REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 409 OF 2020

(Before Hon. Lady Justice Maureen Onyango)

BANKING INSURANCE AND FINANCE UNION.....CLAIMANT

VERSUS

KENYA BANKERS ASSOCIATION.....RESPONDENT

JUDGMENT

The Claimant is a trade union registered under the Labour Relations Act to represent employees in the banking sector and the wider money market industry. The Respondent is an employer's association registered under the Labour Relations Act with membership of 46 commercial banks and microfinance banks carrying on banking business in Kenya under the provisions of the Banking Act and the Microfinance Act respectively.

The Claimant and Respondent have a valid recognition agreement and have negotiated many CBAs to cover the terms of service for unionisable employees of the banks in the membership of the Association. The last CBA was for the period of 24 months from 1st March 2019 to February 2021.

A2 of the said agreement provides as follows: -

> ***A2. DURATION OF AGREEMENT AND EFFECTIVE DATE***
>
> *The duration of this Agreement shall be for a period of twenty four (24) months commencing on 1st March 2019 provided that at any time after 30th November 2020 either party may give to the other at least three (3) months' notice in writing of its desire for this Agreement to continue in force for a further period to be agreed upon, or of its intention to terminate the Agreement or alter any clause in the Agreement. In the later event, parties will enter into negotiations on the terms and conditions of a new Agreement and until such time as this is finalised the present Agreement shall continue in force.*
>
> *Provided further that the party wanting a change or changes must also submit their proposals within (4) months from the date of such notice and the other party shall respond by counter proposals within four (4) weeks of the receipt of the proposals.*
>
> *The terms of this Agreement shall be subject to any relative legislation enacted during the period of the Agreement, which might necessitate alteration or amendment to the Agreement.*
>
> *With effect from 1st March 2019, Housing Allowance shall be payable as per Appendix 'B'. However, with effect from 1st April*
>
> *1980, salaries shall be reviewed annually.*

Further, Section AB12 of the Agreement provides as follows: -

> ***AB12 INCREMENTAL DATES – SECTION HEADS, CHECK CLERKS, CLERKS, COPY TYPISTS, TECHNICAL AND SUBORDINATE STAFF***
>
> *For employees engaged on or before 30th June in any year, the first incremental date shall be the 1st January immediately following. For employees engaged on or after 1st July in any year, the first incremental date shall be 1st July immediately following.*
>
> *Thereafter, in all cases, the incremental dates shall be 1st January and 1st July respectively.*

Further, paragraph AB13 provides as follows: -

> ***AB13 EFFICIENCY BARS – SECTION HEADS, CHECK CLERKS, CLERKS AND COPY TYPISTS***
>
> *The passing of an Efficiency Bar shall depend on the commendation of the Management concerned except that in the event of the Management concerned not recommending that an employee be permitted to pass an Efficiency Bar the employee concerned shall be required to sit a written examination.*
>
> *An efficiency bar shall be created after the sixth year of the sliding*
>
> *scales in clause AB 3.*

Pursuant to the above provisions of the CBA on 5th February 2020, the claimant wrote to the Respondent in the following terms: -

> *"5th February 2020*
>
> *The Chief Executive Officer*
>
> *Kenya Bankers Association*
>
> *International Life House 13th Floor*
>
> *Mama Ngina Street*
>
> *P. O Box 773100 – 00100*
>
> *Nairobi*
>
> *Dear Sir,*
>
> *RE: UNION'S PROPOSAL FOR THE WAGE – REOPENER CLAUSE EFFECTIVE 1ST MARCH 2020 TO 28TH FEBRUARY 2021*
>
> *In compliance with Clause A2 of the parties CBA and the tradition and practice in the industry, we would like to propose a general wage increment of 15% across the board to all unionisable bank employees in the industry.*
>
> *Kindly and urgently carry out your analysis and consultations and consequently favour us with your counter proposals so that parties may commence negotiations promptly. We thank you for*
>
> *your continued support.*
>
> *Yours Faithfully*
>
> *SIGNED*
>
> *Tom O' Odero*
>
> *National Organising Secretary"*

The Respondent replied as follows: -

> *14th February 2020*
>
> *The Secretary General*
>
> *Banking Insurance and Finance Union (Kenya)*
>
> *Sonalux House, 6th Floor, Moi Avenue*
>
> *P. O Box 42748 – 00100*
>
> *NAIROBI*
>
> *Attention: Tom O' Odero.*

Dear Tom.

RE: REVIEW OF THE WAGE RE-OPENER CLAUSE OF THE CBA FOR THE PERIOD 1ST MARCH 2020 TO 28TH FEBRUARY 2021

We are in receipt of your letter dated 5th February 2020 on the above mentioned subject.

We advise that we intend to commence negotiations as soon as subsequent consultations are completed which will result in

a decision as to our counter proposals and probable meeting dates.

Yours faithfully,

SIGNED

Dr. Habil Olaka"

The Respondent did not get back to the claimant with either counter proposals or meeting dates causing the claimant to send a reminder on 19th May 2020 in the following terms: -

"5th February 2020

The Chief Executive Officer

Kenya Bankers Association

International Life House 13th Floor

Mama Ngina Street

P. O Box 773100 – 00100

Nairobi

Dear Sir,

RE: REVIEW OF THE WAGE – REOPENER CLAUSE OF THE CBA FOR THE PERIOD 1ST MARCH 2020 TO 28TH FEBRUARY 2021

WE wish to refer to the above matter read together with the Union's proposal dated 5th February 20220 and your response of 14th February 2020 and would like to raise the following issues: -

1. The Union is yet to receive your counter proposals as stated in your reply to us. The parties Recognition Agreement requires that you submit the counter proposals within two (2) weeks, a period which is now long overdue.

2. That under the circumstances we require you to submit your response so that parties may commence negotiations without further delays.

Thanking you and eagerly awaiting your counter proposals and meeting dates.

Yours Faithfully

SIGNED

Isaiah Kubai

General Secretary"

The Respondent replied by its letter dated 23rd June 2020 as follows: -

"23rd June 2020

The Secretary General

Banking Insurance and Finance Union (Kenya)

Sonalux House, 6th Floor, Moi Avenue

P. O Box 42748 – 00100

NAIROBI

Attention: Isaiah Kubai

Dear Isaiah.

RE: SUSPENSION OF REVIEW OF THE WAGE RE-OPENER CLAUSE OF THE CBA, FREEZE OF WAGE AND BENEFITS INCREMENT FOR THE PERIOD 1ST MARCH 2020 TO 28TH FEBRUARY 2021

We refer to the above matter, your letters doled 5th February 2020 and 19th Moy 2020 and ours doted 14th February 2020 regarding the review of the Wage Re-Opener clause of the CBA for the period 1st March 2020 to 28''' February 2021

Following the outbreak of the COVID-19 pandemic as declared by the World Health Organization (WHO) and locally by the Ministry of Health, the banking industry has extensively held consultations on the impact and effects of the pandemic to the Industry and the sustainability of the banking workforce

Consequently, and to mitigate the adverse effects of COVID-19 pandemic and support the banking industry and its workforce and having regard to the Tripartite Memorandum of Understanding (MOU) signed by the social partners, Ministry of Labour, COTU (K) and FKE. We seek your indulgence and concurrence on the following:

1. Suspension of the CBA negotiations and review of wage re-opener for the period 1st March 2020 to 28th February 2021 and resume full CBA negotiations following the lapse of the current CBA on 28th February 2021.

2. Freeze to all wage and benefits increments for the period 1st March 2020 lo 28th February 2021 pursuant to the current CBA.

We advise that our members are committed to social dialogue with you for harmonious labour relations during and post the pandemic period and look forward for your feedback.

Your continued cooperation, engagement and support are highly appreciated.

Yours faithfully,

SIGNED

Dr. Habil Olaka

CHIEF EXECUTIVE OFFICER"

The respondent in its letter above referred to the Memorandum of Understanding signed between the Government, COTU (K) and FKE as the basis for suspension of the CBA negotiations and freeze of all wage and benefits increments.

The parties held two meetings on 1st and 6th July 2020 to deliberate on the request by the Respondent to suspend review of wage-reopener and freeze of wage and benefits for the period 1st March 2020 to 28th February 2021 but did not reach agreement. As a consequence the Respondent by letter dated 23rd June 2020, advised its members to withhold implementation of the July 2020 salary notch and efficiency bars increment pending resolution of the two issues with the claimant. It is this directive by the Respondent to its members that prompted the Claimant to report a trade dispute to the Minister for Labour and Social Protection in accordance with Section 62 of the Labour Relations Act.

The Minister accepted the dispute and appointed Mr. Boaz Musandu as Conciliator. After hearing the parties, the Conciliator made the following findings and recommendations: -

FINDINGS

Investigations established that the parties have a valid recognition agreement.

Investigations further established that the parties have a valid CBA effective 1st March 2019 to 28th February 2021.

Management prayed for suspension of the wage re-opener negotiations till 28th February 2021. They however agreed to implement the notch increment effective 1st July 2020 to 28th February 2021 as a condition.

The union on the other hand is not prepared to suspend the wage Re-opener negotiations consequently this matter deadlocked.

RECOMMENDATIONS

I recommend that the management immediately make their counter proposals as is guided by the parties recognition agreement.

Once this is done the parties can engage and settle on the middle ground in the spirit of give and take.

Finally I appeal to you to accept this recommendation as the basis for settling this matter."

In the statement of Claimant dated 13th August 2020 and filed on 14th August 2020, the claimant seeks the following orders: -

i. The Respondent's member banks to immediately implement the salary notch and efficiency bars effective 1st July 2020.

ii. The Respondent to forward to the Claimant a counter proposal within seven (7) days and the parties to engage in CBA negotiations.

iii. The unionisable employees be paid a General Wage Increment of 15% effective 1st March 2020 to 28th February 2021.

iv. Any other relief the court finds merited granting.

Together with the claim, the claimant filed a notice of motion of even date in which it seeks the following orders:-

1. Spent.

2. That the Court be pleased to make an order compelling the Respondent's member banks to implement the salary notch and efficiency bars as envisaged in the CBA as from 1st July 2020 to the affected unionisable employees.

3. That the Court be pleased to make an order Compelling the Respondent to negotiate wage re-opener for the period 1st March 2020 to 28th February, 2021.

4. That the claim/suit be fixed for hearing and determination on priority basis.

5. Costs of this application be provided for.

The grounds in support of the application, which are also similar to the grounds in support of the claim, are that: -

i. The Respondent has unilaterally suspended CBA negotiations and implementation of the salary notch and efficiency bars effective July 2020.

ii. That the CBA binds the parties to the agreement and therefore the Respondent's conscripting and/or ignoring to negotiate and refusal to implement CBA is unlawful and unconstitutional.

iii. The Respondent's members have effected salary notch and efficiency bars for employees entitled to it in January, 2020 and therefore discriminating employees who were to benefit from the same as from July, 2020 as provided for in the CBA.

iv. The Respondent cannot hide under the pretext of Memorandum of Understanding by the tripartite parties. The said Memorandum of Understanding has no force of law on parties to voluntary CBA.

v. That any suspension of the CBA benefits can only be implemented upon mutual consent of the parties and not at the unilateral move by the Respondent.

vi. That the salary notch and efficiency bars implementation are inbuilt in individual employee's salary.

vii. That salary notch compensates for seniority in terms of years of service and avoids salary overlaps.

viii. That the employees need to be compensated for inflation in line with the tradition of the parties' negotiations effective March 2020.

ix. That the Respondents will not suffer any prejudice if the orders sought are granted.

x. That this Application has met the threshold for the grant of orders sought.

xi. That such other grounds to be adduced at the hearing.

The claimant further filed a supplementary affidavit of Isaiah Munoru Mucheke and submissions.

The Respondent filed a replying affidavit of Dr. HABIL OLAKA, its Chief Executive Officer sworn on 21st September 2020, in opposition of the application. It further filed a statement of response dated 19th August 2020 and submissions with list and bundle of authorities both dated 12th November 2020.

The claim was disposed of by way of written submissions. The claimant highlighted the written submissions while the Respondent relied entirely on the submissions. In both submissions, the parties largely adopted the facts, which are uncontested, and the averments in the pleadings.

Analysis and Determination

I have considered the pleadings and submissions. The issues arising therefrom for determination are whether the claimant is entitled to the orders sought in the claim and the application as already set out above.

1. Withholding of Salary Notch for July 2020 and January 2021

The CBA between the parties hereto as registered by this court on 10th September 2019 at Clause A2 (already set out herein above) provides that the agreement shall be in force for 24 months from 1st March 2019. The clause further provides that a party who wishes that the agreement continues in force beyond the date on the face thereof, that is 28th February 2021, or to terminate the agreement or alter any clause of the agreement at any time after 30th November 2020 may give the other party three (3) months' notice in writing. The agreement further provides that in any such event, the agreement would continue in force until parties agreed on the terms of the new agreement.

In the instant case, the claimant intimated to the Respondent its intention to review the terms of the CBA wage re-opener clause vide its letter dated 5th February 2020 (which has been reproduced above). The union proposed a general wage increase of 15% across the board and sought counter-proposals from the Respondent. The Respondent acknowledged receipt of the letter and promised to get back to the Claimant with both its counter proposals and meeting dates, but by 19th May 2020, had not done so. It is only after the claimant's reminder of that date that the Respondent communicated its decision to suspend review of the wage re-opener clause of the CBA and communicated its intention to freeze wage and benefits increment for the period 1st March 2020 to 28th February 2021.

This was in violation of Clause A2 of the CBA, which provides that any changes to the CBA are to be proposed 3 months in advance and to be agreed upon, and before that is done, the agreement is to remain in force until agreement is reached.

The Respondent's circular letter No. 98/2020 to its members advising them to withhold implementation of the July salary notch and efficiency bars increment pending the resolution and settlement of the two issues in dispute was a further violation of Clause A2 of the CBA.

Besides the parties CBA, Section 59 of the Labour Relations Act provides as follows: -

59. Effect of collective agreements

1) A collective agreement binds for the period of the agreement—

(a) the parties to the agreement;

(b) all unionisable employees employed by the employer, group of employers or members of the employers' organisation party to the agreement; or

(c) the employers who are or become members of an employers' organisation party to the agreement, to the extent that the agreement relates to their employees.

2) A collective agreement shall continue to be binding on an employer or employees who were parties to the agreement at the time of its commencement and includes members who have resigned from that trade union or employers' association.

3) The terms of the collective agreement shall be incorporated into the contract of employment of every employee covered by the collective agreement.

4) A collective agreement shall be in writing and shall be signed by—

(a) the chief executive officer of any employer, the chief executive or national secretary of an employers' organisation that is a party to the agreement or a representative designated by that person; and

(b) the general secretary of any trade union that is a party to the agreement or a representative designated by the

general secretary.

5) A collective agreement becomes enforceable and shall be implemented upon registration by the Industrial Court and shall be effective from the date agreed upon by the parties.

Any agreement on wages and terms and conditions of service in a CBA thus become incorporated into the contracts of employment of all unionisable staff covered by the same and become part of their terms of service, from the date of registration of the CBA. By withholding the implementation of the July 2020 salary notch and efficiency bars increment, the Respondent and its members, in addition to violating the terms of the CBA, also breached the terms of contract of all the unionisable employees of the Respondent's members whose terms were covered by the CBA.

The Respondent has pleaded that its demands for freeze of July 2020 salary notch and efficiency bars increment is driven by the COVID 19 pandemic and the TRIPARTITE SOCIAL PARTNERS MOU dated 20th April 2020 as gazetted on 26th June 2020. Paragraph 3 of the Memorandum of Understanding states as follows: -

c) These measures may include, but are not limited to—

(i) suspension of negotiation of Collective Bargaining Agreements (CBAs);

(ii) suspension of implementation of concluded CBAs whose effective date falls within the COVID-19 period;

(iii) review of some terms negotiated in the existing CBAs; and

(iv) freezing wage increments during the period of the pandemic.

d) Employers' and workers' organisations are encouraged to actively participate in planning, implementing and monitoring measures for recovery from COVID-19 pandemic.

e) Employers and workers' unions are expected to dialogue to ensure they are well-informed on the measures being undertaken to mitigate the COVID-19 effects which have an impact on their terms and conditions of employment, and on how to protect themselves from COVID-19 infections.

f) Mutually agreed terms and conditions of employment entered into during the pandemic period must be in writing and may be filed with the Labour Commissioner through the nearest labour office.

[Emphasis added]

The Memorandum of Understanding emphasises that any suspension of any terms of concluded CBAs are to be agreed upon in writing and may be filed with the Labour Commissioner through the nearest Labour Office. I would add that in view of the fact that the CBA is registered by this court, such changes ought to be also registered with the court. No such agreement has been filed with respect to the CBA between the claimant and Respondent registered by the court on 10th September 2019.

As submitted by the claimant which fact has not been contested by the Respondent, its members did effect 1st January 2020 notch and efficiency bars increment as per clause AB12 of the CBA for those employees whose incremental date fell on 1st January 2020. This therefore means that the employees whose incremental date fell on 1st July 2020 would be discriminated against by the Respondent's members should they too not be paid their salary notch increment that fell due on 1st July 2020. I agree with the claimant that this further violates Section 10(5) and 26 of the Employment Act, which provides as follows: -

Section 10(5)

(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

Section 26

26. Basic minimum conditions of employment

(1) The provisions of this Part and Part VI shall constitute basic minimum terms and conditions of contract of service.

(2) 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.

It is further a violation of Article 27 of the Constitution and Section 5 of the Employment Act both of which provide for protection against discrimination and, under Section 5(5) of the Employment Act, amounts to an offence.

The court has further noted that the circular letter No. 98/2020 issued by the Respondent to its members does not refer to any difficulty by any of its members to implement the CBA and appears to be intended to coerce the claimant into agreeing to its demands without any proof of the same having been a consequence of COVID 19 and without the same being subjected to negotiations with the claimant. Section 57(2) of the Labour Relations Act requires an employer to disclose to a trade union all relevant information that allow the trade union to effectively negotiate. No such information has been offered by the Respondent to the claimant or to the court to justify its demand for freeze of salary notch and efficiency bars increment.

The Court however notes that the Respondent has agreed to implement the salary notch and efficiency bars increment, albeit conditionally. The court further notes that in the circular to its members, the Respondent advised them to accrue the budget for the increments, an indication that the same had been budgeted for and is available. I thus do not find the cases relied upon by the Respondent being **Moses Kamau and 6 Others v Signature Holdings (E.A) Limited [2020] eKLR** and **Kenya Union of Commercial Food and Allied Workers v Tusker Mattresses Limited (2020) eKLR,** relevant to the issue herein. There is no proof of inability to pay due to COVID 19 Pandemic.

2. Suspension of CBA Wage Re-Opener negotiations until March 2021

March 2021 has come and gone. The Respondent's submission that it is yet to ascertain the impact of COVID 19 pandemic on its member banks incomes is thus no longer a valid reason to delay negotiations. COVID pandemic has been with us for more than a year and the banks have already published their financial statements for the period relevant to the wage re-opener negotiations. Empirical evidence is thus available to demonstrate whether or not the Respondents members can afford or not afford a wage increase and the extent thereof. It is therefore necessary for each party to place its cards on the table to justify its position.

Section 57(1) of the Labour Relations Act compels every employer or group of employer who has a valid recognition agreement to negotiate a collective agreement with the recognised trade union. The wording of the Act is couched in mandatory terms, that the employer/group of employers *"shall"* negotiate with the union.

This right is also entrenched in the Bill of Rights in the Constitution under Article 41(5), which provides that : -

> **(5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.**

Further, as already pointed out above, the Memorandum of Understanding between the Tripartite Partners emphasizes the need for negotiations on any matters affected by the COVID pandemic. The Respondent and its members cannot therefore just refuse to negotiate or decide to defer negotiations without proof of the extent to which the pandemic has altered their ability to review terms and conditions of service. As the claimant has demonstrated from performance indices from the banks, there is no proof that the banks cited by the claimant suffered losses. Some of them had reduced profit margins while others exceeded their profit margins compared to the same period in the previous year.

The Respondent did not contest the veracity of the evidence adduced by the claimant on performance of the banks. It stated at paragraph 38 of the Statement of Response that –

> *38. The banking industry's half-year performance for 2020 does not provide accurate data for any initial assessment of the COVID-19 impact to the industry having regard to the March 2020 Government announcement of COVID-19 positive cases in the Country and the subsequent lock-down measures. However, analyzing the sample half- year 2020 results as submitted by the Claimant signifies a drop when compared to the 2019 half year results as prorated from the 2019 Claimant's sample."*

In its letter to the Chief Industrial Relations Officer dated 20th August 2020 in response to the findings and recommendations in the Conciliator's Report, the Respondent states as follows: -

> *a) Salaries are recurrent expenditures thus the need for sustainability and ability to pay into the future. The increment sought by the Union must be funded by current and future revenue by banks which revenue cannot be generated independent of bank customers, a majority of whom are in the red because of COVID 19 pandemic.*
>
> *b) The Industry has provided loan holidays and moratoriums to customers amounting to over Kes.1 trillion directly affecting the banks revenue.*
>
> *c) Any wage increase at present is not sustainable by the industry and will automatically lead to redundancies and loss of employment; Management's commitment is in presenting the industry Jobs of the current pay levels us much as possible as the Industry navigates the effects of the Pandemic.*

These are matters that must be supported by evidence during negotiations. The Respondent has as yet not made any counter offer to the claimant's proposal of 15% general wage increase made in the claimant's letter of 6th February 2020. It is imperative that the Respondent makes its counter proposal and that the parties hold negotiations for each of them to justify its position, or modify its position relative to the information that each of them will adduce during negotiations. In this respect, I agree with the recommendation of the Conciliator.

The Wages Guidelines, a copy of which has been produced by the claimant, delineates the factors to be taken into account during negotiations.

The court finds that the Respondent has not adduced sufficient proof to justify the suspension of negotiations.

3. Frustration of Contract

The Respondent has submitted that although the pandemic does not automatically suspend or waive the terms of the CBA, the effect of the pandemic is such that the performance of its contractual obligations has been frustrated. The Respondent relied on the decision of the Court of Appeal in **Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR** in dealing with the issue of frustration of contracts where the court cited the case of **Davis Contractors Ltd v Farehum U.D.C. (1956) AC 696** which had sought to provide guidance on when a contract can be held to have been frustrated. In that case Lord Radcliff stated thus:-

> *"…frustration occurs whenever the law recognizes that, without*
>
> *the default of either party, a contractual obligation has become incapable of being performed because the circumstance in which the performance is called for would render it as a thing radically different from which was undertaken by the contract. "Non haec in foederi veni" It was not what I promised to do...There… must be such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for."*

The Court in **Lucy Njeri Njoroge case (supra)** held that;

> *"For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties…*
>
> *In **Davis Contractors Ltd vs Farehum U.D.C. (supra),** it was stated thus,*
>
> > *"The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced."*
>
> *In **Howard & Company (Africa) Ltd vs Burton [1964] EA 157** this Court concurred with Lord Sumner in **Bank Line Ltd vs Arthur Capel & Company (26) [1919] AC p. 425** who stated;*
>
> > *"It is now well established that the doctrine of frustration cannot apply where the event is alleged to have frustrated the contract arises from the "act or self-election of the party" who seeks to invoke it. Reliance cannot be based on a self-induced frustration".*

Contribution to the matters leading to the frustration is only one of the factors to be considered by the court. The main factor is whether the intervening event(s) have altered the position of the parities to an extent that it is no longer possible to continue with the contract.

As has been observed above, the Respondent has not adduced any evidence to prove its inability to either implement the 1st July 2020 salary notch and efficiency bars or to negotiate CBA wage re-opener clause effective 1st March 2020 to 28th February 2021. The Respondent has not demonstrated that its members have become incapable of performance of either obligations. The decrease of profits or income per se does not qualify as frustration. No evidence has been adduced by the Respondent to prove that any of its member's circumstances have significantly changed to the extent that they are incapable of performing their obligations, including the obligation to implement the 1 st July 2020 salary notch and efficiency bars or to negotiate wage re-opener effective 1st March 2020 to 28th February 2021.

The doctrine of frustration is a complex one in the law of contract. It provides a vent for each party to bear the loss or gains of a contract, which cannot be performed at a particular point in time. The Court of Appeal in **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] eKLR** stated as follows;

> *"This now leads us to the issue of whether the agreement was genuinely frustrated.*
>
> *In **Halsbury's Laws of England, Vol. 9(1), 4th Edition** at paragraph 897:-*
>
> > *"As subsequently developed, the doctrine of frustration operates to excuse from further performance where: (1) it appears from the nature of the contract and the surrounding circumstances that the parties have contracted on the basis that some fundamental thing or state of things will continue to exist, or that some particular person will continue to be available, or that some future event which forms the basis of the contract will take place; and (2) before breach, an event in relation to the matter stipulated in head (1) above renders performance impossible or only possible in a very different way from that contemplated. This assessment has been said to require a 'multi-factorial' approach. Five propositions have been set out as the essence of the doctrine. First, the doctrine of frustration has evolved to mitigate the rigour of the common law's insistence on literal performance of absolute promises so as to give effect to the demands of justice. Secondly, the effect of frustration is to discharge the parties from further liability under the contract, the doctrine must not therefore be lightly invoked but must be kept within very narrow limits and ought not to be extended. Thirdly, the effect of frustration is to bring the contract to an end forthwith, without more and automatically. Fourthly, the essence of frustration is that it should not be due to the act or election of the party seeking to rely upon it, but due to some outside event or extraneous change of situation. Fifthly, that event must take place without blame or fault on the side of the party seeking to rely upon it; **nor does the mere fact that a contract has become more onerous allow such a plea."***
>
> *In the case of **Davis Contractors LTD -vs- Farehum U.D.C, (1956) A.C 696,** Lord Radcliffe at page. 729 held:*
>
> > *"...frustration occurs whenever the law recognizes that, without the default of either party a contractual obligation **has become***

> ***incapable of being performed because the circumstances in which the performance is called for would render it a thing radically different from that which was undertaken by the contract. "Non haec in foedera veni". It was not what I promised to do".*** [Emphasis added]

The collective bargaining agreement between the claimant and the Respondent is still in place. Their positions have not been altered by the pandemic. Neither have the contracts of employment between the Respondent's members and their employees who are covered by the CBA. A dip in the profits of an entity, in this case a bank, does not imply frustration.

It is my finding that the doctrine of frustration of contract is inapplicable in the circumstances of this case.

Conclusion

Having found that the Respondent has not justified either the freeze of wage and benefits increment for the period 1st March 2020 to 28th February 2021 or suspension of review of the wage re-opener clause of the parties CBA, the court makes the following orders; -

> **1) The Respondent's member banks do and are hereby directed to immediately implement the salary niche and efficiency bars effective 1st July 2020.**
>
> **2) The Respondent do and are hereby directed to send the claimant its counter proposals on the wage re-opener effective 1st March 2020 to 28th February 2021, forthwith to pave way for parties to engage in the negotiations for the CBA Wage Re-Opener General Wage Increment.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 9TH DAY OF APRIL 2021

MAUREEN ONYANGO

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE