



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL DIVISION & ADMIRALTY DIVISION**

**MISC. CIVIL CAUSE NO. 131 OF 2016**

**GOODISON SIXTY ONE SCHOOL LIMITED.....APPLICANT**

**VERSUS**

**SYMBION KENYA LIMITED.....RESPONDENT**

**RULING**

1. Goodison Sixty One School Limited (Goodison) calls in question the validity of the final Arbitral Award and Costs made on 25<sup>th</sup> February 2016 by an Arbitral Tribunal comprised of Paul Ngotho (The Arbitrator). The thrust of the Complaint by Goodison is that it was deprived a fair hearing and reasonable opportunity to present its case before the Tribunal and that it was not granted sufficient time and a reasonable opportunity to engage Counsel of its choice.

2. In the Notice of Motion dated 23<sup>rd</sup> May 2016, Goodison seeks the following Orders:-

- 1. THAT this Honourable Court be pleased to set aside the Final Arbitral Award and Costs made in the Arbitral proceedings dated 25<sup>th</sup> February, 2016.**
- 2. THAT this Honourable Court be pleased to set aside any and all Rulings and Awards and set aside and/or vacate any Orders made in the Arbitral proceedings.**
- 3. THAT this Honourable Court be pleased to declare the Arbitral proceedings a nullity.**
- 4. THAT this Honourable Court be pleased to direct that Arbitral proceedings commence *de novo* between the parties with a new arbitrator to be appointed by the agreement of the parties within such period as the Court shall specify.**
- 5. THAT failing such agreement between the parties as to the appointment of an arbitrator this Honourable Court be pleased to appoint a new arbitrator to arbitrate the dispute between the parties.**
- 6. THAT costs of this application be provided for.**

3. Although Goodison has in the present Application also asserted that the Arbitrator failed to treat the parties with equality due to his lack of impartiality or independence and was manifestly biased, the occasion to consider that assertion is passed. The Court notes that in an Application dated 23<sup>rd</sup> March 2016, Goodison had not only sought to declare the Arbitral proceedings and the Award therefrom a nullity but also to have the Arbitrator disqualified and removed from the proceedings. The mainstay of that Application was an allegation of partiality and lack of independence by the Arbitrator. That application was dismissed in a decision rendered by Hon. Ochieng J. on 6<sup>th</sup> October 2016. It would be needless therefore for this Court to reconsider the veracity or otherwise of that complaint.

4. A dispute between Goodison and Symbion Kenya Limited (Symbion) was referred to arbitration under the terms of a Dispute Resolution Clause set out in the Standard Conditions of Appointment which formed part of a Contract entered between the parties. It fell to Mr. Ngotho to constitute the Tribunal after he was appointed by the Chairman of the Chartered Institute of Arbitrators (Kenya Branch).

5. Upon his appointment the Arbitrator issued various Orders of Directions that would enable him process and hear the Dispute. One such Order (Order No.1) was issued on 24<sup>th</sup> April, 2013. Of significance to the controversy this Court is called to determine are the Directions in respect to the filing of Witness Statements and manner of taking evidence. Direction 33 reads as follows:-

**“The parties agreed that it would be necessary to hold an oral hearing, in which the witness statements and expert reports**

**shall serve as evidence-in-chief”.**

6. The timetable for submission of written statements was set out in Direction No. 4 of 6<sup>th</sup> November 2013. Having exchanged their respective bundles and statements of Claim and Defence, the Arbitrator gave the following Directions in respect to the filing of Witness Statements:-

**“3. Each party is now aware of the other side’s case and can assemble the evidence it considers necessary to canvass its own case and to rebut the other side’s case.**

**4. The parties are encouraged to engage Joint Independent Experts to save time and costs. The parties shall share the fees payable to party-appointed joint experts equally pending my award on costs.**

**5. Each expert witnesses called by a party shall disclose in its report whether s/he is independent or would play an advocacy role.**

**6. Witness Statements from expert witnesses shall be accompanied by the Individual’s (not firm’s) detailed CV and copies of all the relevant certificates and licences.**

**7. Each party shall in first instance pay the fees and disbursements associated with its witnesses pending my award on costs.**

**8. I reserve the right to engage an expert in any field at the expense of the parties at any time after consulting the parties”.**

In respect to timelines, Symbion was to serve its Witness Statements on or before 29<sup>th</sup> November 2013 while Goodison was to submit theirs by 13<sup>th</sup> December 2013. It is common ground that following a preliminary meeting held on 9<sup>th</sup> December 2013, the timetable for submissions of the Witness Statements was expanded. It was agreed by consent, and captured in Directions No.5, that the Witness Statements would be exchanged simultaneously on or before 31<sup>st</sup> January 2014 (*although erroneously indicated as 31<sup>st</sup> January 2013 in the Order*) in the offices of the Lawyers for Goodison, then the Law firm of Hamilton Harrison & Mathews.

7. Prior to that date, Mr. Gross appearing for Symbion wrote to the Arbitrator requesting for rescheduling of the oral hearing which had been slated for 18<sup>th</sup>, 19<sup>th</sup> and 20<sup>th</sup> February 2014. Again before the deadline for submission of the Witness Statements Mr. Kiragu Kimani appearing for Goodison wrote on 29<sup>th</sup> January 2014 indicating that his Client was not able to submit the Witness Statement by 31<sup>st</sup> January 2013 (*must have meant 31<sup>st</sup> January 2014*) and sought an assurance from Mr. Gross that he would have no objection to an extension of time. In that letter Counsel for Goodison indicates that his Client has consented to the hearing dates in February being vacated.

8. And so on 3<sup>rd</sup> March 2014 the Arbitrator issued Directions in which he revised the timetable as follows:-

**1. The parties shall exchange the Witness Statements on or before Monday 10<sup>th</sup> March 2014 and shall send copies to me on or before that date.**

**2. If the parties are unable to agree on the modalities of simultaneous exchange, then each party shall send 2 copies to me on or before that date for me to retain one and forward the other one to the other side.**

**3. The tentative hearing dates shall be 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> April 2014.**

**4. The above hearing dates are tentative only to allow flexibility in case it turns out that an oral hearing is not necessary but shall otherwise be considered firm.**

**5. The earlier timetable is amended accordingly.**

9. On 10<sup>th</sup> March 2014 (*which was the revised deadline for exchange of Witness Statements*) Mr. Kimani informed both the Arbitrator and Counsel for Symbion that the firm of Wamae & Allen would henceforth be representing Goodison in place of the firm of Hamilton Harrison & Mathew. On the same day at 13.19 hrs which would be about 2 hours after the email by Mr. Kimani, Mr. Gross sent an email to Mr. Kimani and the Arbitrator confirming convenience of the proposed hearing date and that his Client’s witness statements were ready for simultaneous exchange on that very day.

10. In an email dated 11<sup>th</sup> March 2014, the Arbitrator wrote to Mr. Gichuhi of Wamae & Allen asking him to confirm availability on the proposed hearing dates and whether his Client’s Witness Statements were ready. It would seem that there was no direct response to this letter. Instead, there is an exchange of email between the Arbitrator and Mr. Gichuhi on 19<sup>th</sup> March 2014. Mr. Gichuhi’s email which was a response to the Arbitrator’s earlier email advises that he and Mr. Gross had spoken about the matter and agreed to get the parties to mediate over the Dispute. Counsel therefore sought that the hearing date be vacated.

11. An email from Mr. Gross follows on the next day (the 20<sup>th</sup> March, 2014) in which he indicates his preparedness to indulge Mr. Gichuhi. In the same communication he informs the Arbitrator that he and Mr. Gichuhi would shortly be agreeing on a Mediator.

12. It is common ground that through an email of 20<sup>th</sup> March 2014, the Arbitrator agreed to stay the Arbitration proceedings to give the mediation a chance. As is now common knowledge to both sides the mediation failed. Each party blames the other for the failure but a

discussion on the circumstances and reasons for the failure is outside the scope of this decision.

13. Indication that the mediation process may have run aground came in an email of 14<sup>th</sup> July 2014 from Mr. Gross to the Arbitrator and which mail was copied to Mr. Gichuhi. In that letter Symbion informs both the Arbitrator and Goodison of its intention to resume the Arbitration process. Of significance, the Advocates for Symbion states that they will not be making any indulgence to Goodison in respect to the issue of Witness Statements. A day after, the Arbitrator asks Mr. Gichuhi to respond to two issues:

- (i) is eTThe Arbitrator's email of 8<sup>th</sup> July 2014
- (ii) to TotTo indicate how soon he would be ready for simultaneous exchange of witness statements.

On 16<sup>th</sup> July 2014 Mr. Gichuhi informs both the Arbitrator and Mr. Gross that his firm had ceased representing Goodison.

14. On that very day Ms. Zainab Jaffer (Jaffer) telephoned the Arbitrator. She is a Director of Goodison. In her affidavit in support of the application before Court, she makes comments of the contents of her conversation with the Arbitrator, at least from her perspective. Anyhow, the Arbitrator writes an email informing Mr. Gross that Ms. Jaffer had telephoned her.

15. On 11<sup>th</sup> December 2014, a meeting was convened by the Arbitrator and in attendance was Mr. Gross assisted by Mr. Njoroge Advocate for Symbion and Mr. Rafi Nourafchan assisted by Ms. Zainab Jaffer for Goodison. The meeting culminated in the issue of Directions No.5 on 19<sup>th</sup> December 2015. In those Directions the Arbitrator noted the proposal by Goodison that they be given upto 16<sup>th</sup> March 2015 to submit Witness Statements on the contention that some of the Witnesses were abroad and time was required to prepare their statements and that this was at a time heading to the festive season with the consequent Public Holidays. The Arbitrator also noted the objection by Symbion and directed that the Witness Statement be delivered to the Tribunal on or before 30<sup>th</sup> January 2015. A further direction that has attracted some controversy is Direction NO. 14 which reads as follows:-

**“By consent, the Tribunal shall impose sanctions on any party which defaults on the delivery of the witness statements including the barring of persons who have not given written statements from giving evidence during the oral hearing”.**

16. On 9<sup>th</sup> January 2015, Goodison raised certain issues in respect to Direction No. 9. Abridged, Goodison indicated that it had received those Directions on 19<sup>th</sup> December 2014 and would only have 3 weeks up to the deadline to identify Counsel, retain them, appraise them of the case, identify Witnesses, coordinate potential site visits of expert witnesses and prepare and submit witness statements. In that email Goodison revived their request for a 16<sup>th</sup> March deadline.

17. On 25<sup>th</sup> February 2015, the Arbitrator issues Directions No.11. The Arbitrator having noted that Goodison had not submitted the written statements within time given imposed sanctions in the following fashion:-

**“ The Tribunal attaches great importance to a Party's right to be heard and is not prepared to jeopardise these proceedings and the award, the above party agreement notwithstanding, and so it shall not bar the Respondent from giving oral evidence at the hearing but shall impose below the sanctions it considers appropriate in the circumstances:**

- (i) The Respondent is hereby declared time-barred from submitting written witness statement.**
- (ii) The Tribunal reserves the right to make adverse inferences from the Respondent's non-compliance [s.26.(g) (ii)].**
- (iii) The Respondent shall be responsible in any event for any costs which could have been saved at the hearing had the Respondent facilitated the early exchange of witness statements”.**

18. It has to be noted that, the Directions did not bar Goodison from giving oral evidence at the hearing. The hearing dates of 26<sup>th</sup> and 27<sup>th</sup> March 2015 were given under Direction No. 12 of 14<sup>th</sup> March 2015. Hearing proceeded on 26<sup>th</sup> March 2015. The Record of hearing shows that Goodison did not offer any evidence.

19. It is against this backdrop that the Court considers the Motion before it. The Courts determination focuses on the narrow issues raised by the Motion which are twofold:-

- (a) Did the Arbitral Tribunal deny Goodison reasonable opportunity to engage Counsel of its choice?
- (b) Was Goodison deprived of a fair hearing and reasonable opportunity to present its case?

20. If this Court were to find in favour of Goodison in either or both of the issues then this Court would be obliged to set aside the Award by virtue of the provisions of Section 35 (2)(a)(iii) of The Arbitration Act. The setting aside of an Arbitral Award under the provisions of Section 35 of The Act is one of the limited occasions when a Court can intervene in Arbitral proceedings governed by the Act. (see Section 10 of the Act).Section 35(2)(a)(iii) provide:-

**“An Arbitral Award may be set aside by the High Court only if:-**

(i) ,,,,,

(ii) ,,,,,

(iii) ***The party making the Application was not given proper notice of the appointment of an Arbitrator or of the Arbitral proceedings or was otherwise unable to present his case.***

21. When a party is deprived of a fair and reasonable opportunity to present his/her case (Section 19 of The Act), the party cannot be said to have been able to present his/her case. Presentation of a case means both the prosecution and defence of a case. This inability to present a case would have to extend to instances where a party is not granted reasonable opportunity to engage Counsel of choice. The right to engage Counsel presupposes that the party has adequate time not only to engage Counsel but to conference and prepare the Party's case.

22. I first deal with the issue of Counsel. If this Court were to take the appointment of the Arbitral Tribunal as the date for the commencement of the Arbitral proceedings, then the proceedings commenced on 11<sup>th</sup> March 2013. The first preliminary meeting was held on 12<sup>th</sup> April 2013 in which Mr. Kiragu Kimani Advocate represented Goodison. Mr. Kimani is an Advocate in the firm of Hamilton Harrison and Mathews. That firm acted on behalf of Goodison until 10<sup>th</sup> March 2014.

23. That firm was replaced by Wamae & Allen Advocates on 11<sup>th</sup> March 2014. Mr. Allen of this latter firm wrote to both the Arbitrator and Mr. Gross (*who represented the Symbion*) that he had been approached to take over the matter. A few days later on 19<sup>th</sup> March 2014, Counsel informs the Arbitrator that the parties had agreed to mediate over the 'matter' and sought that the prefixed hearing dates of 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> April 2014 be vacated.

24. As both sides were willing to give Arbitration a chance, the Arbitrator stayed the Arbitration for one (1) month with a provision for extension for 14 days by party Agreement. This was through Orders and Directions given on 16<sup>th</sup> March 2014.

25. The mediation took longer than the one month with none of the parties seeking extension. On 12<sup>th</sup> June, 2014, the Arbitrator writes to Counsel on both sides seeking to know the progress of the mediation, he does so as follows:-

**“Dear Mr. Gross and Mr. Gichuhi,**

**Good morning,**

**I trust that the Mediation is going on well. Please let me know if you are both contented with the progress.**

**I am happy to defer the Arbitral process longer provided that Mediation is actually taking place and both parties are happy with the progress.**

**Otherwise I propose to resume Arbitration with effect from 1<sup>st</sup> July 2014.**

**,,,,,**

**Best regards**

**Signed**

**PAUL NGOTHO**

26. Symbion was not happy with the progress, and says as much in its Counsel's email of 14<sup>th</sup> July 2014. It communicates its wish to resume the Arbitration process.

27. On 16<sup>th</sup> July 2014, Allen Gichuhi writes informing the Arbitrator and Mr. Gross that his firm had ceased acting for Goodison.

28. It is not in contest that on that very day Ms. Zainab Jaffer of Goodison called the Arbitrator. She alludes to this conversation in paragraph 22 of her affidavit in support of the motion. She depones that her telephone conversation involved, inter alia, seeking guidance from the Arbitrator as to the way forward. In an email making reference to that conversation the Arbitrator sets out what, from his vantage, was the content of the discussion. A relevant bit of the conversation is that Goodison would appoint a new advocate. Goodison does not refute that this was discussed.

29. Two things emerge from the events of July 2014. On 14<sup>th</sup> July 2014 there is the clearest of indications that Symbion was desirous of resuming of the Mediation progress. Two (2) days later, on 16<sup>th</sup> July 2014 there was a discussion in respect to Goodison appointing a new Advocate. Now that it was clear that the Arbitration would be resuming, Goodison had sufficient time to engage Counsel before 11<sup>th</sup> December 2014 when a 3<sup>rd</sup> Preliminary meeting was held in which issues of Witness statements and Site visit were discussed and directions issued in respect thereof. And it was not until 25<sup>th</sup> February 2015 when the Tribunal reserved some tentative hearing dates which included the two confirmed dates of 26<sup>th</sup> and 27<sup>th</sup> March 2015.

30. From this chronology of events, it is clear that Goodison had about 8 months from 14<sup>th</sup> July 2014 to 26<sup>th</sup> March 2015 to engage an Advocate and prepare its case. Even if the Court were to take the date of 19<sup>th</sup> December 2014 when Goodison says it received the Directions in respect to the last extension of submission of Witness Statements, Goodison would have had at least 4 months prior to that day to engage an Advocate of choice. This Court is unable to find any prove whatsoever that Goodison was not granted a fair and adequate opportunity to engage Counsel.

31. This Court now turns to the complaint in respect to deprivation of the right to fair hearing and right to a fair and reasonable opportunity to present its case.

32. It is accepted that at the very outset (see Directions NO.1 of 24<sup>th</sup> April 2013), parties agreed that hearing would be by oral evidence in which Witness Statements and Expert Reports would serve as evidence in-chief. To that extent and as deponed by Ms. Jaffer, the Witness Statements were of vital importance. However, as a result of events that followed, the insistence that Witness Statements would comprise the evidence in-chief was done away with.

33. The Arbitrator set deadlines for the filing of the Witness Statements. The first deadline was set out in Direction NO.4. Symbion was to submit its witness statements on or before 29<sup>th</sup> November 2013 and Goodison had a deadline of 13<sup>th</sup> December 2013. These deadlines were not met by either side. A Revision of the timelines followed. Directions No. 5 shows that parties agreed to exchange the Witness Statement simultaneously in the offices of Lawyers for Goodison on or before 31<sup>st</sup> January 2014 (*although erroneously indicated 31<sup>st</sup> January 2013 as that was a date past*).

34. As Goodison had difficulty submitting its Witness Statements by the new deadline, its Advocates Hamilton Harrison and Mathews wrote to the Advocates for Symbion on 29<sup>th</sup> January 2014 seeking an extension of time to the end of February.

35. What followed in respect to the deadline was the Arbitrator's Directions of 3<sup>rd</sup> March 2014 in which the parties were given an extension of up to 10<sup>th</sup> March 2014 to exchange the Statements and to send copies thereof to the Arbitrator.

36. It would seem that by or at least on 10<sup>th</sup> March, 2014, the Witness Statements of Symbion were ready and its Advocate was ready for the exchange contemplated by the Directions of 3<sup>rd</sup> March 2014. In this regard the email of AF Gross dated 14<sup>th</sup> July 2014 is of significance and is reproduced:-

**14<sup>th</sup> July, 2014**

**“By email”**

**Mr. Paul Ngotho**

**Arbitrator**

**Block 1, 7<sup>th</sup> Floor**

**Eden Square**

**Chiromo Road**

**Nairobi**

**E-mail: [ngothoprop@yahoo.com](mailto:ngothoprop@yahoo.com)**

**Dear Mr. Ngotho,**

**IN THE MATTER OF ARBITRATION BETWEEN SYMBION KENYA LIMITED AND GOODISON SIXTY ONE SCHOOL LIMITED**

**I refer to the above matter and your email of 8<sup>th</sup> July, 2014.**

**We share your concerns that the mediation process is taking long with little progress. The prospect of having this matter resolved amicably through mediation is slowly fading and any extension of mediation beyond July 2014 would be a venture of futility to say the least owing to lack of goodwill and bona fide on the part of the Respondent.**

**Consequently, you had ordered in your revised Order for Directions dated 3<sup>rd</sup> March, 2014 that the parties shall exchange the Witness Statements on or before 10<sup>th</sup> March, 2014 with copies to you on or before the said date.**

**We confirmed to you on 10<sup>th</sup> March, 2014 that our witness statements were ready for simultaneous exchange but coincidentally, Mr. Kiragu Kimani notified us on the said dated that Mr. Allen Gichuhi was now on record for the Respondent.**

**Prior to the matter being referred to Mediation by consent of the parties, you had notified Mr. Gichuhi on 11<sup>th</sup> march, 2014 that the simultaneous exchange of Witness Statements was scheduled for 10<sup>th</sup> March, 2014 but no response was received from Mr. Gichuhi in that regard.**

**We are not going to indulge Mr. Gichuhi in regard to the issue of Witness Statements and/or any further application for extension. You had categorically stated in your Order for Directions of 3<sup>rd</sup> March, 2014 that you do not expect another Application for extension of time for the service of Witness Statements.**

**Pursuant to your Order for Directions No.6 and owing to the fact that the Mediation process has no prospect of success for reasons stated above, the Claimant wish to resume the arbitration process and we would be happy to receive your further directions regarding the hearing dates as soon as possible.**

**Yours faithfully,**

**ANTHONY GROSS**

**CC. Allen Gichuhi (my emphasis)**

37. Goodison has not challenged the truthfulness of this assertion by Symbion and this Court accepts that Symbion was ready and willing to abide by the Directions on the submission of the Witness Statements by the deadline of 10<sup>th</sup> March 2014.

38. Up to there both Goodison and Symbion had benefitted from the two extensions. The first from 29<sup>th</sup> November 2013 to 31<sup>st</sup> January 2013 and then from 31<sup>st</sup> January 2013 to 10<sup>th</sup> March 2014.

39. However, Goodison asserts that the firm of Hamilton Harrison & Mathews consented to the deadline for filing Witness Statements without its instructions and this was one of the reasons why it withdrew instructions from the said firm.

40. If there is candour in this assertion then it would be expected that at the point of instructing its new Advocates Wamae & Allen, the issue of the deadline for filing the Witness Statements would feature in its instruction and be taken up by the new Advocate. But what is the stance of the new Advocates in this regard?

41. The first email by the new firm is dated 11<sup>th</sup> March 2014 in which Mr. Gichuhi informs the Arbitrator that they are taking over the matter. The next is the email of 19<sup>th</sup> March 2014. While informing the Arbitrator of the Parties desire to attempt Mediation, Counsel Allen Gichuhi makes no mention of the Witness Statements and deadlines imposed in that respect.

42. Then there is a lull for sometime because of the Mediation. On 14<sup>th</sup> July, 2014, Counsel for Symbion makes it clear that they will not indulge Goodison in respect to the issue of Witness Statements and/or application for extension. On 15<sup>th</sup> July, 2014, the Arbitrator raises the following specific issue with Mr. Gichuhi in respect to the Witness Statements,

***“please let me have.....***

***(i).....***

***(ii) an indication of how soon you would be ready for the simultaneous exchange of Witness Statements”***

Perhaps because he ceases acting the next day (16<sup>th</sup> July 2014) Mr. Gichuhi says nothing in reply to that vexing issue.

43. It would be expected that Goodison who now had its own conduct of the proceedings would take an early opportunity to raise the issue of the Witness Statements as it was clear that Symbion was insisting on the resumption of the Arbitration. But Goodison does not!

44. Instead, on 11<sup>th</sup> August 2014, the Arbitrator raises the issue. In regard to the Witness Statements he states,

***“As for separating the Claim from the Counter-claim, again the Respondent has not responded. I doubt that the Respondent would support the idea in view of the comments made by the Claimant.***

***I am afraid it is difficult to move this matter forward quickly when the Respondent is so quiet. The Respondent has previously stalled the matter twice when we came to the point of exchanging the documents.***

***The Claimant has always insisted on the simultaneous exchange of witness statements but that might not work here. Even peremptory orders are unlikely to be helpful her. I invite a part which has a contrary view to draft such orders for my consideration.***

***Would the Claimant consider submitting its witness statements first? That would pave way for an oral hearing with or without the Respondent’s witness statements, which are, of course, very welcome.***

***If the Claimant would not submit its witness statements first, then I request the Claimant to suggest ways of moving this matter forward. Then the Respondent will comment”.***

45. In response Goodison does not react to the issue of Witness Statements but instead insists that the Mediations are going on. This is in its email of 12<sup>th</sup> August 2014. Two days later, Counsel for Symbion responds emphasizing that the Mediation proceedings had aborted and were, as far as his Client was concerned, history.

46. Matters are quiet, in respect to the Witness Statements, until 11<sup>th</sup> December 2014 when, in the 3<sup>rd</sup> Preliminary meeting, Goodison sought up to 16<sup>th</sup> March 2015 for submitting Witness Statements. The Tribunal did not accede to the request for such length of time but instead granted Goodison up to 30<sup>th</sup> January 2015 to submit its Witness Statements.

47. Was this oppressive and unreasonable as submitted by Goodison? Even if it is accepted that Goodison did not give its Advocates instructions to accede to the first deadlines, Goodison were well aware by 10<sup>th</sup> March 2014, when Hamilton Harrison & Mathews ceased to be their Advocates, that deadlines for filing of Witness Statements had come and gone. By the time of imposition of the new deadline of 30<sup>th</sup> January 2015, Goodison had 8 months to prepare those Statements. Even if the period when the dispute was under mediation is removed for reckoning, Goodison had from 14<sup>th</sup> July 2014 (when it was clear that the Mediation process had collapsed and Symbion would be insisting on Arbitration) to 30<sup>th</sup> January 2015 to prepare those Statements. That is a period of about 5½ months.

48. The history of the matter shows that Goodison had more than sufficient time to comply with the directions for submission of Witness Statements. And deadlines given were generously extended. The conduct of the Arbitrator was neither oppressive nor unreasonable. Instead of condemnation, the Arbitrator needs to be commended for indulging the parties herein so as to give each side more than adequate opportunity of submitting Witness Statements.

49. The Arbitrator’s neutrality did not stop there. Even though he had the choice of shutting out the evidence of Goodison because of non-compliance, he made the following indulgent Directions on 25<sup>th</sup> February 2015:-

**“The Tribunal attaches great importance to a Party’s right to be heard and is not prepared to jeopardise these proceedings and the award, the above party agreement notwithstanding, and so it shall not bar the Respondent from giving oral evidence at the hearing but shall impose below the sanctions it considers appropriate in the circumstances:**

**“(i) The Respondent is hereby declared time-barred from submitting written witness statements.**

**(ii) The Tribunal reserves the right to make adverse inferences from the Respondent’s non-compliance [s.26.(g) (ii)].**

**(iv) The Respondent shall be responsible in any event for any costs which could have been saved at the hearing had the Respondent facilitated the early exchange of witness statements”.**

50. Those Directions in my view ensured that, notwithstanding the intransigent stance of Goodison of failing to file the Witness Statements on time, both sides would have a fair and reasonable opportunity of presenting their respective cases. Goodison still retained its right to call Witnesses without reducing their Statements into writing and serving them in advance on Symbion. By returning the Witness Statements (*unopened*) back to Symbion, Goodison would not have the advantage of knowing or accessing the evidence of Symbion in advance (which Goodison had deprived Symbion by refusing or failing to file its Witness Statements within the stipulated time). In this way the field was even.

51. Counsel for Goodison has submitted that Symbion provided its Witness Statements to Goodison on the day of the hearing and that Goodison had no opportunity to see that Statement in advance and prepare for cross-examination. I make two comments in this respect. First, Goodison has itself to blame because it had breached the rules that entitled it to an advance access of the Witness Statements.

52. Secondly, the record of the proceedings shows that the evidence in-chief of the Witnesses of Symbion (Mr. Michael Lord and Mr. Alfred Kamicha) proceeded on the basis of oral evidence and the Written Statements. Because parties had failed to exchange Witness Statements, each side would be confronted with the evidence of the other for the first time during the hearing. That is the reality that the parties had to deal with as Goodison had contravened the Order for filing Witness Statements. The record shows that before commencing with an extensive cross-examination of Mr. Lord, the representatives of Goodison did not ask for time to read his Witness Statement. In respect to the second Witness, Alfred Kimicha, Mr Nourafchan representing Goodison states as follows before proceeding with cross-examination:-

**“As she is reading the Statement I will commence”**

She, here refers to his colleague, Ms. Jaffer.

53. Unlike what Counsel for Goodison submits, the record of the proceedings has no evidence that the representatives of Goodison were disadvantaged or handicapped in cross-examining the witness.

54. On the issue that the Applicant did not call any witness, the record of the the hearing reveals that the Arbitrator reiterated his early directions in respect to witnesses,

**“Mr. Ngotho: You could still bring witness even without witness statement.**

**Mr. Nourafchan: We were not aware of that.**

**Mr. Ngotho: No I made it very clear in my Directions, very clear in fact.**

**Mr. Nourafchan: Okey, well we don't have any witnesses unfortunately right now"**

Indeed, the Directions No.11 were as explicit as they could be, Goodison was entitled to call Witnesses even without submitting Witness Statements. How can Goodison now turn and blame the Arbitrator for barring them from calling Witnesses? In addition, there is no evidence that Goodison sought an adjournment to call Witnesses who were not present at the hearing.

55. In paragraph 30(c) of her Affidavit in support of the current Motion and part 4 of its Written submissions to this Court, Goodison sets out what it perceives as other instances of curtailment of its right to a fair hearing. It turns to examine them.

56. It is submitted that the Arbitrator pressurized the Directions of the Applicant to make on-the-spot Decisions when they had no idea of the consequences of such decisions and that he hurriedly brought the proceedings to an end without properly explaining the consequences of not giving oral evidence or calling witnesses to them. What is to be made of this complaint? The Directors must have been well aware of the gravity of the matter they were dealing with yet they elected not to appoint Counsel to represent them at the hearing. In the nature of the hearing, parties participating are expected to make certain decisions and to know the consequences of the decisions they make. If a party felt inhibited because of the technical nature of the dispute then it ought to have sought representation by Counsel. Goodison had sufficient opportunity to appoint Counsel and cannot shift the blame if it found the hearing to be heavy!

57. As to issues of bias and partiality allegedly displayed by the Arbitrator in the course of the hearing, this Court has already found that those are matters that were or ought to have been the subject of the Application that was dismissed by Hon. Ochieng J. on 23<sup>rd</sup> March 2016. It is not helpful for this Court to give them any further consideration.

58. This Court has been able to resolve this matter without reference to the many authorities cited to it by Counsel for both parties. This is not out of disrespect for the effort of Counsel but because the Court perceived the application as raising rather straightforward questions which could be answered without reference to those authorities.

59. The Notice of Motion dated 25<sup>th</sup> May 2016 is hereby dismissed with costs.

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> Day of April, 2018.**

**F. TUIYOTT**

**JUDGE**

**PRESENT:**

S. Amin for Applicant

Njuguna for Respondent

Nixon – Court Assistant