**REPUBLIC OF KENYA**

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

**PETITION NO. 25 OF 2016**

**GLADYS MUTHONI MWANGI & 20 OTHERS ……..…..... PETITIONERS**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED ……..……..…… 1ST RESPONDENT**

**BARCLAYS AFRICA GROUP LIMITED ……. 2ND RESPONDENT**

**JUDGEMENT**

1.The Petitioners are all adult Kenya citizens resident in Nairobi. The 1st Respondent is a company limited by shares and incorporated under the Companies Act, Kenya. The 2nd Respondent is a company limited by shares incorporated in South Africa and is the holding company for the 1st Respondent and other affiliate companies in Africa. The Petitioners moved the Court through their Petition and seeking interlocutory orders stopping the closure, ceasing operations in the Africa Regional office of the 2nd Respondent where they were placed as employees pending the disclosure, provision of a detailed criteria and mechanism used to short-list and identify the employees eligible for redundancy.

2.The Court stopped the ***closing down or ceasing operations of their Africa Regional office in Nairobi; terminating, declaring redundant or in any manner relinquishing the services of the Petitioners, transferring any of the job functions currently vested in such office to any other location other than Nairobi pending hearing of the Petition.***

3.In response to the petition, the Respondents filed their cross-Petition on the basis that they have a constitutional right to determine the size, scope and direction of their business within the bounds of law. The Petitioners' work with the Respondents has ceased or diminished and they are entitled to make the Petitioners redundant. The extended stay of the Petitioners in employment has forced the Respondents into further costs of salaries and despite the Petitioners being offered deployment opportunities so as to remain employees and would not receive a redundancy pay.

4.The parties have exchanged their written submissions and highlighted the same in court.

**The Petition**

5.The Petition is premised on the provisions of alleged contravention of rights and fundamental freedoms in article 2, 3, 10, 20, 21, 27, 35, 41, 43, and 47 of the constitution; the Employment Act; the Companies Act, the Competition Act; the banking Act and the Capital Markets Act. That there is an obligation to respect, uphold and defend constitutional rights which bind all persons to apply values and principles of governance, rule of law and social justice so as to enjoy their fundamental rights to equality and non-discrimination, human dignity, access to information, freedom of association, fair labour practices,

economic and social rights and fair administrative action. The Employment Act has outlawed discrimination in any form at the work place; the Banking Act place all financial institutions under various controls including the requirement to get approval in restructuring; the Competition Act requires an entity such as the Respondents to get approvals in trade practices including proposed restructuring; and the Capital Markets Act requires all listed companies to conform to disclosure requirements including restructuring decisions which could affect the values of listed securities.

6.The Petitioners were employed under contract of service with the 1st Respondent in the course of which they were deployed with or seconded to serve the 2nd respondent, the holding company of the 1st Respondent and placed at the Regional office in Nairobi. In March 2015, it came to the attention of the Petitioners that the Respondents intended to close down its Regional office. They sought audience with management and it was confirmed that there was no such issue. The 2nd Respondent went ahead to renew its lease for 6 years to keep operations in Kenya.

7.On 14th January 2016 there was a meeting between the senior executives of Barclays Africa Group Limited (BAGL) with employees at the 2nd Respondent where they received communication that the 2nd Respondent Africa Regional office would close in Nairobi. There was no discussion with the Petitioners on their expectations in relation to the redundancy but the last day of employment was indicated as 31st March 2016. On 15th January 2016 there were follow up meeting one-on-one when each Petitioner was called and handed over the redundancy letter with details of the severance package but without prior consultation or concurrence. The Respondents decided to declare redundant Kenyan employees at the Regional office and gave different terms to the non-Kenya employees which was an act of discrimination against the Petitioners. The terms given were different from what unionisable employees have under the CBA but the Respondents have kept them in the dark save for learning that their positions have been migrated to other persons in South Africa which is discrimination on the basis of nationality.

7. On 19th January 2016, the Petitioners wrote to the Respondents seeking favourable terms of exit;

a. The option of redeployment;

b. Service payoff one and a half (45) days for every year served, similar to what has been offered by the Respondents and similar employers in the sector;

c. 25% discount on bank loans for early repayment and continuance of loans at the preferential staff rate and in terms of previous practice; and

d.Continuation of medical cover as offered in previous cases.

8. In response, the respondents' offered to consider redeployment opportunities but the employees should apply as this was not guaranteed; severance pay would be as offered in earlier cases; there would be outplacement, career counselling, and training in start-up own business; and the medical cover would be extended up to 31st December 2016. Despite various discussions, there was no agreement.

**The Petitioners seek the following reliefs;**

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

*i…*

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

*i. 3 months' notice pay;*

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

*iii. Payment of outstanding leave balance;*

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

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

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

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

*d. [Spent].*

*e. That the costs of this Petition be borne by the respondents'.*

9. In support of the petition, the Petitioners filed the affidavit of Gladys Muthoni Mwangi who avers that the Petitioners are employees of the Respondents having contracts of service from the 1st Respondent and deployed with the 2nd Respondent. Ms Mwangi is employed as the Manager, Security Governance (Africa Security) in the grade of Vice President and has worked as such since 1st June 2015 having been employed by the 1st Respondent from 7th May 1990 and been in the establishment for over 26 years. Like the other Petitioners Ms Mwangi put all her energy in the growth of the Respondents. The Petitioners have witnessed various restricting of the Respondent including early retirement schemes and staff were offered suitable exit packages of not less than 2 months' notice pay; 1 ½ month as service pay for each year service and the Petitioners herein have legitimate expectations for similar packages.

10. Ms Mwangi also avers that in March 2015 they learnt that the 2nd Respondent wanted to close their office in Kenya and upon enquiry they were informed that this was not correct and the 2nd Respondent went ahead to renew their lease for 6 years. However on 14th January 2016 the BAGL held a meeting with staff and indicated the office would close by 31st march 2016 which was without consultations with the Petitioners. At the meeting, the Petitioners were given various option;

a. Some Petitioners would be transferred to the Regional office in south Africa which was taking Kenyan operations;

b. Some Petitioners would be allowed to continue doing their Regional jobs from Kenya despite the closure of the office;

c. Some Petitioners would be transferred to other Regional offices within African region;

d. Some Petitioners would be redeployed back to the 1st Respondent in Kenya.

11. The Petitioners asked to know what compensation they would get from the above options by the Respondents but this meeting was followed by one-on-one meetings on 15th January 2016 where the Petitioners were issued with redundancy letters with details of a severance package without prior concurrence and a contradiction with proposals made the previous day. All the Kenyan employees at the Barclays Africa Regional office were declared redundant as against other foreign employees and the package offered was way below what had been awarded to previous employees in similar circumstances. The petitioners' positions were taken over by South Africans which were all acts of discrimination against

the Petitioners. The Petitioners therefore wrote on 19th January 2016 seeking for a better package of redundancy and proposed;

a. The option of redeployment be given and employees be given the opportunity to work for the respondents;

b. Affected employees be offered service pay of 1 ½ months (45) days for every year worked;

c. 25% discount on bank loans for early repayment and alternatively continuance of loans at the preferential staff rate as per previous practice;

d. Continuance of medical cover as proposed in previous meetings.

12. The Respondents in response offered;

a. That the issues raised by the Petitioners would be given consideration; deployment would be upon looking at viable opportunities for employees to apply as it was not guaranteed;

b. Severance pay would be as offered earlier;

c. There would be 'outplacement' support; and

d. Medical cover would be extended to 31st December 2016.

13. Ms Mwangi also avers that there were subsequent meetings between employees and the Respondents who offered that The Respondent had no precedent in severance terms; That the Petitioners would receive 2 months' pay for the first 2 years worked; An additional 45 days' pay for the subsequent years worked; and On loans, they would be converted to commercial rates from 3 months to 12 months. These meetings did not bear fruits. The Respondents therefore violated the petitioner's rights as they failed to communicate with the Labour Office or the other regulatory agencies as required by law; the Petitioners were never notified of the redundancy as require din law; and the 2nd Respondent treated Kenya employees different as against other nationals. The Petitioners are entitled to;

a. 3 months' notice pay;

b. 3 months service pay for every year worked;

c. Staff loans to continue at staff rates and those who pay in full to have a discount of 25%;

d. Medical benefit to continue for the reminder of the current cover; and

e. Other contractual benefits.

**Response and counter-claim**

14. In response, the Respondents states that the 2nd Respondent is incorporated in South Africa and is a shareholder of the 1st Respondent which is listed with the NSE. The Court has no jurisdiction to make determinations with regard to cited provisions of the banking Act, the Competition Act and the Capital Markets Act. As admitted by the Petitioners, the 1st Respondent is their employer.

15. In 2010 the 1st Respondent provided technical support services to the 2nd Respondent which ran a Regional office situated in the 1st Respondent premises/offices (Africa Regional Office) which office was staffed by the employees of the 1st Respondent who employed the Petitioners and paid their salaries. Pay slips submitted confirm these facts.

16.In 2016 the 2nd Respondent made a decision that technical support services would be provided for all African subsidiaries from a central hub in South Africa. The function and work carried out by the Petitioners would therefore be moved to South Africa in order to enhance operational efficiency across the business. The services of the 1st respondent's employees at the Regional office were rendered superfluous necessitating the redundancy of all its employees working at the Regional office as the function and the work they were performing was moving to South Africa. On 14th January 2016 the employees were notified of the 1st respondent's intention to declare a redundancy for the reasons of the Regional office being moved to South Africa and their functions being superfluous. The 1st Respondent also wrote to all the Petitioners notifying them that their last day at work would be 31st march 2016. Simultaneously there was a notice to the Labour and Manpower development informing them of the intended redundancy. There was an exit package offered to the Petitioners comprising of;

a. 2 months' salary for the first 2 years worked and 15 days salary for the remainder of the completed years worked;

b. Upon taking into account concerns by the Petitioners this was enhanced to one month's salary for each year served which matched the terms of the CBA even though the Petitioners are not unionised

c. All employee at the Regional office were offered the opportunity to apply for suitable vacancies within the respondents' business – the 4th, 10th, 11th, 16th and 18th Petitioners were offered alternative positions by the 1st Respondent following their application and were offered redeployment.

d. The Petitioners offered redeployment refused to accept it.

17.The Respondents also state in their defence that they had no obligation to consult with the employee in March 2015 on their concerns of a closure of the Regional office but with regard to redundancy the 1st Respondent consulted extensively with the Petitioners on the redundancy exercise and each Petitioner got a personal notice.

18.The Respondents deny all allegations with regard to discrimination allegedly perpetuated by themselves against Kenyan employees as all employees were Kenyan and were affected by the redundancy. The Petitioners disagreed with their redundancy packages but no previous redundancy package had been incorporated as a policy of the Respondents as part of the employment contract and change of job for operational reasons cannot be a legal ground for discrimination as alleged by the Petitioners. The redundancy packages offered by the Respondents way exceeded the legal limits and matched the terms of redundancy provided for in the CBA for unionised employees. The payers set out by the Petitioner with regard to a redundancy package is not contractual and not set out anywhere known in law and is therefore not justified.

19.The 1st Respondents sought to lawfully terminate the employment of the Petitioners on account of redundancy for operational reasons. In so doing, the 1st Respondent as the employer of the Petitioners followed the strict provisions of the law. The 1st Respondent is in compliance with the law in that they notifies each Petitioner personally with a 2 ½ months' notice prior to termination; there was a notice to the Minister; all employees at the Regional office were affected by the redundancy; a redundancy package was offered to the Petitioners that exceeds the legal minimum and matches the CBA package for unionised employees; and redeployment was offered to Petitioners who were given first priority but was rejected.

20.The Petition is therefore brought in bad faith with the intention to unfairly obtain the Petitioners more favourable redundancy package that that provided for in law and this amounts to abuse of Court process. The 2nd Respondent is not incorporated in Kenya nor resident within the jurisdiction of the Court and no orders lie against them as the 1st Respondent is the employer. The suit should be dismissed with costs and

the Court allow the Cross-Petition.

**Cross Petition**

21. In Cross-Petition, the Respondents state that it is their constitutional right to determine the size, scope and direction of their business within the bounds of law. The requirement of the Respondents business for employees to carry out work in the place where they were employed have ceased or diminished which entitles the 1st Respondent to declare redundancy. The redundancy declaration has been adhered to by the 1st Respondent who has offered a package and due to the delay in the conclusion of the same, it has incurred additional costs in salaries from the anticipated termination date of 31st march 2016. The Petitioners were offered redeployment opportunities and their applications prioritised but this was rejected. In this regard therefore, the 4th, 10th, 11th, 16th and 18th Petitioners are not entitled to a redundancy package as they forfeited any right thereto when they failed to accept offers for redeployment to suitable and alternative positions within the 1st Respondent business.

The Respondents Petition for orders that;

a. The Petition be dismissed with costs;

b. The Cross-Petition be allowed with costs;

c.The redundancy notice issued on 14th January 2016 be and is hereby reinstated;

d. The Petitioners be ordered to pay to the 1st Respondent a sum equivalent to salaries paid to them for the period of their employment extended past 31st March 2016;

e. A declaration that the 4th, 10th, 11th, 16th and 18th Petitioners are not entitled to a redundancy pay;

f. Interest of (d) above, from 31st March 2016 until payment in full.

22. In support of the Respondents case is the affidavit of **Geneva Musau,** who states that as the Human Resource Director of the Barclays Bank of Kenya Limited, the 1st Respondent and has authority from the employer and 2nd Respondent to represent them herein.

23. Musau also avers that on 3rd March 2016 a meeting was held where the offer made to the Petitioners in January as reiterated with two choices of exit package being;

a. 2 months' salary for 2 years of service and 15 days' pay for the remainder of the years worked, or

b. One month's salary for each completed year worked.

24.The Petitioners were to choose the most advantageous option based on the duration of service. The offer was repeated on 8th March 2016 between the 1st Respondent and the Petitioners but it was rejected.

25. In support of the cross-petition, the Respondents have 5th practitioners contact of employment and the pay slip for March 2016; letter dated 14th January 2016 to the Minister for Labour; minutes of meeting held on 3rd March 2016; and correspondences regarding offer of redeployment to the 4th, 10th, 11th, 16th and 18th Petitioners. In this case, the Petition should be dismissed and the cross-Petition allowed with costs.

**Reply to Response and to the Cross Petition**

26.The Petitioners filed their response to the Respondents' and replied to the Cross-Petition vide Affidavit sworn by Teresiah Ndung'u and 12th Petitioner who avers that she was recruited by the 1st Respondent in 2007 and deployed with the 2nd Respondent in 2013 as head of Customer Insights. That all costs incurred at the Africa Regional office were recharged to the 2nd Respondent and therefore not correct of the Respondents to aver that they had not jointly employed the Petitioners. That it is not correct for the Respondents to state that they have moved all the technical support services to south Africa for all Africa subsidiary as other Barclays Africa Office Regional colleagues are still operational in their respective countries such as India, Ghana and Botswana as supported by Charity Kimathi and Samuel Mwaniki in their affidavits.

27. Ms Ndung'u also avers that all the Petitioners were informed of the redundancy by the 2nd Respondent and not the 1st Respondent in a meeting held on 14th January 2016 where the 2nd Respondent representative Richard Daniel reassured the Petitioners that they would all be offered options of redeployment as released to the press and to the Petitioners in a memo. The meeting of 14th January 2016 was without detail about the planned redundancy until the Petitioners were served with the individual notices on 15th January 2016. The letter to the Minister has no evidence that it was received to warrant mention. The Respondents have refused to match the redundancy package to be similar to what they have offered before and thus not in good faith. The redeployment was not offered to the petitioners, applications were invited from all employees ad of the impacted staff who applied, 3 were unsuccessful while 5 were successful and their offers were withdrawn following the filing of this Petition.

28. Ms Ndung'u also avers that the defence that all employees at the Regional office were declared redundant is not correct as only Kenya employees were affected while non-Kenyans were redeployed to other offices outside the country. The redundancy package offered was withdrawn and it had not factored the skills and nature of work the Petitioners were undertaking at the Regional office where they were in charge of 12 African countries. The outplacement services were withdrawn with regard to the Petitioners and maintained for non-Petitioner employees. Therefore, the Court has jurisdiction to determine the matters pertaining to the constitution and all statutes such as the Banking Act which regulates the respondents, the Competitions Act and the Capital Markets Act which requires the Respondents to apply them by taking into account matters of unlawful discrimination and the legitimate expectations of the Petitioners.

29.On the cross-petition, the petitioner's response is that the Respondents have acted unprofessionally driven by financial motives and failed to adhere to the law in declaring the redundancy. Some non-Petitioners declined redeployment with the 1st Respondent and got redundancy packages and it would be unfair to deny the 4th, 10th, 11th, 16th and 18th Petitioners their packages.

30. There is also the Supplementary Affidavit of Rachael Gitau filed on 18th April 2016 who avers that she is the 5th Petitioner who has witnessed differential treatment imposed on the Kenyan employees by the Respondents. Upon her recruitment by the 1st Respondent in 1993 she was later seconded to the 2nd Respondent as head Corporate Operations. During the meet and greet meeting held on 14th January 2016, /Richard Daniel an employee of the 2nd Respondent as a director indicated that the 2nd Respondent office would close and on 15th January 2016 only Kenyan employees were issued with redundancy letters. on 28th January 2016, the Chief of Operations Mr Daniel and Paul Misweski the Human Resource Manager of the 2nd Respondent held a meeting with Barclays Africa Regional Director Nairobi Office, Ramesh Kavil who were to advice on the redundancy and the Kenyan employees were informed to await further communication on the matters as discussions were ongoing so as to ease their transition.

31. Ms Gitau also avers that one of the Petitioners Ms Winnie Kangethe the Personal Assistant was offered to remain in employment until june 2016, an additional 3 months so as to facilitate the transition including the cancellation of the lease agreement, relocation and school transfers.

32. Following the Court ruling on 31st March 2016, the Respondents have taken the following actions;

a. Employment offers given to various employees who had been successfully done interviews have been withdrawn – Tom Osebe, Chrispine Mwangi, Mercy Gitau, Robert Masila and Christine Ogola;

b. The Respondents have refused to negotiate a favourable exit package and instead kept the Petitioners in an anxious position with worry of constructive dismissal as non-Kenya employees have started their transitions to other Respondents offices outside Kenya which is meant to frustrate the petitioners;

c. The Respondents have since dismissed some line managers who are not part of the Petition leaving the Petitioners without clear direction in their roles;

e. The Respondents have withdrawn the outplacement and redeployment services offered before the Petition was filed;

f. On 13th April 2016 the Managing Director of Barclays Kenya Limited and the Chairman, Mr Awori made statements in the electronic media stating that the team in South Africa has been developing and is large duplicating the roles of the Petitioners which is not correct as Ms Gitau has been recruiting South African nationals to take over her roles.

33. There are internal job advertisement for roles, a holding reply on the job offers and expiry of the offer notice from Respondent and the withdrawal of outplacement support notification to confirm the Respondents have not acted in good faith. That Tom Osebe, Samuel Mwaniki, Charity Kimathi, Peter Gitau and Christine Wanyonyi who have been performing the same roles as other colleagues in other Regional offices in various countries have been declared redundant but the other Regional colleagues who are part of Barclays Africa Regional Office based outside Kenya have not been so affected as confirmed in the affidavit of Tom Osebe, Samuel Mwaniki, Charity Kimathi, Peter Gitau and Christine Wanyonyi and the Petition should be allowed and orders sought granted.

34. In this regard, **Tom Osebe** avers that Change Governance Analyst job grade 4 he has been with the Respondents for over 8 years based in Nairobi, BAGL. He has worked with a colleague Susan Nyirenda at job grade 5 with similar roles and job description save for analytical aspects but despite good performance and a promise for upgrade to job group 5 this was not done resulting in lower pay compared to his contemporary. In his team he was the only one issued with a redundancy letter while team mate in Zambia was not and was absorbed into Barclays Bank Zambia Limited.

**35. Samuel Mwaniki** avers that he was employed by the 1st Respondent in 2007 and seconded to the 2nd Respondent in 2010 as Business Analyst in a team of 4 managers based in Kenya and the team was later increased to 11 managers stationed in south Africa, Kenya, and India for the 2nd Respondent. He was placed at job group 4 and an Indian national Priti Rushtagi was recruited in 2013 as Business Analyst and placed at job group 5. Mr Mwaniki's remuneration remained lower than that of Priti Rushtagi which was discriminatory against him. on 15th January 2016 he was issued with a termination letter and asked to handover to Johannes Thongo, the Vice President Barclays Africa Group VP or BA6 in south Africa. Both Priti Rushtagi and Johannes Thongo have been retained by the business at higher grades despite holding similar position with Priti Rushtagi which is differential treatment.

**36. Charity kimathi** on her part avers that she has been in the employment of the Respondents for over 21 years and was with the 2nd Respondent in the last 6 years in the Regional Fraud Team as the Regional Strategy Manager with 4 other managers, one a UK national was based in the Kenya Regional Office, 2 in Botswana and one in Ghana until her termination. Despite holding similar qualifications she was declared redundant while the other managers hold their respective positions in their countries and the UK manager was redeployed to the business office in London. This was discriminatory practice against her and the Petitioners herein.

**37. Peter Gitau** avers that he joined the 1st Respondent in 1993 and was deployed with the 2nd

Respondent in the last 5 years as Programmes Manager at Job grade 4 in the Digital Channels Team based at the Kenya Regional office and reporting to Barclays Africa Limited group in South Africa for the 2nd Respondent. For the last 23 years he has served the business. In the last 3 years, 3 non-Kenya nationals, 2 in South Africa, 2 Kenyans and one Indian have been hired as programme managers at Barclays Africa VP of BA5 manager with higher grades and pay despite having the same job descriptions and work. His terms remained lower than the 3 non-Kenyans nationals who held similar positions. The department has expanded from 3 managers to 5 and out of these 5, 2 are from South Africa with grade AVP or BA5 but he has remained at BA4 a clear indication of differential treatment

**38. Christine Wanyonyi** avers that she joined the Respondents in May 2013 as the Communication, Reward and Recognition champion based in Kenya with similar counterparts in South Africa Rita Boshof who was at BA5 and she remained at BA3. The job evolved and more duties added to include complaints management, MI and Insights and was at the time working with Christina Van Wyk and Naeem Dadabhay who were based in South Africa who were at BA5. Her colleagues in similar positions had a higher pay yet they held similar positions and job descriptions and this treatment was also visited upon Teresiah Ndung'u a co-Petitioner herein.

39. Part of Ms Ndung'u reply Affidavit is the **affidavit of Ms Winnie Kangethe filed on 22nd April 2016** who avers that she is a Kenya citizen, the 9th Petitioner who has worked with the Respondents for the last 9 years. In 2010 she was interviewed by the 2nd Respondent for the position of Administrative Assistant, a position in the Regional office in Kenya and South Africa. All expenses for the Nairobi Regional team and office are charged back to the 2nd Respondent where the 1st Respondent incurs costs which are paid for by the 2nd Respondent. There are emails confirming these charges and how they are recharged upon the 2nd Respondent.

**Submissions**

40. The Petitioners filed their written submissions on 16th May 2016 together with their list of authorities and an Additional Supplementary Document. The Respondents filed their written submissions on 20th May 2016.

41. The Petitioners also filed their list of Issues on 4th May 2016 as follows;

a. Whether the Respondents followed due process and fair administrative action in the purported redundancy;

b. Whether the Respondents complied with the requirements of the Employment Act, 2007 as well as other legal and regulatory requirements in the purported redundancy process;

c. Whether the redundancy package offered to the Petitioners meet the provisions of the Employment Act, 2007 and whether the package took into consideration the contractual, legal obligati0ns and the Petitioners legitimate expectations as well as complying with the best practice in the industry and in the region;

d. Whether previous practices of the Respondent and/or industry standards are capable of being incorporated as terms of the contract of employment between the 1st Respondent and the petitioners;

e. Whether the actions of the Respondents to close the Regional office amount to or were actuated by unlawful motives and/or discrimination;

f. Whether the Petitioners who gave a holding response to the job offer with the 1st Respondent are entitled to their redundancy package;

g. Whether the Respondents gave sufficient communication to the labour office in Nairobi and other regulatory bodies pertaining to the purported redundancy and restructuring process as required by law;

h. Whether the redundancy notice constitutes unfair termination;

i. What compensation and other reliefs are entitled to the petitioners

j. Who is entitled to costs in this suit?

42. The Respondents did not file any issues. I find their issues set out in their written submissions;

a. The validity of the reasons for declaring the Petitioners redundant;

b. The process that was followed in the redundancy; and

c. The legitimacy of the exit packages that were offered to them and the consequences of declining.

**43. <u>The Petitioners submit</u>** that they have been gainfully employed with contracts of service by the 1st Respondent in the course of which they were deployed and or seconded with the 2nd Respondent which is the holding company of the 1st Respondent with its Regional office in Nairobi. In March 2015, it came to the attention of the Petitioners that the 2nd Respondent was closing its office in Nairobi but this was said to be not correct by the Respondents but on 14th January 2016, in a meeting between the Petitioners and 2nd respondents, there was communication that the office would close and they would be terminated on 31st March 2016. The exit package offered to the Petitioners is not in keeping with their legitimate expectations based on previous practice within the Respondents business and industry and which is conflict with the CBA for unionised employees.

44. The Petitioners also submit that the Respondent did not follow due process and fair administrative act5ion in their purported redundancy and failed to comply with the Employment Act. A redundancy related to the existence of genuine work-related reasons and where there is no reason, the redundancy declared is not justified and should be declared a nullity. The law requires an employer to provide the employee with information when there is anticipated change(s) that will affect their employment. Section 4(3) of the Fair Administrative Action Act provides that where an administrative decision is likely to affect a person, prior notice and reasons of the action should be given. The Petitioners were never given notice until the day of notice of termination. The meeting of 14th January 2016 was the first where the Petitioners learnt from the 2nd Respondent that they would be terminated from their employment with effect from 31st March 2016. There was no period consultation for the Petitioners to state their expectations with regard to an exit package. The Respondents failed to invoke the provisions of section 40 of the Employment Act which are mandatory and where not followed, an employer fails to abide by the constitutional with regard to fair labour practice. Where the procedures set out under section 40 of the Employment Act are not followed, any resulting termination is an unprocedural dismissal of the employees and they are entitled to damages as held in the case of **Caroline Wanjiru Luzze versus Nestle Equatorial Regional Limited [2016] eKLR,** the law requires two (2) distinct notices of not less than one (1) month each which must be in writing, and where these notices are not issued, an employee is entitled to damages. The Respondents failed to follow the procedures set out under section 40 of the Employment Act and the notices issued were mechanical issued for the sake of going through the processes as a decision had already been made to terminate the claimants as held in **KUDHEIHA versus The Aga Khan University Hospital Nairobi, Cause No.815 of 2015.** The notices issued to the Petitioners did not meet the threshold set out under section 40 of the Employment Act and therefore a nullity and compensation is due.

45. The Petitioners also submit that the exit package by the Respondents did not take into consideration the contractual, legal obligations and was contrary to legitimate expectation based on best practice in the

industry where the Respondent in awarding exit packages to its employees had a favourable package. The Petitioners legitimately expect a similar m package, otherwise to get a less favourable package would be an act of discrimination against them. The Petitioners gave the example of the business entity in Ghana which in 2011 offered employees an early retirement package of;

a.One and a half (1 ½) months' salary of every year served

b. Free medical cover for 5 years for employees aged less than 55 years and for those above 55 years, they got a medical benefit similar to the business retirees; and

c. A 20% discount on total loans due.

46. The practice at the Respondents has been to pay severance for all the years worked. In 2013 the 1st Respondent underwent a restructuring where they offered some employees early exit packages of;

One and a half (1 ½) month severance pay for every year served;

One (1) months' pay in lieu of notice; and 25% discount on loans.

47. The Petitioners legitimately expected similar packages as held in **Oindi Zaippeline & 39 Others versus Karatina University & Another [2015] eKLR** where like in this case, the Court held that legitimate expectation is founded upon a basic principle of fairness – that legitimate expectation ought not to be thwarted – that in judging a case a judge should achieve justice and weigh the relative strength of expectation. The law does not protect every expectation but only those which are 'legitimate' and the Court relied on the case of **South African Veterinary Council versus Szymanski 2003 (4) SA 42 (SCA).** the Petitioners also rely on the case of **Isabel Wayua Musau versus Copy Cat Limited (2013) eKLR** where the Court held that where an employee's salary was not reviewed upwards just like others were, there was a legitimate expectation of an increment with time as a management practice and as a custom or usage of the employer making the employee have a right or entitlement to the right to a salary increment.

48. The Petitioners also submit that the action by the Respondents to close the Regional office were actuated by unlawful motive and or discrimination against the Petitioners. The actions of the Respondents are actuated by malice and discrimination against Kenyan employees as there was unilateral declaration of redundancy that only affected Kenyan employees at the Regional office and gave different terms to the non-Kenyan employees which constitute actionable discrimination. In this case, the Petitioners were on 28th January 2016 asked to hand over their roles to other Regional colleagues based in South Africa while non-Kenyan employees were asked to continue with their roles while decisions were being made on the fate of their employment. the Petitioners were therefore treated different from other non-Kenyan employees and as held in the case of **Rose Wangui Mambo & 2 Others versus Limuru County Club & 17 Others (2014) eKLR,** that discrimination means affording different treatment to different persons attributable wholly or mainly to their descriptions or unfair treatment or denial of normal privileges to persons because of their race, age, sex all ending up in unjustified different treatment.

49. In the Petitioners case the non-Kenyan employees in the Respondents business were offered reasonable and better treatment something which amounted to discrimination against them. Even where the Petitioners held similar qualifications of higher qualifications and skills, they were underpaid, in lower grades and eventually the non-Kenyan employees were retained and the Petitioners terminated. This is evident in the affidavits of Peter Gitau, Tom Osebe, and Samuel mwaniki.

50. The Petitioners also submit that in a Notice of Motion filed on 21st March 2016, the Respondents were requested to disclose and give access to all information necessary for the enforcement of their rights touching on the redundancy but have failed to do so. The Respondents have a duty to produce all relevant evidence before the Court and if they do not, they risk an adverse inference being drawn against them for failure to produce such records as held by the Court of Appeal in **Nguku versus Republic (1985) KLR.** The failure by the Respondents to produce the relevant records clearly demonstrate that discrimination

took place and they did not respect the concept of equal pay for equal work where they paid Kenyan employees less than their counterparts from other countries. Such unequal pay practices should be corrected by the Court as held in **David Wanjau Muhoro versus Ole Pejeta Ranching Limited (2011) eKLR.**

51.The Petitioners are therefore seeking maximum compensation for the unfair termination and labour practices and damages for the unprocedural declaration of redundancy and the constitutional violations. The Petitioners also seek a comparable redundancy package in line with the industry standards in the banking sector and in Barclays Africa. Damages for aggravated damages are due for the discrimination and breach of human dignity and the right to fair administrative action. The remedies under section 49 of the Employment Act can be awarded together with constitutional remedies in damages.

52. In the further submissions, the Petitioners also state that the lack of consultations in the declaration of redundancy is in itself unprocedural and cannot be justified. In **Kenya Airways Limited versus Aviation and Allied Workers Union of Kenya & 3 others [2015] eKLR** the Court held that the decision to declare employees redundant was justified where the employer called financial experts to demonstrate business losses and therefore could not afford to sustain the business with a huge number of employees.

53. The Petitioners also submit that the 4th, 10th, 11th 16th and 18th Petitioners did not decline redeployment as they were never offered first priority and where there was such an opportunity they were made to apply and therefore compete with other unaffected persons working for the 1st Respondent. In light of this petition, the Petitioners gave a holding response to the redeployment offer made.

54. In their oral submissions, the Petitioners were emphatic that they wish to have an early exit from the Respondents as since the Court ruling herein, they have been placed under an unhealthy work environment. The parties have been unable to agree on an exit package.

**55. <u>The Respondents submit</u>** that in the globalised market it is a reality for multinational companies to establish subsidiaries within particular countries of choice and to have a Regional office within a particular country with a purpose to serve the region. The 2nd Respondent opened an office which was staffed by the 1st Respondent to provide operations and technical support services in the East Africa Region. It also became a business decision to close the office and to migrate to another country leading to terminations on account of redundancy. The services of the 1st Respondent employees at the Regional office were rendered superfluous necessitating the redundancy of them all as deployed with the 2nd Respondent. On 14th January 2016 all employees at the Regional office were called and notified by the 1st Respondent that there was intention to declare them redundant due to the migration of the 2nd Respondent. There was also a formal notice issued to the employees and to the Minister.

56. The Respondents also submit that the 1st Respondent offered the Petitioners a redundancy package initially comprising of 2 months' salary for the first 2 years worked and 15 days for the reminder of each completed year and upon consulting with the Petitioners and taking their views this was enhanced to one months' salary for each completed year worked. This offer exceeded the statutory minimum and matched the CBA for unionised employees even though the Petitioners are not unionised. All employees at the Regional office were offered the opportunity to apply for suitable vacancies within the 1st Respondent business. The 4th, 10th, 11th, 16th and 18th Petitioners were among the Petitioners whose application were successful but they failed to accept the redeployment offers within the timelines given and instead instituted these proceedings prompting the 1st Respondent to withdraw the offers in the interests of business continuity.

57. The Respondents also submit that the issues set out in the dispute have been framed by the Petitioners to infer discrimination but the dispute only relates to a redundancy situation. The 1st Respondent is entitled to declare a redundancy as set out under section 2 of the Employment Act and as held in **Ngurangwa & Others versus Registrar of the Industrial Court of Tanzania [1999] 2 EA** where a redundancy was held to be cessation of business and the employee is dismissed due business closure.

Similarly in **Kenya Airways Limited versus Aviation & Allied Workers union Kenya & 3 Others** the Court held that where the services of an employee becomes superfluous due to abolition of office such amounts to a redundancy and termination of employment follows.

58. From 2010 the 1st Respondent provided technical support services to the 2nd Respondent which ran a Regional office in their premises in Nairobi but in January 2016 the 2nd Respondent took a business decision to close its business to a central hub in South Africa. This was with the purpose to reorganise the business and the roles carried out by the Petitioners were impacted and moved to South Africa. The 1st Respondent therefore genuinely believed that there was a redundancy situation in respect of the Petitioners as the decision to declare a redundancy is sorely upon the employer.

59. The Respondents have not discriminated against the Petitioners. On this issue, the Court in its ruling on 31st March 2016 held that there was need for the call of evidence on the question of discrimination against the Petitioners. The parties agreed to be heard by way of affidavits and written submissions and consequently the Petitioners are precluded from inviting the Court to make findings on the issue of discrimination. Such allegations are without justification and should be disregarded. The Petitioners pleaded a case of redundancy and not discrimination against them but through filing of numerous affidavits that issue (s) have been enlarged to include new matters. The Petition has no prayer with regard to the issue of discrimination and cannot be introduced at the submissions stage. The facts remain that the petitioner's positions were taken over by South Africans when the Regional office migrated to South Africa. The closure of the Regional office in Kenya affected the Petitioners as they are within the jurisdiction of the Court and this cannot be extended to other nationals. The Respondents have therefore not failed to submit any information/records as upon being served with the Petition there was a response and cross-Petition.

60. The Respondents also submit that they followed the redundancy process in terms of section 40 of the Employment Act where notice was issued to employees and the Minister and it was within one (1) month prior to termination. The law does not regulate the consultations between an employer and an employee so as to determine whether there is a redundancy as noted by the Court of Appeal in the Kenya Airways Limited versus AAWU & others case. There was therefore no obligation upon the Respondents to consult with the Petitioners before the terminations on account of redundancy. Such consultations only apply where there is a union or with the minister of Labour. However in this case, upon the notice to the Petitioners there were consultations to find alternative employment. The Petitioners were invited to make applications, some did not qualify and those who qualified were offered redeployment but turned it down. The Respondents also offered outplacement support to mitigate job losses but these were discontinued upon the filing of the Petition.

61. The Respondents also submit that the 1st Respondent offered an exit package that is fair and reasonable. There is no precedent set on a set exit package and the Petitioners have relied on vague information to assert their claim to an exit package. The parties are bound by the contract of employment and the applicable law which sets the minimum applicable standards and in this case the 1st Respondent has offered an exit package that is above such legal minimum.

62. On whether the Petitioners who declined the redeployment are entitled to a redundancy package, the Respondents submit that they have complied with the law and offered the impacted employees with redeployment that they declined. Section 40(1) of the Employment Act is on the basis that the procedural safeguards are to accord an employee with an opportunity that is available to avert or minimise the terminations resulting from a redundancy. On this basis the 1st Respondent in consultation with the Petitioners offered redeployment that was rejected. On this basis, these Petitioners are not entitled to any exit package. The Respondents have relied on the case of **Kenya Engineering Workers Union versus Kaluworks Ltd, Cause No.112 of 1999.**

That the Petition should be dismissed and judgement entered in terms of the cross-Petition with costs to the respondents.

63. In the oral submissions, the Respondents gave emphasis that the 1st Respondent was the employer of the Petitioners and the 2nd Respondent is wrongly enjoined herein. These are facts admitted by the Petitioners who confirm they had employment contracts with the 1st Respondent and not the 2nd Respondent. The 1st Respondent has taken responsibility over the redundancy and followed the law in terms of section 40 of the Employment Act. The exit package should take into account that the matter relates to involuntary termination of employment due to redundancy and not voluntary in terms of early retirement as submitted by the Petitioners. In the case of early retirement, an employer offers and employee and incentive to leave early while in redundancy there is closure of business and the exit terms cannot be similar to case where the 1st Respondent has offered early retirement packages.

**Determination**

Who was the employer?

Whether the redundancy was justified

Whether due process was followed

Whether there is a case of discrimination

Whether there are any remedies

**64. The question of who the employer(s) to the Petitioners is/are** re-emerged in the submissions by the parties. I wish to revisit the ruling of the Court on 31st March 2016 and the finding at paragraph 17 and 19 that the 1st Respondent is the employer who deployed its employees with the 2nd Respondent and who became beneficiary to the petitioner's labours and to appreciate the issues in dispute, both Respondents are necessary. Having both Respondents would facilitate an effective determination of all the issues set out above. Where the 1st Respondent wishes to bear the burdens of the 2nd respondent, such on the final orders both Respondents are at liberty to agree.

65. What remains clear and in reference to the Court ruling on 31st march 2016 is that the notice issued to the employees and in this case to the Petitioners on 14th January 2016 by the 2nd Respondent is unprocedural. The 1st Respondent submissions and insistence that they complied with the procedural requirements of section 40 of the Employment Act in their issuance of the notice issued to the Petitioners on 14th January 2016 and the personal notices that followed on 15th January 2016 is adjudged unprocedural.

66. The above position has not changed. A Redundancy must be declared by the *employer* upon which conditions set out under section 40 of the Employment Act follow. Despite the Court leaving the Petitioners in the employment of the Respondents since 31st march 2016, Where indeed the 1st Respondent was faced with a redundancy situation and had failed to adhere to the procedural requirements of section 40 of the Employment Act as the employer that had deployed the Petitioners with the 2nd respondent, for the last three (3) months since the Court ruling, I find no effort to address such requirements. The 1st Respondent has remained adamant that there was compliance with the provisions of section 40 of the Employment Act. However the notice declaring a redundancy, that essentially should emanate from the employer and by the 1st Respondent insistence that they are the employer, which fact is correct as they have employment contracts with the Petitioners and they took the option to deploy their employees with a third party, then, as a rule, the notices issued to the Petitioners should have been by the employer, and not any other party. See section 2 of the Employment Act which is also similar to section 2 of the Labour Relations Act on the definition of 'redundancy' thus;

> *"Redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, <u>involving termination of employment at the initiative of the</u>*

*employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment;* [emphasis added].

67. In *Response to Petition and Cross Petition* the 1st Respondent at paragraph 5(g) avers;

> *Further to the meeting on 14th January 2016, the 1st Respondent wrote formally to the Petitioners advising of the redundancy and informing them that their last day of service would be 31st march 2016. These letters contained the exit packages for the affected employees and are annexed to the petition.*

68. The nature of *meeting on 14th January 2016* is not gone into by the 1st Respondent. The nature of such meeting can be traced from the Petition where the Petitioners aver at paragraph 11 and 12 of the Petition thus;

> *11. Sometime in March 2015, it came to the petitioners' attention that the Respondent was harbouring intentions of closing down its Regional office …*
>
> *12. On a meeting held on 14th January 2016 between the Senior Executives of Barclays Africa Group Limited (BAGL) and the undersigned Barclays Africa Office employees the Petitioners received the first communication of the decision by the 2nd Respondent to close the Barclays Africa Regional Office in Nairobi. …*

69. In further response, the 1st Respondents at paragraph 8 and 9 agree that they had no obligation to consult with the Petitioners in declaring the redundancy. However even where the employer enjoys the prerogative to re-organise its business, restructure or declare a redundancy, the employee on the other hand enjoys the right to be issued with a written notice of the intended redundancy which should be *not less than a month prior to the date of the intended date of termination on account of redundancy.* This position is given affirmation in the Court of Appeal case of **Thomas De La Rue (K) Limited v David Opondo Umutelema eKLR** this Court said:

> ***It is quite clear to us that section 40(a) and 40(b) provide for two different kinds of redundancy notifications depending on whether the employee is or is not a member of a trade union. Where the employee is a member of a union, the notification is to the union and the local labour officer at least one month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing to the employee and the local labour officer.***

70. The Notice declaring the redundancy must be issued first. That sets in motion other procedures that requires and employer to set out the modalities of the reasons for, and the extent of, the intended redundancy. In KUDHEIHA versus The Aga Khan University Hospital, cause No.815 of 2015, the Court held;

> *… the primary recipients of such a notice [redundancy notice] is the union such as the claimant and the employee who is not unionised and in both cases the Labour Officer must receive direct communication. The notice is not meant for information purposes, it is a direct communication to the subject recipients envisaged under section 40(1)(a) and (b) noting the clear message content in the notice is to give reasons for, and the extent of the intended redundancy.*

71. The reasons for the redundancy cannot be justified after the fact of its declaration and termination of employment. Before an employer takes a decision to declare the redundancy, whether the employees are unionised or not, the employer must have a genuine reason that is valid and fair so as to terminate employment.

72. Consultations are therefore a necessary procedure. To give reasons for, and the extent of, the intended redundancy, as of necessity, this cannot be left to the employer alone. There are factors that affect the

employees that must be gone into. Definitely the extent of the redundancy is a matter that affect the employees directly and consultations are necessary. The Court of Appeal in **Kenya airways Limited versus Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR;**

> *The legal obligation on the parties to consult on the matter is designed to enable the parties to explore ways and means of minimizing the social and economic impact of the loss of jobs. The obligation is primarily imposed on the employer. The union's duty is to make reasonable counter proposals to the employer's proposals with a view to giving the affected employees a "soft landing ground". In our view such consultations must be meaningful and held within the true spirit of collective bargaining. The employer ought to give the union an opportunity to influence its decision. There must be a genuine attempt to resolve the matter through objective consideration of the proposals generated by the parties to mitigate the harsh impact of redundancy*

73. It is a fair labour practice and indeed a good best practice for parties to have consultations. In any event, as set out above, a redundancy arises out of no fault by either party. It should therefore not be rocket science to set out the issues and have parties to an employment contract seat and agree on the modalities. In the notice by the 1st Respondent dated 14th January 2016 to the petitioners, it notes;

> *Reference is made to previous communications to all members of staff and the discussion with yourself regarding the impact of the organisation restructuring involving the closure of the Barclays Africa Officer in Kenya. Following your agreement to exit from the bank under the restructuring program, the bank now confirms that it will be able to release you from employment with effect from 1st April 2016, on the following terms. Your last day of service will therefore be 31st March 2016.*

74. This is essentially a termination letter. The reference of it to restructuring and closure of the Barclays Africa Regional office is note a notice declaring redundancy. The letter makes reference to;

- previous communication to all members of staff;
- discussions with staff regarding the impact of the reorganisation
- the closure of Barclays Africa Office in Kenya;
- agreement by the employees to exit from the bank under the restructuring program
- bank confirmation to release the employees as at 1st April 2016; and
- terms of the release

75. The notice to the Minister of labour is also dated 14th January 2016 and delivered on 15th January 2016. The Respondents have not attached the notice declaring the redundancy referenced in the termination notice issued to the Petitioners noting the above issues of previous communication on the redundancy; the nature of discussions held culminating into the termination notice; the notice leading to the closure of the Barclays Africa Office in Kenya; the agreement entered into between the parties where the employees agreed to exit the Respondents employment; so as for the Respondents to confirm such release and offer of an exit package. The context of the 1st respondents' letter to the Petitioners and its materials reference is therefore lost.

76. As noted by the Court in **Caroline Wanjiru Luzze versus Nestle Equatorial African Regional Limited,** the employer is supposed to give two (2) distinct notices on account of redundancy. Such must be in writing. These notices are not mechanical so as to satisfy the motions of the law, fair labour practice requires the employer to act in good faith as held in KUDHEIHA versus the Aga khan University Hospital.

77. The argument that the employer is not bound to consult with the employees save for where there is a trade union or the Minister of Labour is involved is not correct. My reading of the judgement by the Court of Appeal in **Kenya Airways Limited versus AAWU & Others** and sections 40(1)(a) and (b) is that an employee who is not unionised should not be treated unfavourably simply because they are not unionised.

Section 40(1) (b) specifically requires the employer to;

> *40. (1) an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions –*
>
> …
>
> *(b) Where an employee is not a member of the union, the employer notifies the employee personally in writing and the labour officer*

78. In my view, there is no departure from the law in the holding by the Court of Appeal. The *conditions* set in law with regard to what procedures an employer should follow in a situation of redundancy is clear. Where employees are unionised, the union and the Minister must be issued with notice. Where employees are not unionised, the employer must issue personal notice to the employees and the Minister.

79. It is trite in employment and labour relations in Kenya that an employee has an unfettered right to challenge the reason(s) of termination of employment. The rationale is that any termination of employment must be based on genuine, valid and fair reasons. Such reasons must be proved by the employer as otherwise, the termination is unfair. Where such reasons do not exist, the termination, by whatever reason(s) stated by the employer without prove, this amount to unfair termination of employment in terms of section 45 of the Employment Act. Specifically, where an employer relies on the provisions of section 40 so as to terminate employment without justifying the redundancy, it does not matter that the employee was not consulted, the same amounts to unfair termination of employment. It is therefore not sufficient for an employer to state that there is a business reorganisation, the business has moved or that there is a 'section 40 situation' and therefore the Court must infer a redundancy. Not at all. There must be a justification. The employer must demonstrate that there exists a genuine reason that requires the business to reorganise, reduce staff or restructure the business to viability, the same must be found as valid and fair. The Court must look at the circumstances of each case based on the available evidence and make a finding. This in my view would serve to avoid a situation where an employer keen on terminating several selected employees from abusing the process set in law to address a specific business situation.

80. It is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before and the only change is the location. In this case the employer, the 1st Respondent has not changed. Even where the 2nd Respondent business is said to migrate, the nature of business and the technical support of the Petitioners has not been demonstrated as having changed. Even where there is need to move such business to South Africa as stated, while the business is in Kenya, support services have been by Kenyans, South Africans, Indians and other nationals. What is the new change? Only the location, otherwise the business and the roles of the Petitioners are not indicated to have changed. In ***Polkey*** **v. A.E. Dayton Services Limited, 1988 ICR 142** cited by the Court in the case of Kenya airways Limited versus AAWU and others, Cause no.1616 of 2012, the Court held that it is the duty of employers to act reasonably in all termination decisions

> *… in the case of incapacity, the employer will normally not act reasonably, unless he gives the employee fair warning and an opportunity to mend his way, and show that he can do the job; in the case of misconduct the employer will normally not act reasonably unless he investigates the complaint of misconduct fully and fairly, and then hears whatever the employee wishes to say in his defence or in explanation or mitigation; in the case of redundancy, the employer will normally not act reasonably unless he warns or consults any employees affected or their representatives, adopts a fair basis on which to select for redundancy, and takes such steps as may be reasonable to avoid or minimize redundancy by redeployment within his own organization.* [Emphasis added].

81. In the context of our country, employers are required to act fairly. Such fairness has many facets but the fundamental principle is to ensure that the employee is treated within the confines of the law in a manner that their rights at work are respected, upheld, secured and given a fair chance to mitigate their situation particularly in a redundancy situation. Such is what fair labour relations is.

82. In the affidavit of Geneva Musau in support of the Response and Cross-petition, save for admission that the 1st Respondent offered technical support to the 2nd Respondent who now wishes to close its business, the 1st Respondent has not demonstrated that it is facing a redundancy situation as the employer. As the principal employer to the petitioners, fair labour practices requires that the employer demonstrates the reasons for, and the extent of, the intended redundancy. Where the 1st Respondent enjoyed a business opportunity to offer technical support to the 2nd respondent, the impacted employees should not suffer and pay for the loss. The Petitioners are employees of the 1st respondent, and before deployment with the 2nd Respondent they had their positions with the 1st Respondent. Some Petitioners have served the Respondents business entity for periods ranging from 8 to 26 years. Such cannot be wished away in a minute. Fair labour practices dictates that where there is a deployment in employment the principal employer does not change. The contract of employment and its terms and engagement have not been altered and the employee has the option to return back to the principal or where the reasons for deployment has changed, abetted, ended, employment continues with the principal. The 1st Respondent as the employer and the 2nd Respondent as a shareholder of the 1st Respondent and other subsidiaries in Africa, has a duty to its employees – not to use them and benefit from their labours and once done, terminate their employment under the guise of redundancy. More is required of the 1st Respondent as an employer. Nothing is set out with regard to positions previously held by the Petitioners before their redeployment, as they only were offering technical support to the 2nd Respondent.

83. I find the Respondents failed to adhere to procedural requirements set out in law which violates section 40 of the Employment Act. Such ended in unfair declaration of a redundancy against the Petitioners. Compensation is due under the provisions of section 49 of the Employment Act.

84. I also find the declaration of redundancy was not justified. The 1st Respondent has taken the easy option to ride on a business decision made by the 2nd Respondent without making any effort to secure contracts of employment held between then and the Petitioners. This amounts to an unfair labour practice. The practice of engaging in unfair labour practice is specifically outlawed under article 41 of the constitution. The Petitioners have clearly demonstrated that the respondents, jointly failed to adhere to fair labour practice when they declared them redundant without the issuance of the requisite notices that are mandatory. Such I find to be an unfair labour practices contrary to the Bill of Rights and damages are due.

85. On whether there was discrimination against the petitioners, I go back to the Notice of Motion filed with the Petition and the amendments made thereto. Part of the prayers the Petitioners were seeking related to provision of Information and records relating to their employment thus

*The Respondents be hereby ordered to publicly disclose the detailed criteria and mechanism used to short-list and identify the employees eligible for redundancy, and to disclose all documents, correspondent, and information, internal or otherwise, generated or obtained in the process of declaration of redundancy of the petitioners;*

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

86. In the Court ruling delivered on 31st march 2016, the Court noted that the unprocedural declaration of redundancy had the impact that the relevant documents leading to the same were not submitted. Had such records, documents and procedures leading to the termination notices of the Petitioners been issued to them, the terminations or the Petition in the manner they were effected or the necessity of it would have been avoided. The upshot of it is that the Respondents failed to share relevant information, material and records relevant to the case herein. In employment and labour relations, the non-production of employment records cannot be justified on the grounds that the employee has not asked for it.

87. It is a requirements that an employer is to keep all work records and produce them in Court once a dispute is registered with the Court. In **Rewel Mwangi & Others versus KRA, Cause No.1421 of 2014** the Court held;

> *… materials and document necessary for the claimant's case are in their nature to be issued at the work place. Such records/documents/materials are not for the consumption of the Court. They should be made available at the shop floor at all material times. Such facilitate fair administration of any dispute at the internal level and offer both parties, employer and employee the best chance to be heard based on the facts at hand.*

88. The defence that the material, information and records required by the Petitioners are vague and ambiguous not capable of being implemented is not correct. The Petitioners in their application asked for;

> *Disclose the detailed criteria and mechanism used to short-list and identify the employees eligible for redundancy, and to disclose all documents, correspondent, and information, internal or otherwise, generated or obtained in the process of declaration of redundancy of the petitioners*

89. It is common cause that while the Petitioners offered technical support to the 2nd Respondent they worked with other employees – Kenyans, South Africans, others from Ghana, UK, India, and Zambia – as stated in pleadings. The Respondents have the record of its employees. It is not denied that some Kenyan employees are not part of this petition, but this record is not set out; it is not in dispute that Richard Daniels was the Chief Operating Officer of the 2nd Respondent and worked closely with the petitioners; that Ramesh Kavil was the lead in the 2nd responding transition as the Barclays Africa Regional Director Nairobi; Paul Misweski was the Human Resource manager; that Tom Osebe worked with Susan Nyirenda; Samuel Mwaniki worked with Priti Rushtagi an Indian national and Johannes Thongo a south Africa national; that Charity Kimathi worked with several Regional manager; and Christine Wanyonyi worked with Christina Van Wyk and Naeem Dadabhay. These facts have not been challenged. However, they only emerge from the Petitioners pleadings. Had the Respondents shared all the records, information and materials used in arriving at the decision to terminate the employment of the petitioners, such information, records and materials would have been relevant in addressing the issues in dispute.

90. Without sharing all relevant information that relate to the reasons for, and the extent of, the intended redundancy, an employer would not be able to comply with the conditions set out in section 40 (c ) thus

> *(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy*

91. The right would be empty without the employment records. Where an employee enjoying their right to challenge the decision of the employer to terminate their employment seeks for the reason(s), the employer in justifying the same, particularly in a case of redundancy has to show/demonstrate the selection criteria used with regard to a given employee. Such criteria would require each individual employee be assessed and set out as against other similarly situated and the decision to identify the Petitioners rationalised as a genuine, valid and fair decision. As otherwise, the simply apply a general view and defence that all Kenyan employees were terminated due a redundancy is to hide behind non-issuance of records, information and material necessary in arriving at the same. Such would justify the claim of discrimination against the Petitioners on the basis of nationality as indeed there is uncontroverted evidence that the Petitioners were working with other employees of different nationalities. Where are these records to show that only Kenya employees were impacted and how can that be justified? The records of the respondents' workforce was necessary. Such is denied of the Petitioners and this Court. Such denial is not justified, the information required is in the custody of the Respondents and have taken the option not to produce it. The consequence is that without such records, the assertion by the Petitioners are justified. Such is summed up by the Court in **Christopher Onyango and Others versus Heritage Insurance, Cause No.781 of 2015;**

> *… where an employer fails to act and promote equality of opportunity in employment; fails to*

*promote and guarantee equality of opportunity; and proceeds to terminate the employment of any employee in a manner that is discriminatory – that is without setting out the reason(s), without justification and in setting out such an employee aside and separate from other employees so as to deny them a legal right without any justification – such an employer commits discrimination against the employee and such is specifically prohibited under section 5 of the Employment Act, it is unconstitutional practice under article 27 of the constitution and the same is an unfair labour practice under article 41 of the constitution.*

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

93. I find the evidence by the Petitioners that they were among the best performing employees of the Respondents not challenged. This is indeed true as they were selected and placed as the technical staff at the Africa Regional office and held senior positions which have now been moved to South Africa office and broken down to be held by several officers upon migration. This can only mean one thing, the Petitioners performed their duties exceptionally well in that one Petitioner was able to do work that ordinarily should be done by more than one person and in some cases, it is now being done by 3 officers. Fair labour relations requires that in terminating such an officer due to a redundancy situation, such skill, competence and capacities be put into account.

94. The issue of discrimination against the Petitioners is specifically pleaded in the Petition. The matter is also clearly set out in the various affidavits of the Petitioners who set out matters pertaining to their work environment and the various acts of difference in treatment in terms of remuneration, target for termination and difference in allocation of an exit package. the Petitioners also set out that only Kenyan nationals were targets of the redundancy process as their counterparts from other countries particularly from south Africa have retained their positions or been redeployed to other countries. In their case they were made to apply and compete for available positions with the 1st Respondent just like any other employees and were never given priority.

95. The successful Petitioners were offered new employment but such was withdrawn upon the Petitioners filing this Petition. The Respondents have challenged this evidence on the basis that the issue in dispute relates to redundancy and the Petitioners have changed the same or mutated the issue(s) to include discrimination which was not the case. However, in the affidavit of Geneva Musau for the respondents, there is no evidence to controvert what the Petitioners have set out in their affidavits particularly the issue raised under oath by Teresiah Ndung'u.

96. I therefore find the Petitioners were subjected to different treatment while at work, the terms and conditions of work for the Petitioners were made unfavourable without justification; the declaration of redundancy that rendered the Petitioners without work lacks justification, is not genuine or valid, which amounts to discriminatory treatment outlawed by the constitution under article 27 of the constitution and is also contrary to fair labour practice under the Bill of rights article 41 of the constitution.

97. In a society such as ours where its members have decided that there should be no discrimination against any of its members and further gone out to set the prohibited grounds, any member who goes contrary to such social contract, upsets its equilibrium. Where such actions are without any justification and go contrary to the principles set out so as to guide such a society on how to conduct its affairs so as to avoid instances of discrimination against any of its members, then to go contrary, a sanction must follow. The Petitioners are entitled to damages.

98. The Petitioners have also relied on the provisions of the Banking Act, Capital markets Act, and the Competition Act. The Respondents have challenged the application of these statutes and their provisions on the basis that they are not applicable before this Court. However, in any employment and labour relations dispute, any legislation that protects, promotes and upholds the right(s) of an employee becomes automatically applicable before this Court. indeed where the Respondents have failed to obtain various

approvals and controls in matters of licencing, location of place of business, establishment of branches and subsidiaries, restructuring and amalgamation; have no authorisation prior to consummation so as to protect the interests of the petitioners; and have made restructuring decisions which could affect the value on listed securities, such where the Petitioners as employees are affected is actionable before this Court. However, the Petitioners failed to set out clearly how these statutory protection impacted upon them and the damage suffered as a result. There was clarity with regard to constitutional violations and workplace unfair practices under the Employment Act, but I find no content evidence to support the other statutes set out in the Petition. I make no orders in this regard.

**Remedies**

99. The parties herein have made effort to agree on an exit package under the termination on the grounds of redundancy. The Respondents have made effort to make various offers to the Petitioners which has been rejected.

100. On the finding that the termination of the Petitioners on account of redundancy is unprocedural. Such unfair termination is regulated under section 40(1) of the Employment Act which is couched in mandatory terms. The Petitioners are therefore entitled to compensation. As held in the case of **Christopher Onyango & others versus Heritage Insurance Company Limited, Cause No.781 of 2015,** in a case of unprocedural declaration of redundancy, the employees were paid compensation equivalent to 10 months of the last gross salary. Similarly in this case, such I find to be due and is hereby awarded. The Petitioners shall be paid 10 months gross salary in compensation.

101. Similarly, on the finding that the Petitioners rights under the constitution were violated, such rights stem from the Bill of Rights, such rights relate to their right to non-discrimination, dignity of the person and right to fair labour relations, damages are due. An award of kshs.500, 000.00 to each Petitioner is appropriate.

102.The Petitioners have lost their employment due to no fault of their own. The Respondents have taken the easier option and given the reason of redundancy. The Respondents are willing to pay an exit package so as to severe their relationship with the Petitioners. The application of the reason of redundancy as the sole reason for termination of the Petitioners requires that the Respondents as the employer not to apply separate terms on unionised and non-unionised employees. The exit package due is that of redundancy and not retirement. What the union has been able to negotiate for unionised employees should apply for the Petitioners. There exists the Collective Bargaining Agreement (CBA) between the **Kenya Bankers Association and Banking Insurance and Finance Union (BIFU)** dated 10th September 2015 and applicable for the subject period herein. Section 40(1) (d) requires the Court to take into account such a CBA in awarding terminal benefits upon redundancy. The Court is also to apply any other contractual obligation between the parties such as the contract of service and the business practice. In this regard, the work records, information and materials in the custody of the employer become relevant. Such records have been denied of this Court. However the contract of service for each Petitioner give provision of pay in lieu of notice at on one (1) months' pay which is similar to the CBA terms. Such shall apply here. In the subject CBA the following provisions set out in a redundancy situation are relevant in this case;

a. severance pay at one month's pay for every completed year;

b. one months' notice pay;

c. within 12 months from the date of discharge on the grounds of redundancy the employers shall give preference to such a persons in the event of engaging new staff of similar grade; and

d. Where an employee is entitled to other benefits, a pro-rata compensation shall be made at the time of discharge on account of redundancy.

103. The exit package for the Petitioners is not contested by the Respondents in a material way save for the severance pay computation, due loan(s) and the rate of repayment. I find no major challenge to the

other issues set out. I shall therefore factor the above CBA terms which I find fair and reasonable in that it takes into account the legal minimum and the business practice in place for unionised employees negotiated between the Kenya Bankers Association and BIFU and there the sector practice. In this case the Court awards the Petitioners the following;

**a. one month gross pay as notice pay;**

**b. severance pay shall be at one month's gross salary for every completed year;**

**c. accrued leave days are payable;**

**d. payable bonus for 2016;**

**e. medical cover shall be extended to 31st December 2016; and**

**f. Each Petitioner shall be issued with a Certificate of Service.**

104. On the loans due, and other facilities advanced to the Petitioners in the course of their employment, it is apparent from the pleadings and proceedings, the Petitioners have concerns due to sudden loss of employment. In majority of cases, employees now are able to enjoy work benefits and secure various credit facilities, loans and mortgages which are secured by their employment. The loss of such employment leave these loans or mortgages still owing and the terminal dues payable are either not sufficient to make full repayment. The employee is exposed to other unforeseen challenges that should not have arisen had the employment not been unfairly terminated. The compensation and damages awarded by the Court ends up not covering such an employee and they are left empty handed by the simple fact of loss of employment due to no fault of their own. Such an employee should be secured against such unfair labour practice.

105.The Petitioners shall continue repaying any loans and or facilities advanced to them while in the employment of the Respondents at the same terms, rates, interests as at the time of termination unless they wish to repay such in advance. The Respondents shall not apply any unfavourable terms against the Petitioners on any facility due from them outside the terms already in existence.

106. I find no challenge to the prayer with regard to the motor vehicle facility advanced to the Petitioners. There is a specific order sought in this regard which is granted save that, the Petitioners are at liberty to organise from their terminal dues on the mode of repayment based on the findings hereinbefore with regard to facilities advanced and are due from the Petitioners. The Petitioners shall however not be put at a disadvantage in negotiating for the repayment of such motor vehicle assets facility advanced to them while in the employment of the respondents.

107. On the remedy of aggravated damages, noting the compensation and damages awarded above, the letter of termination gives emphasis that the Petitioners are to keep the confidentiality clause over their contracts of service despite exit from the Respondents business. Such terms restrict the employability of the Petitioners whose outplacement and redeployment has since been withdrawn. In the circumstances of this case, there should be unconditional release noting the failure by the Respondents to adhere to mandatory provisions of section 40 of the Employment Act. In this regard, the Petitioners shall be bound by the confidentiality clause as required for the next six (6) months and upon which, the Respondent shall pay the due salaries for the same period.

**Cross Petition**

108. On the cross-petition, the respondent's case is that there is compliance with the redundancy process and the delay in the conclusion of the case has resulted in expenses of salaries paid to the Petitioners. That the Petitioners were informed of redeployment opportunities and their applications prioritised but those who qualified refused to accept redeployment and should not be considered for a redundancy package. The Petitioners have challenged this averments and noted that there are non-Petitioners and former

employees of the Respondents who declined redeployment and were given the exit package and therefore an act of discrimination to set apart the Petitioners who have given a holding reply to the redeployment awaiting the determination of this petition.

109. The ruling of the Court on 31st march 2016 as noted above returned the Petitioners to the employment of the Respondents. Noting the issues set out therein, nothing stopped the Respondents from following the clear provisions of section 40 of the Employment Act if indeed there was a genuine redundancy situation. These employees have been at the respondent's disposal for the last 3 months. Nothing stopped the Respondents from doing that which is lawful and constitutional in ensuring fair labour practice was achieved in their effort of terminating the employment of the Petitioners.

110. The outcome of the proceedings herein cannot be blamed upon the Petitioners. The Petitioner have come to Court to assert their rights and their case heard on merit. Where the Respondents made a settlement offer to the Petitioners and declined and the Respondents felt constrained in terms of time in the haste to close the business so as to render the Petitioners without work, the rule of law requires that each party should move with haste to secure their rights but within the confines of fair administration of justice and in an atmosphere where each party has a chance to be heard however weak the voice may be. In the intervening period from March to June 2016, parties have had a chance to exchange their pleadings, their submissions and make their oral arguments in Court. The Respondents have had the chance to respond to the issues raised by the Petitioners which would not have been possible had the Court rushed over the matter to make a judgement so as to fit the time period planned for the closure of the 2nd Respondent business. Justice serves both ways.

111. In this regard I wish to bring to the attention of both parties the provisions of section 46(h) of the Employment Act thus;

> ***46.*** *The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—*
>
> *(h) An employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation;*

112. Every employee has an unfettered right to initiate suit, complaint or to challenge the decision of the employer in a case of dismissal. Where there are well founded grounds, the Court must stop all else and listen to the employee and upon a finding that the employee has a legitimate claim, the Court must work diligently and address and redress the same. I therefore find in this case the Petitioners had valid reasons of concern that are noted in the petition, their claims are legitimate and as set out above, this is now remedied. To find otherwise would be the injustice.

113. Once a redundancy has been declared by an employer, it is not for the employees to determine where they are to be redeployed. In any case, when the Petitioners were removed from the 1st Respondent and placed with the 2nd respondent, I find no evidence that they were required to apply. Similarly, a second redeployment or a return to the principal employer, the 1st responding should have been a matter of course. On 14th January 2016 the Petitioners woke up to undertake their roles as employees, only to return home without job security. Such I find to be cruel, inhuman and lacks the dignity that is contemplated under article 41 read together with 28 – every employee should be treated fairly and with dignity of the person.

114. I take it the business practice is that where a redundancy is declared and employees laid off, *within 12 months from the date of discharge on the grounds of redundancy the employers shall give preference to such a person in the event of engaging new staff of similar grade.* Therefore, where the 1st Respondent had deployed the Petitioners with the 2nd Respondent and due to a business reorganises and restricting still had positions that the Petitioners were qualified for, they ranked in preference as a business practice set out in the CBA. Also, as a best practice and as set out in **Aviation Workers union & others versus**

**Kenya Airways Limited, Cause No.1616 of 2012** thus;

> *Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether … it is not a genuine redundancy, where the requirements of the business for the affected employees continues, just the same as before. In this case the employer terminated the contracts of certain employees on the basis of redundancy, but went ahead to recruit new employees to undertake the same roles.* [Emphasis added].

115. To therefore subject the Petitioners to the rigours of job applications, interviews and requirements to take up redeployment is to subject them to new conditionalities that are already addressed within the business and well set out in the CBA regulating unionised employees and to require the Petitioners to take a new schedule so as to get redeployment, such is discriminatory. Where there were available positions within the 1st respondent, the Petitioners ranked in preference. In any event the 1st Respondent is the employer, had deployed them with the 2nd Respondent as technical support employees and had undertaken their duties well. To therefore put them under new scrutiny and require them to apply for a redeployment is to rubbish their credentials and put them down for no apparent reason that has been explained. I find no good reason(s) to have subjected any Petitioner to job applications and issuance of conditions so as to accept the redeployment. It should have been automatic unless the same had not been initiated in good faith and was only meant to target the Petitioners for employment termination. To require fresh application for available jobs that already fitted the job roles of the Petitioners, this I find to be an unfair labour practice. This confirms the Court finding that the 1st Respondent faced no redundancy situation, the declaration of the same was not by the 1st Respondent and to require the Petitioners to apply for work with their existing employer was done in bad faith. The haste to close the 2nd Respondent and pay off the Petitioners was a culmination of such bad faith.

116. However, by the petitioners holding their responses to await the outcome of their Petition and noting the subsisting work environment now resulting from these proceedings, to require the respondents to keep and hold the redeployment would not result into any productive outcome. Separation is inevitable. Where the parties wish to engage, such can be well be done outside of these proceedings.

117. The employment relationship between the parties shall therefore cease.

118. No remedy is due to the Respondents for salaries paid to the Petitioners or costs incurred in cross-petition.

119. It is unacceptable to deny any of the Petitioners their exit package on the basis that the redeployment offer that should have been automatic in the first instance declined, and on good reason on the basis that these Petitioners have taken the option of filing this Petition. As noted above, section 46(h) protects the Petitioners in their initiation of this Petition. They cannot be denied their terminal dues as a result. The cross-Petition therefore lacks basis and is hereby dismissed with costs.

**Conclusion**

**On the above findings, the Cross-Petition is hereby dismissed with costs; Judgement is hereby entered for the Petitioners against the Respondents jointly and severally in terms of paragraphs 104 and 106 above and with declarations that;**

> **a. the redundancy notice issued to the Petitioners on 14th January 2016 was unprocedural and unlawful;**
>
> **b. I declare the termination of employment of the Petitioners on account of redundancy is not justified and unfair;**

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

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

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

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

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

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

**g. Noting the above, these shall be cessation of employment relationship between the parties herein on 30th June 2016.**

**h. Petitioners are Awarded Costs.**

**Orders accordingly.**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH JUNE 2016.**

**M. MBARU**

**JUDGE**

In the presence of:

Lilian Njenga: Court Assistant

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