



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT No 686 Of 2009

B E T W E E N:

OPTIMA SPORTS MANAGEMENT(UK) LIMITED.....PLAINTIFF

VERSUS

KENYA BROADCASTING CORPORATION.....DEFENDANT

Consolidated with CIVIL SUIT 687 of 2009

OPTIMA SPORTS MANAGEMENT (NIGERIA) LIMITED...PLAINTIFF

VERSUS

KENYA BROADCASTING CORPORATION.....DEFENDANT

J U D G M E N T

1. The Plaintiff had filed two suits against the same Defendant seeking similar relief arising from a licence agreement between the Parties. During the course of hearing this matter the two files were consolidated with **High Court Civil Suit No 686 of 2009** being the Lead File.
2. The Plaintiff is described in both suits as “a Limited Liability Company duly incorporated in the Republic of Nigeria, pursuant to and under the provisions of the relevant laws of Nigeria, having its registered offices at 35B, Ladipo Bateye Street, GRA Ikeja Lagos” and having its sales office at 140/142 Kingsland High Street London E8 within the United Kingdom, which appears to be the same as the address for the Management Company. The Defendant is a State Corporation established pursuant to the ***Kenya Broadcasting Corporation Act***
3. The Plaintiff describes the cause of action as arising from a Licence Agreement(s) made in 2008 between the Plaintiff(s) and the Defendant. The facts pleaded are that the Plaintiff(s) had acquired exclusive rights from the Licensor in respect of certain football matches played as per of the Primera Division (“La Liga”) and Copa del Ray during the 2008/2009 Football season (**Civil Suit No 686 of 2009**). Those rights related to the broadcast rights in respect of the football matches to which it relates. In relation to Civil **Suit No 687 of 2009** the Licence Agreement and rights acquired related to matches played in the English Premier League during the 2008/2009 Football Season in England. The Plaintiff avers that it entered into two sub-licence agreements with the Defendant. The Agreements are said to have been entered into at the request of the Defendant. It is the Plaintiff’s case that the Parties agreed that the Plaintiff would licence the Defendant to broadcast the agreed matches. In order to do so it would sub-licence the Defendant as well as provide the necessary access necessary to air the matches.
4. At paragraph 5 of the Plaintiff’s Complaint the Plaintiff avers that “Pursuant to the Agreement Aforementioned, the Defendant was required to make a down payment (deposit) of Euros 30,000.00 on or before 7th September 2008 and a final payment of Euros 20,000.00 on or before 19th December 2009 in consideration of the television broadcast rights sub-licensed by the Plaintiff to the Defendant.
5. The Plaintiff’s Complaint was filed on 7th December 2009 (**HCC 686/2009**). The Plaintiff’s Complaint was verified by the Affidavit of Andrew Howes who describes himself as a Director of the Plaintiff. The Defendant filed a Written Statement of Defence on 10th November 2009. In its Defence the Defendant denied the Plaintiff’s Complaint and each of its allegations. The Defendant denies that the Plaintiff had acquired any rights as alleged from the Principal Licensor. The Defendant also expressly denied that it entered into any sub-licence agreement with the Plaintiff as alleged or otherwise. In effect the Defendant was saying that each Plaintiff was a stranger to it.
6. In relation to the Sub-Licence Agreement, the Plaintiff averred that the Defendant would make an initial payment and then a final payment on or before 19th December 2009. That is denied. In addition the Plaintiff alleges that the Sub-Licence Agreement contains other terms inter

alia:

- (a) The Defendant would be liable to the Plaintiff for interest on any sums outstanding (described as "late payment"). Interest would be payable on demand;
- (b) The Rate of interest would be the commercial rate that the Plaintiff would be liable to pay for an overdraft to its own bankers.
- (c) The Defendant would make payment to the Plaintiff of the gross sums due, that is without deduction or set-off or counterclaim and without any deduction on account of tax
- (d) The broadcast rights that the Defendant acquired was for the territory of Kenya.

The Defendant denies all those terms. Further the Plaintiff avers that it discharged its own contractual obligations and the Defendant is in default by failing and/or refusing and/or ignoring demands to pay pursuant to the Sub-Licence Agreement. The same applies to the interest demanded. The Plaintiff avers that the cause of action arose in Nairobi and therefore the Court has jurisdiction. The Defendant takes issues with that statement.

7. The Defendant denies there was any agreement. The Defendant denies that the Plaintiff is entitled to any damages and the Defendant puts the Plaintiff to strict proof. The Defendant denies that it is liable, and the Defendant denies that it has been served with a Notice of Intention to Sue pursuant to **Section 46 of the Broadcasting Act**, notwithstanding the Plaintiff's documents containing a copy of a demand. The Defendant avers that the Plaintiff's claim is bad in law and an abuse of process.

8. The Plaintiff filed a Reply to Defence (**HCC 687/2009**) on 16th November 2009. Surprisingly it was not served until 1st December 2009. In it the Plaintiff joins issue and in rebuttal states that the Defence is a sham, baseless an abuse of the process of the Court ...". The Plaintiff expressed the intention to seek an order striking out the Defence. The two suits were consolidated by an order of Hon Justice Havelock made pursuant to the Plaintiff's Application filed on 19th April 2013. Although the two suits were consolidated it is important to bear in mind that the Plaintiff in **HCC 686 of 2009** is Optima Sports Management International (UK) whereas in **HCC 687 of 2009** the Plaintiff is Optima Sports Management International (Nigeria) Limited. In other words two separate entities who are managed by the same driving force.

9. On 24th April 2013 the Defendant filed its list of issues. The issues listed for determination are:

- 1. Whether the Plaintiff is a limited liability company duly incorporated in the United Kingdom, pursuant to and under the provisions of the Companies Act of the United Kingdom*
- 2. Whether the Plaintiff acquired exclusively from the Licensor television broadcast rights in respect of certain football matches to be played in the Primera Division ('La Liga') and the Copa fry Try during 2008/2009 Spanish Football season*
- 3. Whether the Plaintiff and Defendant entered into a sub-licence agreement*
- 4. Whether the Defendant requested from the Plaintiff any broadcast rights*
- 5. Whether the Plaintiff through the sub-licence agreement granted and/or availed to the Defendant television broadcast rights in respect of right in respect of the football matches to be played in Primera Division ('La Liga') and the Cop dey Rey during the 2008/2009 Spanish Football season*
- 6. Whether the Defendant was to make any down payment and a further final payment or any payment at all to the Plaintiff within an ascertained period in consideration of the television broadcaste rights sub-licensed by the Plaintiff to the Defendant*
- 7. Whethr the Plaintiff is entitled to any interest from late payment.*
- 8. Whether the Defendat has breached a sub-licence agreement between it and the Plaintiff or any agreement at all*
- 9. Whether the Plaintiff has suffered any loss and/or damages, and if so how much?*
- 10. Whether the Defendant should reimburse the Plaintiff for interest charged upon it by its bankers*
- 11. Whether the Plaintiff has made demand and served notice of intention to sue upon the Defendant*
- 12. Whether the honourable court has jurisdiction to adjudicate over the matter*
- 13. Whether the Plaintiff is entitled to the prayers sought in the plaint*
- 14. Whether the relevant documents have been exchanged between the prties to the suit*
- 15. Who should pay the costs of the suit".*

10. The Defendant raised the issue of jurisdiction at point 12 of its list of issues.

11. The Plaintiff filed its list of issues on 20th March 2015. The issues listed are:

1. *Whether the Plaintiffs exist as averred in Paragraphs 1 of the Plaintiff in HCCC No 686 of 2009 and HCCC No 687 of 2009 respectively*
2. *Whether the Plaintiffs acquired the exclusive Broadcast License Rights for the Free to Air (FTA) by the Football Association of Premier League Limited (commonly known as 'the English Premier League') for the Audio-Visual Exploitation of the Live FTA Matches in the African territories that include Kenya for the period 2008-2009.*
3. *Whether Plaintiffs acquired the exclusive Broadcast License Rights for the Free to Air (FTA) matches played in the Spanish 'La liga' Primera Division and the Ropa del Ray for the Audio-Visual Exploitation of the Live FTA Matches in the region in the African territories that include Kenya for the period 2008-2009.*
4. *Whether the Defendant transmitted and/or broadcasted the Live FTA Football Matches of the Football Association of Premier League Limited (commonly known as 'the English Premier League') in the period 2008-2009 within Kenya.*
5. *Whether the Defendant transmitted and/or broadcasted Live FTA Football Matches of the Spanish La Liga and the Copa del Ray in the period 2008-2009 within Kenya.*
6. *If the answer to 4 and 5 is in the affirmative, whether the Defendant had lawfully acquired the rights to broadcast the Live FTA Matches mentioned in 4 and 5 within the territory of Kenya*
7. *If the answer to 4 and 5 is in the affirmative, whether the Defendant expressly requested and negotiated with the Plaintiff for the sub-Licensee Charges for the live transmission of the matches.*
8. *Whether the Plaintiffs and the Defendant entered into a Sub-Licence Agreement for the exploitation of the Live FTA Matches of the English Premier League, Spanish La Liga and Copa del Ray Matches for the period 2008-2009.*
9. *If the answer to 8 is in the affirmative, whether the Plaintiffs and the Defendant agreed on the total sum of Euro 120,000.00 and whether the sum was payable in two equal instalments.*
10. *If the answer to 9 is in the affirmative, whether the Defendant made payments on the agreed and/or due dates.*
11. *Whether one Monica Waceke Ndungu an employee and/or Officer of the Defendant made express assurances to the one Kunle Falodun an Officer of the Plaintiffs that the payments due would be forthcoming.*
12. *Whether prior to the Plaintiffs commencing these proceedings, the Defendant has ever denied being indebted to the Plaintiffs or the sums owed and now claimed*
13. *Whether the Plaintiffs issued a Demand and Notice of Intention to commence these proceedings against the Defendant and whether the Defendant was served with the same.*
14. *If the answer to No 13 above is in the affirmative, whether the Defendant ever wrote to the Plaintiffs or their Advocate denying the contents of the Demand served upon the Defendant.*
15. *Whether the Plaintiff is entitled to recover the sum of Euro 70,000.00 and Euro 50,000.00 claimed respectively summing to Euro 120,000.00 or its equivalent in Kenya Shillings against the Defendant.*
16. *If the answer to No 15 is in the affirmative, whether the Defendant is liable to the Plaintiff for the interest on the sum claimed.*
17. *Whether the Honourable Court has the jurisdiction to hear and determine this dispute.*
18. *If answer to Issues No 14-15 is in the affirmative, whether the Plaintiff is entitled to Costs of both suits being HCCC No 686 of 2009 and HCCC No 687 of 2009 respectively.*

12. On 23rd April 2015, the Plaintiff filed an Amended Plaintiff expressing the special damages in Euros only. The Defendant did not object to the amendment.

13. In its Amended Plaintiff for HCC **686 of 2009** the Plaintiff seeks the following Prayers:

- a. The sum of Euro 50,000.00
- b. Interest at a rate of 14% on the sum of Euros 30,000.00 unpaid since 7th September 2008

c. Interest at a rate of 14% on the sum of Euro 20,000.00 from 19thDecember 2008

d. Alternatively interest at the Court rate on the sum of Euro 50,000.00

e. Costs and interest

14. In its Amended Complaint in relation to ***HCC 687 of 2009*** the Plaintiff seeks the following Prayers:

a. The sum of Euro 70,000.00

b. Interest at a rate of 14% on the sum of Euros 50,000.00 unpaid since 7th September 2008

c. Interest at a rate of 14% on the sum of Euro 20,000.00 from 19thDecember 2008

d. Alternatively, interest at the Court rate on the sum of Euro 50,000.00

e. Costs and interest

15. The Court heard oral evidence from the Witnesses tendered by the Parties. The Parties also filed their Lists and Schedules of Documents containing voluminous documents. The process of filing new evidence was ongoing in respect of both sides.

16. In the case of the Defendant, attached to the Statement of Defence was the Witness Statement of Monica Waceke Ndung'u the Defendant's Television Programmes Manager. That was repeatedly affirmed as the witness the Defendant would call. She never appeared before the Court. Eventually the Defendant made an application to call an alternative witness, in the form of the current Programmes Manager. Although, the witness had been an employee of the Defendant previously, she told the Court she could find no documents relating to the issues in dispute and further that she did not have any handover nor any conversation with her predecessor about this case. She did she was "briefed" by her superiors as to the contents of her evidence.

17. The Parties have filed voluminous Written Submissions which the Court has considered and is grateful for. They will not be set out her verbatim in the interests of brevity. The Plaintiff has distilled its voluminous list of issues into the following:

(a) Whether on a balance of probabilities, the Plaintiffs entered into a sub-licensing agreement for broadcasting rights with the Defendant

(b) Whether on a balance of probabilities, the Defendant broadcasted the matcher under the sub-licensing agreement

(c) Whether the Plaintiff is entitled to the reliefs sought against the Defendant.

18. The Defendant's Submissions state that the issues the Defendant "is seeking to have determined" are:

i. Whether the Parties to this alleged sub-licence agreement are the parties sued herein and if they are well within their rights to sue the Defendants?

ii. Whether there was a pre-existing and enforceable sub-licence agreement between the Plaintiffs and the Defendants?

iii. Whether the conduct of the Defendants genuinely frustrated the Agreement

iv. Whether the Defendants owe the Plaintiffs any monies and interest thereof?

19. Notwithstanding the reams of documents and the hours of Court time taken in the hearing of this case, the issues are relatively straightforward. In its written submissions the Plaintiffs say the position taken by the Defendant "makes it imperative for this court to first determine the issue of the existence or non-existence of the contractual relations between the parties". However, the Defendant has taken a different approach, at first the Defendant raised the issue of jurisdiction. The Defendant then submitted to the jurisdiction of this Court by complying with the Civil Procedure set out in the CPR 2010 as well as the Case Management Practice Direction for the Commercial Division. The Defendant did not ask the Court to determine the issue of jurisdiction at any time between 2009 and 2016, however when required to present a positive case, it once again raised the issue of jurisdiction. Therefore this Court resolves that the issues for determination are:

1. Does this Court have jurisdiction to hear and determine this dispute?

2. What is the Applicable Law

3. What are the rights and obligations of each Party to the Other?

4. Is interest payable

5. If so at what rate and for such periods
6. Who should pay costs
7. What is the standard of proof in civil disputes
8. What weight should the Court give to the evidence adduced by each of the Parties.

20. The dispute relates – at its heart – to the broadcast of football matches in the English Premiere League and the Spanish equivalent referred to as La Liga. This Court takes judicial notice of the fact that football is an extremely popular sport in Kenya. Football matches played locally and abroad have been broadcast and enjoyed popular interest since time immemorial. Virtually every Kenyan, has heard of Manchester United, Arsenal, Barcelona and Real Madrid. In other words the teams that are part of those league tables.

21. On the issue of jurisdiction. The Plaintiff relates to a contract entered into by a Kenyan Company. Although the negotiations were carried out largely by email, the Plaintiff's case is that the contract was concluded in Kenya and signed in Kenya. The Defendant is a Kenyan State Corporation, therefore the dispute is properly before the Kenyan Court. Notwithstanding that the Defendant argues that there was never any contract between the Plaintiffs and the Defendant, the Defendant does rely on the sample contract produced by the Plaintiff in evidence. That Contract provides for **the applicable law** to the Contract to be English law. The Defendant seeks to rely on the same contract to say that a Kenyan Court cannot have jurisdiction. In fact the Law of Contract Act provides at **Section 2 that:**

2. English law of contract to apply in Kenya

(1) Save as may be provided by any written law for the time being in force, the common law of England relating to contract, as modified by the doctrines of equity, by the Acts of Parliament of the United Kingdom applicable by virtue of subsection (2) of this section and by the Acts of Parliament of the United Kingdom specified in the Schedule to this Act, to the extent and subject to the modifications mentioned in the said Schedule, shall extend and apply to Kenya:

Provided that no contract in writing shall be void or unenforceable by reason only that it is not under seal.

(2) After the commencement, and subject to [section 4](#), of this Act, the provisions of section 74 of the Kenya (Constitution) Order in Council, 1958, shall have effect, in relation to paragraph (2) of Article 4 of the Kenya Colony Order in Council, 1921, as if the Contract Act, 1872, of India had never been applied to Kenya.

[Vol. V, (1948), Act No. 9 of 1872, [L.N. 87/1964](#), Sch.]

In the circumstances, it is without doubt that this Court is eminently suited to hear this dispute and has jurisdiction to do so.

22. The Two Plaintiffs are sister companies. The Witness for the Plaintiff, a director of both companies, states that he is authorised to appear as a witness. That was challenged by Counsel for the Defendant. Those Companies are incorporated in England and Nigeria. Counsel did not adduce any evidence to show that Kenyan Company Law and in particular the requirement for a Board Meeting to authorize a Director to act applies to those countries. In fact, in relation to English Company law, the sanction is different, a Director who acts in excess of authority opens himself up to the possibility of personal liability. Against that analysis the Defendant's objection can hold no weight whatsoever. MrKunleFuladon was a competent witness for the Plaintiff.

23. The Defendant is a Corporation with perpetual succession and the right to sue and be sued in its own name. Therefore the Defendant is a proper party. The Defendant has not produced any Board Minutes stating that it is authorised to defend the suit, but it is doing so. The Defendant has a Legal Department and the Company Secretary who are said to be responsible for those matters. On the issue of the Defendant's capacity to enter into contractual relations Section 8 of the Kenya Broadcasting Corporation Act provides: **Section 8. (1) The Corporation shall -**

(a) provide independent and impartial broadcasting services of information, education and entertainment, in English and Kiswahili and in such other languages as the Corporation may decide;.....

(b) provide, if the Minister so requires, an external broadcasting service for reception in countries outside Kenya and may for that purpose, subject to the acquisition of any requisite licence, concessions, rights or privileges, construct or acquire and establish, install, equip and use radio-communication stations in countries or places outside Kenya or in space;.....

(h) provide facilities for commercial advertising and for the production of commercial programmes at such fee or levy as the Corporation may determine;.....

(2) (b) to provide to and receive from other persons material to be broadcast;

(c) to organize, provide and subsidize public entertainment for broadcast or for any connected purpose;

(d) to collect news and information in or from any part of the world and in any manner that may be thought fit and to establish and subscribe to news agencies;

24. The Plaintiffs claim that they are the persons entitled to the benefit of certain broadcast rights associated with the worldwide broadcast of

football matches comprising the EPL and La Liga. The two Plaintiffs assert that they were successful bidders for the rights of broadcast for the two leagues. The Court heard from the Plaintiff's witness that Optima UK held the rights for broadcast within sub-saharan Africa and Optima Nigeria for the Nigerian market. That evidence was not challenged by the Defendant except for a bare denial. **Section 116 Evidence Act** provides "*When the question is whether any person is owner of anything of which he is shown to be in possession, the burden of proving that he is not the owner is on the person who affirms that he is not the owner.*". The Court was also shown documentary proof that the Plaintiffs held those rights. The Plaintiff's witness also told the Court that the Plaintiffs were brokers and not broadcasters therefore they acquired the rights in question for the sole – and very lucrative commercial purpose of sub-licencing the rights to broadcast those matches in other words a right to exploit the intellectual property belonging to another. That meant they must be sold on to broadcasters to be broadcast. The Defendant disputes that.

25. The next question the Court must ask is whether the Defendant in anyway used and/or broadcast and/or exploited the intellectual property owned by the Plaintiffs, including but not limited to the right to broadcast and/or advertise etc. The Plaintiffs' case is that the Defendant did use its intellectual property. It was used to advertise, it was used to obtain advertising revenue including, it seems, from sports Pesa. The Defendant's denial is a bare denial. The Defendant could have called potentially three witnesses who could have given first hand evidence of the facts in question. They would be the Managing Director, The Programming Director and the Advertising Director. It did not call any of those persons. Instead it called a person who was the newly appointed programming director/manager, Rachel Irene Nakitare. Notwithstanding being a person who was said to be professional and competent enough to have won an award and/or a scholarship, she told the Court she had no direct dealings with the facts and matters in question. She had no knowledge of the documents nor what transpired. She did not look for any programme logs nor back up records because she assumed they would have been deleted. She did not speak to nor have a formal handover with her predecessor. That is an unfortunate state of affairs in particular since the Defendant led the Plaintiff and the Court to believe for a period of 7 years that it would be calling the Programme Manager involved in the negotiation and broadcast of the football matches in question, namely Monica Weceke Ndungu. Therefore on the question of whether after advertising the broadcast of matches, the Defendant decided not to air those matches must be within the knowledge of the Defendant. **Section 112 of the Evidence Act** provides: "*Proof of special knowledge in civil proceedings in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.*"

26. In this case, the Plaintiffs claim that the Defendant through its Managing Director did sign the Sub-Licence Agreement thereby granting the Defendant the right to exploit the intellectual property of the Plaintiffs and in particular to broadcast the relevant football matches. The Plaintiffs cannot locate the original document. This is attributed to the delay caused by the Defendant. The Defendant is denying signature. In the circumstances, the only person who can say categorically whether he did or did not sign the contract is the Managing Director of the Defendant. He did not deny that the contracts were signed. He was not called as a witness. Thereafter the Plaintiff provided the Defendant with the relevant access codes to enable access to the satellite transmission and onward broadcast.

27. The Court takes judicial notice of the fact that the Defendant is a broadcaster and the mainstay of its sports broadcasting has been football since the 1960s. In addition, the Defendant did place an advertisement in the Saturday Nation of stating that it would be broadcasting the Bolton vs Arsenal Match (part of the EPL) on Saturday 20th September 2008. That advertisement is further circumstantial evidence that the matches the subject of the sub-licence agreement were televised by the Defendant on the respective dates of those matches. The advertisement incorporates a photograph of two players and the logos of their respective teams. Again, those images are the intellectual property of other persons, not the Defendant. Again, the Defendant must demonstrate that it had acquired the right to publish other than from the Plaintiffs. It has not done so. The same applies to the Arsenal v Hull City match scheduled for Saturday 27th September 2008. Noteable in this context is the email from Monica Waceke Ndungu Television Programmes Manager to Hakeem Abdulraheem on 15th September 2008 under the title EPL/LALIGA RIGHTS". Where she demands; "Kindly send me confirmation(sic) that we are the rights holders for the two tournaments". The recipient of the email then requests the assistance of his Director Kunle Falodon (aka PW-1) saying "*Please could you help send an email stating that KBC are the true rights owners for Kenya, pending when you sign the agreement which is in the post to you*". That shows that the Programmes Manager of the Defendant was making demands which could only relate to an agreement as to the exploitation of certain intellectual property "rights". The timing too is instructional. In response, on the same day Kunle Falodon responds thus; "This is to confirm that KBC Kenya are the rights holders of the OSMI Live FTA EPL package exclusively in Kenya. These rights were awarded in accordance with the provisions of The Agreement entered into by KBC and OSMI. The Live FTA package consists of one English Premier League match per weekend and a full highlights package every match weekend (sic)" He goes on to state clearly that "The grant is subject to the satisfactory completion of all contractual obligations according to the Agreement and the receipt of all fees due based on the Agreement." In case that was not a sufficiently clear reference to the Agreement he believed to have been signed he says, "Please do not hesitate to revert if anything remains unclear.". The Defendant did not produce any evidence to show that there was a challenge to the reference to a concluded agreement at that point in time, in other words before broadcast and/or exploitation of the intellectual property rights owned by the Plaintiffs.

28. Further, the Court was taken to a series of emails between the Plaintiffs Directors and the Defendant's Programme Manager promising payment and/or signed agreement. It was not until the Court directed the Parties to file Closing Submissions in July 2017 did the Defendant come clean and state that their witness/programme manager had resigned from the Corporation and refused to appear as a witness to adopt the statement already filed by the Defendant's Advocates. Interestingly the invoices rendered by the two Plaintiffs and appearing in the Plaintiffs Bundle of documents p. 30-33 also refer to "The Agreement".

29. The email correspondence between pages 34 and 45 show the Defendant consistently requesting access to the transmissions in order to Broadcast the matches exclusively to the local market. Therefore, the Defendant is arguing that there is no evidence before the Court that there was any form of agreement nor any contract between either of the Plaintiffs and the Defendant on the other hand. Unfortunately, the facts set out in the Defendant's submissions leave out a significant part of what transpired in Court. Firstly, the Court heard oral evidence. The Plaintiff's witness Mr. Kunle Fuladon appeared in person having travelled from London as and when he was required to do so. He gave evidence at length and he introduced several documents in the possession and control of the Plaintiff companies. Mr Fuladon gave evidence that he was a Director of the Plaintiff companies. He was not cross-examined on that issue. He also said that the Plaintiff and Defendant had previously conducted a similar endeavor. He referred to the Defendant as a client who he knew well enough to consider a discount when it came to "repeat business". The Defendant did not dispute or shake any of that evidence. In the circumstances, the Court found him a believable and reliable witness. He introduced a document – which he frankly stated was a partial document setting out the genesis of the Plaintiff Companies as brokers acquiring the rights to broadcast and associated rights from the original licensee. The Defendant did not shake that evidence in cross-examination. The Defendant did not produce any witness or document that would demonstrate that what was

said was untrue. Further, the Defendant through its Programme Manager repeatedly requested log in details and reported on the quality of the signal. Why would that be necessary with a complete stranger? The Defendant's witness was unable to answer that question. The Court takes judicial notice of the fact that the Defendant has similarly not pleaded that it was served with any notice or claim from any other person claiming to own those rights. In the circumstances, this Court is satisfied on a balance of probabilities that the Plaintiff's had the right to sub-licence broadcasting and associated rights in intellectual property in the form of the football matches in question as well as associated activities including advertising.

30. Further, this Court is satisfied that there was an agreement between the Parties. The Defendant through its Programme Manager – who did not appear to tell the Court otherwise – repeatedly relied on the existence of a signed agreement (see emails pages 33-45) in order to gain access to the signal and/or broadcasting protocols. Further, the Defendant, for its own benefit, commercial and reputational, held out to the world at large that it had the rights to broadcast. Those rights could only have been obtained from another person. That other person was the relevant Plaintiff. In the circumstances the Defendant is estopped from denying the existence of the Contract.

31. As to the terms of the agreement between the Defendant and the respective Plaintiff the Court was taken to an email sent by the Plaintiff's witness to Monica Waceke the Programme Manager. In that email the Director of the Plaintiffs stated that unless payment is received the signal will be withheld during the next match. That email received a response. In her response the Programme Manager stated that "all the paper work was done". When the Defendant's witness was asked why that was the response – if in fact the two correspondents were complete strangers, she was unable to explain the conundrum. She reverted to the same refrain that she would not admit to anything without seeing the document which seems to have not been done over the 10 years of the life of this litigation. This Court takes into account the fact that the Defendant was a State Corporation. That means that the Programme Manager was a State Official acting in the course of her duties. In the circumstances, the Court would expect a high degree of competence and integrity. Therefore if Monica said the paper work was in order, the Court accepts that was the true state of affairs at the relevant time (email page 44).

32. Further, the Plaintiff then, in reliance on that assurance continued to provide a signal and/or logs and/or problem. That gives rise to promissory estoppel. If a party induces another party to act to its detriment on the strength of a promise, that party is estopped from denying the truth of that promise at a later date. (High Trees Case). In the circumstances the Defendant is estopped from denying the agreement as referred to by the Programme Manager in the communications with the Plaintiffs. In any event, given previous course of trading between the Parties, the Defendant knew the standard terms the Plaintiffs applied and therefore were it necessary to imply a contract, which it is not, the terms would be those of which the Defendant was fully aware before it started using the intellectual property of another. This must be the only correct interpretation because the interpretation offered by the Defendant – at this late stage – in its closing submissions would be for the Court to find that a State Corporation is justified in exploiting the valuable intellectual property of another without being permitted to do so and without paying a licence fee. That submission must be made clearly with full instructions and not suggested by the device of the Defendant asserting that it has frustrated a contract from which it received a benefit.

33. What then are the terms of the contract whether express and/or implied. This Court is satisfied that the Agreement sent to the Defendant was an offer. The Defendant was fully aware of the terms whether or not it was signed. The Acceptance of the contract and its full terms was by (a) requesting log on details and protocols; (b) using those details to broadcast matches, (c) advertising in the press that the Defendant as opposed to any other broadcaster would be the preferred choice for a football enthusiast; (d) offering advertising around those broadcasts thereby seeking and/or obtaining revenue as a consequence. Only one of those acts is sufficient to amount to acceptance. The Defendant did more. In the circumstances, the Defendant is liable to pay the consideration in full. In other words the market price for that use and exploitation of intellectual property.

34. Further, this Court is satisfied from the oral evidence of Mr Fuladoun and the correspondence appearing at pp 123 to 127 of the Plaintiffs Bundle that the Plaintiffs had demanded that the outstanding sums be paid. This Court is further satisfied by the correspondence at pages 44-45 that the Defendant was aware throughout that they were not receiving a gift but that payment was due.

35. In the circumstances and the reasons set out above the Defendant shall pay to Optima Sports Management (UK) the following:

- (i) The sum of Euro 50,000.00
- (ii) Interest on the sum of Euros 30,000.00 at a rate of 14% per annum from 7th September 2008 until today's date and thereafter interest will be paid on a reducing balance until payment in full
- (iii) Interest on the sum of Euros 20,000.00 at a rate of 14% per annum from 19th December 2008 until today's date and thereafter interest will be paid on a reducing balance until payment in full
- (iv) Interest to be simple interest
- (v) Costs of the suit and
- (vi) Interest on the costs of the suit at Court rates until payment in full.

36. In relation to HCC 687 of 2009 the Defendant shall pay to Optima Sports Management (Nigeria)Ltd the following:

- (vii) The sum of Euro 70,000.00
- (viii) Interest on the sum of Euros 50,000.00 at a rate of 14% per annum from 7th September 2008 until today's date and thereafter interest will be paid on a reducing balance until payment in full

(ix) Interest on the sum of Euros 20,000.00 at a rate of 14% per annum from 19th December 2008 until today's date and thereafter interest will be paid on a reducing balance until payment in full

(x) Interest to be simple interest

(xi) Costs of the suit and

(xii) Interest on the costs of the suit at Court rates until payment in full.

Order accordingly,

FARAH S. M. AMIN

JUDGE

SIGNED DATED AND DELIVERED at Voi on this the 6th day of February 2020

In the Presence of:

Court Assistance: Josephat Mavu

Plaintiff: Mr Holding Brief for Mr Maruti

Defendant: No Appearance