Kenya Defence Forces & another v Sande (Civil Appeal (Application) 10 of 2020) [2024] KECA 1675 (KLR) (22 November 2024) (Ruling)

Neutral citation: [2024] KECA 1675 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL (APPLICATION) 10 OF 2020

DK MUSINGA, S OLE KANTAI & JM MATIVO, JJA

NOVEMBER 22, 2024

BETWEEN

KENYA DEFENCE FORCES ..... 1ST APPELLANT

THE HON. ATTORNEY GENERAL ..... 2ND APPELLANT

AND

LT. COL. LUKALE MOSES SANDE ..... RESPONDENT

(Being an application to strike out record of appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Makau, J.) dated 30th November 2018 in ELRC Cause No. 1529 of 2015)

RULING

1. By way of a notice of motion dated 26th February 2020 which is brought pursuant to the provisions of rules 77(1), 82(1) and (2), 83 and 84 of the Rules of this Court, the applicant seeks an order to strike out the record of appeal dated 31st December 2019 and filed on 13th January 2020.

2. The grounds in support of the application are laid down on the face thereof and in the affidavit in support sworn by the applicant. It is contended that judgment in the suit giving rise to this application, to wit, Employment and Labour Relations Court Cause No. 1529 of 2015, was delivered by the trial court on 30th November 2018; that the respondents never filed a notice of appeal against the decision as the notice of appeal on record is indicated to be against a decision of the trial court delivered on 30th December 2018; and that the notice of appeal so filed by the respondents was served upon the applicant's advocate on 22nd February 2019, which was about 82 days from the date of delivery of the impugned judgment, and it was therefore, for all intents and purposes, served out of time.

3. In addition, it is contended that after delivery of the judgment, the respondents failed to take an essential step of applying for a decree, which is a necessary document in any appeal, and that they only

began the process of obtaining the decree on 7th January 2020, which was more than 2 years from the date the impugned judgment was delivered. The delay is inordinate and inexcusable, the applicant stated. Further, that the letter applying for proceedings from the trial court was never served upon the applicant or his advocates as required under the rules of this Court.

4. The applicant contends that the respondents have attended to this appeal with a lot of unexplained delay, with the sole intention of frustrating him from enjoying the fruits of his judgment. He urges this Court to find favour in his application and strike out the record of appeal with costs.

5. The applicant filed submissions in support of the application. The submissions are no more than a rehash of the arguments we have summarized above.

6. The application is opposed by way of a replying affidavit sworn by Colonel Alice M. Mate, of the Kenya Defence Forces Headquarters. The gist of her response is that the respondents filed a notice of appeal dated 7th December 2018, but the date of the impugned judgment was erroneously captured as 30th December 2018 instead of 30th November 2018; that the typographical error does not in any way prejudice the applicant; that the notice of appeal and the letter requesting proceedings were served upon the applicant's advocate on 22nd February 2019 owing to a mistake of the clerk who was instructed to effect service of the said documents upon the applicant's advocate; and that the respondent applied for the decree on 7th January 2022, which application was well within the time for filling the record of appeal.

7. It is averred that the respondents have complied with all the requirements of rule 82 and that it is in the interest of justice that this application be disallowed so that the appeal can be heard on its merit.

8. The respondents have filed written submissions wherein they contend, inter alia, that a mistake of their clerk who failed to serve in good time, the notice of appeal and the letter requesting for the proceedings should not drive them away from the seat of justice; that they have fully complied with the provisions of rule 82, and that Article 50 of *the Constitution* guarantees them the right to a fair hearing.

9. At the hearing hereof, only Mr. Were was present for the applicant.

   There was no appearance for the respondents, despite service of the hearing notice upon their representative, the Attorney General. Mr Were made brief oral highlights of his client's written submissions.

10. We have given due consideration to this application, the replying affidavit, the submissions and the applicable law. The appellate process to this Court is commenced by filing of a notice of appeal within 14 days from the date of the decision sought to be appealed from. Rule 75 (1) and (2) of the Court of Appeal Rules, 2010 (which Rules were applicable at the time this application was filed), stipulates as follows:

> "(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.
>
> (2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal." [Emphasis added]

11. The notice of appeal in question was filed on 7th December 2018 whereas the impugned decision was delivered on 30th November 2018. The notice of appeal, therefore, in our view satisfies the provisions of rule 75 (2). The erroneous citing of the date of the impugned judgment as 30th December 2018 instead of 30th November 2018 is an issue that is overtaken by events in view of the decision by Musinga, (P),

dated 17th May 2024 where the Court allowed an application by the respondents to amend the notice of appeal to reflect the correct date of the delivery of the impugned judgment.

12. By dint of the provisions of rule 77 (1), an intended appellant must serve the lodged notice of appeal on all persons directly affected by the appeal within seven days of lodging it. This is the gravamen of this application. The notice of appeal was filed on 7th December 2018 and was therefore supposed to be served upon the applicant or his advocate by 14th December 2018. It was not served by that date and the respondents acknowledge that it was in fact served upon the applicant's advocate on 22nd February 2019, more than two months from the date it was filed in court. In essence, therefore, an essential step in the proceedings was not taken by the respondents within the stipulated timeframe. On the purpose of service of a notice of appeal, this Court stated in Daniel Nkirimpa Monirei vs. Sayialel Ole Koilel & 4 others [2016] eKLR thus:

> "... The purpose of service of a Notice of Appeal is to alert the parties being served that the case in question has not been concluded yet as the same has been escalated to another level. This enables the party to prepare and get ready for another fight, be it by way of gathering resources or just getting mentally prepared for defending the intended appeal. Failure to serve a party with a Notice of Appeal within the time prescribed by law gives a party false belief that the matter has been concluded, only to be ambushed later with the record of appeal in which the said notice is tucked away somewhere in the record. That occasions prejudice to the ambushed party, and it is in our view a habit that should not be countenanced in any fair and just process. That would explain why Rule 77(1) of the Court of Appeal Rules is couched in mandatory terms."

13. The respondents contend that failure to serve the notice of appeal was a mistake of a clerk who did not act on the instructions for service. They also allege a mix-up at their registry, the excitement surrounding the Christmas vacation, and the proceeding for annual leave by the said clerk as some of the other reasons why the notice of appeal was not served within the stipulated timeframe.

14. We do not think that these are plausible reasons for the delay in service, and in any case, the respondents ought to have caused the said unnamed clerk to swear an affidavit explaining the alleged mistake on his part. In the absence of such affidavit, the explanations by the respondents are hollow and cannot warrant the exercise of this Court's discretion in their favour. In any case, the respondents, upon realizing the said mistake, ought to have moved this Court under the provisions of rule 4 to seek enlargement of time within which to serve the notice of appeal upon the applicant. They did not do so.

15. Therefore, it is clear that there is no valid notice of appeal on record for want of proper service upon the applicant. As there is no valid notice of appeal on record, we do not deem it necessary to address the issue of service of the letter requesting proceedings. The record of appeal being premised on an incompetent notice of appeal must face the singular fate of being struck out.

16. In upshot, this application is merited. The record of appeal dated 31st December 2019 and lodged in this Court on 14th January 2020 is hereby struck out with costs to the applicant.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF NOVEMBER 2024.

D. K. MUSINGA, (P.)

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR.