exercising its purported rights under certain debentures given by the plaintiff company, appointed the second and third defendants as receivers and manager over two assets and businesses of the plaintiff company to recover an alleged debt of Kshs 523,389,559 said to be owed by the plaintiff to the first defendant. The terms of the

debentures provided that the lender had a right to appoint receivers/managers if default was made in repayment of the debt. The lender demands the said above amount to be paid by 28 Feb 2003 in full and final settlement and given notice that failure to pay would result in the plaintiff being placed under receivership. The plaintiff being aggrieved by the appointment on 14th Nov 2003 filed a suit and prayed for a declaration that the first defendant was not entitled to appoint the receivers and further prayed for revocation of their appointment. It was held that it is well-settled law that a dispute as to the amount due cannot be a ground for an injunction to restrain a lender from appointing receivers on the ground of default in payment obligations[23].

Therefore, a receiver is appointed under a debenture deed that creates security over the company assets, and such powers of appointment are contained in an instrument such as a mortgage debenture. Thus it is an implied condition in a receiver of the income of

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the mortgaged land¹ and before the appointment of a receiver, the mortgagee shall serve a notice on the mortgagor and shall not proceed until fifteen working days have lapsed from the date of the service of the notice of appointment of a receiver^[24]. The appointment of a receiver shall be in writing and signed by the mortgagee. Thus, in the case of Ranch on the Lake Ltd^[25], DFCU and the Bank advanced sums of money to the company all of which were secured by the same securities

Receiver Appointed by Court

The court has inherent jurisdiction to appoint a receiver/manager to take care of the property until the rights of the interested parties are determined. This jurisdiction includes the power to appoint a receiver even in the absence of any express power in the relevant debentures^[26]. In Uganda, the High Court has unlimited original jurisdiction to appoint receivers in cases that appear just and convenient to appoint them. It follows therefore the receiver is an officer of court in all cases and must act fairly and impartially. Therefore Order 42 rule 1(1) stipulates that where it appears to the court to

Procedure of Appointment

Where a receiver is appointed by the court under powers contained in the charging document or debenture, the receiver must give notice of his appointment. After his/her appointment, a receiver shall give written notice of the appointment to the grantor and shall not later than fourteen days after the commencement of the receivership give public notice of the date of the commencement of the receivership^[27]. The receiver's full name, the receiver's physical address, electronic mail address, and daytime telephone number, and a brief description of the property under receivership that has come into his or her possession. Where the grantor is a body corporate, the receiver shall not later than fourteen working days after the commencement of receivership, deliver to the registrar and official receiver, a copy of the notice referred to in subsection(2), and where the receiver is an administrative receiver, he/she shall give notice on every invoice, order for goods or business letter issued by or on behalf of the grantor on which the company's name

Seeking Guidance and Clarification from the Court

A receiver is an officer of the court in all cases and he or she is not an agent to anyone, and he or she must act fairly and impartially. Where any dispute arises in the course of exercising his or her duties, he is at liberty to seek the court's intervention to solve the dispute. Therefore upon application of a receiver, the court may give directions on any matter concerning the functions of the receiver^[17]. In the matter of Ranch on the Lake Ltd^[25], DFCU

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thereby entering into a security sharing agreement dated 16th September 1996, the company in due course failed to meet its obligations and on 17th September 2001, DFCU appointed a receiver relying on its powers as a mortgagee and the bank was notified of the action on the same day. The court held that it is an implied condition that in every mortgage, the mortgagee has the power to appoint a receiver of income, thus the appointment of a receiver by DFCU was valid.

be just and convenient, the court may by order appoint a receiver of any property whether before or after decree. This unlimited jurisdiction of the High Court can be invoked where the charging documents do not give/confer powers to a holder to appoint receivers, where the petition is for the winding up of a company, and is about to levy execution, where the company's business has been closed or is about to close among other circumstances, thus providing redress to a holder of charging documents by way of court appointing a receiver on his or her behalf.

appears by stating after the grantor's name "receiver appointed" and lastly in every other case, upon entering into any transaction or issuing any document in connection with the property in receivership^[5]. Therefore, subject to the appointing document, a receiver shall within forty working days after his or her appointment prepare and send a preliminary report on the state of affairs of the property in receivership including the particulars of the property under receivership, the particulars of the debts to be satisfied from the property under receivership, the names and addresses of all known creditors with an interest in the property under receivership, names and addresses of all known creditors of any associated company or other business organisation or person, the particulars of any charge over the property under receivership held by creditor including the date on which any relevant information and any information as the receiver may consider necessary.

appointed a receiver in September 2001 relying on its powers as a mortgagee, the receiver then subsequently sold the securities and realized a sum of UGX shs. 1,000,000,000. After the receipt of that money, the receiver sought directions from the court as to how to disburse the said amount between DFCU and the Bank (two secured creditors). The court held that clause 3 of the security sharing agreement was not void, applying the said condition

precedent, the Bank is not entitled to share in the proceeds of receivership for as long as the secured

liabilities to DFCU have not been met and the receiver is directed to proceed accordingly.

Duties of Receivers

The appointment of a receiver comes with several duties which ought to be executed by the receiver and these duties are contained in different statutes ranging from the Insolvency Act, the Mortgage Act, and the civil procedure rules. These duties comprise both common law and statutory

duties as follows. First and foremost, the fundamental duty of a receiver is to exercise his/her powers in a manner that he/she believes on reasonable grounds to be in the best interests of all persons in whose interests the receiver is appointed[28].

Duty to take possession

After the receiver is appointed, he/she is duty-bound to take possession of the assets charged by the debenture so that they can be sold to pay off the debenture holders and others entitled in priority to the debenture holder. Therefore, if anyone prevents the receiver from taking possession or interferes with his possession when obtained

proceedings can be taken to obtain possession or prevent interference. As a general rule receivers as such are not entitled to bring such proceedings in their names but they have a right to sue in the company's name even in the absence of an express power[29].

Duty To Render Proper Accounts

A receiver is duty-bound to render proper accounts by generally accepted accounting procedures and standards full accounts and other records of all

receipts, expenditures, and other transactions of the company[29].

Duty of Care

A receiver owes a duty of care to the debenture holder and preferential creditors. The duty entails acting bonafide to realize the assets of the company in the interests of the debenture holder the company and preferential creditors. The duty of care further involves obtaining the best price possible when selling the company's property [29]. Thus in the

case of Downsvie Nomines Ltd V First City Corporation[30], the Privy Council held that a receiver only owed equitable duties to non-appointing debenture holders and to the company to act in good faith. Thus, a receiver was subject to specific equitable duties to take reasonable care to obtain a proper price for assets sold.

Duty to Safeguard Property

A receiver owes a duty to safeguard property under receivership for the benefit of the security

holder, the company, and secured creditors who appointed him/her[29].

Statutory Duties of a Receiver

The fundamental statutory duty of a receiver is to exercise his/her powers in a manner that he/she believes on reasonable grounds to be in the best

interests of all persons in whose interests a receiver is appointed[31].

Duty to Disclose Information

A receiver is duty-bound to disclose all relevant information within his or her knowledge during receivership and must disclose the information in good faith to all people in need of it. Thus, the

mortgagee and mortgagor shall act honestly and in good faith in particular to disclose all relevant information relating to the mortgage[17].

Duty to Prepare a Preliminary Report

A receiver shall within forty working days after his/her appointment prepare and send a preliminary report on the state of affairs of the property in receivership including the particulars of the property, particulars of the debts to be satisfied from property under receivership, the names and addresses of all known creditors with an interest in the property under receivership, names and

addresses of all known creditors of any associated company or other business organisation or person, the particulars of my charge over the property under receivership held by any creditor including the date on which it was created. Particulars of any default by the grantor in making available any relevant information and any other information as the receiver may consider necessary[5].

Duty To Furnish Security

Every receiver so appointed shall furnish such security, if any as the court thinks fit duly to account for what he/she shall receive in respect of the

property, submit his/her accounts at such periods and in such form as the court directs, pay the amount due from him/her as the court directs[31].

Power and Duty of Sale

A receiver appointed under debenture has the power to sell the assets to generate the funds to repay the debenture holder. Furthermore, a receiver appointed under a securing document has a primary duty to realize assets charged by the debenture to liquidate

the debt owed to the mortgage. Thus, a receiver's power to sell the charged assets arises in the terms of the debenture under which he/she is appointed[31].

Fiduciary Duties of a Receiver

The rules of common law and doctrine of equity apply to mortgages and receivership shall continue in force except in so far as they are inconsistent with the Act. Therefore the fiduciary nature of receivership prevents the receiver or his agent from purchasing the company's assets not to take any

profit out of the property distributed to him without consent of all parties, and where he is appointed by the court, he is the court's officer and his personally liable for debts incurred where he carries all businesses but he has a first claim to taking priority over all other chargers for indemnity[32].

Liability of a Receiver

After the appointment of a receiver as provided for by the debentures or court, a receiver is obliged to execute various duties as earlier on discussed, and where in due course he/she fails or breaches out of the duties, a receiver is personally held liable. Therefore a receiver shall be personally liable for any contract entered into by him in the exercise of any of the powers but shall not be liable for the grantor's debts[5]. Furthermore, a receiver shall be

liable for wages, salary, and allowances including sickness and holiday allowances but shall not be liable for payments in lieu of notice that are incurred during receivership, under a contract of employment adapted by the receiver and in respect of services rendered after the adoption of the contract[5].

CONCLUSION

For creditors to recover any debt from the debtor in case of default in payment, creditors can appoint a receiver who will manage the property of the debtor in order to realize the debt. A receiver is appointed either through debentures, an instrument which takes effect when a receiver accepts the appointment in writing or through court which is specified in the court order. It is in this wise that the article calls for increase public awareness on receivership through sensitization of the public by creating public seminars on receivership law and procedure, these will in return increase their knowledge on the law and procedure of receivership, since receivership is one of strategy to deal with financially distressed companies or persons. More so, the qualification of a

person to be appointed as a receiver should not be limited to only professional qualification of a lawyer or accountant, but rather the receiver's character and reputation to be put into consideration which will limit the appointment of fraudulent receivers since professionalism alone does not guarantee a smooth process of receivership. Therefore, any person with the requisite skills should be considered since he/she is aware of the procedure to wind up a company in receivership. Finally, it is recommended that the law should provide for the procedure of protecting the director's interest, since the appointment of a receiver came with a number of effects on the company directors, employers and the company itself.

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