



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 296 OF 2016 CONSOLIDATED

WITH CIVIL APPEAL NO. 301 OF 2016

BETWEEN

BARCLAYS BANK OF KENYA LTD ..... 1ST APPELLANT

BARCLAYS AFRICA GROUP (S.A) LTD ..... 2ND APPELLANT

AND

GLADYS MUTHONI & 20 OTHERS ..... RESPONDENTS

*(An appeal from the Judgment and Decree of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J) dated 30<sup>th</sup> June, 2016 and an appeal from the Ruling and Order of the Employment and Labour Relations Court at Nairobi (Monica Mbaru, J) dated 4<sup>th</sup> August, 2016 in Constitutional Petition No. 25 of 2016)*

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JUDGMENT OF THE COURT

1. The two appeals herein were consolidated and heard together because they relate to the same parties although the decisions under challenge are different. Both, however, have their roots in a constitutional petition filed before the Employment and Labour Relations Court (**ELRC**) invoking a plethora of Articles of the **Constitution of Kenya, 2010** (Articles 20, 21, 27, 28, 35, 36, 41, 43, 47), the **Companies Act**; the **Banking Act** (Sections 6, 8, 8A, 9, 32, 32B, 33, 33A), the **Competition Act** (Sections 21, 50, 56), the **Capital Markets Act** and the **Employment Act** (Section 5), asserting that they were all violated. At the core of the matter, however, is the issue of redundancy consequent upon Barclays Africa Group Limited (**BAGL**) winding up its operations in Kenya resulting in termination of services of the 21 petitioners (**the respondents**) who had been seconded/deployed to BAGL by their employer, Barclays Bank of Kenya Ltd (**BBK**).

2. Civil Appeal No. 296 of 2016 (**CA 296**) challenges the finding by the trial court on 30<sup>th</sup> June, 2016 that the redundancy was unjustified and unprocedural, and therefore amounted to unfair termination of employment and a violation of the respondents' rights. The remedies granted consequent upon those findings, are also under challenge. There is also a cross appeal by the respondents who seek additional remedies and damages. On the other hand, Civil Appeal No. 301 of 2016 (**CA 301**) arose out of orders made on 4<sup>th</sup> August, 2016, rejecting a preliminary objection raised by the appellants that the court was

*functus officio* and could not therefore deal with the merit based matters raised by the respondents in the process of execution of the decree. An issue of bias was also raised against the trial court.

3. A short background to both appeals is necessary.

BAGL is a South African registered company which holds shares in BBK, a listed company in the Kenya stock exchange. It also holds shares in other subsidiaries across Africa but it had its regional office in Kenya. For its staff and other technical assistance BAGL relied on the employees of BBK who were seconded to work there and it is common ground that the contracts of service for all the respondents were signed with BBK which paid their salaries.

4. In the year 2016, BAGL took a decision to relocate to South Africa from where it would control and manage its subsidiaries in Africa. The decision meant that all employees working for it in Kenya would be rendered superfluous and cease working for BAGL. BAGL called the respondents for a meeting on 14<sup>th</sup> January, 2016 and informed them of its plans. On the same day BBK issued individual letters to each respondent informing them that the last day of their employment would be 31<sup>st</sup> March, 2016 and offered them several exit terms. The terms were rejected by the respondents who made counter offers. In the end there was no agreement reached after several meetings.

5. The respondents moved to court on 16<sup>th</sup> March, 2016 and filed the petition aforesaid seeking the following reliefs:

*"(a) a declaration that the intended restructuring of the respondents' business is unconstitutional null and void to the extent that the Respondent purports to close down its Regional offices without consulting and providing proper information to the Petitioners who stand to be affected by the significant change in disregard of its constitutional, statutory and contractual obligations.*

*(b) A declaration that the Petitioners are entitled to the best comparable redundancy package in line with the industry standard in the Banking sector and in Barclays Africa, including the following:*

*i. 3 months' notice pay;*

*ii. Service pay of 3 months for every year worked;*

*iii. Payment of outstanding leave balance;*

*iv. Staff loans to continue at staff rates until payment in full, with the option of 25% discount for early repayment;*

*v. Motor vehicle assets availed to the staff as car benefit to be transferred to the staff at book value and the value deducted from the redundancy package; and*

*vi. Further to 12 months compensation for unfair dismissal.*

*(c) A declaration that the Petitioners are entitled to general and aggravated damages for discrimination and breach of human dignity and the right to fair administrative action."*

6. BAGL and BBK opposed the petition asserting that they had followed the law in terminating the employment of the respondents on account of redundancy due to operational reasons after giving notice to each one of them; notifying the relevant Minister; offering a redundancy package that exceeded the legal minimum; and offering the first priority to each one for redeployment. They charged that the petition was filed in bad faith and in abuse of court process. They also objected to the joinder of BAGL in the petition when it was neither the employer of the respondents nor subject to the jurisdiction of Kenyan courts as it was no longer resident here.

7. A cross petition was filed asserting that the two companies had a constitutional right to determine the size, scope and direction of their business within the bounds of law; that they were entitled to declare redundancy when their business ceased or diminished; that they had no obligation to consult with their employees; that the refusal by the respondents to accept reasonable exit terms offered had caused additional costs in salaries from the anticipated termination date of 31<sup>st</sup> March, 2016; and that five of the respondents who had been redeployed to other positions of employment in BBK but rejected them were not entitled to make any claim. They sought the dismissal of the petition and prayed for orders that the redundancy notice issued on 14<sup>th</sup> January, 2016 be reinstated; the respondents refund to BBK the salaries paid to them for the period of their employment extended past 31<sup>st</sup> March, 2016 together with interest thereon; and a declaration that the 4<sup>th</sup>, 10<sup>th</sup>, 11<sup>th</sup>, 16<sup>th</sup> and 18<sup>th</sup> respondents are not entitled to a redundancy pay.

8. Pending the hearing of the petition, the respondents applied for and obtained a conservatory order stopping BAGL and BBK from '*closing down or ceasing operations of their Africa Regional office in Nairobi; terminating, declaring redundant or in any manner relinquishing the services of the Petitioners, transferring any of the job functions currently vested in such office to any other location other than Nairobi*'. That was on 31<sup>st</sup> March, 2016. According to the respondents, following that ruling, BAGL and BBK withdrew the employment offers given to the five employees who had successfully been interviewed; refused to negotiate any other exit package; allowed non-Kenya employees to migrate to other offices outside Kenya as their Kenyan counterparts pondered constructive dismissal; dismissed some line managers who were not part of the Petition; and withdrew the outplacement and redeployment services offered before the petition was filed. They also charged that on 13<sup>th</sup> April, 2016, the Managing Director of BBK made erroneous statements in the electronic media that there was another team in the South African office which was bigger than the Nairobi team, despite his knowledge that South African nationals were being recruited to take over roles played by Kenyans in BAGL.

9. The petition and cross petition were heard and determined through written submissions and oral highlights made by the parties. In the end the trial court identified five issues which it answered as summarized hereunder:-

***i. Who was the employer?***

BBK was the employer who deployed its employees with BAGL who in turn became beneficiary to the respondents' labour. To appreciate and effectively determine all the issues in dispute, it was necessary to enjoin both companies in the petition.

***ii. Whether the redundancy was justified.***

The notices issued by BAGL to the respondents on 14<sup>th</sup> January, 2016 were unprocedural. A Redundancy must be declared by the *employer* upon which conditions set out under **section 40** of the **Employment Act** follow.

***iii. Whether due process was followed.***

It was not, for several reasons, including: failure to give the written notice of the intended redundancy prior to the date of the intended date of termination; issuing a termination letter instead of a redundancy notice; failure to consult and give reasons for the redundancy to the respondents prior to the letter of termination; attempting to justify the termination and negotiate terms after the event; sending out a notice to the Minister that was devoid of particularity; feigning a redundancy situation when the business of the employer, BBK, was still intact; engaging in unfair labour practice by purporting to declare redundancy before securing the respondents' contracts of employment; and failure to adhere to **section 40** of the **Employment Act**, thus ending up with unfair declaration of a redundancy.

***iv. Whether there is a case of discrimination.***

Yes there was. The assertion by the respondents that there was reluctance and/or refusal by BBK and BAGL to produce records, information and materials used in arriving at the decision to terminate the employment of the respondents, was not controverted as no records were availed to the court. It justified the claim of discrimination against the respondents on the basis of nationality as indeed there was evidence that the respondents were working with other employees of different nationalities. The respondents were subjected to different treatment while at work, the terms and conditions of work for them were made unfavorable without justification; the declaration of redundancy lacks justification, is not genuine or valid, and amounts to discriminatory treatment outlawed under **Article 27** of the **Constitution**. It was also contrary to fair labour practice under **Article 41**.

**v. Whether there are any remedies.**

The following remedies were found appropriate and were prescribed:

**"a. The redundancy notice issued to the Petitioners on 14<sup>th</sup> January, 2016 was unprocedural and unlawful;**

**b. I declare the termination of employment of the Petitioners on account of redundancy is not justified and unfair;**

**c. I declare the unlawful acts of the Respondents in the unprocedural and unjustified termination of the Petitioners employment amounted to Discrimination against the Claimants herein;**

**i. For unlawful and unfair termination of employment each Petitioner is awarded 10 months gross salary;**

**ii. For discrimination each Petitioner is awarded 500,000.00 in damages;**

**d. The Petitioners shall be bound by the confidentiality clause in their contracts of employment for six (6) months and for which the respondents shall pay each 6 months' salary in aggravated damages.**

**e. The petitioners with loan balances, facilities advanced and secured by the employment with the respondents and now due shall continue the same at the same terms, rates and interests as at the time of termination – 30<sup>th</sup> June, 2016 - and without undue disadvantage caused by the termination of employment;**

**f. The Motor vehicle assets availed to the Petitioners as car benefit shall be transferred by the Respondents to the respective Petitioners at book value;**

**g. Noting the above, these (sic) shall be cessation of employment relationship between the parties herein on 30<sup>th</sup> June, 2016.**

**h. Petitioners are awarded costs."**

10. The cross petition was dismissed on the basis that the respondents had an unfettered

right to go to court and agitate their grievance; after the Order made on 31<sup>st</sup> March, 2016, there was nothing to stop the employer from following the provisions of **section 40** of the Employment Act, if indeed there was a genuine redundancy situation; the respondents were not required to reapply for their jobs with BBK which had no redundancy situation and their return to the principal employer should

have been a matter of course; on 14<sup>th</sup> January, 2016 the respondents woke up to undertake their roles as

employees, only to return home without job security, which was cruel, inhuman and lacking in the dignity contemplated under **Articles 28 and 41** of the **Constitution**.

11. It is against those findings that BBK and BAGL raised 15 grounds of appeal through their Advocates, M/s Mohamed Muigai & Company. The grounds, together with oral highlights, were urged before us by learned counsel **Mr. Mohamed Nyaoga**, assisted by **Miss Wanjiru Ngige**. For the respondents, a cross appeal was filed through M/s Muma & Kanjama Advocates and urged by learned counsel, **Mr. Charles Kanjama**, assisted by **Ms. Veronicah Kanyara**.

12. We propose to deal with the grounds of appeal and cross appeal *seriatim*. As we do so, we must recall that this is a first appeal and therefore we must consider it in the manner of a retrial in order to arrive at our own conclusions of fact and law. See **Rule 29** of the **Court of Appeal Rules**. We must, nevertheless, accord due respect to, and not lightly differ from, the findings of the trial court unless such findings are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching them. See ***Jabane vs Olenja [1986] KLR 661***. Indeed, an appellate court is not bound to accept the factual findings of a trial court if it appears either that it has clearly failed on some material point to take account of particular circumstances or probabilities material to an estimate of the evidence on record. See ***Mwangi vs Wambugu [1984] KLR 453***. There was no oral evidence tendered before the trial court in this matter and therefore, this Court has equal standing with the trial court in assessing the documentary and affidavit evidence on record.

13. The grounds and the submissions made thereunder may be summarized and determined as follows:

**Ground 1.**

***The trial court erred in finding that the respondents were employed by both BBK and BAGL and yet, their contracts were with BBK.***

Mr. Nyaoga submitted that the finding by the trial court had imposed an employment relationship to a stranger in the employment contract. In his view, the finding would mean that there can be two employers in respect of a single employment relationship, thus encouraging employees to choose the employer with the most advantageous terms upon termination of employment, contrary to the law. The facts were clear, he noted, that there was no contract signed between BAGL and the respondents and the joinder of the former in the petition could only have been meant to stop it from closing down its offices in Nairobi.

14. In response to those submissions, Mr. Kanjama submitted that the symbiotic relationship between BBK and BAGL, coupled with the fact that the respondents rendered services directly to BAGL for which BBK was reimbursed, made it necessary to enjoin the two in the petition. Counsel pointed out that the trial court did not make a finding that an employee can have two employers, but rather that having both on record would facilitate the effective determination of all issues. According to counsel, the court was clear that it was BAGL which gave notice of closure of their offices on 14<sup>th</sup> January, 2016 while BBK served the termination letters.

15. On our part, we think there can be no argument, as borne out by the record, that the contracts of employment were signed between BBK and the respondents. Indeed, the respondents had worked for BBK for years before BAGL happened on the scene. We have perused the judgment of the trial court and we do not get the impression that the court was under a misapprehension that BAGL was the employer. Nevertheless, it was not lost to the trial court that there existed a special relationship between BBK and BAGL which made it a necessary party for purposes of determining the issues placed before it. There are several passages which attest to this understanding but we reproduce only one, in relevant part:-

***"The Petitioners are employees of the 1<sup>st</sup> respondent (BBK), and before deployment with the 2<sup>nd</sup> Respondent (BAGL) they had their positions with the 1<sup>st</sup> Respondent..... The 1<sup>st</sup> Respondent as the employer and the 2<sup>nd</sup> Respondent as a shareholder of the 1<sup>st</sup> Respondent and other subsidiaries in Africa, has a duty to its employees – not to use them and benefit from their labours and once done, terminate their employment under the guise of redundancy. More is***

*required of the 1<sup>st</sup> Respondent as an employer."*

In our view, the first ground of appeal has no firm basis and we reject it.

16. **Ground 2, 3, 4 & 5** may be handled together as they appear to be the fulcrum of the appeal:-

*The court erred in holding that:*

*2. the redundancy notices were issued by a party other than the employer.*

*3. the redundancy notices were unprocedural and not in accordance with section 40 of the Employment Act.*

*4. the appellants failed to justify the redundancy.*

*5. the declaration of redundancy was an unfair labour practice.*

17. Counsel relied on the passage in the judgment on the finding complained about and submitted that it was the incorrect finding which led the court into holding, erroneously, that the redundancy notices were unprocedural. According to counsel, there was a meeting of the respondents (and other staff members) on 14<sup>th</sup> January, 2016 where they were all informed about the impending closure of operations and the reasons for it. On the same day BBK issued the letters of termination and proposed suitable terms of exit. A copy was also given to the Minister for Labour on the same day. All this, in counsel's view, was in compliance with the provisions of **sections 40 (1) (a) and (b)** of the Employment Act as the redundancy was to take effect more than two months after the notice.

18. Counsel further submitted that the Employment Act was silent on consultations with non-unionizable employees and it was not mandatory therefore to have consultations with the respondents. The law of Kenya does not provide for pre-redundancy consultation but only post-redundancy dispute resolution. For this proposition, counsel relied on the judgment of **Githinji, JA.** in **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR**. He further asserted that despite the absence of compulsion to consult, BBK undertook to mitigate the adverse consequences of the redundancy by offering redundancy packages and redeployment offers to five of the respondents which they rejected. Those measures, according to counsel, were in line with the holding of **Maraga, JA** (as he then was) in the **Kenya Airways case** (supra) "*to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.*"

19. As for the issue of justification of redundancy, counsel submitted that change of location was one of the factors that would necessitate a redundancy as held in the Tanzanian case of **Nguragwa & Others vs Registrar of Industrial Court of Tanzania [1999] 2 EA 245**. It was also erroneous for the trial court to find that the reason of reorganization of business for operational efficiency was not a justifiable reason for declaring redundancy. In counsel's submission, it was not the business of the court to substitute its business judgment for that of the employer as stated in the case of **G. N. Hale & Son Ltd vs Wellington Caretakers IUW. 4**. Overall, and in view of the foregoing submissions, a labour practice cannot be unfair where it is provided for in the law and was lawfully carried out, he concluded.

20. In response, Mr. Kanjama charged that the purported redundancy notices never met the threshold set under **section 40** of Employment Act. That is because the respondents were officially informed about the closure of the regional offices, for the first time, in a meeting called by the senior management of BAGL on 14<sup>th</sup> January, 2016. There was no discussion on the legitimate expectations of the respondents in that meeting. That could hardly be said to have been a pre-redundancy notice which was a requirement of the law. In any event, the notification was not from the employer, BBK, and was therefore unprocedural. When the employer came into the picture the following day, it was to serve termination letters dated 14<sup>th</sup> January, 2016 without any prior consultations. The trial court, in counsel's view, was therefore right in its finding that the purported notice was unprocedural.

21. Counsel further referred to **section 2 (ii)** of the **Fair Administration Act** defining 'administrative action' and **section 4 (3)** providing that 'a person affected by an administrative decision must be given prior and adequate notice of the nature and reasons for administrative action that would adversely affect his rights and fundamental freedoms'. Relying on **Article 13 (1)** of the **ILO Convention, 1982**, counsel submitted that it was mandatory for the employer to give early and detailed information on the proposed redundancy to the affected employees, as well as the Labour Officer, which was never done in this case. Finally counsel relied on the **Kenya Airways case (supra)** per Maraga and Murgor JJ.A who were clear that real and not cosmetic consultations were an imperative requirement if the provisions of the ILO Convention and the Employment Act were to be respected and applied.

22. As for justification of the redundancy, Mr. Kanjama echoed the trial court's finding that termination of employment must be based on genuine, valid and fair grounds. He also supported the finding that the redundancy here was not genuine because the employer was still intact and faced no redundancy situation in Kenya and there was no demonstration of the nature of business and technical support, other than the change of location of BAGL which was being used as the excuse to terminate the respondents' employment. What happened to the positions held by the respondents in BBK for years ranging from 2 to 26 years, before they were redeployed to assist BAGL?, posed counsel.

23. We have anxiously considered these four grounds of appeal. One of the troublesome findings was framed by the trial court as follows:

**'the notice issued to the employees and in this case to the Petitioners on 14<sup>th</sup> January, 2016 by the 2<sup>nd</sup> Respondent (BAGL) is unprocedural. The 1<sup>st</sup> Respondent (BBK) submissions and insistence that they complied with the procedural requirements of section 40 of the Employment Act in their issuance of the notice issued to the Petitioners on 14<sup>th</sup> January, 2016 and the personal notices that followed on 15<sup>th</sup> January, 2016 is adjudged unprocedural'. [Emphasis added].**

24. As far as we can see from that quotation, two sets of notices were declared unprocedural: the notice given orally by BAGL in the meeting of 14<sup>th</sup> January, 2016 that the regional offices would be closed; and the letters terminating the respondents' employment issued by BBK. The court went ahead to elaborate on that finding, stating that BAGL was not the employer and had no business therefore to call a meeting relating to declaration of redundancy of the respondents. The court cited for emphasis **section 2** of the Employment Act on the definition of 'redundancy' emphasizing that it involves **'termination of employment at the initiative of the employer'**.

25. It stands to logic therefore, that in as much as BAGL purported to notify the respondents about its woes and an impending redundancy, it was simply out of order as it was not the employer. We find no reason to fault the trial court for making the finding that it was unprocedural.

26. The more fundamental question to ask is whether the letters issued by BBK on 14<sup>th</sup> January, 2016 and served the following day on the respondents were also 'unprocedural and unlawful'. Were they 'redundancy notices' or 'termination letters'? Simply put, did they pass muster under the provisions of **section 40** of the Employment Act.

27. The trial court was of the view that there ought to have been two notices - a specific notice alerting the respondents about the impending redundancy and the reasons therefor, and another one terminating their services. It reasoned as follows:

**"As noted by the Court in Caroline Wanjiru Luzze vs Nestle Equatorial African Regional Limited, the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing.**

According to the trial court, there was no redundancy notice issued or served on the respondents. All they received was a **'termination letter'**, hence the finding that it was unprocedural.

28. In holding that view, the trial court was not alone. Maraga, JA in the Kenya Airways case (supra) also opined:

*"My understanding of this provision is that when an employer contemplates redundancy, he should first give a general notice of that intention to the employees likely to be affected or their union. It is that notice that will elicit consultation between the parties, and I will shortly show that consultation is imperative, on the justifiability of that intention and the mode of its implementation where it is found justifiable. At that initial stage, the employer would not have identified the employee(s) who will be affected. So that notice cannot have the names of the employees as Mr. Mwenesi contended. It does not have to be a calendar month's notice as Mr. Mwenesi contended. The Act requires one month's notice. The period runs from the date of service of that notice. It is after the conclusions of the consultations on all issues of the matter that notices will be issued to the affected employees of the decision to declare them redundant."*

29. We must now look at the redundancy letter in issue and the applicable law. The letter was headlined "ORGANISATION RESTRUCTURING: CLOSURE OF THE BARCLAYS AFRICA OFFICE IN KENYA". Apart from the specifics on the exit package proposed for each of the respondents, it had the following common opening paragraph:

*"Reference is made to previous communication to all members of staff and the discussion with yourself regarding the impact of the organization restructuring involving the closure of the Barclays Africa Office in Kenya. Following your agreement to exit from the Bank under the restructuring program, the Bank confirms that it will be able to release you from employment with effect from 1<sup>st</sup> April 2016, on the following terms. Your last day of Service will therefore be 31<sup>st</sup> March 2016". [Emphasis added].*

30. It also had a common final certificate for signature by all the respondents, couched thus:-

"ACCEPTANCE

*I ..... confirm that I have read, understood and voluntarily accepted the above terms of my exit from the Bank's employment and the payment of the terminal dues set out above in full and final settlement of all my dues from the Bank. I confirm that I have no further or additional claims against the Bank.*

*Signed by the Said \_\_\_\_\_ Date: \_\_\_\_\_ ."*

31. Unfortunately for BBK, the letter was rejected by the respondents and the certificate confirming the crucial information emphasized above was not signed. With that rejection, the letter lost the probative value it would have had as a concession and it became necessary for BBK to prove otherwise that indeed the respondents had discussed the redundancy issue as purported. Instead of providing that evidence, the appellants proceeded as if the facts should be accepted on the basis of their saying so. It is no wonder therefore that the trial court lamented:

*"The Respondents [BBK & BAGL] have not attached the notice declaring the redundancy referenced in the termination notice issued to the Petitioners noting the above issues of previous communication on the redundancy; the nature of discussions held culminating into the termination notice; the notice leading to the closure of the Barclays Africa Office in Kenya; the agreement entered into between the parties where the employees agreed to exit the Respondents' employment; so as for the Respondents to confirm such release and offer of an exit package. The context of the 1<sup>st</sup> respondents' letter to the Petitioners and its materials (sic) reference is therefore lost."*

What followed the rejection of the letter was an exchange of emails exploring an acceptable exit package which was not successful, hence the petition.

32. The other troublesome finding complained about was on the issue of justification for the redundancy. The trial court expressed itself, in relevant parts, as follows:

*"The rationale is that any termination of employment must be based on genuine, valid and fair reasons. Such reasons must be proved by the employer as otherwise, the termination is unfair. Where such reasons do not exist, the termination, by whatever reason(s) stated by the employer without prove(sic), this amounts to unfair termination of employment in terms of section 45 of the Employment Act. Specifically, where an employer relies on the provisions of section 40 so as to terminate employment without justifying the redundancy, it does not matter that the employee was not consulted, the same amounts to unfair termination of employment. It is therefore not sufficient for an employer to state that there is a business reorganization, the business has moved or that there is a 'section 40 situation' and therefore the Court must infer a redundancy. Not at all. There must be a justification. The employer must demonstrate that there exists a genuine reason that requires the business to reorganize, reduce staff or restructure the business to viability, the same must be found as valid and fair. The Court must look at the circumstances of each case based on the available evidence and make a finding..... It is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before and the only change is the location. In this case the employer, the 1<sup>st</sup> Respondent has not changed. Even where the 2<sup>nd</sup> Respondent business is said to migrate, the nature of business and the technical support of the Petitioners has not been demonstrated as having changed..... The 1<sup>st</sup> Respondent has not demonstrated that it is facing a redundancy situation as the employer. As the principal employer to the petitioners, fair labour practices requires that the employer demonstrates the reasons for, and the extent of, the intended redundancy. Where the 1<sup>st</sup> Respondent enjoyed a business opportunity to offer technical support to the 2<sup>nd</sup> respondent, the impacted employees should not suffer and pay for the loss. The Petitioners are employees of the 1<sup>st</sup> respondent, and before deployment with the 2<sup>nd</sup> Respondent they had their positions with the 1<sup>st</sup> Respondent. Some Petitioners have served the Respondents business entity for periods ranging from 8 to 26 years. Such cannot be wished away in a minute. Fair labour practices dictates that where there is a deployment in employment the principal employer does not change. The contract of employment and its terms and engagement have not been altered and the employee has the option to return back to the principal or where the reasons for deployment has changed, abetted, ended, employment continues with the principal. The 1<sup>st</sup> Respondent as the employer and the 2<sup>nd</sup> Respondent as a shareholder of the 1<sup>st</sup> Respondent and other subsidiaries in Africa, has a duty to its employees – not to use them and benefit from their labours and once done, terminate their employment under the guise of redundancy. More is required of the 1<sup>st</sup> Respondent as an employer. Nothing is set out with regard to positions previously held by the Petitioners before their redeployment, as they only were offering technical support to the 2<sup>nd</sup> Respondent. "*

33. **Section 40 (1)** of the **Employment Act** prohibits, in mandatory tone, the termination of a contract of service on account of redundancy unless the employer complies with the following seven conditions, namely:

*a. if the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;*

*b. if the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;*

*c. in determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;*

*d. where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of the employee being or*

*not being a member of a trade union;*

*e. the employer must pay the employee any leave due in cash;*

*f. the employer must pay the employee at least one month's notice or one month's wages in lieu of notice; and*

*g. the employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service.* [Emphasis added].

34. It is common ground in this case that the respondents were not members of a union and therefore the notice they were entitled to ought to have been issued in accordance with **section 40 (1) (b)**. The purpose and period of the notice was construed in the case of ***Thomas De La Rue (K) Ltd vs David Opondo Omutelema [2013] eKLR*** to be the same as provided for in **section 40 (1) (a)**, that is, '***the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect***'. It is mandatory to serve the same notice on the Labour Officer.

35. Despite the heading and contents of the disputed letter above, we are prepared to accept, as contended by the appellants, that it was intended to be a redundancy notice. At least it gave more than two months' notice before the contracts of employment came to an end. But was it a valid one? Was it substantially justified? Was it lawfully and fairly implemented? Those are the million dollar questions.

36. The trial court was emphatic that the requirement for consultations before issuance of a redundancy notice was imperative, otherwise it would result in unfair termination of employment. The appellants argue that they had a right to organize and run their business operations as they saw fit and there was no obligation for an employer to have consultations before declaring redundancy. They cited the dicta of Githinji, JA in the ***Kenya Airways case (supra)***, that in Kenya there was no '*pre-redundancy consultation but only post redundancy dispute resolution*'. On the other hand, the respondents rely on the dicta of Maraga and Murgor, JJ.A in the same case.

37. We have carefully examined that case which, unlike this case, involved unionizable employees, a collective bargaining agreement and oral evidence tested in cross examination. In the end, we are persuaded that the dicta of Maraga and Murgor, JJ.A regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of **Article 2 (6)** of the Constitution.

38. Both **section 2** of the **Employment Act** and **section 2** of the **Labour Relations Act** define redundancy as:

***“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”*** [Emphasis added].

39. There is a heavy burden of proof placed upon the employer to justify any termination of employment. As stated earlier, the appellants here ought to have given the "***the reasons and the extent of the redundancy***" but there is no evidence on record sufficient to discharge that burden. It was further contended by the respondents that the Labour Officer was not served with any letter or reasons as required under **section 40** but the appellants merely made a bare assertion that service was made and reasons given for redundancy. In the absence of proof, we must find that there was no service and therefore the notice was invalid.

40. Furthermore, consultation was necessary before the redundancy notices were issued. **Article 13 of Recommendation No. 166** of the ILO Convention No. 158 - **Termination of Employment Convention, 1982** - provides:

**“1. When the employer contemplates terminations for reasons of an economic, technological, structural or similar nature, the employer shall:**

**(a) provide the workers' representatives concerned in good time with relevant information including the reasons for the terminations contemplated, the number and categories of workers likely to be affected and the period over which the terminations are intended to be carried out;**

**(b) give, in accordance with national law and practice, the workers' representatives concerned, as early as possible, an opportunity for consultation on measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.”**

41. That law is applicable in this country. The purpose of the provision as Maraga, JA emphasized:

**“is to give the parties an opportunity to consider “measures to be taken to avert or to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimize the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure that as little hardship as possible is caused to the affected employees. In the circumstances, I agree with counsel for the 1<sup>st</sup> respondent that consultation is an imperative requirement under our law.”**

42. The learned Judge further emphasized that the consultation must be real and not cosmetic, citing with approval the New Zealand case of ***Cammish vs Parliamentary Service (1996) 1 ERNZ 404*** stating thus:

**“Consultation has to be a reality, not a charade. The party to be consulted must be told what is proposed and must be given sufficiently precise information to allow a reasonable opportunity to respond. A reasonable time in which to do so must be permitted. The person doing the consulting must keep an open mind and listen to suggestions, consider them properly, and then (and only then) decide what is to be done.”** [Emphasis supplied]

43. Murgor, JA in the same case stated as much, adding:

**“..consultations in redundancies are two-way discussions between the employer and the union to be conducted with candor, reasonableness and commitment towards addressing the concerns of both management and the employees and focused on reaching solutions.”**

44. We respectfully agree with the views expressed by the two learned Judges. The Constitution in **Article 41** is fairly loud on the rights to fair labour practices and we think it accords with the Constitution and international best practices that meaningful consultations be held pre-redundancy. We agree with the trial court that redundancy notices are not mechanical so as to satisfy the motions of the law, and that fair labour practice requires the employer to act in good faith. It is not good faith, for example, to subject innocent employees to making fresh job applications to their employer who was not undergoing a redundancy situation, then vilify them for rejecting the manouvre. Being of that persuasion, the questions of substantial justification and fair implementation posed above must be answered in the negative. Grounds 2, 3, 4, 5 have no substance, and we so find.

45. **Grounds 6, 7 and 8** relate to the finding on discrimination and the complaint is that the court casually made the finding without *viva voce* hearing of the matter. The finding was made on the basis that it was common ground that the respondents worked with other nationalities but the appellants had refused, despite demand being made, to share the records, information and materials used in arriving at the decision to terminate the employment of the respondents; that in the absence of relevant material it was not possible to determine the criteria and mechanism used to short-list and identify the employees eligible

for redundancy; and that it was also difficult to determine whether regard was made to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy. The trial court concluded thus:

***"By the Respondents avoiding, failing and neglecting to respond to the very serious issues raised by the Petitioners about discrimination against (sic), they exposed themselves. I find no evidence to counter the averments made by the Petitioners under oath with regard to different treatment of employees who are specifically Kenyans unlike any other from India, South Africa, Zambia or Ghana."***

46. Mr. Nyaoga assailed such findings on the basis that they required evidence tested in cross examination as the court itself had opined in an earlier application. He observed that the alleged discrimination was made by six respondents with respect to the exit package only, and not on the general treatment of all Kenyan employees. In his view, the claim was unduly expanded by the irregular admission of affidavits filed by the respondents, which the appellants were denied an opportunity to rebut. Counsel further submitted that the trial court erred in comparing the respondents to employees in other subsidiaries of BAGL outside Kenya. Such approach totally ignored that companies are distinct persons in law, the reality of the operations of multinational companies, and the existence of different economic, social and statutory conditions in different countries. Citing the Indian Supreme court case of ***State of Kerala & Another vs N. M. Thomas & Others 1976 AIR 490***, counsel submitted that '*the question of unequal treatment does not arise between persons governed by different conditions and circumstances. Equality means parity of treatment under parity of conditions*'. It follows therefore, urged counsel, that differential treatment of persons by different legal entities based on different factors such as location, jurisdiction and work grade cannot be discriminatory. Finally, counsel explained that an application made by the respondents seeking production of documents was never prosecuted and no orders were made. It was therefore erroneous for the trial court to castigate the appellants for failing to comply with an order that was never made and to make adverse findings.

47. Responding to those submissions, Mr. Kanjama opened with the definition of discrimination as found in the case of ***Rose Wangui Mambo & 2 Others vs Limuru County Club & 15 Others [2014] eKLR*** citing ***Peter K. Waweru vs Republic [2006] eKLR*** as follows:

***"...Discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions ....***

***whereby persons of one such description are subjected to...restrictions to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured."***

48. Applying that definition counsel contended that the respondents, as demonstrated by several of them by affidavit, were treated differently from their foreign counterparts in the course of their employment and complained about it to no avail. Counsel also observed that the respondents had established discrimination in the manner the redundancy was declared and the differential manner in which exit terms were proposed to non-Kenyan employees. Such proof was made through affidavits filed after the court opined that the issue of discrimination required evidence to determine, but there was no response from the appellants. As for the application made for disclosure of information and records, counsel conceded that the application was not decided on but observed that there was agreement by the parties to dispose of the petition by way of written submissions and affidavits. The appellants never filed any responding affidavit or sought to cross examine any of the deponents. In counsel's view, therefore, the trial court was right to draw an adverse inference.

49. Mr. Kanjama moved on to legitimate expectation, urging that the respondents expected the same exit terms as given by the same bank to their Ghanaian counterparts after rationalization of employment. He

also relied on the case of ***David Wanjau Muhoro vs Ol Pejeta Ranching Limited [2014] eKLR*** where Rika, J. relied on the ILO Publication, 'Equal Pay, An Introductory Guide' by Martin Oelz, Shauna Olney and Manuel Tomei, ILO Labour Standards Department, Conditions of Work and Equality Department - Geneva: ILO 2013, at paragraph 190 to underscore the importance of remedies, whenever an employee is found to have suffered wage or salary disparity, based on reasons which are not objective and permissible such as race. It was opined that:

***"The consequences of the unequal pay must be reversed. The Employee must receive compensation and where possible, Courts must impose sanctions such as fines, to deter continuing or future pay discrimination. Other mechanisms meant to promote and protect the right of equal pay for equal work, or equal pay for work of equal value, include partially or wholly shifting the burden proof to the employer, through legislation. ILO explains that the employee may not have access to employment records, to establish a claim for discrimination. Courts are urged to protect Employees against victimization, once such Employees in an ongoing employment relationship, have lodged unequal pay claims. The ILO observes that most unequal pay claims escape judicial correction, because Employees are afraid of retaliation from Employers."***

50. We have considered the three combined grounds of appeal and it seems to us that the main reason why the trial court held against the appellants was because, in its view, they had refused or neglected to disclose information sought by the respondents which would have confirmed or dispelled the assertion by the respondents that there was discrimination. The respondents had pleaded discrimination generally as part of the legal foundation of the petition in the following manner:

***"a. Under the Employment Act at section 5 thereof, the Employment and Labour Relations Court is required to promote equality of opportunity in employment in order to eliminate discrimination in employment. In addition, discrimination on grounds of race, colour, sex, ethnic or social origin, or nationality is prohibited in all employment practices, which means that restructuring decisions including redundancy should not by intention or effect result in disadvantage to any class of employees merely because of their nationality, origin or other prohibited ground. Further, employees have a right and legitimate expectation where genuine redundancy occurs, to be given full access to information and fully consulted in the manner in which the redundancy shall affect them"***.

51. The facts relied on for discrimination were then narrowed down in paragraph 13 of the petition as follows:

***"13. The above meeting was followed by one-on-one meetings held on 15<sup>th</sup> January 2016 when the Respondents called each Petitioner separately and handed over redundancy letters with details of the severance package and without any prior consultation or concurrence. The Respondents unilaterally decided to declare redundant the Kenyan employees at the Barclays Africa Regional Office, but to give different terms to the non-Kenyan employees, which constitutes actionable discrimination"***.

52. The relevant part of the affidavit in support stated thus:-

***"iii. The 2<sup>nd</sup> Respondent failed to treat Kenyan employees fairly or similar to the treatment accorded their corresponding non-Kenyan employees in Kenya, as well as their Regional employees outside Kenya. For example, the non -Kenyan employees have not been declared redundant, and further are being allowed to remain in their current situation until end of June 2016 when they will be transferred and redeployed"***.

53. Finally, the prayers sought in the petition with regard to discrimination were as follows:-

***"Further and In Particular:***

**A. (I). A declaration that there is discrimination in the matter of granting the exit packages against the Petitioners and other Kenyan employees of the Respondents Regional Office in Kenya.**

.....

**"C. A declaration that the Petitioners are entitled to general and aggravated damages for discrimination and breach of human dignity and the right to fair administrative action".**

54. In their response to the petition, the appellants denied discrimination stating:-

**"10. Paragraph 13 of the Petition is denied and the contents of this Response repeated in response thereto. In particular, the 1<sup>st</sup> Respondent denies that there was any discrimination as alleged or at all in respect of its employees, all of whom are Kenyan and all of whom were to be made redundant".**

The affidavit in response reinforced that denial.

55. Subsequent to closure of pleadings, the respondents took out a notice of motion dated 15<sup>th</sup> March, 2016 (amended on 21<sup>st</sup> March, 2016) seeking a conservatory order and the following additional orders:

**"3. THAT the Respondents be hereby ordered to publicly disclose the detailed criteria and mechanism used to short-list and identity the employees eligible for redundancy, and to disclose all documents, correspondence, and information, internal or otherwise, generated or obtained in the process of declaration of redundancy of the Petitioners.**

**4. THAT the Respondents be hereby ordered to disclose and give access to the Petitioners of all information necessary for the enforcement of the Petitioners' fundamental rights, including internal information, touching on the early retirement, redundancy and pay packages offered to other Barclays staff in Kenya and the region within the last ten years of current date".**

56. After the hearing of the motion, the conservatory order was issued but the two prayers above were neither considered nor granted. The trial court stated instead:-

**"The Petitioners have raised the matter of discrimination against them on the grounds of nationality. Such is a serious matter, when pleaded, this Court is bound to stop everything else and delve into the subject as discrimination at the work place is outlawed under section 5 of the Employment Act read together with Article 27 and 41 of the constitution. However, such require the Court to take evidence as such cannot be addressed within the current application for interim orders."**

If the prayers were neither granted nor rejected, they are deemed in law to have been denied.

57. We have carefully examined the record of appeal and it is not apparent that the respondents subsequently pursued the two prayers. As there was no compulsion for the appellants to produce any documents, it was erroneous for the trial court to make a finding that they had refused or neglected to do so. Considering the sentiments expressed by the court, it would have been prudent for the respondents to apply for admission of oral evidence tested in cross examination for proof of discrimination, but they did not. Instead, they proceeded to file further affidavits without leave of the court which the appellants had no opportunity to respond to. We agree with the appellants on this score that the procedure was flouted. At any rate, in our view, the affidavits fell short of proving this very serious charge. A more clinical approach to this whole matter would have been to file an ordinary claim where oral testimony would have been adduced and tested in cross examination but the respondents chose to proceed by way of a petition seeking declarations, with its attendant limitations.

58. Arbitrary discrimination in the workplace is outlawed at the highest level of the Constitution and has

always been. The appellants had denied in their pleadings that there was any and the burden was shifted to the respondents to establish it. In the case of *Ol Pejeta Ranching Limited vs David Wanjau Muhoro [2017] eKLR* this Court examined at some length the issue of discrimination and stated in part as follows:-

*"Now, although the allegations levelled against the appellant happened before the promulgation of the current Constitution, arbitrary discrimination was still prohibited during the material times by section 82 of the former Constitution. Moreover, Kenya had also ratified a plethora of international instruments that prohibit racial discrimination among them the United Nations Convention on the Elimination of all forms of Racial Discrimination. Further, section 5 of the Employment Act, 2007 provides inter alia:*

*"(1) (a) ....*

*(b) ....*

*(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

*(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee –*

*(a) On grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status;*

*(b) In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment and other matters arising out of employment.*

*(4) It is not discrimination to –*

*(a) take affirmative action measures consistent with the promotion of equality or the elimination of discrimination in the workplace;*

*(b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job;*

*(c) employ a citizen in accordance with the national employment policy; or*

*(d) restrict access to limited categories of employment where it is necessary in the interest of State security.*

*(5) An employer shall pay his employees equal remuneration for work for equal value.*

*(6) An employer who contravenes the provision of the section commits an offence.*

*(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.*

*(8) For the purposes of this section –*

*(a) "employee" includes an applicant for employment;*

*(b) "employer" includes an employment agency;*

*(c) an "employment policy or practice" includes any policy or practice relating to recruitment procedures, advertising and selection criteria, appointments and the appointment process, job*

*classification and grading, remuneration, employment benefits and terms and conditions of employment, job assignments, the working environment and facilities, training and development, performance evaluation systems, promotion, transfer, demotion, termination of employment and disciplinary measures.”*

*Further, fairness requires that people doing similar work should receive equal pay. The principle has however extended to an analogous situation requiring that work of equal value should also receive equal pay as is claimed in the present appeal. ....In claims of this nature, where the claimant invokes the principle of equal pay for equal work the claimant must establish that the unequal pay is caused by the employer discriminating on unlawful grounds. It was observed in Louw vs Golden Arrow Bus Services (Pty) Ltd [1999] ZALC166 that discrimination on a particular 'ground' means that the ground is the reason for the unequal treatment complained of by the claimant. As discussed by the writer, Adolph A. Landman in his article *The Anatomy of Disputes about Equal Pay for Equal Work*,*

*“The mere existence of disparate treatment of people of, for example, different races is not discrimination on the ground of race, unless the difference in race is the reason for the disparate treatment. Put differently, it must be shown that the difference in salaries is because of sex, gender, race, and so on.”*

*.....The respondent had to establish that the unequal pay was caused by the employer discriminating on impermissible grounds.”*

59. All in all, the issue of discrimination was not given the seriousness it deserved and there was no firm basis for the finding that the respondents were discriminated against. There is merit in the three grounds of appeal, and we so find.

60. The final batch of grounds of appeal relate to the remedies granted by the trial court. The appellants complain that the trial court erred in:

*'9. awarding the respondents redundancy pay as well as damages for unfair termination.*

*10. applying computation of redundancy package to totally unrelated circumstances.*

*11. awarding the respondents an exit package that far exceeded the statutory provisions.*

*12. awarding aggravated damages in the absence of proof of malice and on the basis of the confidentiality clause in the employment contract.*

*13. issuing orders that would survive the termination of the employment relationship'.*

61. In his submissions on those grounds, Mr. Nyaoga faulted the court for granting two sets of damages flowing from one action. Either the redundancy was unjustified and the respondents were entitled to damages or it was justified and they would receive redundancy pay, he posed. It would otherwise be unjust enrichment to grant both. Secondly, urged counsel, the orders given on medical cover, loans, and motor vehicles had no basis in law or the contract between the parties and should be set aside. Thirdly, there was no prayer made in respect of the confidentiality clause and there was no basis for awarding aggravated damages in respect of the clause when no malice was pleaded or proved. Finally, contended counsel, the court exceeded its jurisdiction in dealing with loans which were not based on employer/employee basis but on banker/customer relations which could endure beyond the employment relationship.

62. In response, Mr. Kanjama contended that the two awards were mutually exclusive: the redundancy payment for loss of employment due to no fault of the respondents, and the compensation for unfair termination which is envisaged under **section 49 (1) (c)** of the Employment Act, capped at 12 months. As for all the other remedies granted by the court, counsel referred to **Article 23 (3)** of the Constitution and

submitted that the court has a wide mandate to grant remedies that it deems appropriate, including declarations and compensation. The trial court was well grounded in law to give the remedies it did, he concluded.

63. We have considered those submissions and take the following view of the matter: The law on assessment of damages is well settled and we take it from the case of Peter M. Kariuki vs Attorney General [2014] eKLR where this Court stated in part:-

*"The principles which guide an appellate court in this country in an appeal on award of damages are now well settled. In Kemfro Africa Ltd vs Lubia & Another, (No. 2) 1987 KLR 30, Kneller, JA identified the principles as follows:*

*"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either the judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be wholly erroneous estimate of the damage."*

*Later in Johnson Evan Gicheru vs Andrew Morton & Another, CA No. 314 of 2000, this Court reiterated the same principles in the following words:*

*"It is trite that this court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a larger sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgement of this court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."*

*(See also Butt vs Khan, (1981) KLR 349 and Standard Ltd vs Kagia t/a Kagia & Company Advocates, (2010) 2 KLR 55)*

*The challenge, in our view is not limited to assessment of damages in personal injuries claims alone; it extends to all assessment of general damages that are essentially at large. In addition this Court has stated time and again that in assessment of damages, it must be borne in mind that each case depends on its own facts; that no two cases are exactly alike, and that awards of damages should not be excessive. See Jabane vs Olenja, (1986) KLR 1."*

64. As regards matters employment, **Rika, J.** expressed the following view, which we respectfully agree with, in the case of Abraham Gumba vs Kenya Medical Supplies Authority [2014] eKLR:-

*"The employment relationship is not a commercial relationship, but a special relationship, which must be insulated from the greed associated with the profit-making motives, inherent in commercial contracts. This has been the historical justification of capping compensatory damages since the era of the Trade Disputes Act Cap 234 the Laws of Kenya, to a maximum of 12 months' salary. The Industrial Court traditionally functioned in the manner of the English Employment Tribunal, and in addition to capped compensatory awards, or as alternative to such awards, could order for the reinstatement or re-engagement of the Employee. The Civil Courts on the other hand had no capping on the amount of damages they could award for breach of the contract of employment, but were conversely deprived of the power of reinstatement or re-engagement. The rationale for capping was explained in the House of Lords cases of Eastwood & Another vs Magnox Electric PLC; McCabe vs Cornwall County Council & Others [2004] UKHL 35, where the Court stated:*

*'in fixing these limits on the amount of compensatory awards, Parliament expressed its view on*

*how the interests of the Employers and the Employees, and the socio-economic interests of the country as a whole, can best be balanced in cases of unfair termination. It is not for the Courts to extend further a common law implied term, when this could depart significantly from the balance set by legislature. To treat the legislature as creating the floor, and not the ceiling, would do just that....it would be inconsistent with the purpose Parliament sought to achieve by imposing compensatory awards payable in respect of unfair dismissal.'*

*This Court is of the view that in general, judicial restraint must be exercised in exceeding the capping of 12 months' salary, in compensating Employees for the wrongful acts of their Employers. The proliferation of monetary damages above the equivalent of 12 months' salary will only disturb the equilibrium intended to be achieved by Parliament, in placing the capping."*

65. In line with those principles, we advert to the prayers made in the petition and the awards made in the judgment. Four declarations were sought together with consequential orders. The trial court made three declarations: that the redundancy notice was unprocedural and unlawful; the termination of employment of the Petitioners on account of redundancy was not justified and was unfair; and that the acts of the appellants amounted to discrimination. As a result of those declarations, the court awarded each respondent: *10 months gross salary for unlawful and unfair termination; and Sh.500,000.00 in damages for discrimination.* In addition, each respondent was awarded *'one month gross pay as notice pay; severance pay at one month's gross salary for every completed year; accrued leave days; bonus for 2016; medical cover up to 31<sup>st</sup> December, 2016; Certificates of Service; interest rates on loan balances to remain unchanged after cessation of employment; motor vehicle assets transfer at book value; cessation of employment relationship set for 30<sup>th</sup> June, 2016.* Finally an award of six month's gross salary was made as aggravated damages to each respondent for maintaining the confidentiality clause.

66. In their notice of cross appeal, the respondents say those awards were inadequate and seek additional awards in: *severance pay at three months for each year worked; aggravated and exemplary damages for discrimination; orders for breach of the Banking Act, Capital Markets Act and the Competition Act; and additional orders for effecting the declarations made by the trial court.*

67. In view of our finding that the claim for discrimination was not sufficiently proved, the damages granted thereunder dissipate. So does the prayer made in the cross appeal for enhancement. We also find no firm basis laid in the judgment for the award of aggravated damages in respect of the confidentiality clause. No malice or other contumacious disregard for the law was proved. The damages are set aside. The cross appeal also asserts, erroneously, that a finding was made that there was breach of the **Banking Act, Capital Markets Act** and the **Competition Act**. On the contrary, those claims were rejected by the court stating:

*"Petitioners failed to set out clearly how these statutory protection impacted upon them and the damage suffered as a result. There was clarity with regard to constitutional violations and workplace unfair practices under the Employment Act, but I find no cogent evidence to support the other statutes set out in the Petition."*

We find no reason to find otherwise and so the prayer fails. So do the other prayers made in the cross appeal in view of the rest of our findings in the main appeal, which we now make.

68. The award of *'10 months gross salary for unlawful and unfair termination'*, could only have been made under **section 49** of the Employment Act. We have affirmed that, indeed, the redundancy amounted to unfair termination of the respondents' employment. As this Court stated in the case of ***Kenfreight (E. A.) Limited vs***

***Benson K. Nguti [2016] eKLR:***

*"What then are the remedies for unfair termination under the law? Where it is demonstrated that the termination of a contract of service was unjustified, a range of remedies is available, subject to certain considerations. An employer can pay to an employee whose services are*

*unfairly terminated;*

*i. The wages which the employee would have earned had he been given the period of notice to which he was entitled,*

*ii. The equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

*iii. Reinstatement of the employee*

*iv. Re-engagement*

*The learned Judge relied on (ii) above and awarded 12 months gross salary, being the maximum number of months' salary. This was an exercise of judicial discretion for which on appeal can only be interfered with or reversed*

*if it is demonstrated that the judge misdirected himself on the law, or that he misapprehended the facts and thereby arrived at a wrong decision. See Mrao Ltd vs First American Bank of Kenya Msa Civil Appeal No. 39 of 2002."*

69. In this case, the trial court laid a basis for choosing an award of 10 months, following a previous decision in ***Christopher Onyango & Others vs Heritage Insurance Company Limited, Cause No. 781 of 2015***. Among other considerations were the circumstances in which the termination took place and the fact that the respondents or any of them did not contribute to the termination. We have no reason to disturb the exercise of the court's discretion. Under **subsection (2)** such payment is subject to statutory deductions. Similarly, we do not intend to disturb the other awards which were made within the discretion of the court and proper reasoning and basis laid for their grant. Indeed, some of them mirror the offer of the exit package proposed by the appellants.

70. We now briefly deal with **Appeal No. 301**. It arose from orders made by the trial court after the issuance of the Decree in the main suit on 13<sup>th</sup> July, 2016. It is not clear from the proceedings how the matter landed before the trial Judge on 4<sup>th</sup> August, 2016, but there was an order made on 28<sup>th</sup> July, 2016 for mention on 4<sup>th</sup> August, 2016. Certainly there was no formal application filed or made before the court. Apparently the matter related to execution of the decree and in particular, confirmation of the decretal amount. On that day, the respondents' counsel Mr. Kanjama sought an order for execution on the basis of amounts calculated by the respondents, while the appellants here raised a Preliminary Objection that the court was *functus officio* and could not make any merit-based decision in the matter which was under appeal. They also sought recusal of the trial Judge on suspicion of bias.

71. Despite the appellants' protestations, the trial court proceeded to make the following orders:

***"1. THAT the Claimant agree to Respondent's computation of dues vide documents filed by Respondent before Court of Appeal. I wish to adopt the same; the Judgment amount confirmed at 252,793,280.80;***

***2. THAT the process of execution of the Judgment the Petitioners where necessary shall move the Court formally;***

***3. THAT on application by Respondent for my recusal, file a formal application and Court shall address it.***

***4. THAT the Court shall hear the Respondent preliminary objection on a date to be allocated at the registry".***

72. Those are the orders that provoked the appeal, asserting on two grounds and written submissions

made thereon that the matter was only set down for 'Mention' on 4<sup>th</sup> August, 2016 and there was no jurisdiction, therefore, for the court to make substantive orders varying the original judgment; that the doctrine of finality prevents the hearing of a matter after conclusion of proceedings; and that on the face of the record, the presiding Judge was biased against the appellants and it was wrong to proceed further before hearing a formal application for disqualification. The case of **Telkom Kenya Limited vs John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] eKLR** was cited in support of the doctrine of finality.

73. In response, the respondents submitted that the matter was only placed before the trial court for directions on settlement of terms of the amended decree and there was agreement on the decretal amount upon which the court proceeded to issue an order. According to counsel, the court was not *functus officio* since it was merely confirming computation of damages before execution of the decree. There was no finality prior thereto. For this proposition, reliance was made on the case of

**Bellevue Development Company Limited vs Vinayak Builders Limited & Another [2014] eKLR.**

74. We do not propose to delve into the issue of *functus officio* as it was well articulated on both sides of the argument, and it is clear that there are exceptions to finality depending on the circumstances of each case. In the **Telkom Kenya case (supra)** relied on by the appellants, this Court stated thus:

***"The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in Jersey Evening Post Ltd vs Ai Thani [2002] JLR 542 at 550, also cited and applied by the Supreme Court;***

***"A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available."***

75. On the other hand, it was stated in the **Bellevue Development Company case (supra)** that:-

***"Properly understood, whereas the court becomes functus officio when it has exercised its authority over a matter and has completely determined the real issues in controversy, nevertheless, care should be taken not to inadvertently or otherwise overstretch the application of the concept of functus officio; for, in all senses of the law, it does not foreclose proceedings which are incidental to or natural consequence of the final decision of the court such as the execution proceedings including contempt of court proceedings, or any other matter on which the court could exercise supplemental jurisdiction. Therefore, in determining whether the court is functus officio one should look at the order or relief which is being sought in the case despite that judgment has already been rendered by the court."***

76. We shall also not delve into the issue of 'Bias' since there is no material on record to adjudicate on it and the order made was that a formal application supported by affidavits be filed.

77. The appeal will be determined on the premise argued by the appellants that substantive orders were made on a 'mention' date. As stated earlier, there was no formal application before the court for hearing and determination. On a previous date, the court had fixed the case for mention on 4<sup>th</sup> August, 2016 on which date contentious issues arose and the court, properly in our view, gave directions on three of them. But on the fourth and most drastic order, the court determined some computation of dues on the basis of some contentious documents filed in court. The appellants' protests cut no ice with the court and the substantive order was made.

78. With respect, we think the order was made in error on a mention date. In the case of **Republic vs Anti-Counterfeit Agency & 2 Others ex-parte Surgippharm Limited [2014] eKLR**, Odunga, J. examined several decisions of this Court laying to rest the matter of "mention" dates:

***"In Central Bank of Kenya vs Uhuru Highway Development Ltd. & 3 Others Civil Appeal No. 75 of 1998 the Court of Appeal held that where a matter is fixed for mention the Judge has no business determining on that date, the substantive issues in the matter unless the parties so agree, and of course, after having complied with the elementary procedure of hearing what submissions counsel may wish to make on behalf of the parties. In Mrs. Rahab Wanjiru Evans vs Esso (K) Ltd. Civil Appeal No. 13 of 1995 [1995-1998] 1 EA 332, it was held that when the matter is fixed for mention it cannot be heard unless by consent of the parties and that orders cannot be made before hearing submissions of the parties. Dealing with the same issue the Court of Appeal in AG vs Simon Ogila Civil Appeal No. 242 of 2000 (supra) held that substantive matters cannot be determined on a date when the matter is coming up for mention only. Similarly in Peter Nzioki & Another vs Aron Kuvuva Kitusa Civil Appeal No. 54 of 1982; [1984] KLR 487, it was held that when the matter is fixed for mention and not hearing it cannot be lawfully dismissed. A similar view was taken by the Court of Appeal in Kenya Commercial Bank vs N J B Hawala Civil Application No. 240 of 1997..... As was held in Onyango Oloo vs Attorney General [1986-1989] EA 456 a decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at."***

79. To sum up both appeals:-

- (i) Appeal No. 296 of 2016 is partly successful in terms of the findings made on the various grounds of appeal discussed, but is otherwise dismissed.**
- (ii) The cross appeal is dismissed.**
- (iii) The appellants are partly successful in Appeal No. 301 of 2016 and we order that Order No. 1 made and issued on 4<sup>th</sup> August, 2016 be and is hereby set aside.**
- (iv) Each party shall bear its own costs of the appeals.**

Orders accordingly.

**Dated and delivered at Nairobi this 16<sup>th</sup> day of March, 2018.**

**P. N. WAKI**

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**JUDGE OF APPEAL**

**W. OUKO**

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**JUDGE OF APPEAL**

**K. M'INOTI**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**