



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO. 160 OF 2019**  
**(Originally Mombasa Cause No. 485 of 2018)**

**AMALGAMATED UNION OF KENYA METAL WORKERS...CLAIMANT**

v

**ASSOCIATED MOTORS LIMITED.....RESPONDENT**

**RULING**

1. In a Judgment delivered on 24 April 2020, the Court directed the Amalgamated Union of Kenya Metal Workers (the Union) and the Associated Motors Ltd (Respondent) to execute a collective agreement forthwith incorporating

- (i) 11% wage increment spread over 2 years.
- (ii) 5.5% house allowance increase.
- (iii) Leave travelling allowance of Kshs 6,150/-.

2. However, on 15 June 2020, the Respondent filed a Motion seeking orders

- 1. ...
- 2. ...

3. THAT this Honourable Court be pleased to review and set aside the Judgment delivered on 24<sup>th</sup> April 2020 by the Hon Justice Stephen Radido and/or any consequential orders therein.

4. THAT the Honourable Court be pleased to issue such further orders as it may deem in the interests of justice.

5. THAT the costs of this application be provided for.

3. The Union filed what it called a *Replying Memorandum* on or around 19 June 2020. The Respondent filed its submissions on 17 July 2020.

4. The Union indicated that it would not file submissions causing the Court to direct that it would deem the *Replying Memorandum* as the Union's submissions.

**Respondent's contentions**

5. In seeking a review of the Judgment, the Respondent contended new and important matters of evidence/circumstances which were not within its knowledge had arisen in that the declaration of COVID19 public health pandemic had led to a massive drop in its business (sale of motor vehicles) and the same had impacted labour costs; that its financial performance from 2016 has been poor and it would not be able to sustain the wage increments as ordered by the Court, and that job losses were likely to occur.

6. To strengthen its case, the Respondent requested the Court to consider the Memorandum of Understanding between the Ministry of Labour and Social Protection, the Central Organisation of Trade Unions and the Federation of Kenya Employers.

7. One of the objectives of the Memorandum was the preservation of jobs and cushioning of businesses against the expected impact of

COVID19.

**Union's rebuttal**

8. The Union, in its *Replying Memorandum*, asserted that the collective agreement in contention related to 2016/2017 to 2017/20198, and therefore COVID19 could not be used as a reason to review the Judgment.

9. The Union also asserted without providing evidence, that other companies in the motor industry had negotiated and agreed to wage increments for the material period and the Respondent could not be heard to allege it was operating in a difficult business environment.

10. The Court has considered all the material placed before it.

11. The Court does not agree with the Respondent that its financial position is a matter of new and important evidence it could not have discovered by the exercise of diligence.

12. The Court says so because it is expressly deposed in the supporting affidavit that the downturn started in 2016.

13. As the Court noted in paragraphs 20, 23, 26 and 30 of the Judgment, the Respondent did not make any counter-offers to the Union's proposals, based on its financial performance.

14. On the question of COVID19, it is correct that by the time the hearing of this Cause concluded, the impact of COVID19 had not been foreseen in this country.

15. Now that COVID19 is here, it would be an understatement that it has gravely affected the body politic including businesses and the workers.

16. The question however still begs as to the extent of judicial intervention where employment and organised labour is concerned.

17. When the Court delivered its judgment, it was setting terms and conditions of service for members of the Union, on those aspects of the terms where the Union and Respondent had failed to agree (the parties had agreed on most of the terms).

18. Terms and conditions of service once set in a collective agreement become incorporated in individual employment contracts of unionisable employees.

19. By dint of section 10(5) of the Employment Act, 2007, to vary and/or alter such terms and conditions of service, the employer is required to consult with the employee, and where the employees have organised under a Union, the employer ought as a matter, of course, consult and negotiate with the Union.

20. Such a course was recognised by the tripartite partners (social dialogue) when they appended their signatures to the Memorandum of Understanding relied on by the Respondent.

21. Given the recognition and prominence of social dialogue in the Memorandum, as well as in ILO Guidelines on COVID19, should the Court intervene in the manner suggested by the Respondent?

22. The Court does not think so.

23. The Respondent has not even remotely suggested that it sought to dialogue with the Union.

24. The Respondent must be aware that social dialogue is one of the cornerstones of industrial harmony and peace and such dialogue should be approached in utmost good faith. Court intervention should only be sought after an attempt has been made to dialogue and the intervention should not replace the need for social dialogue.

25. From the foregoing, the Court declines to review the judgment as sought by the Respondent.

26. The motion is dismissed with no order on costs due to the anticipated and ongoing social partnership between the Union and the Respondent.

**Delivered through Microsoft teams, dated and signed in Nairobi on this 7<sup>th</sup> day of August 2020.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Ondiege, Industrial Relations Officer

For Respondent Mr. Muhindi instructed by O & Law LLP Advocates

Court Assistant Judy Maina