REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 104 OF 2020

(Consolidated with Cause No. 294 of 2020)

(Before Hon. Justice Hellen S. Wasilwa on 20th August, 2020)

KENYA AVIATION WORKERS UNION..PETITIONER

VERSUS

KENYA AIRWAYS PLC...RESPONDENT

AND

CENTRAL ORGANIZATION OF TRADE DISPUTES (K)....1ST INTERESTED PARTY

FEDERATION OF KENYA EMPLOYERS.............................2ND INTERESTED PARTY

JUDGEMENT

1. The Petitioner herein filed a Petition against the Respondent on 9/7/2020 and an Amended Memorandum of Claim on 14/7/2020 being Cause 294 of 2020. The Claim was subsequently consolidated with the instant Petition.

2. In the course of the proceedings, the Central Organisation of Trade Unions and the Federation of Kenya Employers were enjoined as the 1st and 2nd Interested Parties respectively.

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3. The Petitioner avers that the worldwide Covid -19 pandemic substantially paralysed normal business in the aviation industry. Consequently, the parties herein executed a Memorandum of Agreement (MOA) dated 2/4/2020 and 27/5/2020, which altered the terms of service of employees. This included remuneration and leave days of the Respondent's unionisable employees by allowing pay cuts and unpaid leave for the period April 2020, provided that the said deductions would be compensated upon resumption of normal business.

4. The Petitioner avers that it was a term of the MOA dated 2/4/2020 that it would apply for the month of April 2020 while the MOA dated 27/5/2020 would be apply for the months of May and June 2020 or any earlier period that the Respondent would resume normal business. Further, the MOA would be varied or extended by both parties.

5. It avers that the MOA dated 27/5/2020 lapsed on 30/06/2020 and was never extended by the agreement of the parties. Therefore, the terms of the Collective Bargaining Agreement (CBA), dated 19/12/2014, in respect of remuneration, leave and other terms would apply until an agreement between the parties varies or limits the said terms.

6. It avers that on 3/7/2020 the Respondent's Managing Director, without prior notice, discussions or agreement with it, issued a general notice to all employees that, it anticipated resumption of domestic flight operations but with depressed demand and directed all its staff not required to support the alleged reduced operations to proceed on unpaid leave effective 6/7/2020.

7. It further avers that on 7/7/2020, the Respondent's Chief Human Resource Officer issued an undated general notice/directive ***"Looking Forward Staff Communication, Leave Guidelines from July 2020"*** purporting to implement the Managing Director's Directive.

8. On 7/7/2020, the Respondent's Chief Human Resource Officer issued a general notice/directive ***"Moving Forward July 2020 Onward- Frequently Asked Questions: Resumption of Operations".*** The several notices clarified that all employees not required to support core operations would proceed on unpaid leave without any benefits commencing 6/7/2020. Those supporting core functions, as was to be

determine by the Respondent's Head of Departments, would work on salary pay-cuts of 30% without any provision for compensation of the remainder of 70% salary upon resumption of normal operations characterised by the MOA.

9. It avers that the directives were not only given without prior notice, discussions or concurrence of the Petitioner but also implemented without seeking voluntary, free and fair concurrence of the Respondent's employees. In addition, the implementation of these directives is a breach of Clause 4 of the CBA.

10. It further avers that the retrospective requirement by the Respondent to its employees to consent to unpaid leave and or pay cuts of 30% of their salaries without promise of compensation not only amounts to unfair labour practice but is also in breach of the CBA, Part IV and V of the Employment Act and the rights of the Petitioner and the unionisable employees to freely and voluntarily bargain terms of employment without undue pressure coercion and undue influence.

11. It avers that the directives are contrary to Article 25 of the Constitution that guarantees freedom from human and degrading treatment. In addition, the directives are in breach of Articles 27 (1) and (2) of the Constitution in that they violate the employees right to equality, protection and benefit as they deny employees freedom of contract to alter, amend or vary their terms of service as protected by the law of contract, Section 9 , 10 (5) Part Iv and V and Section 28 of the Employment Act as well as Clauses 4, 9A, 9B, 18 , 20 and 21 of the CBA.

12. It contends that the directives are also in breach of section 4 of the Fair Administrative Action Act, section 55 and 59 of the Labour Relations Act and Chapter 4 of the Constitution.

13. The Petitioner seeks the following reliefs:-

> ***i. A declaration that the Respondent's administrative actions illustrated by the Respondent's Managing Director's General Notice on 3/7/2020 and consequential directives flowing therefrom on 7/7/2020 by the Respondent's Chief Human Resource Officer particularly undated General Notice/Directive titled Looking Forward staff Communication, Leave Guidelines from July 2020 and General Notice/Directive titled "Moving Forward July 2020 Onwards-Frequently asked Questions: Resumption of Operations" and all consequential directives or actions arising therefrom stated above directing unlawful pay cuts and unpaid leave are contrary to Collective Bargaining Agreement (the CBA) between the Petitioner and Respondent dated 19/12/2014, the Employment Act Law of Contract on freedom of contracts, Fair Administrative Action and the Constitution is illegal, unlawful, unprocedurally fair, unfair labour practices, discriminatory , null and void.***
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> ***ii. An Order of Certiorari to call, remove , deliver up to this Honourable Court and quash or revoke the Respondents Managing Directors General Notice on 3/7/2020 and consequential directives flowing therefrom on 7/7/2020 by the Respondent's Chief Human Resource Officer particularly undated General Notice/Directive titled Looking Forward staff Communication, Leave Guidelines from July 2020 and General Notice/Directive titled "Moving Forward July 2020 Onwards-Frequently asked Questions: Resumption of Operations" and all consequential directives or actions arising therefrom stated above directing unlawful pay cuts and unpaid leave are contrary to Collective Bargaining Agreement (the CBA) between the Petitioner and Respondent dated 19/12/2014, the Employment Act Law of Contract on freedom of contracts, Fair Administrative Action and the Constitution.***
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> ***iii. An order of permanent injunction restraining the Respondent, its agents, servants, officers and or anyone claiming under them to restrain them from implementing the directive or decision by the Respondent's Managing Directors General Notice on 3/7/2020 and consequential directives flowing therefrom on 7/7/2020 by the Respondent's Chief Human Resource Officer Particularly undated General Notice/Directive titled Looking Forward staff Communication, Leave Guidelines from July 2020 and General Notice/Directive titled "Moving Forward July 2020 Onwards-Frequently asked Questions: Resumption of Operations" and all consequential directives or actions arising therefrom stated above directing unlawful pay cuts and unpaid leave are contrary to Collective Bargaining Agreement (the CBA) between the Petitioner and Respondent dated 19/12/2014, the Employment Act Law of Contract on freedom of contracts, Fair Administrative Action and the Constitution.***
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> ***iv. Costs of the Petition.***
>
> ***v. Any other relief that the Court may deem fit to grant in the circumstances of the Petition.***

14. The Petition is supported by the undated affidavit of Moss K. Ndiema, the Petitioner's Secretary General in which he reiterates the averments in the Petition.

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15. The Petitioner who is also the Claimant in this Cause avers that it executed a MOA with the Respondent on 10/5/2017 providing for terms of remuneration for about 370 unionised employees outsourced from 3rd Parties by the Respondent. It avers that the said MOA was registered on 27/7/2017 and became part of the CBA. It further avers that between 25/6/2018 and 3/7/2018 the parties executed an Addendum and Variation to the MOA.

16. It contends that the MOA executed on 10/5/2017 provided that all employees engaged by the Interested Parties, but seconded to the Respondent, and who had worked for a continuous period of 3 years and above would be eligible for engagement by the Respondent on 2 year contracts provided they met the requirements specified in the Respondent's evaluation process.

17. It contends that it was a term of the MOA that upon the expiry of the 2 year contract, the Respondent would agree with it on terms of service for future engagement. However, there was no agreement on terms applicable for such future engagement but on 3/5/2019 the parties executed an Agreement before a Conciliation Committee providing *inter alia* that parties had agree to continue outsourcing and insourcing of

employees into the Respondent's employment on contract basis in accordance with sections 5 (1) (a), (2) and 3 (b) of the Employment Act, the Constitution, the ILO Convention and the best labour practice.

18. It avers that on 3/7/2020, the Respondent's Group Managing Director and Chief Executive Officer issued written communication to all its employees that the organisation had reached a decision to carry out an organisation-wide rightsizing exercise, which would result in a reduction of staff. Further, that the staff rationalisation process was expected to be completed by 30/9/2020.

19. It avers that the Respondent's Group Managing Director also issued it with written communication dated 3/7/2020 informing it of the decision to carry out a phased staff rationalisation with effect from July 2020.

20. The Petitioner avers that the Respondent further notified it that it would resume its normal flight operation with effect from July 2020 and employees who are not involved in normal flight operations were to proceed on unpaid leave effective July 2020.

21. The Petitioner contends that although the Respondent's communication advised that some of the unionisable employees would be affected by the decision and undertook to engage the Petitioner as required by law, the purported engagement was an afterthought as the Respondent's decision to rationalise the organisation's staff and send them on unpaid leave had already been made and executed.

22. The Petitioner avers that the Respondent's notices and consequential actions arising therefrom violated Clauses 4, 9A, 9B, 18, 20 and 21 of the CBA. It further contends that the intended phased staff rationalisation violated section 40 of the Employment Act and Clauses 42-49 of the CBA in so far as it purports to render the targeted employees redundant without due procedure of the law.

23. The Petitioner further avers that the Respondent's Chief Human Resource Officer issued a notice to the Petitioner on 3/7/2020 that the Respondent would not be renewing contracts of about 48 insourced staff working in various functions/departments of the Respondent and whose contracts were to lapse on 31/7/2020. It maintains that the decision to terminate these employees was arrived without prior notice, discussion, engagement or concurrence in breach of Clause 4 of the CBA.

24. It seeks the following prayers:-

> ***i. A declaration that the Respondent's Group Managing director and Chief Executive Officer written communication to all its employees on 3/7/2020 the Respondent's Group Managing Director's letter dated 3/7/2020 to the Claimant on phased rationalisation of its employees as well as unpaid leave policy and the Respondent's Chief Human Resource Officer's letter to the Claimant dated 3/7/2020 notifying of non-renewal of their contracts of the Respondents 48 insourced staff on contracts contrary to the Employment Act, the Fair Administrative Action Act, the Constitution and CBA to unfair labour practices, illegal, unlawful , null and void.***
>
> ***ii. An order of permanent injunction restraining the Respondent by itself, its officers, agents, services or any person claiming under it from implementing the Respondent, by itself , its officers, agents, servants or any person claiming under it from Respondent's Group Managing Director and Chief Executive Officer written communication to all its employees on 3/7/0202, the Respondent's Group Managing Director letter dated 3/7/2020 to the Claimant on phased rationalisation of its employees as well as unpaid leave policy and the letter by the Respondent's Chief Human Resource Officer to the Claimant dated 3/7/2020 notifying of non-renewal of the Respondent's insourced staff contracts in violation of the CBA, the Employment Act, the Fair Administrative Action Act and the Constitution.***
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> ***iii. Compensation or unfair labour practices, loss of earnings and employment by the Claimant's unionisable members consequent to the impugned unlawful notices in the claim herein.***
>
> ***iv. Costs of the suit.***
>
> ***v. Any other relief as this Honourable Court may deem fir and just to grant.***

<u>Respondent's Case</u>

25. In response to the Petition, the Respondent filed a Replying Affidavit sworn by Evelyne Munyoki, its Chief Executive Human Resource Officer, on 15/7/2020.

26. She depones that since the onset of the Covid-19 pandemic, the Respondent's operations have drastically reduced. She further depones that the revenues which would cater for the Respondent's operation costs such as employees remuneration have significantly declined to a position that it cannot cater for these costs. She avers that the effects of the pandemic have exacerbated the losses that the Respondent incurs on a weekly basis to the tune of USD 7.4 million.

27. She avers that from the Technical Financial Report dated 13/7/2020 on the effect of the pandemic to the Respondent's operations, it is evident that the Respondent has taken several measures to mitigate these effects. That these measures include a moratorium on loans for a period of 6 and 12 months and deferment of lease rentals between 3 and 6 months, payment plans with key suppliers to delay the settlement of outstanding dues and engaging competitively priced cargo freighters and repatriation flights.

28. She avers that owing to the effects of the pandemic, the Respondent and the Petitioner engaged in monthly negotiations to accommodate interests of the Petitioner's members while balancing the Respondent's interest in continuing to operate, albeit at decreased capacity as a going concern.

29. She avers that the Petitioner was fully aware of the precarious position that the pandemic had placed the Respondent in. She avers that the parties herein signed a MOA for the months of April, May and June 2020, which incorporated provisions on unpaid leave and pay cuts for the applicable period.

30. She contends that the parties were in the process of negotiating the MOA for the month of July 2020 when the Petitioner moved to Court. She further contends that among the outstanding items for discussion included a proposal on unpaid leave, which had been the subject of discussion since 30/6/2020.

31. She avers that the Respondent was also acting in compliance of a Memorandum of Understanding (MOU), between the Tripartite Social Partners under the Ministry of Labour and Social Protection dated 30/4/2020, which gave directions and recommendations to industrial partners to take cognizance of the effects of the pandemic and commit painful but necessary policy measures aimed at mitigating the impact of Covid-19 Pandemic.

32. She avers that Clauses 20 and 21 of the CBA provide for instances when the Respondent can send unionisable employees on unpaid leave during study leave and compassionate leave. However, the CBA does not preclude other instances when unpaid leave can be invoked.

33. She avers that the actions which the Respondent proposed to take in view of Pandemic would not only affect the Petitioner's members but its entire staff. She avers that the communications issued were not in breach of Clause 4 of the CBA and that the communications contained information and proposals on the way forward toward resumption of operations, incorporating not only matters to do with employment.

34. She avers that Clause 4 requires discussion with the Petitioner before implementation of the notices and that the Petitioner moved to Court while discussion was ongoing. She further avers that the matters were subject to the employee's consent or the consent of their representative unions.

35. She avers that the Respondent did not make any representation of salary reductions in the month of July as alleged by the Petitioner and that , as stated in her email, the employees were required to apply for unpaid leave upon submission of consent. In addition, the pay out rates had not been determined for those who would be working.

36. She avers that contrary to the impression created by the Petitioner, the communications did not in any way affect negotiations between the parties herein.

1st Interest Party's case

37. The Central Organisation of Workers Union (COTU K) filed a Replying Affidavit sworn by Francis Atwoli, its Secretary General on 20/7/2020. He depones that the Tripartite MOU signed on 30/4/2020 by the Cabinet Secretary Ministry of Labour and Social Protection, the Federation of Kenya Employers and COTU, aimed at addressing the unprecedented challenges posed by the Covid-19 Pandemic.

38. He avers that the MOU is binding upon all employees including the Respondent herein. However, while consultations were ongoing between the Petitioner and the Respondent, the Respondent on 3/7/2020 issued an email communicating a decision to carry out a rightsizing exercise.

39. He contends that the communication issued on 7/7/2020 did not take into account consultations between the Respondent and the Union. He further contends that the communication on 3/7/2020 and 7/7/2020 came at a time when the Union was still demanding more clarity and further consideration of the proposals.

40. It is his position that the administrative actions taken by the Respondent grossly violated the spirit and letter of the executed MOU.

2nd Interested Party's case

41. The Federation of Kenya Employers filed its Grounds of Opposition on 4/8/2020. It raises the following grounds:-

> ***i. The Petition contravenes the provisions of Rule 4 (1) and Rule 7 (3) of the Employment and Labour Relations Court (Procedure) Rules 2016. The Petition herein is an abuse of Court process and amounts to sub-judice contrary to section 6 and 7 of the Civil Procedure Act.***
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> ***ii. The Petition offends the provisions of Rule 7 (1) of the Employment and Labour Relations Court Rules 2016.The Petitioner has not filed this Petition in accordance with the Constitution of Kenya (Protection of Rights and Fundamental Freedoms and Enforcement of Constitution) Practice and Procedure Rules, 2013.***
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> ***iii. The cause of action in the Petition does not reveal any breach of rights and fundamental freedoms by the employer and no justification has been given as to why the Petitioner's claim is in the form of a Petition. The Petition does not meet the threshold for a Constitutional Petition as held in Anarita Karimi Njeru v Republic (1979) 1 KLR.***

Petitioner's Rejoinder

42. In reply to the Respondent's Replying Affidavit, the Petitioner filed a Supplementary Affidavit sworn by Moss K. Ndiema, its Secretary General, on 20/7/2020.

43. He avers that the Technical and Financial Report does not satisfy the legal and evidential threshold to illustrate the true and accurate financial status of the Respondent and that the effect of the Covid-19 pandemic do not suspend, waive or validate violations of the provisions of law and the CBA.

44. He avers that the impugned decisions and communication are authoritative directives stating the Respondent's position on the alterations of terms and conditions of employment without prior discussions, negotiations and agreement with the Petitioner.

45. He contends that the purported request for consent from individual employees post the fact while by-passing the Petitioner amounts to obtaining consent by compulsion, coercion or undue influence in so far as the indirect and direct consequences of declining consent are followed with penal consequence to lose employment.

46. He contends that the impugned communications violate the Tripartite MOU dated 30/4/2020.

47. The Parties in this Petition agreed to proceed with this Petition by way of written submissions. The Parties also agreed to highlight the said submissions orally.

Petitioner/Claimant's Submissions

48. The Petitioner contended that the main gist of this Petition and Claim is pegged on the general notice issued by the Respondent's Chief Executive Officer which is at page 108 of their Petition in which the Respondent's Chief Executive Officer indicated that due to the suppressed demand for air transport, a large part of their fleet remain grounded and therefore a decision had been made to carry out an organization wide rightsizing exercise which will result in a reduction of their network.

49. Further, that they were going to request all staff who will not be required to support the reduced operation to proceed on unpaid leave effective Monday 6/72020.

50. The Petitioner also contends that the directive issued by the Respondent's Chief Executive Officer was also going to lead to loss of jobs for 48 unionisable employees.

51. The Petitioner contended that the general notice or directive was contrary to Clause 4 of the CBA between the Parties, which is at page 30 of the Petitioner's bundle.

52. The main gist of Clause 4 of the CBA was an agreement between the Parties not to implement any decision between the Parties without prior notice and discussion between the Parties.

53. The Petitioner averred that the directives were an amendment and contrary to the CBA and without notice to Petitioner and consultation.

54. The Petitioner further submitted that at page 109 of their bundle, the Human Resource issued a notice and provided clarification on how she was going to implement the notice.

55. The Petitioner contends that the implementation was being implemented when consultations were going on and this was a violation of the Constitution.

56. The Petitioner referred Court to various authorities – see **Kenya Union of Journalists and Allied Workers Union vs Nation Media Group Limited and Another (2013) eKLR** where the Court held that:-

> ***"A recognition Agreement gives to the trade union a single union deal. Effectively, the trade union becomes the sole collective bargaining agent".***

57. The Petitioner also cited Kenya **Chemical Workers Union vs General Plastics Limited (2017) eKLR** where the Court held as follows:-

> ***"From Clause 2 of the CBA, it is clear that the Parties negotiated and agreed on 44 hours of work per week spread over 6 days. The Claimant states and the Court agrees that any variation to this work schedule ought to have been agreed upon by the Parties in the CBA. The Court did not see any such agreement nor was there evidence that the affected employees had been notified of the changes in writing. From the foregoing, the Court finds the work shifts adopted by the Respondents are in violation of Clause 2 of the CBA".***

58. The Petitioner also submitted that the directives are illegal and unlawful as they violate Article 27(1) and (2) of the Constitution as they violate the employees right to equality before the law, protection and benefit as well as full and equal enjoyment thereof in so far as it denies the employees freedom of contract and to enter into contracts freely and voluntarily particularly all these agreements that alter, amend and/or vary their terms of service as protected by the law of contract, Section 9, 10(5), Part IV, V and Section 28 of the Employment Act as well as Clause 4, 9A, 9B, 10, 20 and 21 of the CBA on voluntary taking of leave and alteration of their terms of work as well as pay.

59. The Petitioner also submitted that the directive violates Article 27(5) of the Constitution resulting in inhuman and degrading treatment, as the employees who do not give the coerced consent would be terminated from employment unlawfully.

60. The Petitioner cited **Sarah Wanyaga Muchiri vs Henry Kathii & Another (2014) eKLR** where the Court quoted the South African Labour Appeals Court case of **Engen Petroleum Limited vs Commission for Conciliation Mediation and Arbitration and Others (2007)**

ALAC 5 as follows:-

> ***"The South African Labour Appeals Court in the case of Engen Petroleum Limited vs Commissioner for Conciliation Mediation and Arbitration & Others [2007] ZALAC 5 has observed that..."At times there was some or other definition of an unfair labour practice which the Industrial Court had to apply in deciding whether a dismissal was unfair. A finding by Industrial Court that a dismissal constituted an unfair labour practice meant that the dismissal was unfair".***

61. The Petitioner further submitted that the decision to terminate the 48 unionisable employees on contracts is discriminatory and amounted to breach of contract and statute.

62. The Petitioner submitted that Clauses 9A, 9b, 18, 20, 21, 42-19 of the CBA provides for terms and rates of pay, allowances, leave and termination of employment for all unionisable employees engaged by the Respondent and by reading of Section 5, 55 and 59 of the Labour Relation Act, the above stated CBA and Clauses hereof are of binding agreement between the Parties and any variation of the terms thereof must be by a variation agreement between Parties.

63. The Petitioner argued that the staff rationalization envisaged by the Respondent without giving the Petitioner/Claimant and/or its members a chance to be heard and give their views offends Section 4 and 6 of the Fair Administrative Action Act as read with Article 47 of the Constitution which provides for fair administrative action hence it is unlawful, illegal, unfair and a wrongful termination.

64. The Petitioner relied on **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya and 3 Others (2014) eKLR** where the Court held as follows:-

> ***"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".***

65. In **Barclays Bank of Kenya & Another vs Gladys Muthoni & 20 Others (2018) eKLR,** the Court also adopted the reasoning in the Kenya Airways case (supra).

66. The Petitioner has therefore submitted that the Respondent cannot terminate the employment of the 48 in serviced employees at will and should follow due process as held in **James Kabengi Mugo vs Syngenta East Africa Limited (2013) eKLR**.

67. The Petitioner also submitted that the Respondent's conduct in the directives violates the Tripartite Agreement dated 20th April 2020 at page 72 to 77 of the Respondent's Replying Affidavit in that the agreement particularly B(3) thereof recognize and illustrate the Parties' undertaking to Dialogue, Agree and Active Participation of each Party. They aver that the impugned decisions, directive or communications are devoid of dialogue, agreement of Parties and/or participation of all Parties, which elements are clearly guaranteed by Clause 4 of the CBA and various provisions of the CBA and the Constitution cited in statute.

Respondent's submissions

68. The Respondent in its submissions set out 3 clusters to address. The 1st was on whether Clause 4 of the CBA had been violated. As a background, the Respondent submitted that they are littering on the edge due to a precarious financial situation now caused by the Covid 19 Pandemic and are therefore between a rock and a hard place hence the airline has had to make painful decisions to stay afloat or otherwise plunge into bankruptcy.

69. It submitted that despite all these difficult times, it has been open to consultations with all relevant stakeholders to ensure the best outcome possible.

70. The Respondent submitted that due to the difficult period it has had to ground its fleet due to the Pandemic. It averred that their financial woes have been worsened by the global crisis, which affected its key Asian Markets as early as January.

71. It averred that this precarious situation is best demonstrated by the Technical Financial Report on the effect of the Pandemic on the Respondents' operations (page 1 to 11 of the Replying Affidavit of 15th July 2020).

72. The Respondent aver that it has engaged with the Petitioner on behalf of its unionisable employees in ongoing negotiations that have resulted in various Memoranda of Agreement - (pages 41 to 47 of the Replying Affidavit).

73. They submit that to their surprise, whilst in the midst of negotiating the terms applicable to the Respondent's employees, for the month of July, the Petitioner filed the Petition and Claim before this Court challenging three notices/communications by the Respondent (pages 108-117) of the Petition) and a further Claim on no renewal of the contract staff (page 119 of documents in support of the Claim.

74. On whether Clause 4 of the CBA has been violated, the Respondent submitted that the Clause requires the Respondent to avail notices to the Union, which affect its membership where the notices could lead to an alteration of terms of service. The Respondent is required to discuss with the Union before implementation.

75. The Respondent submitted that contrary to the impression created by the Petitioner, the Clause does not require discussion with the Union before issuance of a notice that could alter terms of service.

76. The Respondent submitted that the notice does not lead to an alteration of terms of service and that it did not purport to implement them without discussion with the Petitioner.

77. It averred that it has consistently engaged the Petitioner and relevant stakeholders since the onset of the pandemic in matters to do with alteration of terms of service. It referred the Court to Minutes of the meetings held between the Respondent and Petitioner culminating in the signing of several Memoranda of Agreement - (See Annextures EM2 and EM3) in the Replying Affidavit of 15th July 2020 and EM3 in the Replying Affidavit of 27th July 2020.

78. On the impugned notices which are at page 108 of the Petition, the Respondent submitted that it is a general message from the Respondent's Chief Executive Officer to all staff not just the Petitioner's members and it was categorical that the Respondent's Human Resource Team would engage the affected staff in a fair and transparent manner.

79. It averred that the notices refer to staff being requested not directed to proceed on unpaid leave and that the consents of the unionisable employees would be obtained from the representative unions.

80. That the notices were clear that in the event the employees do not consent they would be engaged on the implication of the declined consent. (No 10 at page 117) – That the notice never threatened dismissal from employment as submitted by the Petitioner.

81. The Respondent also submitted that due to the effects of Covid-19, the Ministry of Labour and Social Protection, the COTU and FKE held discussions which resulted in the MOU dated 30th April 2020 being agreed upon.

82. The Respondent submitted that the MOU recognizes that there may be need to commit to painful but necessary policy measures aimed at mitigating the effects of the Pandemic in the workplace.

83. The Respondent further submitted that the Employment Act while seeking to regulate the employment relationship recognizes that an employer at all times has the sole mandate and responsibility to make decisions that are in its best interest. They cited **Kenya Airways Limited vs Aviation & Allied Workers Union & 3 Others (2014) eKLR** and averred that the impugned notices and directives were in pursuit of a legitimate goal in the Respondents best interest of ensuring that the airline maintains its liquidity despite the Pandemic.

84. On the issue of renewal of contracts of the 48 unionisable employees, the Respondent submitted that there were fixed terms contracts and the Parties have the freedom to agree on the terms and conditions which will regulate their relationship. They cited **Rajab Barasa & 4 Others vs Kenya Meat Commission (2016) eKLR.**

85. It also cited the Court of Appeal in **Amatsi Water Services Company Limited vs Francis Shire Chachi (2018) eKLR** where the Court held that as a general principle, a fixed term contract will terminate on the set date unless it is extended in terms stated in the contract. It therefore submitted that it has no obligation to renew these contracts.

86. It also relied on **Trocaire vs Catherine Wambui (2018) eKLR** a Court of Appeal decision and submitted that the case law the Petitioner seek to rely on concerning substantive and procedural fairness are distinguishable owing to the nature of the contracts that are before this Court. It also submitted that the Petitioner submissions concern redundancy and the law relating to Court which are irrelevant in this case.

87. Other authorities cited by the Respondent include **Davis Contractors Limited vs Fareham UDC (1956) AC 696 and Kenya Airways Limited vs Satwant Singh Flora (2013) eKLR** which deal with frustration of contracts.

88. The Respondent also submitted that the Petition is an abuse of the Court process and they cited the Court of Appeal in **Kivanga Estates Limited vs National Bank of Kenya (2017) eKLR** where the Court held that its duty to is to maintain the integrity of the Court system of administration of justice …………stopping litigations brought for ulterior and extraneous consideration ……..”

1st Interested Party's submissions

89. The 1st Interested Party supported the Petitioner's submissions. They referred Court to the Tripartite Agreement between Social Parties to address effects of Covid 19.

90. It also referred Court to the ILO standards in proving guidelines on how to respond to Covid 19 and the guidelines underscore the issue of social dialogue and cooperation in mitigating Covid 19.

91. The Agreement was signed between FKE and COTU and is therefore binding on the Parties. He submitted that paragraph 3 of that Agreement obligates employer and workers union to dialogue to ensure any steps being taken to check effects of Covid 19 are done after consultation.

92. It submitted that the impugned decisions by the Respondent were taken during consultation and without consultation with the Petitioner and this is against Article 41(1) and 41(2) of the Constitution.

2nd Interested Party's submissions

93. The 2nd Interested Party submitted that it is the employer's prerogative to manage its business, protect jobs and ensure the sustenance of Business Empire without which there would be no opportunities of employment. In support of this position, it relied on the decision of **Dock**

Workers Union v Kenya Ports Authority [2015] eKLR.

94. It submitted that the Petitioner is not a stranger to the adverse impact of the pandemic on the Respondent's enterprise and is also not a stranger to the challenges experienced in the industry.

95. It submitted that fair labour practices and the Employment Act provide that wages and annual are earned benefits. It was its submission that employment laws clearly demonstrate that there is a reciprocal relationship between wages and delivery of services.

96. It urged the Court to consider and balance the rights and interests of parties under unprecedented times and circumstances such as Covid-19 pandemic.

97. It submitted that the Court should consider that section 5 (4) of the Employment Act provides that an employer is to pay his employees equal remuneration for work of equal value. Thus, when there is no delivery of service/work there is no justification for payment.

98. It submitted that even though the doctrine of frustration of contracts has not been applied in employment contracts, the adverse impact of the pandemic has caused frustrations to the employment contracts. It relied on the Court of Appeal decision in **Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR.** It submitted that under the current situation and government directives, neither party is able to meet its obligations under the contract.

99. It argued that the Parties ought to have applied the provisions of section 62 of the Labour Relations Act to resolve the dispute on grounds that this Petition is not only an issue of contractual obligations but also an economic dispute.

100. It urged the Court to exercise its discretion to refer the matter to conciliation or dismiss the Petition.

Consideration and issues for determination

101. I have considered the above averments and submissions of the Parties herein. I set the following as the issues for this Court's determination:-

> ***1) Whether the Respondent has violated Clause 4 of the CBA between the Petitioner and the Respondent.***
>
> ***2) Whether the Respondent is obliged to renew the contracts of the 48 unionisable employees.***
>
> ***3) Whether the Respondent has breached the constitution and rights of the Petitioner's members.***
>
> ***4) What remedies to grant in the circumstances.***

1. Clause 4 of the CBA

102. Clause 4 of the CBA between the Respondent and the Petitioner states as follows:-

> ***"STAFF RULES, NOTICES AND STANDING INSTRUCTIONS***
>
> ***Staff Rules and regulations, staff notices and any other standing instructions issued by the Company, applying to the members of the Union, will be made available to the Union.***
>
> ***Any amendments thereto and additional Rules and Regulations, staff notices and standing instructions which could lead to an alternation in the terms and conditions of service will not be arbitrarily introduced by the Company and will be discussed with the Union before implementation.***
>
> ***Such a discussion shall be foregone only if the said changes are necessitated by a change in the existing laws".***

103. From the above provisions, any staff rules, regulations and notices will as of necessity be made available to the Union and those that can lead to an alternation in terms and conditions of service will not be arbitrarily introduced by the company and will be discussed with the Union before implementation.

104. The Petitioner has maintained that the Respondents deliberately breached the terms of the CBA by issuing notices and directives without discussing with them.

105. The Respondents on the other hand submitted that it was not necessary to discuss with them the notices before issuing them and the consultation was only necessary if implementation was to follow.

106. Indeed Clause 4 of the CBA makes provision for sharing of the rules, regulations and notices with the Union. This is however not couched in mandatory terms as the word used is "will".

107. The only catchword is when the instructions and notice would be introduced arbitrarily. Arbitral is a word defined in the online

dictionary as:-

> 1) ***"Based on random choice on personal <u>whim,</u> rather than any reason or system.***
>
> 2) ***Of power or a ruling body, unrestrained and autocratic in the use of authority".***

108. In the case of the impugned notices and directions complained of by the Petitioner are the communication issued by the Respondent's Chief Executive Officer which is at page 108 of the Petitioner's documents and communication giving guidelines from July 2020 issued by the Human Resource Support Services.

109. The Petitioner has submitted that the communication was issued breaching Clause 4 of the CBA. The reason the Petitioner avers breach is due to the fact that there was no consultation before the issuance of the communication.

110. I however note that Clause 4 of the CBA did not make it mandatory for a discussion with the Union before issuance of the communication. Clause 4 however envisages that implementation may not proceed without discussion.

111. From the communication issued by the Respondent's Chief Executive Officer one Clause states as follows:-

> ***"Therefore after a comprehensive review, a decision has been reached to carry out an organization wide rightsizing exercise which will result in a reduction of our network, our assets and our staff <u>effectively, we have commenced</u> (emphasis is mine) a phased staff rationalization process, which we expect to conclude by Wednesday 30th September 2020".***

112. My view here is that the communication is not just for information purposes, it is also coupled with a statement that the staff reduction has already commenced and is therefore at the implementation stage.

113. The question then is whether this had already been discussed between the Union and the Respondent. The Respondent insists that there was discussion on this and referred Court to Minutes of the meeting held on 8/7/2020 at the Kenya Airways Finance Board Room.

114. From the meeting Minutes, the Agenda of the meeting was the July MOA. During the meeting, the draft MOA was presented by the Management to the Union. The Union queried whether the MOA was necessary given that Management was communicating and making decision without consulting the Union. Under Minutes of the said meeting, the Union also indicted that they were disturbed by what was going on since Management was concluding on matters and communicating with staff before concluding with the Union.

115. The Union also queried the fact that the Respondent's Chief Executive Officer had written to the Labour Commissioner requesting to suspend the CBA negotiations.

116. From the Minutes, it is clear that there had been some discussions on the issues raised in the communique by the Chief Executive Officer but the negotiations had not been concluded.

117. The meeting was adjourned to 10/7/2020 at 9 am but on 9/7/2020, the Petitioner approached this Court and obtained interim injunctive reliefs.

118. As indicated above, the Respondent did not need to notify the Union of the intended action unless implementation was eminent. I have noted that the wording of the Chief Executive Officer dated 3/7/2020 indicated that the decisions were already foregone and due for implementation.

119. The communication by the Human Resource on 7/7/2020 also indicated that unpaid leave was to begin on 6/7/2020. The communique also indicated that from July, the pay will be at reduced rate.

120. It is therefore obvious that implementation of the issues communicated had commenced and the decision already made. There is no indication that this had been discussed in the Minutes of 7/7/2020 and agreed upon as the meeting to conclude the issue was rescheduled to 10/7/2020.

121. It was therefore valid as submitted by the Petitioner that the Respondent proceeded to implement certain decisions without consulting them or if consultation was ongoing, the same had not been concluded.

122. It is therefore my finding that indeed the Respondent was in breach of the CBA between the Parties by proceeding to implement certain actions or decisions without consulting the Petitioners. The Respondent is also in breach of Article 27(1) and (2) and Article 41 of the Constitution.

2. <u>Renewal of contracts for 48 unionisable employees</u>

123. Vide the Chief Executive Officer's letter of 3/7/2020, the Chief Executive Officer informed the Petitioner of the phased rationalization of its employees as well as unpaid leave policy and the letter by the Respondent's Chief Executive Officer to the Petitioner dated even date notified them of the non-renewal of the Respondent's insourced staff contracts. The Petitioner contends that this was in violation of the CBA, the Employment Act, the Fair Administrative Action Act and the Constitution.

124. The Petitioner has submitted that on 10/5/2017, it executed a MOA providing terms of remuneration (pay and allowances) for about 370 unionisable employees outsourced by the Respondent from 3rd Parties to work for the Respondent and agreed that the terms of the said Memoranda of Agreement shall constitute an Addendum to the CBA thereof. This MOA was registered on 27/6/2017.

125. Further MOA was executed again between 25/6/2018 and 3/7/2018 between the Parties. It was agreed that the said Addendum and variation was to constitute part of the CBA thereof.

126. The Petitioner avers that it was a term of the Memorandum of Agreement of 10/5/2017 that all employees engaged by the Interested Parties and seconded to the Respondent who had worked for a continuous period of 3 years and above would be eligible for engagement by the Respondent for a 2 year contract in same roles provided they met the requirements specified in the Respondent's evaluation process.

127. The Petitioner avers that on 3/5/2019, the Respondent and Petitioner executed another agreement before a Conciliation Committee providing inter alia at Clause 6 that Parties wherein agreed to continue outsourcing and insourcing of employees into the Respondent's employment on contract basis within the provisions of Section 5(1)(a), (2) and (3) (b) of the Employment Act 2007, the Constitution of Kenya 2010, ILO Convention and best practices.

128. The Petitioner avers that on 3/7/2020, the Respondent's Management issued a notice to it that it will not be renewing contracts of about 48 insourced staff working in various functions/departments of the Respondents and whose contracts were ending on 31/7/2020.

129. The Petitioner avers that the termination of the 48 employees must be done within the provisions of Section (5) (1) (a), 2 & (3) (b) of the Employment Act, the Constitution the Constitution of Kenya, ILO Convention and best labour practices.

130. The Petitioner exhibited the exhibit MKN which is in the agreement signed on 10/5/2017 between the Respondent and itself. The agreement at Clause 6 provided the nature of engagement between the Respondent and Petitioner's members. At Clause 7, the employees were to be on probation for 3 months and upon successful completion of probationary period, Clause 42 provided that the engagement could be terminated by either Party giving 2 months written notice or 2 months' salary in lieu.

131. As per Clause 58 of this agreement, this agreement was to remain in force until another one is finally agreed upon between the 2 Parties to the agreement.

132. Vide an Agreement dated 3/5/2019, the Parties agreed to start negotiations of the stalled CBA negotiations. Technically, then the CBA of 11/5/2017 remains inforce until another one is negotiated between the Parties.

133. The Respondent submitted that the 48 unionisable employees referred to were serving on a fixed term contract, which has since expired.

134. The Parties did not however exhibit before this Court the contracts in question for this Court to examine their terms and make an informed decision. In the absence of the contracts entered into by the 48 unionisable employees from which this Court can make a determination, this Court cannot second guess the terms of the said contracts and determine whether they have been terminated fairly or not.

3. Breach

135. Having found as above, the instances I found contain breach of the law and constitution in the failure by the Respondent to consult the Petitioner/Claimant before implementing certain directives and decisions.

136. It is common knowledge that the impact of Covid 19 on Industry has been grave. This is a matter which is obvious. That however does not mean there will be derogation from the well known principle of negotiations and consultations between Union and Management before implementing certain decision which can have far reaching consequences on the employer and the employees. This is obviously in breach of fair labour practices as envisaged under Article 41(1) and (2) of the Constitution which states as follows:-

> ***1) "Every person has the right to fair labour practices.***
>
> ***2) Every worker has the right:-***
>
> ***a) to fair remuneration;***
>
> ***b) to reasonable working conditions;***
>
> ***c) to form, join or participate in the activities and programmes of a trade union; and***
>
> ***d) to go on strike".***

137. The decisions made by the Respondent indeed impact on remuneration of the Union members and their livelihood and it should therefore be handled with caution.

Remedies

138. Given the nature of this Petition/Claim and the need to balance between industry in these difficult times due to the negative impact on

the Respondent by Covid 19 and the need to keep the Respondent afloat in the circumstances in order to save massive job losses, I find that the best remedy in the circumstances is to have the Parties go back to the conciliation process in order to reach the best decision.

139. In the circumstances, I direct that the Respondent and Petitioner submit to a conciliation process within the next 30 days and resolve the issues herein.

Dated and delivered in Chambers via zoom this 20th day of August, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Mohammed Nyaoga with Imende, Mwangi for Respondents – Present

Litoro for Claimant/Petitioner

Litoro holding brief Aduda for Union – Present

Kanyiri for FKE – Present