



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 416 of 2008

SAMUEL MWAMBA AMBUNDO & 327 OTHERS ..... PLAINTIFFS

VERSUS

SPELL INVESTMENT CO. LTD. .... 1ST DEFENDANT

CONSOLATA NABWIRE ASEMBO ..... 2ND DEFENDANT

CONSOLIDATED BANK OF AFRICA ..... 3RD DEFENDANT

FRANCISCA ADIKINYI ASEMBO ..... 4TH DEFENDANT

ROBERT AKUMU ASEMBO .....5TH DEFENDANT

RULING ON PRELIMINARY OBJECTION

There is a Notice to raise a Preliminary Objection by 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents. The first point is numbered (a). The point numbered (b) has been withdrawn. Therefore the objection now is that no order has been made BY this court in terms of provisions of **Order 1 Rule 10 (2)** to empower the 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents as parties to this suit and consequently, they are not proper parties to these proceedings and therefore their names ought to be struck off.

The replying affidavit sworn by Robert Akumu Asembo states that he is the son of Francisca A. Asembo, the 4<sup>th</sup> defendant who has given authority to him swear this affidavit. Court leave was not obtained to join them in the suit. They should not be sued together as a single party.

They relied on the authority of **Chanzu vs. Guardian Bank Villa Ltd.** Considering the **Civil Procedure Rules** in relation to that authority it is to be observed that **Order 1 Rule 10 (1)** and **(2)** deals with substitution and addition of parties where a suit has already been instituted. **Order 1 Rule 10 (2)** deals in circumstances where the court may at any stage of proceedings either upon or without application of either party and on terms as may be just add any party to the suit.

In this case the applicants were joined in the place of the deceased relative and the appointment issued from Succession Division of this High Court. They represent the estate of the late Boniface Anderson Ngosia. No leave would be required in the circumstances, only evidence of a grant. There is no prejudice which will be suffered by the addition.

In the circumstances, I find no merit in the Preliminary Objection and I do not uphold the Preliminary Objection. Costs will be in the cause.

Orders accordingly.

DATED, SIGNED and DELIVERED this 17<sup>th</sup> day of July, 2009.

**JOYCE N. KHAMINWA**

**JUDGE**