S O C I A L F U N C T I O N S

O F

B A N K R U P T C Y L A W

I N

E A S T A F R I C A

A DESSERTATION SUBMITTED IN PARTIAL
FULFILMENT OF THE REQUIREMENTS FOR THE
LL.B DEGREE, UNIVERSITY OF NAIROBI

BY

PATRICIAH MUTHONI NDUNG'U (MRS)

Nairobi June 1984

D E D I C A T I O N

To my parents Mr. & Mrs. Kamugi and my children, Gitonga, Watetu and Njambi I dedicate.

A C K N O W L E G E M E N T

The Author is sincerely grateful to various people to whom she is specially indebted and without whom the work would have been icomplete.

Firstly special thanks are due to my supervisor Mr. Leonard Njagi for his ideas, suggestions and critisisms. Secondly to my beloved husband Mr. Charles Ndung'u who has been a constant source of inspiration to me. The Registrar of Companies for kindly allowing me to refer to records and to Mrs. Gladwell for transforming my other-wise illegible handwriting into its present form.

A B B R E V I A T I O N S

ALL. E. R.	All England Law Reports
CH. AP.	Chancery Appeals
CH. DIV. R.	Chancery Division Reports
E.A.	East African Law Report
K.B.	Kings Bench Division Report
K.L.R	Kenya Law Report
L.Q.R.	Law Quarterly Review
M.L.R.	Modern Law Review
Q.B.D.	Queeus Bench Division Report
T.L.R	Tanzania Law Report
T.L.R	Times Law Report

CONTENTS

CONTENTS

TABLE OF CASES

TABLE OF CASES

TABLE OF STATUTES

Advocates Act, Chapter 16 of the Laws of Kenya

Advocates Act, Chapter 341 of the Laws of Tanzania

Banking Act , Chapter 488 of the Laws of Kenya

Banking Act , Chapter 88 of the Laws of Tanzania

Bankruptcy Act, Chapter 53 of the Laws of Kenya

Bankruptcy Act, Chapter 25 of the Laws of Tanzania

Bankruptcy Act, Chapter 71 of the Laws of Uganda

Bankruptcy (Amendment) Act, 1948, Kenya Companies Act, Chapter 486 of the Laws of Kenya

Deeds of Arrangements Act, Chapter 54 of the Laws of Kenya

English Bankruptcy Act, 1542

English Bankruptcy Act, 1869

English Bankruptcy Act, 1883

English Bankruptcy Act, 1890

English Bankruptcy Act, 1926

English Debtors Act, 1870

Indian Insolvency Act, 1909

Indian Provincial Insolvency Act, 1907

Judicature Act, Chapters 8 of the Laws of Kenya

Judicature Act, Chapter 34 of the Laws of Uganda

Local Government Act, Chapter of the laws of Kenya

Local Government Act, Chapter 333 of the Laws of Tanzania

Mental Health Act, Chapter 248 of the Laws of Tanzania

Trustee Act, Chapter 167 of the Laws of Kenya

Urban Authorities Act, Chapter 27 of the Laws of Uganda.

* English Bankruptcy Act 1914

ORDERS IN COUNCIL

1897 East African Order - In - Council

1902 East African Order - In - Council

1920 East African Order - In - Council

B I B L I O G R A P H Y

BOOKS

A REPORT BY JUSTICE - BANKRUPTCY

(London, Stevens & Sous 1975)

Baldwin THE LAW OF BANKRUPTCY AND BILL OF SALE (11th Edn 1915)

Cardozo B.N. THE NATURE OF THE JUDICIAL PROCESS (New Haven, Yale U.P(1921)

Clomens Duff FUNDAMENTALS OF MARXISM-LENINISM (2nd Edn, Moscow 1968)

F. Engels THE ORIGINS OF THE FAMILY PRIVATE PROPERTY AND THE STATE (Moscow, 1972)

Friedman, HICKS and JOHNSON
BANKRUPTCY LAW AND PRACTICE (Butterworths, 1970, London)

HALSBURYS" LAWS OF ENGLAND
Vol. 2, 3rd Edn, 1953 London Butterworths

HOLDSWORTH W. A HISTORY OF ENGLISH LAW
London, Methuen and Company Limited and Marxwell

Ian Macneil BANKRUPTCY LAW IN EAST AFRICA (Nairobi, Legal Publications 1966)

James Philips INTRODUCTION TO ENGLISH LAW (9th Edn. London Butterworths 19

John Burk JOWITTS DICTIONARY OF ENGLISH LAW (2nd Edn.) Vol. 2 Sweet and Maxwell)

Pollock and Maltland THE HISTORY OF ENGLISH LAW BEFORE EDWARD I Vol.I 2nd Edn 1923

WORDS AND PHRASES LEGALLY DEFINED (2nd Edn, Butterworths) Vol. I A - C

A R T I C L E S

Joslin G.S. " Bankruptcy Anglo - America Contrasts" Modern Law Review Vol. 29 Pg. 149f.

Mutitu DISSERTATION - " The Objects of Bankruptcy Law in Kenya Demystified"

ARTICLES CONTINUED

Mutunga Willy "The aims of Bankrupty Law in Kenya. The Separation of the wheat from the chaff". (Handout)

Treiman J. " Middle Ages, Escaping the Creditor" Law Quarterly Review 1927 Vol. 43 Pg. 230

Turnour Murray A "Bankruptcy of Partners" (1891) Law Quarterly Review Vol. 7 pg. 53f

INTRODUCTION

0:1 An analysis of the social functions of Bankruptcy Law, calls for an understanding of the intentions of the Legislators in enacting the 1925 Bankruptcy ordinance of Kenya. The intentions of the legislators which are the main social-functions of Bankruptcy Law are contained in the words of the then Attorney General for the colony of Kenya, who said;

> "Bankruptcy is a privilege which is granted to insolvent debtors whereby they are enabled to get clear of their liabilities and to start a fresh on a clean footing.... No provision is made in the Indian Provincial insolvency Act for getting hold of the Estate of an insolvent person. That is the most important provision and the lack of any such provision has given rise to very great complaints by creditors in this country. ..... The act also contains a very short list of offences which may be committed by a fradulent debtor".[2]

The writer has quoted Kenya, because she was the first of the three East African countries to enact the Bankruptcy ordinance. The writer also feels there is no need of giving the intentions of the legislators in Uganda and Tanzania because their's were similar to

...../2

Kenya's. For example it is in record that Uganda intended to apply the Kenyan Bankruptcy Bill without any alterations. This is clear from the words of the then Uganda's Attorney General after reading Kenya's Bankruptcy Bill in 1925. [3]

The intentions of Kenya's legislators have been referred to as the cardinal objects or social functions of Bankruptcy law by various writers.[4] In analysing such functions the writer will frequently refer to English statutes as well as English writers' views and case law reasons for this being that English law has been imported in toto to East Africa viz through various orders-in-council as will be shown in the historical background. The authority for reference to English Law in general is best illustrated by the Kenyan case of CARNIE V CARNIE [5] where Spry J.A. agreed with the argument advanced by counsel for appellant that;

> "It is a general rule of interpretation that where one country adopts without material alteration a provision from the law of another country which has received judicial interpretation in the latter country the former country is presumed to have adopted the provision as so interpreted..."

Friedman, Hicks and Johnson in their books,[6] state the aims or social functions of English Bankruptcy law in the following words;

> "The alleviation of the plight of a debtor by a more merciful, though none the less rigorous provisions of the law relating to bankruptcy, has a number of causes. The rise in importance of trading on credit

and the need to encourage such trading for commercial purposes, thereby increasing the chance of financial embarrasment and failure on the part of those engaged in trading, which would make trading more difficult if the harshness of the older Law of debt still obtained; the change in the outlook of society to those who fail in payment of their debts from regarding them as criminals to looking on them only as unfortunate; the need to protect creditors by giving them some relief, albeit not as great as they are justly entitled to expect, rather than to punish the debtor; the benefit to the community as a whole .... Secondly, in that an opportunity is afforded to the debtor to overcome his present financial difficulties and to recover his position..."

Macneil writing on bankruptcy law in East Africa[7], on the other hand, states three functions as the broad social functions of bankruptcy law in East A frica and in the whole of the common law jurisdictions. These he says, include;

"To enable worthy debtors to secure fresh starts in their lives, free of the load of obligations which they have incurred. To preserve the debtors' property and to enable the creditors to share equitably in that property rather than each snatching what he can' and the devil take the hindermost'. Enforcing certain standards of commercial morality".

Thw writer intends in the following chapters to show whether the intentions of the legislators in 1925 and as summarized by various writers have been thwarted. This will

...../4

be done by closely looking at the various provisions of the bankruptcy acts of East Africa and the attitudes of the courts on the same. The short-comings will be brought out and suggestions as to what could be done will be given. Before I embark on this analysis, it is important to give a definition of bankruptcy as understood by various writers as the Acts are silent on this.

The Halsburys' Laws of England provide that;

"Bankruptcy is a proceeding by which when a debtor cannot pay debts or discharge his liabilities, or the persons to whom he owes money or has incurred liabilities cannot obtain satisfaction of their claims, the state, in certain circumstances, takes possession of his property by an officer appointed for the purpose and such property is realised and distributed in equal proportions amongst the persons to whom the debtor owes money or has incurred pecurinary liabilities".

This definition merely describes the process of bankruptcy instead of telling us what the term bankruptcy actually means. Other writers have defined the term bankruptcy in the same spirit Friedman, Hicks and Johnson in their book [9], have described bankruptcy as:-

"..... a legal process which is entirely the creation of statutes, whereby a person who is unable to discharge his financial liabilities is declared insolvent subject to certain disabilities and deprived of his property in order to ensure a more just and equitable distribution of such assets as he has amongst his various creditors".

...../5

On the other hand, one of the Law Dictionaries 10 defines bankruptcy as:-

> "A process by which the state takes possession of the property of a debtor by an officer appointed for the purpose, and such property is realised and subject to certain priorities, distributed rateably amongst the persons to whom the debtor owes money or has incurred pecuniary liabilities".

Whichever definition we take, we note the importance attached to this branch of the law, viz; the function of enabling the debtor's property to be assembled for equitable distribution amongst his creditors.

2 HISTORICAL BACKGROUND

To understand the present Bankruptcy Laws and practices it is important to understand the historical origins of this branch of the law. As noted elsewhere, an understanding of the historical background of bankruptcy law in East Africa, calls for an understanding of this law and its historical background in England from where it has been imported.

After the Berlin Conference, in 1884-5 which led to the partition of Africa by the European powers, Britain had present day Kenya and Uganda as her spheres of influence, and later by an Anglo-German agreement present day Tanzania was also brought under British control. Hence the laws of these former colonies of the British imperialists have been imported from Britain and are very much similar to those of the donor country, hence, the resemblance of the provisions of the three East African Countries Bankruptcy Acts.

:1 THE INSTITUTION OF BANKRUPTCY BEFORE 1542

The Institution of bankruptcy became an established part

of English law in the first half of the 16th century, [11] as a result of credit dealings between merchants and traders which were the only groups making use of credit at this early time.[12] At this time there was no method by which creditors as a group could seize and distribute assets of a debtor rateably among themselves. Each creditor was left to his own devices such as seizure, execution and body imprisonment with the comcommitant jostling for preferences and inevitable race between creditors in the collection of their accounts. This involved physical torture on the part of the be debtors. The attitude of the courts during this period was no different, in the sense that they were not sympathetic with the debtors. This is best illustrated by the case of DIVE V MANNINGHAM [13] where the judge said;

> "If one can be in execution, he ought to live his own;.... and neither the Sheriff is bound to give him meat or drink... And if he have no goods he shall live of the charity of others, and if others will give him nothing let him die, in the name of God, if he will and impute the caus of it to his own fault, for his presumption and ill behaviour brought him to that imprisonment".

Without a method by which creditors could seize and distribute the debtors assets amongst themselves, most debtors absconded hence the need in 1542 of the passing of the first Bankruptcy Act in England. Usually referred to as the Act of Henry the Eighth.

2:2 THE INSTITUTION OF BANKRUPTCY LAW AFTER 1542 IN ENGLAND AND ITS INTRODUCTION IN EAST AFRICA

Bankruptcy law can at this time be applied only to or agair

...../7

those designated as merchants. This attitude was changed in 1890 when bankruptcy law became available to others who were not necessarily merchants. However, the object of giving a debtor a fresh start in life was still not recognised as of paramount importance. Physical torture was still practiced even after the enactment of 1542 Bankruptcy Act.[14] It was however, abolished in 1869, with the enactment of the Debtor's Act, which provided that the creditor could only realise his debt from the debtor's property but not from his body. Under capitalism, the act further underwent various changes to conform with the new mode of production. Among these changes was the passing of the 1914 Bankruptcy Act of England which is the law to date as amended by the 1926 Bankruptcy (Amendment) Act.

In East Africa on the other hand, Bankruptcy Law was introduced through the various reception clauses. In Kenya, the 1890 English Bakruptcy Act was introduced through the 1897 East Africa Order-in-council, in Uganda, the same statute was introduced by the 1902 East Africa Order-in-council and in Tanzania by the 1920 East African Order-in-council the 1914 English Bankruptcy act was imported. Article 52 of Kenya's 1897 East African Order-in-council imported into Kenya;

> "the substance of the common law, doctrines of equity and statutes of general application in force in England on the 12th of August 1897".

Such statutes were the 1890 Bankruptcy Act of England introduced in Kenya and Uganda in 1897 and 1902 respectively and the 1914 English Act introduced in Tanzania in 1920.

...../8

It is important at this point to note that the Indian statutes (discussed below) were applied in all the East African Countries.

In 1909, there was an end to direct importation of English law with the introduction in Kenya of the 1907 Indian insolvency Act.[15] This was a consolidating act and was therefore applied with other Indian statutes in bankruptcy proceedings, viz, the provincial insolvency Act. The provincial insolvency Act was based on the English bankruptcy acts of 1883 and 1890. The act was small with only 56 sections and was not elaborative. (This applied to Tanzania and Uganda as well). By 1924 it was clear to the colonial authorities that there was an urgent need for a more comprehensive bankruptcy law. A commission [16] was hence appointed and asked to enquire into the bankruptcy law of Kenya, Uganda and Tanzania viz the Indian provincial insolvency Act of 1907; which was found to be unsatisfactory. This resulted in the enactment of Kenya's Bankruptcy ordinance [17] in 1925. S (147) of this ordinance repeated the insovency Act, 1907. The 1925 Ordinance was meant to be a model ordinance for the whole of East Africa. This nevertheless was found to have various shortcomings, hence the enactment of the 1930 Bankruptcy ordinance presently chapter 53 of the laws of Kenya. The Ugandan Bankruptcy Act was enacted in 1930 [18] and so was that of Tanzania.[19] All three East African countries Bankruptcy Acts were re-enactments of the 1914 English Bankruptcy Act. In addition to these acts, each of the East African countries have got rules. Kenya's 1927 Bankruptcy Rules are a replica of the 1914 English rules and so are those of Tanzania. Uganda's Banruptcy rules are

...../9

similar to the 1915 English Bankruptcy Rules.

Attempts have been made to achieve uniformity in Bankruptcy law in the three East African Countries, among these attempts is the amendment of the Bankruptcy Act in 1948 through the Bankruptcy (Amendment) Bill 1948. The reason for this need of uniformity was that there were several firms which came on business in the three East African teritorries and such uniformity would enable the creditor to get relief cheaply from a debtor in any of the three countries.

Bankruptcy legislation in East Africa deals with natural persons who became insolvent, while winding up provisions of the company law deals with corporations. Section 118 of Kenya's Bankruptcy Act, section 115 Tanzania's Bankruptcy Ordance and section 117 of Uganda's Bankruptcy Act all provide that, a receiving order shall not be made against any corporation or against any association on company registered under the companies Act.

3 THEORETICAL FRAMEWORK

The intentions of the legislators (as given by the then Attorney General for the colony of Kenya in 1925), text book writers as well as various critics all support the conclusion that the law was enacted to ensure that the debtors property was assembled for equitable distribution among the creditors this social function has been reinforced by the third of Macnell's social functions of enforcing certain standards of commercial morality. These two functions have been narrowly interpretted to enable distribution of the debtor's assets while giving him a fresh start has remained a legal myth. These differences could be explained from the fact that creditors who as will be shown later are the most economically

...../10

powerful class in society whose interests must be protected by the Laws they have made. The position has clearly been brought out by the words of Clomens Duff [20], where he said;

> "Law is a system system of jurisdicial standard and prescuptions expressing the will of the ruling class and protected by the coercive power of the state."

The situation is further explained by analysing an extract from Engels' writings [21];

> "Because the state arose from the need to hold class antagomism in check, but becuase it arose, at the same time, in the midst of conflict of these classes. It is as a rule, the state of the most powerful economically dominant class, which through the medium of the state becomes also the politically dominant class and thus acquires new means of holding down and exploiting the oppressed class".

A look at who the creditors and debtors are in East Africa will help in an understanding of these extracts. Engel's means of"holding down and exploiting the oppressed class" is the law and in our context the East African Bankruptcy Acts which though originally enacted to safeguard the three major social-functions only cater for the creditors interests (economically dominant class' interests). The provisions relating to offences, disqualification as well as the fact that even the after-acquired property of the debtor has to be distributed to his creditors and those relating to discharge indicate clearly how the law, and in particular bankruptcy law can be used in disregard of some unfortunate persons

...../11

viz the debtors (whom most creditors, refer to as a disgrace to the system (capitalism) and who must/discarded through / be bankruptcy proceedings).

In a piece of work like this one, it is not possible to bring out clearly the achievements of law or its short comings. It is therefore important to subdivide the thesis into various chapters.

Chapter one will involve a discussion of the second of Macneils [22] social functions, viz, preservation of debtor's property for equitable distribution amongst the creditors. The discussion will involve showing whether the legislators' intentions have been carried out and also the attitude of the courts to this. Further ... any shortcomings will be brought out and suggestions as to what could be done, given (if any).

Chapter two will involve a discussion of the first of Macneils social functions, viz, giving the debtor a fresh start in life. This will be discussed under the concept of rehabilitation - showing whether this is ever done or it is only a legal myth. As in the first chapter, the achievements of the legislature, shortcomings and necessary reforms will clearly be given.

Chapter three on the other hand will discuss the last of Macneil's social functions, viz, "enforcing certain standards of commercial morality. The discussion will follow the same style as in the other two chapters.

Lastly, chapter four will include a general view of the reforms necessary and a conclusion which will involve showing what the law has or has not achieved and why and the alternative approach the writer deems necessary.

...../12

METHODOLOGY

PRIMARY SOURCES

Interviews and questionaires given by people involved in the bankruptcy process have been an important source of information. Analysis of data from the Registrar has also been done.

SECONDARY SOURCES

Archival records such as Parliamentary Debates and Reports, Authoritative Legal Articles, Case Law and Text Books have all been used, where there has been no written material on any issue(s) the author has given her own hypothesis.

CHAPTER ONE

PRESERVING THE DEBTOR'S PROPERTY FOR DISTRIBUTION AMONGST HIS CREDITORS

:1 INTRODUCTORY SECTION

This chapter involves a discussion of Macneil's[1] second social function of Bankruptcy law in East Africa. In doing this it will be shown that this social function has been treated by the legislatures and the courts as the most important of the three.

The analysis in this chapter covers a broad area, viz, the legislators' objectives in 1925, the Historical background, various definitions, provisions of the Acts and the courts attitude to the same.

The Legislators' objectives in 1925 included enacting a law which would provide a system of getting hold of the estate of an insolvent person so that he could not deal with it. This is clearly stated to have been;

"the most important provision and the lack of any such provision has given rise to very great complaints by creditors"[2]

Various writers[3] have stressed on this function of bankruptcy law as the cardinal one in both England and East Africa. Mutunga[4], for example, writes that the sole function of the law of bankruptcy is the protection of the private property of the debtor creditors. Other so called functions are just incidental to the main one and indeed reinforce it.

The various definitions of bankruptcy also emphasize the protection of the debtor's property for distribution amongst the creditors thus the protection of the creditors interests.

The importance of protecting the property of the debtor for distribution among the creditors can further be gauged from the historical background of the law of bankruptcy. In particular/feudalistic backwardness as emphasised in physical/ the torture of the debtor.

All the enactment of the English legislature on bankruptcy dealt on how best the interests of the creditors were to be served by ensuring the debts owed to them by the debtors were duly paid. Joslin noted this, when he wrote;

"The economic pressure bringing forth the the first bankruptcy legislation was exerted by creditors and naturally then the bankruptcy process was geared to their interest and convinience[5]."

For East Africa on the other hand the legislative council debates, the appointment in 1924 of the East African Commission as well as the enactment in Kenya of the first bankruptcy ordinance and later in the other two East African countries were all geared towards ensuring protection of the creditors interests.

The various amendments to the 1926[7], 1930[8] and 1931[9] bankruptcy ordinances were all done to ensure that the debtors property was assembled for distribution among the creditors hence the protection of the creditors interests.

A definition of a "debtor" and a "creditor" is important before discussing how the courts and the legislatures have carried out this 'important' social function of bankruptcy law.

A debtor has been defined by Kenyas bankruptcy Act Section 3 subsection 2[10] in the following words;

...../15

"Except where the context otherwise implies debtor includes any person whether domiciled in Kenya or not, who at the time when any act of bankruptcy was done or suffered by him:-

(a) was personally present in Kenya or

(b) ordinary resided or had a place of residence in Kenya or

(c) was carrying on business in Kenya, personally or by means of an agent or manager or

(d) was a member of a firm or a partnership which carried on business in Kenya, and includes a person against whom bankruptcy proceedings have been instituted in a reciprocating territory and who has property in Kenya.

A 'creditor' on the other hand has not been statutorily defined but the writer is of the view that he is one who is owed something - 'the debt' - which he must prove as soon as possible after the making of a receiving order for purposes of initiating bankruptcy proceedings. In East Africa there are mainly three categories of creditors. The first category and by far the most important comprises of the commercial banks and financial institutions, while the second category consists of the various governments and the last embraces individual persons acting as creditors.

The commercial banks and financial institutions are foreign owned and controlled. They belong to Metropolitan countries such as Britain, the Netherlands, the United States, Switzerland and various other overseas countries. The main aim of these banks is to maximize profits and that is why they charge high rates of interests on all borrowed funds.

...../16

The I.C.D.C. (Industrial and Commercial Development Corporation) is the main creditor to small and medium African traders and businessmen in Kenya. Individual persons often extend "friendly loans" to one another for pursuance of certain objectives. Resort to bankruptcy process for the recovery of such friendly loans" is not very popular as the loan is normally given on mutual trust and confidence between the parties. With individual creditors the relationship between the"debtor" and the "creditor" is either friendly or alternatively, both parties have family ties and therefore the creditor is often patient should there be circumstances leading to delay, in the repayment of the loan. Money lenders have also a part to play in extending credit to business men in East Africa. Such money lenders carry on business as individual persons as companies or as partnerships. Since money lenders do not require any security they lend such money at very high rates of interests. Both the individual lenders and licensed money lenders are unrealiable creditors with the result that most African businessmen and traders turn to commercial banks and financial institutions for larger loans.

An analysis of the East African bankruptcy laws and thei courts interpretation will show that the most important social function of bankruptcy law is to ensure that the debtors' property is properly assembled for distribution among the creditors.

WHO MAY BE ADJUDGED BANKRUPT

The list of those who may be adjudged bankrupt is so long as to enable their assets to vest in a trustee in

bankruptcy and to be distributed among the creditors [11].

The word "debtor" has been widely defined to include aliens; [12] Lipstein [13], commenting on this observed that this is a conflict on laws because jurisdiction should be limited to a particular country. However this is not the case because in the present instance the wide definition is in keeping with the most important social function of Bankruptcy law under observation. When even aliens can be adjudged bankrupt in a foreign country this in essence means that they can not abscord with any debts, hence protecting the creditors interests. The jurisdiction of the High Court (court dealing with bankruptcy cases) has been extended to aliense. The case of Vrajdas Lalji v Hussein Ahmed [14], illustrates this. In this case the appelent appealed to recover Sh.3,997/46 on two promisory notes. By a deed of arrangement the creditors (appellant included) agreed to accept a compositio of Sh.10/- in the pound. It was agreed that the deed of arrange ment was void for want of registation. A debtor under the deeds of Arrangement Ordinance meant a debtor subject to the bankruptcy laws. On whether the debtor was subject to the Bankruptcy Ordinance of Kenya, 1930 it was found that he was under S3(2) of the bankruptcy Ordinance, as he was personally present in the colony when he entered into an arrangement with the creditors and arrangement which amounted to an act of bankruptcy within S.3(i)(h) of the bankruptcy ordinance. Though no act of bankruptcy was proved and hence no registration was required, the court made it clear that a "debtor" included an alien. The English case of RE HEQUARD [15] further empasizes the courts' attitude and interpretation of

bankruptcy provisions. In this case the debtor, a frenchman who was domiciled and resident in Paris, came to London for three months with his wife and servants to conduct an action in the Chancery Division against the petitioning creditor for the specific performance of an agreement relating to some concession of some mines in Burmah. He rented furnished rooms of which he had exclusive use in a house in which the landlord reserved one room for his own use, but reserved no control over the debtor's rooms. During this period a bankruptcy petition was filed against him. It was argued on his behalf that he was not a debtor within the meaning of the English Bankruptcy Act of 1883 which is equivalent to section 3 subsection 2 of all the East African Bankruptcy acts. The court nevertheless held that the fact that he had a dwelling house in England made him subject to English Bankruptcy Law.

2:2 INFANTS

The East African Statutes have no provision exempting minors from bankruptcy proceedings. The courts have gone further than the legislatures in explaining that infants are subject to bankruptcy proceedings that is, they can be adjudged bankrupts. In the English case of RE ADEBTOR [16] the master of Rolls said,

> "There is nothing, to my mind, in the bankruptcy Act which requires or permits the inference that the Act is not intended to apply to infants, provided that in all cases the conditions stated in the Act are fulfilled".

The position of infants as far as bankruptcy proceedings are concerned is also given by Fletcher Moulton L.J when he

...../19

was explaining why a loan to an infant was irrecoverable although intended for the purchase of necessaries, unless it could be shown that it was actually used to purchase such necessaries. In the case of NASH VINMAN [17] he said;

> "An infant like a lunatic is incapable of making a contract of purchase in the strict sense of the words but if a man satisfies the needs of the infant or lunatic by supplying to him necessaries, the law will imply an obligation to repay him for the services rendered, and will enforce that obligation against the estate of the infant or lunatic .... the basis of the action is hardly based on contract. Its real foundation is an obligation which the law imposes on the infant to make a fair payment in respect of needs satisfied."

In the light of the social stigma attaching to bankruptcy it is not advisable to include infants as persons who can be adjudged bankrupts; since they are not capable of making any contracts as such. Moreover, such an infant bankrupt will grow as an embarassed person and his credit-worthness will be very questionable in the commercial world.

2:3 LUNATICS

Lunatics like infants may be subjected to bankruptcy proceedings, It is possible for a lunatic to commit an act of bankruptcy up until the provisions of the mental Health Act [18], are applied to him after which time follows the appointment of a manager in whose control the lunatics property is vested [19] where this happens a court goes further to appoint a fit person to represent, appear for and

act for and in the name of the debtor.[20] It is submitted here, that the procedure of appointing another person to represent the insane person is unjustified in that this other person (appointee) does not act in the debtor's interests but in the interests of those who appoint him since he acts without receiving any instructions from the debtor. This in turn gives the creditors a chance to share the debtors property despite the latter's ignorance. This is not conducive to giving the lunatic (debtor) a fresh start in life because even once he is healed of his mental disorder he will not understand why his property was auctioned or sold/why his / or salary was attached.

MARRIED WOMEN

Bankruptcy proceedings affect married women as they do to unmarried ones [21]. The privilege given to married women and mistresses is virtually done away with in the Law of Bankruptcy. In other branches of commercial Law such as Agency married women and mistresses may pledge their husbands credits for necessaries. [22]

DECEASED PERSONS

The fact that a debtor is deceased or dies after the presentation of a petition will not affect the jurisdiction of the court, since there is a provision for the administration in Bankruptcy of the Estate of a deceased person, and the Bankruptcy Act enables proceedings already commenced to continue as if the debtor were alive.[23] The effect of this is quite clear in that the deceased debtor's property is available for distribution to creditors even if the debtor himself is dead.

2:6 PARTNERSHIP

The fact that a debtor is a partner in a firm is not in itself a ground for ouster of jurisdiction.[24] Any two or more persons, being partners, or any person carrying on business under a partnership name, may be proceeded against under the Act in the name of the firm. Limited partnerships are treated in the same way as ordinary partnerships, the assets of such partnerships vesting in the trustee in Bankruptcy where all the general partners of such a partnership are adjudged bankrupt. However, the provision of the Bankruptcy Act do not apply to corporations, partnerships, associations or companies registered under the companies Act. Such juristic persons are dealt with by other legislation and other procedure. Uganda's and Tanzania's bankruptcy acts are silent on bankruptcy proceedings being commenced against partnerships.

2:7 UNDISCHARGED BANKRUPT

It is no bar to the commencement of bankruptcy proceedings that the debtor is already an adjudicated, undischarged bankrupt. A person may be made bankrupt any number of times concurrently.

A look at the persons who may be adjudged bankrupt shows that anyone may be adjudged bankrupt. This clearly shows that the function of the law of bankruptcy of enabling the debtor's property to be assembled for equitable distribution among creditors is properly taken care of.

:3 DEBTOR'S PROPERTY AVAILABLE TO CREDITORS

The definitions of the word "property" in the three Bankruptcy Acts shows the kind of property which is available

...../22

for distribution among the creditors.[25] The statutes provide that it is all such property as may belong to the bankrupt or may be acquired or is inherited by him before he obtains his discharge.[26] The definition of property is so wide as to cover every conceivable thing or interest, such that even after acquired property of the debtor is included. Such property includes goods which are in the possession order or disposition of the bankrupt in his trade or business by the consent and permission of the true owner, under such circumstances that he is the reputed owner thereof though not belonging to the bankrupt. Such property will vest in the trustee and will be avilable for distribution to creditors. In the case of RE GATEHOUSE EXPARTE BOLLAND [27] It was held that it is sufficient if such property is in the possession of the bankrupt. The true owner must consent to the bankrupts possession of the goods and to the goods being used for trade or business. The workings of the principle of the reputed ownership clause could be illustrated by the cases of KHETSI HANSRAJ HALAMI V OFFICIAL RECEIVER where after purchasing a car from the bankrupt, A allowed the former owner to continue in possession but before any act of bankruptcy had been committed. The East African Court of appeal held that the title to the car passed to the trustee when the former owner became a bankrupt. In the other case of RE FOX[29] where the court was supposed to decide whether the materials were in the reputed ownership of the bankrupt. It was held that to bring the presumption of the reputed ownership into operation, it was necessary to show not only that the materials were in the possession of the bankrupt but that they were in his possession in circumstances

that supported the conclusion that he was the reputed owner thereof and also that they were in his possession with the consent of the true owner. Applying this test, the court held that the building materials at the bankrupts' yard were in his reputed ownership. Briefly the facts of the case were that a builder was engaged in building two houses. He had in his possession certain building materials which were the property of the two appellants and which were to be used for the construction of the two houses. Part of the building materials was kept at the builders yard and the rest was on the sites where the builders name was displayed on a board. The builder was adjudged bankrupt under the reputed ownership clause. These two cases illustrate the use of the Reputed Ownership Clause and its retention in Bankruptcy law inorder to allow creditors to seize any property which may be in the possession of the bankrupt without the need to trace title to such property, hence ignoring the rights of innocent third parties. In view of the injustice arising or likely to arise from the application of this doctrine particularly to third parties, I recommend that the doctrine be abolished in bankruptcy.

The after acquired property which is made available for distribution among creditors in East Africa should be left at the debtor's disposal so that he can start a fresh in business or otherwise once he has fully discharged his liabilities. Mutitu [30] rightly observes that various injustices arise when such after aquired property is made available for the trustees hence for the creditors.

...../24

All the East African Bankruptcy Acts [31] set out the kind of property which is not available for the creditors from the debtor's assets. Section 43 (a) and (b) of the Kenya and Ugandan Bankruptcy Acts provide that this includes property held on trust for any other person and the tools if any of his trade and the necessary wearing apparel and bedding of himself, his wife and children to a value inclusive of the tools and apparel and bedding not exceeding five hundred shillings The court may, depending on the bankrupts' station in life, increase the amount but can not exceed one thousand shillings.

The bankruptcy rules [32] empower the official receiver to make such allowances out of the property of the bankrupt for the support of the bankrupt and the bankrupt's family as may be just. Looking at the provisions on what property is not to be distributed amongst the creditors one notes that they are economically unrealistic. In the light of present inflation the figure is too little infact absurd and should be raised to cope with present economic situations.

The wide definition of the debtor's property available to the creditors is indicative of the major social function of bankruptcy law, in disregard of not only the debtor's fate but even more pathetic of innocent third parties.

PROCEEDINGS AFTER PRESENTATION OF PETITION ORDER

Either the debtor [33], or the creditors [34] may petition the court to make a receiving order which precipitates bankruptcy proceedings. Section 8(1) of all the statutes provide that a debtor may file a declaration in court of his inability to pay his debts. The petition must be in the

prescribed form and signed by him before an advocate [35]. Statistics [36] show that most receiving orders are made on the debtor's petition. The debtor being tired of the debts and wishing to free himself from the load of obligations petitions himself to bankruptcy for it is only through such proceedings that he can free himself from that load. The petition is the first step in bankruptcy proceedings which enables the official receiver to assemble the debtors property for equitable distribution among the creditors.

As already mentioned, the creditor may also petition the court by showing the commission of at least one act of bankruptcy. The petition must also show that the creditor is owed a debt of not less than Sh.1,000/- and if two or more creditors join in the petition then the aggregate amount owing to them must be Sh.1,000/-. The act of bankruptcy upon which the petition is based must have occured within three months before the presentation of the petition. The debtor while committing such an act of bankruptcy on the other hand must have been domiciled in the respective country viz Uganda, Kenya or Tanzania [37]. The requirements mentioned above and in particular the one that the creditor before petitioning must be owed not less than one thousand shillings is not realistic in 1983. This figure was set in England in 1869 - more than 100 years ago !!!!! and having not been reviewed has been overtaken by economic realities. It should therefore be amended as a matter of urgency. However, it is retained with out any amendments to enable a creditor to subject a debtor to bankruptcy proceedings for as little as Sh.1,000 inspite of the expenses involved in such proceedings and which must be met by the debtor.

4:1 ACTS OF BANKRUPTCY

Proceedings in bankruptcy may involve serious consequences for the debtor, and therefore before a petition can be presented against the debtor the court will require prima facie evidence of insolvency. It must therefore be shown that the debtor has committed one or more acts of bankruptcy as specified in section 3 of all the East African countries bankruptcy Acts. An analysis of each of these bankruptcy acts will show how they achieve this cardinal social function of bankruptcy law.

Section 3(1) (a) of all the statutes provide that a debtor commits an act of bankruptcy if in Kenya [38] or elsewhere he makes a conveyance or assignment of his property to a trustee for the benefit of creditors generally. This has been as an attempt by the debtor to distribute his property otherwise than provided in the Act, that is in accordance with the more equitable principles of Law.[39] There must be conveyance of the whole or substantial amount of all the property of the debtor. This was said to be the meaning of the word "assignment" in section 4(1) (a) of the English Bankruptcy Act of 1883 by Lord Eshen M.R. in the case of IN SPACKMAN EX PARTE FOLEY [40]. Intention in this subsection is immaterial, the intention need not have been to delay or defeat his creditors or any of them.

Deeds of arrangement is not an assignment of property as provided for in S 3(2) of the Deeds of Arrangement Act [41] but a deed of arrangement for a composition under paragaph (b) of the same subsection. This was the holding by Farrel J, in the case of RE MEGHJI NATHOO [42] in dismissing a petition for a receiving order founded on the following act of bankruptcy, that is, the execution of a deed of arrangement.

It must be noted that the debtor is controlled in the way he is to deal with his property in case this would jeopardise the very interests of the creditors. Hence the insistence in dealing with property only as provided for in the statutes.

S 3(1)(b) of all the statutes like the counterpart S 3 (1) (a) restricts the debtor from dealing with his property in a particular way. It provides inter alia that;

"If in Uganda [43] or elsewhere he makes a fradulent conveyance, gift delivery or transfer of his property or of any part thereof...."

That is a debtor commits an act of bankruptcy whose effect is to deprive him of his property for equitable distribution amongst his creditors. It must be noted that the transfer need not be for creditors but for anyone. This provision imposes a substantial prohibition in that the debtor may not dispose of his property with intent or effect of placing it beyond the reach of his creditors.[44] The term "fradulent" does not mean as in S3(1)(c) an intent to benefit one creditor to the exclusion of others, but, what must be shown either expressly or by implication is the intent to delay or defeat the claims of creditors by disposing of property which might otherwise be utilised as assets for the payment of the debtor's liabilities This is an act of bankruptcy even if consideration of an adequat amount is given, if the necessary consequences of a transfer by the debtor is that his creditor will be defeated or their payment delayed. Hence, on this ground in RE SIMMS[45]

.....28

the sale of his business by a debtor to a private company in which the debtor acquired shares and over the property of which a debenture was given to a bank, was an act of bankruptcy.

Thirdly, a debtor may commit an act of bankruptcy if in Uganda, Kenya or Tanzania or elsewhere he makes any conveyance or transfer of his property or any other act be void as a fradulent preference if he were adjudged bankrupt[46] fradulent preference is defined in the statutes as[47] :-

> "Every conveyance, transfer or change of property made, every payment made, every obligation incurred and every judicial proceeding taken or suffered by any person unable to pay his debts as they become due from his own money in favour of any creditor or of any person in trust for any creditor, with a view to giving such creditor or any surety or guarantor for the debts due to such creditor, a preference over the other creditors shall if the person making, taking, or paying or suffering the same is adjudged bankrupt on a bankruptcy petition presented within six months after the date of making, taking or suffering the same, be deemed fradulent and void as against the trustee in bankruptcy".

To constitute a fradulent preference, the act must be a voluntary and spontaneous act of the debtor to make a preferential payment in favour of the creditor requesting payment. The intention to prefer one creditor amongst many knowing very well he cannot pay the rest in full and not the payment itself is what is fradulent.[48] The mere fact that payment does prefer

...../29

a creditor is not in itself enough. The dominant motive of the debtor in making the payment is the test. This was explained by Lord Esher, MR. in the case NEW, PRANCE AND GARRANDS'S TRUSTEE V HUNTING [49] in the following words:-

> The question whether there has been a fradulent preference depends not upon the mere fact that there has been a preference but also upon the state of mind of the person who made it ..... It depends upon what was in his mind".

Similarly the Kenyan case of VRAJDAS LALJI V HUSSEIN [49b] the court was of the same opinion that is the state of the mind of the one making the preference is of paramount importance. In this case Abrahams C.J. said that it was important when determining whether or not there was preference to ask one question i.e.;

> "What effect would the debtor's actions produce on the mind of the creditor receiving it as to the intention of the debtor with regard to his creditors".

The writer here submits that this test of motive is unsatisfactory since it is not easy to tell what a man's motive is in his actions. It might also be very hard for the debtor to prove what his motive was when paying some creditors when the court has already imputed one. Though the provision clearly protects the interests of the creditors in the debtors property it is nevertheless not fair on the part of the debtors and therefore should be reviewed since no man can ascertain what the other man's motive is; and when this

is attempted injustices is bound to be done to the debtor.

> "Fourthly a debtor commits an act of bankruptcy if with intent to defeat or delay his creditors he does any of the following things, namely; departs out of Kenya, Uganda or Tanzania or being out of these countries remains out of them, departs from his dwelling house or otherwise absents himself or begins to keep house". [50]

An intent to delay his creditors may be inferred. It is not necessary to show any particular delay of a creditor, intention of so doing may be presumed if it is the natural consequence of the debtor's act. Proof of the necessary intent must be available. Thus, that a debtor failed to appear at an appointment with his creditor at which he was supposed to be discharging the debt did not establish the necessary intent in view of the facts that he was present at his place of business and so available for interview. [51]

The origin of the two offences of "fleeing" and "keeping house" is the continent and England. [52] This was enacted inorder to curb the English merchants who were practicing it. East Africa has blindly re-enacted these provisions though not relevant as the offences of "keeping house" and "fleeing" have never been known to exist in East Africa. It follows therefore that the Legislature's intention was to protect the creditor's interests at all costs. far-fetched point!

Fifthly, a debtor may commit an act of bankruptcy under S 3 (i) (e) of all the East African Bankruptcy statutes. Further, he commits an act of bankruptcy if he files in the

...../31

court a declaration of his inability to pay his debts or presents a bankruptcy petition against himself. [53] The later provision enables the debtor himself to call the law to assemble his assets so that they can be distributed amongst his creditors. This has to be seen in the light of the first of Macneil's social functions, viz; that of enabling the debtor to start a fresh. Being overburdened by his liabilities he expects the Law to give him a fresh start in life but on the contrary such a declaration is disadvantageous to him, in that bankruptcy proceedings are immediately commenced.

For practical purposes, perhaps the most important instance of an act of bankruptcy in East Africa occurs where, after a creditor has obtained a final judgement or final order against a debtor for any amount, or for which execution has not been stayed, the creditor has served on the debtor in any of the East African countries a bankruptcy notice. The bankrupt will commit an act of bankruptcy if within seven days after service he does not comply with the requirements of such notice or does not satisfy the court that he has a counterclaim, set off or cross demand. [54] It is the most important, because it is the only available course open to a creditor who sees no other avenue to payment, especially, if he is not aware of any particular act of bankruptcy committed by the debtor upon which a petition can be founded. It therefore enables creditors to secure their interests evenif the debtors are not aware of them. The seven days available to the debtor to pay the debts is too short, as he cannot within this time organise a harambee meeting, or consult friends who might help him raise the required amount. The three days in which

he has to send a counter claim, set off or cross demand are also inadequate especially if he has to consult a lawyer. This has also erroneously been based on the assumption that means of communication are so well developed even in the rural area where such debtors may be living. Consequences of non compliance of the notice after three days is often not prominent enough. Though all this can be explained in that the intentions of the legislatures were to protect the creditors' interest as the author has shown throughout this chapter. It is her submission that regard should be had to the other two social functions, hence the provision should be amended to extend the time for example to 21 days instead of 7 and 7 instead of three for the counter claim leaving the court with the sole discretion to extend such time as may deem just. The consequences of non-compliance of the notice should be displayed prominently although the writer is aware of the fact that various creditors would agree that this is a standard form cntract - in view of the consequences of adjudication it is just to display the consequences prominently. It is also my submission that such amendments as suggested may go to reinforce the third social function viz enforcing certain standards of commercial morality in that debtors might pay their debts but must not be unduly harassed in so doing by being given inadequate time.

Finally, a debtor commits an act of bankruptcy if he "gives notice to any of his creditors that he has suspended, or he is about to suspend payment of his debts". [55] Oral notice of supension is enough.

The assence of this provision is similar to the rest already discussed.

...../33

:5 PROCEEDINGS CONSEQUENT ON RECEIVING ORDER

If the debtor commits an act of bankruptcy the court may on a bankruptcy petition being presented by the creditor or the debtor make a receiving order for the protection of the debtors Estate. [57] The official Receiver is thereby constituted the receiver of the property of the debtor, [58] S(10) of all the East African statutes provides that before a Receiving Order is made, but after the petition the court may appoint an interim receiver if it is shown to be necessary for the protection of the estate. S 12(1) of the statutes further provide (note still in the spirit of protecting debtor's assets for equitable distribution amongst creditors) that, the court may appoint a special manager if debtor's business so requires or if the creditor's interests so require. The official receiver is an official of the court who vacates the office once the trustee has been appointed.

5:1 STATEMENT OF AFFAIRS

Upon the making of a receiving order the debtor is required to prepare and submit a statement of affairs. [59] The statement must be in the prescribed form and supported by an affidavit declaring the truth of the contents contained therein and submitted within 14 days from the date of order.

The statement of affairs shows the particulars of the debtors assets, debts and liabilities; the names, residence and occupation of his creditors. It must also show the securities held by them, the dates when the securities were given and such other information as may be prescribed or as the official receiver may require. [60] The importance of this statement is clearly indicated by the particulars of the same. The statute here leaves the debtor with the duty of indentfying those persons

(creditors) whose debts wil be discharged by his assets. This provision is also indicative of the interests intended to be catered for by the Acts 16 (3) of Uganda's and Kenya's bankruptcy Acts which deals with the punishment to be imposed incase of default further shows that the Bankruptcy Acts throughout East Africa cater for the creditors interests, viz adjudication of bankruptcy and its consequences and contempt of court. This double punishment is in keeping with the other of its functions, in particular, enforcing certain standards of commercial immorality It is recommended here therefore that the punishment for contempt of court, be done away with as in Tanzania, since the statment of affairs needs expert knowledge to draw from such professionals as lawyers, accountants and valuers. Section 16(3) should therefore be repealed. The time given in which the statement of affairs is to be submitted should also be extended since the debtor who may need an expert to help him draw the statement will need money to pay the expert and since he is already in financial problems he should be given time to get the money. As such the court should not give a fixed period but rather allow the debtor to submit the statement of affairs even after the expiry of the 14 days provided such period is reasonable. (The period which is reasonable to be left to the courts discretion). Such considerations are necessary because it has been shown that statement of affairs are costly to draw. For example in the case of GURBACHAN SINGH S/O BACHITTAR SINGH et al V GAILEY ROBERTS [61]. The statement of affairs of about ten hand written pages costed Sh.2,740/40 to be prepared by an advocate. In 1984 it is more expensive.

...../35

1:5:2 FIRST MEETING OF CREDITORS

Fourteen days after the receiving order the official Receiver is supposed to convene the first meeting of creditors. Section (14) of the three countries' bankruptcy Acts clearly states the function of the meeting as enabling the court decide on how best the debtors property is to be distributed among the creditors. The official Receiver must give three days' notice to the debtor of the time and place of the appointed meeting. Which notice can be delivered to him personally or through a prepared post letter. The debtor must attend such meeting, failure of which he is deemed guilty of contempt of court. This provision though inkeeping with the social function under scrutiny has various shortcomings, in that the law assumes that communication by post in East Afric is as developed as in England. The writer suggests that this section should be amended to give the debtor adequate time.

:5:3 PUBLIC EXAMINATION

Once a receiving Order is made the court will appoint a day for the public examination of the debtor. Section 17(1) of all the statutes (Bankruptcy) provide that the function of this examination is to examine the debtor's conduct, his dealings with property and his property. The importance of this provision in protecting the creditors property is clearly stated and elaborated by the various subsection for example section 17 (8) provides that the debtor is to be examined upon oath - the essence of this is to expose him to a criminal offence viz, perjury if he conceals any fact concerning his property which would be detrimental to the creditors assets. Section 17(9) further provides that failure to give satisfactory answers amounts to contempt of court lastly section 17(12) of the Kenyan Act provides that an advocate of the debtor may

attend a public examination but will not question the debtor or address the court. one then wonders the idea behind allowing an advocate during the examination. In the light of the financial position of the debtor it is only fair to repeal this provision so that the presence of an advocate is completely done away with.

4 SCHEME OF ARRANGEMENT

The Bankruptcy Acts [62] provide for an immediate position where by the debtor against whom a receiving order has been made may either before adjudication submit proposals for a composition or scheme of arrangement which if accepted by the requisite majority will have the effect of disposing of the bankruptcy proceedings altogether. However, it must be noted that the fact that there has been an acceptance by the requisite majority it is no bar to the court carrying out a public examination. This as will be shown in chapter three amounts to a violation and non-recognation of one of the laws' social functions viz, enforcing certain standards of commercial morality, Since the scheme is a result of negotiations between the debtor and his creditors, it should be governed by the principles of freedom of contract and therefore should not once accepted by creditors be followed by a public examination.

If the composition or scheme of arrangement is rejected by the creditors the debtor is adjudged bankrupt whose effect [63] is to vest his property in a trustee appointed by the creditors. The trustee thereup takes over from the official receiver the duty of assembling the debtor's assets for equitable distribut on among his creditors. It is obvious to the reader for

...../37

whose interests the trustee is likely to champion having been appointed by the creditors. The courts' interpretation of provisions enabling an aggrieved debtor to petition the court incase the trustee deals improperly with his property [64] clearly indicates that the trustees are appointees of the creditors and must therefore act on their behalf. The courts in East Africa have misused their discretion of modifying, reversing or confirming acts of the trustees which debtors complain of. This misuse has led to injustices on the part of the debtors who have not successfully invoked the provision for their own benefit instead the trustees make unjust environments from the surplus of assets for example such was made in the case of BARKATAI S/O ABDUL V COMMISSIONER OF INCOME TAX [64b] where the debtor's overall liabilities were Sh.6,700/- while his assets were worth 49,500/- yet he did not recover the difference

It is clear from decided cases that in practice the bankrupt is not entitled to the surplus remaining after payment in full of his creditor. For example in RE A DEBTOR EXPARTE THE DEBTOR V DODWELL,[65] where the issue was to what extent if any, the bankrupt could call the trustee in bankruptcy to account for his management and disposition of the estate.

Herman J, stated the position in the following words:-

> "It seems to me clear that there must be circumstances in which the court can interfere at the instance of a bankrupt to control the actions of the trustee..... I need not, I think attempt to define what these circumstances are. They cannot, I think (in the absence of fraud) justify interference in the day-today administration of the estate, nor entitle the bankrupt to question the

exercise by the trustee in good faith of his discretion nor to hold him accountable for an error of judgement. Adminstration in bankruptcy would be impossible if the trustee must answer at every step to the bankrupt for the exercise of his powers and discretions in the management and realization of the property" [66]

The last line clearly indicates that if the trustees were to be accountable "at every step to the bankrupt for the exercise of his powers and discretions" it would be impossible to assemble his (bankrupt's) assets for equitable distribution among the creditors which is the main social function of this branch of the law. As with the committee of Bankruptcy law [67] reporting in 1957, the present writer is of the opinion that the East African sections similar to S (69) of the English Bankruptcy Act of 1914 should be amended as they do not give the debtor any protection though he has a statutory right to get the surplus.

5 DISCHARGE

After his adjudication the debtor is supposed to apply for his discharge.[69] On hearing the debtor's application the court may either grant or refuse an absolute order of discharge or suspend the operation of the order for a specified time or grant an order subject to any conditions. [70] More often than not, the courts grant conditional discharges so that the debtor's property continues to vest in the trustee for distribution among the creditors. (see chapter two).

1:6 BANKRUPTCY OFFENCES

Sometimes criminal sanctions are involked when a debtor conducts his affairs in a manner likely to jeopardize the

...../38

interests of his creditors, These sanctions are invoked under Part VIII of the three East African Countries Bankrutcy Acts. Offences are committed by a person who is already an adjudicated bankrupt, or is on the way to being so adjudicated in that a receiving order has been made against him, or while not subject to adjudication or a receiving order at the time of the commission of the material acts becomes the subject of either a receiving order within a specified time. The offences which may thus be committed by a bankrupt, or a debtor who is enroute to bankruptcy may be divided into two groups; those which can be committed after adjudication (or possibly before adjudication but after the making of a receiving order) and those which consist of acts committed before bankruptcy or the making of a receiving order, the conduct in question only becomes criminal if bankruptcy proceedings ensue and are successfully pursued by the creditors. Most of these offences are aimed at protecting the creditors interests in that a debtor who deals with his property in a manner likely to jeopardize the creditors interests is punished. The first section of part 8 of the Bankruptcy acts deals with the debtor's failure to discover to the trustee all his property [70]. The effect of this provision is seen in that the creditors are delayed or are not paid in full which is against the very object or social function of bankruptcy law. The other subsections [71] deal with failure to deliver up to the trustee such movable and immovable property in his custody, [71] failure to deliver books or documents relating to property to the value of Sh.200/- or if he removes any

...../ 40

property two years before the petition for the value of Sh. 200/- and above.[73] Any person guilty of an offence under subsection (1) shall be liable to imprisonment for a term not exceeding three years.[74]

An undischarged bankrupt commits an offence if he obtains credit of Sh.100 without informing that person he is an undischarged bankrupt.[75] This is so restricted so that the debtor does not incur more liabilities or debts which he might be unable to discharge thus defeating the object of this branch of the law relating to the distribution of his assets equally among his creditors. This financial unit of Sh.100 was fixed as early as 1840 [76] in England, when the then economic situations made it reasonable. Today this figure is unrealistic in the light of the rate of inflation and needs urgent revision. subsection(b) of the same section intends to protect the interests of the creditors so that the bankrupt is not allowed to change his trading name because if he does so he is likely to enter into business relationships which are detrimental to the interests of the creditors in that there are all the chances of contracting more debts thus making it difficult to pay even the first lot of creditors. It is also an offence to fail to preserve assets.[77] The Offence may be committed in the following instances; if he (the bankrupt) makes gratuitous dispositions of property, if he sells such property for much less the market price, if he pays a betting debt long overdue and if he is a partner and when still a partner of a firm he uses partnership property to pay a private debt. If he obtains

...../41

property on credit by fraud [78] or on pretence of carrying on business or he pawns [79] property obtained on credit [80] he shall be guilty of an offence and liable to imprisonment for a term not exceeding five years. [81]

The foregoing discussions has shown that the social functions of assembling the debtors property for distribution among his creditors has been carried out to great heights. This has been done and achieved through the courts interpretation of various provisions as well as the legislatures refusal to amend the law even where the provisions are manifestly unjust on the part of the debtor.

...../42

TABLE ONE

	RECEIVING ORDERS	
YEAR	MADE ON DEBTORS' PETITION	MADE ON CREDITORS' PETITION
1968	9	2
1969	9	2
1970	3	1
1971	3	2
1972	6	1
1973	9	2
1974	4	3
1975	5	3
1976	9	3
1977	4	1

APPENDIX XXV

SOURCE: ANNUAL REPORTS OF THE REGISTRAR-GENERAL 1977

...../43

CHAPTER TWO

REHABILITATING THE DEBTOR OR GIVING THE DEBTOR A FRESH START

INTRODUCTION SECTION

With the development of Commerce and Industry during capitalism, trading or credit became a common feature. This had the effect of increasing the chance of financial embarrasment among the debtors (the traders who relied on this form of trade). These debtors, as expected in a capitalist mode of production, were seen as a disgrace to the system hence the need to get rid of them through bankruptcy proceedings. These proceedings enable the debtor's property to be assembled and distributed among his creditors. After distribution of the debtor's assets, he is entitled to a fresh start in business or otherwise. This right to a fresh start in life was stated as one of the objects of Bankruptcy Law in Kenya in the following words;

> "Bankruptcy is a privilege which is granted to insolvent debtors whereby they are enabled to get clear of their liabilities and to start a fresh on a clear footing..."[1]

Macneil[2] pointed at as one of the social functions of Bankruptcy Law in the Common Law Jurisdiction, hence in Kenya, is that it enables worthy debtors to secure fresh starts in their lives free of the load of obligations which they have incurred. The words "worthy debtors" will be understood once a discussion on discharge provisions are given because only "worthy debtors are given absolute discharges. They are "worthy" in the sense that they have not acted contrary to

commercial morality as understood in a capitalist mode of production.

The aim of this chapter is to examine whether this social function of bankruptcy Law is properly carried out. The writer will suggest reforms necessary where the act will be seen to fall short of the expectations of the legislators who enacted th Bankruptcy Acts in East Africa. This in essence will involve an analysis of the philosophy of rehabilitation in both England and East Africa, i.e. the extent to which rehabilitation of the debtor is a legal myth, and - or, reality. A look at the East African Bankruptcy Acts, their constitutions and other statutes as well as decided cases will help in answering this perplexing question.

Rehabilitation has been defined as the restoration of a delinquent to a former rank, privilege, or right.[3] Thus when we talk of rehabilitating the debtor we mean restoring him to his former position after he has discharged all his obligations to the creditors. This is what the legislators had in mind when enacting this branch of the law and what should be the first consideration of the courts when interpreting the provisions of the Bankruptcy Acts. However, the position is quite different in that these provision are interpreted only to suit the interests of the creditors, that is, in disregard of the right to give the debtor a fresh start in life.

The various definitions of bankruptcy, the historical background of bankruptcy law, the various provisions of the Bankruptcy Acts and the courts interpretation of the same go to show that this social function of bankruptcy Law is ignored.

IMPORTANCE OF REHABILITATION

The positions after bankruptcy proceedings commence is that the debtor is in great financial difficulties, and has to pay off all such debts. Justice requires that once he has paid off all such debts he should be freed of any liability by being given an absolute discharge instead of, as is the practice, delaying such discharge or denying him the same indefinitely. Economically, a discharge is essential in that it is only after such a discharge (absolute) that the debtor can carry on trade which he was formerly doing and hence realise some profits, which will help him recover from his homeless financial state.

Socially, rehabilitation is important in that the insolvent debtor is afforded an opportunity to start a new - this will, as it were, enable him to earn a living without living miserably, he will also manage to take care of his family especially if he is the sole bread-earner as most men are in most East African households. He will also, once he is discharged and enabled to start a fresh be saved from a homeless and helpless state from which costly social problems develop, such as committing suicide, stealing, killing in the process of stealing as in robbery with violence, etc.

It will be noted however, that rehabilitating the debtor is only a legal myth. A look at the provisions of the Bankruptcy Acts and their interpretation by the courts show that the emphasis is on ensuring the debtor's property is assembled and properly distributed to the creditors, without any regard for his rehabilitation or fresh start in life.

...../ 46

After reading the Bankruptcy Bill for the second time in 1925, the Attorney General pointed out that the privilege of giving the insolvent debtors a fresh start on a clear footing after clearing their liabilities had to be limited. He said,

> "Bankruptcy is a privilege which is granted to insolvent debtors whereby they are enabled to start a fresh..... it is therefore of greatest importance that the conditions under which the privilege is given should be carefully limited.[4]"

This privilege, as will be shown below, has been so limited. A look at the definitions of bankruptcy available[5] as well as the historical background of this branch of the Law will show that the cardinal function of Bankruptcy Law was and has been to ensure that the debtor's assets are properly assembled and distributed among the creditors. It is from this background that the reader must see and understand the half heartedness of the East African Bankruptcy Acts in giving the debtors a fresh start in business. Even where provisions appear on the face to enable the debtor to get a fresh start their provisions and the courts' attitudes and hence their interpretation of these provisions thwart any such intentions.

REHABILITATION: PETITION TO DISCHARGE

A bankrupt is assured of his rehabilitation once an absolute order of discharge is given. However, before applying for discharge a chain of events must take place. First and foremost the debtor must petition himself or any of the creditors must file a petition against him in the High Court which has the jurisdiction to hear bankruptcy proceedings.

...../47

PETITION

The point from which a bankrupt debtor may look forward to a new start, is the time in which he files his petition for bankruptcy relief[6] or when a petition is filed against him by the creditors.[7] The Debtor's petition in essence calls in the aid of the court to assemble such assets as he has and from them realise money to repay his creditors so that he can start a fresh free of those obligations. In a nutshell the debtor's petition constitutes an act of bankruptcy which commences bankruptcy proceedings, which in turn are meant to result in a discharge thereby enabling a debtor to have a fresh start in life. This is however theoretical because in practice, a discharge is often delayed as it is discretionary and as will be shown very few debtors are seen by the courts as deserving an absolute discharge due to the distrust ascribed to them. The statutes provide that the creditors before petitioning the court must be owed at least 1,000/= and if two or more creditors join in the petition they must be owed an aggregate amount of Shs. 1,000.[8] Having been set in England in 1869, this amount has been overtaken by economic realities and therefore should be increased especially when one compares the costs involved in bankruptcy proceedings by the debtor with the Shs. 1,000/=[9]. The writer suggests that the figure be raised to about £150 (Three Thousand Shillings) and a machinery for adjusting this sum when necessary should be introduced, otherwise, it is only fair to give the debtor ample time to repay the Shs. 1,000/=

The Bankruptcy Acts provide that the court may dismiss the creditors' petition;[10] it reads;

...../48

"If the court is not satisfied with the proof of the petitioning creditor's debt or of the act of bankruptcy, or of the service of the petition or is satisfied by the debtor that he is able to pay his debtor ..... the court may dismiss the creditors' petition"

Since a dismissal of a petition will amount to having no bankruptcy proceedings against the debtor, the provision seems to be concerned with giving the debtor a fresh start in that his former economic and social status remains unlnterfered with by bankruptcy proceedings. In practice however, this provision is rarey invoked by the courts and when they do so they come out with unfavourable findings. For example, in the case of RE DESAIBHAI J. PATEL[11]. The petitioner was asking the court to dismiss the petition upon the ground that its presentation constituted an abuse of the process of the court and he could pay the debts complained of, on this justice Pickering pointed out that although the words contained in the Provincial Insolvency Act, Section 16 (1) are mandatory in form, the court has jurisdiction and will **dismiss** a petition which it deems to be an abuse of the process of the court. The court excercising its discretion refused to dismiss the petition even if the debtor could pay his debts on grounds that it was an abuse of the courts' process and an order for adjudication was made.

Section 3 (1)(f)[12] **provides** that the debtor commits an act of bankruptcy which in turn leads to adjudication, if he files in court a declaration of his inability to pay his debts. Rule 98[13] provides for the procedure the debtor has to follow in declaring his inability to pay his debts. This declaration must be understood as a proof of the debtor's yearning to be guided by the court on how best he is to discharge his liabilities and start a fresh.

The following discussion will show the half heartedness of the various provisions in giving the debtor a fresh start, thus blatantly showing that the only social functions of a great concern to the law is that of assembling the debtor's assets for distribution among creditors.

:3:2 INFANTS

The statutes do not exempt minors from bankruptcy proceedings either expressly or by implication, nor do they give guidance as to whether such an infant will be subject to bankruptcy proceedings and if so when. Yet inspite of this, the courts have for long, declared such infants bankrupts, and have accepted the idea that they too like adult debtors have the capacity to be adjudged bankrupt. The case of RE A DEBTOR[14] illustrates the courts' attitude in England which has also been the attitude in East Africa. In this case the Master of Rolls stated the following, on the issue as to whether the infants were, or would also be deemed debtors and thus persons to whom bankruptcy proceedings could be instituted;

> "There is nothing to my mind, in the Bankruptcy Act which requires or permits the inference that the Act is not intended tc apply to infants provided that in all cases the conditions stated in the act are fulfilled."

In 1950 the court of Appeal in the case of RE A DEBTOR[15] recognised that an infant could be subjected to bankruptcy proceedings at the suit of a creditor to whom the infant owed a debt that was legally enforceable and recoverable against him. In that case an infant failed to pay purchase tax in respect of trading transactions in which he had been engaged.

...../50

Notwithstanding, the earlier decisions as to trading by an infant, it was decided that liability to tax was a debt which the crown could enforce, if necessary by seeking a receiving order. Since this case, numerous other infants have appeared in court on grounds of their inability to pay their debts to their creditors and receiving orders have been sought against them. The position is quite unfair in that the infant - debtor may grow up as a very embarrased person, on the other hand his creditworthiness might be impaired in the commercial world. The result will be that even after the discharge of such an infant which is not automatic but may be conditional or denied indefinitely, such an infant bankrupt will not be given a fresh startinglife. Before his adjudication, he might not even have been a trader in the strict sense of the word, and therefore might find it very hard to engage in any trade. Perhaps it is only fair that such an infant is not subjected to bankruptcy until he reaches majority age.

2:3:3 LUNATICS

Under Rule 247[16] a lunatic like an infant may be adjudged bankrupt. The Acts provide that such a lunatic will be represented by a person appointed by the court;

> "to appear for, represent or act for and in the name of the lunatic either generally or in and for the purpose of any particular application or proceeding, or the exercise of any particular right or powers which under the Act and rules thereunder the lunatic might have excercised if he had been of sound mind."

Since the representative is not an appointee of the lunatic it is only fair for the lunatics assets to be assembled but not

...../51

distributed until he is well. Perhaps the courts would determine the period in which the assets would remain undistributed, but not too long to jeopardize the interests of the creditors.

3:4 DEBTORS PROPERTY NOT AVAILABLE TO CREDITORS

In laying down what property is not to be distributed among the creditors, the Legislature must be seen as having intended to accomplish all their social functions. In particular as having intended to give the debtor a fresh start in life once he had paid off all the debts to his various creditors. However, such an intention is questionable on the grounds that the legislatures have been reluctant in amending the provisions relevant in giving the debtor a fresh start. The courts' attitude on the property which is not available to the creditors leaves one in doubts as to the very intentions of the legislators in 1925 as seen.

Section 42 (1) of Uganda's Bankruptcy Act[17] for example, provides that;

> "The property of the bankrupt divisible among his creditors in this Act... shall not comprise the following particulars -
>
> (a) Property held by the bankrupt on trust for any other person
>
> (b) The tools (if any) of his trade and the necessary wearing apparel of himself, his wife and children to a value, inclusive of tools and apparel and bedding not exceeding three hundred shillings, in the whole, except that in any case the court having regard to the bankrupt's station of life, may order that this allowance be increased to any value not exceeding eight hundred shillings in the whole."

..../52

Further Rule 257 (1) of Kenya's Bankruptcy Act provides that;

> "Subject to any general or special direction of the court the receiver while in the possession of the property of the debtor, may make him such allowance out of his property for the support of his family as may be just."

Though these provisions seem to leave out something for the debtor to start a fresh once he is discharged, the figures as to the value of these items are too little to give the debtor any protection. They are no doubt in need of urgent amendment if the intended protection will be given to the debtor. On the other hand, the rules allowing the receiver to give allowance to the debtor and his family sound quite humanitarian but since they are rarely invoked, the protection is only incidental. The writer suggests that the court excercises its discretion fairly so that allowances are made available for the debtor's family.

Unlike the United States[18] where the property of the bankrupt at the time of the petition is the only property which is administered for the benefit of the creditors, the converse of this is true in East Africa , in that, any property, salary, wages etc which comes to the bankrupt after the petition (instigation of bankruptcy process) rests in the trustee in Bankruptcy for distribution among the creditors.[19] In a nutshell the position is that in the United States the point from which a bankrupt may look forward to a new start is the time in which he files a petition or a petition is filed against him. While in East Africa the petition is uncertain because a fresh start is only possible after an absolute discharge order (orders which are normally rare as they are discretional).

...../53

In view of the injustices done to the bankrupt when even his after-acquired property vests in the Trustee in bankruptcy the writer suggests that such after-acquired property, wages etc should be excluded from the list of the debtor's property available for distribution to the creditors. Such after-acquired property, personal earnings etc, if made available to the bankrupt, would give him capital on which to build and star a fresh after his discharge.

The writer further suggests that the personal earnings of the bankrupt after adjudication, where such earnings are required for the support and maintenance of himself and his family should not vest in the Trustee.

In the case of RE WILSON EXPARTE VINE[20] James L.J. put the position on after-acquired property in particular on personal earnings in England (and so in East Africa) dramatically when he said;

> "The general principle always has been that until the bankrupt has obtained his discharge all his property is divisible among his creditors. But an exception was absolutely necessary in order that the bankrupt might not be an outlaw, a mere slave to his trustee; he could not be prevented from earning his living."

On this, the appeal by the trustee was dismissed because the trustee had no right to intercept damages recovered by the bankrupt for a personal wrong. Rulings of this nature are rare, and therefore the courts would address their minds to the injustices done to the bankrupts by permitting such personal earnings to vest in the trustee in bankruptcy they would allow them to retain such earnings, afresh once they are discharged.

...../54

Section 3 of the 1883 English Bankruptcy enacts a provision which permits the bankrupt to retain his personal earnings. Vaughan Williams distinguishing between personal earnings and business profits in the case of RE ROGERS[21] pointed out that the only moneys to be retained by the bankrupt for his maintenance was his personal earnings.

Section 2[22], 43[23] (1) (b), 40 (2) (a)[24] and 42 (2) (a)[25] all provide for the general rule that all after-acquired property coming to the bankrupt subsequently upon his adjudication vests in his trustee in bankruptcy whether coming to him from his personal efforts, his investments, by right of successions or otherwise. Nevertheless, the general rule has been qualified in England, hence giving the debtor some means of starting afresh in the well known doctrine of COHEN V MITCHELL.[26] The doctrine was stated by Lord Esher M.R. as follows:

> "I am therefore prepared to lay down a proposition which has been agreed upon by us all... It is this - until the trustee intervenes all transactions by a bankrupt after his bankruptcy with any person dealing with him bonafide and for value in respect of his after-acquired property whether with or without knowledge of the bankruptcy are valid against the trustee."[27]

The English Bankruptcy Act, 1914 has adopted and extended this doctrine. This is contained in section 47 of the 1914 Act which reads;

> "All transactions by a bankrupt with any person dealing with him bonafide and for value in respect of property; whether real or personal acquired by the bankrupt after the adjudication shall, if completed before any intervention by the trustee be valid against the trustee and any estate or interest in such

property which by virtue of this act is vested in the trustee shall determine and pass in such a manner and to such an extent as may be required for giving effect to any such transactions."

The adoption of section 47, 1914, English Bankruptcy Act, the writer submits will ensure that the Law enforces its social functions.

On adjudication of the debtor his creditors are empowered to appoint a trustee[28]. The statutes provides that;

"if the bankrupt or any of the creditors or any other person is aggrieved by an act or decision of the trustee, he may apply to the court, and the court may confirm, reverse or modify the act or decision complained of, or make such orders in the premises as it thinks just."[29]

The provision prima facie, seems to protect the debtor and provide him with a surplus to start afresh after discharge. However, a close scrutiny of the provision and its application by the English as well as East African courts leaves doubts as to whether the debtor was ever or is ever entitled to the surplus after all his debts have been paid. The courts have either refused to interfere even when the trustee has acted unequitably or refused to return such surplus to the bankrupt even after the creditors debts have been fully paid.[30] On the principles the courts follow in the event that a surplus is misapropriated by the trustee in bankruptcy, HARMAN J in the case of RE A DEBTOR EXPARTE THE DEBTOR U DODWELL[31] expressly stated that the English courts will not interfere in the day to day management of the estate in the absence of fraud.

In this case the court was more concerned with the efficient administration of the bankrupt's estate than the prospect of the bankrupt obtaining a surplus which is important if he has to

...../56

start afresh without incurring further debts. It is the submission of the writer, that if a provision was introduced in the statutes defining the duty owed by the trustee as one of utmost good faith and one which would give rise to an action for breach of duty, such surplus which is now misappropriated by the trustee would be made available to the debtors and enable them to start afresh once they are discharged.

...../57

5 SCHEME OF ARRANGEMENT

Section 13[32] provides for the holding of the first meeting of creditors for the purpose of considering whether a proposal for composition or scheme of arrangement shall be accepted or whether it is expedient that the debtor shall be adjudged bankrupt and generally as to the mode of dealing with the debtors property.

Section 18[33] further provides that a debtor can only make a proposal for a scheme of arrangement of his affairs four days after submitting his statement of affairs with the official receiver. The proposal must be in writing, signed by him and embodying the terms of the composition which he is so desirous to make. If at the meeting a majority in number and three-fourths in value of all the creditors who have proved, resolve to accept the proposal, it shall be deemed to be duly accepted by the creditors[34]. Acceptance by the creditors of the debtor's proposal has the effect of disposing the bankruptcy proceedings altogether. This prima facie sounds good in so far as such a disposal of bankruptcy proceedings will mean discharging him and thus giving him a chance to start afresh. However, in practice an acceptance by the majority does not mean anything in the light of what usually happens. This is so because such a proposal does not bar the court from continuing with proceedings hence public examination which as earlier pointed out is expensive and embarrasing on the part of the bankrupt. Such is not tantamount to giving him a fresh start in life but only enables his assets to continue vesting in the trustee in bankruptcy for equitable distribution among the creditors.

If S 18 (2) of the Bankruptcy Acts is properly applied thus making the creditor's acceptance final, such would have the

...../58

effect of disposing bankruptcy proceedings and therefore giving the debtor a fresh start in life.

DISCHARGE

A discharge has the effect of releasing a debtor from disqualifications and disabilities which in turn have the effect of enabling him start a fresh in life. A bankrupt applies for his discharge to the court at any time after being adjudged. The court then appoints a day for hearing the application but such an application will not be heard until the public examination of the bankrupt is concluded. The court gives 28 days notice to the official Receiver and the trustee of the time and place of hearing which is conducted in public.[35] To decide whether to grant or refuse an application for discharge the court takes into consideration, the following; the length of time the debtor has been bankrupt, the extent of his liabilities, amount of property available for distribution amongst the creditors, the nature and circumstances giving rise to the debtor's bankruptcy, debtor's future prospects and any attempts made by him prior to the application and likely to be made by him in the event of a discharge being granted to contribute something to his trustee out of his earnings and the debtors conduct during the bankruptcy proceedings.[36] The effect of the court taking into consideration the conditions listed above, is to deny the debtor any absolute discharge which in effect denies him a chance to start afresh.

Section 29 (2) of Kenya's Bankruptcy Act,[37] further provides that the court has a discretion to either grant or refuse an absolute discharge or suspend the operation of the order for a specified time, or grant an order of discharge subject to any conditions with respect to any earnings or income which may

...../59

afterwards become due to the bankrupt or with respect to his after-acquired property. Table Two below shows that absolute discharges are rare while refusal of such discharges or suspension of their operation are quite common sub-section 3 of the same section provides that the court may grant an order of discharge subject to any conditions with respect to any earnings or income which may afterwards become due to the bankrupt or with respect of his after-acquired property which earnings, income or after-acquired property will be distributed among his creditors.

This clearly shows that the underlying justification for the discharge is the honesty and good faith of the debtor in preserving his assets for his creditors. Such discharge is therefore denied most of the bankrupts because of the strong presumption of faults on the part of the debtors which both East Afrcian and English courts have adopted. With this in mind, it is submitted that the idea of rehabilitating the debtor becomes a legal myth.

Section 31[38] of the Kenya Bankruptcy Act provides that failure to apply for an order of discharge within the period specified, exposes a bankrupt to punishment for contempt of court. Nevertheless most bankrupts prefer being punished for contempt than appear in court twice, that is after the public examination ordeal. This has the effect of making rehabilitation of the debtor impossible because it is only in his application for discharge that the court will consider giving him a discharge, thence enabling him to start afresh in business.

In view of this, it is the submission of the writer that debtors should be entitled to an automatic discharge on the expiry of two years from the date of adjudication since very few

debtors apply for their discharge for reasons ranging from ignorance of their right to apply for the same knowledge of the courts' strictness in giving absolute discharge, to fear of being exposed to public ridicule as the one they have already been exposed to during the public examination as applications for discharge are heard in public.[39]

The statutes provide that the bankrupt may obtain his discharge with a certificate to the effect that the bankrupt was caused by misfortune without any misconduct on his part[40] such a certificate if issued amounts to an absolute discharge. In practice however the writer learnt that certificates of misfortune are not given in East africa.[41] The case of DEVJI V TWENTCHE OVERSEAS HANDEL[42] is illustrative. In this case the debtor had been driven into bankruptcy by an economic crisis in 1962 when the price of cotton goods which the debtor dealt fell in the world market. On these facts one would have expected a certificate of misfortune to be granted but on the contrary it was not, nor was all absolute discharge given. Infact discharge was delayed for five years.

In England on the other hand certificates of misfortune are normally given but on certain conditions. Harman L.J. in the case of RE A DEBTOR[43] gave the conditions for granting such a misfortune he said;

> "In order to grant a certificate one has to find that there is no misconduct: One has also to find combined with that, that there is no misfortune. If one either finds some degree of misconduct or an absence of misfortune then no certificate will follow.

In this case the bankrupt claimed that the action of the stock exchange in suspending dealings in certain shares was a "misfortune" within the meaning of the act, which caused or helped

to bring about his bankruptcy it was held that his bankruptcy had not been caused by "misfortune" but his own conduct in dealing with shares by buying them on borrowed money thereby placing himself in a position of great vulnerability in consequence of which he was exposed to debt and bankruptcy when the stock exchange suspended dealings in those shares a certificate of misfortune was thus refused.

Lord Esher M.R. on certificate of misfortune in RE LORD COLIN CAMPBELL[43b] said..." When the bankruptcy is not solely

> the result of some accident over which, or over the direct conducing causes of which the debtor has no control, it cannot be said to arise from "misfortune".

In other words, the provision refers to "pure Misfortune".

It is recommended that East African courts follow the section strictly as long as the legislator has not repealed it in that where facts show that the bankruptcy was not solely caused by the bankrupts' fault the court should grant a certificate of misfortune. Such a certificate amounts to discharging the debtor absolutely and therefore giving him a chance to start a fresh in life.

Insistence that the bankrupt pay at least 10 Shillings in the pound is unrealistic and only serves to prolong the bankrupt's agony thus denying him a chance of starting afresh. This provision should be repealed in that the bankrupt is unlikely to get 10 Shillings in the pound when he is still undischarged, through any other means other than borrowing.

THE CIVIL AND PENAL SANCTIONS AGAINST AN UNDISCHARGED BANKRUPT.

Both civil and penal sanctions are applied when a bankrupt deals in a manner likely to jeopardize the interests of the creditors.

...../62

Civil sanctions in particular include such disabilities as undischarged bankrupt is exposed to. These disabilities are contained in the Bankruptcy Acts as well as in other Acts. Some of these disabilities continue even after the bankrupts' discharge for upto five years.

These sanctions, expecially criminal ones, influence the court in discharging the bankrupt and in most cases a discharge will not be given. Even after imprisonment or a fine depending on the offence hence making the chance of starting afresh of the debtor completely impossible.

DISQUALIFICATION OF A BANKRUPT

In both England and East Africa, many disqualifications (disabilities) follow in the wake of bankruptcy. Such disqualifications have the effect of delaying the debtors right to a fresh start in life.

The Bankrupt is normally disqualified from acting as one who is not a bankrupt in various fields.

Section 101(1) of all the East Africa Bankruptcy Acts provide that;

"where a debtor is adjudged bankrupt, he is disqualified for - (a) being appointed or acting as a justice of the peace or -

(b) being elected to, or holding or exercising the office of mayor or member of local authority council, school committee or road board."

Section 188(1) Kenya's Companies Act [44] not only prohibits undischarged bankrupt from acting as a director of any company but also prohibits such a director from directly or indirectly taking part in the management of any company except with leave of court.

...../63

Default in complying with provisions of this section renders the undischarged bankrupt liable to imprisonment for a term not exceeding two years or to a fine not exceeding ten thousand shillings or to both such imprisonment and such fine.

Paragraph 2 (b) of the fifth schedule to the Local Government Regulations 1963[45] provides that no person shall be qualified to be registered as voter in elections to local authorities if he is an undischarged bankrupt having been adjudged bankrupt or otherwise declared bankrupt under a law in force in Kenya. Since an undischarged bankrupt cannot vote or be voted for as a councillor, he cannot become a mayor who is elected from among the elected councillors.[46] Further, section 101 (1) (b)[47] provides that if one is elected to or holding or excercising the office of mayor or member of a local authority, school committee or road board, then he shall be disqualified and his office will thereupon become vacant.

Section 12, sub-section 3, of Tanzania's Local Government Act[48] provides that;

> "No person who makes a composition or arrangement with his creditors or, who becomes an auditor of the authority.... shall be appointed to or continue to be a member of an authority."

Section 9 sub-section 1 (e) of Uganda's Urban Authority Act[49] provides that a person shall be disqualified for election or appointment as a councillor if he is a person who has been adjudged bankrupt or has entered into a form of composition with his creditors. Sub-section 2 of that section provides that the disqualification of such a bankrupt will only cease if the bankruptcy is annuled or if he is discharged with a certificate of misfortune or after the expiry of five years after his discharge or if he pays his debts in full.

...../64

Section 27 sub-section 1 (a) of the Banking Act[50] provides that a person who is an officer of licensed bank or licensed financial institution shall cease to hold office if he becomes bankrupt or suspends payment or compounds with his creditors. Contravention of this provision renders one guilty of an offence punishable with imprisonment for a term not exceeding six months or a fine not exceeding five thousand shillings or both such imprisonment and fine.

Accordingly to Kenya's constitution[51] section 35 sub-section 1 (d) a person shall not be qualified to be an elected member of Parlaiment if at the date of his nomination for election he is an undischarged bankrupt having been adjudged bankrupt under any law in force in Kenya. Neither can an undischarged bankrupt qualify as a nominated member of Parliament because according to section 33 of the constitution, only those members who would qualify to stand as elected members can be appointed by the President as nominated members. Further, an undischarged bankrupt will be denied his voting rights under section 43 sub-section 2 (b) of the constitution and thus will not be in a position to vote in parliamentary election let alone be voted for. In the same spirit and strictness the Ugandan Constitution provides that;

> "No person shall be qualified to be a member of the National Assembly who.. (b) has been adjudged or otherwise declared bankrupt under any law in force in Uganda and has not been discharged."

A bankrupt is also disqualified from acting or being appointed a trustee in bankruptcy or of a trust estate[53]. Further, if a bankrupt is an advocate he cannot continue enjoying the benefits of a practicing certificate.[54] Section 37 sub-section 1

of Tanzania's Advocates Act[55] similarly provides;

> "An adjudication in bankruptcy of an advocate shall operate immediately to suspend the practising certificate if (any) of such advocates for the time being in force and such suspension shall continue in operation until the certificate expires or the adjudication in bankruptcy is annuled.

The disqualifications stem from the old English attitude towards bankrupts. A bankrupt was a social failure and a disgrace to the society and therefore seen and treated as a second class citizen in that once a person is adjudged bankrupt he looses the trust and confidence formerly due to him by virtue of his position of responsibility. The retention of this attitude by East African Statutes is unfair in that when a bankrupt is discharged he should not continue to be subjected to such disqualifications especially those which state that he remains disqualified from holding certain posts until five years after his discharge. The effect of disqualifying such a bankrupt even after his discharge is contrary to giving him a fresh start in life because once he is discharged he should be freed from all personal liabilities and be enabled to start afresh.

The sanction of fine or imprisonment attached to a bankrupt who fails to honour the terms of the disabilities only delays the bankrupt's discharge and is not tantamount to giving him a fresh start. In East Africa for example, bankruptcy proceedings (which ultimately lead to a discharge, and hence some hope of rehabilitation) will be stayed until a fine is paid or he has served his term of imprisonment. The position is that since the bankrupts personal earnings as well as his after-acquired property vest in the Trustee in bankruptcy, one wonders whether the

Trustee will pay such fines without jeopardizing the interests of the creditors. Since the trustee will not part with any moneys or assets to discharge the bankrupt's liabilities the bankrupt will be denied a chance to starting afresh.

In view of this, it is recommended that the part of the provisions dealing with disqualifications extending to five years after discharge be repealed as it denies the debtor any chances of starting afresh.

BANKRUPTCY OFFENCES

As already pointed out in this section, bankruptcy offences are committed when the bankrupt's conducts his affairs in a manner likely to jeopardize the interests of the creditors. When this is done, criminal sanctions such as fines and imprisonments are imposed. For example, all the East African bankruptcy Acts provide that any person guilty of an offence under sub-section 1 [56] shall be liable to imprisonment for a term not exceeding 3 years. The same section further provides that if any offence is committed under sub-section 1 (m) (n) and (o) the bankrupt will be liable to imprisonment for a term not exceeding five years. What constitutes a bankruptcy offence is listed down under Part VIII of the East African Bankruptcy Acts. (A full discussion of these offences will be given in chapter III of the thesis). The writer learnt from Messrs Desai and Bosire [57] that if a bankrupt has been guilty of any offences under Part VIII this in itself influences the courts in awarding absolute discharge orders necessary in giving the debtor a chance of starting afresh. Since rehabilitating the debtor was among the many objectives of the legislators enacting this branch of the law, it is suggested that the term of imprisonment be reduced probably to one and three years respectively and the courts' attitude towards a

bankrupt who has been convicted thus denying him discharge, changed, since such a denial amounts to punishing the bankrupt twice.

From the foregoing, it is clear that in an effort by the courts to ensure that the debtor's assets are properly assembled for distribution among creditors, they have ignored the bankrupt's right of rehabilitation once he has discharged his liabilities. The provisions providing for the debtor's rehabilitation do so in a half-hearted manner as most of them have been overtaken by present economic realities. It is only by amending some of these provisions and the courts changing their attitude towards the bankrupt that the debtor will as was initially the intention of the legislators be given a chance of starting afresh.

...../ 68

TABLE TWO (II)

DISCHARGE ORDERS

YEAR	GRANTED UN-CONDITIONALLY	GRANTED SUBJECT TO SUSPENSION OR CONDITION	REFUSED
1968	2	41	4
1969	3	16	-
1970	1	10	-
1971	-	10	-
1972	1	2	-
1973	4	5	2
1974	1	3	-
1975	-	10	-
1976	4	9	-
1977	-	2	-

APENDIX XXV

SOURCE ANNUAL REPORTS OF THE REGISTRAR GENERAL

...../ 69

CHAPTER THREE

ENFORCING CERTAIN STANDARDS OF COMMERCIAL MORALITY

INTRODUCTORY SECTION

This chapter deals with the third last of Macneil's social functions of the law of bankruptcy in East Africa (Part of the Common Law Jurisdictions). The chapter involves a discussion on how this branch of the law enforces certain standards of commercial morality. To show how this is done, the writer will attempt to answer the following questions. Firstly, what is commercial morality, and why should certain standards of commercial morality be enforced? Secondly, how has or how is commercial morality enforced by the law of bankruptcy in East Africa? Thirdly, has the enforcement been effective? if not, why? and how should it be done?

COMMERCIAL MORALITY AND ITS ROLE IN THE ECONOMY

The mode of production in East Africa is predominantly the capitalist one whose motto is the maximization of profits. Profits are best maximized through credit trading. In other words, credit ensures that profits are released within the shortest time possible and ploughed back into the process of manufacture, distribution and hence maximization of profits. Money lending or credit becomes very crucial in this chain of maximizing profits. However, such credit must be repaid without undue delay so that this chain of profit making is not broken. The law of bankruptcy and in particular the concept of commercial morality ensures that this chain is not broken. Like all other branches of the Law, the Law of Bankruptcy protects the mode of production hence the very interests of the ruling class - promulgators of those rules.

...../ 70

In a nutshell, commercial morality ensures that the debtor pays all that he owes the creditors through the rigours of bankruptcy proceedings. The debtor who also interferes with his property which on adjudication vests in the Trustee in bankruptcy for distribution among the creditors is also dealt with. He is either imprisoned if his conduct is proved to be against commercial morality or sometimes fined. Such a debtor is also disqualified from holding positions of trust and responsibility as long as he remains undischarged.

Holdsworth recognises the importance of enforcing certain standards of commercial morality when he writes:

> "At all times there will be persons whose morality is so much below the average commercial morality of the age, that they do not scruple to take advantage of the credit which, in reliance upon the existence of that commercial morality is given to them. If it is advantageous to commerce that standards of commercial morality should be high, and that credit should be given, it is necessary to bring home to such persons in the only which they will feel the consequences of their conduct.[1]"

The bourgeois or capitalist commercial morality requires that the standards of commercial morality be high and credit be given if commerce is to be of any advantage.

As a result of these high standards of commercial morality demanded, the debtors are made to feel the consequences of their commercial immorality or misconduct in a number of ways.

LAW OF BANKRUPTCY: ENFORCING COMMERCIAL MORALITY

The debtor's whose commercial morality is proved to be so much below the average commercial morality of the age viz, by failing to repay debts due are subjected to bankruptcy proceedings. In chapter one we saw that either the debtor[2] or the creditor[3]

may petition the court to make a receiving order, that is, subject the bankrupt to bankruptcy proceedings. At this point it will be noted that this social function is so closely interwoven with the second one that it needs no further elaboration as such elaboration would amount to repetition. The fact that enforcing certain standards of commercial morality is an extension of the law's function of ensuring that the creditors are duly paid from the debtor's assets as has been recognized by various writers. For example James Philips observed;

> "The purpose of the law of bankruptcy is twofold, first, to ensure that the distribution among the creditors of what property there is, is fair and that it is proportionate to the amount of their claims. Secondly, to give the debtor a chance to make a clean start discharged of his liabilities

Having observed the connection between this social function and that of assembling the debtors assets for distribution among the creditors, this section will only look at those provisions which, strictly speaking, ensure that the debtors discharge their obligations. They will also include those provisions which restrict the debtor from interfering with such assets in a manner likely to deny the creditors of the same or delay such distribution, hence bankruptcy offences and criminal sanctions attaching. Lastly a look at the provisions or disqualifications and disabilities will show how commercial morality is enforced.

COMMERCIAL MISCONDUCT LIKELY TO INVOLVE THE DEBTOR IN BANKRUPTCY PROCEEDINGS.

Section 3 of (1) (b) of Kenya's Bankruptcy Act[5] provides that;

> "A debtor commits an act of bankruptcy (which has the effec of beginning bankruptcy proceedings against him) in each

of the following cases... if in Kenya or elsewhere he makes a fraudulent conveyance, gift, delivery or transfer of his property or any part thereof."

This is so prohibited because if allowed it would amount to delaying the creditors which as seen is not only contrary to commercial morality of the bourgeois but even more serious and also contrary to the very core of capitalism - profit maximization.

In the same vein and for the same reasons it is an act of bankruptcy for a debtor if with intent to defeat his creditors departs out of Kenya, remains out Kenya or departs from his dwelling house or otherwise absents himself or begins to keep house.[6]

COMMERCIAL MISCONDUCT OF THE DEBTOR LIKELY TO INVOKE CRIMINAL SANCTIONS

A debtor will be liable to imprisonment, or a fine, or both if his conduct amounts to an interference with his assets before the receiving order or after which interference has the effect of delaying the distribution of such assets or a complete denial of such distribution. Such interference breaks the chain leading to maximization of profits and the courts as well as the legislatures have severely dealt with it.

Macneil has divided the offences which a debtor (undischarged bankrupt) may commit under three heads firstly - the informational offences, secondly, the property offences and third head which he offence against the commercial morality. This last head is the one that concerns us here as the other two have been discussed in preceeding chapters.

Offences against commercial morality are aimed at preventing kinds of business conduct tinged with fraud. The term fraud here is used in the sense it was applied and defined by Justice Maughan

in the case of RE PATRICK & LYON LTD[7] when he said;

> "fraud" connoted actual dishonesty involving according to current notions of fair trading among commercial men, real moral blame."

Under Section 138 (1) (i) of Kenya's Bankruptcy Act[8], it is an offence for a debtor either after the presentation of a bankruptcy petition or within two years next before such presentation to conceal, destroy, mutilate or falsify or to be a privy to such concealment, falsification of any book or document affecting or relating to his property or affairs. If a debtor is found to be guilty of this offence he is liable to imprisonment for a term not exceeding three years.

Under Section 138 (1) (m) of Kenya's Bankruptcy Act[10] it is an offence for a debtor two years before petition or after petition but before the receiving order either by false representation or any other fraud to obtain any property on credit without paying. Under Section 138 (1) (n) it is an offence to obtain by false pretences of carrying on business or trading, any property without paying for it. The debtor will also have committed an offence if he pledges or disposes of any property which he has obtained on credit and has not paid for.[12] If the debtor is proved to be guilty of any of these offences he is liable to imprisonment for a term not exceeding five years.[13]

The issue of intent to defraud is crucial in these offences and the debtor must therefore prove the absence of such an intention in the light of the time when such offences may be committed, for example, two years before the petition, many debtors have been convicted under these offences. The reasons is that many of these debtors do not deem themselves bound to preserve their property or assets before the making of a Receiving Order, while others are not

aware that dealings with their property two years before the petitic amounts to an offence. Although the bourgeois standards of commercial morality requires the debtor to honour his obligations, the debtor should not be punished for what he did so many years before a bankruptcy petition was presented. If commercial morality is to be taken to allow the debtor to discharge his obligations but without unduly harrasing him the law will be seen to serve its purpose better.

Under Section 138 (1) (v) of Kenya's Bankruptcy Act[14], it is an offence punishable by three years imprisonment for a debtor to continue carrying on trade or business knowing himself to be insolvent.

Insolvency was defined by the court of Appeal for East Africa in the case of R v INUBHAI AMIN[16] to mean inability to pay Sus. 20/= in the pound on the unsecured liabilities.

It is also an offence against commercial morality to contract any debt provable in bankruptcy without having at the time of contracting it any reasonable or probable ground of expectation of bein able to pay it.[16] The meaning of reasonable or probable ground of expectation of being able to pay was given in the case of RV MOHANLAL POPAL[17] where the court of appeal said.

"While it is no douht, to some extent ordinary business usage to pay existing debts from subsequent profits if the only way of paying an existing debt is by incurring a further debt which there is no reasonable or probable ground of expectation of being able to pay except by incurring another debt, then in our opinion, that falls within the mischief of the pragraph Section 137 (1) (t) it could not have been the intention of the legislature in enacting paragraph (t) to impose no limit on the extent to which Peter may be robbed to pay Paul. It is a matter of degree. If there is a reasonable or probable

...../75

expectation of being able to pay an existing debt in the ordinary course of business, then that does not fall within the paragraph. It is not an answer, however, to a charge under the section for a man who knew himself to be hopelessly insolvent to say that he expected to swindle someone into supplying him with goods which he could sell to pay the existing debts."

This section aims at protecting not only present creditors, but also would-be creditors. In that debtors are prohibitted from incurring further debts to pay existing ones, for this mischief, if allowed would continue indefinitely.

Under section 135 (a) of Tanzania's Bankruptcy Act[18], it is an offence against commercial morality for a debtor to obtain credit to an extent of Shs. 100 or more. This section and injustices attaching has been discussed elsewhere in the thesis. It only suffices here to mention that the courts have extended the meaning of obtaining credit to include both goods and money with the result of having many debtors convicted and punished under this provision, Justice Wilson explained this as having been the intention of the Legislature in the case of GORDON DAVE VR[19] when he said,

> " I believe the legislature intended the words obtaining credit to include the obtaining of either property or money. I can conceive of no good reason why an undischarged bankrupt should be allowed without disclosing his condition to borrow money above the prescribed unit, but be precluded from obtaining goods on credit."

Reasons for prohibitting a debtor from obtaining credit are obvious and among them is that if he is allowed to obtain credit, he is likely to incur more liabilities which to the disadvantage of the creditors has the effect of denying them their

share in the debtor's assets for the more creditors there are, the fewer are the chances of being adequately paid their debts.

Other offences under commercial morality include the bankrupt defrauding his creditors[20], including the extent of his insolvency by gambling or by rash and hazardous speculations[21] or either by quiting the country or making preparations to do so.[22] Such conduct should be prohibitted because if the debtor is allowed for example to increase the extent of his insolvency by gambling there are all the chances of losing even the little money or assets he had, thus denying the creditor of the same. Further, quitting the country is also disadvantageous to the creditors who might not manage to follow his assets (debtor's).

Courts in East Afr[illegible] have been at pains to prosecute any bankrupt who is guilty of any offence against commercial morality. The Registrar at Sheria House in one of the interviews with the writer said most bankruptcy proceedings are stayed until after the bankrupt who is guilty of any of the offences against commercial morality has been convicted, sentenced and served the term of imprisonment or paid the fine. Inspite of the absence of any mention of a fine as an alternative or additional to a sentence of imprisonment in the penalty section of the Bankryptcy Act, the courts have imposed them Such a fine was imposed in the case of G.S. GILL VR[23] where O'Connor C.S. and Justice Rudd rejecting the dictum in RV MOHAMEED ALAN[24] OBSERVED THAT THE COURT HAD power to inflict a fine if it considered it to be the proper sentence The idea of a fine being a proper sentence is ridiculous because the debtor's assets are in the hands of the trustee in Bankruptcy and therefore he cannot properly discharge his obligations of paying such a fine unless he incurs further liablities which, as already shown is itseelf an offence agsinst commercial morality.

The words of Sir Barclay Nihil in the case of R V MOHAMMED ALAN[26] clearly illustrates this ambiguity of imposing fines in Bankruptcy where he said;

> "The penalty section of the Bankruptcy Ordinance applicable to Section 138 makes ne mention of a fine as an alternative.... to a sentence of imprisonment. It is true under section 27 (3) Penal Code the magistrate's Order with regard to a fine is not ultra vires but I cannot believe that it is either proper or expedient to apply that sub section to offences in bankruptcy where the bankruptcy ordinance itself excludes the power to impose a fine. Exclusion is obvious. An adjudicated bankrupt having no estate of his own a fine imposed on a bankrupt means a fine on his trustee in bankruptcy and if recoverable could only be recoverable to the prejudice of his creditors, since this won't be done it will mean sending the bankrupt to prison for a further term in default of payment."

In view of this double punishment the writer suggests that the courts should restrict themselves to the penal section in the Acts which excludes fines.

DISQUALIFICATIONS AND DISABILITIES OF THE BANKRUPT

These disqualifications are contained both in the Bankruptcy Act and other statutes including the constitutions. Once a debtor is the adjudged bankrupt he becomes a second class citizen and is disqualified from holding certain positions of trust and responsibility. He does not only become an economic out-cast (for bankruptcy proceedings are geared towards punishing him for his un-economic conduct or commercial immorality hence the need to discard him from the capitalist system but also a social outcast). Once he is so disqualified, he is looked down upon by his own society.

Such disqualifications and disabilities from managing any company[27], being a director of a company[28] being elected a councillor[29]

or Mayor [30] or being a lawyer [31] or a justice of the peace [32] etc must be seen as punishments for his commercial misconduct and since these persons form the medium class bourgeois the must be punished.

SCOPE OF COMMERCIAL MORALITY

The above discussion has clearly shown that commercial morality is a term restricted to the commercial morality of the burgeois - hence the creditors. In other words the role of the Law of Bankruptcy of ensuring that the creditors are duly paid their debts without having any regard for the debts. This disregard of the debtors, and in particular as to how they are to discharge their liabilities has led to enomous injustices on their part. It is for this that the writer suggest the term commercial morality be extended so as to ensure that such principles as freedom of contract are given their due place in the law of Bankruptcy and also to ensure that the debtors are not unduly harassed in repaying their debts by being given inadequate time or otherwise. It should also be extended because its restricted application has led to a disregard of another of the laws social functions, viz, giving a debtor a chance to start a fresh once he has discharged his obligations.

Under section 3(1)(g) [32] the debtor commits an act of bankruptcy if he fails to comply with the requirements of a Bankruptcy notice. As already pointed out the consequences of non-compliance are not properly displayed on the notice, and also the time given for compliance, viz, seven days and three days for the counter claim, set off etc is too short in view of our communication system. This amounts to unduly harrassing the debtor and should be reviewed to allow him adequate time.

...../ 79

Under section 14[33], the debtor is given inadequate time to attend the creditors' meeting and yet punishment for contempt if he fails to attend. Such failure is treated as commercial misconduct and in view of the influence any misconduct has on the mind of the judge in deciding whether to give an order of discharge, I am of the opinion that the time or period of notice be extended.

Under section 7(3) [34] the court may discuss the creditor's petition if it is satisfied among other things that the debtor is able to pay his debts. In practice this is hardly the case for the courts do not discuss such a petition but rather have the assets of the debtor vest in the trustee in bankruptcy and bankruptcy proceedings continue as though he had declared his inability to pay. If commercial morality would be extended to cater even for the debtors, the fact that the debtor is able to pay his debts would have the effect of discussing the creditor's petition and thus discharging the debtor which has the effect of giving him a chance to start a fresh in business.

The principle of Freedom of Contract which is otherwise adhered to in other branches of commercial law is completely disregarded in the law of Bankruptcy through out East Africa. For example even where creditors accept a scheme of arrangement the courts continue to carry on the Public Examination to ascertain that the debtor has not been guilty of any commercial misconduct so as to refuse him an order of discharge. [35] The acceptance of such a scheme by the creditors is rendered futile. The strictness of the courts of carrying on public examinations is contrary not only to enforcing certain standards of commercial

morality but also denies the debtor a chance of starting a fresh, a chance which is only possible on discharge(absolute).

The statutes provide that the surplus of the debtor's assets are to be given to them once the creditors have been paid.[36] However in practice such surplus is never given as the courts interpretting this provision [37] narrowly see themselves as not being bound to interfrere in what the Trustees do in the absence of fraud (which is not easy to prove to the satisfaction of the courts.)

This has had the result of the trustees using surplus which would otherwise help the debtor in starting a fresh on their own. If commercial morality was extended to cater for the interests of the debtors as well it would be against standards of commercial morality in bankruptcy for the trustees to rob them of such assets.

Lastly when a bankrupt is disqualified from taking up employment until five years after discharge such a situation only amounts to delaying the creditors since the bankrupt's after acquired property as well as personal earnings should vest in the trustee in bankruptcy. This restriction is against commercial morality which requires the debtor to repay what he owes as soon as he can so that profit making is not delayed.

This discussion has shown that commercial morality has been restricted to the bourgeois commercial morality with the effect of unduly harassing the debtors through either its strict application by the courts or their failure to apply it. It has also been seen that if this function of enforcing certain standards of commercial morality was extended to mean the commercial morality of all the parties concerned, (debtors and creditors) the law would peform all its functions without as it is, disregarding its role of rehabilitating the debtor.

...../ 81

CHAPTER FOUR

REFORM AND CONCLUSION

1 INTRODUCTORY SECTION

The foregoing chapters have shown that the law relating to bankruptcy in East Africa has not fully given effect to it's very social functions. Though originally the legislators spelt out the law's objectives as securing that the bankrupts assets and assembled for distribution among his creditors, ensuring that the debtor is given a fresh start in life and ensuring that certain standards of commercial morality are maintained. The above discussion has clearly shown that almost all the provisions of the bankruptcy Act and rules are geared towards protecting the creditors' interests. In other words the law has only given effect to two of its functions, viz, assembling property for distribution among the creditors and maintaining some standards of commercial morality which means making sure that the creditors are properly paid their debts by the bankrupt as they fall due. As already noted this third function of enforcing commercial morality reinforces the function of distributing the debtor's assets.

The second function of rehabilitating the debtor once he has paid all his debts has been ignored. This ignorance has taken various forms, firstly, refusal by the legislators to amend those provisions which prima facie ensure that the debtor is given a chance of starting a fresh and much presently has been overtaken by economic realities. Secondly, the courts' attitude towards the bankrupt as a social outcast and an offender, and finally the courts interpretation of the various provisions which would otherwise have the effect of giving the debtor a fresh start in life thus rehabilitating him.

It is with this background in mind that the writer will in this chapter suggest any reforms necessary, that is, an alternative approach to the law of Bankruptcy which will as it were ensure that this law caters for all its social functions without catering for some in disregard of others. The reform is intended to take different forms; firstly by amending existing provisions, secondly, enacting new provisions where the law is silent on some important issues, which may take the form of subsidiary legislation and finally repealing certain provisions

Which the writer feels are unjust to either the creditors or the debtors.

4:2 ALTERNATIVE APPROACH TO THE LAW OF BANKRUPTCY IN EAST AFRICA

In the thee chapters already discussed, the shortcomings of each of the provisions discussed were given and some suggestions on what could be done briefly given. In this section the writer will only point out those shortcomings in the key provisions that need real urgent attention if the law of bankruptcy is to be seen to give effect to all its social functions.

The object of reform is mainly to suggest what could be done to ensure that the law gives effect to its three social functions. Suggestions given will also take care of provisions which are not directly concerned with the social functions but rather with fairness, that is, where a provision is unjust or unreasonable.

4:2:1 PERSONS WHO MAY BE UNJUDGED BANKRUPT

In the preeding chapters, it was noted that infants like grownups, may be adjudged bankrupt. This is submitted is unfai on the part of such infants as their credit worthiness becomes doubtful and questionable in the commercial world with the possibility of such infants growing up as embarrassed persons.

Rule 247(1) of Kenya's bankruptcy Act, provides that a lunatic may be adjudged a bankrupt whereupon he is represented by a manager who acts on his behalf. Since such a manager is not instructed by the lunatic (who is a sick person anyway) it is only fair that bankruptcy proceedings are stayed until such a lunatic is properly healed and as in criminal proceedings can conduct his own defence.

This is of particular importance especially when the bankrupt (lunatic) has to submit his statement of affairs or answer questions during the public examination for he is the only person likely to know why he dealt with the property in question the way he did. Alternatively the rule could be repealed thus exempting lunatics from bankruptcy proceedings. The writer learnt [2] that in practice the court will not allow bankruptcy proceedings to be convened by a creditor (who is the only person who can petition the court to declare the lunatic bankrupt) against a lunatic. Since the law onppaper (rule 247(1) is different from that obtaining in practice, justice

PROPERTY AVAILABLE FOR DISTRIBUTION TO CREDITORS

Under Section 23 and Section 43[4] the property of the bankrupt divisible among his creditors has been so widely defined to include almost every conc vable thing. Present, future, inherited property and goods in the possession of the bankrupt in his trade or business by consent of, or permission of the owner under circumstances that he is the reputed owner thereof are all included.

This famous reputed ownership clause has been retained in bankruptcy law to ensure that the creditors are fully paid without having regard to the rights of third parties. In view of the injustices caused to such innocent third parties the doctrine of reputed owner should be done away with in the law of bankruptcy.

After acquired property of the bankrupt also ests in the trustee in bankruptcy. This as has already been pointed out only defeats the debtors right to rehabilitation or chance of starting afresh because it is only with such property that once he is discharged that he can start afresh in business or otherwise.

If the law is to give effect to the function of rehabilitating the debtor after acquired property should not rest in the trustee in bankruptcy if the present assets of the bankrupt can adequately discharge his liabilities. In the light of the attitude of East African courts in giving absolute discharges, it is unfair for the after acquired property, inherited, vesting in the trustee in bankruptcy.

It is also common knowledge that personal earnings of the bankrupt also ests in the trustee in bankruptcy for distribution among creditors in East Africa. In England on the other hand Section 53 of the 1883 English Bankruptcy Act provides that such personal earnings which may include damages awarded as a result of a personal wrong will not vest in the trustee in bankruptcy but will be retained by the bankrupt for his maintenance and that of his family. Courts in England have maintained this position, a good example is the case of Re Rolfe[5]

...../84

It is clear from this observation that sometimes East African legislatures have followed English legislature blindly to the detriment of their inhabitants. It is therefore suggested that Section 53 of the 1883 English bankruptcy Act be enacted in the East African Bankruptcy statutes so as to have some regard for the bankrupt's family. Such personal earnings could also be used by the bankrupt to start afresh in business.

Property coming to the bankrupt subsequently upon his adjudication either through personal efforts; his investment or by right of succession vests in the trustee in bankruptcy[6] This provision has been strictly applied and interpreted by East African courts, while the courts and legislature in England have evolved a rule to qualify this strict provision the former in the case of Cohen V Mitchell[7] by enunciating the famous doctrine in Cohen V Mitchell, and the latter, in enacting Section 47 of the 1914 English. Bankruptcy Act. This Section, it is submitted should be enacted in the East African bankruptcy Acts. If it is so enacted and interpreted properly by the courts it will give the debtor a chance of starting afresh in business. Section 47, as far as is material, reads;

> All transactions by a bankrupt with any person dealing with him bona fide and for value, in respect of property, whether real or personal acquired by the bankrupt after the adjudication, shall, if completed before any intervention by the trustee be valid against the trustee and any estate or interest in such property which by virtue of this Act is vested in the trustee shall determine and pass in such a manner and to such extent as may be required by giving effect to any such transaction.

PROPERTY NOT AVAILABLE FOR DISTRIBUTION TO CREDITORS

The East African bankruptcy statutes[8] provide that, property held by the bankrupt on trust for another person shall not be divisible among his creditors.

...../85

Further, they provide that the tools of trade and necessary weaving apparel of the bankrupt and his family will not be divided among the creditors.[9]

The limit set as Sh.300 for the tools of trade, weaving apparel and bedding is too little and unrealistic in present economic position and in view of the provision is in need of urgent revision so that as orginally intended will enable the discharged bankrupt to start afresh in business. The writer suggests that the figure be raised to at least £500 in the case of weaving apparel and bedding of the bankrupt his wife and children, and a limit set to at least £250 in relation to tools of trade when the bankrupt has such. The court could also be given a discretion to increase both the suggested figures if the circumstances of the case call for such an increment. Alternatively, there could be introduced a machinery, such as subsidiary legislation by which the figures can be raised from time to time depending on the rate of inflation.

If the power given to the court to order the allowance of the bankrupt to be increased under Rule 257(1) of Kenya's bankruptcy Act was properly exercised the law would, as was originally intended by the legislators when enacting this law give effect to its social functions. In particular, it would give the debtor a chance of starting afresh.

The Acts[10] further state that the bankrupt may apply to the court if he is aggrieved by any act or decision of trustees, and on such an application the court may confirm, reverse or modify the act or decision complained of or make an order as it thinks just.

This provision, primafacie, seems to protect the debtor and provide him with a surplus to start afresh because he may claim such surplus from the trustees. However, as already indicated, the courts in practice have narrowly interpreted this provision to completely deny the bankrupt a right to petition the court.

...../86

In the case of RE A DEBTOR EXPARTE THE DEBTOR V DODWELL,[11] justice Haman clearly stated that English courts were not to interfere in the day to day management of the estate in the absence of fraud. In view of the difference between the law and practice the writer suggests that this provision should be amended as it does not give the debtor the statutory protection he is entitled to and as the 1957 committee on bankruptcy observed such is not tantamount to giving a debtor a fresh start when even the surplus which should otherwise be given to him to enable him start a fresh is fraudulently misappropriated by the trustees, thus unjustly enriching themselves.

The wide discretion given to the courts under this provision is not in keeping with the object or social function of giving the debtor a fresh start in life nor in enforcing certain standards of commercial morality, firstly, because such surplus as exists, once the creditors have been paid in full, is not given to the debtor to start afresh. Secondly, commercial morality requires that the bankrupt pays his creditors what he owes but not to be unduly harrassed - retention of such surplus by the trustees amounts to financial harassment of the bankrupt because once he is discharged he will not make use of such surplus in starting afresh, as he would otherwise have done had the trustees acted in good faith. On this I suggest that there should be enacted in the bankruptcy acts a provision requiring the trustees to act in good faith and in case of breach to be severely punished for breach of a statutory duty. In this way the bankrupt would be assured of some surplus to start afresh once he is discharged and would not mind his earnings vesting in the trustee in bankruptcy because the surplus will always be given to him.

THE PETITION

Either the creditor[12] or the debtor[13] may petition the court, to appoint an official receiver to take care of the bankrupt's assets.

....87

The debtor's petition amounts to all act of bankruptcy which precipitates bankruptcy proceedings. The creditors petition on the other hand, must show the commission at least of one act of bankruptcy by the debtor as already discussed in Chapter one. The creditor must be owed Sh.1,000 and when two or more creditors join in the petition they must be owed an aggregate amount of Sh.1,000. This figure was set in England in 1869 and since then has not been reviewed in East Africa. In the circumstances it has become unrealistic and has also been overtaken by economic realities. Today bankruptcy proceedings cost more than £75 (advocates', Auditor's and valuer's fees excluded)[14] and in the light of this, it is not fair to expose or subject the debtor to bankruptcy proceedings which will involve him incurring more expenses than the debts. Though in keeping with the function of assembling the debtor's property for distribution among the creditors, it ignores the other function of giving a debtor a fresh start. The writer thus suggests that debtors should not be subjected to bankruptcy proceedings when the debt they owe only amounts to Sh.1,000. Instead they should be given time to pay such moneys, because with such time through harambeed spirit of the family members and friends the Sh.1,000 would be raised and paid to the creditors. From the Registrar of bankruptcy the writer learnt that in practice the courts will allow bankruptcy proceedings to commence on the grounds that the amount owing to the creditor(s) is only Sh.1,000. Hence, the Section is superflous and in view of this, the figure should be raised to £150 and a machinery for adjusting this figure when necessary should be introduced.

East Africa has been lagging behind other countries in amending the law to correspond with economic realities as well as contemporary legal thinking. England, for example, has increase the figure to £200 while Australia has increased the figure to the equivalent of our Sh.5,670.

Section 7(3) of the Bankruptcy Act provides that the creditor petition may be dismissed if the court is not satisfied with the proof of the petitioning debts or of the Act of bankruptcy or is satisfied by the debtor that he is able to pay his debt.

...../88

In exercising their discretion the courts refuse to dismiss the petition, even where it is obvious that the creditor has not proved his debts to the satisfaction of the court, or has not shown the existence of an Act of bankruptcy or when the debtor is in a position to pay his debts, on the grounds that a dismissal of the petition will amount to an abuse of the court process. A proper interpretation of the words 'constituting an abuse of the courts' process' it is submitted would have the effect of discharging the debtor, hence giving him a chance to start afresh without jeopardizing the interests of the creditors. Failure or refusal to dismiss the petition here, amounts to an abuse of the court process and not vice versa. As was the position in the case of RE DESAIBHAI J. PATEL[15]

PROCEEDINGS AFTER THE PETITION

In a bid to protect the creditors' interests the legislatures went as far as adopting English provision not in keeping with the East African context. For example under Section 3(1)d[16] it is an Act of Bankruptcy for the debtor with intent to delay or defeat his creditors to depart out of any of the East African countries or being out of any of these countries to remain out of them, or to depart from his dwelling house or to begin to keep house. The origin of these two offences; viz, 'fleeing' and 'keeping house' is the continent and later England where merchants practiced them[17] being foreign to East Africa these offences should not be included in our statutes since they only help the courts in unfairly assembling the debtor's property by unjustly and wrongly interpreting this section.

The offence of fleeing which amounts to an Act of bankruptcy should be done away with since any debtor who attempts to flee out of the country will be dealt with by the department of immigration (which exists in all the East African countries). In other words the fear of the debtor absconding with any debts is no longer felt by the creditors therefore the law which here appears archaic should be done away with if bankruptcy law will be seen to give effect to its social functions as this offence, upon which bankruptcy proceedings are commenced only delays the debtors chance of starting afresh.

...../89

Under section 3(1)g of the acts, where a creditor has obtained a final judgement or final order against a debtor for any amount, or for which execution has been stayed, and has saved on the debtor in any of the East African countries a bankruptcy notice - the debtor commits an Act of bankruptcy if he fails to comply with its requirements with 7 days of service or to satisfy the court of a counter claim, set of on cross demand within 3 days. Being the most exploited Act of bankruptcy by creditors who have no other avenue; the 7 days period period is too short a period and so is the 3 days for the counter claim, set off especially if the debtor has to seek legal advice. The Section has erroneously been based on the assumption of fast communication system in East Africa, while it is common knowledge that letters in the remote parts of East Africa take more than two weeks to get to their destinations.

In view of the injustices likely to be done to the debtor, the writer recommends the time of compliance to be extended to 21 days and that of the counter claim , set off etc. extended to seven days.

Further, the courts should be given a discretion to extend such time when necessary for purpose of doing justice to both the debtor and the creditor. In view of the hardships a debtor is exposed to if he fails to comply with the bankruptcy notice, the writer is of the view that such notices should not be regarded as standard form contracts but on the contrary to have the consequences properly displayed. Such would amount to ensuring that all the social functions are taken care of for the debtor should pay but not to be unduly harrassed for example in giving him very little time.

Upon the making of a receiving order the debtor must submit a statement of affairs.[18] The time given to the debtor to submit such a statement is too short especially when the debtor has to engage an expert, for example a lawyer, an accountant or a valuer.

...../90

The punishment set viz; for contempt of court in both Kenya and Uganda if he fails to comply with this section is unfair and as in Tanzania should be done away with as it is contrary to enforcing certain standards of commercial morality one of the law's cardinal functions because the debtor is unduly harrassed by being given inadequate time.

Fourteen days after the receiving order the official Receiver is supposed to convene the first meeting of creditors.[19] The official Receiver will give the debtor three days notice of the time and place of the meeting which is delivered to him either personally or through a prepaid post letter the latter being the most common method used. Failure to attend such a meeting exposes him to punishment for contempt of court. The Tanzanian position seems to be fair as 60 days are enough for the letter to get to the debtor. On the contrary the Ugandan and Kenyan provisions completely ignore the fact that communication system is not so well developed as in England from where they copied this provision. This is erroneously based on the common law principle that a letter which is correctly addressed and posted will be received by the addressee on time. This, it is the submitted writer is contrary to the judicature Acts[20] Kenya's S3(1) of the Judicature Act, for example requires an adoption of English Laws only in so far as the local circumstances allow. This was clearly explained by Denning L.Y (as he then was in the case of NYALI LTD V A.G[21] when he said: "This wise provision should, I think be liberally construed. It is a recognition that the common law, cannot be applied in a foreign land without considerable qualification. Just as with an English Oak so with the English common law you cannot transplant it to the African Continent and expect it to retain the tough character which it has in England, it will flourish indeed but it needs careful tending. So with the common law it has many principles of manifest justice and good sense which can be applied with advantage to peoples of every race and colour all the world over: but it has also many refirements, subtleties and technicalities which are not suited to other folk. These offshoots must be cast away. In these far off lands people must have a law which they understand and which they respect. The common law cannot fulfil this role except with considerable qualifications".

The wise words of Lord Denning mean that we are not bound to follow common law principles, e.g. on communication, blindly but should amend such principles or do away with them when injustice will be done to the community if they are applied. Since such injustice is done by limiting the time the writer suggests the time to be increased in both Uganda and Kenya so that the debtor is not punished for contempt of court unjustly. It could be increased to twenty one days.

...../91

Section 17[22] provides that after the receiving order the court appoints a day for the public examination of the debtor. Under section 17 subsection 8 the examination must be made upon oath - essence of this is to expose the debtor to the offence of perjury if he conceals any fact conserning his property section 17 (9) of the Kenyan act exposes the debtor to punishment for contempt if he fails to give satisfactory answers. The Ugandan and Tanzanian Bankruptcy Acts have omitted This section since it is not clear what "a satisfactory answer" means, since the meaning always depending on the particular judge as justice cardozo [23] observed that law is what the judges do in court whereby they are influenced by such instincts as social demands and beliefs. This section should be repealed in the Kenyan statute for there is no justification retaining it. Section 17 (12) of the Kenyan Act [24], provides that the debtor's advocate will not address the court. In view of the financial problems the debtor is already experiencing, this provision should be repealed as there is no point of engaging a lawyer (who is hard to get and who charges exhorbitantly) but one who will not perform his duties which include addressing the court during such a public examination. Debtors are also compelled during the examination to answer questions of incriminating nature. As already noted under section 18, a debtor against whom a receiving order has been ~~melde~~ Made may either before or after adjudication submit proposals for a composition or schedule of arrangement. Such a scheme if accepted by the requisite majority and approved by the court will have the effect of disposing of the bankruptcy proceedings altogether. In practice this is not the case because even after acceptance by the creditors the public examination is normally carried out even where the courts approves the scheme such does not have the effect of disposing of the proceedings but instead discharge is delayed [25] This is infact a move towards defeating the legislators' intentions, viz; that once a schedule is agreed upon by the requisite majority such acceptance should be treated as final and hence requiring the debtor to be discharged absolutely. Public examination should only be carried out when the requisite majority rejects a scheme. Alternatively and more important, the public examination could be done away with in small bankruptcies as it elicits no more information other than the one already with the official receiver in the debtor's statement of affairs.

...../92

This has successfully been done in Australia. The position today is that the public examination is a waste of the courts' time if the scheme is already accepted or in small bankruptcies, it also defeats the laws function of giving the debtor afresh start because such is delayed by the public examination and such public examination may influence the court to deny a debtor who would otherwise have been given an absolute discharge (as the way he answers or addresses the court may influence the court in deciding whether to give a discharge or not)[26]

6 THE DISCHARGE

After his adjudication, the debtor must apply for his discharge to the court. The court, as already observed, exercise its discretion in granting a discharge. Normally absolute discharges will not be granted, but conditional ones which are delayed for years. The courts erroneously believe that such delays will act as deterrents to would be bankrupts. Such an attitude is also based on the prenise that most of the bankruptcy have been untrustworthy in disclosing the whereabouts of their assets. Absollute discharges are also rare because such would mean that the after acquired property of the debtor will cease to vest in the trustee for the benefit of the creditors. This in itself is wrong because very few people are likely to learn from/others Infact most people will not cease trading or carrying on a business and borrowing funds simply because others have been unable to pay the funds and have been exposed to bankruptcy proceedings. This is very true incase of a person who is being adjudged bankrupt another time other that the first, meaning, that although he is aware of the proceedings and what they entail business cannot survive without credit facilities together with this refusing to discharge the bankrupt so that his after acquired property continues to vest in the trustee is contrary to giving the debtor a fresh start. With these shortcomings and those already discussed - discharge provisions are in urgent need of revision so as to have the most important consideration as rehabitating the debtor once he has paid off all his debts.

The statutes provide that the bankrupt may obtain his discharge with a certificate of misfortune.[27] However it has been observed that these are never given in East Africa;. In view of the intention of the legislatures in enhancing this branch of the law; viz; that such certificates be issued when the bankruptcy has been caused not by the debtors misconduct but by misfortune and circumstances beyond his control, the writer recommends observance of this provision strictly by the courts, which has the effect of enabling "worthy" debtors secure a fresh start in life.

...../93

East African courts should also change their altitude which exemplified by the case of GHANAN SINGH V. OFFICIAL RECEIVER [28] and instead adopt the doctrine of undischargeability of obligations. In that when a bankrupt fails to pay debts due to illness or other factors beyond his control should be discharged with a certificate of misfortune.

On discharge provisions which at present are unsatisfactory, the writer suggests that the bankrupt be entitled to automatic discharge on the expiry of two years from the date of adjudication Automatic discharges were introduced in Australia (1966) and in New Zealand (1967) and helps to solve the problem which now exists in East Africa of bankrupts refusing to apply for their discharge because if they do they will not be given absolute discharge but on the contrary will only remind the trustee of their existance and their after acquired property will hence rest in the trustees while if they do not apply, nothing seems to command some respect of the law which today is lacking in East Africa, because the debtor will be eager to pay his debts before the expiry of the two years.

4:2;7 DISQUALIFICATIONS AND DISABILITIES OF AN UN DISCHARGED BANKRUPT:

As already shown in chapter Two, the bankrupt is disqualified on adjudication from holding official posts open to a Citizen who who is not a bankrupt. Hence, he is a less citizen as Macneil would want to refer to him.
Some statutes [29] specifically state that such a bankrupt cannot hold a respectable post unless on the expiry of five years after his discharge. Since discharges are normally not given (depends on whether the bankrupt has applied for the same [30]) and when given its after many years the five-year disqualification should be done away with as it only delays the bankrupts reliabilitation.[31] This five-year disqualification also defeats the cardinal object of distributing debtor's assets among his creditors which include future earnings and after acquired property because within this period he cannot get employment and hence earn something which will vest in the trustee.

Various disabilities have been enlisted in the bankruptcy Acts. Under section 34[32] of Kenya's Bankruptcy Act an adjudged bankrupt

...../94

undischarged may not manage, assist or take part in the management of any trade or business even with a relative. The essence of this is to completely deny the bankrupt a chance of earning any money through such a business. Justification for this is not clear and could be done away with.

In the same token he cannot be appointed or act as justice of the peace, hold office of the major councillor e.t.c until five years after his discharge.[33] Nor can he conceal or fraudulently removes any part of his property to the value of Shs. 200/- or upwards.[34] Or prevent the production of or be responsible for or be prior to the destruction, concealment or falsification of any book or document relating to his property or affairs [36] or obtain credit for shs. 100 or more from any person without informing that person he is an undischarged bankrupt.[37] This disability which is an offence protects the interests of the creditors. The one hundred shillings is too little a limit today and having been set in Kenya in 1980 is archaic and in need of revision. The amount could be raised to £25 and revised occassionally. He may not engage in trade in any nature other than that under which he was adjudged bankrupt.[38] now incur any debt or liability or obtain credit by false pretence or other fraud[39] nor quit Kenya [40] or act as director or indirectly take part in the management of any company.[41]

4:2:8 OFFENCES:

The offences enlisted under part III of the Acts are in keeping with two of the social functions and intentions of the legislators. Firstly, ensuring that the Bankrupt does not interfere in the assembling of his property for distribution among the creditor either through fraud, concealing etc. Secondly, enforcing some standards of commercial morality which provide that the debtor must honour his obligations and pay all debts owing much as earlier pointed out enforces the first function. These offences,however carry a big sentence unfairly. For example where a debtor fails to keep proper books because he was illiterate he should be excused because East Africa is known for its rate of illiteracy especially where everything writen is in the English language which very few people understand. Thus the case of R V MOHAMED ALAN[42] should not be binding authority to the East African courts, but the

courts should exercise their discretion to see whether for example omission to keep proper books of account was honest and execusable for example on grounds of illiteracy.

Though the bankruptcy Acts do not mention fines to be imposed instead of or together with imprisonment, the courts have often imposed the same on grounds that the Penal code allows for the same i.e. empowers them to impose such fines. For example, in the case of G.S. GILL VR [43] Ruddy J stated that the court had power to inflict a fine if it considers it be the proper sentence, that is where a sentence of imprisonment would prejudice the creditors.

The writer here is of the opinion that since the bankruptcy Acts make no mention of a fine as alternative or additional to a sentence of imprisonment . It should not be inflicted inbankruptcy cases. When the bankrupt is guilty of any offence under the Acts, the courts should restrict themselves to the sentences mentioned by the Acts, (viz, imprisonment).

It is also unrealistic to impose a fine as Barclay Nihil C.J. observed in the case of RV MOHAMMED ALAN [44] when he said;

> "The penalty section of the bankruptcy ordinance applicable to section 138 makes no mention of a fine as an alternative or additional to sentence of imprisonment ....

...../96

...../

(after observing that under section 27(3) Penal code the Magistrate's Order with regard to a fine is not Ultra Vires he continued)

"....I cannot believe that it is either proper or expedient to apply that subsection to offences in bankruptcy where the bankruptcy ordinance it self excludes the power to impose a fine. The exclusion is obvious, an adjudicated bankrupt having no estate of his own, a fine imposed on a bankrupt means a fine on his trustee in bankruptcy and if recoverable could only be recoverable to the prejudice of his creditors....."

Since the trustee will not allow the creditors interests to be prejudiced it will mean sending the bankrupt to prison for a further term in default of payment. This defeats the function of rehabilitating the debtor it prolongs such reliabilitation.

The writer also submits that the sentence imposed [45] be reduced to one and a half years and three years for offences committed under subsection (1) and subsection 1(m) (n) and (10) respectively. Since as noted elsewhere convictions of debtors have the effect of delaying the debtors rehabilitation and at times influencing the court in giving an order of discharge.

4:3 CONCLUSION

Through out this work it has been illustrated that the

...../ 97

law relating to bankruptcy in East Africa like any other branch of the law has been at pains to protect the interests of the ruling class, that is the interests of the creditors vis a vis those of the debtors. Hence, the marxist definition of Law as a tool or instrument of exhibition in the hands of the ruling class has been proved true in bankruptcy. The ruling class are the creditors who as shown in chapter one are big corporatious and based in East Africa though others are foreign owned. Such have to be protected by the ruling class because of the interests derived therein. Therefore, these corporations are either directly or indirectly owned and run by the ruling class.

It is a wonder thenthat the definitation of bankruptcy, the history of the law of bankruptcy, the history of the Law of bankruptcy in England and its establishment in East Africa, the legislative council Debates which state the objectives of the law in East Africa, the provision in both the Bankruptcy Acts as well as other acts and finally the courts names interpretation all go to show that it is the interests of the creditors that were and have been of paramount importance. Hence, the law neglecting its social function of giving the debtor a fresh start in life in favour of its observing the other two functions.

In a bid to properly observe its function of assembling the debtors assets for distribution amongst the creditors

...../98

and enforcing certain standards of commercial morality among the debtors so that such assets are assembled without the debtor's interference, the law on paper (in the statutes) and the law in action (as practiced by the courts) are quite different. The dispanty between that which is on paper and that which is observed and implemented in the courts is caused by the courts' attitude towards the debtor's right to rehabilitation. The courts being part of the system (ruling class) have to protect the rights of that class.

In the first section of this chapter the writer noted that all the laws social functions could be properly taken care of, if the law was reformed, suggestions being in the form of amending, repealing, or re-enacting new provisions depending on the provisions' nature and the extent they failed to protect the bankrupts.

The reader will nevertheless agree with me that that it is one thing recommending reform and another implementing such reform. The problem is mainly centered around. "the conflict of interests". In that where rehabilitating the debtor will amount to denying the creditor such assets as he would be otherwise entitled to, it is clear that such rehabilitation is not possible.

Nevertheless, it has been clearly pointed out that the debtor is entitled to rehabilitation only when he has discharged his liabilities and as such no conflict arises. The emphasis here is not on denying the creditors what is due to them because such an act is unjust but on the contrary denying them such unjust enrichment

...../ 99

which the law today allows them to have, thus denying the debtors their right to rehabilitation. The emphasis here as has been is that once the debtor has discharged his obligation(s) such surplus as may be in the hands of the trustees should be given back to him. In the same spirit property acquired after his discharge or any personal earnings should belong to the bankrupt but should rest in the trustee in bankruptcy. It is here that the discharge provisions should be amended to allow automatic discharges without unduly punishing the bankrupt.

FOOTNOTES

1. Ordinance No 1 of 1926

2. Kenya Legislative Council Debates
1925 vol 2 Part 2 pg 500

3. Op cit pg 503.

4. Such writers include Willy Mutunga in an article "The aims of Bankruptcy Law in Kenya. The separation of the wheat from the Chaff pg 2,6-7 which he calls "aims". Macneil in his book Bankruptcy Law in East Africa (1966) pg xiii refers to them as social functions. Friedman, Hicks and Johnson on the other hand refer to these objects as the "aims" of bankruptcy law in their work.
Bankruptcy Law Practice, London 1970 pf 2.

5. (1966) E.A. 233 at pf 235 (C.A.).

6. Friedman, Hicks and Johnson op. cit pg 1

7. Macneil op. cit pg xiii.

8. Halsbury's Laws of England Vol.2 pg 4.

9. Friedman, Hicks and Johnson op. cit pg 1.

10. Words and Phrases legally defined
(2nd Edn) Butterworths Vol. I A-C pg 152.

11. Halsburys' Laws of England Vol. 2 (3rd Edn) 1953 pg 251.

12. The History of England Law Before Edward I Pollock and Maritland Vol.I (2nd Edn) 1923 pf 467.

13. (1551) Plowden pg 68.

14. Baldwin: The Law of Bankruptcy and Bills of Sale (11th Edn. 1915) pgs 3-4.

...../ 101

15. Application Ordinance of 1910 No. 10 of 1910.

16. The East African Commission. Government Printer, 1924.

17. Ordinance No. 1 of 1926.

18. Ordinance No. 15 of 1930 Now chapter 71.

19. Ordinance No. 9 of 1930. Now chapter 25 of the laws of Tanzania 1930.

20. Fundamentals of Marxism - Leninism 2nd Edn, Moscow (1968) pg 127.

21. The origins of the Family, Private Property and the state Moscow (1972) pf. 168.

22. Macneil op. cit pg xiii.

...../102

CHAPTER ONE

FOOT NOTES

1. Macneil op. cit pg xiii.
2. Legislative council Debates 1925, vol 2 Part 2 pg 500 at pg 501.
3. Friedman, Hicks & Johnson op cit. pg 1 Turnor Murray 7 L.Q.R. pg 53 where he wrote ; "The law of bankruptcy, if it exists for any purpose, exists for the purpose of fairly distributing the property of the debtor among his crditors".

   Macneil op. cit pf Xiii.
4. "Aims of Bankruptcy Law. The separation of the wheat from the chaff."
5. The Modern Law Review Vol. 29 pg 149.
6. Ordinance No. 1 of 1926.
7. Kenya's Bankruptcy Ordinance No. 1 of 1926.
8. Uganda's Bankruptcy Ordinance.
9. Tanganyika's Bankruptcy Ordinance.
10. Section 1 (2) of the 1914 English Bankruptcy Act.
11. Section 3 (2) Uganda's Bankruptcy Act (1964)
12. Section 3 (2) Tanzania's Bankruptcy Ordinance (1930)
13. Modern Law Review (1949) Vol. 12 Pg. 454 and Pg. 471
14. (1933) 15 K.L.R. Pg. 16
15. (1889) 24 Q.B.D. 71; 6 T.L.R. 32
16. EXPARTE CUSTOMS & EXCISE COMMISSIONERS V DEBTOR (1950) ch 282; (1950) 1 all tr 308.
17. (1897) 2 Q.BD.

...../ 103

18. Chapter 248 of the laws of Kenya

19. S 38 (b) Ibid.

20. Rule 247 (1) of the Kenyan Bankruptcy Rules

21. Section 117 Kenya's Bankruptcy Act.

Section 116 Uganda's Bankruptcy Act.

Section 114 Tanzania's Bankruptcy Ordinance.

22. Nanyuki Green Grocers V Peterson (1968) E.A.

23. Section 121 Kenya's Bankruptcy Act.

Section 119 Uganda's Bankruptcy Act.

Section 120 Tanzania's Bankruptcy Ordinance.

24. S 119 Kenya's Bankruptcy Act.

25. Section 2 of all the statutes.

26. S 43 Kenya's Bankruptcy Act.

S 43 Uganda's Bankruptcy Act.

S 40 Tanzania's Bankruptcy Ordinance.

27. (1871) Q.B.D. Pg 242

28. (1952) 19 E.A. C.A. p 200

29. (1948) ch 407.

30. Mutitu's Dissertation " The Objects of Bankruptcy Law in Kenya Denystified" pg 16.

31. Section 43 a & b Uganda's Bankrutpcy Act.

Section 43 a & b Kenya's Bankruptcy Act.

Section 40 a & b Tanzania's Bankruptcy Ordinance.

32. Rule 263 Kenyas bankruptcy Rules.

33. Section 8(1) of all the East African Bankruptcy Acts.

34. Section 7(1) of all the East African Bankruptcy Acts.

35. Form No. 3 (Kenya).

36. Table I Below.

.....

37. Section 3 (2) of all the Bankruptcy Acts of East Africa define who a debtor is for purpose of bankruptcy proceedings.

38. Substitute Uganda and Tanzania for Kenya.

39. RE PHILLIPS (1900) 2 Q.B.D 329 per wright J at pg 331.

40. (1890) 24 Q.B.D. pg 728.

41. Chapter 31 of the laws of Kenya.

42. (1960) E.A. 560 (K).

43. Read Kenya and Tanzania

44. Macneil op. at pg 8.

45. (1930) ch. D.p 22.

46. Section 3 (1)(c) of the three East African Countries' Bankruptcy Acts.

47. Section 49(1) Kenya's Bankruptcy Act.
Section 48 (1) Uganda's Bankruptcy Act .
Section 46(1) Tanzania's Bankruptcy Ordinance.

48. Friedman, Hicks & Johnson op. cit pg 191.

49. (1897) 2 Q.B.D. 19 at pg 27.

49b. K.L.R. 16 (C.A. 1933

50. Section 3 (1) (d) of all the East African Bankruptcy Acts.

51. RE STEPHANY EXPARTE MEYER
(1871) L.R. 7 ch. App. 188.

52. The Law Quaternary Review Vol.43
(1927) pgs 230-237.

53. Section 3 (1) (f) all bankruptcy statutes.

54. Section 3 (1) (g) all bankruptcy statutes.

55. Section 3 (1) (h) all bankruptcy statutes.

56. This was the holding in the case of RE WALKER EXPERTE

.....f

NICKOLL (1884) 13 Q.B.D. 469

57. Section 5 of all the statutes.

58. Section 9(1) of all the statutes.

59. Section 16 of all the East African Countries Bankruptcy Acts.

60. Section 16 (1)(3) of all the East African Countries Bankruptcy Acts.

61. Case No. 16 of 1965 in the High Court at Nairobi.

62. Section 18 of the three East African Countries Bankruptcy Acts.

63. Section 21 of all the East African Bankruptcy acts.

64. Section 82 Kenya's Bankruptcy Act.

Section 81 Uganda's Bankruptcy Act.

Section 79 Tanzania's Bankruptcy Ordinance.

64b. Bankruptcy cause No. 12 of 1905.

65. (1949) Ch. 236 (1949) all E.R. 510.

66. Op cit pg 241 (1949) Ch D.

67. CMND 221 par 143 - 149.

68. Section 82 Kenya's Bankruptcy Act.

Section 79 Tanzania's Bankruptcy Ordinance.

Section 81 Ugandas's Bankruptcy Act.

69. S 29(1) Kenya's Bankruptcy Act.

S 28 (1) Tanzania's Bankruptcy Ordinance.

S 29 (1) Uganda's Bankruptcy Act.

70. Section 138(1)(a) Kenya's Bankruptcy Act.

Section 134 (1) (a) Tanzania's Bankruptcy Ordinance.

Section 136 (1) (a) Ugandas Bankruptcy Act.

71. Section 138(1) (b) Kenya's Bakruptcy Act.

...../

Section 134 (I) (b) Tanzania's Bankruptcy Act
Section 136 (I) (b) Uganda's Bankruptcy Act

72. Section 138 (I) (c) Kenya's Bankruptcy Act

Section 134 (I) (c) Tanzania's Bankruptcy Ordinance

Section 136 (I) (c) Uganda's Bankruptcy Act

73. Section 138 (I) (d) Kenya's Bankruptcy Act

Section 134 (I) (d) Tanzania's Bankruptcy Ordinance

Section 136 (I) (d) Uganda's Bankruptcy Act

74. Section 138 (2) Kenya's Bankruptcy Act

Section 134 (2) Tanzania's Bankruptcy Ordinance

Section 136 (2) Uganda's Bankruptcy Act

75. Section 139 Kenya's Bankruptcy Act

Section 135 Tanzania's Bankruptcy Ordinance

Section 137 Uganda's Bankruptcy Act

76. Holdsworth A History of English Law Vol. 8 Pg. 98

77. Section 141 Kenya's Bankruptcy Act

Section 139 Uganda's Bankruptcy Act

Section 137 Tanzania's Bankruptcy Ordinance

78. Section 138 (I) (m) Kenya's Bankruptcy Act

Section 134 (I) (m) Tanzania's Bankruptcy Ordinance

Section 136 (I) (m) Ugnada's Bankruptcy Act

79. Section 138 (I) (n) Kenya's Bankruptcy Act

Section 134 (I) (n)Tanzania's Bankruptcy Ordinance

Section 136 (I) (n) Uganda's Bankruptcy Act

80. Section 138 (I) (o) Kenya's Bankruptcy Act

Section 134 (I) (o) Tanzania's Bankruptcy Ordinance

Section 136 (I) (o) Uganda's Bankruptcy Act

81. Section 138 (2) Kenya's Bankruptcy Act

Section 134 (2) Tanzania's Bankruptcy Ordinance

Section 136 (2) Uganda's Bankruptcy Act

82. Legislative Council Debates 1925 opicit

...../107

CHAPTER TWO

FOOT NOTES

1. Legislative Council Debates 1925 Vol. 2 Part 2 Pg. 500
2. Op. cii Pg. xiii
3. JOWITTS DICTIONARY OF ENGLISH LAW
   2nd Edition By John Burk Vol. 2 L - Z (Sweet & Maxwell) Pg. 1529
4. Legislative Council Debates opcit Pg. 501
5. Already given in the Introductory Chapter
6. Section 8 (I) of all the East African Bankruptcy Acts
7. Section 7 (I) of all the East African Bankruptcy Acts
8. Section 6 of all the East African Bankruptcy Acts
9. In an interview with Mr. Desai who is in charge of the Bankruptcy section at Sherfa House, I learnt that the bankrupt must pay to the court 1,000 shillings filing fee. If a receiving order is made and the debtor has no asset he is required to further contribute to the official receiver some money as the official may decide for the benefit of the creditors. Further in his application for discharge the debtor must pay Shs.2/= for each creditor shown in the statement of affairs. In addition to this money he has to pay in court he has to pay such experts as valuers, advocates etc who help in drafting his statement of affairs. That such statement of affairs are expensive to make has been illustrated in Chapter one with the case of GURBACHAN SINGH S/O BACHITTAR, SINGH et al V GAILEY & ROBERTS case No. No. 16 of 1965 in the High Court at Nairobi. In this case the statement of affairs of about ten handwritten pages costed Shs.2,740/40 to prepare by all advocates.

...../108

In 1983, it quite obvious that the figure has doubled hence making the cost of bankruptcy proceedings more than £75 which the Registrar at Sheria House decided could be the minimum. And further illustrating that Shs. 1,000 debt which allows the creditor to petition the court is quite unrealistic.

10. Section 7 (3) of all the East African Bankruptcy Acts.
11. (1924) - 26 Vol. 10 K.L.R. Pg. 119.
12. Of all the East African Bankruptcy Acts.
13. Of of the Kenyan Bankruptcy Act.
14. (1903) I.K.B. 705.
15. EXPARTE CUSTOMS & EXCISE COMMISSIONERS V DEBTOR (1950) Ch. 1 Pg. 282.
16. Rule 247 (1) Kenya's Bankruptcy Rules.
17. Section 43 (b) Kenya's Bankruptcy Act, limits the value of the items to be left with the bankrupt to Sh. 500/= while the court may increase the allowance to Sh. 1,000/=. Section 40 (2) Tanzania's Bankruptcy Act limits the value of the items to be left with the bankrupt to Sh. 300/= while maintaining that the court may exceed such a figure or allowance to be increased to any value not exceeding Sh. 800/=.
18. Stanley Joslin Opicit 154-5.
19. Section 38 1914 English Bankruptcy Act.
    Section 43 (1) Kenya's Bankruptcy Act.
    Section 42 (2) (a) Uganda's Bankruptcy Act.
    Section 40 (2) (a) Tanzania's Bankruptcy Act.
20. (1878) 8 Ch. D. 364 at Pg. 366.
21. (1894) 1 Q. B 417.
22. Of all the Bankruptcy Acts of East Africa
23. Kenya's Bankruptcy Act.
24. Tanzania's Bankruptcy Ordinance (1930).
25. Uganda's Bankruptcy Act (1964).
26. (1890) 25 Q. B. D 262.

27. Ibid Pg. 267.

28. Section 79 (1) Kenya's Bankruptcy Act.

29. Section 78 (1) Uganda's Bankruptcy Act.

Section 76 (1) Tanzania's Bankruptcy Act.

29. Section 82 Kenya's Bankruptcy Act

Section 81 Uganda's Bankruptcy.

Section 79 Tanzania's Bankruptcy.

30. In BARKATAL S/O ABDULLA V COMMISSIONER OF INCOME TAX Bankrupt cause No. 12 of 1965. In this case the debtors overall liabilities were Sh. 6,700/= while his assets were worth Sh. 49,500/= yet he did not get the surplus once the creditors had been paid.

31. (1949) I all G r 510; (1949) Ch. 236

32. Of all the East African Bankruptcy Acts.

33. Section 18 (2) of all the East African Bankruptcy Acts.

34. Section 29 (1) Kenya's Bankruptcy Act.

Section 29 (1) Uganda's Bankruptcy Act.

Section 28 (1) Tanzania's Bankruptcy Act.

35. Rule 186 (2) Kenya's Bankruptcy Rules.

36. A Report By Justice - Bankruptcy London Stevens & Sons 1975 24 par. 60 which was confirmed to be the position in Kenya by Mr. Desai (in charge of Bankruptcy proceedings at Sheria House).

37. Section 29 (2) Uganda's Bankruptcy Act.

Section 28 (2) Tanzania's Banruptcy Act.

38. Section 31 Uganda's Bankruptcy Act.

Section 30 Tanzania's Bankruptcy Act.

39. Section 29 (1) Kenya's Bankruptcy Act.

Section 29 (1) Uganda's Bankruptcy Act.

Section 28 (1) Tanzania's Bankruptcy Act

40. Section 29 (4) Kenya's Bankruptcy Act.

Section 29 (4) Uganda's Bankruptcy Act.

41 Mr. Desai (man incharge of Bankruptcy and liquidation of companies at Sheria House) pointed to the writer that cetificates of misfortune are never given in Kenya, instead the courts grant absolute or conditional discharges

42. Cause No. 17 of 1964 in the High Court at Nairobi.

43. (1964) and E.R. 165 at pg 169.

43b. Re Lord Colin Campbell.

44. Cahpter 486 Laws of Kenya.

45. Legal Notice No. 256 of 1963 of the Laws of Kenya.

46. Regulation 13(1) Local Government Regulations 1963 LIN No. 256 of 1963.

47. Of all the Bankruptcy Acts of East Africa.

48. Chapter 333 Tanganyika Rivised Laws 1962.

49. Chapter 27 Laws of Uganda.

50. Chapter 488 of the Laws of Kenya. Chapter 88 of the Laws of Ugznda.

51. Act No. 5 of 1969.

52. Section 40 (1) (b) Uganda's Constitution (1962).

53. Section 42 (2) of the Trustee Act.
Chapter 167 of the laws of Kenya.

54. Section 32 of the Advocates Act.
Cap 16 of the Laws of Kenya.

55. Chapter 341 of the Laws of Tanzania (Revised Edn 1965)

56. of section 138 (2) Kenya's Bankruptcy Act.
" " 136 (2) Uganda's Bankrutpcy Act.
" " 134 (2) Tanzania's Bankruptcy Act.

57. The men who are in charge of both Bankruptcy and liquidati of companies at Sheria House.

...../ 111

FOOTNOTES

CHAPTER THREE

1. Holdsworth Opicit Vol. 8 Pg.
2. Section 8 (1) of all the East African Bankruptcy Acts.
3. Section 7 (1) of all the East African Bankruptcy Acts.
4. INTRODUCTION TO ENGLISH LAW
   9th EDITION LONDON Butterworths 1976 Pg. 441.
5. Section 3 (1) (b) Uganda's Bankruptcy Act.
   Section 3 (1) (b) Tanzania's Bankruptcy Act.
6. Maniel Op. cit Pg. 148
7. (1933) Ch. Div. 786 at 790 - 7901.
8. See Section 136 (1) (i) Uganda's Bankruptcy Act
   Section 134 (1) (i) Tanzania's Bankruptcy Act.
9. Section 138 (2) Kenya's Bankruptcy Act.
   Section 136 (2) Uganda's Bankruptcy Act.
   Section 134 (2) Tanzania's Bankruptcy Act.
10. Section 136 (1) (m) Uganda's Bankruptcy Act.
Section 134 (1) (m) Tanzania's Bankruptcy Act.
11. Section 136 (1) (n) Uganda's Bankruptcy Act.
    Section 134 (1) (n) Tanzania's Bankruptcy Act.
12. Section 138 (1) (o) Kenya's Bankruptcy Act.
    Section 136 (1) (o) Uganda's Bankruptcy Act.
    Section 134 (1) (o) Tanzania's Bankruptcy Act.
13. See footnote 9
14. Section 136 (1) (v) Uganda's Bankruptcy Act.
    Section 134 (1) (v) Tanzania's Bankruptcy Act.
15. (1962) East Africa 65 (CA)
16. Section 138 (1) (t) Kenya's Bankruptcy Act.
    Section 136 (1) (t) Uganda's Bankruptcy Act.
    Section 134 (1) (t) Tanzania's Bankruptcy Act.

17. (1961) E.A. 263 (CA)
18. Section 139 (a) Kenya's Bankruptcy Act
    Section 137 (a) Uganda's Bankruptcy Act.
19. (1940) 17 L.R. 241
20. Section 140 Kenya's Bankruptcy Act.
    Section 138 Uganda's Bankruptcy Act.
    Section 136 Tanzania's Bankruptcy Act.
21. Section 141 Kenya's Bankruptcy Act.
    Section 139 Uganda's Bankruptcy Act.
    Section 137 Tanzania's Bankruptcy Act.
22. Section 143 Kenya's Bankruptcy Act.
    Section 141 Uganda's Bankruptcy Act.
    Section 139 Tanzania's Bankruptcy Act.
23. (1956) 29 K.L.R. 127
24. (1948) K.L.R. (1) Pg. 34
25. See footnote 16
26. (1948) K.L.R. (1) 34 at Pg. 35.
27. Section 34 Kenya's Bankruptcy Act.
28. Section 188 Companies Act Cap 486
29. Section 101 (1) of all the East African Bankruptcy Acts.
30. Regulation 13 (1) Kenya's Local Government Regulations 1963.
    Section 12 (3) Tanzania's Locoal Government Act Cap 333 Laws Tanzania.
31. Section 32 Kenya's Advocates' Act. Cap 16 Laws of Kenya.
    Section 37 (1) Tanzania's Advocates Act. Cap 341 Laws of Tan (1965).
32. Of all the Bankruptcy Acts of East Africa.
33. Of all the Bankruptcy Acts of East Africa.
34. Of all the Bankruptcy Acts of East Africa.
35. Section 18 and Section (17) of the Bankruptcy Acts.
36. Section 82 Kenya's Bankruptcy Act.

Section 79 Tanzania's Bankruptcy Act.

Section 81 Uganda's Bankruptcy Act.

37. Ibid.

...../114

CHAPTER FOUR

FOOT NOTES

1. Chapter 53 Laws of Kenya.
2. Mr. Desai in Charge of Bankruptcy and liquidation of companies at Sheria House and who has been working as such for the last 26 years informed the writer.
3. Of all the East African Bankruptcy Act.
4. Of Kenya's Bankruptcy Act which is similar to section 40 of Tanzania's Bankrutpcy Act and section 42 of Uganda's Bankruptcy Act.
5. (1894) 1Q.B 417
6. Section 43 (1)(b) Kenya's Bankruptcy Act.
   Section 40 (2) (a) Tanzania's bankruptcy act.
   section 42 (2) (a) Uganda's Bankruptcy Act.
7. (890) 25 Q.B.D. 262 at pg 267.
8. Section 42 (1)(b) Uganda's Bankruptcy Act.
   Section 40 (2) Tanzania'a Bankruptcy Act.
   Section 43(a) Kenya's Bankruptcy Act.
9. Section 42 (1)(b) Uganda's Bankruptcy Act.
   Section 40 (2) Tanzania's Bankruptcy Act.
   Limits the value of such tools and wearing apparel and bedding to three hundred shillings but provides that this amount may be raised by the court to Sh.800 Kenya's S 43(b) has had some debates on how it could be reviewed to increase the figure.
10. Section 82 Kenya's Bankruptcy Act.
    Section 81 Uganda's Bankruptcy Act.
    Section 79 Tanzania's Bankruptcy Act.

11. Supra

12. Section 7 of all the Bankruptcy Acts of East Africa.

13. Section 8 of all the Bankruptcy Acts of E.A.

14. As already discussed in the proceeding chapters.

15. (1924, 26)Vol.10K.L.R. pg 119.

16. Of all the East African Bankruptcy Acts.

17. (1927) L.Q.R Vol.43 pg 230-7.

18. Section 16 (0) all Bankrutpcy Acts of E.A.

19. Section 14 of the Kenyan and Ugandan Bankruptcy Acts. Tanzania's Act provides that the first meeting will be called by the official receiver soon as may be but not after 60 days.

20. S.3(1) Kenya's Judicature Act Cap 8 Laws of Kenya. Proviso to S(2) Uganda's Judicature Act Cap 34 Laws of Uganda.

21. (1955) 1 all E.R. 646.

22. Of all the East African Bankruptcy Acts.

23. Nature of the Judicial process.

24. Uganda and Tanzania do not have these provisions.

25. Mr. Desai at Sheria House told the writer that when a scheme is approved the order for discharge is delayed in such a way that it is better for the creditors to reject the scheme because when this is done and the debtor applies for discharge he is likely to get before the debtor whose composition or scheme was accepted.

26. S 29(1) Kenya's Bankrutpcy Act.
S 28 (1)Tanzania's Bankruptcy Act.
S 29 (Uganda's Bankruptcy Act.

...../ 116

27 Section 29(4) Kenya's Bankrutpcy Act.

Section 29(4) Uganda's Bankrutpcy Act.

Section 28 (4) Tanzania's Bakruptcy Act.

28. (1965) E.A. 426.

29. For example (o) Section 9(1)(e) of the Urban Authorities Act Cap 27 of the Laws of Uganda S (101) Kenya's Bankruptcy Act.

S(10) Tanzania's Bankrutpcy Act.

30. In accordance with S 29 of all the bankruptcy Acts.

31. There is a file at Sheria House whereby the bankrupt applied his discharge 20 years ago. In others there has been no action for the last 8, 9, or ten years while yet in others the bankrupt has never applied for his discharge.

32. Section 3

33. S 101 of all the East African Bankrutpcy Acts also see comments on reform.

34. Section 138 Kenya's Bankruptcy Act.

Section 136 Uganda's Bankruptcy Act.

Section 134 Tanzania's Bankruptcy Act.

35. Ibid

36. Ibid

37. S 139 Kenya's Bankruptcy Act.

S 137 Uganda's Bankruptcy Act.

S 135 Tanzania's Bankruptcy Act.

38. Ibid

39. Section 140 Kenya's Bankruptcy Act.

Section 138 Uganda's Bankruptcy Act

Section 136 Tanzania's Bankruptcy Act.

...../117

40. Section 143 Kenya's Bankruptcy Act.

Section 141 Uganda's Bankruptcy Act.

Section 139 Tanzania's Bankruptcy Act.

41. Section 144 Kenya's Bankruptcy Act.

Section 142 Uganda's Bankruptcy Act.

Section 140 Tanzania's Bankruptcy Act.

42. (1948) K.L.R. Part I pg 34.

43. (1956) 29 K.L.R. 127.

44. (1948) K.L.R. pg 34 at pg 35.

45. Section 138 (2) Kenya's Bankruptcy Act.

Section 136 (2) Uganda's Bankruptcy Act.

Section 134 (2) Tanzania's Bankruptcy Act.

.....