Finezza Capital Holdings Limited (aka) Finezza Limited Capital Limited v Solomon (Civil Appeal E920 of 2022) [2024] KEHC 8869 (KLR) (Appeals) (18 July 2024) (Judgment)

Neutral citation: [2024] KEHC 8869 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

APPEALS

CIVIL APPEAL E920 OF 2022

AB MWAMUYE, J

JULY 18, 2024

BETWEEN

FINEZZA CAPITAL HOLDINGS LIMITED (AKA) FINEZZA LIMITED CAPITAL LIMITED ..... APPELLANT

AND

RUTH NIVA ONGACHI SOLOMON ..... RESPONDENT

(Being an Appeal against the Ruling of Hon. L.L. Gicheha (CM) delivered on 23rd June, 2021 in Milimani CMCC No. E723 of 2020)

JUDGMENT

1. The Memorandum of Appeal dated 7th November, 2022 sets out five (5) grounds all of which revolve around a solitary question, which is whether the Trial Court was in error in dismissing with the costs to the Respondent the Appellant's Application dated 9th March, 2021 which sought to set-aside the interlocutory judgment entered against the Appellant on 1st December,2020 together with all its consequential orders, and also grant the Appellant leave to file a defence and defend the suit.

2. The Appellant's Written Submissions dated 8th April, 2024 contend that the Learned Magistrate was in error in declining to exercise the lower court's discretion in favour of the Appellant. The Appellant contends that the lower court failed to cure an injustice meted out upon the Appellant as a result of lack of proper service of the summons and the suit documents; and also that it raised a good defence to the claim, and that the Trial Court erred in law and in fact in making a finding to the contrary.

3. Unsurprisingly, the Respondent's Written Submissions dated 29th April, 2024 argue that there were no errors of law or fact in the Trial Court's impugned decision. The Respondent averred that the lower court matter proceeded *ex-parte* after the Appellant failed to enter appearance after being properly served with the summons and the plaint documents. The Respondent points out that this proper

service was evidenced by the Appellant stamping the suit documents, a fact that was set out by the Trial Court in arriving at the impugned decision. The Respondent also supports the lower court's determination that the defence that the Appellant sought to present did not raise any triable issues.

4. In considering whether the Appellant's contention that the Trial Court erred by failing to exercise its discretion properly to set aside the ex parte judgment should be sustained, the famous passage from the Court of Appeal's decision in *CMC Holdings Limited v James Mumo Nzioki*, [Nrb CoA CA No. 329 0f 2001] guides this Court. That famous passage is that:

> " Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle."

5. Further guidance can be found in the dicta of the Court of Appeal in *Pithon Waweru Maina v Thuku Mugira*, [Nrb CoA CA No. 27 of 1982] in which the Court of Appeal cited with approval the seminal decisions of *Shah v Mbogo*, [9167] EA 116 and *Patel v E.A. Cargo Handling Services Limited*, [1974] EA 75. The relevant passage is as follows:

> " ... if a default judgment is a regular one, the Court has unfettered discretion to ser aside such judgment and any consequential decree or order...the discretion is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but it is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice....it should always be remembered that to deny a person a hearing should be the last resort of the court."

6. This Court, sitting on appeal, must examine the Trial Court's finding in light of two questions, namely:

   i. Did the Appellant provide a good, compelling, and acceptable reason?; and

   ii. Did the Appellant point to a good defence that raises triable issues?

7. The Appellant's reason for not entering appearance was that there had not been good and proper service on it. The lower court rejected this argument and found that the Appellant had been served severally and had even stamped the suit documents in acceptance and confirmation of service. In arriving at that conclusion, the lower court was not in error. The Respondent herein adduced evidence that plainly shows that the Appellant accepted and confirmed receipt and service of the suit documents, and this is plainly seen from the Respondent's Replying Affidavit in opposition of the Appellant's Application.

8. Having been properly served, it was incumbent on the Appellant to offer a good reason as to why it did not thereafter enter appearance. It did not have a good reason either before the Trial Court or before this Court sitting on appeal.

9. On the second issue, I take the view that even if a defendant does not have a good excuse as to why it failed to enter appearance and defend a suit, if it presents the trial court with a good defence that raises triable issues then the trial court may nonetheless choose to set aside the default judgment and grant the defendant leave to defend the suit having been persuaded by the issues that the defendant proposes to ventilate. After all, the plaintiff can be mollified for the delay and elongated processes by way of costs. It is no strict obligation to set aside a default judgment where a court that has found that there

was no good excuse for the failure to enter appearance and defend the suit but then has found there are triable issues; but if those triable issues are of such a weighty nature as to amount to an injustice if the defendant is allowed to defend itself then a trial court should allow such an application on such terms as it sees fit but awarding the costs to the plaintiff.

10. In the present case, I agree with the Trial Court's finding that the Appellant did not raise any triable issues deserving of having a regular *ex-parte* judgment set aside so that the matter be determined on its merits. The proposed defence was in fact an admission of the debt, with the only issue which the Appellant sought to litigate being the question of the interest payable. The lower court found that this was not a triable issue as it was a contractual term that the Trial Court could not interfere with since there was no suggestion or proof of coercion, fraud or undue influence; a finding that I also affirm.

11. The Trial Court's finding that the Appellant did not proffer a good reason that would compel it to exercise its discretion in favour of the Appellant, as well as the finding that the Appellant did not raise any triable issues in its proposed defence are both sustained.

12. Consequently, this Appeal is without merit and I dismiss the matter with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18TH DAY OF JULY, 2024.

BAHATI MWAMUYE

JUDGE

In the presence of:

Ms. Kagendo h/b for Mr. Gitonga Counsel for the Appellant

Ms. Adhiambo h/b for Mr. Gitonga Counsel for the Respondent

Mr Guyo, Court Assistant