

1997

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Recommended Citation

Kuruk, Paul (1997) "A SURVEY OF BANKRUPTCY LAW IN GHANA," *NYLS Journal of International and Comparative Law*. Vol. 17 : No. 2 , Article 20.

Available at: [https://digitalcommons.nyls.edu/journal_of_international_and_comparative_law/vol17/iss2/
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A SURVEY OF BANKRUPTCY LAW IN GHANA

*Paul Kuruk**

I. INTRODUCTION

This essay outlines the law of bankruptcy in Ghana. Because customary law constitutes an important source of law in Ghana,¹ the essay begins with an explanation of the notions of debt under customary law generally. Under that system of law, the most important factor determining whether or not a particular service or gift or loan creates a debt is kinship.² Normally, debts cannot be incurred from loans provided or services rendered to kinsmen, but debts result from the same exchanges between non-kinsmen.³ While bankruptcy law would seem to be relevant only to the debts incurred by non-kinsmen, this article argues that bankruptcy protection would be equally relevant to kinsmen as most debts are now required to be paid regardless of the degree of kinship.

The remaining part of this essay outlines the statutory scheme regulating bankruptcy procedures in Ghana.⁴ It traces the critical stages of a bankruptcy proceeding from the time a petition is filed with the trustee through the issuance of protective insolvency and/or bankruptcy orders leading eventually to the discharge of the debtor.

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1. The main sources of law in Ghana include statutory law, common law and customary law.

2. MEYER FORTES, *KINSHIP AND SOCIAL ORDER* 246 (1969).

3. *Id.* at 246-47.

4. *See* Insolvency Act, No. 153 (1962) (Ghana).

II. BANKRUPTCY LAW UNDER CUSTOMARY LAW

A. Kinship and Notions of Debt

In traditional societies, the social structure, as determined by the degree of kinship relations, defines the rights and obligations in the society.⁵ Not surprisingly, the notion of debt is affected by rules of kinship. For kinsmen, a form of altruism is expected.⁶ Kinsfolk are required to share their property freely. If material possessions are loaned, or services are rendered to kinsfolk, they should reciprocate equitably on account of the spirit of friendship that exists between kins, but no sanctions would be imposed on a kinsman that fails to reciprocate.⁷ Thus, members of a lineage and of an expanded family do not incur debts by borrowing from one another. The same rule applies to persons whose kinship ties are as close as those of members of a nuclear lineage.⁸

This is in sharp contrast to services or loans provided to non-kinsfolk. For non-kinsmen, there are no binding rules of altruism. Debts are goods or services accepted or requested by non-kinsmen on the definite understanding that they will be repaid, and it is a maxim that debts never die. An informal sort of bookkeeping exists and there is a deliberate calculation in the reciprocities of non-kin.⁹ Even a man's heirs will be expected to repay his debts.

B. Relevance of Bankruptcy Procedures Under Customary Law

From the above discussion, it is readily apparent that bankruptcy procedures are irrelevant for debts incurred by kinsmen. Since the goal of bankruptcy is to give the debtor a fresh start by discharging his debts, bankruptcy procedures will not be necessary in a system where a kinsman-debtor's obligations are not considered to be debts. Conversely, the procedures will be highly useful in a system where obligations of non-

5. RAYMOND FIRTH, *WE, THE TIKOPIA* 577 (1936); MEYER FORTES, *DYNAMICS OF CLANSHIP AMONG THE TALLENSI* 135 (1945); Paul Kuruk, *Refugeeism, A Dilemma in International Human Rights: Problems in the Legal Protection of Refugees in West Africa* 1 *TEMPLE INTERNATIONAL AND COMPARATIVE L.J.* 179, 193-94 (1987).

6. FORTES, *supra* note 2, at 246.

7. *Id.*

8. This is the case where a person borrows from his mother's brother. The brother is not part of the lineage.

9. FORTES, *supra* note 2, at 246.

kinsmen are deemed to be debts and must be repaid even by heirs of the deceased debtor. No evidence has been found of a customary law practice of forgiving the debts of non-kinsmen. Non-kinsmen seeking relief from debts would therefore resort to remedies available under alternative systems of law, such as the bankruptcy procedures provided under the statutory law.

Significantly, there is evidence that kinship may no longer be important in determining certain rights and obligations in traditional societies.¹⁰ Thus, the distinction that has hitherto been drawn between obligations of kinsmen and non-kinsmen has become blurred. As argued elsewhere, due to changing socio-economic conditions in traditional societies, there has been a considerable weakening of the rules of amity that previously governed social relations.¹¹

Consequently, the altruistic attitude that was previously expected from kinsmen and which formed the basis for customary law rules, such as the non-recognition of obligations of kinsmen as debts, would now for the most part be non-existent, or at best, remain important for only the most nuclear of family relationships. Increasingly, kinsmen debtors are being held accountable for their debts to the same degree as non-kinsmen. Hence, the bankruptcy procedures discussed in the following section will be relevant even for kinsmen.

III. BANKRUPTCY PROCEDURES UNDER STATUTORY LAW

A. Commencement of Proceedings

Insolvency proceedings in Ghana are commenced when either the debtor or a creditor of the debtor files a petition with the trustee. To be qualified to file, debtors must be insolvent and their immediately payable indebtedness in liquidated sums must exceed a specified amount.¹² In addition to proof that indebtedness to the creditor is more than the statutory amount, a creditor's petition must show that within the preceding three months, the debtor had given notice of an intention to stop honoring his payment obligations, or that the sheriff or any creditor of the debtor had obtained a court order attaching the debtor's property.¹³

10. Kuruk, *supra* note 5, at 198.

11. *Id.*

12. The statutory limit was 500 pounds. See Insolvency Act, No. 153, art. 10(1) (1962) (Ghana).

13. *Id.* art. 9(15).

B. Protective Orders

Seven days after the trustee is presented with a petition, the trustee is required to examine it and issue an interim order protecting the debtor's property.¹⁴ The protective order vests the trustee with powers over all existing and after-acquired property of the debtor, and it prohibits the institution of any legal proceedings against the debtor without leave of the court.¹⁵

The order also imposes various obligations on the debtor. For example, during the period from the making of the order to the determination of insolvency, the debtor is required to cooperate with the trustee, and disclose any after-acquired property that comes into the debtor's possession to the trustee or attempts made by the debtor to acquire credit.¹⁶ The debtor could be subject to arrest if the court determines that the debtor is impeding the bankruptcy proceedings by concealing property.¹⁷

Within seven days after the issuance of a protective order, the debtor must provide the trustee with a statement listing all property controlled, identifying all creditors as well as the amounts owed, and stating the reasons for insolvency.¹⁸ Within the same period, the debtor may submit a proposal for an arrangement with his creditors.¹⁹

While a protective order is in effect, a creditor may submit a statement identifying the outstanding financial obligations of the debtor to such creditor and providing details of the transactions that gave rise to those obligations.²⁰

C. Meeting of Creditors

The trustee is required to call a meeting of creditors within four weeks after the issuance of the protective order. The trustee must provide each creditor with a copy of the debtor's statement of affairs and any proposal he may have filed for an arrangement with creditors in advance of the

14. *Id.* art. 11(2).

15. *Id.* art. 12.

16. *Id.* arts. 12, 25(2), 26, 28, 29.

17. *Id.* art. 28(1).

18. Insolvency Act, No. 153, art. 13 (1962) (Ghana).

19. *Id.* art. 14.

20. *Id.* art. 15(2).

meeting.²¹ Matters discussed at the meeting are at the discretion of the trustee and may include approval of any proposal for an arrangement with creditors.²² The creditor's meeting must be closed no later than six weeks after the issuance of the protective order.²³

D. Judicial Consideration

Within fourteen days after the close of the first meeting of creditors, the trustee should apply to the court for an examination of the debtor's petition.²⁴ In addition to the application, the trustee is required to provide a report describing the assets and liabilities of the debtor, the grounds for issuing the protective order, and decisions taken at the first meeting of creditors.²⁵

After reviewing the trustee's report and considering any evidence presented by either the debtor or creditor at the hearing, the court is empowered to make an insolvency order,²⁶ confirm an arrangement with creditors²⁷ or rescind the protection order.²⁸ An insolvency order not only empowers the trustee to realize and distribute the debtor's property,²⁹ but also it continues the obligations imposed on the debtor under the protective order and stays all legal action against the debtor.³⁰

The court will confirm an arrangement with creditors where it finds the terms to be fair and reasonable.³¹ It shall then be the duty of the trustee to carry out the terms of the arrangement.³² The court will rescind a protection order if, after a review of new evidence³³ presented or other circumstances, it appears the order should not have been made or if full

21. *Id.* art. 16(2).

22. *Id.* art. 16(3).

23. *Id.* art. 16(5).

24. Insolvency Act, No. 153, art. 17(1) (1962) (Ghana).

25. *Id.* art. 18(2).

26. *Id.* art. 19.

27. *Id.* art. 20.

28. *Id.* art. 21.

29. *Id.* art. 19(2).

30. Insolvency Act, No. 153, art. 19(2) (1962) (Ghana).

31. *Id.* art. 20(a).

32. *Id.* art. 20(4).

33. *Id.* art. 21(1).

payment of the debt has been made as a result of payments made on behalf of the debtor.³⁴

E. Adjudication of Bankruptcy

If the court finds that grounds for bankruptcy exist, either at the time an insolvency order is made or at any time before the debtor is discharged from an insolvency order, a public examination of the debtor would be ordered.³⁵ A debtor would be adjudged bankrupt if certain facts are established at the hearing.³⁶ Typically, the bankruptcy order specifies the date for the discharge of the bankrupt, which is usually at least two years from the date of the order.³⁷

In addition to liabilities imposed under the insolvency order, the debtor is barred from carrying on a trade, operating bank accounts, obtaining credit or entering into a hire-purchase agreement.³⁸

F. Discharge

A debtor who is not a bankrupt is generally discharged from an order of insolvency about two years after the insolvency order is made. For a debtor who is bankrupt, the date of discharge is the date fixed by the bankruptcy court at the time the debtor was adjudged bankrupt.³⁹ The discharge releases the debtor from his debts, and any duties and liabilities imposed on him under the Bankruptcy Act.⁴⁰

34. *Id.* art. 21(1).

35. *Id.* art. 22.

36. Insolvency Act, No. 153, art. 23 (1962) (Ghana). These include evidence of the following: (a) for a consecutive period of twelve months within three months preceding the protective order, the debtor carried on his trade with knowledge that he was insolvent; (b) the debtor contributed to his insolvency by rash speculations, or by gambling or unjustifiable extravagance; (c) a debt was contracted by the debtor with no intention of repaying it; (d) the debtor failed to account satisfactorily for assets that have disappeared since the protective order was issued; (e) the debtor has failed to carry out his duties in the insolvency proceedings; (f) the debtor is a former bankrupt; and, (g) within the preceding three years the debtor has been convicted of an offence involving dishonesty. *Id.*

37. *Id.* art. 23(2).

38. *Id.* art. 24(1)(2).

39. *Id.* art. 30(2).

40. *Id.* art. 34(1).

IV. CONCLUSION

The essay has described the bankruptcy procedures in Ghana. Examination of the customary law rules in the first part of the essay appears to indicate that bankruptcy laws may be irrelevant where the creditor and debtor have kinship ties since the traditional approach was to consider provisions of property, services or loans to a kinsman as not constituting a debt with a concomitant obligation to repay. Nevertheless, the use of kinship as a criterion for determining when a debt is repayable may no longer be valid. Like debtors not related to a creditor, the kinsman debtors are increasingly being compelled to repay their debts. The absence of a system of forgiving debts under customary law means that all debtors overburdened by debts, whether related to their creditors or not, will find the statutory scheme presented above to be quite beneficial.

