



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**

**Civil Suit 404 of 2010**

**NEXTECH LIMITED.....**  
**.....PLAINTIFF**

**VS**

**BEDAN CHEGE t/a BEDAN AUCTIONEERING SERVICES .....**  
**1<sup>ST</sup>DEFENDANT**

**YOUNG BIBIRIONI INVESTORS LIMITED.....2<sup>ND</sup>**  
**DEFENDANT**

**RULING**

1. The application before me is a Notice of Motion dated 23<sup>rd</sup> February 2012 and expressed to be brought principally under Order 40 Rules 1, 2 and 3, Section 52 of the Transfer of Property Act and Section 159 of the Constitution of Kenya 2010. Through the application, the Plaintiff/Applicant seeks orders to prohibit and/or restrain the 2<sup>nd</sup> Respondent from transferring, charging and/or disposing property L.R. No. 209/1173 Nairobi (hereinafter called “the suit property”) pending hearing and determination of the suit in this matter. In the alternative, the Applicant seeks orders that the Respondents be ordered to deposit security for defending the suit.
2. The application is based on grounds set out on the face of the application and is further supported by an affidavit sworn on 20<sup>th</sup> February 2012 by Eugene Victor Wandera, the Managing Director of the Plaintiff Company.
3. The Applicant’s case is that the 2<sup>nd</sup> Respondent is in the process of disposing the property aforesaid in order to avoid any consequential orders that may be issued in this suit hence the necessity for the orders of prohibition in line with the doctrine of *lispendens*.
4. The Applicant was a tenant in the suit premises. The Applicant filed the suit herein claiming general damages for unlawful eviction by the Respondents which suit it claims has high chances of success. Following the filing of the suit, the Applicant is apprehensive that the Respondent is likely to interfere with the said premises in order to avoid any consequential orders that may be issued against him. To that end, the Applicant claims that the Respondents have already offered the property as security for bail in a case ending at the Kibera Law Courts. The Applicant claims further that the suit property has been offered for sale and that many people have been viewing it. A valuer had also visited the premises to

conduct valuation for purposes of the intended sale. The property should therefore be preserved pending the hearing and determination of the suit as any consequential orders issued in the suit will be in vain if the premises are not preserved. No prejudice would be suffered by the Respondents as the property will be preserved in accordance with the law.

5. Counsel for the Applicant Mr. Kwengu submitted that the application for *lis pendens* is based on Section 52 of the Transfer of Property Act, 1882 of India (hereinafter called "ITPA"). He relied on the authority of **Trust Bank Ltd vs. Samuel Ngara Kabundit/a Cord Trading Company Civil Application No. NAI 37 of 1993(19/93UR)** where **Bosire J.** applied the doctrine of *lis pendens* in a suit challenging wrongful eviction to grant a mandatory injunction against the Applicant restoring possession of property to the Respondent. The present application was therefore not based on Order 40 of the Civil Procedure Rules. Mr. Kwengu submitted further that the amount of damages claimed was substantial and that if the court was minded not to grant an injunction it should make an order that the Respondent deposits security for the sum claimed in court.

6. The application is opposed through Grounds of Opposition filed by the 2<sup>nd</sup> Respondent on 6<sup>th</sup> March 2012. The 2<sup>nd</sup> Respondent contends that the Applicant has not established a prima facie case with any probability of success as the claim was based on auctioneer's attachment of assets for rent recovery and that the staggering claim of Kshs. 5,361,504,500/- was not supported by evidence. It further contends that the Applicant had not shown what substantial loss it stood to suffer if no injunction was granted and neither had it shown that the said loss was incapable of being adequately compensated by an award of damages. It is further contended that the Applicant's claim was not for recovery of L.R. No. 209/1773 hence the doctrine of *lis pendens* under Section 52 of the ITPA did not apply. The 2<sup>nd</sup> Respondent further asserts that its right of ownership of the suit property under Article 40 of the Constitution of Kenya could only be trammled if the property was unlawfully acquired, which was not the case in the present matter. Order 40 Rule 1(b) of the Civil Procedure Rules could also not apply as there was no empirical evidence that the 2<sup>nd</sup> Respondent intended to dispose of the property in circumstances affording reasonable probability that the 2<sup>nd</sup> Respondent intended to obstruct or delay execution of any decree issued against it.

7. Counsel for the 2<sup>nd</sup> defendant Mr. Kamara in buttressing the opposition to the application submitted that the application was clearly for orders of injunction, as it was brought under Order 40 rules (1) (2) & (3) which deals with applications for injunction. In that regard, the application had failed to meet the principles for grant of injunction as set out in **Giella Vs. Cassman Brown**. The claim by the Applicant of Kshs. 5 Billion was not supported by documents showing the basis of the claim. Further, on the face of what was stated in the plaint and the supporting affidavit, the claim was for special damages, as it was quantified. The plaintiff had therefore not made a prima facie case for injunction orders. Mr. Kamara submitted further that the plaint did not make any claim for injunction orders against the defendants with regard to LR No. 209/9773. No claim for land had also been. The issue before the court was a claim for damages and an injunction to restrain the defendants from selling the property did not lie. On the claim that the defendants intended to sell the property, Mr. Kamara submitted that no evidence had been tendered to show that the property was being sold. The information relied upon for such contention was hearsay, as the Plaintiff claimed that the information was from tenants. The tenants have not reported to that information. The same is hearsay. Mr. Kamara submitted that the property was not for sale and any valuation done was for rental purpose. He submitted further that Section 52 of ITPA had no application to the present suit, as LR 209/1773 was not the subject matter of the suit. He distinguished the case of **Trust Bank Ltd vs. Samuel Ngara** (supra) from the present case as in that case, the tenant was claiming reinstatement. He urged the court to look at the strength of the company *vis a vis* the claim for Kshs. 5 Billion arguing that the share capital of the company was only Kshs. 400,000/-. He urged the court to dismiss the application as it had no merit.

8. In his brief response, Mr. Kwengu for the Applicant told the court that the present case involved a tenancy relationship hence Section 52 of the ITPA applied. He further submitted that Article 159 of the Constitution gave the court jurisdiction to give parties substantive justice. On the value of the company, Mr. Kwengu submitted that experts would be called at an appropriate time to prove the value of the IT

equipment claimed by the Applicant.

9. I have carefully reviewed the application and the affidavit evidence placed before the court. I have also considered the submissions by counsel for both parties as well as the authorities cited.

10. The issues that arise for determination of the application before me are mainly two: Firstly, whether the Applicant has met the requirements for grant of injunction orders as established in the case of **Giella vs. Cassman Brown(1973) EA 358** and, secondly, whether Section 52 of the Indian Transfer of Property Act, 1882 is applicable to this case and whether therefore an order of *lis pendens* can be granted to preserve the suit property pending hearing and determination of the suit.

11. With regard to the issue of whether the Applicant has made a case for grant of injunction orders, the basis upon which an injunction order is sought is that the 2<sup>nd</sup> Respondent is in the process of disposing of the suit property so as to avoid any consequential orders that may be issued in the suit in this matter. The evidence relied upon by the Applicant is that the Applicant has been informed by tenants occupying the suit property that people have been visiting the premises to view with the intent of purchasing the property. The Applicant further claims that the property has been valued for purposes of the intended sale. I have evaluated the evidence relied upon by the Applicant and take the view that the same does not suffice to constitute a prima facie case in favour of an order of injunction. This is essentially because the evidence given by the tenants of viewing of the property by would-be purchasers is hearsay and is not corroborated by additional incisive evidence. The contention that the property has been re-valued is also insufficient to prove an intention to sell the property as valuation of property can be done for several purposes and not necessarily for purposes of sale only.

12. Further, it is clearly evident that the claim by the Applicant is liquidated, being well computed and particularized. In that regard, the claim can adequately be compensated by an award of damages. As for the substantial amount of damages claimed, the size of quantum of damages cannot on its own found a prima facie case for grant of an injunction especially when the quantum itself is disputed and further when no evidence is tendered to show that the Respondents would be incapable of paying such damages if eventually awarded.

13. In any event, I take the view that the prospects of grant of an injunction against sale of the property as sought by the Applicant are further dented by the fact that the Applicant does not currently have a legal or equitable claim against the property itself. The subject matter of the suit is a claim founded on damages for wrongful eviction as opposed to a claim for ownership of the property or indeed one based on enforcement of the tenancy relationship between both the landlord and the tenant. The prayers sought in the plaint filed by the Applicant on 3<sup>rd</sup> June 2010 seeks prayers for an order of prohibition restraining the defendants from selling the plaintiffs goods, general damages and interest thereon, which in effect disclaim any right targeted at the property itself. The Applicant's claim is therefore distinguishable from the claim in the case of **Trust Bank Ltd vs. Samuel Ngara**(supra)where the tenant sought to be restored back to the leased premises.

14. In my view, the position would have been different if the Applicant had a right or claim directly bearing upon the property by virtue of some encumbrance in its favour over the property created by a legal instrument or registered against the title. Such encumbrance would have ipso facto founded a prima facie case for restraining the 2<sup>nd</sup> defendant from disposing of the property until the suit herein is heard and determined. In the absence of such a right, the Applicant's quest for an injunction against sale of the property is remote.

15. For the above reasons, I am reluctant to grant an order of injunction as prayed in the present application.

16. With regard to the Applicant's invocation of Section 52 of the ITPA in seeking the preservation of the property vide the doctrine of *lis pendens*, I have perused the wording of that section and the same states as follows:

**“During the active prosecution in any court having authority in British India, or established beyond the limits of British India by the Governor-General in Council, of a contentious suit or proceeding in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the court and on such terms as it may impose”**

17. In my view, the effective words in Section 52 aforesaid are **“suit or proceedings in which the right to immovable property is directly and specifically in question”**. In that regard, application of Section 52 of the ITPA only arises where the suit in question involves a direct contest between parties on the right to immovable property. In other words, the right to the immovable property itself has to be the subject matter of the suit. Consequently, Section 52 of the ITPA does not apply in the present suit as the Applicant’s suit is not based on a claim to ownership of L.R. No. 209/1173 Nairobi, the suit property. As it is common ground that ownership of the property is not the subject matter of this suit, there can be no doubt that Section 52 of the ITPA does not apply and right to *lis pendens* does not arise. The application therefore fails on this strand.

18. For these reasons, the Plaintiff/Applicant’s Notice of Motion dated 17<sup>th</sup> February 2012 is hereby dismissed with costs.

**IT IS SO ORDERED.**

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 3<sup>RD</sup> DAY OF MAY 2012.

**J.M. MUTAVA**  
**JUDGE**