



**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**

**VERSUS**

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

**RULING NO. 2**

1. For determination are 2 applications.

2. The first is a Motion dated 28 August 2020 by the Amalgamated Union of Kenya Metal Workers (the Union) seeking orders

1. ...

2. ...

3. **THAT** the Honourable Court do issue an order adopting the calculations of arrears to the grievant employees.

4. **THAT** the Honourable Court do issue an order enforcing section 26 of the Employment Act, 2007 and ILO Convention No. 100.

5. **THAT** the Honourable Court do issue any order it deems fit to address the cause of justice.

6. **THAT** costs of the suit to the applicant.

3. The second Motion is dated 1 September 2020 by the Respondent seeking orders

1. ..

2. ...

3. **THAT** pending the hearing and determination of the intended Appeal, this Honourable Court be pleased to stay implementation and/or execution of the Ruling delivered on 7<sup>th</sup> August 2020 dismissing the Applicant's application for review and affirming 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 interest of justice.

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

4. The Union filed a replying affidavit in opposition to the Respondent's Motion on 21 September 2020.

5. When the parties appeared in Court on 22 September 2020, the Court directed the filing and exchange of affidavits and submissions as a result of which the following were filed

(i) Respondent's replying affidavit in opposition to the Union's Motion on 7 October 2020.

(ii) Respondent's submissions on 19 October 2020.

(iii) Union's submissions on 21 October 2020 (the Union indicated in the submissions that the Respondent had not served it with its submissions by the agreed date).

6. The Court will first examine the Motion by the Respondent seeking a stay of implementation and/or execution of the Ruling delivered on 7 August 2020.

### **Respondent's Motion**

7. The grounds advanced by the Respondent in support of the Motion were in brief, that the onset and declaration of COVID19 public health pandemic had negatively impacted its business and therefore it was not possible to implement the judgment delivered 24 April 2020; that there was a risk of the Respondent ceasing operations within 6 months; that the Union had declined to engage in dialogue to agree on the best way forward to safeguard jobs; that the tripartite partners had agreed and issued a Memorandum of Understanding on 20 April 2020 on the suspension of the implementation of collective bargaining agreements during the COVID19 public health pandemic and, that it had an arguable appeal with high chances of success and that there was a likelihood of suffering a substantial loss if the judgment was enforced.

8. The Union, in opposing the Motion contended that the Respondent had not filed a Notice of Appeal within 14 days against the Ruling of 7 August 2020; the Court had become *functus officio* and that the Respondent had not invited it to any discussions to amicably resolve any emerging issues.

9. The Court has considered the Motion, affidavits and submissions, and come to the conclusion that the Respondent's Motion should be declined for the following reasons.

10. First, the Respondent is attempting to get orders which were effectively refused by the Court through its Ruling delivered on 7 August 2020.

11. Second, the primary grounds relied on by the Respondent in the instant Motion are the same grounds which were brought before the Court in the Motion which was dismissed on 7 August 2020. The grounds were COVID19 public health pandemic and its effects on the business environment and economy in general.

12. Third, the orders emanating from the Ruling of 7 August 2020 constituted a negative order and would not render itself of a stay of execution pending Appeal, unlike the Judgment which was delivered on 24 April 2020.

13. Four, the Respondent, despite asserting that the Union had refused to cooperate with a view to social dialogue did not exhibit any evidence such as letters and/or emails to demonstrate that approaches had been made with a view to dialoguing in good faith.

### **Union's Motion**

14. In asking the Court to grant an order requiring the Respondent to implement the Judgment of 24 April 2020, the Union contended that the Court had given the Respondent 60 days within which to pay any arrears resulting from the Judgment but the Respondent had failed to make the payments.

15. The Union attached a schedule listing the arrears due to the named employees.

16. The Respondent, explaining why it did not make payments cites the effects of the COVID19 public health pandemic. It also indicated in the replying affidavit that it had attempted to engage the Union but the Union had not cooperated and that the Union had not submitted any computations on due arrears to it and therefore the application was premature.

17. The Respondent asserted that the computations by the Union had many errors and included employees who had left employment and non-union members.

18. In the judgment of 24 April 2020, the Court, being alert to the fact that the collective bargaining agreement related to 2016 to 2018 ordered the Respondent to make payments within 60 days. The Respondent as the employer did not attempt to compute the arrears accruing out of the judgment (the Respondent only filed its computations as a result of the Unions application).

19. The COVID19 public health pandemic was declared in March 2020.

20. Despite making depositions in the supporting affidavit, the Respondent did not produce any evidence on how it had been affected as an employer. It cannot be that the Respondent did not have formal records which could show the effect of COVID19 public health pandemic on its business.

21. The COVID19 public health pandemic explanation, the Court finds to be more of an afterthought.

22. As to the errors and other faults in the computations by the Union, the Court notes that the initial obligation was on the Respondent as the employer to compute and pay out any arrears as ordered by the Court.

23. The Respondent did not make even a feeble attempt to demonstrate *bona fides* by placing before the Court what the correct computations ought to be when it moved the Court for review at the first instance.

24. It was merely satisfied in poking holes in the computations by the Union.

25. The Respondent, in the view of the Court and the Court, accepts the argument by the Union, appears to be on a mission to ensure that this litigation is not put to rest.

26. The establishing statute of this Court, and the attendant Employment and Labour Relations Court (Procedure) Rules, 2016 contemplate expeditious and proportionate determination of employment and labour disputes.

27. The procedures have also been kept simple and straightforward.

28. In light of the above, and considering that the Respondent has not as the employer placed any computations before the Court, the Court orders that

(a) The Respondent sits with the Union and agrees on joint computations of arrears within the next 15 days from today.

(b) The joint computations be filed in Court within 21 days from today.

(c) In default, the computations by the Union will be deemed as the correct computations and be adopted for purposes of execution.

29. The Respondent to bear costs of the Union's motion.

**Delivered through Microsoft teams, dated and signed in Kisumu on this 25<sup>th</sup> day of November 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/Chrispo Aura