

A CRITIQUE OF VOLUNTARY OR DEBTOR INITIATED BANKRUPTCY ADJUDICATORY PROCESS AND THE NEED FOR LEGISLATIVE REFORMATION IN NIGERIA *

Abstract

This work will present a critique of the defect inherent in debtor initiated Bankruptcy adjudication as provided for in the Bankruptcy Act of Nigeria and will suggest remedies especially with regard to the use of same as an engine of fraud.

Definitions

The term “Bankruptcy” has been seen as a proceeding by which the State takes over possession of the properties of a debtor by an officer appointed for that purpose and such property is realized and subject to certain priorities distributed ratably among persons to whom the debtor owes money or has incurred pecuniary liabilities”.¹ In the words of Sir Livingstone Njemanze, it is:

A legal procedure designed to extricate an insolvent debtor from financial burden by distributing his available estate among his creditors equitably.²

Bankruptcy is a process where people who cannot pay their debts give up their assets and control of their finances, either by agreement or court order; in exchange for protection from legal action by their creditors. Bankruptcy proceedings usually involves the court of competent jurisdiction appointing an officer to take over the debtor’s assets, realizing them and distributing the proceeds thereof rateably among his creditors to the extent that the assets permit and subject to existing priorities.³ To A.U.G. Ojinta it is:

A process whereby the property of a debtor who is unable to settle his debts are administered so that all his creditors will be fairly treated in relation to the debts he owes them and the debtor himself will be set free from the burden of the said debt.⁴

Bankruptcy law, thus, provides for the development of a plan that allows a debtor, who is unable to pay his debts to his creditors, to resolve his debts, through the division of his assets among his creditors⁵. According to Black’s Law Dictionary, it is:

A statutory, procedure by which a debtor obtains financial relief and undergoes a judicially supervised reorganization or liquidation of the debtors assets for the benefit of creditors⁶.

As a proceeding, bankruptcy focuses on the statutory, common law and estate law procedures, steps or means of relatively and compulsorily managing and distributing the available assets of

* **Dr. Uwadineke C. Kalu**, LL. B (Hons). LL. M, Ph. D, B. L., Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka Anambra State, Nigeria

¹ See Halsbury’s Laws of England (3rd ed.) Vol. 2 p. 250; Akinyelure, P.A.O., **Executors, Trusteeship and Bankruptcy Law and Accounts** (Lagos, Allover & Associates, 2001) p. 155

² Njemanze L.O., **Understanding Bankruptcy, Executors and Trusteeship Law and Accounts** (Enugu, Rhyce Kerex Publishers, 2003) p. 1

³ A.R. Ayeni, **Bankruptcy, Liquidation, Executors and Trusteeship Law and Account** (Ado-Ekiti, Princtech Press Ltd, 2003) p.1

⁴ Ojinta, A.U.G. **Introduction to Bankruptcy, Trusts and Executors** (Enugu, Immaculate Publishers, 1999) p. 3

⁵ **Osborn’s Concise Law Dictionary** 9th ed. Sweet and Maxwell, 2001.

⁶ Bryan, A Garner **Black’s Law Dictionary**, 8th ed. (St. Paul, Minnesota, West Group Ltd 1999). Credit J.P. **Creditors Remedy** (Vancouver, Unitrend Industries Ltd, 1970) 37 described it as a procedure by which an insolvent debtor’s property is coercively brought under a judicial administration in the interest primarily of the creditors.

an indebted person to those he owes money while simultaneously releasing him from those pecuniary obligations. As a field or area of study, bankruptcy is that aspect of our law which captures the procedures, rules, and regulations, governing how an individual is adjudged bankrupt. In this case, it may be observed that a failure to settle a debt promptly may be due either to the debtor's lack of means to pay back his debts- or refusal to pay. His failure to pay can entail very serious consequences for those who have extended credit to him and it is thus quite essential for our law to make provision for adequate remedies which are capable of affording the creditors as high a degree of protection as possible. The love of money is the root of all evil, they say. It follows then that the enjoyment of credit is the root of all bankruptcy. With the increasing commercial activities and globalization on the heel of all, a law of bankruptcy to make provision for a state of insolvency which can unfortunately occur as a consequence of enjoyed credit by the debtor is called for. Bankruptcy may be seen as a legal status of an individual against whom an adjudication order has been made by a court primarily because of his inability to meet his financial liabilities⁷.

The term 'insolvency' is broader and contemplates other measures of dealing with the property of a debtor, who is unable to pay his debts; this can be by composition or voluntary assignment to avoid technical bankruptcy. Simply put, insolvency means the inability of a debtor to meet his obligations as they fall due." It depicts a situation where a person's liabilities exceed his assets resulting in his inability to meet his financial obligations as they become due. When a person is therefore unable to pay his debts or meet his other pecuniary liabilities as they fall due, such a person is said to be a victim of insolvency. It is the statutory indication of the debtor's inability to pay his creditors generally.⁸

Statutorily, insolvency can be defined thus:

"A person is deemed to be insolvent... who has either ceased to pay his debts in the ordinary course of business or cannot pay his debts as they become due whether he has committed an act of bankruptcy or not".⁹

Insolvency is a state of fact of not being able to pay back one's creditors their due debts or monetary advances or loans.

As stated earlier, the enjoyment of credit is the foundation of all bankruptcy actions and proceedings, credit takes two forms principally – loan credit and supply or sale credit. Loan credit is credit extended by payment of money to the debtor, or to a third party at the debtor's request, upon terms (express or implied) that the debtor is to make repayment. Supply credit is simply the deferment of the debtor's obligation to pay the price of goods or services supplied/rendered. Thus, loan credit involves repayment of an advance, while supply credit involves deferment of payment. By definition, every instance of credit is an instance of a debt, something owed.¹⁰ A 'debtor' according to Black's Law Dictionary is one who owes an obligation to another especially an obligation to pay money, a person who files a bankruptcy petition or against whom an involuntary petition is filed.¹¹ Correspondingly, the same Dictionary sees a creditor:

⁷ J.H. Thompson, **The Principles of Bankruptcy Law** (London, H. Foulks Lynch & Co. Ltd,1967) P. 1

⁸ P.A.O. Akinyelure, *Op.cit* p. 155.

⁹ See S. 62 (3), of the Sale of Goods Act, 1893. See **Afrotec Technical Services Nigeria Ltd v. MIA & Sons Ltd & Another** (2001) 1 MJSC 37 at 75 per Wali JSC.

¹⁰ E. Enefiok, **Law of Credit and Security in Nigeria** (Uyo, Golden Educational Publishers, 2000) pp. 3-4; See R.M. Goode; **Consumer Credit Legislations, Issue No. 43** London, Butterworths, 1994, para 431

¹¹ **Black's Law Dictionary** (*supra*) p. 411

as one to whom a debt is owed, one who gives credit for money or goods; a person or entity with a definite claim against another especially a claim that is capable of adjustment and liquidation; a person or entity having a claim against the debtor predating the order for relief concerning the debtor; one to whom an obligation is owed whether contractual or otherwise.¹²

A creditor thus simply denotes the man or person (entity) to whom money or other liabilities or obligation is due or is being owed. He is the person who must have been borrowed from by the debtor or to whom pecuniary or other liabilities has been incurred against to activate either the state of fact of insolvency or the state of law of bankruptcy. In **Nigerian Sugar Co. Ltd V. Mojec International Ltd**,¹³ the Court of Appeal defined a “debt” as:

a sum of money due by certain and express agreement; a specific sum of money owing to one person from another, including not only obligation of debtor to pay but right of creditor to receive and enforce payment; a fixed or certain obligation to pay money or some other valuable thing or things either in the present or in the future.¹⁴

Perception of Credit

The taking of credit or loan, prior to this time, was seen as symptomatic of poverty or lack. Its rationale or need most often arises from lack of means to pay on the spot or there and then, for goods and services. This lack of means or wherewithal resulted in the society of old, looking down on a debtor. In the 18th and 19th centuries, there existed moral prohibitions with regard to the principle of credit and dislike was expressed in moralistic terms/tones from the perspectives of the prosperous and wealthy viz-à-vis credit facility. Prof. Enefiok Essien, thus opines and I agree wholeheartedly that:

“A whole series of proverbs set the tone and reveal the attitudes: “Better to go to bed supperless than to rise in debt”. “He that borrows must pay again with shame and loss”. “Out of debt, out of danger”. “He who goes a-borrowing goes a-sorrowing”. “Neither a borrower nor a lender be; for a loan often loses both itself and friend, and borrowing dulls the edge of husbandry.”¹⁵ “Rags make paper, paper makes money, money make banks, banks make loans, loans make beggars, beggars make rags.”¹⁶ “The man who is once involved in debt remains a debtor all his life, exchanging, like a horse that has once been bridled, one rider for another¹⁷; thou canst not fly high with borrowed wings”¹⁸ “He that buildeth his house with other men’s money, is as one gathering stones for his sepulcher”¹⁹, even the Holy Bible also advises that “thou shalt lend unto many... but thou shalt not borrow”²⁰; probably because it is more blessed to

¹² *Ibid* p. 375

¹³ (2005) 17 WRN 71 at 98 per Ikongbeh, JCA

¹⁴ See U.C. Kalu, Esq. and N.B. Okpalaobi, (Mrs.) Jurisdictional Issues in Bankruptcy Adjudications in Nigeria”, **UNIZIK Law Journal**, vol. 6 No.1. 2007 p. 30 at 49

¹⁵ See generally E. Enefiok *Op.cit* p. 4 Shakespeare William (1564-1616) **Hamlet**, Act I Scene 3, 1600-1601

¹⁶ 18th Century, Proverb

¹⁷ Plutarich, “On Borrowing”, **Moralia**, 97

¹⁸ Thomas Fuller, **Gnomologia**, 1732

¹⁹ Ben Sira Old Testament, Ecclesiasticus 21; 8 c.190 BC

²⁰ The **Holy Bible, King James Version**, Nash ville; Thomas Nelson Publishers, Deuteronomy Chapter 15 Verse 6.

give than to receive”²¹ or/ and because just as “the rich ruleth over the poor... the borrower is servant to the lender.”²²

The above and many moral adjurations made the receipt of credit or loans unpalatable in the olden days. Debtors or borrowers then were seen as weaklings; feeble men who cannot farm or do meaningful jobs.²³ It is a celebration of poverty in pre-colonial times to be a debtor. Before the industrial revolution, “most of the borrowing and lending were between individuals who often had some pre-existing social or economic relationship, for example, as between neighbours or as between the inn keeper and his customers. Money-lending concerned nine-tenths of the population but was spasmodic, irregular, unorganized, a series of individual and sometimes surreptitious transactions between neighbours”²⁴. Is the above statement still true as to the perception of credit, lending or borrowing in today’s Nigeria? The answer to that question is negative as there has been a growing use of credit and this has caused a change of attitude towards its role and impact, and towards the credit system generally.

The prevailing perception of credit or loans is permissive adopting almost a lackadaisical stance. Permit me to state that credit is today the in thing even the wealthy and prosperous as well now seek credit to further business profitability and keep financially afloat. Large businesses or huge commercial concerns rely on credit or loans for any hope to make substantial profits. The giving and taking of credit today is no longer repulsive or reproached. People these days freely seek credit for purposes that are multifarious. Some of the reasons why people solicit credit are to use in daily sustenance of life, family business, erecting a house or acquiring stocks, shares and other properties. Credit taking is no longer seen as an indicator of poverty meaning that the societal perception and attitude is gradually changing. In the words of Darling M. L. it remains indeed one of the complexities of the subject that debt may be as much an indicator of prosperity as of poverty.”²⁵

Prof. Essien supportively asserts that;

It can however not be said conclusively that debt, or obtaining credit is per se an index of poverty.... In fact, with perhaps a few exceptions it can be said that debtors who are able to provide security for their debts are anything but poor. The provision of security for debt negatives any inference of poverty. Besides, the borrowing may be as a result of unforeseen occurrences like accident, loss, etc; or such loan may be for the purpose of investment which the debtor wants to embark upon without exhausting the personal savings which he has put aside for a rainy day or for some other purpose.”²⁶

He continued:

It is significant that there has been a growing use of credit and this has caused a change of attitude towards its role and impact and towards the credit system

²¹ *Ibid.*, Acts, Chapter 20 Verse 35

²² *Ibid.*, Proverbs, Chapter 22 verse 7

²³ See the character of Unoka, Okonkwo’s Father in C. Achebe’s **Things Fall Apart**, a novel that partly celebrated Igbo History and social life in pre-colonial times.

²⁴ E. Enefiok *op. cit.* p.5

²⁵ M.L. Darling, **The Punjab Peasant in Property and Debt** 4th edn. (New Delhi, Manohar, 1977), p. 50

²⁶ Essien Enefiok, *op. cit.* p. 5 See also Ford J.; **The Indebted Society**, (London, Routledge, 1988) pp. 12-13. In the Financial mail of Sunday, November 2, 1997 pp. 36-37 Barbara Taylor Bradford, world-renowned novelist stated that “it would be silly not to borrow.

generally.... Today... the structure and use of the credit system is better characterized as continuous, regular, organized, a series of increasingly impersonal, often mere formal transact between individuals and institutions. Individuals have also changed their views of credit as a system for the poor and there has been in some cases an attempt to conceal or neutralize any potential stigma by substituting the world, trust for 'credit'....

Today, credits are openly sought, freely given and securities overtly provided. In fact, granting credit has become an important avenue of profit, it is now recognized as one of the important developments that have provided capitalist organizations with the means to maintain and increase their sales and profitability. Borrowing and provision of security has indeed become fashionable.²⁷

The United States of America and the United Kingdom are noted for the elevation of the credit card system to a height hitherto unheard of. It is now status enhancing, a status symbol sort of, to flaunt one's credit cards or cheque guarantee cards as a sign of one's credit worthiness. That one has been or can be given credit is highly regarded. Banks even attract bonus loans from their credit worthy customers by using the credit system.²⁸

Having thus seen that people now readily accept credit, in prosperity or in adversity/austerity, as the theme of this article shows where such credit obtained is wasted or mismanaged by the borrower, will voluntary or debtor-initiated bankruptcy not serve as a leeway for such a person to, disclaim his debts as escape liability and unduly punish his creditors? Is it equitable that for enjoyed credit or loan, what a creditor gets is an invitation to court to prove for debts in bankruptcy? Why should those who enjoy credit be given an opportunity to self-induce its non-satisfaction through the bankruptcy process? Is the Bankruptcy Act not being used as an engine of fraud in this regard? In view of the *maxim ex turpi causa non oritur actio*, should the debtor who initiates bankruptcy proceedings against himself not be guilty of taking advantage of his own wrong doing where it is shown that he was negligent, reckless and extravagant in the use of advanced or obtained credit? Unraveling or answering the foregoing questions will occupy our minds as we ruminate on or criticize the concept of voluntary or debtor initiated bankruptcy in Nigeria.

Legal Framework for Voluntary or Debtor-Initiated Bankruptcy in Nigeria

Certain salient provisions of the Bankruptcy Act²⁹, and the provisions of the Bankruptcy Rules, Subsidiary Instrument No. 8 of 1990 made pursuant to sections. 15 (2), 34, 110 and 111 of the Bankruptcy Act aforesaid and which regulation first became operative on 25th September, 1990 allow the debtor to initiate, induce or maintain bankruptcy proceedings against himself even when no proper examination or scrutiny is made on how the fact of insolvency came about in the first place. This article posits that a debtor should not be permitted or allowed by law to file a bankruptcy petition or action against himself given the possibility or likelihood of fraud against creditors on the part of an unethical, greedy or cunning, shrewd, crafty or incorrigible debtor. It portends or affords an opportunity for fraud to thrive and forecloses or rubbishes the advantages or rationale of bankruptcy adjudications, albeit, the positive attributes or factors. Section 1(c) on Acts of Bankruptcy provides partly as follows:

²⁷ Essien *op. cit* pp. 5-6

²⁸ P.E Sayer, **Credit Cards and the Law; An introduction** (London, Fourmat Publishing, 1988) pp. 1-4. Adams, P., **Odious Debts;** (London, Toronto Earthsca, 1991) p. 89

²⁹ Chapter B2, LFN, 2004 (formerly Cap. 30 LFN, 1990)

A debtor commits an act of bankruptcy in each of the following cases:
(c) if he files in the court a declaration of his inability to pay his debts or present a bankruptcy petition against himself.

Section 3 provides that

.... if a debtor commits an act of bankruptcy the court may, on a bankruptcy petition being presented either by a creditor or by the debtor make an order in this act called a receiving order, for the protection of the estate.

Again, section 8(1) of the Act provides that

A debtor's petition shall allege that the debtor is unable to pay his debts, and the presentation thereof shall be deemed an act of bankruptcy without the previous filing by the debtor of any declaration of inability to pay his debts, and the court shall thereupon make the receiving order....

However, a debtor's petition shall not after presentation be withdrawn without the leave of the court.³⁰ The provision of section 9 of the Act is to the effect that

on the hearing of any creditor's or debtor's petition it shall be lawful for the Official Receiver to appear and to call, examine and cross examine any witness and, if he so thinks fit, to support or oppose the making of a receiving order.

Again, a look at Rules 15 and 16(1) of the Bankruptcy Rules, 1990 support the legality of a debtor initiated bankruptcy regime and even specify the form and manner it takes and what it must contain. Whereas Form 4 can be adopted from the Schedule to the Rules with reasonable modifications and variations in accordance with the circumstances of each case, a petition shall be dated, signed and witnessed. Rule 16(1) provides:

16(1) – Where a petition is presented by a debtor, he shall insert his name and description, his address and the date when the petition is presented, and an address at which he has resided or carried on business and at which he has incurred debts and liabilities remaining unpaid or unsatisfied at the date of the petition.

The foregoing provision is permissive and remains the anchor on which voluntary bankruptcy thrives or can be carried on under Nigerian law. Our task in the subsequent or succeeding pages of this work will be to show how an untruthful and fraudulent debtor can cheat, dupe or use to his advantage the provisions of the Act facilitative of Bankruptcy, to defeat the rationale or ultimate objective of bankruptcy adjudications. He can turn the Act into an engine of fraud which equity and the law abhor.

For example, what stops a fraudulent or dishonest debtor from disobeying the provisions of section 16 (1) of the Act on the requirements to be stated in the statement of affairs, where the debtor's ultimate goal is to be adjudged bankrupt upon his (debtor) own petition consequent

³⁰ See section 8(3) of the Bankruptcy Act, Cap. B2, LFN, 2004

upon his own declaration of inability to pay his debts or his presentation against himself, of a bankruptcy petition. His reward will be section 16(3) which provides that

If the debtor fails without reasonable excuse to comply with the requirements of this section, he may be punished for a contempt of court and the court, may, on the application of the Official Receiver or of any creditor, adjudge him bankrupt.³¹

In fact, section 16(1) and (2) of the Act provide as follows:

16(1) – where a receiving order is made against a debtor he shall make out and submit to the Official Receiver a statement of and in relation to his affairs in the prescribed form verified by affidavit.

- (a) showing the particulars of the debtor’s assets, debts and liabilities whether in Nigeria or elsewhere.
 - (b) showing the securities held by them respectively and the dates when the securities were respectively given.
 - (c) giving such further or other information as may be prescribed or as the Official Receiver may require, and,
 - (d) giving details of all property held by him in a name or under any alias, or by his wife or his children, or by any person in trust for him or them, with full particulars as to the manners and date of its being acquired.
- (2) The statement will be submitted within the following times, namely:
- (a) if the order is made on the petition of the debtor, within seven days from the date of the order.
 - (b) if the order is made on the petition of a creditor, within fourteen days from the date of the order. But the court may in either case for special reasons extend the time.

Rationale for Bankruptcy Adjudication

In the words of T.G. Ready

One of the tasks of a legal system has remained to provide a method whereby the estate of a person who becomes unable to pay his debts is administered so as to ensure its equitable distribution among his creditors, while the debtor himself is freed from the burden of the debts so that he can make a fresh start.³²

Predicated on the above, one can state that the objectives of bankruptcy adjudication are that

- It affords support or protection to the debtor from a multiplicity of debt recovery cases/suits from his creditors arising from his inability to repay or defray his debts to them individually. Adjudication in bankruptcy thus operates as a consolidation of many suits or litigations into one proceedings usually against a single person. The process remains cost efficient and functionally adaptable or pliable to substantial debt repayment over time than would have resulted from a multi-farious suits regime or a litigious scheme where creditors individually initiate debt recovery cases. Little wonder then that the Bankruptcy Act also stipulates that:

³¹ Section 16 (3) of the Bankruptcy Act, 2004 underlining mine for emphasis

³² T.G. Ready, **The Law Relating to Banking**, 2nd ed. P. 156 quoted in A.U.G. Ojinta, *op.cit* p. 3

...except as directed by the Act, no creditor to whom the debtor is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the debtor in respect of the debt, or shall commence any action or other legal proceedings³³ against such a debtor once bankruptcy proceedings has been initiated or commenced.

- Bankruptcy adjudication facilitates an inquiry, a probe or an incisive investigation in finding out or establishing the reasons or causes of the failure or insolvency of the debtor. It thus serves as a learning ground such that others who become aware of such reasons might be saved from getting into similar predicaments or from rashly incurring debts without the possibility of substantial foreseeable repayment.
- Bankruptcy adjudication frees or releases the debtor from his debts at the material point in time which then allows him to make a fresh start as soon as his discharge is approved or sanctioned by the court of adjudication.³⁴

Quintessentially, bankruptcy adjudication procures or secures a fair, equal and equitable distribution or sharing of the properties of a debtor amongst such a debtor's proven creditors. Here, all creditors who prove their debts or credit must partake in the distribution or sharing of the debtor's assets no matter how small or intangible it might be.

Challenges/Criticisms of Voluntary Bankruptcy

A. Debtor's Manipulation of the Process: It is beyond dispute that due to the obvious advantages which bankruptcy adjudication present, it also carries adverse consequences. However, a fraudulent debtor, desirous of escaping or being freed from his debts might manipulate the adjudicatory process into adjudging him bankrupt. Here, he enjoys the palliative or helpful incidents of bankruptcy adjudication and does not care about the punitive aspects. A crook will not care whether any of the provisions of Sections 126 and 127 of the Bankruptcy Act applies to him. Among the adverse consequences of adjudication include a debtor's (bankrupt's) disqualification from contesting and/or being elected into any political office or position of trust in Nigeria. Likewise, he cannot be appointed to or sit in the governing board of any statutory corporation or of a limited liability company. He cannot also be appointed as Justice of Peace, a trustee of a trust estate or allowed to practice any profession regulated by law. It is an offence for a bankrupt to put himself up for appointment or election or admission into any of the above offices or positions³⁵. He is again further required to furnish information as to his status as an undischarged bankrupt when entering into certain transactions with another person³⁶. In a voluntary bankruptcy scenario, the applicant is in the driving seat and it is simply his decision that matters. This decision can be out of greed or avarice, corruption, collusion or connivance/condonation for wrongdoing, or to take advantage corruptly of the scheme of arrangement provision or the application of a composition to a certain factual situation.

A debtor desirous of bankruptcy adjudication can feign insolvency. The former American Bankruptcy Act of 1898 (repealed by the Bankruptcy Reform Act of 1978) in Section 1 (19) provides that:

³³ See S. 10 (1) of the Bankruptcy Act, Cap B2, LFN, 2004.

³⁴ The competent court of adjudication is the Federal High Court See U.C. Kalu, & B.N. Okpalaobi Jurisdictional Issues in Bankruptcy Adjudications in Nigeria, *UNIZIK Law Journal*, Vol. 6 No. 1, 2007 p. 30 at 33-39

³⁵ See S. 128 of the Bankruptcy Act, Cap B2, LFN 2004.

³⁶ See S. 131 of the Bankruptcy Act, Cap. B2, LFN, 2004.

a person shall be deemed insolvent within the provisions of this Act whenever the aggregate of his property, exclusive of any property which he may have conveyed, transferred, concealed, or removed, or permitted to be concealed, removed with intent to defraud hinder or delay his creditors shall not at a fair valuation be sufficient in amount to pay his debts”³⁷

The indented portion shows that it is possible and practicable for a debtor to conceal, convey, remove or transfer his properties fraudulently with a view to his eventual adjudication. Such a manipulation has been criminalized even under the Bankruptcy Act here in Nigeria. It denotes that this position does and can exist as a debtor can easily manipulate the bankruptcy process thereby and file for bankruptcy protection to run away from defraying his debts lawfully and genuinely contracted thus operating a sabotage of the adjudicatory procedure and gravely abusing the entire process. To buttress or substantiate this point, Ezejiofor, Okonkwo and Ilegbune had asserted that:

Bankruptcy procedure is designed to provide relief to those who through no fault of their own are unable to meet their liabilities. The procedure, is, however, not intended to afford a refuge for the fraudulent.³⁸

In pursuance of the foregoing, the Act criminalizes acts or omissions such as where any person adjudged bankrupt or in respect of whose estate a receiving order has been made,

- (a) if, he does not to the best of his knowledge and belief fully and truly disclose to the trustee, all his property, real and personal, and how and to whom and for what consideration and when he disposed of any part thereof....
- (b) if he does not deliver up to the trustee, or as he directs, all such part of his movable property as is in his custody or under his control and which he is required by law to deliver up....
- (c) if, after the presentation of a bankruptcy petition by or against him or within twelve months next before such presentation, he conceals any part of his properties to the value of ₦50 or upwards or conceals any debt due to or from him, unless he proves that he had no intent to defraud.
- (d) if, after the presentation of a bankruptcy petition by or against him or within 12 months next before such presentation, he removes, conceals, destroys, mutilates, or falsifies or is privy to the removal, concealment, destruction, mutilation, or falsification of any book or document affecting or relating to his property or affairs...
- (e) if, after the presentation of a bankruptcy petition by or against him, or within twelve months next before such presentation he fraudulent parts with, alters, or makes any omission in, or is privy to the fraudulently parting with, altering or making any omission in, any document affecting or relating to his property or affairs.
- (f) if, within twelve months next before the presentation of a bankruptcy petition by or against him or after the presentation of a bankruptcy petition, he pawns, pledges or disposes of any property which he had obtained on credit and has not paid for.³⁹

³⁷ See S. 1 (19) of the now repealed American Bankruptcy Act of 1898 as amended in 1938 (underlining mine). The present code (1978) defines insolvent as the financial condition that exists when “the sum of the debtor’s debts is greater than all of the debtor’s property of fair valuation excluding fraudulently transferred and exempt property. “See S. 101 (31) A of that Code.

³⁸ G. Ezejiofor, C.O. Okonkwo, & C.U. Ilegbune, **Nigerian Business Law**, Sweet and Maxwell, London,1982. p. 450

³⁹ The above constitutes offences under S. 129 (1) of the Bankruptcy Act, 2004 and S. 140 (1) imposes the penalty of a fine of N200 or 2 years’ imprisonment or both in a summary trial

Sections 132 (1) of the Act incriminates inter alia, causing or conniving at the levying of any execution against the property of a bankrupt or a person against whom a receiving order has been made.⁴⁰

Sections 133 (1) stipulates that he is liable, if being a trader or engaged in any business, and having outstanding debts at the date of the receiving order, he has within 2 years prior to the presentation of the bankruptcy petition materially contributed to or increased the extent of his insolvency by gambling or by rash and hazardous speculations.⁴¹

The above specific offences under the Act criminalize the acts or omissions of a debtor or a bankrupt and show the extent to which a fraudulent mind could go in a bid to take the advantages of bankruptcy procedure to the detriment of the system. It stipulates or shows that a debtor can manipulate the adjudicatory process to suit his aims and aspirations.

The incidence of fraud, collusion, connivance or concealment agreements with or by a debtor is thus high in a voluntary bankruptcy regime than in a wholly creditor engineered or driven process since the rationale bankruptcy tilts more towards the repayment of creditors in advanced countries. A bankruptcy process that places the debtor in the seat of the bankruptcy ship as a sole captain is detrimental to the system and rubbishes the edifying content of adjudication. The existence of sections 129, 132, 133, and 134 of the Bankruptcy Act point inexorably to the fact that fraudulent people can beat the system, defeat the whole legal structure of adjudication and enjoy the benefits of bankruptcy relief at the expense of their creditors. This is unfortunate.

B. Taking Advantage of One's Wrongs/Transgression or Recklessness

Voluntary bankruptcy allows a debtor to take advantage of a situational setting willfully or consciously created or caused by him. This is contrary to the legal precept that a man cannot take advantage of his own wrongdoing. Given our finding that a debtor can manipulate the process leading to his ultimate adjudication, it is imperative that such a person be not allowed to take advantage of such transgressions. Voluntary bankruptcy thus provides a veritable avenue for a debtor to profit from a self-created situation or self-induced loss or precipitated business or transactional collapse.

In **Re Debtor No 612 of 1960**⁴², a bankrupt in his expensive *modus operandi* acquired a dormant company, the shares of which the Stock Exchange later suspended. He (the bankrupt) then sought a certificate that the bankruptcy was caused by "misfortune without any misconduct on his part" under Section 26(4) of the Bankruptcy Act, 1914. The Court of Appeal refused that application or certificate holding that

where a person deliberately placed himself in a position of vulnerability to insolvency should (the) shares become unmarketable due to action by the Stock Exchange... for a long period than his creditors would tolerate", his loss could not be said to be due to his own "misfortune".

What he did was thus wrong, self-induced, self-created and a conscious miscalculation which the bankrupt cannot be allowed to take advantage of. Voluntary bankruptcy does the same thing as it permits a debtor to file a petition, activating the bankruptcy jurisdiction of the Federal

⁴⁰ S. 132 (1) (d) of the Bankruptcy Act, 2004 prescribes N200 fine or one-year imprisonment for him

⁴¹ See S. 133(1) (a) of the Bankruptcy Act, 2004. See also S1. 134(1) of the Act.

⁴² (1964) 1 WLR 807

High Court based on facts peculiar to him; facts not capable of independent inquiry and verification. To consider a debtor's filing or petition that he is insolvent or incapable of repaying his debts as an act of bankruptcy, rubbishes the bankruptcy or adjudicatory process. Here, there seems or appears to be a tacit presumption of honesty in favour of a debtor filing for voluntary bankruptcy. It is upon such filing that a receiving order can then be made.⁴³ When the stage for both private and public examination of the debtor is still in future, then there is a serious lacunae in the law of bankruptcy adjudication. A debtor gets up and states what he likes and the whole legal system approbates. This should not be. He takes undue advantage of his wrongs without any opposition or legal impediments or checks. Recently, in the case of **Ibrahim v Fulani**⁴⁴, the Court of Appeal stated that:

The principle of law is that no one can take advantages from his own wrongs. In other words, a party, should not be allowed to benefit from their own wrong, if proved. The Latin maxim being *nullus commodum capere potest de injuria sua propria*.

Again in **Kish v. Taylor**,⁴⁵ Fletcher Moulton LJ opined that "A man may not take advantage of his own wrong. He may not plead in his own interest a self-created necessity". In **Green v. Green**⁴⁶, Hon. Justice Aniagolu JSC said:

As a matter of general principle of avoiding injustice and absurdity, a court would not allow a person to profit by his own wrong. A person may not create a crisis situation and turn round to plead the crisis in support of his interest.

Even the House of Lords (the Privy Council) had in **Buswell v. Godwin**⁴⁷ put the proposition that a man will not be allowed to take advantage of his own wrongdoing more forcefully and trenchantly and it said:

The proposition that a man will not be allowed to take advantage of his own wrong is no doubt a very salutary one and one which the court would wish to endorse.

In **Ibrahim v Osunde**⁴⁸, the Nigerian Supreme Court held that administrators of a will cannot give out trust property nor take advantage of their own wrongdoing. It rationalized that:

If S.E. Lawal had taken advantage of his position as an administrator of the estate of A.K. Ibrahim Goubadia, created an impression of legal ownership of any of the property subject matter of the administration in his favour such that his most senior son or any son or member of his family could now take advantage of it after his death, to acquire the property, that would be a serious wrongdoing. The time-honoured principle is that no one can or shall take advantage of his own wrong doing.

⁴³ See SS. 10 and 11 of the Bankruptcy Act, 2004

⁴⁴ (2009) 18 WRN 40 at 119 Per Sankey JCA

⁴⁵ (1911) 1 KB 625 at 634

⁴⁶ (2001) 45 WRN 90 at 138. See also **Civil Design Construction (Nig.) Ltd v SCOA (Nig) Ltd** (2007). All FWLR (pt. 363) 1 at 64; **Admorah v Ajufo** (1988) 3 NWLR (pt. 80) 1; (1988) 6 SCNJ 18; **Ajibade v Pedro** (1992) 5 NWLR (pt. 241) 257; (1992) 6 SCNJ 44.

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⁴⁸ (2009) 37 NCVQR 196 at 221 – 222 per Aderemi JSC

The maxim is *nullum commodum capere potest de injuria sua propria and ex turpi causa non oritur actio*.

It was further the Supreme Court's holding that:

It is wrong, in law, for an administrator of an estate or anybody claiming through him, to assimilate the property to his own. Equity will not even permit that under any guise. To say the least, it is gross abuse of office. Administrators or executors are trustees of the properties placed in their care, so to say, on trust to the beneficiaries. A heavy duty is placed on those in whom trust and confidence are reposed to show the righteousness of their transactions with the property entrusted to them. No ownership known to law can ever be conferred on an administrator in respect of the property subject matter of that administration. Such an administrator, the like of S.E. Lawal, cannot have possession of such a property which will ever have any legal blessings. So S.E. Lawal cannot, in the least, give out the possession of the property which never belonged to him, in law. The maxim is *nemo dat quod non habet*. Indeed, he gives nothing who has nothing. Again, the maxim is *nihil dat quod non habet*.⁴⁹

Voluntary bankruptcy allows the debtor to approach the throne of equity, hallowed and respected through the ages, with soiled or unclean hands. Succinctly restating the law, the Supreme Court had in **Ibrahim v Osunde**⁵⁰ asserted that

no polluted hand (shall) be allowed to touch the pure fountain of justice. One shall not have a right of action when one comes to a court of justice in (an) unclean manner.... The facts of this case reveal a clear case of 2nd Respondent taking, unconscientiously, advantage of his relationship with the estate.

Permit me to bring in a case of fraudulent concealment into this discourse as our premise has remained that such a concealment is possible and can be brought about by a fraudulent debtor to take undue advantage of the adjudicatory process. In the celebrated case of **Administrators/Executors of the Estate of General Sani Abacha (Deceased) v. Eke-Spiff & Others**⁵¹ the 1st Respondent was seized of a plot of land situated at No. 288 GRA, phase II, Diobu, Port Harcourt, Rivers State. Without giving 1st Respondent prior notice, the then Governor of Rivers State, Police Commissioner, Fidelis Oyakhilome, purported to revoke the 1st Respondent's building lease over the plot of land and proceeded to allocate the same plot to General Sani Abacha, the then Chief of Defence Staff. The General erected a multi-storied building on it without the 1st Respondent's knowledge or consent. The 1st Respondent made all these discoveries in 1996, by then General Abacha was the Head of State and the 1st Respondent had recovered from a protracted illness and returned to Port-Harcourt. The 1st Respondent, together with his daughter then sued the Military Administrator of Rivers State, the Attorney-General of Rivers State and the Appellant. The land was first granted to the 1st Respondent in 1975, and General Abacha's Certificate of Occupancy was dated March, 1987. The trial court gave judgement to the Respondents giving them back both land and building. The Administrators/Executors of General Abacha appealed. Others did not. It was part of the

⁴⁹ *Ibid* at P. 222

⁵⁰ *Op. cit* at pp. 222-223

⁵¹ (2003) 1 NWLR (pt. 800) 114 at 174

holding of the Trial Court that the Rivers State Limitation Edict⁵² did not apply as the cause of action arose in 1986 instead of 1996 as the Edict did not and cannot have retroactive effect. The Court rejected this, applying the English Statute of Limitation of 1623 (a statute of general application) as same was not pleaded in the joint statement of defence of the Defendants.

On appeal, Nsofor JCA, of the Court of Appeal held *inter alia*:

It is sufficient for me just to say that from the relationship that existed between the 1st Defendant and 1st Respondent, the conduct of the former was an unconscionable behaviour and in the circumstance amounted to “fraud in equity”. For the 1st defendant to take away the 1st Respondent’s plot No 288 Diobu, Phase II and to re-allocate or transfer same to the Appellant for the Appellants’ private purpose denoted a conduct by the 1st Defendant such as was against conscience for him to avail himself of lapse of time. It amounted in my respectful view to “robbing Peter to pay Paul” a conduct unconscionable, unwarrantable and unsupportable in a democratic society. Besides, the 1st Defendant revoked the interest of the 1st Respondent “knowingly” and did not tell him or give him a notice thereof. He did the wrong “secretly: by saying nothing he kept it secret”. He concealed the right of action of the 1st Respondent an unconscionable conduct – in such circumstance, it would be inequitable to allow him (1st Defendant) to rely on the lapse of time as bar to the action – I have no doubt in my mind that the 1st Respondent’s right of action was concealed and concealment is fraud in equity.... In my respectful view, the period of limitation under the 1623 Act would begin to run from the discovery of the fraudulent concealment of the respondents’ right of action. That was in 1996. The action having been brought in 1998, was in my judgment within the limitation Act/Statute of 1623. *Nullus commodum capere protest de injuria suapropria* meaning no one can take advantage of his own wrong doing.⁵³

3. Bankruptcy Act as an Engine of Fraud

Equity abhors a statute or law (legislation) or the provisions or stipulations of such enactment being used as engines of fraud. A Statute cannot therefore be used as an engine or facilitator of fraud. Given this universal truism, the Bankruptcy Act, seems or appear, to be doing just that if a cheat or a fraudster can adapt its provisions to suit his selfish or parochial interest. We have above stated the various ways a cheat could adapt the adjudicatory process to suit mundane personal and selfish permutations. Allowing the Bankruptcy Act, to remain the way it presently is, is an indirect way of permitting organized fraud on unsuspecting creditors who might have advanced credit to the debtor in good faith. Voluntary bankruptcy can thus facilitate the application of fraudulent acts on such creditors by a determined debtor desirous of beating the adjudicatory process. There is therefore, an urgent necessity to refocus our orientation vis-à-vis our bankruptcy legislations. Bankruptcy involves two parties – the debtor and the creditors. None should be allowed to take advantage of the other as the extant provisions of the Bankruptcy Act, are wont to do. In essence, the debtor should be effectively barred through legislative stipulations vide a timeous amendment, from presenting or filing a declaration of his inability to pay his debts, which can at the same time be relied upon as an available act of bankruptcy founding the Receiving Order in the adjudicatory process. To do otherwise, to leave the system/law as it presently is, is to operate the extant Bankruptcy Act in Nigeria, as an engine of fraud. The doctrines of equity and the principles of justice abhor this position and

⁵² No. 7 of 1988, Laws of Rivers State

⁵³ *Op. cit* at p. 174 Per Nsofor JCA

cry for its timeous rectification. Only creditors who feel aggrieved with a debtor should have the capacity or right to initiate bankruptcy actions in Nigeria at the Federal High Court. A debtor who does so becomes a part time prosecutor and the accused at the same time. He might, in the long run, have also been his own judge in fraudulent exercise of a right conferred on him under the Bankruptcy Act. Section 36 (1) and (4) of the 1999 constitution frown sternly at this monstrosity nay illegality. It should be legislatively discouraged and consigned to the dustbin of legislative history. The time to act is now.

Remedial Projections

There should be an immediate alteration or amendment of the extant Bankruptcy Act in Nigeria⁵⁴ to remove the permission presently given debtors, to present or file bankruptcy petitions against themselves. All provisions of the Act and the Subsidiary Rules facilitative or permissive of voluntary or debtor initiated bankruptcy regime in Nigeria should be amended to reflect a zero tolerance posture for debtor bankruptcy initiation in Nigeria. Only creditors should be given the legislative right and conferred with capacity to present bankruptcy petitions against debtors as the debtors have in the past, compromised and committed frauds given their powers to initiate bankruptcy. Section 1 (on acts of bankruptcy), section 2 (on bankruptcy notice) sections, 3,7,8,10,11, etc of the Act should all be amended to reflect the writers views in the foregoing pages.

The apparent presumption of honesty in favour of a debtor who files or presents a petition against himself should be removed for all times by legislatively outlawing voluntary bankruptcy. A system of recording creditor discontent with a debtor should be institutionalized. Such debtors should be protected only to the extent that creditors present their proof of debts to an Office or Government Agency to be charged with this responsibility. To this end, I recommend the immediate establishment or creation of a Bankruptcy Accountability and Verifications Agency at the Federal level with its state counterparts. This Agency (BAVA) should investigate all cases or reports of bankruptcy or insolvencies by creditors and render an opinion on the accuracy, practicability or otherwise of the bankruptcy option on a particular debtor. It should act within a stipulated time frame, say one month and it must be truly independent and impartial.

The Agency should again carry out the private examination of the debtor just like a commission of inquiry before the filing of a creditors petition to adjudge the debtor bankrupt. It is only where the Agency gives a nod of approval, that creditors can file petitions against their debtors. Through the legislation overdue for amendment, the functions and powers of this Agency should be well-spelt out and streamlined. A time frame, say 3 months – 6 months, should be set for its activities in order not to stultify the Bankruptcy process through undue bureaucratic intervention or posturing, the proceedings before the agency must be sent to the Federal High Court when the matter gets there.

All the sections of the Act, facilitative of fraudulent understanding and permissiveness should be amended. Bankruptcy offences should be streamlined and reasonable penalties prescribed for their transgressions. Our bankruptcy or adjudicatory system should borrow a leaf from Western Jurisdictions, where bankruptcy practice have moved or shifted away from shielding a debtor to affording reasonable recompense to creditors whose debts in the first place founds the bankruptcy process.

⁵⁴ Chapter B2, LFN, 2004

As a piece of legislation, the Bankruptcy Act should no longer be the engine of fraud it presently is, if the role of the debtor in both the inception and practice of bankruptcy and insolvency and its adjudication/administration is drastically minimized or if possible, eliminated outrightly.

Conclusion

Bankruptcy laws were enacted to provide and govern an orderly and equitable liquidation of the estates of insolvent debtors. This purpose has remained an important aim of bankruptcy legislation since the middle ages. Because in the past, bankruptcy was coupled with the loss of civil rights and imposition of penalties upon fraudulent debtors, the designation ‘bankrupt’ came to be associated with dishonesty, casting a stigma on persons who were declared bankrupts. Eventually, however, bankruptcy legislation was extended to provide procedures for the adjustment of debts so as to avoid liquidation and for the rehabilitation of insolvent debtors. Modern bankruptcy laws, therefore, include detailed provisions for preventive compositions, arrangements, or corporate reorganizations of various types. In fact, the salvage of an enterprise in financial difficulties has become the principal focus of bankruptcy legislation with particular concern for the maintenance of employment opportunities and the protection of members of the labour force. This is the more reason why debtor-initiated or voluntary bankruptcy should be abolished not only in Nigeria but progressively across the globe. I firmly believe that widening and overhauling the scope of inquiry and verifications/investigations in debtor’s preemptive proceedings, with due-entity whether a debt is actually owed, as well as refocusing the basic framework to remove the provisions that reduce the bankruptcy process to an ancillary/secondary debt recovery procedures route remains the way forward.