



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**MILIMANI COMMERCIAL COURTS**  
**CIVIL CASE NO. 391 OF 2000**

**ASSIA PHARMACEUTICALS .....PLAINTIFF**

**VERSUS**

**NAIROBI**

**VETERINARY CENTRE LTD..... DEFENDANT**

**RULING**

This is an application for Summary Judgment dated 14th April, 2000. It is supported by an affidavit evidencing an admission of a sort in respect of Shs.677,806/55 dated 7th May, 1999 (RM4) Since then in September, 1999 shs.100,000/- was paid an account making the amount now claimed shs.577,806/55.

The application was defended on a number of Grounds as follows:

1. The Authority of the Plaintiff it is alleged has to originate from a Resolution of the Directors. I was referred to HCCC No. 576 of 1991 R.M. Muthama & Others Vs. G.P. Waithaka & Another.

This was a short case between opposing shareholders & directors of the same Company, some of whom apparently instituted a suit in the name of the Company. In that context, I can understand Mwera J. stating “.....it is a settled law that where a suit is to be instituted for and on behalf of a Company there should be a Company Resolution to that effect”. Also cited was Simba Wood Industries Ltd. vs. IDB & 2 Others. This again was an internal company dispute where the shareholders and some of the directors of the plaintiff disagreed with IDB and the Receivers appointed by it and sought to challenge their actions. The actual point at issue was whether a resolution had been passed to institute proceedings in the Company’s name or not and there was a contest as to what the wording of the resolution was.

The latter case cited the commentary in 4th Halsbury Vol. 7 paragraph 767 which reads as follows:

“Control of Company’s litigation. As regards litigation by an incorporated company, the directors are, as a rule, the persons who have authority to act for the company; but, in the absence of any contract to the contrary in the articles of association, the majority of the members of the company are entitled to decide, even to the extent of overruling the directors, whether an action in the name of the company should be commenced or allowed to proceed. The secretary of a company cannot institute proceedings in the name of the company in the absence of express authority to do so; but proceedings started without proper authority may subsequently be ratified.

Danish Mercantile vs. Dearmont 1951 1 All E.R. page 925 is cited as authority for that last proposition. It is an English Court of Appeal decision which fully supports the statement in Halsbury. It is urged on me that whether the suit has been properly instituted is a triable issue. As it seems that even if that is so, the matter can be rectified in short order. I do not consider that it is such an issue.

2. That the affidavit dated 10th May, 2000 should be disallowed in that while court leave was given to file it, no specific court leave was given to file an affidavit on information and belief in this an application for final judgment – not an interlocutory matter – see Order 18 rule 3. That affidavit directly exhibited a directors resolution authorising suit. In the interests of safety and because it is of little practical importance, I will disallow that affidavit and ignore its contents.

3. That there is an argument about interest. The plaintiff conceded that the starting date for the claim for interest could be put forward from January, 1996 to 1st December, 1998, the last date on which any of the goods comprised in this claim was

delivered. The Defendant alleges court rates only are applicable on the grounds that there is no other agreement for interest. As I understand Mr. Njenga, he was prepared to concede court rates.

4. Finally, there was a set-off of Shs.39,375/- in respect of goods returned where there was a triable issue as to their return and their condition on return.

Having considered all these matters, I enter summary judgment for Shs.538,431/05 with interest thereon at court rates from 1st December, 1998 until payment in full but I stay execution until the Plaintiff passes and files in this court a resolution of its directors ratifying these proceedings to date.

There will be unconditional leave to defend in respect of the set-off of Shs.39,375/-

The Defendant is to pay the costs of this suit but the costs of the setoff are of course reserved to the trial judge. Delivered and dated this 27th day of June, 2000.

P.J.S. HEWETT

JUDGE