



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CASE NO 82 OF 2009**

**SAMUEL MWANGI GATOTO**

**T/A DIANI FARMERS DAY & NIGHT CLUB &**

**T/A GOMBATO GUEST HOUSE.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**THE ATTORNEY GENERAL.....DEFENDANT/RESPONDENT**

**RULING**

1. The plaintiff has moved this Court under the provisions of Order 45 vide his notice of motion application dated 23<sup>rd</sup> April 2018 seeking orders of review in the following terms:

**1. Spent**

2. That the Court be pleased to review such part of judgment delivered on 12<sup>th</sup> March 2018 as decides that; the plaintiff is granted interest, on the special damages of Kshs. 20,837,310, at Court rates from the date of the judgment till payment is made in full; the claim for burnt oranges is dismissed for failure to produce an agricultural officer's report and the claim for loss of business is declined since the plaintiff did not say he wasn't able to continue with his business after renovation and in lieu thereof grant the following orders:-a) Kshs. 6,750,000 being the loss of 2500 mature trees which were burnt.

b) Loss of business on business carried out in the suit properties from March, 2008 to September, 2008 being the period within which the plaintiff's properties were being renovated as follows:-

**For Property "A"**

**Kshs. 600,000/= per month multiplied by 7 months**

**(From March to September) Kshs. 4,200,000**

**For Property "B"**

**Kshs. 300,000/= per month multiplied by 7 months**

**(From March to September) Kshs, 2, 100,000**

**c) Interest at 14% per annum on the special damages from the date of filing the suit till payment is made in full.**

**3. That costs of this application be provided for.**

2. The application is supported by the grounds listed on its face and on the supporting affidavit of Samuel Mwangi Gatoto. Briefly the applicant felt this Court was in error for failing to

*i) Grant him interest from date of filing of the suit.*

ii) To award him damages for loss of business for the period March – September 2008 as well as damages for the burnt mature oranges.

3. The application is opposed by the A. G. though grounds of opposition dated 6.4.18 which stated thus:

**(a) That application is misconceived, frivolous and vexatious.**

**(b) That the application is an abuse of the process of Court.**

**(c) That the claim for loss of business for Property A from March, 2008 to September, 2008 was not pleaded in the Amended Plaint amended on 6<sup>th</sup> October, 2014 hence the Plaintiff/Applicant is not entitled to such an award.**

**(d) That the application contravenes the provisions of section 26 of the Civil Procedure Act and practice note No. 1 of 1982.**

**(e) That no substantive reason has been given for seeking interest at the rate of 14% per annum.**

4. The applicant has put reliance on section 26 of the Civil Procedure Act on the error regarding interest. The said section provides thus “(1) where and in so far as a decree for the payment of money, the Court may order interest at such rate as the Court deems reasonable to be paid ...from date of suit to date of decree.”

5. The reading of section 26(1) of the Civil Procedure Act in my interpretation leaves it to the discretion of the Court to make an order for interest. Subsection (2) states that where the Court is silent on the issue of interest, the Court shall be deemed to have ordered interest at 6% per annum. However there is no mention of 14% interest as is being alluded to by the applicant. From this provision of the law, the only error is on date from when the interest is to be calculated and not the rate of interest.

6. On loss of business, it is my belief that this is a claim that falls under general damages and not special damages. At paragraph 28 of my judgment I stated thus “*the plaintiff did not say he was not able to continue with business after the renovations.*” I had made a finding that the loss of business was not proved. To reverse this finding, it is my considered opinion that the applicant moves a higher Court by way of appeal. I had given reasons for reaching this finding and such a finding cannot be said to be error apparent on the face of the record. I decline to reverse my finding on this heading of the application as requested.

7. As regards the loss on the burnt oranges, I stated that there was no agricultural officer’s report produced. I have since seen a copy of the letter dated 30.7.2014 referenced “*crop assessment report for Mr Samuel Mwangi Gatoto.*” It gave the estimated total costs of oranges destroyed at Kshs 6,750,000. To this extent I am persuaded there was error in my judgment thus I do award the plaintiff the said sum of Ksh 6,750,000 for the loss of mature oranges with interest payable from the date of the report i.e. from 30.7.2014 till payment in full.

8. In conclusion, the application partially succeeds to the extent that:

**i) Interest at Court rates on Kshs 20,837,310 is chargeable from the date of filing of the suit till payment in full.**

**ii) An award of Kshs 6,750,000 is made in favour of the plaintiff as damages for the mature oranges burnt during the incident.**

**iii) Interest at Court rates is awarded on the sum of Kshs 6,750,000 from the date of the report i.e. 30.7.2014**

**iv) Each party bears their costs of this application.**

**Dated, signed & delivered at Mombasa this 20<sup>th</sup> September 2018**

**A. OMOLLO**

**JUDGE**