



Optima Sports Management International (UK) Limited & another v Kenya Broadcasting Corporation (Commercial Case 686 & 687 of 2009 (Consolidated)) [2023] KEHC 18547 (KLR) (Commercial and Tax) (16 June 2023) (Ruling)

Neutral citation: [2023] KEHC 18547 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 686 & 687 OF 2009 (CONSOLIDATED)**

DAS MAJANJA, J

JUNE 16, 2023

BETWEEN

**OPTIMA SPORTS MANAGEMENT INTERNATIONAL (UK)
LIMITED 1ST PLAINTIFF**

**OPTIMA SPORTS MANAGEMENT INTERNATIONAL (NIGERIA)
LIMITED 2ND PLAINTIFF**

AND

KENYA BROADCASTING CORPORATION DEFENDANT

RULING

1. By the ruling dated March 30, 2023, the court granted the Defendant a stay of execution of the judgment and decree herein on terms that in addition to the sum of Kshs 5,000,000.00 deposited in court, it would provide a bank guarantee in favour of the Plaintiff for the sum of Kshs 30,000,000.00 to be furnished within 45 days of the order.
2. The Defendant has now filed the Notice of Motion dated 16th May 2023 seeking review or variation of the order made on March 30, 2023 on condition that it should only provide the amount of Kshs 5,000,000.00 already deposited in court as security or in the alternative, it be ordered to provide an additional security of Kshs 5,000,000.00 only.
3. The application is supported by the affidavit of the Defendant's Acting Managing Director, Samuel Maina, sworn on May 16, 2023. It is opposed by the Plaintiff through Grounds of Opposition dated May 30, 2023. The counsel on record made oral arguments in support of their respective positions.



4. The principal reason advanced by the Defendant in support of its application is that it is in financial distress as it can barely able to meet its operational needs hence it is unable to come up with a bank guarantee as ordered. It has produced its bank statements of its Salary Account at Kenya Commercial Bank for the period May 1, 2023 to May 15, 2023 which shows an amount of Kshs 826,687.54 in the account. It has also produced a newspaper article from the Nation newspaper for April 18, 2023 titled, “Salary delays: Tighten your belts, State tells civil servants” which gives an account by the Cabinet Secretary, Treasury and Economic Planning, warning of the dire financial situation in the Government. The Defendant has also attached an Internal memo dated April 5, 2023 from its Managing Director to Staff informing staff of delay in payment of the March 2023 salaries.
5. In its opposition, the Plaintiff states that the application is incompetent and devoid of merit and an abuse of the court process. It contends that the orders sought are unsustainable and are therefore unavailable to the Defendant and that they are contrary to public policy.
6. I have considered the parties’ arguments which are along the lines set out above and I take the following view of the matter. I have no doubt that the court had jurisdiction to review, vary, set aside or discharge its orders should the circumstances warrant such course. This is the import of the provisions for review under section 80 of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) and Order 45 of the *Civil Procedure Rules*. As I understand, the Defendant case is predicated on hardship and inability to comply with the orders of stay issued by the court. This would fall under the rubric of “sufficient cause” which would entitle the court to review its own orders.
7. The Defendant has not controverted the averments of hardship set out by the Plaintiff. On the other hand, the general principle is that a successful party must not be deprived of the fruits of its judgement and where the court issues an order of stay it should avoid a situation where the decree-holder is inconvenienced if the appeal is unsuccessful. This is why the court is empowered to grant an order of stay on terms as to security.
8. Turning back to the matter at hand, the Plaintiffs are already secured by a cash deposit of Kshs 5,000,000.00. The Plaintiffs were awarded at least EUR 120,000.00 on February 6, 2020. This amount continues to accrue interest. Noting that the Defendant is a State Corporation and the fact that it is facing financial difficulties. I would reduce the Bank Guarantee to Kshs 10,000,000.00 or a cash deposit of the same amount to be provided within 60 days from today.
9. In conclusion I allow the Defendant’s application dated May 16, 2023 and order as follows:
 - a. The order made on March 30, 2023 is varied to the extent that the Defendant is ordered to provide a bank guarantee in favour of the Plaintiff for the sum of Kshs 10,000,000.00 from a reputable bank to be agreed by the respective advocates within 60 days from the date hereof or the said amount be deposited in a joint account of the advocates or in court as may be agreed by the parties.
 - b. The Defendant shall pay the Plaintiffs costs assessed at Kshs 40,000.00.

DATED AND DELIVERED AT NAIROBI THIS 16TH DAY OF JUNE 2023.

D. S. MAJANJA

JUDGE

Mr Aloo instructed by Simba and Simba Advocates for the Plaintiff

Mr Awino instructed by COOTOW and Associates Advocates for the Defendant.

