REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 912 OF 2018

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF COMMERCIAL, FOOD AND

ALLIED WORKERS.....CLAIMANT

VERSUS

LONDON DISTILLERS (K) LIMITED .....RESPONDENT

RULING

The application before me for determination is dated 18th March 2019. It is filed by the Respondent herein under Articles 159 and 165 of the Constitution of Kenya, Sections 1A, IB and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Rule 17 (1) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

The Applicant seeks the following orders

1. *This Court be pleased to order that Claimant be compelled to rally its members to participate in the proposed job evaluation exercise at the Applicant's premises.*

2. *This court be pleased to order the Claimant to participate in the Job Evaluation process before the proposed CBA negotiation can proceed.*

3. *The costs of this application be provided for.*

The grounds in support of the application as set out on the face thereof are the following –

1. *The claimant and the applicant carried out a job evaluation exercise in the year 2002.*

2. *The Claimant and the Applicant have and continue to rely on the said job evaluation*

3. *It is now over 17 years since the said exercise was conducted.*

4. *It is only prudent and in view of the changing business environment that an updated and mote enhanced job evaluation report be made.*

5. *The Claimant has and continues to oppose the said exercise, though on unfounded grounds.*

6. *The Applicant has made every effort to involve the Claimant in the exercise all to naught.*

7. *This exercise and its subsequent report will inform this Court's judgment on the substantive matters before it.*

8. *The job evaluation exercise is to assist the parties make an informed position on any CBA negotiations.*

9. *The Claimant will suffer no prejudice if this Application is granted.*

The application is supported by the affidavit of PETER NZIOKI MULI, the Applicant's Group Human Resources Manager sworn on 18th March 2017 in which he reiterates the grounds on the face of the application.

The claimant opposed the application and filed a replying affidavit of SIMON KIMEU, its Assistant National Organising Secretary in which he deposes that the Respondent herein is a registered company under the laws of Kenya and engages in distillery and bottling of wines and spirits within Kenya.

That the claimant has a valid Recognition Agreement with the Respondent pursuant to which several collective bargaining agreements have been negotiated, concluded and registered.

That the Collective Bargaining Agreement whose review is now in dispute was set to expire on 30th April, 2017 and a revised one was expected to be in place by 1st May, 2017.

That on 18th May 2016 the Claimant drew proposals for the review of the expiring Collective Bargaining Agreement and forwarded the same to the Respondent for the purposes of studying and counter drawing its proposals to pave way for negotiations.

That the Respondent did not demonstrate willingness to review the Collective Bargaining Agreement prompting the Claimant to report the existence of a trade dispute to the Ministry of Labour on 3rd July 2017.

That the Ministry of Labour, through the Chief Industrial Relations Officer, appointed Mr. Kinegeni Nyaga of Athi River Labour Office to act as a Conciliator. That the Conciliator invited parties for meetings on 30th August, 2017 and on 2nd October, 2017. That the Respondent did not attend any of the conciliation meetings.

That the job evaluation exercise which the Respondent is now introducing is intended to frustrate the review of the Collective Bargaining Agreement and should not be entertained because it is a completely different issue requiring different processes with different end results.

That the Collective Bargaining Agreement dispute now before the court is purely a different matter from the job evaluation exercise with different processes and a different end result and are in no way connected. That the prayers in the claim have nothing to do with the intended job evaluation exercise.

That the Respondent has not demonstrated in their Notice of Motion how the collective bargaining agreement once reviewed will interfere with the job evaluation exercise which they intended to carry out.

The affiant prays that the application be dismissed with costs.

The application was disposed of by way of written submissions with the consent of the parties.

The applicant filed submissions on 6th February 2020 while the claimant filed on 26th May 2020.

Applicant/Respondent's Submissions

The Applicant submits that the disagreement over negotiation of the job evaluation exercise has been the main obstacle to the conclusion of the CBA negotiations. That there are ongoing disputes pitting the parties over the issue of employees' placement.

That the last comprehensive job evaluation was conducted in the year 2002 and there is need to have another comprehensive one conducted before the CBA is negotiated any further. That this is also in tandem with the changing economic times and management structure at the Company.

The Applicant submits that the proposed job evaluation is a review of the job evaluation exercise conducted in 2002 in consideration of changing market trends and financial circumstances affecting the Applicant's industry. That it is to be conducted in collaboration with and consideration of the' Respondent's input and views.

That the main objectives of the proposed job evaluation are to:-

i. Establish the relative worth of jobs within the Applicant's organization.

ii. Generate a hierarchy and grading structure within the Company with a view to determine their respective remuneration.

iii. Establish and place the employees in management and Union cadre respectively.

That the proposed job evaluation exercise, will be beneficial to

the Respondent's members in that it will lead to reviewing the remuneration and benefits, attract and retain the skills required to execute their functions which will in the long run increase productivity and performance.

That the other benefits of the job evaluation will be the establishment of a proper basis for recruitment and selection of incoming staff,

ensuring proper succession at the Company as well as mapping out training needs of the Company's staff.

The Applicant submits that in proposing the job evaluation exercise it has made every consideration i.e. the existing legal provisions, comparative market surveys, prevailing market rates, justification for the allowances or benefits, prevailing policy on allowances or other remunerative benefits, the legal, social and economic issues, results of job evaluation, results of market studies, benchmark with similar organizations, equity and competitiveness and therefore no prejudice will occasion on the Respondent's members.

That the supporting affidavit as deponed by PETER MULI, is a testament to the Applicant's willingness to engage the Respondent on an open platform to conclude on the Job Evaluation exercise. That the Applicant has made every effort to engage the Respondent albeit to naught.

That the Job Evaluation is to be conducted in a clear and transparent manner and in consideration of the following factors: -

i. Current labour efficiency and dynamics and present economic situation.

ii. Full participation of Respondent's employees and officials.

iii. In line with procedural rules and observance of • the rules of natural justice devoid of any illegality, unreasonableness or procedural unfairness.

That the proposed job evaluation will unlock the CBA negotiation deadlocks and provide a platform for the Union to participate in the Employees' job placement at the Company. That it is in no way a scheme to scuttle the cordial relationship and Recognition agreement between the parties.

In support of its application the Applicant relies on the case of **Universities Academic Staff Union (UASU) v Salaries and Remuneration Commission & Another [2019] eKLR** where the court held that: -

> *"... Consultation does not mean that all the proposals or demands of the people who are to be consulted must be adopted wholesale or at all. It requires that the input of the people consulted is taken into account before the final decision is reached..."*

The Applicant also relied on the case of **Kenya National Union of Nurses v Salaries and Remuneration Commission & 7 Others [2019] eKLR** where the court held that: -

> *"... The Court has no intention of deliberately denying a party audience however where a dispute is capable of being resolved without resort to litigation the Court will encourage the parties. Article 159(2)(e) of the Constitution enjoins the Court in exercising judicial authority to be guided by principles among others, alternative forms of dispute resolution. The complaints raised by the Claimant are not frivolous. However, the respondents have indicated their willingness to listen and possibly accommodate them in implementing the report of the job evaluation exercise. It would therefore not be appropriate to throw a fiat of a judicial determination over a matter the parties can negotiate and resolve. If anything, the essence of the Claimants business is negotiations for better terms of its members..."*

It prays that the application be allowed.

Claimant's Submissions

The claimant submits that job evaluation is carried out periodically to review the general worth of existing jobs and is largely occasioned by technological changes in production line or service delivery. The results of such exercise may enhance and upgrade jobs or demote or even declare obsolete certain jobs within the enterprise.

That job evaluation exercise may at the tail end, reduce requirement for human capital and promote the use of modern machines in the production line or service delivery and may result in job losses through redundancies. It may also, to a small extent, create more employment opportunities. That trade unions participate in the exercise upon certain conditions being met by the sponsoring party and by the consultant in terms of cost of the exercise and workers' participation. This has not been made clear despite several requests by the union.

That collective bargaining is properly guided by the wages guidelines, cost of living indices, productivity and general economic performance of a country. To this end, Section 15(5) and (6) of the Employment and Labour Relations Court Act, 2011 provide as follows:-

> **(5) In the exercise of its powers under this Act, the Court may be bound by the National Wage guidelines on minimum wages and standards of employment, and other terms and conditions of employment that may be issued, from time to time, by the Cabinet Secretary for the time being responsible for finance.**
>
> **(6) Nothing in this Section shall preclude the court from making reference to the guideline as may be published from time to time by the Salaries and Remunerating commission to the extent to which they may be relevant to the dispute.**

That the revised wages guidelines issued on 23rd November, 2005 by the then Minister for Finance, the Hon. David Mwiraria (deceased) were as follows:

"***Guideline No. 1:*** *The wages of workers are a primary determinant of workers' standard of living. The workers are entitled to be accorded, at least, a just minimum standard of living. The Industrial Court will, in its awards, endeavour to decide the levels of wage earners remuneration that will protect the desired minimum standard of living and guarantees the worker an existence worthy of human dignity as shown by attainment of basic human needs. Towards this, the court will consider how the lower unionized wage earners and statutory minimum wages as well as the average small-scale farmer in rural areas compare, with a view to reducing wide income differentials and promoting employment creation.*

Guideline No. 2: *Collective agreements and revision of wages should be in in with productivity increases in order to protect Kenya's competitiveness and increase employment. Wage claims by wage earners arising from erosion in their purchasing power owing to inflation, or claims arising as a consequence of greater labour productivity in their firms should be considered along the following lines:*

(a) (i) Allow the lower wage earners up to 100% compensation measured by the Nairobi Lower Income Group Consumer Price Index since the most recent revision of wages. Compensation as a decreasing percentage of the rise in the cost of living should be awarded to the higher wage earners so as to narrow overall wage differentials. To the extent that price increases due to taxation can be identified, these should not be compensated.

(ii) Where deconsolidation of consolidated wage is deemed necessary, the housing element shall be deemed to be no more that 15 percent of the prevailing minimum wage for the particular groups covered. Separate compensation for rent in addition to (a) (i) above should be allowed provided hat this will not exceed one half (1/2) of the permissible compensation due for a particular group as provided for in (a) (i) above.

(b) Allow wage adjustments follow the growth of firm productivity so that productivity forms the major factor for any additional wage compensation considerations.

Guideline No. 3: *Trends in salary and wages in any occupation or sector should be industry/sector specific, relating to actual returns to industry emanating from increased labour productivity and efficiency. Salary/wage demands based on wage trends or awards in other occupations or sectors perse, is not to be allowed. Acquisition of skills and other training of workers should, nonetheless, be rewarded appropriately as this will enhance efficiency and productivity in the firm and the country as a whole.*

Guideline No. 4: *Salary/wage contracts, together with all other negotiable terms and conditions of service, should not be reviewed more often than once every twenty four months. Such reviews would only be determined by causes for new awards due to changes relating to factors determined in the first three guidelines.*

Guideline No. 7: *Ability to pay higher wage should not necessarily be regarded as adequate and conclusive reason for the increase if it means that one group of workers will increase awards significantly out of step with those being given to other workers of similar skills. Conversely, financial inability to pay higher wages should be a factor in determining the level and timing of wage awards.*

Guideline No. 8: *The compensation for price increases should be spread out so that the later year (s) of the contract period are not left without any increase in wages.*

That to assist the court with economic analysis with regard to Economic Disputes involving terms and conditions of service, the court has always sought the services of the Central Planning and Monitoring unit of the Ministry of Labour.

That job evaluation is not a requirement during the process of negotiations. The results of a job evaluation exercise, if carried out successfully and concluded, can form an addendum to an existing collective bargaining agreement or form the basis for the next round of negotiations or better still, be implemented as shall be agreed upon at the conclusion of the exercise.

That the Respondent in their submission at paragraph 1 do allege that there remains a lacuna as to which employees are unionized and/or management and that this can only be corrected by a Job Evaluation Exercise. The claimant disagrees and submits as follows:-

(i) The Collective Bargaining Agreement for the period 2015-2017 at clause 31(a) provide unionisable grades covered by the collective bargaining agreement.

(ii) All the grades covered are unionisable and where the Respondent intends to promote any of them into management cadre, they are at liberty to exercise such management discretion and where such promotion is a result of an Evaluation Exercise, the report shall expressly state so and same shall be out of a participatory process.

(iii) That Article 11 and Appendix 'C' of Kenya's Industrial Relations Charter makes provision on who, among all employees is management and who is unionisable. It provides as follows:-

Article 11 the following will be excluded from union presentation:

1. *Persons who are formulating, administering, coordinating, and/controlling any aspects of the organisations policy.*

2. *Staff who perform work of a confidential nature as shall be defined by a tripartite committee*

3. *Any other category of staff who may in the case of any particular undertaking be excluded from union representation by mutual agreement*

That at a meeting chaired by the Minister of Labour and attended by representatives of the Federation of Kenya Employers and Central Organization of Trade Unions (K) it was agreed that the following persons shall be excluded from union representations

1. (i) Executive chairman, Managing Director, General Manager (And his Deputy) and functional heads – that is departmental Heads (and their Deputies)

(ii) Branch manager (and his Deputy)

(iii) Persons in-charge of operation in an area (and their Deputies)

(iv) Persons having authority in their organizations to hire, transfer, appraise, suspend, promote, reward, discipline and handle grievances provided that such persons fall within the Industrial Relations Charter Clause No. 11.

(v) Persons training for above positions (including understudies)

2. (i) Personal secretaries to persons under 1 above

(ii) Persons whose functional responsibilities are of a confidential nature as shall be agreed upon between the parties

3. Any other category of staff who may, in the case of particular undertaking, be excluded from union representation by mutual agreement

That clause 31(a) of the outgoing Collective Bargaining Agreement and Article 11 and Appendix 'c' of the Industrial Relations Charter, there is provision of who can and who cannot be covered by the CBA. That there is no merit in the assertion of the Respondent that there is no clarity of who should and who should not be covered by the CBA.

The claimant prays that the court to finds: -

(i) Collective Bargaining is a process far detached from a Job Evaluation Exercise and that the two processes do not depend on each other to be concluded.

(ii) Collective Bargaining is guided by principles set out in the wages guidelines and the Employment and Labour Relations Court Act, 2011 which take cognizance of such principles and which do not include a Job Evaluation Exercise.

(iii) Level of Trade Union representation is clearly spelt out in the Industrial Relations Charter and that any other category of employees can be excluded from Trade Union representation only by mutual consent and not through a Job Evaluation Exercise.

(iv) Collective bargaining Agreements cover a period of two years or our years for certain employees and must be renewed upon expiry while a Job Evaluation Exercise does not have a fixed period.

The claimant submits that the issue before the court is negotiation of 2017 – 2019 Collective Bargaining Agreement and whose prayers do not include a job evaluation exercise. That it is a review of the existing terms and conditions of service. That should there be a job evaluation exercise the outcome can only compliment collective bargaining but not disrupt the process.

That the Respondent is at liberty to proceed with their quest for job evaluation exercise and where there shall be any form of disagreement, they are equally at liberty to declare a trade dispute within the law. They cannot cling on the said exercise to make employees suffer as the 2017-2019 is long overdue and parties should now be considering negotiations for the 2019-2021 Collective Bargaining Agreement.

It prays that the application be dismissed with costs and that the court makes a determination on the issue in dispute in this suit which is the CBA for 2017 – 2019.

Determination

Having considered the application together with the grounds and affidavit in support thereof as well as the replying affidavit and the rival submissions of the parties, the issue for determination is whether it is necessary to carry out a job evaluation before the court can determine the issue in dispute herein being the CBA for the period 2017 – 2019.

The reasons advanced by the Applicant/Respondent in support of its application in a nutshell are that the job evaluation will lead to the reviewing of remuneration and benefits, attract and retain skills and improve long term productivity and performance. Further, that it will lead to establishment of proper basis for recruitment and selection of incoming staff, proper succession and mapping of training needs.

The Applicant further avers in the application that it is the claimant's opposition the exercise on unfounded grounds that is the basis of filing the instant application. In support of the averment, the Respondent has annexed communication at Exhibit PNM 2 a-e. The first letter is dated 8th November 2017 and advises the Secretary General of the claimant union as follows –

"LDK/MG/1054/17

8TH NOVEMBER 2017

THE SECRETARY GENERAL

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS

COMFORD BUILDING

P.O. BOX 46818 – 000100

KILOME ROAD

NAIROBI

Dear Sir,

RE: ***JOB EVALUATION***

The above subject refers,

We are in the process of undertaking a Job evaluation exercise for the entire company with a view of improving efficiency and maximizing staff utilization. This process will not in any way prejudice the union members rather it will assist the employees as they will be well placed within the company.

To this end, kindly corporate with our consultancy for this exercise, MANPOWER SERVICES who have already commenced the exercise with the management.

Yours Faithfully

MOHAN GALOT

SIGNED

CHAIRMAN"

The second letter is again from the Respondent dated 10th November 2017 and reads as follows –

"10TH NOVEMBER 2017

LDK/MG/1054/17

THE SECRETARY GENERAL

KENYA UNION OF COMMERCIAL FOOD AND ALLIED WORKERS

COMFORD BUILDING

P.O. BOX 46818 – 000100

KILOME ROAD

NAIROBI

Dear Sir,

RE: ***CBA NEGOTIATIONS POSTPONEMENT***

The above subject and our letter dated 8th November 2017 refer;

In view of the ongoing job evaluation exercise, we propose that the CBA negotiations scheduled for the 13th November 2017 be held in abeyance pending the conclusion of the exercise.

This should not in any way be construed as unwillingness on our part to conclude the CBA negotiations.

We reiterate the need for the union to co-operate with the job evaluation consultant so as to have the exercise concluded as soon as possible.

Yours Faithfully

MOHAN GALOT

SIGNED

CHAIRMAN"

The next letter dated 1st December 2017 is also from the Respondent and informs the Chairman that its Chairman is out of the country on a business trip and therefore their proposed meeting cannot take place. The Respondent promises to fast track the meeting once the Chairman is back

The letter at annexure 2b reads as follows; -

"*LDK/MG/042/18*

20th January 2018

Secretary General

Kenya Union of Commercial Food and Allied Workers

P.O. Box 46818 – 000100

NAIROBI

Attn. Charles Egesa

Dear Sir,

RE: INTENDED JOB EVALUATION

Thank you for your letter dated 30th December 2017 in respect to the above subject matter.

We reiterate that the intended job evaluation is an upgrade of the previous job evaluation conducted by FKE and yourself and signed by FKE Officer, Secretary General of the Union, LDK's management and LDK's Shop Steward.

Attached, please find a copy of the signed page of Job Evaluation report for your reference.

Regards,

MOHAN GALOT

SIGNED

CHAIRMAN"

The letter at annexure 2a is from Counsel for the Respondent and in no way proof of resistance to job evaluation by the Claimant union.

The claimant union has in both the replying affidavit and the submissions insisted that there is no conflict between CBA negotiations and job evaluation and that the negations do not have to be delayed because of job evaluation. That the issue before the court is review of the CBA and not the job evaluation. Further that any changes in grading that arise from the job evaluation can be incorporated into the CBA.

The prayers by the Applicant/Respondent are that the court compels the claimant to rally its members to participate in the proposed job evaluation exercise at the Applicant's premises and that the job evaluation exercise be undertaken before the CBA negotiations.

The Applicant/Respondent has not explained why the CBA negotiations cannot be concluded before the job evaluation as proposed by the claimant. It has not even explained how the job evaluation would affect the negotiations, or why the outcome of the job evaluation cannot be incorporated into the new CBA that is pending determination before the court.

A CBA is a time bound document as it relates to a specific period. Delay in conclusion thereof prejudices the employees of the Respondent who are members of the Union as it means that they lose out on the improvement to their terms of employment that would arise from the

revised CBA. The CBA under dispute is for the period 1st May 2017 to 30th April 2019. It was therefore already late by about a year by the time the instant application was filed.

Further, from a perusal of the Applicant's response to the Memorandum of Claim herein, it is evident that it is not the Claimant, but rather the Respondent/Applicant, who caused delay in the conclusion of the CBA negotiations.

The first meeting for review of the CBA was held on 3rd November 2017 and parties confirmed 20 clauses of the CBA. Parties also identified 25 clauses which were not agreed upon and 12 new clauses. During the said negotiations parties further agreed on several other clauses. The meeting agreed that the next meeting for negotiations would be held on 13th November 2017.

Before that date the Respondent wrote the letters dated 8th and 10th November 2017 which have been reproduced above putting off the negotiations.

Thereafter, the Applicant, by its letter dated 29th January 2018 categorically expressed its intention not to proceed with the CBA. The letter is reproduced below –

LDK/MG/068/18

29th January 2018

Secretary General

Kenya Union of Commercial Food and Allied Workers

P.O. Box 46818 – 000100

NAIROBI

Attn. Charles Egesa

Dear Sir,

RE: REVIEW OF C.B.A

The above and your letter ref. L/4/29018/01 dated 19th January 2018 refer: -

I have now come back from overseas and following issues in my view are yet to be discussed and resolved: -

1. London Distillers (K) Limited (LDK) employees went on illegal strike on 10th July 2017 and 22nd August 2017 and no attempts have been made by the union to assure the company that no such action will again take place going forward.

2. You have illegally and in breach of CBA agreement, enrolled employees of Galot Estate, who are my personal employees for whom I have neither deducted nor paid Union fees.

3. My advocate has given notice of intention to terminate the Recognition Agreement between LDK & KUCFAW. See attached copies of the letters dated 19th June 2017 and 22nd June 2017 respectively. This matter is still pending with the National Labour Board.

4. Lastly, you have failed to cooperate with Manpower Services Limited, our consultants for the job evaluation exercise. The job evaluation exercise will essentially form the basis of our CBA negotiations.

In view of the above, there is nothing to discuss at the moment until the issues are conclusively resolved.

Regards,

MOHAN GALOT

SIGNED

CHAIRMAN"

The Respondent/Applicant reiterated its intentions not to engage in negotiations by its letter dated 28th February 2018 addressed to the Conciliator following a report of the dispute to the Minister by the Claimant. The letter to the Conciliator is also reproduced below –

LDK/MG/161/18

28th February 2018

Conciliator

Ministry of East African Community, Labour and

Social Protection, Department of Labour

Machakos County

P.O. Box 127 – 90100

Machokos

Attn. Mrs. A. W. Guchu

MEMORANDUM

Pursuant to the initial meeting held on 20th February 2018 at your offices and attended by the Union and the company representatives, I now wish to make my position clear op the following issues: -

1. JOB EVALUATION:

There is an ongoing update of a job evaluation exercise previously done in the year 2002 (Copy of the report is attached for ease of reference) and jointly signed by FKE, KUCFAW, CHIEF SHOP STEWARD & THE COMPANY. This exercise in my view must first be conducted to ascertain the eligibility of workers to be classified as either union or management staff. Manpower Services Limited (MSL) has been given this assignment and therefore we shall wait for the assignment to be completed jointly by MSL, KUCFAW, CHIEF SHOP STEWARD and THE COMPANY before any negotiation on terminal benefits for any worker(s) proceeds. This exercise can be completed within two weeks' time if the Union agrees to co-operate. Thus the current job evaluation is a fundamental requirement before we can engage any further in any negotiations and/or discussion on worker's terminal benefits.

2. CBA IS NULL & VOID:

KUCFAW has illegally and in breach of CBA agreement, enrolled employees of Galot Estate. It is clear to me as it should be to the union that there is no recognition agreement between Galot Estate & KUCFAW. LDK has neither deducted nor paid Union & COTU fees for Galot Estate Employees. The company advocate has given notice of intention to terminate the Recognition Agreement between LDK & KUCFAW. (See attached copies of the letters dated 19th June 2017 and 22nd June 2017 respectively. Also attached is letter dated 20th February 2018 on unresolved dispute from Ministry of East African Community, Labour and Social Protection).

It would therefore not be in LDK's interest to continue discussions with the union whereas we have made it clear that we do not wish to have a recognition agreement with it.

for the foregoing reasons and unless the above two matters are resolved, there cannot be any dialogue on trade dispute

on failure to pay employees' terminal benefits due to any union member.

I wish to reiterate that, the dispute on payment of any terminal benefit(s) dues is fundamentally dependent on the two issues being resolved first.

Yours faithfully

SIGNED

MOHAN GALOT

CHAIRMAN

LONDON DISTILLERS (K) LIMITED"

It is thus clear that it is the Respondent/Applicant to blame for the stalemate in the negotiations of the CBA. It is further clear that the issue of the job evaluation came up after the CBA negotiations had commenced and there is no reason why the CBA negotiations could not be concluded before the job evaluation commenced. As already pointed out, no reason has been advanced by the Applicant why this could not be done.

In the job evaluation report for 2002, the benefits of a job evaluation as set out therein are as follows –

1. *The ensuing job description becomes a suitable training tool, especially for new staff or those who may change jobs*

2. *Conformance to established standards of performance is enhanced*

3. *Accountability for expected results is made easier*

4. *Elimination of responsibility overlaps*

5. *Performance appraisal focuses on job objectives*

6. *Jobs are harmonised with pay points*

7. *Staff morale improves*

None of these benefits has a direct bearing on the CBA to warrant the conclusion of the job evaluation before the CBA.

Further, from the content and tone of the letters dated 29th January and 28th February 2018 (supra), it is evident that the Respondent assumes that it can unilaterally decide not to negotiate the CBA. This is contrary to the provisions of Article 41 of the Constitution which provides that: -

41. Labour relations.

(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.

(3) Every employer has the right—

(e) to form and join an employers organisation; and

(f) to participate in the activities and programmes of an employers organisation.

(4) Every trade union and every employers' organisation has the right—

(a) to determine its own administration, programmes and activities;

(b) to organise; and

(c) to form and join a federation.

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

Further, Section 57(1) of the Labour Relations Act provides as follows –

57. Collective agreements

(6) An employer, group of employers or an employers' organisation that has recognised a trade union in accordance with the provisions of this Part shall conclude a collective agreement with the recognised trade union setting out terms and conditions of service for all unionisable employees covered by the recognition agreement.

The Respondent can therefore not dictate whether or not the parties can negotiate a collective bargaining agreement. Negotiation of a CBA is a fundamental right of every trade union and every employee who has joined membership of a trade union. The Labour Relations Act sets out elaborate procedure for resolution of any disputes that may arise during negotiations. Job evaluation is not one of them and can therefore not be a reason to stall negotiations.

For the foregoing reasons I find no merit in the application and dismiss it with costs.

In view of the fact that the CBA is already overdue, parties are directed to take directions on the hearing of the suit herein at the time of delivery of this ruling.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 25TH DAY OF SEPTEMBER 2020

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