



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 995 OF 2010**

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

**v**

**AUCMA DIGITAL TECHNOLOGY AFRICA LTD.....RESPONDENT**

**JUDGMENT**

1. The Amalgamated Union of Kenya Metal Workers (the Union) instituted legal proceedings against Aucma Digital Technology Africa Ltd (Respondent) on 3 September 2010 and the issue in dispute was stated as Refusal by the Respondent to negotiate a Collective Bargaining Agreement (CBA).
2. The Respondent filed a *Reply to Memorandum of Claim* on 26 August 2015, and on 15 September 2015 the Central Planning & Monitoring Unit of the Ministry of Labour filed a report in Court.
3. When the Cause came up for hearing on 15 October 2018, both Mr. Ondiege for the Union and Ms. Mengesa for the Respondent indicated that they would not call any witnesses. They opted to rely on the record and submissions.
4. The Court has considered the record and submissions made by the parties.
5. The dispute primarily turns on the question whether the Court can impose terms and conditions of service through a collective bargaining agreement where the social partners have failed to agree on all the items subject of negotiations.
6. At the outset of the submissions, the Court was not sure whether it had the jurisdiction to impose contractual terms upon parties in an employment relationship, and it invited the parties to bring to its attention any relevant case law.
7. The Union presented the case of *Amalgamated Union of Kenya Metal Workers v Load Trailers (EA) Ltd* (2018) eKLR while the Court's research brought out the Court of Appeal decision in *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* (2018) eKLR.
8. It is not in dispute that the Union and the Respondent entered into a recognition agreement on 22 May 2009.
9. Upon the recognition, the Union forwarded to the Respondent proposals towards the conclusion of a collective bargaining agreement.
10. The Respondent declined to negotiate with the Union and it reported a trade dispute to the Minister for Labour who accepted the dispute and appointed Mr. L.K. Bii as a conciliator.
11. On 7 January 2010, the Conciliator wrote to the parties requesting them to attend a joint conciliation meeting, but no resolution was forthcoming prompting the Union to move the Court seeking one substantive order

4.1 THAT the Honourable Court deem fit to order the Respondent to compensate the members of the Claimant by way of signing the proposed Collective Bargaining Agreement (CBA).

12. The Court of Appeal in *Kenya Tea Growers Association* identified the issue in dispute at paragraph 43 thus

It follows therefore that the ELRC at this stage is tasked with the responsibility of determining the trade dispute between the parties which in our view, includes the disagreement with regard to the terms of the CBA or what the parties refer to as the economic dispute between them.

13. On the extent of the powers of the Court, the Court of Appeal had this to say at paragraphs 45 and 46:

45. Having expressed ourselves as herein above what is the extent of the ELRC's role in resolving the dispute pertaining to the terms of the CBA in question? Is it as suggested by the appellant that the court is restricted to implementing the minimum standards set out under the *EA* or wages orders published by the government under the *Labour Institutions Act*?

46. *Section 26(2) of the EA* provides that-

*Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply*

We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the *EA* and Wages Order but also empowers the ELRC to issue such favourable terms.....

14. The answer to the question of the powers of this Court is that the Court has the jurisdiction to intervene. However, the Court of Appeal cautioned that the Court should act judiciously and on a case by case basis.

15. Is this a suitable case for the Court to intervene?

16. This dispute has now been in the Court system for about 8 years.

17. However, the report by the *Central Planning & Monitoring Unit* covered the Respondent's and general economic trends from 2011 to 2014 (4 years ago).

18. Without the benefit of a more current report from the *Central Planning & Monitoring Unit*, the Court risks making awards and or orders whose effects could be crippling upon the Respondent or not in tandem with the applicable and relevant economic indicators, thus denying the employees terms and conditions of service at prevailing rates.

19. In the view of the Court this is therefore not a suitable case to intervene.

20. In this regard, the Court terminates these proceedings and orders that the parties start a fresh round of and conclude a *collective bargaining agreement* within 60 days, and in case of a stalemate, the Union would be at liberty to invoke the provisions of Part VIII of the Labour Relations Act.

21. No orders as to costs.

**Delivered, dated and signed in Nairobi on this 30<sup>th</sup> day of November 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Union Mr. Ondiege, Industrial Relations Officer

For Respondent Ms. Mengesa instructed by Wangai Nyuthe & Co. Advocates

Court Assistant Mambo