THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA, AT KAMPALA

MISC. CIVIL APPL. NO 695 OF 2002

ARISING OUT OF HCCS NO.199 OF 2002.

1. NGAMITA PAROZA
2. SAMALI NALUBOWA SSENYONGA]
3. MWANJE
SILVEST ::APPLICANTS

Vs.

BANK OF UGANDA
THE LIQUIDATOR OF
THE CO-OPERATIVE BANK
LIMITED::RESPONDENTS

RULING.

This application, by chamber summons, seeks leave to amend the plaint in civil suit number 199 of 2002.

The original plaint in civil suit number 199 of 2002 was filed in the Civil Registry n 4th April,2002. Civil Suit number 199 was instituted against two defendants. They were named in the plaint as below:

"1. The Bank of Uganda
2. The Liquidator of The Co-operative Bank Limited."

These chamber summons were presented before court on 8th November, 2002. The application was heard on l0" December, 2002. That was before a scheduling conference could be fixed for Civil Suit No.199 of 2001.

The application is presented under Order 6 rules 18 and 30, of the Civil Procedure Rules. There is a supporting affidavit deponed by the first plaintiff, Mr.Ngamita Paroza. The amendment, in respect of which leave is being sought, aims at renaming the defendants in Civil Suit No.199 as below:

"1. The Bank of Uganda (as the liquidator of the Co-operative Bank ltd.
2. The Co-operative Bank Ltd. (In Liquidation).

In his submissions learned counsel Mr. R.K. Kasule, Counsel for the applicants, has stated that all the amendment in respect of which leave is being sought is simply to re-describe the second defendant as " Co-operative Bank in Liquidation". He explained that the wrong description of the second in the first place, was the result of inadvertence. Mr. Kasule submitted that the amendment was being sought at an early opportunity before the commencement of the trial and, if leave were granted, the amendment would not occasion any prejudice or injustice to the opposite parties since the Bank of Uganda was the main player both as the liquidator of the Co-operative Bank and as the regulatory body.

Mr. Masembe Kanyerezi, learned counsel for the respondents has raised two distinctive objections to the application.
The first objection relates to Order 6 rule 18 under which the application has been present by way of chamber summons. Mr. Masembe Kanyerezi argued that Order 6 rule 18 was a wrong procedure for an application which was affecting substituting or adding a new party to the case. In counsel's view, the correct procedure should have been to present the application under Order I rule 10(2) of the Civil Procedure Rules. That would have been by way of Notice of Motion.

The second objection relates to the legality of suing Bank of Uganda where the bank is acting as a liquidator. Counsel argued that section 32 (2) (e) of the Financial Institution's Statute, 1993, prohibited an action against Bank of Uganda where the bank was acting as a liquidator. In Counsel's view the only proper party to civil suit No.199 of 2002, was the Co-operative Bank in Liquidation. Any amendment seeking to introduce the Bank of Uganda as a party

ought to be disallowed for it would be made contrary to the express statutory law. Counsel undertook to provide this court with a direct authority on the subject. However, he subsequently never did so.

The general principles which guide the court when considering whether an amendment should be allowed or not have been well stated in numerous judgments of the highest courts in Uganda and East Africa in general.

An Amendment sought before the commencement of the hearing of the case to whose pleadings the amendment relates, should be freely allowed if the amendment can be made without prejudice to the other party. There would be no prejudice caused if the other party can be compensated by costs. Eastern Bakery Vs. Castellino [19581 E.A. 461 Also see Gaso Transport Service ltd. Vs. Martin Adala Obene, SCCS NO. 4 of 1994.

Where an amendment is not different in quality, from the original cause of action, it should be allowed. Essaji vs. Solanki [19681 E.A.

In their commentary upon the Indian Code of Civil Procedure, Citaley and Rao, 7th Edition Vol.11 P.2230, the learned authors state that two criteria must be kept in the mind of the court when considering whether a proposed amendment to the pleadings of a party to a suit should or should not be allowed. The court should answer the question, does the amendment put the other party to a disadvantage or cause injury? And, if so, can the disadvantage or injury be compensated by costs? If it can, then the amendment may be allowed. If it cannot, then the amendment must be refused.

With regard to the instant application, it appears to me that it would normally qualify to be easily allowed since court's leave is being sought at a very early stage before the hearing of the suit has commenced. It neither seeks to introduce a new cause of action nor does it cause any injustice to the opposite party or parties.

In respect of the first party named as defendant number one, I have carefully examined learned counsel, Mr. Masembe Kanyerezi's first objection to the application. I am unable to agree with him when he argues that the amendment is in effect a substitution of parties and, therefore, the application should have been by Notice of Motion, under Order I rule 10(2), of the Civil Procedure Rules. It is clear that the original plaint, filed in this court by the

applicant, on 4' April, 2002, named the first defendant as "The Bank of Uganda". The amendment now being sought is to rename and qualify the same defendant as The Bank of Uganda (as the Liquidator of The Co-operative Bank Ltd). It appears to me that what the amendment seeks to effect is clearly not to substitute the Bank of Uganda with a new defendant altogether. The amendment merely seeks to define the capacity under which the Bank of Uganda is being sued in the particular suit. Whether the Bank of Uganda were sued generally or in its definite capacity as the liquidator of the Co-operative Bank Ltd, the substantive party being sued would remain the Bank of Uganda. There would, in essence, be no addition or substitution of any party to the suit necessitating the invocation of the procedure under Order I rule 10(2) of the Civil Procedure Rules as Mr. Masembe Kanyerezi has argued.

The second party to the original plaint was named as "The liquidator of The Co-operative Bank", in the original plaint. The proposed amendment seeks to re-designate the second defendant as "The Cooperative Bank Limited (In liquidation). Mr. Masembe Kanyerezi has argued that the two are different entities and replacing one with the other is not re-defining or re-designating but substituting one completely different entity or party for another. He submits that the amendment cannot be allowed under Order 6 rule 18. It can only be by Notice of Motion under Order 1 rule 10(2) of the Civil Procedure Rules.

Prima facie, the liquidator of the Co-operative Bank and the Co-operative bank limited, in liquidation, appear to be different entities. The role of being liquidator of a financial institution seized by the Central Bank under Section 31 of the Financial Institutions Statute, 1993, is given to the Central Bank by Section 32(2) (f) of the same Statute. After the seizure of a financial institution, the Central possesses exclusive powers of management and control of the affairs of the financial institution. The Co-operative Bank Limited, as the name itself suggests is a corporate entity. To that extent it appears that the amendment appears to be seeking to introduce a new party which is the Co-operative Bank Limited (in Liquidation). The company was not a party named in the original plaint. Mr. Masembe Kanyerezi's argument appears to me to be valid to that extent.

The pertinent question, however, is whether lack of use of appropriate procedure is fatal to the application. That is whether leave for the proposal amendment should be denied to the applicants on account of the fact that the proposed amendment, in as far as it seeks to rename

the second defendant, amounts to an introduction of a new party who was not named in the original plaint and because the application for leave to amend has been made by chamber summons under Order 6 rule 18 and not by Notice of Motion under Order 1 rule 10(2), of the Civil Procedure Rules?

It seems to me that if this court rejects this application only on account of the two reasons which I have stated above, it would be failing in its duty of ensuring that all parties whose presence before the court are necessary in order to enable the court hear and effectively and completely adjudicate upon and determine all the questions involved in the suit before it. In my humble view, both Order 1 rule 10(2) and Order 6 rule 18 serve a similar purpose. They aim at achieving the same ultimate objective. Under Order I rule 10(2) the court can exercise the jurisdiction upon its own motion.

Spry J.A, as he then was, in Boyes Vs. Gathure 119691 E.A. 385, enunciated a very sound principle which appears to me to apply to a situation such as the one pertaining in the instant application with regard to the proposed naming of the second defendant.

That principle is that the mere adoption of a wrong procedure would not invalidate the proceedings where:
(a) it did not go to the question of jurisdiction, or
(b) no prejudice was caused to the opposite party.

None of those two essential elements pertain in the instant application in as far as I am able to ascertain. Neither does learned counsel for the respondents allege that they do.

Lastly, it appears to me that even Article 126 (2) (e), of the Constitution of The Republic of Uganda, 1995, would be appropriately invoked in a situation of this kind. Substantive justice must be administered without undue regard to technicalities.

For those reasons, I must conclude that the entire first objection raised by learned Counsel, Mr. Kanyerezi, fails.

The second objection related to the provisions of Section 32 (2) (e) of the Financial Institutions Statute, 1993. Mr. Masembe Kanyerezi argued, if I got him right, that under that provision of the law the Central Bank cannot be sued, under whatever descriptions. The

proposed amendment to sue Bank of Uganda as the liquidator of the Co-operative Bank limited, therefore, would be illegal and should be rejected upon that account.

The provisions of Section 32, of the Financial Institutions Statute, in the relevant parts read as below:

"32. (1) The Central Bank shall, upon possessing a financial institution under section 31 of this Statute, be vested with exclusive powers of management and control of the affairs of the financial institution.

(2) The powers referred to in subsection (I) of this section shall include power to

e) initiate, defend and conduct, in its name, any action or proceeding to which the financial institution may be a party

I have, earlier, mentioned the fact that learned counsel for the respondents did not eventually provide the authority which is mentioned during his submissions as constituting the basis of this particular submission.

I have examined the text of the law as set out above. I find nothing to support the submission made by learned counsel before me. On the contrary, the opposite of his submission seems to me to be true. The word "defend" used in paragraph (e) of subsection (2) of section 32, of the Financial Institutions Statute, 1993, is not restricted to merely defending a suit instituted against the financial institution solely but also includes the Central Bank defending such suit as a co-party to it.

Lastly, Mr. Masembe Kanyerezi prayed that if this court grants leave to the plaintiffs, as sought by them through this application, then the costs of the application should be awarded to the defendants. I have examined the submission and found no basis for that prayer. I reject it. This court in its discretion orders that the cost of the application abides by the outcome of Civil Suit No 199 of 2002.

The final orders therefore are:

(a) Leave is granted to the applicants to amend their plaint in the terms proposed in the amended plaint which was annexed to this application.

(b) The defendants will have 14 days from the delivery of this ruling to adjust their own pleadings should they desire to do so.

(c) The case is fixed for a scheduling conference on Friday, 14th February, 2003 at 10.00 a.m.

V.F.MUSOKE-KIBUUKA (JUDGE)

14/1/2003.