ANALYSIS OF THE LAW AND PRACTICE OF RECEIVERSHIP IN UGANDA

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DECLARATION

I, declare that this dissertation is the work of NANFUKA SAIDA alone, except where due acknowledgement is made in the text. It does not include materials for which any other university degree or diploma has been awarded

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Date : 30 – JULY – 2018.
APPROVAL

"I certify that I have supervised and read this study and that in my opinion, it confirms to acceptable standards of scholarly presentations and is fully adequate in scope and quality as a dissertation in partial fulfillment for the award of Degree of bachelor of law of Kampala international University"

Name of supervisor : 
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Date : 07-04-2018
DEDICATION

I dedicate this report to my parents Mr. Kasujja Asuman and Mrs. Rehama Kasujja and my dearest sisters and brothers. Thank you for loving and praying for me. All my success is partly behind you.
ACKNOWLEDGEMENT

I thank my dear parents, Mr. Asuman Kasujja and Mrs. Rehamah Kasujja may the Almighty God bless you abundantly for all your financial and moral support you have given me.

I acknowledge the contribution of my Supervisor, Mr. Muhamud Sewaya for all his tireless efforts to see that this research becomes a success. You have been very helpful and encouraging you were always there and I appreciate all your efforts made to this report.

I acknowledge the efforts of all my friends Diana Biribawa, Said Khamisi, Prisicilla Kabazzi and all my classment thank you so much for all your encouragements that you have supported me with.
Abstract
The study was set to analyze of the law and practice of receivership in Uganda, it was guided by the following objectives which included; examine the adequacy of law on receivership in relation to duties of receivers and power of sale, to examine the liabilities of receiver and how such can be avoided, to examine the problems/challenges released to receivership in Uganda and to examine remedies available to the parties in receivership process. The research design used both doctrinal and non-doctrinal research design. Doctrinal research is concerned with legal prepositions and doctrines. The sources of data were legal and appellate court decisions. The study used a selection of literature from different legislations, like the companies Act, Insolvency Act, the Mortgage Act and their respective regulations were consulted. In study it was found out that the public are not aware of law and practice of receivership more so even some of creditors’ of business. The study recommended that Recapitalization is a type of corporate reorganization involving substantial change in a company’s capital structure. Recapitalization may be motivated by a number of reasons. Usually, the large part of equity is replaced with debt or vice versa was recommended that there was need to increase public awareness on receivership so that public can increase the knowledge they have on receivership in that it was one of options of insolvency and how to deal with company that was under receivership, It was recommended that where there was family interests in business under receivership should be safe guarded or creditors interests should not override them, So do not consider any such arrangement without taking legal advice.
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Mortgage Act 2009
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The Companies Act, 2012
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CHAPTER ONE
GENERAL INTRODUCTION

1.1 Background of the study

The ultimate aim of a business is to generate profit through sale maximization of profit maximization. But this anticipation does not come on silver plate. The company may encounter difficulties especially financially which may force the company to secure loans and mortgage its property as collateral for loan secured.¹

The purpose of the loan is to revamp the company back to profitability but however this may not materialize and company stay’s in losses and cannot fulfill their obligation of paying back the loan as agreed² These calls for charge holder to appoint receiver if the charging document confers to him such powers³

Financial distress has afflicted numerous corporate entities in Uganda. The last 15 years have witnessed a steady growth of insolvency cases in Uganda. Starting with a few receivership cases in the mid 1990’s, Insolvency practice has growth to include few full blown winding up, liquidation and Insolvency proceedings. But until the first receiverships case in 15 years the laws governing insolvency and insolvency practice had remained unused for nearly thirty years.⁴

The debenture holders of these defaulting companies can appoint receivers if charging document confers those powers or go to court to exercise their inherent powers to put the company under receivership⁵. The research seeks to investigate critically the law and practice of receivership in Uganda, basing in mind that companies like Sarope Petroleum, Wavah Broadcasting Services (WBS), and Crane Bank, National Bank of Commerce were put under receivership among others. Receiver means a receiver or manager and includes a receiver and manager or administrative receiver in respect of any property and any person appointed as receiver by or under any document or by the court in the exercise of a power to make such an appointment

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¹ C. J. Chacha “Receivership and Insolvency A conceptual overview” 2005 by Ernest and Young certified Public Accountant Pg.35.
given by any Act or any Rule of court or in exercise of inherent jurisdiction\(^6\) and\(^7\), Receiver is disinterested person appointed by a court, or by a corporation or other person, for the protection or collection of property that is the subject of diverse claims\(^8\).

Odoki JSC defined A receiver as person who is appointed to take possession of property which is the subject of charge and deal with it primarily for the benefit of the holder of the charge.\(^9\)

In Uganda the principal insolvency law is contained in the Insolvency Act,\(^10\) Companies Act\(^11\). These are almost a replica of the English law that was adopted from Britain by virtue of s.15 of the 1902 Order in Council.\(^12\)

Following studies by Reid and Clare Manuel,\(^13\) it was realized that there is need to have a single insolvency law in Uganda tailored to addressing these problems. Consequently, the Uganda Law Reform Commission conducted a study\(^14\) and came up with a draft Insolvency Act, that it believes will assist in remedying the situation. However, this Act has not yet received presidential assent. As to whether this Act is relevant and adequate is a subject of this discussion.

Insolvency is defined, as the inability to pay debts in full.\(^15\) It applies to both natural and artificial persons, namely, individual and corporate insolvencies.\(^16\) Thus, if all assets of the debtor are insufficient to pay his debts then he or she is technically insolvent. He or she is deemed insolvent if he or she fails to settle his debts as they fall due. Relevance of the Insolvency Act, can better

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\(^5\) Section 2 of Insolvency Act 2011.
\(^6\) Section 2 of Mortgage Act 2009.
\(^7\) Black’s Law Dictionary 8th Edition.
\(^9\) Cap.67, Laws of Uganda.
\(^10\) Cap 110 Laws of Uganda.
\(^11\) Business law and development: The way forward for Uganda, a paper presented at the conference organized by Uganda Law Reform Commission on Uganda’s experience on insolvency law held at Nile Hotel International Conference Centre from 19th-21st July 2004.
\(^14\) Osborn’s Concise Law Dictionary, (7th ed.) by Roger Bird at p.182. On the other hand Black's Law Dictionary (Abridged 5th Ed) defines insolvency as the one’s inability to pay his or her debts, or, a lack of means to pay debts.
\(^15\) Supra note 4
be understood when one looks at the weaknesses within the current law and compares the same with changes proposed in the Act.

Uganda's current insolvency was scattered in different legislations, notably, the Companies Act,17 The Bankruptcy Act and the Deeds of Arrangement Act. This made it hard to research, reference and to administer. In this respect, the Insolvency Act was relevant in a sense that it sought to consolidate this law into a single code.18 With a single code, time spent perusing different Acts will be saved. It was equally ease reference and policy control as well as reduce administrative costs.

Bringing insolvency law at par with globalization, As aforesaid, the Insolvency laws were archaic, having been adopted from Britain without much modification to suit the circumstances prevailing in Uganda,19 yet with globalization and trade liberalization, these laws had come under criticism as failing to address modern business problems.20 The Act was important in order to bring the law in conformity with modern business demands, particularly to protect Uganda's economy against the dangers of globalization while at the same time attracting foreign investment.21 This boosted the confidence of financial institutions since they were assured of the means of proceeding against defaulters to recover their money.

Thus, the insolvency Act provided for regulation of cross-boarder insolvency22 which was fundamental in the current global economies. There was need to revive the cross-border insolvency. Reciprocity with other states or territories of the Insolvency Act which has been in

17 Cap. 110, which provides for corporate insolvency.
18 As is read from its long title, the insolvency bill, 2004 is inter alia meant to consolidate the law relating to receiverships, administration, liquidation, arrangements and bankruptcy. See also the paper presented at the conference on business law and Uganda's experience on insolvency law held from 19th-21st July 2004 at Nile Hotel international Conference Centre.
19 The Companies Act for example has never been repealed.
21 P.47 of the Report under para.4.1. The law will go along to protect the debtors, creditors and their property in Uganda as stronger economic entities are capable of triggering off the insolvency of weaker firms, thereby dispossessing them of their resources consequently driving them out of business especially given the fact that Uganda is a perfectly competitive market.
22 The bill proposes to address the issue of cross-boarder insolvency under part IX and section A thereof lays out provisions for reciprocity. In particular, under clause 218 a receiving order, adjudication order made or a special manager or interim receiver appointed in the reciprocating territory bankruptcy proceedings against the debtor, shall have the same effect as if the proceedings have been instituted in Uganda. Under clause 219 the property of the bankrupt in Uganda vests in the trustee in the reciprocating country.P.47 of the Report.
disuse and create reciprocal arrangements whereby countries were able to cooperate in handling insolvency matters involving multinational corporations or foreigners.

The Act was also relevant for the reason that it upholds the interests of unsecured creditors. The current ranking of secured creditors and the state as the priority creditors at distribution of assets of the insolvent firm is unfair to unsecured creditors. This means that where the property available for distribution is insufficient to meet the claims, the unsecured creditors will loose their money. Unfortunately, more often these are small scale enterprises with limited financial capacity and stand to collapse if their money is not recovered; yet, the government is in a better position to mitigate its loss as compared to small scale enterprises. By virtue of clause 13(2) (b) the Act secured creditors are given priority over secured creditors in so far the property of the debtor is insufficient to meet all the claims. The inadequacy however is that the topmost priority is given to settlement of remuneration and expenses of trustees, receivers, liquidators and administrators instead of preferring creditors.

As a result, insolvencies are handled by unqualified individuals who, instead of saving the insolvents and bankrupts, they have worsened their financial problems. It was reported that some of them have ill-advised their clients or even cheated them of huge sums of money. Ignorance of insolvency matters is even apparent among the business community and most of the businesses and individuals endure debt burdens without knowing that they can apply to court to be discharged and give them a new lease of life. In light of this, the Insolvency Act became relevant in so far as it seeks to introduce insolvency practitioners and the manner of their regulation of this field was necessary to promote transparency on matters of insolvency. With cross-boarder insolvencies-a phenomenon incident to globalization, there is still need to have

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23 Under ss.36 and 315 of the bankruptcy and Companies Acts respectively are to the effect that tax authorities and secured creditors are to be paid first disregarding the interests of unsecured creditors.
24 Business law and development: The way forward for Uganda, a paper presented at the conference organized by Uganda Law Reform Commission on Uganda’s experience on insolvency law held at Nile Hotel International Conference Centre from 19th-21st July 2004, at p.
25 Ibid.
26 Under section 209, only members of professional bodies are permitted to act as insolvency practitioners, the contravention of which amounts to an offence and will be punished for illegally acting in that capacity (section 210). Even then, under section 209 (1) (b), an insolvency practitioner must give security or professional indemnity as sort of insurance to the client against his professional negligence. All this is will go along way to ensure that these professionals act transparently and diligently while dealing with insolvency matters, and for those unqualified, they will be technically eliminated.
experts to ably handle matters of insolvency. On the whole, these experts help advise embattled individuals and firms on how best to handle their debt obligations without necessarily having to litigate.

Abolition of acts of Insolvency, This makes the act relevant in current commercial transactions which require expediency.27 Accordingly, it eliminates the complex procedure that is expensive and would delay justice for the creditors as acts of Insolvency are hard to prove in view of modern cross-boarder business which would involve moving to the foreign country to collect evidence on commission of an act of insolvency for instance if the creditor is to ably prove that the debtor is keeping house. This would mean incurring heavily. Instead the money that would be lost in lengthy litigation is ploughed back into business thereby ensuring business growth and consequently the economy through revenue collections, uninterrupted employment for workers, among others.

1.2 Statement of the problem
Since the Insolvency Act of 2011, the focus of reforms in corporate insolvency law has increasingly been on the avoidance of corporate failure and improvement of the rescue culture. An example of this is through the Insolvency Act 2011 where a statutory moratorium has been introduced which makes the companies voluntary acts more attractive to small eligible companies that require salvage.

Uganda has experienced business problems since 1986 culminating in major company failures despite rescue mechanism being put in place. Receiverships have been prevalent in Uganda as a strategic tool for financially distressed companies. Ailing business institutions are placed under company’s statutory management in the hope to restore them back to profitability and facilitate total debt recovery. However this has not happened and almost all those cases result into liquidation. In a banking crisis, depositors, lenders to the bank, and owners of bank capital all lose confidence and seek to simultaneously salvage their resources by withdrawing them. Proper

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27 Under clause 4 of the bill a debtor is deemed unable to pay his debts if he fails to comply with the statutory demand under clause 5, or where he fails to partly or wholly satisfy a Judgement debt or where his property is substantially or wholly within the possession of the receiver. This is in pari materia with s.233 of the Companies Act cap. 110 and is considerably simple to prove as compared to acts of bankruptcy under s.2 (1) of the Bankruptcy Act cap. 67.
reorganization of insolvent companies is therefore a must for the regulatory framework and supervisory system to be respected as a source of discipline and sound Business.

Literature suggests that, all the symptoms of failure are often observable for some years before the failure actually occurs. According to Argenti (1976)\textsuperscript{28}, top management should see symptoms of failure fast. If they do not, then this suggests they are not competent and it is reasonable to guess that matters will deteriorate until others start to see the signs. A study conducted by Leonard, (2008)\textsuperscript{29} on the magnitude and causes of corporate failure in Uganda ranked management incompetence and inexperience as the major cause of corporate failure. Part XIII of the Insolvency Act 2011 prescribes that an receiver should be a qualified professional, with the competence and experience to prevent avoidable corporate failure\textsuperscript{30}. However, companies continue to collapse, even after the failure symptoms have been identified and a receiver manager is appointed to help reverse the situation.

Section 20\textsuperscript{31} provides for various remedies available for Mortgage in case of default by mortgages and among others to appointment of receivers of the income of the Mortgaged land. Due to costly court process and duration a company can go through during liquidation receivership may be enacted in an attempt to review a failing company. The receiver works to restructure the company, managing assets and obligations as necessary, to bring the company into a period of recovery. Certain assets may be liquidated, under the authority of the receiver, but the true purpose is to work to bring the company back to a profitable state.

Company looking towards receivership is to consider a restructuring in order to turn round the company viability and take it back to course of profitability which calls for preservation but sometimes it might seem an uphill task which may call for change in plan and sale the company assets in order to realize the debt incurred in order to fulfill the debtors obligation. Instead, passing the option to reorganize may show a sense of desperation of either creditors or debtor and have lost all hope of possible rejuvenation and resurrection of company and all they want is

\textsuperscript{28} Argenti, J. (1975). "Company Failure; The Tell Tale Signs at the Top," The Director, 28 (September), 287-9.


\textsuperscript{31} Mortgage Act 2009
plausible way to acquire back their money lent to company the easiest way and quickest way and opt to send the company in liquidation not knowing that its length and tedious process compared to receivership

1.3 Objectives of the study
   a) Examine the adequacy of law on receivership in relation to duties of receivers and power of sale.
   b) To examine the liabilities of receiver and how such can be avoided.
   c) To examine the problems/challenges released to receivership in Uganda.
   d) To examine remedies available to the parties in receivership process

1.4 Scope of the study
The study encompasses the modus operandi of appointment of receiver, duties and liability and how challenges their action and its strictly limited to practice and laws in Uganda.

1.5 Research methodology
The research used both doctrinal and non-doctrinal research design. Doctrinal research is concerned with legal prepositions and doctrines. The sources of data are legal and appellate court decisions. The study used a selection of literature from different legislations, like the companies Act, Insolvency Act, the Mortgage Act and their respective regulations were consulted.
The study was also as result of comparative study between Ugandan jurisprudence and other jurisprudences on receivership. Literature of renowned scholars was consulted and internet was of great use in finding relevant materials and close reference to case law and where need was interviews’ were conducted with insolvency practitioners to help study come up with correct analysis and conclusion. Textbooks and reports were also looked at in gathering of literature.

1.9 Literature Review
Butterworth provides a comprehensive analysis of insolvency with main focus on English parameter with broader perspective on duties modes of appointment, powers and effects of receivership. Butterworth view even though it discusses broader picture of receivership it falls

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short of showing us how it salvages the distressed company but highlight duties powers and fails to show how effective this mode to other modes of debt recovery. In his different modes of winding up to creditors of distressed company in financial distress as liquidation and winding up but does not envisage receivership as remedy.  

Bakibinga’s book is not updated to the current *Insolvency Act of 2011* and *Mortgage Act of 2009* which makes it applicability difficult though it lays pertinent principles, furthermore lacks Ugandan touch and Ugandan perspective since the author is Ugandan, he expected that Ugandan feel more to that apart from explaining it’s as one of forms in which creditor can secure his interest and other form company can undergo while winding up it does not encompass Ugandan cases. 

Ridley in his book does wider scope on duties of receiver as will be seen in following Chapter, and effects Though its more on common law premised limited on statutory duties and falls short on how the duties are effected.

Shash covers focal points in process of receivership and applicable law in regards to receivership: With broader perspective on duties of receiver powers, their remuneration, they should follow in attachment of property. Even though Shash gives a broader perspectives of duties but does not give us modus oparandi of receiver a case in point if the powers given to receiver is to preserve the company and pay back the interests of creditors how he or she actualize it indeed his discussion is more academic it lacks practical touch and the role of the receiver or manager and the manner in which he could take over the company the receiver would normally continue to run the company in the process save the viable parts of its business though often by selling them off. The creditor’s interest who in most cases the mortgagee should be debenture creating a floating charge. With closer look on appointment, powers and duties of

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33 David Bakibinga, *Company Law,* 2000 Pg. 89  
34 David Bakibinga, *Company Law* 2000 Pg. 90  
36 Shash Rajani, Tolleys *Corporate Insolvency,* 1994, chapter one Pg.95
receiver the status of receiver in company and the position of director in the company during receivership\textsuperscript{37}

Davies\textsuperscript{38} discusses extensively the law on receivership and shows practice and explores viability of receivership as quickest mode of debt recovery but does not juxtapose it with other modes of debt recovery and which one is most suitable for creditors.

Durrant also looks at roles and duties of receiver, powers, and effects. The rescue culture as protective measure of creditors against financially and economic distressed company whether he can continue to run it if it's still viable or he can sell it off or merge them to secure the creditor’s claim. He contends that receiver is usually appointed for particular purpose and is effected by him taking possession of the property which subject of charge which he deals in interest and benefit of the holder of charge\textsuperscript{39}.

Three types of receiver for example, administrative receiver who is appointed by debenture holder for floating charge, property receiver appointed under law, and court appointed receiver\textsuperscript{40}

Gregory does not show which one is better to redeem distressed company, Receivership is fact that receiver is regarded as debtors agent who owes his primarily obligation to charge\textsuperscript{41} and it's his choice to deal with company property but must do it in utmost good faith in charge’s interest. According to Gregory, a company in distress must be divided into two economically distressed company and financially distressed company and this should be ascertained when a company becomes unable to pay debts as they fall due and raises fundamental question why receivership not liquidation straight away? And goes ahead to discuss role and duties and powers and effects of receivership.

\textsuperscript{37} Paul Davies \textit{The Principles of Modern Company Law} (2006) Pg 218.
\textsuperscript{39} David Milman and Chris Durrant, \textit{Corporate Insolvency; Law and Practice} (1994) Pg. 34.
\textsuperscript{40} Gregory Michael; \textit{Insolvency Solution} (2008) Pg.200.
\textsuperscript{41} Med forth v Blake (2000) Ch. 86.
Mokal\textsuperscript{42} introduces a new test of utmost good faith as foundation duty a receiver should have en distinguishes the company in distress into two economically and financially distressed companies but falls short of showing what the receiver should do or his mandate in both more so apart from the definition doesn’t attempt to further differentiate the two versions of distress on this legal corporate personality.

Receivership is remedy which is equitable where a receiver is appointed to protect real property which owing to charge accrued in it creates an equitable interest to creditor in case of default by debtor to fulfill his or her obligation like paying debts as they fall due and the debenture called for it is appointed to fulfill that duty. He goes ahead to describe the duty and power of him and effects and when a company can be put under receivership\textsuperscript{43}.

Lint\textsuperscript{44} presumes that a receiver owes the entire obligation to creditor sideling the interests of debtor who is partially true he appointed to realize interests of creditors primarily but sometimes he or she is appointed to salvage the company in distress and settle also creditors also can be for preservation of debtors threatened properties through restructuring the company assets

Though Wikipedia shows us different types of receivers but falls short of showing us when and how they adopted and applied by creditors and practice in each is not clearly spelt out and little reference to any country’s law on Insolvency so it’s also lacks that legal applicability feel and touch.

1.8 Significance of study.
This study will focus to look at law and practice of receivership in Uganda indentify the gray areas and see how to better it. The findings of the study will contribute to informing academicians, company managers, scholars, legislators and policy makers on the way insolvency should be handled in Uganda. The study will help the researcher in widening her knowledge and understanding regarding the law and practice of receivership. This will be possible since the study will involve interactions with stakeholders and legal practitioners and which will be Good

\textsuperscript{42} Rizwan Jamel Mokal; Administrative Receivership and Administration-An Analysis (2011) Pg 41.
\textsuperscript{43} Weingart Lint; Receivership in Prison Mitigation (2007) Pg. 38.
\textsuperscript{44} Weingart Lint; Receivership in Prison Mitigation (2007) Pg. 59.
Avenue for learning. The findings of the study will increase on the pool of knowledge for future researchers on the topics related to practice of receivership and insolvency. This will be possible since a lot of information will be collected which will be beneficial to many other researchers to come.

1.7 Organization layout

Chapter One: is an introduction into the study. Chapter Two: looks at the overview of insolvency practice in Uganda; Chapter Three: will look at the duties of receivers, Chapter Four: will look at the rewards available to parties in receivership challenging receiver action and remedies. Chapter Five will provide findings of study, conclusions and recommendations.
CHAPTER TWO
OVERVIEW OF THE INSOLVENCE PRACTICE IN UGANDA

2.1 Introduction
The last ten years have witnessed a steady growth of insolvency cases in Uganda. Starting with a few receivership cases in the mid 1990s, insolvency practice has grown to include a few full-blown winding up (liquidation) and Insolvency proceedings. But until the first receivership case of ten years ago, the laws governing insolvency and insolvency practice had remained unused for nearly thirty years!! As a result, there is at least a whole generation of lawyers, businessmen, financial consultant’s e.t.c. who cannot appreciate or understand the workings and functions of insolvency. While we do applaud the renewed interest in this area of the law, the numbers of cases still coming up are not enough to capture the required level on understanding and appreciation among all the stakeholders of this law. To have every one understand the concept and functions of insolvency, we must start from the very basics.

Simply put, the term insolvency means the one’s inability to pay his/her debts, or, a lack of means to pay debts. This definition suggests two ways of determining one’s inability to pay his/her debts. The first is through the study of the assets and liabilities of the debtor. If all the assets when immediately made available will not sufficiently discharge the liabilities, then, technically speaking, the debtor will be deemed to be insolvent.

Insolvency describes a situation where a person or a company gets into financial difficulty. A business may owe more than it owns, or it may have run out of cash and be unable to pay bills. The law (mainly the Insolvency Act, 2011) sets out a number of procedures which aim to deal with insolvent persons.

The second is the inability to pay debts as and when they fall due. When a debtor is unable to pay his/her debts as and when they fall due, then he/she is technically deemed to be insolvent. To establish this, one would obviously have to study the debtor’s debt payment pattern. The more

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the evidence of a debtor's difficulty in meeting his debts obligations as and when they fall due, the more the likelihood of his being insolvent.

Insolvency law applies to both natural and artificial persons. Corporate insolvency i.e. receiverships, liquidations and winding up of corporations, is founded on Insolvency law (insolvency of the natural persons), as people existed before companies. In many instances, the law governing corporate insolveney is an extension of Insolvency law.

2.2 Insolvency Law – The Ugandan Experience

The principal legislations governing insolvency in Uganda are the Companies Act, the Insolvency Act. Other laws closely related to insolvency include the Mortgage Act, the Civil Procedure Act, e.t.c. Like many of our laws, the above-mentioned legislations were borrowed from the United Kingdom when Uganda obtained independence in 1962.

The Companies Act, which makes provision for corporate insolvency, is a replica of United Kingdom’s Companies Act of 1948. The Insolvency Act, the principal legislation governing personal insolvency, is a replica of the English and Welsh Insolvency Act of 1914. Both the Companies Act of 1948 and the Insolvency Act were the laws in England in 1962. The two Acts have however since been repealed. The Companies Act of 1948 was largely amended in 1967 and 1980 before it was eventually repealed. In comparison, the Ugandan Companies Act has never been amended or modified to suit the modernity of our time46.

Insolvency in Uganda is principally governed by the Insolvency Act, 2011 and the Insolvency Regulations, 2013. The purpose of the Insolvency Act, 2011 is to provide for receivership, administration, liquidation, arrangements, bankruptcy, the regulation of insolvency practitioners and cross border insolvency, amend and consolidate the law relating to receiverships, administration, liquidation, arrangements and bankruptcy, and to provide for other related matters47.

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46 Section 176 Insolvency Act 2011.
47 Long title to the Insolvency Act, 2011.
The Act expressly repeals the old insolvency regime (Bankruptcy Act, Deeds of Arrangement Act and some parts of the Companies Act) under s. 262 and consolidates the entire law into one Act. Insolvency generally connotes the inability of a person, being an individual or a company to pay their debts as and when they fall due. A person being a natural person who is insolvent goes into bankruptcy where as a corporate body goes into winding up or liquidation. In fact modern insolvency has combined both individual and corporate insolvency into one consolidated law. To affect this, the *Insolvency Act* of Uganda defines insolvency as including bankruptcy. Inability to pay debts as and when they fall due and payable has been preferred as the best definition of insolvency. In the Ugandan law, a person is presumed to be unable to pay their due debts if they fail to comply with a statutory demand. The statutory demand should comply with the contents enumerated in s.4 of the Act and should have duly been served on the debtor as required by regulation 5 of the *Insolvency Regulations*.

However evidence of inability to pay based on failure to comply with a statutory demand is only admissible if the petition for insolvency has been made within thirty working days from the last day of complying with a statutory demand. The presumption shall also apply where there has been execution issued against the debtor in respect of a judgment debt which is returned unsatisfied whether in whole or in part.

Also in cases where all or substantially all the property of the debtor is in the possession or control of the receiver or some other person enforcing a charge over that property, it shall presumed that the debtor is unable to pay his debts. In determining inability to pay, even the debtor's contingent or prospective debts may be taken into account.

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48 Keay's insolvency, at pg. 9.
49 Section 2 of the Insolvency Act, 2011.
50 S.3(1) (a) of the Insolvency Act, 2011.
51 Subsection (2) of s.3.
52 S.3(1) (b) of the Insolvency Act, 2011.
53 S.3(1)(c) of the Insolvency Act, 2011.
54 S.3(4) of the Insolvency Act, 2011.
These are essentially debts that are going to become due and payable in a short run according to Keay’s Insolvency, this is called prospective insolvency. However one should note that these considerations only raise a mere presumption of inability to pay which can be rebutted. Under the Act and for purposes of this discussion, the inquiry on the effect of insolvency on pre insolvency rights shall largely depend on a clear understanding of when insolvency does commence. Individual insolvency commences when a bankruptcy order is made whilst corporate insolvency commences where there has been a validly entered resolution for voluntary liquidation of the debtor company or in case of liquidation by court, upon presentation of the petition for liquidation.

The insolvency regime has been relevant both historically and today due to the economic importance of credit as the vehicle of the capitalism. It has been submitted that whilst credit is very important in the survival of almost every business entity, inability to pay such debts may lead to a person being declared insolvent. Briefly, the factors which have led to individual and corporate failure may include bad luck or business misfortune, general economic recession, and the fact that some people tend to think that they are better off in business management than they actually are, which leads to miscalculation of their capacity to repay.

Other instances of corporate failure have been attributed to negligence, embezzlement and mismanagement by those in business control owing to their breach of duty of care to the company, late payments to the business from its debtors or in some cases due to the fact that the other businesses on which the company relied for credit or its supplier is in financial distress. Other insolvencies occur due to technological changes which out date some lines of business and failure to stand stiff competition. It is against this backdrop that the law of insolvency was developed and has been evolving overtime from the 1500s to date. The objectives of the modern insolvency regime are to provide an equal, fair and orderly procedure in handling the affairs of insolvents ensuring that creditors receive an equal and equitable distribution of assets of the

57 S.93(1) and (2) of the Act.
58 Keay’s Insolvency, at 3 law.
debtor’s estate. This is rooted in the “pari passu” (equal sharing) principle of insolvency which has been recognized as the most fundamental principle of insolvency.\(^{59}\)

The “pari passu” rule operates to ensure that creditors of the same priority receive equal percentage returns from the insolvent person’s estate, although the rule is subject to some exceptions. The insolvency regime also aims at providing procedures and processes for dealing with an insolvency with as little delay and expense as possible.\(^{60}\) Where possible, insolvency also aims at restoring the company or business of the individual insolvent to effective or profitable trading.\(^{61}\)

It should be observed that insolvency in the medieval times aimed at maximizing the interests of the creditors at the expense of not only the debtor but also the community at large. To this end, the earlier regimes did treat the insolvents less of any worth and in fact they were condemned to death. This was illustrated in the old case of \textit{Dive v Maningham}.\(^{62}\) In this case, a debtor had borrowed but failed to repay USD 40 and was incarcerated. Montague C.J held that the sheriff who kept the debtor in prison was not obliged to give him meat or water as “he ought to live off his own goods, and if he has no goods he shall live off the charity of others, and if others will give him nothing, let him die in the name of God, and if he will, and impute the cause of it to his own fault, for his presumption and ill behavior brought him to that imprisonment.” This is the unfortunate perspective in which ancient insolvency law saw the phenomenon of inability to pay debts vis-à-vis the rights of the creditors. However, modern insolvency maintains that in addition to maximizing the benefits of the creditors, there are other considerations that should be taken into account and where possible postpone the liquidation. These include the need to protect employees, the general economy, protection of suppliers and other informal local service providers who derive benefit in the continuance of the business.

**Objective of new Insolvency Act**

The \textit{Companies Act, Cap 110} provided for corporate insolvency and the \textit{Bankruptcy Act} governed personal insolvency. Both of these laws were antiquated being of 1948 and 1914.


\(^{60}\) Ibid.

\(^{61}\) Goode, at 60.

respectively. Generally, the law was scattered in different legislations. Therefore it was necessary to have a single legislation. The Uganda Law Reform Commission spearheaded reform and published a draft for insolvency law in Uganda which culminated into the Insolvency Act 2011.63

Other objectives of insolvency include the need to provide a fair and equitable system for ranking of claims64, ensure that administrations are conducted in an independent, competent and efficient manner, ensure maximum returns to creditors especially by preventing removal of assets from the reach of creditors, to provide mechanisms to allow treatment of the affairs of the insolvents before their position becomes hopeless, and provide procedures which enable debtors and creditors to be involved in the resolution of insolvency65. It is also intended to ascertain the reasons of the insolvency and provide mechanisms which allow for the examination of the conduct of the insolvents, their associates and officers for the purpose of maintaining corporate morality66 and where need be ascertain whether any offences have been committed by insolvents, their associates or officers with a view to those offences being prosecuted67.

Indicators of Insolvency

It has been submitted that there are many indicators that can show that a person is insolvent or is about to run insolvent.68 These were discussed in the cases of Lewis v Doran69 (infra) and Asic v Plymin70 where Palmer and Mandie J.J respectively, held that these indicators include continuing losses, low liquidity ratios, overdue taxes, inability to borrow further funds or raise further capital, bank requests to reduce overdraft, suppliers' change of supply terms or otherwise demanding special payment before resuming supply, failure to pay within trading terms, drawing of postdated or round-sum cheques, dishonored cheques, making special arrangements with selected creditors, enforcement action being taken by creditors and inability to produce timely and accurate financial information. The above however, are not the tests of insolvency. They are

63 Section 181(3) Insolvency Act 2011.
64 Goode, op cit, at 62.
65 Keay's Insolvency, at 14.
66 Goode, op cit, at 62 and Keay's Insolvency.
67 Ibid, at 62.
68 Keay's insolvency, at 20.
70 [2003] 46 ACSR. 126, at 386.
mere indicators but with time, scholars and courts have developed three tests of insolvency: the cash-flow or commercial test, the balance-sheet or absolute insolvency test and the break-up test or what is commonly referred to as ultimate insolvency.

Under the cash flow test an individual or company is generally regarded as insolvent when there exists an inability to pay the entire individual or company’s debts as and when they become due and payable. This means that there is insufficient cash or other realizable resources available to pay all creditors at the various times they can demand payment. The primacy of this test has been illustrated in a plethora of case law. In the case of Re:Tweed Garages Ltd\(^{71}\), it was held it is useless to say that if a (company's) assets are realized, there will be ample to pay [20 shillings in pound], this was not the test. Court observed that a company may be at the same time insolvent and wealthy. It may have wealth locked up in investments not presently realizable, but although this is so yet it has not assets available to meet its current liabilities, it is commercially insolvent. In Powell v Fryer\(^{72}\), Olsson J emphasized this commercial test when he stated that it is not appropriate to base an assessment of insolvency on the prospect that the company might be able to trade profitably in the future thereby restoring its financial position. The question is whether it, at the relevant time, is able to pay its debts as they become due, not whether it might be able to do so in the future, if given time to trade profitably.

Similarly in Crema Property Ltd v Landmark Property Development Ltd\(^{73}\) it was observed that the cash flow test of insolvency in contrast to a balance sheet test focuses on the liquidity and viability of the business. That while an excess of assets over liabilities will satisfy a balance sheet test, if the assets are not readily realizable so as to permit the payment of all debts as they fall due, the company will not be solvent. Conversely, it may be able to pay its debts as they fall due despite a deficiency of assets. Under the balance sheet test, the individual or company is insolvent if the total liabilities exceed the value of the total assets such that there are insufficient assets to discharge the liabilities. Under this leg, a business might be commercially insolvent and

\(^{71}\) [1962] Ch. 406, at 410.
\(^{72}\) [2001] 37 ACSCR. 589.
\(^{73}\) [2008] 58 ACSCR. 631, at 652.
fail the cash flow test but when it is asset sufficient and therefore able to satisfy the balance sheet test if creditors may wait for some time for payment\(^74\).

On the other hand, the ultimate insolvency test examines the relationship between owing debts and the forced sale value of the debtor’s assets or the “break-up” value that can be realized from the assets of the debtor. Though somehow latent, these tests have been captured in the spirit of Uganda’s insolvency legislation especially s.3 of the Insolvency Act which explains what inability to pay debts connotes. Though the courts have been seen to prefer the cash flow (commercial) test of insolvency, they have nevertheless taken into account that both cash flow and balance sheet tests are important in making an ultimate conclusion that a debtor is insolvent.

This was indicated in the case of\(^\text{Sandell v Porter}\)^75 where Berwick C.J held that an assessment of the debtor’s insolvency is not limited to the cash resources immediately available to pay a debt. These resources extend to moneys which he can procure by realization through sale, mortgage or pledge of his assets within a relatively short time, relative to the nature and amount of debts and to the circumstances including the nature of the business of the debtor. That the conclusion of insolvency ought to be clear from a consideration of the debtor’s financial position in its entirety and generally speaking it ought not to be drawn simply from evidence of a temporary lack of liquidity. It is the debtor’s inability, utilizing such cash resources as he has or can command through the use of his assets, to meet his debts as they fall due, which indicates insolvency.

In Jetaway Logistics Pty Ltd v Deputy Commissioner of Taxation\(^\text{Jetaway}\)^76 it was held that ultimately, the statement that a company [or individual] is insolvent is usually conclusionary in nature. That unlike for example the fact of incorporation, solvency or insolvency is rarely a matter of straightforward proof. Rather, there must be an examination of the financial condition of the debtor by review of its/ his dealings over a period of time, the identification of the symptoms (if any) of insolvency, and making a diagnosis as to the ability of the debtor to pay its/his debts as they fall due.

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\(^74\) Keay’s Insolvency, at 18.
\(^75\) [1966] 115 CLR 666.
\(^76\) [2009] VSCA.319.
due. Accordingly, a person is insolvent within the meaning of the above three tests or any of them where there is inability to pay debts as and when they become due and payable.

The debt envisaged must be a legal debt recognized at law. In Rothwells Ltd v Nommack (No. 100) Pty Ltd, a debt was defined as a liquidated sum in money which is due from the debtor to the creditor. The term “liquidated sum” was defined as meaning an agreement between the parties as to the calculation of a precise amount as contrasted to un-liquidated sum which requires court to determine the amount payable. In Hawkins v Bank of China it was accordingly observed that a debt is incurred when a debtor acts in such a way as to give rise to a legal obligation to pay a sum of money in the future even if the obligation is contingent on one or more events occurring.

The required debt

In addition, the debt envisaged for insolvency procedures should not be less than a given sum of money and most importantly it should be an undisputed debt. Under the Insolvency Act of Uganda, only a creditor owed not less than one million Uganda shillings in case of an individual debtor or two million Uganda shillings in case of a corporate debtor, can petition for insolvency. Where therefore there is a substantial dispute as to the debt owing or as to the amount, the creditor shall not be entitled to petition for insolvency. Instead, guidance should first be sought from court on the true status of the debt. Substantial dispute of debts was handled in BNP Paribas v Jurong Shipyard where it was held that in a case where a solvent company does not admit the debt and is prepared to offer security to defend the claim, the court should not as a matter of principle, in the exercise of its discretion, allow a claimant to file a winding up petition against the solvent company. Likewise, in Sparkasse Bregenz Bank v Associated Capital Corporation it was held that a creditor who has served a statutory demand in accordance with the Act is not entitled to a disolving order if the debtor company bona fide disputes the debt. That in fact, though the company is insolvent, the creditors have no right to a

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77 [1990] 2 QdR 85, at 86.
80 [2009] 2 SLR 949.
81 British Virgin Island HCCS No. 20 of 2002.
winding up order if the debt is disputed. So it behoves the court to look carefully to see if there is a serious or bona fide dispute. However if the debt is disputed, the dispute must be substantial. In *Special situations Fund Ltd v Barfield Nominees Ltd*\(^8\) it was held that if the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. To fall within the principle, the dispute must be genuine in both a subjective and objective sense, that is, the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. That substantial means having substance and not being frivolous and there must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the party who disputes the debt to bring forward a prima facie case which satisfies that there is something which ought to be tried.\(^8\)

Prior to the order of insolvency, there are many rights which exist or accrue to different parties and these should be examined to see whether they are altered or left intact by the order. The study categorized them into three: rights of the debtor, the rights of the creditors (secured or unsecured), and the rights of third parties such as employees, government, claimants under liability in tort or breach of contract and then company directors. Generally, a debtor whether individual or corporate body has the right to carry on business or engage in lawful trading. This is actually protected by the Constitution where it provides that every person has the right to practice his or her profession and to carry on any lawful occupation, trade or business.\(^4\) Prior to insolvency the debtor also has the right to borrow and create security over any assets he/she or it owns. Hence, he may create either a floating or fixed charge.\(^5\) Whether natural or legal person the debtor has the right to own property and to deal with the same, that is, sell, pledge, mortgage or give as a gift, as he deems fit. This is a Constitutional right and the Constitution protects the same right against arbitrary deprivation.\(^6\)

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\(^8\) British Virgin Islands HCCA No. 14 of 2010.
\(^9\) The same had been discussed earlier by Bannister J in Professional Offshore Opportunity Fund v Daiwa Securities Trust and Banking (Europe) Plc, Claim No. 0006 of 2009.
\(^4\) Art 40(2) of the 1995 Constitution of the Republic of Uganda.
\(^6\) Article 26 of the Constitution.
Setting aside statutory demands

As a natural person, the debtor has the right to stand for elective positions of leadership, be appointed for different official duties and such other related matters prior to the order of insolvency. Also where a statutory demand has been served as required by s. 4 and regulations 4 and 5 of the Insolvency Regulations, the debtor has the right to apply to set aside a statutory demand under the provisions of s.5 and regulation 6 of the Regulations. Also the debtor has the right to dispute the debt claimed by the creditor. That is why under s.5 (4)(a) the court may grant an application to set aside a statutory demand if it is satisfied that there is a substantial dispute whether the debt is owing or is due. (substantial dispute having the same meaning as already discussed in the cases above). The debtor also has the right to freedom of movement as guaranteed under article 29 of the Constitution. On the other hand, secured creditors have their rights also. For example, prior to insolvency a secured creditor, being a holder of a fixed charge has the right to realize security at any time after the time frame of the debenture has expired, without resource to insolvency procedures. Where the creditor holds a floating charge, because it hovers over all or any class of assets of the estate without specifically attaching to any, he may not attach or realize security but he has the right to petition for insolvency. The creditors also have the general right to appoint a liquidator or trustee before an order of insolvency is made as the case may require if there all necessary indicators that the debtor is unable to pay and all possible demands have been made in vain.

Third party rights include the rights of employees to continue in employment and to receive their remuneration or wages as required under sections 40 and 41 of the Employment Act, 2006 respectively and their entitlement to terminal or social security benefits as saved under sections 11 and 12 of the National Social Security Fund Act. Also the government through the Uganda Revenue Authority has the right to demand and receive payment of taxes payable by the debtor’s business or company.

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88 Sections 70 and 25 of the Insolvency Act, respectively.
90 Under the income tax Act, cap 340 and Uganda revenue Authority Act.
It is in light of these that many rights that existed prior to insolvency were maintained intact, others varied or actually avoided. To a smaller extent study agreed that the statement was true due to the fact that the Insolvency Act maintains priority of some entitlements which should not be affected by the order. These were called preferential debts and accordingly any rights and entitlements that arise there under prior to insolvency were not altered by insolvency. Under s.12 preferential debts should be paid in priority to other debts, and where the assets were not sufficient to meet them, they should even come prior to claims of secured creditors.91

**Order of priority**

These debts are supposed to be paid in the order in which they appear in the Act. The first to be paid should be remuneration and expenses properly incurred by the liquidator or trustee, any receiver’s or provisional administrator’s indemnity under ss.159 and 187 respectively and expenses properly incurred by them. Also the reasonable costs of any person who petitioned court for the liquidation or bankruptcy order and any related appearances should be paid first.92

The second list that should be paid are all wages or basic salary wholly earned or earned in part by way of commission for four months, all amounts due in respect of any compensation or liability for compensation under the Workers’ Compensation Act accrued before the commencement of the liquidation or bankruptcy, not exceeding the prescribed amount, and all amounts that are preferential debts under sections 33 and 105 of the Act, that is, entitlements to twenty five currency points in respect of debts for services rendered to the bankrupt or insolvent company prior to the commencement of the bankruptcy or insolvent liquidation.93 The third leg of the priority categories is the amount of any tax withheld and not paid over to the URA for twelve months prior to the commencement of insolvency and contributions payable under the NSSF Act.94 To entrench the right to non interference with these rights, the Act provides that the section should apply not withstanding any other law.95 Therefore, to that extent one can rightly argue that though not maintaining all pre insolvency entitlements from interference, insolvency does protect some entitlements even after the order of bankruptcy or liquidation has been made.

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91 S.12(1) and (2) of the Insolvency Act, 2011.
92 Section 12(4)(a)(b) and (c), Ibid.
93 S. 12(5) (a)(b) and (c) and Ibid.
94 S.12(6)(a) and (b) of the Insolvency Act, 2011.
95 S.12(7) of the Act.
However, the greater number entitlements are in fact interfered with. These are either varied, or totally avoided depending on the provisions of the law applicable. Firstly, the rights of the secured creditors are varied by the insolvency order where the assets in the estate are not sufficient to cover the preferential debts under s.12. This is done by allowing the liquidator or trustee to make payment out of those assets that formed security.96

Accordingly for such rights to be avoided, they must be arising out of a charge over any property of the debtor; the charge must have been created within the year preceding the liquidation or bankruptcy, and it should have been created on account of an antecedent debt.97 To entrench this, the Act presumes that where a charge is created within six months preceding insolvency the debtor is unable to pay their debts immediately after giving the charge98 unless the contrary is proved. However, where the charge secures a sum which is the actual value at which the insolvent acquired the property, the charge shall stand. This is because in analogy to transactions at undervalue, there is neither gain to the creditor nor any loss to the insolvent’s estate.99

In Re: Yeovil Glove Co. Ltd,100 while considering the equivalent of our s.17 of the Insolvency Act, the court saved the floating charge which had been created Yeovil with its bank because neither the bank nor the company had been affected by the transaction. Court observed that this section was designed to prevent companies on the last legs from creating charges to secure past debts or for moneys which don’t go to swell their assets and become available for creditors. However court pointed out that if the overall level of debt remains the same before and after a floating charge is made, the floating charge remains valid. Also if the chargor was able to pay their debts immediately after the charge was made, the floating shall not be avoided.101

The other exception is where the charge was created in substitution for an earlier charge given more than a year prior to insolvency.102 Therefore, to the extent that the charge does not fall within the circumstances excepted expressly by the section, on application of a creditor, receiver,

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96 S.12(2) of the Act.
97 S.17(1).
98 S. 17(2).
99 S.17(1)(a).
100 [65]Ch.148.
101 S.17(1)(a).
102 S.17(1)(b) of the Act.
member, contributory, liquidator or trustee, the rights created thereby shall be interfered with. Rights created through insider dealings are also voidable on application of the liquidator, receiver, member or contributory. The dealing must relate to some asset of the insolvent. The insiders listed include spouses, siblings, children of the insolvent or any person with a close social proximity to the insolvent; employees, officers, professional or other service providers of the insolvent, business associates, partners, shareholders or other similar person (to be interpreted ejusdem generis). The transaction voidable under this section should have taken place within twelve months preceding the insolvency.

Voidable transactions

To emphasize this vulnerable nature, the Act makes it clear that any such transaction shall be taken as a preference or a transaction aimed at aiding the insolvent to put the assets of the estate out of the reach of creditors. Because the Act expressly saves application of common law and the doctrines of equity under S.264, follows from this that rights created through fraudulent transactions shall not be allowed to stand. This is based on the general common law proposition that "fraud unravels all". Fraudulent trading has been understood as the dishonest dealing with the intention to remove assets from the reach of creditors who are claiming or may claim against the company in the near future. This was handled exhaustively in the case of *Arbuthnot Leasing International Ltd v Havelet Leasing Finance* where Lord Scott reiterated that fraudulent transactions are void. That however, if relief is to be granted avoiding such transactions the court must be satisfied that the transaction was entered into for the purpose of putting the assets beyond the reach of a person who is making or may at some time make, a claim against the company. However, in *Morphitis v Bernasconi* the court refused to grant an order avoiding the transaction holding that the test for fraud had not been passed to satisfy the meaning of fraudulent trading under insolvency. That to come within voidable premises, there must have been dishonesty because not every fraudulent transaction makes the business a business carried on with intention to defraud, and there must be a causal connection between the loss which has been caused to the company creditors and the contribution which those knowingly party to the

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103 S.18(1) (a)(b) and (c) of the Act.
104 S.18(3).
105 S.18(1)(a)(b)(c).
carrying on of the business when they carried away assets which the company's creditors would
share in liquidation. (Chadwick L.J).

2.3 Objectives of the Insolvency Act, 2011
The essential objective of an effective insolvency system is the establishment of a protective
mechanism to ensure that the value of the estate's assets is not diminished by the actions of
various parties involved. The Act has the following objectives; (a) To secure an equitable
distribution of the property of the debtor among creditors according to their respective rights
against the debtor; (b) To relieve the debtor of liability to the creditors and to enable the debtor
make a fresh start in life free from the burden of debts and obligations; (c) To protect the interests
of the creditors and the public by providing for the investigation of the conduct of the debtor's
affairs and for the imposition of punishment where there has been fraud or other misconduct on
the part of the debtor.

2.3.1 Features of the Insolvency Law
The Insolvency Act, 2011 interalia provides for receivership, administration, liquidation,
arangements, bankruptcy the regulation of insolvency practitioners and cross border insolvency.
The significant features introduced by the act include: (a) creation of single insolvency code and
increased specialisation driven by strict regulatory framework; (b) Improved corporate
governance; (c) Introduction of a new aspects relating to regulation of Insolvency Practitioners,
their qualifications and uniform training; (d) Clarification the role of the Official Receiver and
increased powers of the official receiver; (e) provisions on receivership; (f) cross-border
Insolvency and cross border transactions; (g) protection against bankruptcy in respect of
individuals in the form of interim and arrangement orders and also for companies in the form of
administration; and (h) protection of the insolvent's estate among others. under, Section 204, an
accountant who is a registered member of the ICPAU is a qualified person to act as an
insolvency practitioner.
2.4 The Importance of Insolvency in Economic Development

The cardinal purpose of insolvency regimes is to protect the debtor declared bankrupt from harassment of creditors. A debtor who failed to pay his debts in old time would probably be sold off into slavery. The law however ignored the important reality that a debtor may accumulate debts and eventually become a bankrupt out of reasons beyond his control\textsuperscript{108}.

The realisation of this fact and the successful fight against slavery set the stage for the development of a Insolvency law that provided for the attachment of a struggling debtor’s assets to settle all his creditors. Thereafter, the debtor would be legally discharged from all other outstanding liabilities that still stood unsettled. This is what is now termed as the ‘bankrupt’s new lease in life’ as the debtor is thereafter free to work himself back into productive life and accumulate property without the fear of his old creditors\textsuperscript{109}.

It is significant to note that insolvency proceedings are meant to benefit all creditors. All a creditor interested in the payment of his claim is required to do is 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 or liquidator will be required to pay the creditors, in accordance with their rankings, out of the assets of the company\textsuperscript{110}.

It is a common and undisputed fact that economic growth of any nation largely hinges on the levels of access and availability of credit. Entrepreneurs, traders, investors and other businessmen often luck funds to establish and promote their enterprises and undertakings. Their recourse is to take out credit from financial institutions. However, no financial institution will avail credit unless it is confident it will recover its money. Through insolvency proceedings, creditors are given the confidence that their monies advanced as loans, overdrafts, e.t.c. can be recovered from the defaulting debtors.

\textsuperscript{109} Terence C Halliday, & Bruce G Carruthers, Bankrupt: Global Law Making and Systematic Financial Crisis (Stanford University Press 2009 ) pg. 1.

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It is not always that the businesses that go under are entirely hopeless cases. Some can be saved and rehabilitated while others are simply irredeemable. Through its corporate rescue mechanism, a good and fair insolvency regime should be able to identify the viable businesses that are in financial difficulties, provide for their rehabilitation and save them from total collapse. This procedure saves the investments, jobs and also protects trade and commerce from the unsavoury effects of losing a trading company.\footnote{Otto Kahn-Freund, 'On Uses and Misuses of Comparative Law' (1974) 37 Modern Law Review 1-27 at p.27}

Insolvency proceedings provide the only opportunity in law of investigating the entire operations of a company from the date of its incorporation to the date of the winding up order.\footnote{S. 236 (2) & (3) of the Companies Act.} The purpose of this investigation is to establish the existence of fraud during the incorporation and/or operations of the company. The procedure makes the company's officers accountable for any crimes that might have been committed and concealed behind the corporate veil. Any person established to be a delinquent director or an errant official of the company may be prosecuted under the law.\footnote{S. 329 of the Companies Act} Insolvency therefore acts a means of promoting responsible and accountable corporate governance.

Insolvency proceedings provide a mechanism of 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. This procedure therefore ensures that only those firms that are worthy to trade can remain to trade in the economy. This is helpful in riding the economy of the unwanted firms and providing a true reflection of the relevant traders in the economy.\footnote{A study report on Insolvency law, by the Uganda Law Reform Commission, 2004, p.59}

\section*{2.5 Conclusion.}

In conclusion therefore, where as some rights indeed remain un interfered with despite the order of insolvency, it is my considered submission in a nutshell that an order of insolvency has a far reaching impact on the rights created prior to the date its pronouncement.
The Key duties of an Insolvency Practitioner in Uganda\textsuperscript{115} are Give notice of his/her interest in all property that may not have come into his control. Keep in accordance with generally acceptable accounting procedures and standards full accounts and records of receipts, expenditure and other transactions of the company; procedures and standards full accounts and records of receipts, expenditure and other transactions of the company; Keep accounts and records of the receivership of the company under his management for a period not less than six years after the receivership; Possess security or professional indemnity for proper performance of duty, Prepare and submit to the Official Receiver regular reports on the state of affairs of the property in receivership, A receiver has the right to register his/her name on any asset of the company including land forming part of the receivership estate notwithstanding any transfers and dealings in respect of the same after the commencement of the insolvency.

The objectives of the modern insolvency regime are to provide an equal, fair and orderly procedure in handling the affairs of insolvents ensuring that creditors receive an equal and equitable distribution of assets of the debtor’s estate. This is rooted in the “pari passu” (equal sharing) principle of insolvency which has been recognized as the most fundamental principle of insolvency. Insolvency practitioners when dealing with insolvent and bankrupt entities must follow the laws and the code of ethics relating to the professional service.

\textsuperscript{115} (S. 29, 180)
CHAPTER THREE
DUTIES AND LIABILITIES OF A RECEIVER AND PRE-APPOINTMENT CONSIDERATIONS

3.1 Introduction
This chapter looks at duties and liabilities of receiver and what is expected of him/her upon appointment and incase default what liabilities their too. The receiver is personally liable to the person over whose property the receiver is appointed or its record or beneficial owners, or to the estate, for loss or diminution in value of or damage to estate property, only if (i) the loss or damage is caused by a failure on the part of the receiver to comply with an order of the court, or (ii) the loss or damage is caused by an act or omission for which members of a board of directors of a business corporation organized and existing under the laws of this state who vote to approve the act or omission are liable to the corporation in cases in which the liability of directors is limited to the maximum extent permitted by RCW.

A receiver under the Insolvency act means ‘a receiver or a manager and includes a receiver and manager or administrative receiver in respect of any property and any person appointed as receiver by or under any document or by the court in the exercise of a power to make such an appointment in exercise of its inherent jurisdiction whether or not the person appointed is empowered to sell any of the property in receivership. It is very common for an appointment to be made not simply of a receiver, but of a receiver and manager (administrative receiver)-a twin office under which the appointee is empowered to manage the business and not just get in and sell of its assets. The rationale is that the company may be able to trade its way back into profitability or that its business can be sold as a going concern rather than on a break-up basis and in that way fetch more

A general receiver is personally liable to state agencies for failure to remit sales tax collected after appointment. A custodial receiver is personally liable to state agencies for failure to remit sales tax collected after appointment with regard to assets administered by the receiver.

116 L.E. Sealy; Cases and Materials on Company law 638 (hereafter Cases and Materials), (Keenan 457).
The receiver has no personal liability to a person other than the person over whose property the receiver is appointed or its record or beneficial owners for any loss or damage occasioned by the receiver's performance of the duties imposed by the appointment, or out of the receiver's authorized operation of any business of a person, except loss or damage occasioned by fraud on the part of the receiver, by acts intended by the receiver to cause loss or damage to the specific claimant, or by acts or omissions for which an officer of a business corporation organized and existing under the laws of this state are liable to the claimant under the same circumstances.

Notwithstanding subsections (1)(a) and (2) of this section, a receiver has no personal liability to any person for acts or omissions of the receiver specifically contemplated by any order of the court.

A person other than a successor receiver duly appointed by the court does not have a right of action against a receiver under this section to recover property or the value thereof for or on behalf of the estate.

Receivership in Black's law dictionary is defined as the state or condition of being in control of a receiver. A receiver under the Insolvency act means 'a receiver or a manager and includes a receiver and manager or administrative receiver in respect of any property and any person appointed as receiver by or under any document or by the court in the exercise of a power to make such an appointment in exercise of its inherent jurisdiction whether or not the person appointed is empowered to sell any of the property in receivership.

It is very common for an appointment to be made not simply of a receiver, but of a receiver and manager (administrative receiver)-a twin office under which the appointee is empowered to manage the business and not just get in and sell of its assets. The rationale is that the company may be able to trade its way back into profitability or that its business can be sold as a going concern rather than on a break-up basis and in that way fetch more. An administrative receiver is therefore defined as a receiver appointed over the whole or substantially the whole of the property and undertaking of a grantor.

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118 L.E. Sealy, Cases and Materials on Company law 638 (hereafter Cases and Materials), (Keenan 457).
119 Section 2(a) Insolvency Act 2011 (hereafter Insolvency Act).
A company goes into receivership when an independent receiver is appointed by a secured creditor pursuant to terms of a charge (the instrument by the security is created will invariably confer on the holder of the security a power to appoint a receiver without recourse to the court), or in rare circumstances by the court \(^{120}\) to take control of some or all of the company’s assets \(^{121}\) in order to realize sufficient assets to repay the appointer and hands the company back to its directors depending on the financial state of the company at the end of receivership. \(^{122}\) Where property has been used as security for a loan under a fixed charge only, the lender usually takes power to appoint a receiver out of court under that fixed charge. This was discussed in *Re Atlantic Computer Systems plc* \(^{123}\) Nicholls LJ stated that ‘when lending money to a company, a bank will take as security a charge the assets of the company. The deed creating the charge authorizes the bank to appoint an administrative receiver.’ \(^{124}\) Receiverships are thus insolvency procedures operating largely without the involvement of the courts. Section 20(b) and 22(1) of the mortgage act 2009 also provide for appointment of receiver by mortgagee where mortgagor is in default, Order 42 of the Civil Procedure rules also provides for court appointment of a receiver.

Appointment of a receiver does not affect the legal existence of the company, directors still remain in office but their powers are limited depending upon the powers granted to the receiver and the extent of the assets over which the receiver is appointed. A receiver appointed by the court is not anybody’s agent, but is simply an independent office of the court accountable to it and is not subject to direction or dictation by the creditor in whose interests he has been appointed. \(^{125}\)

This agency (whether contractual or statutory) enables the receiver to enter into contracts in the company’s name, employ staff which makes him competent to realize the company’s assets for the purpose of discharging the secured debt and to take any necessary steps to protect and

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120 Section 176 Insolvency Act 2011  
121 [Keenan 457]  
122 Gower 840  
123 [1992] 1 All ER 476  
124 Cases and Materials 640  
125 Cases and Materials 638
preserve those assets. In exercising his/her powers, a receiver is taken to act as the grantor’s agent. In Stephen Lubega v Barclays Bank Ltd it was noted that a receiver is usually an agent of the company because of the instrument under which he is empowered or in his position as an administrative receiver.

A receiver under section 178 Insolvency Act gives written notice of appointment to grantor and give public notice or delivery to registrar of companies and official receiver where the grantor is a body corporate and notice on business documents for example every invoice, order for goods inter alia on which the name appears.

3.2 Duties of receivers.

Duties of a receiver as provided under sections 179 and 180 of the Insolvency Act include; The fundamental duty of a receiver under section 179 Insolvency Act is to exercise his/her powers in a manner which s/he believes on reasonable grounds to be in the best interests of all persons in whose interests the receiver is appointed. Essentially, to collect and sell enough of the charged assets to repay the debt owed to the secured creditor/debenture holders on whose behalf he is appointed. He may incidentally save the company or part of it.

Taking custody of all property under receivership and register it in his/her names. Investigate the state of affairs of the property under receivership and give a general notice of his/her interest in all property that has not yet come under his/her control. Keep all money relating to the property in receivership separate from other money not relating to receivership. Keep in accordance with accepted accounting procedures and standards full accounts and other records of all receipts, expenditure and other transactions of the company and retain them for not less than 6 years after the receivership ends. Also important is that a receiver who is appointed to manage the business of the charger has a duty to do so with due diligence. In Medforth v Blake Medforth was a pig-farmer on a very large scale ran into financial difficulties and his bank appointed receivers who

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126 Section 181(3) Insolvency Act  
127 [1992] KARL 230  
129 Bakibinga, Company Law 142 (hereafter Bakibinga)  
130 Keenan 465, Bakibinga 138  
131 [1999] 3 ALLER 97.
ran the business until Medforth was able to find a new source of finance and repay the bank. Although Medforth repeatedly told the receivers that they could claim large discounts from the suppliers of feedstuffs, they failed to do so and heavy expenditures were incurred. The court held that he receivers owed a duty (subject to their primary duty to the bank) to manage the business with due diligence and that for breach of this duty they were liable to Medforth.132

A receiver is in addition to the above duties required under section 189 Insolvency Act to prepare a preliminary report on the state of affairs of the property in receivership and prepare other reports133 periodically summarizing the status of the property under receivership. A receiver under section 191 Insolvency Act may omit from any report any matter which would prejudice the exercise of the receiver’s functions but the fact of the omission must be stated in the report.

The Duty of disclosure, is considered under Section 4 of Mortgage Act, Receiver over duty to disclose all information in relation to disclosing information in relevant to receivership. In Fina Bank Limited V Ronak Limited134 where it was held that receiver must disclose any information within his knowledge during receivership and within six years after receivership to party who wants it.

3.2.1 Duty of care
The receiver owes a duty of care to his debenture holder, a limited duty of care to company and preferential creditor.135 In Downs View Nomine as Limited V First City Corporation Limited136, it was held that a receiver owes no duty of care in tort for negligence for to impose this would be the incompatible with this right and duty to act in the best interest of debenture holder.

David Millman137 States the receivers owes a duty of care to the company and preferential creditors; he also owes duty of care to any other party having an interest in equity of redemption on subsequent Mortgage.
In *Standard chartered Bank V Walker* A company issued to P, a bank, a debenture giving P a charge over the company's assets in respect of any sums then or in future owing to P. The debenture empowered P to appoint a receiver with a provision that any receiver so appointed was to be deemed the company's agent and that the company alone would be responsible for his acts or defaults. In November 1980 P appointed a receiver who engaged auctioneers to hold a sale of the company's stock. As the auction was held on a cold day in February the proceeds of sale was entirely absorbed by the expenses of realisation and preferential debts other than that of P. P claimed the sums guaranteed by D and D subsequently brought an action against P, alleging the sale was poorly organised and realised at a gross undervalue.

Whether a receiver realising assets under a debenture owed a duty to both the borrower and the guarantor of the debt to exercise reasonable care and judgement to obtain the best price available for those assets; Whether the holder of a debenture could be liable for the actions of a receiver if the process of receivership was interfered with.

A receiver realising assets under a debenture owed a duty both to the borrower *and* to a guarantor of the debt to take reasonable care to obtain the best price that circumstances permitted, and that a duty was also owed to exercise reasonable care in choosing the time for the sale. Despite the receiver being deemed the company's agent, P, as holder of the debenture, might have responsibility for the receiver's actions if it were shown that it interfered with the conduct of the receivership. As these were triable issues D would be granted unconditional leave to defend. A receiver over duty to use reasonable case to obtain best possible price which the circumstances of the case will permit.

In *Barclays bank (U) Limited V Global supplier Limited* Justice Kiryabwire also asserts that receiver over duty of care to granter and guarantor which must be fulfilled.

### 3.2.2 Duty to render accounts

Receiver was subject to render true accounts of the company Section 180 (2) (f) of Insolvency Act keep in accordance with generally accepts accounting processes and standards,
full accounts and other records of an receipts expenditure and other transactions of the case. Imputing an obligation on a receiver to take precaution in and draft books of accounts which he will present in a creditors meeting or keep upon winding up.

3.2.3 Duty to safe guard the property for the benefit
Raymond Walton\textsuperscript{141}, state the object of appointment of receivers is to safeguard the property for the benefit of those entities to it, it enables persons who posses rights over property to obtain the benefit of those rights and to preserve the property form some damages which threatens it. The general duty of receiver may be said to be to take possession of the estate or other property of the subject matter of dispute in action, compel payment of them, management, letting land and houses and collecting and selling it.\textsuperscript{142} In \textit{Steel Rolling mills Limited V Standard Chartered Bank (U) limited}\textsuperscript{43} The respondent cancelled the mortgage agreement claiming that debenture is immediately enforceable in total appointing a receiver. Who tried selling the Issue? The main aim of receiver’s appointment is to safe guard the crystallized property in order realize the amount owed.

In the performance of his/her duties, a receiver is regarded as standing in a fiduciary position to the debenture holders who have appointed him/her under the debenture. This duty of care extends to the general creditors and the company over whose assets s/he superintends to obtain the best price possible for the assets as noted in Cuckmone Brick & co v Mutual Finance ltd\textsuperscript{144}.

A receiver’s duties are therefore owed first and foremost to the security holder who has appointed him and the interest of the company, its trade creditor and any other person concerned can legitimately be subordinated to those of the security holder. In Downsview Nominees ltd v First City Corp ltd\textsuperscript{45} a company which carried on a motor dealing and garage business in New Zealand had given debentures to two corporate bodies each secured by a floating charge over all of its assets, It defaulted under the second debenture and FCC (second debenture holder) had

\textsuperscript{140} Smith’s limits V Middleton.
\textsuperscript{141} Kerr Law & Practice on Receivers 1\textsuperscript{st} edition page 5.
\textsuperscript{142} Ibid.
\textsuperscript{143} MA No. 829 of 2005.
\textsuperscript{144} [1971] 2 AllER 633, Keenan 465, bakibinga 141
\textsuperscript{145} [1993] 3 All ER 623
appointed receivers who formed the view that the company's business was unprofitable and that it should be closed down. The company's managing director appealed to Russell (the second defendant) for help which he provided and the company incurred losses of over $500,000. The Privy Council held that Russell had used his powers not for the proper purpose of realizing Downview's security (first debenture holder) but in order to meet the managing director's wish that the company should continue trading.

In exercise of his/her duties, the receiver has powers which are expressly or impliedly conferred by the appointing document. An administrative receiver has power to carry on any business of the grantor or perform functions and exercise power that the company, its directors or secretary would perform was the company not in receivership. He may change the company's registered office and registered postal address. In receivership, there are instances where the receiver is held personality liable during receivership; under section 186 Insolvency act s/he is personally liable for any contract entered into by the receiver in exercise of his powers and for salary and allowances but is not liable for payments incurred during receivership, under a contract of employment adopted by the receiver or in respect of services rendered after the adoption of the contract, rent and other payments subject to agreements at the subsistence of receivership. A receiver under section 187 Insolvency Act, a receiver is entitled to indemnity out of the property under receivership in respect of personal liability incurred in line with his duty. This does not limit any other right of indemnity to which a receiver may be entitled or limit a receiver's liability on any contract entered into without authority. Further, a receiver is not bound by contracts entered into by the company even where he oversees their performance. He cannot interfere with existing equitable rights of a third party e.g. under a contract which is specifically enforceable as in *Freevale Ltd v Metrostore Ltd Lanor*148. However, where the receiver enters into new contracts pursuant to the receivership, they are binding on the company, so the receiver together with the company would be personally liable on them except where he contract otherwise provides.149

146 Section 181 Insolvency Act
147 Airlines Airspares v Handley Page [1970] 1 ALLER 29
148 (1984) 1 ALLER 495, Keenan 464, Gower 847
149 (Gower 847) Airlines Airspares Ltd v Handley Page Ltd [1970] 1 ALLER
3.3 Statutory duties of Receiver

Section 179 of Insolvency Act provides the fundamental duty of a receiver is to exercise his or her powers in manner which he or she believes on reasonable grounds to be In best interest of all persons in whose interests the receiver and these are grantor, any interest in property in receivership, unsecured creditors of the grantor, any surety or guarantor who may called to fulfill the obligation. One should however note that receiver is not obligated to defend any proceedings relating to any breach of duty or receiver compensation or indemnity from the property in receivership of the grants in respect of liability incurred\[150].

Also Section 180, Insolvency Act further imputes more duties on receiver like taking custody and control of all property under land and other assets under receivership; investigate the state of affairs of the property under receivership, separating his account from receivership accounts retaining the accounts and records for at least six years.

The receiver shall apply monies in payment of all rents, safes, charges, taxes and other outgoing requires to be paid in respect of the mortgaged property\[151]. This proviso imputes duty on receiver, to pay rent, taxes and charge included during receivership.

3.4 Power and duty of sale of a Receiver

David Milmann Christopher\[152] Receiver appointed under debenture has power to sell the assets to generate the funds to repay the debentures holders. Lee\[153] states that receiver appointed pursuant to a securing document had primary duty to realize the assets. Charged by the debenture with a view to liquidating the debt owing to the mortgage. A receiver’s power to sell the charged assets arises in the term of debenture pursuant to which is appointed together with plenary.

Section 26 (1) of Mortgage Act where a Mortgage is in default of his or her default at the expiry of time provided for rectification of default in notice mortgagee may exercise his or her power to sell the mortgage land.

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150 Section 179(3) of insolvency Act.
151 Section 22 (9) of Mortgage Act.
Section 28 (1) of Mortgage Act provides that where mortgagee becomes entitled to sale, the sale may be of the whole or part of mortgaged land, (b) Subject to or free of any mortgage or other encumbrance having priority to the most of mortgagee’s mortgage, (c) by way of subdivision or otherwise. (d) by public auction, unless the mortgagor consents to sale by private treaty.

A receiver while exercising his power of sale must ensure the provision of section is fulfilled. Section 28 (2) of Mortgage Act provides where sale is to proceed by public auction, it shall be the duty of mortgagee or receiver to ensure that sale is publically advertised in advance of the sale by function in such manner and form as to bring mortgaged land may include but not limited to the mortgaged placing advert in newspaper with wide circulation in the area concerned.

In Nakamya v DFCU bank Limited\textsuperscript{154}, the plaintiff mortgaged her property comprised in Kyadondo Block 265 upon default of payment, consequently. 1\textsuperscript{st} defendant wanted exercise of its power of sale, 2\textsuperscript{nd} defendant appoints a receiver, where they were not in agreement with the manner of sale one of issues is whether the sale of the suit property by the defendant to Iga Francis was lawful? When receiver is appointed he has absolute and unfettered power of sale of charged property to realize amount owed.

This implies that failure to comply with this requirement the sale will be null and void case. During sale the receiver must ensure he obtains the best price reasonably. The receiver is under duty to obtain best price value must require that he takes steps to ascertain the market value of the charged assets.

Similarly in Epaineti Mubiru V Uganda Credit and Saving Bank\textsuperscript{155}, Sekandi J. held that proximity between mortgagor and mortgagee which give raise a duty to take reasonably precautions in the conduct of sale so as to obtain in market value. This imputes duty on receiver that while sale to do anything reasonable to obtain best price in relation to market value at time of sale.

\textsuperscript{154} Civil Suit No. 513 of (2017).
\textsuperscript{155} HCCS No. 567 of 1965.
Section 31 (1) of Mortgage Act provides that the purchase money received by a mortgagee who has exercised his or her power of sale shall be applied (a) in payment of any rates, rents, taxes, charges or other sums owing and required to be paid, (b) in discharge of any prior mortgage or other encumbrance subject to which the sale was made (c) in payment of all costs and reasonable expenses properly incurred and incidental to the sale or any attempts sale, in discharge or sum advances under the mortgage or so much or it remains outstanding, interest costs and other monies due under mortgage.

The receiver before exercising the power of sale he serves statutory Notice on the mortgagor failure of which is fatal to sale. In Gladys Nyangire Karumu V DFCU Leasing Company Limited.\(^{156}\) The 1\(^{st}\) and 2\(^{nd}\) plaintiffs were directors of 3\(^{rd}\) plaintiff. They had donated powers of attorney to 3\(^{rd}\) power who mortgaged if to Defendant. 3\(^{rd}\) plaintiff was later put in receivership and challenged that deed did not give power to appoint receiver, the later sale was being challenged. Issue whether sale without Statutory Notice was lawful. J. Madrama held it's trite law default in service of statutory notice makes sale illegal. The above is how when receiver wants to sale must exercise

3.5 Liability of Receiver

Section 186 (1) (a) Insolvency Act provides that a receiver shall be personally liable for any contract entered into by the receiver in the exercise of any of the receiver's powers, but shall not be liable for grantors debts. Although this must (1) during the receivership, (ii) under contract of Employment adopted by receiver and (iii) respect of service rendered after the adoption of the contract.

In Stephen Lubega v Barclay's Bank (U) Limited\(^{157}\). The constitution indicated that the appointment of Receiver/Manager is responsible for his action and directors cannot answer for him or her. Therefore personally liable on any contract enters into by him in the performance of his function. This makes receiver liable as person for actions done by him like contracts entered by him in case of breach.

\(^{156}\) HCCS No. 106 of 1972.
\(^{157}\) C.A No. 2 of 1992.
Section 186 (1) (b) of Insolvency Act provides receiver shall be personally liable for wages salary and allowances including sickness and holidays allowances but shall not be liable for payment in lieu of notice that are incurred. This implies that during receivership the receiver must pay workers and staff maintained failure of which he will be liable.

3.5.1 Liability in tort for conversion

Receiver is obligated to take control of the company’s assets quickly after appointment to preserve the assets and to present their disappearance. Receiver who takes possession of or third party’s assets or does some other act inconsistent with that party’s right to possession incur the normal liability in tort for transfer or conversion such if acting in good faith.

In *National Enterprise Corporation and Ors v Nile bank*\(^{158}\) debenture was executed by the 1st appellant in favor of respondent to advance loan to the UEC Bakery way of loan permitting the company other financial accommodation from time to time to aggregate amount. Odoki JSC held that where the property is held by receiver outside powers conferred to it by court or charging document can be liable for conversion or dentinue.

3.6 Legal Framework of appointment of receiver and pre-appointment considerations

When creating charge, the parties come up with document known as debenture which empowers a creditor to appoint a receiver in case of default. Upon default the creditor can appoint receiver this chapter looks at legal framework and appointment receiver.

3.6.1 Validity of proposed appointment

The charge under which the receiver is appointed must be valid. If the charge under which a receiver is appointed, or the appointment itself is invalid or defective, both the receiver and his appointer could even where they acted in good faith, incur substantial liabilities to the company\(^{159}\).

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\(^{158}\) Civil appeal no, 17 of 1994.

\(^{159}\) Re Jaffre Ltd (in liquidation), Jaffre Vs Jaffre (No 2)11932J NZLR 195.
David Mpanga and anor v Roliant Property Agency\(^{160}\) receiver was appointed pursuant debenture of mortgage deed which was not registered issue was whether the deed was valid? it was held invalidity of debenture renders the appointment invalid.

In any case it’s prudent for the receiver designate and his proposed appointer to investigate and take legal advice on all matters which may impinge on the whole or any part of the charge or the appointment.

Among the points to be considered before appointment are:

a) Company’s powers

Before appointment of the receiver, the appointer should look at whether the creation of the charge was within the powers of the company as contained in the objects clause of its memorandum of association in force at the time of creation\(^{161}\). In case it was pre incorporation contract did the promoter have the said powers to enter such agreement that created the charge on property being put under receivership?

b) Director’s powers

Before appointment of the receiver, the appointer should look at whether creation of the charge was within the directors powers. The articles of association of some companies may contain limitations on director’s powers to borrow or create security without a resolution of the general meeting.\(^{162}\) In *T Rolled Steel Products (Holdings) Ltd v British Steel Corporation*\(^{163}\), the application was challenging for closing and appointing receiver for the mortgaged lands LRV 1618 folio 17 Plot Bidico Road, Masese Jinja, LRV 33 897 Folio 6 fifth street industrial Area and several of others one of issues was on legality and enforceability of the facility letters/master credit for the loan issued. There is also an implied general limitation that directors can only exercise their powers for purposes of the company’s business. If the holder was aware (or ought

\(^{160}\) Civil suit no 7 of 1998.

\(^{161}\) Shash Rajani, Page D 2.2, Ibid note 17.

\(^{162}\) Shash Rajani, Page D 2.3, Ibid note 17.

\(^{163}\) [1986] Ch 246, 283-284
reasonably to have been aware) that the charge was not being created for purposes of the company then he/ she will be liable.\textsuperscript{164}

It should be noted that the articles of association of a company are construed strictly, in that; terms can never be implied into them on the basis of extrinsic evidence of surrounding circumstances.\textsuperscript{165}

c) Due execution of charge.

In Re Jaffre Ltd (in liquidation)\textsuperscript{166} it was held that the charge has to be validly executed. This may depend on whether the company’s seal appears to have been affixed in accordance with the formalities prescribed in the articles and whether the persons attesting to the sealing held the offices which they were described as holding.

In \textit{Rev. Ezra Bigangiro v New Makerere Kobil}\textsuperscript{167} Allianz Tours and Travel was fueling its buses at fuel station hence according arrears from supplies later station secured judgement and attached property and applicant was objecting to attachment of property since he had interests, but had memorandum of understating for sale of two buses with bank. And one issue was whether the defendant entered into memorandum with express purpose of saving the defendants property from execution. Where it was held where deed is made for purpose of defeating execution its void hence imperative for charge to be legally created not defeat the interest of the other party Where a charge has not been validly executed as a deed, it may still operate as an agreement under hand and, hence, an equitable charge otherwise than by way of deed. Byblos Bank SALVA! Khudhoiry\textsuperscript{168} where court was willing to effect documents not sealed as if they are deeds, on the ground of the intention of the parties or of estoppels.

In \textit{Jinda International Textiles Corporation v Barclays Bank and Anor},\textsuperscript{169} the mortgaged property was sold and money was credited to 1\textsuperscript{st} defendant’s account which was insufficient to

\textsuperscript{164}[1985] 3 AB ER 52.
\textsuperscript{166}[1932] NZLR195.
\textsuperscript{167}MA No. 10 of2010.
\textsuperscript{168}(1987)BCLC232.
\textsuperscript{169}HCCS No. 156 of 2008.
clear the outstanding balance and plaintiff was contending the sale saying it was illegal since it was done negligently at very low price hence it fraudulently wanted it cancelled. Court held even though charge was not validly executed but it express the intention of parties it can be ratified to suit the intention. Judgement auditor attached 3 Ice Plants, one generator KUA 200 & Fund containers 20 ft & five motor vehicles, and receiver had been appointed as agent of Uganda marine products to collect USD 945,000 and after the residue equity to reverts to the company. Lower on company law 8th edition page 1138 to 1136 where the debenture holder leases the property in possession of the assets it means the receivership has not been effective. Stated deed of appointment of receiver must not be in default but valid and duly filed\textsuperscript{170}

Which implies before appointment of receiver the holder needs to look at legality of execution?

d) Registration

Charges are required to be registered. Non registration of the charge means that the charge is void as against a receiver, creditor, or administrator who have levied execution or otherwise acquired an interest in the assets concerned. In \textit{David Mpanga v Roliant Property Agency}\textsuperscript{171} registration of debenture with query its validity must be prima facie to its validity unless ill motive was imputed during registration hence invalid. The fact that the Registrar accepted for registration the debenture without querying its validity is, to me, prima facie evidence that he accepted its validity and there seems to be no reason for me to impute on the Registrar any ill motives of accepting an invalid document for registration. In any case, Section 99 of the Companies Act provides that the Certificate of registration of a charge or mortgage under 5.96(1) shall be conclusive evidence that the “Requirements of this Part of this Act as to registration have been complied with”. The respondent was therefore ordered to retract its publication. It must publish the retraction in a very distinct space of the newspaper in which it published its discouraging and damaging innuendos. I so order. I also order that the respondent pays to the first applicant the costs of these proceedings.

Registration means delivery of the prescribed particulars to the Registrar of Companies in accordance with the requirements of the companies act and not the actual issue by the registrar of

\textsuperscript{170} \textit{Ifira (u) ltd v Ponsiano Lwakataka} and Uganda marine products, Justice Kiryabwire;

\textsuperscript{171} Civil suit 7 of 1998.
a certificate of registration. This impute that deed once entered into must be registered. When the mortgage deed or debenture is not registered as seen in case of David Mpaga is invalid

e) Enforceability

The question in this instance is whether the holder of the charge is entitled to enforce it. This depends on whether any event giving rise to the right to appoint a receiver has occurred and whether at least the money secured by the charge is; Scope of charge where one looks at what properties covered by charge this applies where there is floating charge and enforceability requires crystallizations and one needs to know which property is covered\textsuperscript{172}. Whether there is prior subsequent charge existing on charged property in favor of any third party which may affect the appointment of receiver\textsuperscript{173}

Facts As Micheal Mawanda was appointed as receiver was appointed per powers of mortgage deed after DFCU started arguing they are not entitled to share process of sale of securities with EADB. Ntende J. Where there is double charge the proceeds got must cater for both\textsuperscript{174}

In conclusion before creditor appoints receiver must ensure it conforms with the requirements above.

3.6.2 Mode of appointment

Appointment out of court should be made as prescribed in charging document. The usual mode is prescribed in writing under the hand of the holder of charge or authorized office holder. The charging document usually provides that a receiver may be appointed in writing under the hands of the holder of charge or during authorizes offices.\textsuperscript{175}

The receiver derives his power from charging not the instrument of appointment, which is merely means of triggering the powers contained in \textit{Phoenix properties Ltd v Wimpole Street Nominees Ltd}\textsuperscript{176} where Mummery J. held that receiver appointed by debenture holder by writing not deed and convey good title to the charges property if acting in capacity as holder of an irrevocable powers of attorney granted in debenture deed with power of sale.

\textsuperscript{172} Shash Rajani Tolleys Corporate Insolvency D2.13 page 407.
\textsuperscript{173} Shash Rajani Tolleys corporate Insolvency page 408.
\textsuperscript{174} In Matter of Ranch on Lake ltd (in receivership) HCT-00-CC-CI-OO9-2005.
\textsuperscript{175} Paul Davies- principles of Modern Company Law 1997.
\textsuperscript{176} (1992) BCLC 737.
In *Winder Refrigerator Co. Ltd v Branch Nominees Ltd*\(^{177}\) High Court grants declaration that appointment of receiver over property was void by reason of not being under seal, as provided for in debenture. Charge created over licenced premises in 1981 - €4m loan - receiver appointed in 2012 - objection to appointment of receiver by sole member of company - s. 316(1) of the Companies Act 1963 - whether appointment void by reason of not being under seal as provided for in 1981 debenture - whether void for lack of authority by respondent to execute deed - failure to challenge appointment for two months - requirement that appointment of receiver comply with strict terms of debenture - strict test of formality - bank's memorandum and articles of association not requiring company to have a seal - Section 64 (2) (b) (iv) of the Land & Conveyancing Law Reform Act, 2009 - deed to be executed in accordance with legal requirements governing execution of instrument where body incorporated - whether applicant estopped from objecting to appointment by reason of two-month delay - acquiescence - whether absence of objection created an estoppel. It was held that an instrument of appointment executes as deed but in effective as deed because it was not validly delivers could never the less be valid appoint; Date when appointment takes place, who may be appointed.

In *General parts v N parts*\(^{178}\) where UCB sought declaratory orders clearing the appointment of receiver and court held that all steps must adhered to. "Whether the debt of Shs. 2, 288, 821, 4737 = was due and owing to the plaintiff and due for payment." In his judgment, however, the learned trial Judge did not advert to that issue at all, let alone answer it. This may well be because counsel expressly stated, in the application for leave to amend, that the prayer for the order for payment was in the alternative to the prayer for declaratory judgment. The omission however, was not subject of any cross-appeal and, therefore, the issue has not been adjudicated. The second matter is the additional security. It was held that the mortgage document was not validly executed. This only means that the intention to create a legal mortgage was not perfected. The fact that the appellant deposited several certificates of title as further security for the indebtedness was not in dispute at any stage of the case.

\(^{177}\) *(1961) Ch375 (CA).*

\(^{178}\) *CA No.5 of 1999.*
In the result, having found merit in grounds 3, 4(b) and 6, court allowed the appeal and set aside the orders of the Court of Appeal, and the High Court. I would substitute for the order of the High Court, an order rejecting the declaration prayed for, that UCB properly appointed M/s. Key Agencies & Auctioneers as receiver/manager and that it executes powers conferred through that appointment. Court allowed to the appellant, three quarters of the costs in this Court, and costs in the Courts below.

In *Development Finance Co. of Uganda v N.G General Parts*179 Development finance Co. the applicant were appointed as receivers of respondent Co. upon failure to repay loan advanced to it by the applicant. The applicant was filed suit challenging this appointment. Court held where a receiver is privately appointed the person appointing must have powers to do so from deed or debenture

3.6.3 Receiver Appointed By Court
Receiver appointed by court under Order 42180 confers unfettered Jurisdiction on High court to appoint a receiver in all cases which it appears to be just and convenient to do so. This unfettered Jurisdiction can be exercised where petition is for winding up where the creditor have obtained judgment against the company and are about to levy execution, where the company’s business has been closed or is about to be closes, or its distributing its reserve to shareholder. In other circumstances is where the charging document does not confer powers to holder to appoint receivers this, then he or she can seek redress from court which can appoint one on his behalf.

3.7 Procedure of appointment
When a receiver is appointed under the court or under the powers contained in the charging document or a debenture, the receiver must give notice of his or her appointment.

*Section 178(1) of Insolvency Act* immediate after his or her appointment, a receiver shall give written notice off the appointment to the grantor. *Section 178(2) of Insolvency Act* provides receiver shall not later than in working days after the commencement of the receiver shall give

179 HCMA No. 1527 of 1999.
180 Civil Procedure Rules.
Section 189 (1) of Insolvency Act provides that subject to appointing document receiver shall within forty working days after his appointment make preliminary report of state of affairs. This report shall include particulars of property under receivership, particular of debt to be satisfied by property receivership, name and address on all known creditors with the interest on property the particulars of any charge over property. This procedural steps imputes that receiver must obtain service of any person with knowledge about the company to make out to him a statement of affairs.

Section 189(2) of Insolvency Act provides for the content of statement of affairs which shall be events within the receiver’s knowledge leading to his appointment disposal of the property under receivership, associated company or business carries on or proposed to be carried on amount owing at date of appointment, to any person whose interests the receiver was appointed, any amount available for payment to creditor. Regulation 166(2) of Insolvency Regulation 2013 provides that every statement of affairs shall be verified by statutory declaration. In Aya Bakery (4) Ltd & Amos V Roko Construction Ltd Applicant appointed receiver pursuant to the arbitral award, applicant did not know process leading to the appointment of receiver. The issue, what was the role of receiver? It was held that receiver has to prepare statement of affairs which will show available property in charge and how to realize assets.

3.7.1 Creditors meeting
A receiver may call for creditors meeting provided whose purpose is to decide and chat the way forward and brief them on the status of company and best way to realize assets and meet there obligation. In People’s Transport Co. Ltd v Africa Co-operative Society Ltd The plaintiff

161 CA No. 661 of 2011.
162 1996)UGHC.
was put under receivership for purpose of winding up paying off dates of creditors and compensating the employees affected subject to Public Enterprises Reform and Divestiture Statute C. No. 9 of 1993 provides creditors to meet and decide on fate of company in receivership.

3.7.2 Seeking for guidance and clarification from court.

Section 195 (1) of Insolvency Act it provides that an application of receiver, court may give directions on matter concerning the function of receiver. A receiver may at time while executing and exercising his powers in receivership apply classification of any matter arising out performance functions. In NL Electrical Limited court held Receivers had not come to court advancing a positive care but rather enquiring on how they should act. In David Mpanga & anor V Roliat Property Agency Justice Ntabgoba held that receiver of property appointed under the power of instrument can apply to court for directions in connection with the performance, functions and court can give such direction or may make such older declaring the rights of person.

3.7.3 Remuneration of receiver

The first test is to look at the charging document (debenture) whether it provides for remuneration of receiver if so he or she is remunerated per its provisos. Section 22 (8) of Mortgage Act provides that receiver is entitled to retain out of any money received by him or her for all costs charges and expenses incurred by him or her as receiver, for his or her remuneration, commission at such rate not exceeding five percent of the gross amount of monies if no rate is specified. The provision Section 22 (8) fixes the ceiling of receiver remunerating him or herself at 5% if the rate is fixes by debenture or charging document.

In addition Section 187 (1) (b) of Insolvency Act receiver is entitled to remuneration and expenses which are reasonably incurred. This implies that a receiver must be paid or deducts money which he has collected his entitlements before disposing it to the creditors. Where a receiver is appointed by court then court has to go further fix the remuneration of the receiver.

183 Shash Rajani Trolleys Corporate Insolvency D 4.9.
184 (1994) IBCLC.
185 Civil suit no. 7 of 1998.
Section 195 (2) (ii) Insolvency Act empowers court on application by receiver, creditor, grantor during receivership in respect of any period, review or fix the remuneration of the receiver at the level which is reasonable in the circumstance and to the extent that amount to remuneration retained by receiver.

3.7.4 Effects of appointment of receiver.
The general effect of receiver is that it paralyses the powers of the company and administration in favor of receiver appointed. In *Mass steamship v Whinney*\textsuperscript{186} held that receiver entirely supersedes the company in the conduct of its business deprives it powers to enter into contract to sell, pledge or otherwise dispose of the property put into possession or under the control of receiver.

The main general effect upon appointment of receiver is first to constitute as an agent of company with wide powers depending on how much control of the company assets.\textsuperscript{187}

3.7.5.1 Effect on directors
The directors are not dismissed by the appointment of the receiver but their powers to deal with the company’s property as noted in *Gomba Holdings UK ltd v Homan*\textsuperscript{188} are suspended during the receivership. If the continuation of a contract of service of a particular director is inconsistent with the position of a receiver and manager his appointment will be terminated.\textsuperscript{189}

In *Newhart Developments v Co-operative Commercial bank*\textsuperscript{190} it was held that they [directors] had power to issue a writ claiming damages for breach of contract against the very creditor who had appointed the receiver. However in *Tudor Grange Holdings ltd v Citibank NA*\textsuperscript{191}, Browne-Wilkinson V-C expressed doubts whether the Newhart case was rightly decided. He ruled that in any event the directors, could not sue on a cause of action which was competent for the receiver to bring

\textsuperscript{186} (1991)AC254.
\textsuperscript{187} Shash Rajani*ibid note) D.5.2.
\textsuperscript{188} [1986] 1 WLR 1301 (Gower 846)
\textsuperscript{189} (Keenan 461).
\textsuperscript{190} [1978] 2 AIER 896 emphasis added.
\textsuperscript{191} [1978] 2 AIER 896 emphasis added
and any action brought by the directors must be funded from sources other than the assets under the receiver’s control.\textsuperscript{192}

With regard to charged property; an administrative receiver may apply to the court for an order to dispose of property subject to a charge. The court must be satisfied that the disposal would be likely to promote a more advantageous realization than would otherwise be achieved.\textsuperscript{193} However in \textit{Medorth v Blake}\textsuperscript{194} court held that receivers, who negligently conducted the business of which they had taken control, liable to the mortgagor, who suffered loss when the business was handed back to him after the secured debt had been discharged in a less good state than if it had been properly run by the receivers.\textsuperscript{195}

In \textit{Nottmans in Gomba Holding (UK) Limited V Homund Stated Board of Directors},\textsuperscript{196} a receiver’s powers of management are delay ancillary to the duty to manage the security, the property of the mortgagee, in the context of the agency of a receiver which is no ordinary agency but primarily a device to protect the mortgagee, the claimant sought damages from mortgagees who had sold their charged properties as receiver’s because had failed to sell at proper value. During the currency of receivership, no powers over the assets in possession or control of the receiver.

In \textit{St. Noah Girls Secondary School V Crane Bank Limited}\textsuperscript{197}, the petition was challenging the premature appointment of receiver who took over the management of the assets of applicant who started collecting fees wanted termination of receivers. Justice Irene Mulyangoja held appointment of receivers operates as dismissal of the directors powers to act during receivership. This implies that once property is placed under receivership it temporary suspends powers of directors to deal with property but they stay in office.

\textsuperscript{192} Cases and Materials 638.
\textsuperscript{193} Keenan 461, Gower 845.
\textsuperscript{194} [2000] Ch.86 CA.
\textsuperscript{195} (Gower 845).
\textsuperscript{196} [1986] IWLJR 1301.
\textsuperscript{197} (2011) UG COMM 68 (3 May 2013).
3.7.5.2 Effect on the charge

In case charge created was floating one the appointed of receiver sees him crystallize the charge. In O’kobusa JA in KisiI Petroleum Products Limited V Kobil Petroleum it way held appointment of receiver is one of the events that cause a floating change to crystallize. This implies in case of floating charge the appointment of receiver crystallize it hence cannot be attached by any other floating charge holder. Crystallization was also considered in Buchiers Anor. V Talbot & Anor. held where it was that where the asset is floating and it is crystallized it becomes fixed charge and company had an equity of redemption. In case there is a floating charge the process of turning it into a fixed charge is through crystallization were they attach a property to a charge.

27.5.3 Effect of receivership on contracts.

Appointment of receivers does not determine contracts entered into by the company before appointment but receiver need not cause the company to fulfill the contract, if contract is specifically enforceable receiver cannot resist claim for specific performance. Section 186 (1) (a) of Insolvency Act provided for any contract entered into by the receiver in exercise of any of the receivers power.

The receiver is personally liable on any contract entered into by him/her and on any contract of employment adapted by him in performance of his function.

In Robert Mwesigwa V Bank of Uganda, it was held that the inelegant draftsmanship cannot be blamed on the Defendant whose onerous duty was to implement the statute to the letter. The plaint as it stands, as regards the alleged acts of bad faith, does not show what rights were enjoyed by the Plaintiffs under the statute and how those rights were violated. To give an example, it is not enough to allege that the Defendant uttered conflicting and contradictory statements on the matter. They must show that the Defendant was under duty, imposed by the statute, to do X,Y,Z which were not done, or if done, not done in accordance with the statute, to raise inference that the act or omission was in bad faith. In the view of the judge, Mr.

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199 [2004] 1ALLER 1289.
200 Griffither V Secretary of state for social service (1973) 3 ALLCR 1184.
201 Gosling V Gaskil (1897) AC 575.
Kanyerezi's second objection to the plaint also had merit. In the result, both objections are sustained. Under 0.7 r 11 (a) of the Civil Procedure Rules, a plaint which does not disclose a cause of action must be rejected. In both instances cited by counsel, the plaint does not disclose a cause of action against the Defendant. The judge ruled that he would strike it out in accordance with 0.7 r 11 (a) of the Civil Procedure Rules and I do so. As regards costs, the usual result is that the loser pays the winner's costs. This practice was, however, subject to the Court's discretion, so that a winning party may not necessarily be awarded his costs. In the instant case, I'm of the considered view that the inelegant manner in which the Financial Institutions Statute was drafted, particularly S. 32 thereof, greatly contributed to the Plaintiffs' inelegant interpretation of it. In these circumstances, court inclined to order each party to bear its own costs.

3.8 Conclusions

Therefore, as seen in chapter, the appointment of receiver is on mere entitlement to creditor to enjoy in case default but must creature debenture that brought up credit agreement or through court. Administration is terminates under Section 168 Insolvency Act provides for termination of administration where court makes an order or where circumstances occur which are specific in the deed for terminating it. Court makes such an order if satisfied that information about the company's business or property was false or misleading. There may be conflicts between majority and minority creditors, and administrators may exercise their wide powers unfairly or incompetently. There are remedies aimed at such conduct. First, administrator proposals to creditors may not involve downgrading the rights of secured or preferential creditors without their consent. It is given specific procedure that the administrator may not propose action which 'affects the right of a secured creditor to enforce his security.' Protection against unfair prejudice is extended to actions of the administrator so that any member or creditor of the company can apply to the court for relief on grounds that the receiver is acting in a way which 'unfairly harms' interests of the applicant.

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203 Gower 853.
204 Gower 853.
An application can be made on the grounds that the administrator 'is not performing his functions as quickly or efficiently as is reasonably practicable. In valuation and consideration of both receivership and administration; the study concludes that as for any debtor, it is crucial to the terms on which a company is able to raise debt finance that it should be able to grant effective security to the lender. The unique enforcement mechanism for the floating charge by means of the appointment a receiver has been substantially replaced by the general insolvency mechanism of the receivership.\textsuperscript{205}

\textsuperscript{205} Cases and Materials 631).
CHAPTER FOUR
CHALLENGING RECEIVER ACTION AND REMEDIES

4.1 Introduction
Having seen duties and liabilities of receiver this chapter looks at after receiver has acted and probably there was default in his actions or he breached one or more duties imposed on him how can aggrieved party challenge his action and can pray for remedies available

4.2 Challenging Receiver Action
Section 177 (1) of insolvency Act Provides where the appointment of person as receiver other than by court order is found to be invalid, the court may on application of an aggrieved person order the person order the person by whom or on those behalf the appointment was made to indemnity the person appointed against any liability which arises as result of the invalidity of appointment.

Challenges may be encountered in some of the following main areas:
(a) Fee pressure: The issues concerning disclosure of fees at the outset of an appointment, does not assist the insolvency practitioner later down the line on a case where further work is required.
(b) We operate in a litigious society now where a lot of people complain because they think they will get something out of it, and so much time is taken up dealing with complaints and going through the correct process of dealing with each of them.
(c) Compliance may be a challenge; not only all the know your customer and money laundering paperwork, checks and disclosures, but the ongoing monitoring and annual external compliance checks that must be carried out.

One needs to note that a receiver is appointed to either preserve the assets of trust estate, safeguard the position between debtor and creditors; safe guard position between mortgagor and mortgagee.

There are events where the receiver’s actions can be challenged in A. K Detergents V East African Development Bank\textsuperscript{206} In that case a receiver had been appointed by the bank under a

\textsuperscript{206} Court of Appeal, Civil Appeal No. 17/1998.
debenture. The receiver sold land and sale was challenged, Manyindo DCJ there was legal mortgage created by the debenture.

The receiver’s action can be challenged under Order 19 Rule 56 of Civil Procedure Rules, the claimant or objector shall adduce evidence to show that at the date of attachment he had some interest in the property attached. In John Verjee and anor v Simon Kalenzi and ors, the appeal was to effect that debenture under which receiver was appointed was also void full lack of registration under companies Act and Judge made order releasing all the movable and immovable properties of judgement debtor from being attached in possession as receiver manager arguing that judge erred in law when ordered full release of the attached property only on account that they were attached whilst in possession of the receiver. Kikonyongo DCJ held in objector proceeding it did not matter whether the receiver held it as legal mortgage but who held property in issue the matter to be investigated extent of possession at time was it actual or in trust.

This implies if the receiver exercises his action like sale but the property sold third party has interest he or she can challenge the action. Where the receiver’s action is based on debenture or charging document which creates interests on property was legally created and fully registered.

In Trans Africa Assurance Company Limited V National Social Security Fund, the issue was whether unregistered charge can be enforced through appointment of a receiver? Wambuzi C.J held there debenture creating power to appoint receiver was illegal and unregistered it can be challenged successfully.

Where the appointment of receiver was premature and receiver went on to act also there his powers can be challenged on ground that debtor had not defaulted on his obligation

In St. Noah Girls Secondary School v Crane Bank, the petition was challenging because of the premature appointment of receiver who took over the management of the assets of applicant who started collecting fees wanted termination of receivers. It was held premature appointment

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207 CA CA NO. 71 OF 2000.
206 Supreme Court Civil Appeal No 1 of 1999.
209 Civil suit no, 388 of 2010.
of receiver can be challenged since the debtor still has time to fulfill or ratify default of his obligation.

This implies that circumstances where receiver acts upon invalid appointment those actions can be challenged by the aggrieved party in the courts of law. But however one need to note that, **Section 177(2) of insolvency Act** provides that if that action is bonafide transaction of person appointed as receiver shall not be affected case. Which implies that receiver who acted in good faith can raise it as defense against challenging party.

The acts of receivers can be challenged if the transaction under value than real market or failed to obtain the best price available.

In **Glatt V Sinclair**, the taxman had put in receiver over his property. The receiver got valuation of the property from proper values. Which reckoned a third of a million which offer for that and duly sold. The issue was whether the sale was bonafide. Court held obligation of the mortgagee or receiver appointed to ensure that property is sold at the best price reasonably available is not delegable. In **Jinda International Textiles Corporation v Barclays Bank**. The mortgaged property was sold and money was credited to 1st defendant’s account which was insufficient to clear the outstanding balance & plaintiff was contending the sale saying it was illegal since it was done negligently at very low price hence it fraudulently wanted it cancelled. Court upheld challenge of receiver’s act of selling property at less value than market value. Hence imputing that if act of receiver especially exercise of power of sale, is at less price than market value upon valuation his act can be challenged in courts of law and can be rescinded.

If receiver’s act amounts to hasty sale to realize asset. If in his exercise of powers of sale was quick and hasty and some steps to be followed in exercise of powers were skipped. This action upon challenge in courts of law can be declared a null and void.

Breach of duty of good faith by the receiver who acted can lead to his actions being challenged. **Section 30 (1) of Mortgaged Act**, to purchase the Mortgaged land without the

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210 (2011) EWCAC is 1317.
211 HCCS no. 156 of 2008.
212 Berg, Challenging LPA Receiver by Alison 2012.
leave of court a) mortgagee, b) an employee of the mortgagee or immediate member of his or her family, c) an agent of mortgagee or member of his family, d) any person in a position to the influence the matter directing or indicating.

In *Green Land Bank Limited (in liquidation) V Wasswa Birigwa*\(^{214}\), the application was brought up to challenge the sale conducted by a receiver which was conducted not under public auction by private treaty. Courts refused to accept sale as proper because it was conducted by private treaty hence breach duty of good faith. In *Co-operative Bank Limited (in liquidation) V Shell Kasese Services Limited*\(^{215}\) upon default by the defendant to pay the sum due and owing to the plaintiff and objected to sale till full satisfaction. The sale was advertised in newspaper and was sold by auction and issue was whether the sale was bonafide. Has mortgagee owed duty to sale in a ropen and transparent acting otherwise is at least to bad faith and can be challenged.

4.3 Remedies available

In *Co-operative Bank Limited (in liquidation) V Shell Kasese Services Limited*, states that remedy is the means by which the violation of right is prevented, redresses, or compensation; (1) by act of the party insured, the principal of which are defence, (2) by operation of the law, (3) by agreement between the parties, (4) by judicial remedy. \(^{216}\) These various remedies available to any lesson aggrieved during receivership.

4.3.1 Interlocutory injunction

Order 41 rule 1 of the Civil Procedure Rules provides where suit is issued by affidavit or otherwise (a) that any property in dispute in any suit is in danger of being wastes or alienated by any party to the suit (b) that the defendant threatens or intends to dispose of his or her property, the court may order grant of temporarily induction to restrain such act or make such order for purpose of staying and preventing sale, wastage etc.

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\(^{214}\) HCT-00-CC-CS-026-2004.

\(^{215}\) High court civil suit No. 140/2005.

\(^{216}\) High court civil suit No. 140/2005.
In *Robert Kavuma V Hotel International Limited*\(^{217}\) the application arose to preserve the status of the mortgaged property which was a threat of sale pending a main suit, where grounds for temporary injunction are considered on balance of convenience, irreparable damage. Hence the temporary injunction was granted.

In *Asante Aviation Limited V Stanbic Bank Limited*\(^{218}\): J. Madrara gave Temporary injunction restraining the sale of property by receiver. This implies that mortgagor has remedy of interlocutory injunction restraining receiver from sale. Mortgagor can apply to court to declare sale null and void because if it was malafide or bad faith or the deed of appointment does not confer the powers exercised by receiver.

*Tsekooko J.SC in Multi Construction Limited V Uganda Commercial Bank*\(^{219}\) the loan was secured through debenture a deed whereby assets of the appellant including building were charged as security pursuant powers in the debenture, receiver were appointed under debenture, who sold the building to the respondent which was declared null & void by High Court, the Mortgagor can have remedy of sale null. As reprieve to acts of receiver if proved that sale breaches some obligation like public auction.

In *Jeane Francis Nakaya V DFCU Bank Limited*\(^{220}\). The plaintiff mortgaged her property comprised in Kyadondo block 265 plots 1861, 1862 & 5036 in Bunamwaya which was subsequently sold to Iga which proceeds were applied for clearing the outstanding sums due and balance was remitted to plaintiff issue. Justice Helen Obura held that failure to perform any of the covenants in the mortgage about sale confers right to the aggrieved party sue the mortgagee to nullify the sale.

### 4.3.2 Retaking possession

Retaking back repossession where by the property is sold one can go to court and it makes order for repossession of property. In *Uganda Development Bank V Rinka Enterprises Co. Limited*. J

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\(^{217}\) *Supreme Court C.A No. 08 of 1990.*

\(^{218}\) *HCT-00-CC-CS-0532-2014. Civil Suits*

\(^{219}\) *Civil Appeal No. 25 of 1994.*

\(^{220}\) *HCCS 813 of 2007.*
Madrama granted remedy of retaking possession or equitable redemption of the property which a receiver was going to sale

4.2.3 Putting the company under administration
There is also remedy of putting company under administration. This where mortgagor or debtor enters agreement with creditors to put the company to administration. The appointment of the administrator freezes the power of administrators because it creates a mutual agreement between parties.

4.3.4 Damages
Damages can also be available as remedy to aggrieved party in receivership it can be pecuniary or liquidated depending on the nature of case of Ronald Kasibante v Shell Uganda Ltd. Where Justice Bamwine held breach of contract is breaking of obligation which confers right of action for damages on the injured party.

4.3.5 Attachment by receiver
Attachment is legal process by which a court of law at the request of a creditor designated a specific property owned by the debtor to be transferred to the creditor or sold for benefit of the creditors. Prejudgment writ of attachment allows recovery of money damages by levying a security interest on the property of the party paying money damages. Section 38 (b) of Civil Procedure Act confers powers on court to order an attachment and sale of any property. In Sarope Petroleum Ltd V Orient Banks, The application sought for declaratory orders of null and void to sale of mortgaged land and sought for alternative respondent pay compensation of equivalent of market value arguing that sale by receiver through attachment was without colour or right of court. Since there was pending ease seeking to declare mortgage and debenture. The above shows that receiver can attach some property in order to realize the assets as remedy but before he does so the practice is to first ascertain which interests are in property. The debtor is in possession of it on his own account or he has lien in it or is holding it on trust of other parties.

222 Ibid.
224 [2013] UG COMMC 146.
In *John Verjee and Anor V Simon Kalenzi*[^225]. The appeal was to effect that debenture under which receiver was appointed was also void full lack of registration under *Companies Act* and Judge made order releasing all the movable and immovable properties of judgement debtor from being attached in possession as receiver manager arguing that judge erred in law when ordered full release of the attached property only on account that they were attached whilst in possession of the receiver because the appointment of a receiver freezes other interests of creditors in the property. Twinomujuni J.A held once a receiver has taken possession of the property before attachment that property cannot be attached by the other subsequent decree holders against the judgment debtor because the appointment of a receiver freezes other interests of creditors in the property.

In *Fulgence Mungereza V Ponsiano Lwakataka*[^226] Justice Geoffrey Kiryabwire held time of the attachment, control over the debtors assets was with applicant who were the receivers and therefore the applicant had constructive possession of property even if they may not be in actual possession of the same.

This implies once property had been attached by earlier encumbrance it cannot be attached thereafter by any other creditor when appointing receiver or when crystallizing floating charge.

### 4.4 Conclusion

Appointment of receiver does not totally preclude director rights in company or it gives receiver right to act in any way he thinks but must act with powers conferred to him or her by appointment deed or court failure of which his actions can be challenged in courts of law and there remedies he can pray for and court can award him

In receivership, there are instances where the receiver is held personality liable during receivership; under section 186 Insolvency act s/he is personally liable for any contract entered into by the receiver in exercise of his powers and for salary and allowances but is not liable for payments incurred during receivership, under a contract of employment adopted by the receiver

[^225]: CACA No. 71 of 200
[^226]: HCT-00-CC-MA-217-2010
or in respect of services rendered after the adoption of the contract, rent and other payments subject to agreements at the subsistence of receivership. A receiver under section 187 Insolvency Act, a receiver is entitled to indemnity out of the property under receivership in respect of personal liability incurred in line with his duty. This does not limit any other right of indemnity to which a receiver may be entitled or limit a receiver's liability on any contract entered into without authority.
CHAPTER FIVE
RECOMMENDATIONS AND CONCLUSION

5.1 Findings of Study
Throughout the research different recommendations keep on cropping up to address challenges faced during receivership this are premised on findings arrived at during the study. Hoping that once adopted they will improve the practice of receivership.

In the study it was found out that there is little literature which is update with the current laws that regulate the practice of receivership most of them are outdate since they are based on the repealed old laws of insolvency. In study it was found out that the directors interest and powers when company is put in receivership are laid to rest since the interests of creditors override his or her interest.

In study it was found out that the public are not aware of law and practice of receivership more so even some of creditors’ of business. It was found out that the General duties of a liquidator (Section 100), shall among other duties, keep in accordance with generally acceptable accounting procedures and standards full accounts and records of receipts, expenditure and other transactions of the company; keep accounts and records of the receivership of the company under his management for a period not less than six years after the Insolvency Proceedings; prepare and submit to the Official Receiver regular reports on the state of affairs of the property. Insider dealings (Section 18), specifically targets transactions entered into with spouses, siblings, children and persons of close social close proximity to the insolvent, or his/her employees, professional advisors or service providers twelve months before commencement of insolvency.

In the study it was found out that law and practice does not adequately address the situation where there is conflict between creditor’s interest and family interest.
In study it was also found out that reporting of receivership cases is still low

Challenges may be encountered in some of the following main areas: (a) Fee pressure: The issues concerning disclosure of fees at the outset of an appointment, does not assist the insolvency practitioner later down the line on a case where further work is required. (b) We
operate in a litigious society now where a lot of people complain because they think they will get something out of it, and so much time is taken up dealing with complaints and going through the correct process of dealing with each of them. (c) Compliance may be a challenge; not only all the know your customer and money laundering paperwork, checks and disclosures, but the ongoing monitoring and annual external compliance checks that must be carried out. Before making a complaint about an Insolvency Practitioner to the regulators, it is advisable that the complainant contact the insolvency practitioner directly.

Concerns often arise as a result of misunderstandings about the insolvency practitioner’s role and it is always best to try to raise these with the insolvency practitioner. If the insolvency practitioner is not able to solve the complaint, one may then take the complaint further with the regulatory authority.

5.3 Recommendations

5.3.1 Recapitalization Method of a company in Distress

Recapitalization is a type of corporate reorganization involving substantial change in a company’s capital structure. Recapitalization may be motivated by a number of reasons. Usually, the large part of equity is replaced with debt or vice versa.

Recapitalization methods where company’s creditors and debtors (owner) before exercising their powers to appoint receiver should explore all recapitalization methods a suitable like listing the company on stock exchange, selling of phantom’ or preferential shares so that company can go back to viability in that company can continue in business and the creditors can get their money’s due without selling the company.

5.3.2 Public awareness on receivership

It's recommended that there is need to increase public awareness on receivership so that public can increase the knowledge they have on receivership in that it will be one of options of insolvency and how to deal with company that is under receivership. Receivership is one of many strategies that have been used successfully by a number of communities as part of their approach to deal with distressed and abandoned properties. The receiver is responsible for rehabilitating and stabilizing a property that has been seriously neglected by the owner.
Combined with other strategies such as tax taking, code enforcement, and condemnation/demolition, receivership can be a very effective way of bringing properties back to the tax rolls and providing tenants and neighborhoods the security and safety they deserve.

5.3.3 Safe guarding of family interests in receivership

It is recommended that where there is family interests in business under receivership should be safe guarded or creditors interests should not override them, So do not consider any such arrangement without taking legal advice. Moving a house with a mortgage into the full ownership of a spouse or relative could also have tax implications, such as triggering a stamp duty land tax charge. Legal advice would be essential to ensure the arrangements are as safe as possible, and that you fully understand the consequences of potential events in the future, such as in the event of divorce. More remote, but still common, is a situation where a business owner compromises with the company’s creditors and uses personal assets to pay or secure the company’s debts. If, as a result of the insolvency of his business your husband goes bankrupt, his share of your joint assets will be taken to pay creditors, and if this becomes likely you should each take separate legal advice.

5.3.4 Prioritising all interest in the Charged Property

As seen in study, floating charge can be crystallized upon appointment of receiver but where the concurrent or subsequent charges on property and both coffered with powers to appoint a receiver but if one of charge holders has attached the property then its impractically impossible for the second charge holder to exploit his rights on the same property because the first in time takes preference and priority over others. This recommends that like in liquidation and bankruptcy where all creditors both second and unsecured creditors benefit here all the creditors with interest in property should benefit from proceed and rights should still attached by others charge holder.

5.3.5 Removing Redtapeism

This redtapeism cause, this is the buercracy underwent by creditors or company to appoint a receiver. In receivership delays in decision making by receiver recommending that at eve of appointing the receiver by court, the document appointing should confer all powers and direction
to receiver which he or she should exercise where any party which feels that receiver is acting ultravires petition court and move court about action which will make receivership so fast.

5.3.6 Qualification of a Receiver
It's recommended that qualification of persons to be appointed as receiver should be expanded in that it should not be limited to any professional qualification of lawyer accountant etc but character of receiver, reputation to be put into consideration which will limit the appointment of fraud or quack receivers. This is because professionalism alone does not guarantee smooth process of receivership but if a person as necessary requisite skills should be considered because is equipped with what it takes to windup a company in receivership.

5.3.7 Protection of the Directors Interest
The appointment of receivers has many effects on the company directors, employees and the company itself, for instance whereby an appointment of receivers powers of the directors to deal with the company assets cause thus rendered powerless tough the any. The recommendation is that the law should provide in the act protecting the directors of the company since they can help the receiver to settle the company debts

5.4 Conclusion
As seen in above receivership acts as Guarantee to creditor knowing that incase a debtor defaults in paying back he or she will be safe can appoint receiver who will manage the property in order to realize the money that was advanced.

In Uganda law of receivership is the situation in which an institution or enterprise is being held by a receiver. A receiver is appointed through, Court, Appointment specified in the court order. Court will direct the indemnity of the receiver. A receivers is also appointed through an instrument, this takes effect when receiver accepts appointment in writing, where the indemnity is through the appointer. There different types of receiver appointments in Uganda which include; Appointed by a government regulator, privately appointed receiver, and lastly Court-appointed receiver

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227 The insolvency Act 2011
In Uganda the law of receivership also delegates certain duties to a receiver which include: Runs the company in order to maximize the value of the company's assets, sell the company as a whole, or sell part of the company and close unprofitable divisions, Secures the assets of the company and/or entity, realizes the assets of the company and/or entity, Manages the affairs of the company in order to resolve debts owing.\textsuperscript{228}

The current legal regime does not provide for regulation of insolvency practitioners. Consequently, any person regardless of his qualifications or integrity can be appointed to preside over an insolvency administration. Secured creditors have avoided to use other persons more knowledgeable of insolvency matter e.g. lawyers and auditors, in the hope of saving costs.

However, those appointed have proved to be incompetent and unreliable. Many have been after a quick buck and have swiftly stripped and sold the assets of their undertakings without evaluation other options available. Many do not appreciate some important insolvency functions like corporate rescue and the need to save investments.

In many instances the receivers appointed have only created liability for their appointers. Some of the receivers appointed have misappropriated the proceeds of the receivership and participated in unethical practice. There being no framework for the discipline of such errant receiver, the banks have had to commence suits to obtain an account for the receivership monies.

\textsuperscript{228} Adopted from General Insolvency Inquiry: A report of the Law Reform Commission of Australia September 1998 at pg 32. The Commission was under the Chairmanship of Mr. Ron Hammer. See also The World Bank Draft Report on Effective Insolvency Systems: Principles And Guidelines. of 2000 where almost similar guidelines are recommended as key objectives and policies of a Good insolvency system. See pages 9-11 thereof.
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