IN THE HIGH COURT OF TANZANIA

AT ARUSHA

MISC. CIVIL APPLICATION NO. 21/2001
(Originating from HCCC 52/1999)

NATIONAL BANK OF COMMERCE LTD. ... ... APPLICANT

- Versus -

RENADA MINERALS CORPORATION LTD.
NBC HOLDING CORPORATION ... ... RESPONDENTS

R U L I N G

MSOFFE, J.

This is an application under Order 1 Rule 10(2) of The Civil Procedure Code, 1966 in which this Court's Order is sought to strike out the name of the applicant and substitute thereto the name of the 2nd respondent. In the alternative, this Court is being asked to extend time to the applicant to file a written statement of defence. The alternative prayer is grounded on the provisions of Order VIII Rule 1(2) of The Civil Procedure Code, 1966 and S.14 of The Law of Limitation Act, 1971.

Mr. Magai learned advocate has filed a written submission on behalf of the applicant. In a nutshell, the gist of the application is that by virtue of S.10 of The National Bank of Commerce (Reorganization and Vesting of Assets and Liabilities) Act,1997 as amended by The Written Laws (Miscellaneous Amendment) Act No.2/98

and further amended by the relevant provisions of Act 10/2001,

to quote Mr. Magai, ".....all liabilities arising from both banking and non banking activities of which the cause of action arose prior to 1st October, 1997 were and are vested in the NBC Holding Corporation (now Consolidated Holding Corporation) and section 10 of the Act as amended by Act No. 10 of 2001 expressly exclude the Applicant from claims which have their causes of action arose before the effective date".

On the other hand, Mr. Ojare learned advocate has appeared and filed a written submission on behalf of the 1st respondent. Again, in a nutshell, he is of the view that the provisions of Order 1 Rule 10 (2) is limited in its application to a situation where a party has been improperly joined - a situation which does not arise here (i.e. Civil Case No. 52/99) because there are no joint plaintiffs or defendants. And that the applicant who is the sole defendant cannot claim to have been improperly joined and therefore bring itself within the provisions of Order 1 Rule 10(2). In this regard, Mr. Ojare has cited the case of Daphne Parry v Murray Alexander Carson 1962 E.A. 515 at page 516 thus:-

"the application for dismissal was misconceived as O.1 r.10(2) dealt with parties who have been wrongly joined or who ought to be joined or added, to "join" or "add" a party was not synonimous with making a person a party to a suit....."

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Also at page 517 that:-

> "Unless the removal of the plaintiff or defendant leaves the suit intact, O.1 rule 10(2) cannot apply."

Mr. Ojare, is also of the view that since the applicant has since filed a written statement of defence in Civil Case No. 52/99 in which there is a preliminary point of objection that the plaint does not disclose a cause of action against it then the gist of this application can only be argued in the said objection.

Mr. Maruma learned advocate has also filed a written submission on behalf of the 2nd respondent. In his submission, yet again in a nutshell, it is not for the applicant to decide who the respondent should sue. He went on to urge that the said respondent has freedom under the law to chose whom to sue. And that in exercise of that freedom it will then be upon the Court ultimately to determine whether or not a cause of action is disclosed from the plaint. He went on to urge that it is "otherwise unusual

> for a Defendant to come to Court and ask that they be removed from the suit and that a third party be brought in to take their place".

In conclusion, he was of the view that should the applicant feel that there is no cause of action there is always an opportunity to raise the matter as a preliminary point of law in the main suit.

I must confess that I have read with keen interest the

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submissions for and against the application. In the end, I am satisfied that the application must fail for the following reasons:-

One, as correctly argued by Mr. Ojare, the situation envisaged under Order 1 Rule 10(2) does not arise in this situation. The applicant as a sole defendant in the main suit could not claim to have been improperly joined.

Two, since the applicant does not deny that a written statement of defence (with a preliminary point of objection under paragraph 1 thereof) has been filed, then it is only fair to say (as argued by both Mr. Ojare and Mr. Maruma) that the best place to canvass the point herein would be there and not here. Indeed this is where the passage quoted to me by Mr. Ojare from Parry's case at page 516 is relevant thus:-

> "the court could not Order that the defendant be "dismissed from the suit" without either holding that the plaint disclosed no cause of action against him; or that, on the face of the pleadings as a whole, the plaintiff had no chance of success as, to so hold would be to prejudice the pending suit itself; one of the issues in which was that the plaint disclosed no cause of action; further there has been no application for rejection of the plaint under O.VII r.11 as disclosing no cause of action."

The application lacks merit. It is dismissed with costs.

J. H. MSOFFE

JUDGE

9/10/2002

Date: 9/10/2002

Coram: P. M. Kente - Ag. DR

For Applicant - Mr. Magai -Absent.

For 1st Respondent: Mr. Ojare Advocate - Absent.

For 2nd Respondent: Mr. Maruma Advocate - - Present

Court: Ruling delivered to Mr. Maruma for the second respondent this 9th day of October, 2002.

P. M. KENTE
Ag. DISTRICT REGISTRAR

ARUSHA

9/10/2002