DEFINITION OF TERMS, CONCEPTS AND HISTORY OF INSOLVENCY LAW IN TANZANIA AND DIFFERENT JURISDICTION

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ABSTRACT

Insolvency often comes suddenly and unannounced all too frequent that employees know when the gates are locked against them. Although Employees have certain rights they are considered as unsecured creditors that their rights are not given a paramount consideration when a company undergoes insolvency therefore their rights are frozen on Insolvency and workers cannot issue proceedings without the consent of the court. In this situation the question that normally arises is what happens to employees working for an insolvent company? What happens to the interest and the rights that they are to acquire when a Company is liquidated for reasons of insolvency?

This study focuses on the corporate insolvency and protection of employee's rights where the researcher addresses the nature of protection of employee's rights in Tanzania drawing relevant examples from laws of various jurisdictions with regard to corporate insolvency and how employee's rights are treated in such a situation.

As a matter of practice in Tanzania employees have been facing problems to acquire their rights and interest from an insolvent company and worse the Employment and Labour Relations Act does not provide a general statutory protection of employees in this situation for there are no specific provisions in the labour laws that provides for employees' protection in this circumstance. Likewise, the Companies Act does not give a paramount consideration to rights of employees when a company undergoes insolvency for the law is not adequate to prevent an employer from putting employee's accrued entitlements at risk.

The findings and analysis of this research have revealed that if employees' rights are not clearly stipulated in the labor laws, then it will be hard for the affected employees

MEANING OF INSOLVENCY

Section 219 of the Companies Act provides that the commonly held view about corporate insolvency is based on the simple notion of a company not being able to pay it's debts. The legal definition goes beyond the common view in order to take into account other possible causes that may render a company insolvent or force it to be wound up. The different circumstances of corporate insolvency are defined as follows:

Commercial Insolvency

It's a kind of insolvency that happens where a corporation becomes un able to pay its debts this is provided under section 168 of the Companies Ordinance, where the overall assets position of the corporation may not be in liability, but its cash flow may be so strained as not to allow it to pay its way. The poor cash flow may be attributable to inefficient asset management with the consequent mismatch between the term maturities of the company's investments and its liabilities.

Balance Sheet Insolvency

It's a kind of insolvency that happens when the assets value of the company are lower than debts owed to it. The corporation may yet be a going concern by reason of its future income streams and the capacity of its assets to sustain profitable operations. It is also likely that if the assets of the corporation were realized there would be sufficient funds to pay creditors and remain with a surplus.

Ultimate Insolvency

It refers to the final position when the corporation's assets have been sold and the proceeds are not sufficient to pay the creditors in full. This may be the case even where the corporation appeared to be solvent at the start of the liquidation and it can also happen in circumstances of forced sale.

These definitions are interested in the protection of the interest of creditors and employees when the public corporations are liquidated for reasons of insolvency of their employer.

LIQUIDATION

A corporation can end its existence and have its assets managed for the benefit of its shareholders and creditors through the process of liquidation. In this instance, insolvency and winding up are interchangeable terms, with liquidation or winding up beginning with either a court order, which is considered forced liquidation, or by the members approving a resolution to wind up, which is considered voluntary liquidation. This was also seen in the case of *China Chang Group Limi*ted in this case the petitioner China Chang Group limited company petitioned before the court of law for the purpose of petitioning for their company to be wound up according to section 279 and 280 of the Companies Act of Tanzania the case was before the High Court of Tanzania Commercial division at Dar es salaam. The court held that since there was no any objection filed the company prayer of being wound up was granted. Leonard Clement Mususa vs. Attorney General and another a case of (2000) T.L.R181It was held that ‘’appointment of a receiver does not alter the tax liabilities of the company however the appointment of a receiver does determine which tax are to be considered preferential and which are not considered to be preferential’’

A firm is liquidated in order to be shut down and its assets distributed to claimants. It is a problem that frequently occurs when a company goes bankrupt or is unable to fulfil its obligations on time. When the company's activities are terminated, the leftover assets are used to pay creditors and shareholders in the order of their claims. The sale of inferior goods for less money than they cost the business or less money than what the business wishes to receive for them is often referred to as “liquidation”. Most businesses fail due to bankruptcy or poor business performance. This is a strategic decision made to exit a failing business or assert. Land, building, property, machinery, furniture, vehicle, equipment, tools, or inventory could all be asserted. Where these assets fail to provide sufficient returns to cover business expenses, the company is liquidated. Winding down is done to reduce losses. To handle the dissolution professionally, a liquidator or insolvency practitioner is employed. After that, the liquidator sells corporate assets on the open market to generate funds. This directly compensates creditors and lenders, and liquidators charge fees for services provided. In the liquidation process, the major claim settlement sequence is secured, unsecured, and stakeholders.

RECEIVERSHIP

Receivership is a phrase used to describe a formal legal situation of an insolvent debtor in which a third party known as a receiver is appointed over assets of the insolvent debtor in order to realise the asserts or manage the insolvent debtor's business for the benefit of a secured creditor. This is a court-ordered procedure that can aid in the recovery of funds lost to defaults and assist struggling companies in avoiding bankruptcy. The receivership process makes it simpler for the lender to recover money owing to them in the event that a borrower defaults on a loan. This might also happen during a company's restructuring process, which is carried out to bring the business back into profitability. In the event of a shareholder dispute, a receivership may also be used to complete a project, liquidate assets, or sell a firm. In this instance, the court appoints an objective receiver or trustee to supervise all aspects of the operations of a failing corporation. The key thing to keep in mind is that a receivership and bankruptcy are not the same thing, nor are they mutually exclusive; they can both happen at the same time, or a receivership can happen without a company being bankrupt. The responsibility of a receiver or trustee is to oversee all financial and operational decisions as well as all of the company's claims. The receivership is in effect, and the company's principals continue to be substantial donors, but their authority is constrained. A receivership was traditionally meant to assist creditors in recovering payments owed under a secured loan (in the event that a borrower defaulted on its loan payment). This is one of the most effective methods for protecting creditors.

Types of appointing receiver

In the process of a receivership there is two types of appointments, whereas the appointment of a receiver can be done in the court of law this is what so called Court appointed receiver and the privately appointed receiver.

Privately Appointed Receiver

Privately Appointed Receiver, often occurs when a debtor obtains a loan from a creditor, such as a bank. In this case, the debtor enters a security agreement with the creditor (the bank) (the Bank). As a result, the bank becomes a secured creditor, and the loan becomes a secured loan. As a result, the secured creditor may include the authority to appoint a Receiver in this security

arrangement if the debtor defaults. In this instance, receivership becomes a remedy available to secured creditors to recover monies owed under a secured loan if the debtor fails to make loan payments. Thus, when such an event occurs, the appointment is referred to as a privately appointed receiver. Similarly, in this case, the appointed receiver will normally only act on behalf of the secured creditor who hired them and will only realise on assets specifically specified by the secured loan agreement.

Court Appointed Receiver

This is done by an application made by the secured creditor or a receiver is appointed by the court of law, which implies that the receiver is appointed during the court procedure. The power and rights of a Court Appointed Receiver are specified in the Court order that appoints them, and they are officers of the court during this procedure. This also happens in complicated circumstances where there may be differences among creditors or between creditors and debtors, or where there is an expectation of a fight from the start. The court-appointed receiver is a court officer who is responsible to all of the debtor's creditors. This means that it functions on behalf of all creditors and takes commands and instructions from the court rather than the creditor who first requested its appointment.

BANKRUPTCY

It is legal to liquidate a company or the assets it owns if the owner is unable to settle all of their debts with their present assets. Insolvent debtors can declare bankruptcy either voluntarily (called self-inflicted bankruptcy) or involuntarily (called court-ordered bankruptcy), both of which are possible.

By eliminating debts that are just unaffordable, bankruptcy enables an individual or organisation to start fresh. However, depending on the available assets, creditors may still be entitled to some kind of reimbursement. In theory, the option to file for bankruptcy can boost an economy by giving people a second chance and giving creditors some form of debt repayment.

CREDITORS

Means present, future and contingent creditors it is categorized into two parts which are secured and unsecured creditors. Secured creditors these are those creditors who holds a security in respect of a certain debt sometimes it may be in respect of a certain obligation which is owed to him or her while unsecured creditors these are creditors who do not hold any security when there is any default in any debt.

EMPLOYER

An employer is a person who hires people to perform services for pay and has control over the manner and means by which the employee performs those services. Section 4 of the Employment and Labour Relations Act defines an employer to mean any person including the government and executive agency who employs an employee.

COMPANY

A company is defined in a case of *Solomon V. Solomon*as a separate legal entity where a company becomes a legal person distinct from its members. It is not always advantageous for a company to be a separate legal entity from its members. For instance, even if a trader holds the

majority of the shares, he will no longer have an insurable interest in the assets of the company if he sells it to a corporation.

This was well illustrated in the case of *Macaura V. Northern Assurance* this instance, the plaintiff was a one-man operation who owned a wood estate and created a limited corporation to whom he sold the timber estate. Before selling the estate to the company, he had insured it in his own name; however, after the company was sold, he neglected to transfer the insurance coverage to the new owner, and the estate was completely destroyed by fire. As the damaged assets belonged to a different party, the company, and the plaintiff had an insurable interest in the company's assets as a shareholder, it was found that the plaintiff was unable to file a claim under the policy.

INSOLVENCY OF A COMPANY IN TANZANIA

All Tanzanian corporations are subject to local insolvency law. Tanzanian corporate insolvency legislation is primarily found in the Companies Act, 2002, which applies to Tanzanian-incorporated companies, and is modified by the Insolvency Regulations, 2005. Under Tanzanian law, corporate insolvency remedies include receiver and manager, administrative receiver, voluntary arrangement, schemes of arrangement, administration, and court-ordered wound up.

THE BASIC PRINCIPLES OF THE LAW OF INSOLVENCY

The primary aim of the Law of Insolvency is to protect the rights of employees and guide them on what they should do if their employer undergoes insolvency for it always comes suddenly and often too frequently, also protect employees' against unlawful dismissal or termination as a result of insolvency of their employer since employees are the life bond of the company. The following are basic principles that cover the law of insolvency:

Protection of Employees' Rights in the Event of Insolvency of the Employer

In the case of company closures due to insolvency, the Insolvency Directives require Member States to guarantee payment of employees' outstanding claims for at least the three months preceding the commencement of the employer's insolvency. As a result, it is up to the member states to decide which institution is accountable for this guarantee example. The guarantee institution in Germany is the Germany Federal Office, which grants employees' insolvency guarantee payments derived from employer contributions.

In practise, the insolvency guarantee payment is frequently used to maintain production during the time between filing for insolvency proceedings and obtaining a well-regulated liquidation. The employer's claim to wages should be given precedence if an insolvency procedure is initiated over the employer's assets. After legal fees and administrative expenses, overdue salaries for the six months prior to the start of the insolvency case rank highest during the insolvency procedures.

The employment office guarantees compensation for unpaid salaries from three months prior to the start of the insolvency proceedings. The same assurance applies to worker claims if the insolvency procedure is refused because the employer has not left enough assets to make such a proceeding profitable. In a situation where there is a group of companies the rule in the case of *Solomon V. Solomon and Co. Ltd* to imply that businesses within a group are each independent legal entities, and that businesses within a group are not liable if another business within the group declares insolvency or liquidation and makes a claim for compensation on behalf of its workers.

HISTORICAL BACKGROUND OF INSOLVENCY LAW

The history of insolvency Law was emerged from 14th Century in Europe and United State whereas the application of insolvency Law was started. The development of the insolvency Law can be categorized into various groups which is the international development of the insolvency Law, Regional development of insolvency Law and Sub regional and domestic development of the Insolvency law.

International Insolvency Law

The concept of the Law of insolvency was emerged in Europe and in United Sate during the 14th Century whereas the application of the concept which related to insolvency was applied by the international Lawyers and the application of different international insolvency theory including International Insolvency Theory of Territorialism and the theory of the Universalism Since the 14th century, when insolvency law first appeared, various attempts have been made to develop a consistent approach to handling international insolvency. The International Bar Association, the World Bank, and the International Monetary Fund (IMF) used their influence and power to propose the Unified Insolvency Mechanism at the international level, but the majority of the state chose not to adopt them out of concern that foreign courts would treat domestic debtors unfairly. This was also adopted in the majority of the state. The enactment of the US Bankruptcy c ode of 1978 caused the development of the international insolvency due to the increase in corporate globalization and international insolvencies, these was emerged after the US congress to adopt Chapter 15 of the code which replaced section 304 which created the effort to unify international insolvency law by requiring US courts to communicate and

cooperate with foreign insolvency courts to avoid unnecessary adjudication and application of foreign laws.

Insolvency under the Roman law (Italy)

In Aristotle's Constitution of the Athenians, which outlines the political structure of ancient Athens over several centuries, debtors who were unable to pay were compelled to give their land to their creditors and enslave themselves to work the land on their behalf. Only one-sixth of the produce was necessary to pay off the creditors' debts.

The use of zeal in the sixth century B.C. led to widespread debt slavery. In response, the Athenian Legislator Solon passed the Seisachtheia Laws, which retroactively fed all chained debtors and promptly annulled any unpaid debt. They also restored all seized property to the original owners. The law forbade using someone is freedom as a form of debt collateral.
The Roman Law of Insolvency and Bankruptcy evolved gradually throughout the Roman Republic and Empire until it was ultimately codified in the Corpus juris Civilis issued by Justinian in 530.

United State insolvency

The history of the development of the insolvency law in the United State was started on the 14th Century whereas the enactment and different reform of the insolvency law was passed in the United States for the example on 1800 the US congress passed the first Federal Law relating to bankruptcy called the Bankruptcy Act of 1800, during that period until the late 1978's reforms the United State congress passed different amendment and different reforms of insolvency and Bankruptcy laws.

The concept of the insolvency Law was starting to develop on the year of 1800s, whereas the Enactment of the Bankruptcy Law was passed by the US congress. The Act of the Bankruptcy Insolvency Law was the first U.S Federal insolvency law which adopted it is root from the position of English. US congress also passed another Bankruptcy Law called Bankruptcy Act of 1841 after the financial panic in US. At this time debtor were allowed to file their own voluntary bankruptcies without to institute it, this Bankruptcy law allowed this for the first time in US.

Prior to the 1970s, the United Nations made few efforts to develop a single method for dealing with insolvency in the United States. Additionally, the rise of corporate globalisation and international insolvency led to the enactment of section 304 of the US Bankruptcy Code (the code) in 1978

The history of insolvency law in East Arica

Kenya, Uganda, and Tanzania have a long history of working together under various regional integration agreements. This cooperation caused to the creation of the East Africa Community which was established on 1967- 1977 and 2000 up to date. The East Africa Community currently is comprised by seven countries which are Tanzania, Kenya, Uganda, Rwanda, Burundi, South Sudan and now the new member of the community the Democratic Republic of Congo (Congo DRC). These countries adopted insolvency law in their countries in a different time.

The history of Insolvency Law in Kenya

Prior to the implementation of the Insolvency Act of 2015, Insolvency law in the United Republic of Kenya was controlled by the Companies Act, Cap. 486 of the Law of Kenya, and the Bankruptcy Act, Cap. 53 of the Law of Kenya. In contrast to the latter provisions, which explained the process to be followed in the case of personal insolvency or bankruptcy, the earlier clauses described the steps to be taken in the case of corporate insolvency. Prior to the passage of the Insolvency Act, insolvency law was referred to as the "kiss of death" since a corporate body would often be dissolved and an individual who was found to have committed an act of bankruptcy would be declared bankrupt by a court with appropriate authority. This reality was articulated in *jambo biscuits v. Barclays Bank (2002)* in 2015 the Act of Insolvency in Kenya was enacted, closely modelled up on the UK insolvency Act of 1986. This Act latter optimizes the rescue culture in Kenya.

Insolvency law in Uganda

The Republic of Uganda adheres to the legal system of English common law, tradition, and the doctrine of equity; additionally, the Judicature Act of Uganda specifies the laws that apply in Uganda, which include written laws, common laws (precedent from decided cases), the doctrine of equity, and any established and current customs and usage. According to this factor Uganda adopted insolvency law from English whereas there is a formal restructuring procedure

of insolvency and informal insolvency or restructuring procedures. In Uganda, formal insolvency procedures include bankruptcy, liquidation, and receivership. The bankruptcy provides an official statement of the company's inability to pay its debts. The liquidation can be initiated by the court, by the firm or its directors, or under the supervision of the court. Also in Uganda the informal insolvency procedures or restructuring procedures is not provided in the law but the parties themselves may opt to avoid mitigating the consequences of insolvency, this may include the government bail Out and compromise or arrangement.

Insolvency law in the Republic of Rwanda

Republic of Rwanda is among the member of the East Africa Community whereas the legal system of this country is a mixed legal system. It sa hybrid country in its legal system it does use a common law legal system and a civil law legal system in economic matters. Insolvency law in Rwanda is governed by the civil law which regulates economic matters which does a great work of governing insolvency matters. The law of insolvency in Rwanda was enacted on the year 2009. In this law Article 1 of the Act does provide the meaning of the term insolvency.

The history of Insolvency Law in the United Republic of Tanzania

The history of insolvency law in Tanzania can be traced back to the British colonial administration's application of laws to colonial Tanganyika (Tanzania). The Indian Companies Act of 1913 is a copy of the English Companies (Consolidation) Act of 1908 was among the Laws that were made applicable to Tanzania from India. The Bankruptcy Ordinance of 1930, which is now known as the Bankruptcy Act, and the Companies Ordinance of 1932, which superseded the pertinent legislation made applicable in Tanzania from India, respectively, prevented the implementation of this Act's provisions regarding corporate insolvency. Also The English Companies Act of 1929 and the English Bankruptcy Act of 1914 served as models for the Companies Ordinance of 1932 and the Bankruptcy Ordinance of 1930, respectively. Whatever the case, Tanzania's primary insolvency laws, the Companies Act of 1932 and the Bankruptcy Act of 1930 , did not provide distinct and comprehensive insolvency legislation for corporations and natural persons acting on their own. In Tanzania, the Companies Act of 2002 and the Bankruptcy Act jointly allow for and govern insolvency processes.

TYPES OF INSOLVENCY LAW

The term insolvency is categorized in two types which are Individual insolvency and corporate insolvency Law. In individual insolvency it covers an individual person not able to pay debts owed to him or her while the corporate insolvency addresses corporate.

Individual Insolvency

Individual insolvency Law is a body of law which regulates the liability of an individual person to pay debts owed to him or her. The framework of this phenomena or the rationale behind is to prevent creditors from harming debtors in order to prevent them from racing to recover back their properties due to this it leads to insolvency resolution. And leads the business practitioners to enter into business with honour and when the business fails to be handled then to return with honour. It leads to higher returns by promoting availability of income of the creditors. It does not take a way future income of the debtor after fresh or earned start and hereby does not undermine incentive to work. It decreases the debtor a burden of debt and does insolate little assets of the debtor it also increases the prospects of realization for creditors it does ensure fairness and equity. In Tanzania individual insolvency in case there is any defect of an individual there were two remedies granted to the creditor which are remedy befalling the person and remedy befalling his property.

Corporate Insolvency Law

Corporate insolvency law is a set of legislation that governs a business that is unable to pay its obligations when they become due. The procedure through which the assets are classified, gathered, and realised by the company's creditors is described below. Also it provides the mechanism of collective execution of the debtors asserts by the creditors whose rights are established, the law of Corporate Insolvency in doing so, it has been fulfilling the objectives which include but not limited to the following, first, to safeguard business affairs of the company wherever possible, This can be done through application of rescue mechanisms such as scheme of arrangement and administration, Secondly is to improve personal liabilities and other sanctions in cases where the principle of limited liability has been abused. In India, the term Corporate Insolvency or winding up of a company has been provided under the Companies Act of 1956. In England corporate insolvency law has undergone two period of

reform. The first, in 1986, provides the frame work for the modern corporate insolvency law. The second, in 2002, may have had slightly higher ambitions for law reform in action than was eventually fulfilled. There is now another period of widespread reflection and debate, not only in the UK but also in Europe and the United States, as jurisdictions consider whether their insolvency law and procedures are fit for the twenty-first century; thus, Corporate Insolvency law is closely related to Business Associations law (BA).

Corporate insolvency Law in India

The Companies Act of 1956 introduced the idea of corporate insolvency or winding up a corporation in India. The 1957 Industrial Companies Act was the first piece of law passed following the Companies Act of 1956, although it did not include all business kinds. This led several Indian authorities to create various rules pertaining to insolvency processes, which likewise did not address the issue of debt collection. Even the Reserve Bank of India (RBI) released a resolution plan in which bankrupt businesses and creditors agree to discuss resolution conditions. This helped prepare the way for the Insolvency and Bankruptcy Code, 2016 (IBC2016), which significantly altered India's insolvency law. Therefore, the advent of (IBC 2016) in India resulted in radically altering how insolvency procedures with a firm are conducted.

Corporate Insolvency Law in England

In England, corporate insolvency law has experienced two key revisions, the first of which occurred in 1986 and established the structure for modern corporate insolvency law. The second, in 2002, may have had slightly higher ambitions for law reform in action than was eventually fulfilled. For that incident, there is now another phase of widespread reflection and debate in the UK, as well as in Europe and the United States, as jurisdictions assess whether their insolvency laws and procedures are fit for the twenty-first century. After the COVID 19 pandemic in England in 2020, a new reform of corporate insolvency legislation included new procedures and measures to try to rescue companies in financial difficulties as a result of the COVID 19, the new Act was known as the Corporate Insolvency and Governance Act (CIGA) of 2020.

Following a swift passage through Parliament following the publication of draughts legislation in May, CIGA became effective in England on June 26, 2020. The English government's

reaction to the COVID19 crisis was CIGA, which changed the previously perceived as creditor-friendly English restructuring and bankruptcy legislation in a number of debtor-friendly ways The Act also contains a number of temporary measures intended to lessen the number of businesses that go through restructuring or insolvency procedures as well as to lessen the impact of the insolvency regime on the duties of directors whose businesses are experiencing difficulties as a result of the COVID19 crisis.

Procedures of Corporate insolvency

The issue of corporate Insolvency can be classified in to five procedures, which are the Company voluntary arrangements, Administration, liquidation, receivership and Scheme of arrangement, here, the basic fundamental functions which are provided under the Scheme of arrangement, administration and company voluntary arrangement is to rescue business affairs of the company, while under the liquidation and receivership, the vital role is debts collection and full payment company's creditors. These procedures are very important in case of the companies or corporate insolvency.

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