



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION – MILIMANI**  
**CIVIL CASE NO. 940 OF 2001**

**HEALTHWISE PHARMACEUTICALS LTD. ....PLAINTIFF**

**VERSUS**

**SMITHKLINE BEECHAM CONSUMER HEALTHCARE LTD. ....DEFENDANT**

**RULING**

This application is brought by a Notice of Motion dated 28<sup>th</sup> October, 2010 and is made under **Order XLIV Rules 1, 2, and 4 (1)** of the **Civil Procedure Rules**. By the application, the Plaintiff/Applicant prays that this Honourable Court do review the judgment delivered herein on 29<sup>th</sup> September, 2010, and that the costs of this application be in the cause.

The application is supported by the annexed affidavit of Amin Ladha, a Director of the Applicant Company, and is based on the grounds that –

1. *There is an error apparent on the face of the record.*
2. *The application of interest on special damages has been wrongly applied as from the date of judgment when it should have been from the date of filing the suit in Court.*
3. *The correct deposit of security to be released back to the Plaintiff is US \$ 45,000.00 and not US \$ 40,000.00 as stated in the judgment.*

Opposing the application, the Defendant/Respondent filed a replying affidavit sworn on 3<sup>rd</sup> November, 2010 by one Purity Wanjiru Macharia, an officer of the Respondent Company who is seized of the facts deponed to in the said affidavit and duly authorized to swear the affidavit on behalf of the Respondent. She deposes in the said affidavit that the Court did not err in its judgment on the Applicant's claim with respect to the issue of interest and the period as it was in conformity with the pleadings filed, and therefore, opposes the Applicant's application insofar as it seeks a review of the effective date of the interest on the Applicant's claim. However, she supports the Applicant's application insofar as the review sought is with respect to the errors apparent on the Court record with respect to the security deposit and effective date of interest on the Respondent's claim.

At the hearing of the application, Mr. Khaminwa appeared for the Applicant while Mr. Mwicigi appeared for the Respondent. By consent of both Counsel, the judgment delivered on 29<sup>th</sup> September, 2010 was varied to correct the security deposit to read US \$ 45,000.00 in lieu of US \$ 40,000.00. Counsel also agreed that the Court do make a determination on whether there was an error on the Court record with respect to the operative dates for computation of interest on the Plaintiff's and Defendant's awards.

It is instructive from the pleadings that in its statement of defence and counter-claim, the Defendant prays that the Plaintiff's suit be dismissed with costs and that judgment be entered in favour of the Defendant against the Plaintiff for –

1. **US\$ 85,929.93**
2. **Interest on the said sum of US\$ 85,929.93 at commercial rates from June, 2000 until payment in full.**
3. **Costs of this suit plus interest thereon.**
4. **Any other relief this Honourable Court may deem fit to grant.**

In the judgment sought to be reviewed, the learned Judge entered judgment as follows –

**(A) (1) For the Plaintiff against the Defendant in the sum of**

1. **US\$ 73,616.66 for debit notes not credited.**
2. **US\$ 95,307.79 for bad debts arising from Defendant's staff.**

**(2) The Plaintiff gets costs of its suit.**

**(3) The Plaintiff gets interest on (1) and (2) above at Court rates from the date of judgment until payment in full.**

**(B) For the Defendant in the sum of US\$ 85,929.93 with costs and interest at Court rates.**

**(C) The sum of US\$ 85,929.93 granted in favour of the Defendant be set off from the sum entered in favour of the Plaintiff in this judgment.**

It will be noted from this judgment that whereas the Defendant was awarded the sum of US\$85,929.93 with costs and interest, that award did not indicate the date from which the interest was to run. The issue for determination is whether the interest on the sum of US\$ 85,929.93 awarded to the Defendant should run from June, 2000 as prayed in the counter-claim; or from the date of the filing of the suit; or from the date of judgment. The said sum of money is treated as more akin to special damages which attract interest from the date of the filing of the suit, as opposed to the general damages which attract interest from the date of judgment. The award of such interest is discretionary as stated in **Section 26 (1) of the Civil Procedure Act** which, in part, states as follows –

**“Where and insofar as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree ...”**

Borrowing a leaf from this provision, I find that the interest on the sum awarded to the Defendant should therefore be payable from the date of the filing of the suit. The judgment in this case is accordingly reviewed by rephrasing the award to the Defendant in Clause (B) above to read –

**“Judgment for the Defendant in the sum of US\$ 85,929,93.with costs and interest at Court rates with effect from the date of the filing of the suit until payment in full.”**

Orders accordingly.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of January, 2011.**

**L. NJAGI**

**JUDGE**