



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 101 OF 2018

WORLD EXPLORER SAFARIS LIMITED.....PLAINTIFF

V E R S U S –

NIC BANK KENYA PLC

(FORMERLY NIC BANK LIMITED).....1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEER.....2ND DEFENDANT

RULING

1. World Explorers Safaris Ltd, the plaintiff/applicant herein took out the motion dated 18.5.2018, in which it sought for the following *interalia*:

1. Spent

2. Spent

3. THAT an interlocutory injunction be granted restraining the 1st and 2nd respondents whether by themselves, their servants, workers, agents and/or employees from interfering, trespassing, auctioning, wasting, damaging, alienating, selling removing, or disposition of the property known as L.R. NO. 1870/IX/181-SUITE NO. G14 5TH FLOOR THE KRISHNA CENTRE-WOODVALE GROVE WESTLANDS-NAIROBI COUNTY REGISTERED IN THE NAME OF WORLD EXPLORER SAFARIS LIMITED or any part thereof pending the determination of the main suit;

4. THAT the charge statutory notice issued pursuant to section 90(1) (2) (3) (e) and the statutory notice to sell issued pursuant to section 96(2) (3) of the Land Act, 2012 by the 1st respondent be revoked/rescinded/voided.

5. THAT the notification of sale issued by the 2nd respondent be revoked/rescinded/voided and or be postponed and the 2nd respondent be restrained from undertaking the public auction of property known as L.R. NO. 1870/IX/181-SUITE NO. G14 5TH FLOOR THE KRISHNA CENTRE-WOODVALE GROVE WESTLANDS-NAIROBI COUNTY REGISTERED IN THE NAME OF WORLD EXPLORER SAFARIS LIMITED which is to be held on 26th June 2018.

6. Spent

7. THAT the court do make a declaration that the 1st respondent breached its duty of care to the applicant because it failed to ensure that a forced sale valuation is undertaken by a valuer before exercising the right of sale.

8. THAT the applicant be granted the costs of this application.

9. THAT this honourable court do issue any such other and/or further orders as justice of the case herein may demand.

2. The motion is supported by the affidavit and a further affidavit of Reshma Shah. When served, NIC Bank Kenya PLC (formerly NIC Bank Ltd), the 1st defendant herein, filed the replying affidavit of Kenneth Mawira to oppose the motion. When the motion came up for interpartes hearing, learned counsels recorded a consent order to have the same disposed of by written submissions.

3. I have considered the grounds set out on the face of the motion and the facts deponed in the affidavits filed in support and against the application. I have also considered the rival written submissions.
4. It is the submission of the plaintiff that the 1st respondent issued an irregular charge statutory notice pursuant to Section 90(1) (2) (3) (c) of the Land Act, 2012 in respect of L.R no. 1870/IX/181 – Suite no. G14 5th floor the Krishna Centre Woodvale Grove, Westlands.
5. The plaintiff further submitted that the 1st respondent failed to ensure that a forced sale valuation was undertaken before issuing the statutory notice, therefore the intended sale scheduled for 26.6.2018 by Garam investments Auctioneers, the 2nd defendant is illegal because it is based on a valuation which is way below the current open market value.
6. The plaintiff/applicant also submitted that it carried out a correct valuation which put the open market value at of the property at ksh. 12 million while the forced sale value is fixed at ksh.9 million as opposed to that of the respondent of ksh. 8 million.
7. The plaintiff stated that it intends to sell the parcel of land knows as LR No. Kajiado/Kaputieir Central/1361 Mashuru Town, Kajiado County and use its proceeds to service the loan due to the 1st respondent.
8. The respondent vehemently opposed the motion. The 1st defendant pointed out that it extended credit facilities to the plaintiff totalling ksh.10,200,000/= and USD.150,000/= by a letter of offer dated 5th April 2016 and the Addendum dated 29th June 2016 secured by a legal charge over office no. 914, 5th floor on LR 1870/IX/181 Krishan Centre for USD 69,500/=.
9. It is said that the legal charge was duly registered on 26.9.2016 and the plaintiff’s directors executed a guarantee and indemnity for ksh.10,200,000/= and USD 150,000/= undertaking to repay the credit facilities.
10. The 1st defendant stated that it issued a statutory notice of sale dated 22.1.2018 pursuant to Section 90(1) of the Land Act, 2012 when the plaintiff defaulted in repaying the loan. The 1st defendant through the 2nd defendant issued a notice of sale dated 23.4.2018 over the charged property.
11. It is also pointed out that the plaintiff admitted by way of email defaulting in repaying the credit facilities and even made proposals to restructure the repayment which did not meet the threshold of Banking Regulations on non-performing loans.
12. Having considered the material placed before this court, it is apparent that the plaintiff does not dispute the fact that it defaulted in repaying the credit facilities advanced to it by the 1st respondent.
13. It is also not disputed that the plaintiff engaged the 1st defendant to have the repayment to be restructured. The main ground the plaintiff has relied in support of the application is that the statutory notices of sale are illegal and invalid.
14. The second ground is that there was no prior valuation before the notices were issued. I have carefully perused the averments and the annexures attached to the replying affidavit filed by the 1st defendant, and it is apparent that the 1st defendant actually carried out a valuation by a competent valuer over the charged property as required.
15. It is also clear that the 1st defendant issued valid notices in compliance with the law. In the end, I find no merit in the plaintiff’s motion. The same is dismissed with costs to the respondents.

Dated, Signed and Delivered in open court this 19th day of October, 2018.

J. K. SERGON

JUDGE

In the presence of:

.....for the Plaintiff

.....for the Defendant