ARTIFICIAL INTELLIGENCE, AMBIGUITY, AND ASSETS: SECURING CREDITOR RIGHTS IN KENYAN INSOLVENCY

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ABSTRACT

This article evaluates the impact of procedural ambiguities within Kenya's Insolvency Act, 2015 on the efficient realization of secured assets by creditors, and explores the potential of digital technologies, particularly Artificial Intelligence (AI), to mitigate these challenges. While the Act aimed to establish a clear, efficient, and equitable framework balancing debtor rehabilitation and predictable security realization, practical implementation is hindered by specific legal provisions and procedural ambiguities. This discrepancy creates adverse economic and financial consequences, including delays, diminished returns for secured creditors, increased lending risk, and erosion of confidence in the financial system. Drawing on a review of the Act, relevant case law, scholarly discourse, and comparative analysis with international insolvency frameworks, this study identifies key procedural ambiguities and systemic impediments. It employs the Creditors' Bargain Theory and the Rescue Theory to contextualize the tension between conflicting objectives within the Act. The findings highlight how ambiguities in areas such as moratoria, the need for court approval, and the lack of granular procedural rules, particularly in liquidation, contribute to judicial uncertainty and hinder efficient realization. The article argues that digital solutions and AI, leveraged for data analysis, process automation, and guided workflows, offer promising avenues to standardize procedures, enhance transparency, and reduce delays, drawing lessons from jurisdictions already integrating technology in insolvency. The study provides an empirically grounded understanding of the realities faced by secured creditors and recommends targeted legislative, judicial, and technological interventions to enhance the Act's effectiveness.

Keywords: *debt, insolvency, bankruptcy, AI, digital, secured creditors, Kenya, Insolvency Act, procedural ambiguities, asset realization, legal reform, technology, machine learning.*

1. INTRODUCTION

The investments, often supported by creditor security, is a fundamental element of Kenya's financial and economic framework, underpinning market vitality, driving investment, and fueling economic growth. Recognizing the crucial role of a robust insolvency system, Kenya enacted the Insolvency Act, 2015, aiming to modernize and consolidate its laws to align with international best practices. A pivotal goal of this landmark legislation was to introduce and strengthen alternatives to traditional liquidation, promoting mechanisms like administration and various arrangements for companies and individuals to enable financially distressed entities to proactively manage their affairs for the collective benefit of their creditors. This reorientation towards rehabilitation and providing a "fresh start" represented a significant departure from previous legislation. Simultaneously, the Act aimed to protect creditor rights, particularly those of secured creditors who historically held a prioritized position in debt recovery. The importance of protecting property rights, including the security interests of secured creditors, is constitutionally enshrined in Kenya.

However, the introduction and emphasis on debtor rescue mechanisms, while beneficial for rehabilitation, have introduced complexities that potentially reshape the traditional pathways for secured creditors to enforce their claims and realize their collateral. This has led to vital questions regarding the practical effectiveness, predictability, and efficiency of realizing security interests under the new Act. This article undertakes a critical examination of the impact of the Insolvency Act, 2015, on the rights of secured creditors, specifically focusing on the challenges posed by procedural ambiguities within the Act and exploring the potential of digital technologies and AI to address these issues.

2. Research Problem Statement

Ideally, Kenya's Insolvency Act, 2015 was designed to establish a clear, efficient, and equitable framework that balances debtor rehabilitation with predictable security realization for creditors. This ideal situation envisions a legal system where secured creditors can navigate insolvency proceedings with certainty, confident in their ability to enforce their rights and realize their collateral in a timely and cost-effective manner, thereby fostering confidence in the credit market and supporting economic growth.

In reality, despite the Act's modernizing objectives, a significant divergence has emerged between this ideal and its practical implementation. There is a persistent inclination towards avoiding liquidation and business rescue, often over creditors' securities, compounded by specific legal provisions, such as the imposition of moratoria, and notable procedural ambiguities.

The problem is that these factors potentially undermine the anticipated ease and cost-effectiveness with which secured creditors can realize their collateral, creating a significant gap between the Act's objectives and its practical impact. This discrepancy generates adverse economic and financial consequences, including potential delays and diminished returns in security realization, increased perceived risk of lending, and erosion of secured collateral value.

To address this critical gap, this research proposes an analysis into the practical impact of the Insolvency Act, 2015, focusing specifically on the impact of procedural ambiguities on secured creditors' ability to realize their securities and investigating how digital technologies and AI could potentially provide solutions to enhance clarity, efficiency, and predictability in the process.

3. Objectives

Based on the research problem, this article aims to achieve the following objectives:

a) To evaluate the impact of procedural ambiguities of the Insolvency Act, 2015, on the efficient realization of secured assets by creditors in Kenya.
b) To explore the potential role of Artificial Intelligence and digital technologies in mitigating procedural ambiguities and enhancing the efficiency and predictability of secured asset realization under the Insolvency Act, 2015.

4. Scope and Significance

This article focuses specifically on analyzing the impact of procedural ambiguities within the Insolvency Act, 2015, on the efficiency and predictability of secured asset realization by creditors in Kenya. It delves into key provisions of the Act, relevant case law, and scholarly interpretations to identify how these ambiguities manifest in practice and their consequences for secured creditors. The scope includes examining the effects of moratoria, the requirement for court approvals in certain scenarios, and the clarity (or lack thereof) of procedural rules governing different insolvency processes, particularly liquidation. The article also considers the potential application of digital technologies and AI as tools to improve clarity and streamline procedures, drawing on examples of technology adoption in insolvency frameworks in other jurisdictions.

The significance of this study lies in its contribution to a deeper, empirically grounded understanding of the practical challenges faced by secured creditors under the Act, moving beyond its theoretical objectives and addressing a notable void in current research which lacks precise analysis demonstrating these practical hindrances. By identifying specific procedural pain points, the study aims to inform targeted legislative or regulatory reforms that can enhance the efficiency, predictability, and overall effectiveness of the Kenyan insolvency regime. Furthermore, by exploring the potential of digital solutions, the article contributes to the growing body of literature on the intersection of law and technology, offering insights into how technological innovation can be leveraged to address legal and procedural challenges in the insolvency context, ultimately fostering greater economic stability and investor confidence.

5. LITERATURE AND LEGAL REVIEW

Kenya's Insolvency Act, 2015, represented a significant legislative undertaking, consolidating previous laws and introducing a framework influenced by international best practices. A core aim was to shift from a liquidation-centric approach towards rehabilitation, reflecting the "rehabilitation theory" of insolvency law. However, achieving this while also protecting creditor interests, particularly the "forefront position" of secured creditors, has presented practical challenges.[1]

A key area of impact for secured creditors is the introduction of **moratoria**, particularly under Section 560(1), which imposes a stay on enforcing security over a company's property without consent or court approval during administration.[2] This directly affects the timing and predictability of security realization. Cases like *Kahindi Mumba Chome & 23 Others v. ARM Cement PLC Limited (Under Administration)* illustrate the courts balancing the moratorium's purpose against other creditor rights, while *Allan Ochieng Oliech v Komaza Forestry Limited (Under Administration)* and *The Republic of Kenya... In the Matter of ARM Cement PLC (ARM Cement Injunction Case)* exemplify judicial discretion in lifting or imposing conditions on actions under the moratorium, introducing unpredictability. Section 560A outlines factors for the court or administrator to consider when deciding whether to lift the moratorium.

Beyond moratoria, the **powers of insolvency practitioners (IPs)** and the requirement for **court approval** for certain actions also impact secured creditors. Part IV of the Act outlines IP powers in managing and realizing assets, but the effectiveness of these powers in ensuring efficient security realization is subject to judicial oversight. Section 227(1) and (2) explicitly grant the Court power regarding the disposal of charged property, contingent on the court's satisfaction, introducing potential delay and uncertainty. While Sections 226 and 228 detail a bankruptcy trustee's obligations regarding secured creditors' options in personal bankruptcy, including a 30-day timeframe, the general framework under Part V for **liquidation** presents different challenges. Although secured creditors generally have priority in liquidation, Section 474(2) mandates a "prescribed part" for unsecured creditors from floating charge proceeds, directly impacting the predictable recovery for floating charge holders.

Scholarly work highlights that perceived **procedural ambiguities** within the Act contribute to judicial uncertainty and hinder efficient realization.[3] A critical challenge identified is the **lack of procedural rules**, particularly for liquidation proceedings, resulting in "legal tumult and quandary" and inconsistency in court handling. The Insolvency Regulations, 2016 aimed to provide guidance, but the issue of insufficient rules, especially for liquidation, persists. This lack of granular guidance leads to divergent judicial interpretations and delays. The critical importance of **strict adherence to procedural requirements** is underscored by cases like *Patrick Asuma v ARM Cement Limited [Under Administration]*, where proceedings initiated without requisite leave were set aside, leading to significant delays. The cases of *Allan Ochieng Oliech v Komaza Forestry Limited (Under Administration)* and *Owiti, Otieno and Ragot Advocates v Mumias Sugar Co. Limited (Under Administration)* further demonstrate the court's discretionary power under Section 560(1)(d), which, while aiming to balance interests, can contribute to extended timelines and impact predictability.

These ambiguities contribute to broader **systemic impediments**, including the substantial costs of insolvency proceedings which erode asset value and diminish recovery prospects, and the often **protracted duration of processes**, exacerbated by moratoria, which can lead to asset depreciation and delay recouping investments.[4] The *ARM Cement* case, for instance, highlights both high administration costs and protracted legal processes.

The **research gap** identified in the sources points to a lack of empirical data quantifying the actual efficiency and predictability of security realization post-2015, the precise impact of procedural ambiguities, and empirical benchmarking of costs and time.

In a **digital context**, other hand, there is increasing integration of AI and technology in law and insolvency globally.[5] AI can be used for data analysis, predictive modeling, automation of routine tasks, and even non-discretionary decision-making. Examples include e-portals that facilitate communication, document submission, and review, and AI tools that verify submissions and draft decisions. AI-powered systems can analyze large datasets quickly to identify patterns and

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[1] Too, Fancy Chepkemoi. *A comparative analysis of corporate insolvency laws: what is is the best option for Kenya?*. Nottingham Trent University (United Kingdom), 2015.
[2] Wanyama, Rebecca. *The movable property security rights act and the legitimisation of moneylenders by implication*. Diss. University of Nairobi, 2019.
[3] Keroti, Richard Osoro. *Sustainable Entrepreneurship Factors Influencing Performance of Clearing and Forwarding Firms in Nairobi, Kenya*. Diss. KeMU, 2022.
[4] Waweru, Millicent N. *Determinants of insolvency in selected insurance companies in Kenya*. Diss. University of Nairobi, 2014.
[5] DIDEA, Ionel, and Diana Maria ILIE. "IMPACT OF ARTIFICIAL INTELLIGENCE (AI). TRANSFORMATIVE TECHNOLOGIES-CHALLENGES AND PERSPECTIVES." *LEGAL AND ADMINISTRATIVE STUDIES*: 508.

detect anomalies, which can aid in fraud detection and investigations.[6] Technology-assisted review (TAR) and generative AI are being used for document review and analysis in legal contexts, speeding up case preparation. Online Dispute Resolution (ODR) is also gaining traction for resolving disputes cost-effectively. These digital advancements offer potential avenues to mitigate the procedural ambiguities in Kenyan insolvency by standardizing processes, enhancing transparency, reducing reliance on manual checks, and potentially automating parts of the workflow.

6. Theory Analysis

The discourse surrounding insolvency law is significantly shaped by the **Creditors' Bargain Theory (CBT)** and the **Rescue Theory**. The CBT, rooted in the idea that insolvency law should replicate the hypothetical agreement creditors would reach to maximize collective recovery, prioritizes the protection of pre-insolvency entitlements, predictability, and efficient liquidation. The Rescue Theory, conversely, emphasizes preserving viable businesses, jobs, and broader societal well-being, advocating for flexibility and judicial supervision, potentially at the temporary expense of strict creditor enforcement.

Kenya's Insolvency Act, 2015, attempts to **balance** these two perspectives by introducing rescue-oriented mechanisms while aiming to protect creditor rights. However, the **procedural ambiguities** identified in the literature and case law reveal the practical difficulties in achieving this balance. The unpredictability and delays stemming from these ambiguities, particularly concerning secured creditors' ability to realize their security, directly **challenge the predictability** that CBT deems essential for market certainty. While the Act's rescue orientation aligns with the Rescue Theory, the systemic impediments, including protracted processes and costs exacerbated by ambiguities, can undermine the successful implementation of rescue plans, potentially leading to outcomes that are suboptimal for all stakeholders, not just secured creditors.

The tension highlights that the Act, in practice, sometimes **fails to fully satisfy the core tenets of either theory** in relation to secured creditors. The lack of clarity and efficiency hinders the predictable recovery sought by the CBT, and the delays can undermine the value preservation sought by the Rescue Theory if rescue efforts are prolonged or fail due to procedural friction. The integration of digital technologies and AI offers a potential path to **bridge this theoretical-practical gap**. By mitigating procedural ambiguities and enhancing efficiency, digital tools could help align the practical outcomes of insolvency proceedings more closely with the predictable and efficient processes favored by CBT, while also supporting value preservation and timely resolution, which are crucial for successful rescue efforts envisioned by the Rescue Theory.

7. METHODOLOGY

This study employs a qualitative research methodology focused on legal analysis and comparative review. The approach begins with an in-depth examination of the Insolvency Act, 2015, and its subsidiary legislation in Kenya to understand the legal framework governing secured creditor rights and security realization. This involves a critical evaluation of relevant provisions, particularly those related to different insolvency procedures (administration, liquidation), moratoria, powers of insolvency practitioners, and the hierarchy of claims, with a specific focus on identifying areas susceptible to procedural ambiguity.

To contextualize the statutory analysis, the study incorporates a comprehensive review of scholarly articles, legal journals, and pertinent publications on Kenyan insolvency law, alongside relevant research on the practical implementation challenges of the Act. This literature review serves to establish the existing body of knowledge, identify key debates and scholarly perspectives on procedural ambiguities, and highlight the research gaps concerning their practical impact on secured creditors.

A critical component involves a detailed examination of selected Kenyan case law where the application and interpretation of the Insolvency Act, 2015, particularly provisions related to secured creditors' rights, moratoria, and procedural requirements, have been litigated. Cases discussed in the provided source, such as those involving ARM Cement, Komaza Forestry, Mumias Sugar, Trust Bank, Cape Holdings, Nyambane Coffee Mills, and Mertens, are analyzed to understand how the judiciary interprets and applies the Act's provisions, and how procedural issues have impacted the realization of secured assets. This analysis aims to identify patterns in judicial interpretation, illustrate the practical consequences of ambiguities, and assess the courts' approach to balancing competing stakeholder interests.

Additionally, the study includes a brief comparative analysis of how other jurisdictions, particularly those with more mature or technologically integrated insolvency systems (e.g., UK, US, Singapore, Australia), address procedural clarity and facilitate secured creditor realization, and how they are leveraging digital technologies in insolvency processes. This comparative perspective informs the evaluation of the Kenyan framework and helps identify potential avenues for reform, including the adoption of digital solutions.

[6] Owen, Anthony, Mark Maddog, and Jassica Moore. "AI-Powered Fraud Detection Systems: Creating a machine learning model to identify and prevent fraudulent transactions by analyzing patterns and anomalies in user data." (2020).

Finally, the study integrates insights from sources discussing the application of Artificial Intelligence and digital technologies in legal and insolvency contexts to explore how these innovations could potentially mitigate the identified procedural ambiguities and enhance the efficiency of secured asset realization in Kenya.

While acknowledging the research gap's call for empirical data, this study focuses on a foundational analysis utilizing available qualitative data to map and evaluate the impact of procedural ambiguities, setting the stage for future quantitative research.

8. FINDINGS

Based on the review of the Insolvency Act, 2015, relevant literature, and case law, several key findings emerge regarding the impact of procedural ambiguities on the efficient realization of secured assets by creditors in Kenya:

a. **Impact of Moratoria:** The imposition of moratoria, particularly during administration under Section 560(1), significantly impacts the timing and predictability of secured asset realization. While intended to provide a breathing space for rescue, the requirement for administrator consent or court approval introduces a layer of potential delay. Case law demonstrates the courts exercising discretion in lifting or imposing conditions on actions under the moratorium, contributing to unpredictability in when secured creditors can proceed.

b. **Need for Court Approval:** Provisions requiring court satisfaction or approval for actions such as the disposal of charged property (Section 227) also introduce potential delays and uncertainty, moving the process away from a direct exercise of secured creditors' rights.

c. **Lack of Granular Procedural Rules:** A critical ambiguity stems from the perceived lack of clear and detailed procedural rules, particularly within the context of liquidation under Part V. Despite the Insolvency Regulations, 2016, providing some foundational guidelines, substantive ambiguities persist regarding the precise sequence of steps and mandated timelines for secured creditors to realize their security within the liquidation framework. This lack of guidance can lead to divergent judicial interpretations and consequent delays.

d. **Inconsistent Judicial Interpretation:** The procedural ambiguities contribute to judicial uncertainty and inconsistency in handling cases under the Act. While some rulings demonstrate a willingness to grant leave for secured creditors to proceed, others emphasize strict adherence to procedural requirements, with missteps leading to significant delays and wasted costs.

e. **Importance of Procedural Adherence:** Case law highlights the critical importance of strict adherence to the procedural requirements stipulated, even minor missteps can lead to setting aside proceedings. However, the clarity on *how* to adhere strictly is sometimes lacking due to the ambiguities.

f. **Systemic Impediments Exacerbated:** The procedural ambiguities contribute to broader systemic impediments, such as the lengthy duration and high costs of insolvency proceedings. Delays caused by unclear procedures or litigation over interpretations reduce the value of assets and the ultimate recovery for secured creditors.

9. DISCUSSION OF FINDINGS

The findings underscore that procedural ambiguities within the Insolvency Act, 2015, pose a significant practical challenge to the efficient and predictable realization of secured assets by creditors in Kenya. The Act's modern objectives of balancing rescue and creditor rights are undermined by these ambiguities, creating uncertainty and friction in the insolvency process.

The impact of moratoria and the requirement for court approvals directly conflicts with the predictability desired by secured creditors. While conceptually sound for facilitating rescue, their practical application, subject to judicial discretion and interpretation, can lead to delays that erode asset value and diminish recovery prospects. Secured creditors, who rely on timely access to their collateral, face uncertainty regarding the timeline for enforcement, making risk assessment more difficult.

The lack of granular procedural rules, particularly in liquidation, is a critical gap that fuels ambiguity and contributes to the "legal tumult" observed in court handling of cases. Without clear, step-by-step guidance, both IPs and creditors face uncertainty regarding mandated procedures and timelines, increasing the likelihood of errors and disputes. This procedural vagueness directly impacts the efficiency of the liquidation process and the secured creditors' ability to realize their claims in a predictable manner.

The resulting inconsistent judicial interpretations further exacerbate the problem, creating a less predictable legal environment for secured creditors. While courts attempt to balance competing interests, the absence of clear procedural signposts means outcomes can vary, making it difficult for creditors to anticipate how their rights will be treated in practice. This uncertainty increases the risk and cost associated with secured lending in Kenya.

These procedural ambiguities are not merely administrative inconveniences; they contribute significantly to the broader systemic impediments of lengthy and costly insolvency proceedings. Litigation stemming from ambiguous provisions consumes time and resources, further diminishing the value available for distribution.

Addressing these ambiguities is crucial to bridge the gap between the Act's theoretical objectives and its practical impact. Drawing lessons from other jurisdictions, such as Singapore's judicial emphasis on readily granting leave for secured creditors to enforce their security, or Australia's unified framework for security interests, highlights the importance of both clear legal frameworks and supportive judicial approaches.

This is where digital technologies and AI present a compelling opportunity. As seen in other jurisdictions, technology can be leveraged to standardize and streamline insolvency processes. AI-powered e-portals could guide users through procedural steps, ensuring complete and correctly formatted submissions, thereby reducing errors and the need for manual checks. AI tools could potentially automate the verification of non-discretionary information, speeding up initial case handling. Digital platforms could enhance transparency by providing all stakeholders with real-time access to case status and relevant documents, reducing information asymmetry and potential for disputes. Machine learning algorithms could analyze historical data to identify patterns and potential bottlenecks in specific types of cases or procedures, providing insights for process optimization. By mitigating the practical effects of procedural ambiguities through clearer digital workflows and automation, AI and digital technologies can enhance the efficiency and predictability of secured asset realization, moving closer to the Act's intended objectives and strengthening confidence in the Kenyan insolvency system.

10. SUMMARY, CONCLUSION, AND RECOMMENDATIONS

Summary

This article has evaluated the impact of procedural ambiguities within Kenya's Insolvency Act, 2015, on the efficient realization of secured assets by creditors, and explored the potential of digital solutions to address these challenges. The Act, while aiming to modernize insolvency law and balance debtor rescue with creditor rights, is hindered by ambiguities related to moratoria, court approvals, and the lack of granular procedural rules, particularly in liquidation. These ambiguities lead to judicial uncertainty, inconsistent interpretations, and contribute to systemic impediments like lengthy and costly proceedings, ultimately undermining the efficiency and predictability of secured asset realization for creditors. The theoretical frameworks of Creditors' Bargain and Rescue theories highlight the tension and practical shortcomings in achieving the Act's objectives. Digital technologies and AI offer a promising avenue to mitigate these ambiguities by standardizing processes, enhancing transparency, and streamlining workflows.

Conclusion

In conclusion, procedural ambiguities within the Insolvency Act, 2015, represent a significant practical challenge to the efficient realization of secured assets by creditors in Kenya. These ambiguities create uncertainty, fuel delays, and contribute to the high costs of insolvency proceedings, thereby undermining the Act's intended objectives and the predictability crucial for secured creditors. While the Act aims to balance rescue and creditor rights, the practical implementation is hampered by a lack of clear, consistent procedural guidance and judicial interpretation. Addressing these ambiguities is essential for enhancing the effectiveness and credibility of Kenya's insolvency regime.

Recommendations

Based on the findings and analysis, the following recommendations are made to mitigate the impact of procedural ambiguities and enhance the efficiency and predictability of secured asset realization under the Insolvency Act, 2015:

1. **Regulatory and Legislative Clarity:** The Insolvency Regulations, 2016, should be revised to provide clear, detailed, and granular procedural rules, particularly for liquidation proceedings. This should include specific, time-bound steps and requirements for secured creditors seeking to realize their security, reducing ambiguity and the scope for divergent interpretations.
2. **Judicial Training and Capacity Building:** Invest in targeted training programs for the Kenyan judiciary focusing on insolvency law, with a specific emphasis on the practical application and interpretation of the Insolvency Act, 2015, particularly concerning secured creditor rights and procedural requirements. This can promote greater consistency and predictability in court rulings.
3. **Explore Digital Integration and AI:** Conduct a feasibility study and pilot programs for the integration of digital technologies and AI into Kenyan insolvency processes. This should include developing an AI-powered e-portal to guide stakeholders through procedural steps, automate the verification of non-discretionary information, and streamline document submissions. Leveraging AI for data analysis could also identify systemic bottlenecks and areas for process optimization. This aligns with global trends and offers a potent tool to enhance clarity, efficiency, and transparency in the realization process.
4. **Standardized Forms and Checklists:** Develop and mandate the use of standardized forms and checklists within the digital platform to ensure all necessary information and documentation are submitted correctly at each procedural step, minimizing delays caused by incomplete filings.

Implementing these recommendations can help address the identified procedural ambiguities, enhance the efficiency and predictability of secured asset realization, strengthen the rights of secured creditors, and ultimately contribute to a more robust and effective insolvency framework in Kenya.

11. REFERENCES