



REPUBLIC OF KENYA



**KENYA LAW**  
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**Delyan Tatu Company Limited v Thika Gateway Management Company Limited & another  
(Civil Appeal E1151 of 2024) [2026] KEHC 3736 (KLR) (Civ) (17 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 3736 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E1151 OF 2024**

**FR OLEL, J**

**MARCH 17, 2026**

**BETWEEN**

**DELYAN TATU COMPANY LIMITED ..... APPELLANT**

**AND**

**THIKA GATEWAY MANAGEMENT COMPANY LIMITED .. 1<sup>ST</sup> RESPONDENT**

**MASTERPIECE SECURITY SERVICES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

***(BEING AN APPEAL FROM THE JUDGMENT/DECREE OF HON  
J.W NASIMIYU (RM-ADJUDICATOR) DELIVERED ON 9<sup>th</sup>  
SEPTEMBER, 2024 IN NAIROBI MILLIMANI SCCC NO E1384 OF 2024)***

**RULING**

**A. Introduction**

1. This Appeal arises from the judgment of Hon J.W Nasimiyu Resident Magistrate/Adjudicator who held that even though the appellant had proved their claim of negligence as against the respondent, their claim for special damages was not proved to the required standard and therefore dismissed the appellants claim. Each party was to bear their own Costs.
2. The background to this matter, is that the appellant was a tenant of the 1<sup>st</sup> respondent, and on 6<sup>th</sup> February 2024 suffered a theft incident, where they lost goods worth Kshs.760,000/=. It was part of their lease agreement that they would pay the 1<sup>st</sup> respondent an extra amount to cover for security, and indeed had paid this amount and thus blamed the 1<sup>st</sup> respondent for failing to undertake their duty, to their loss and detriment. They therefore prayed to be compensated for the lost goods, plus costs and interest of the suit.



3. The 1<sup>st</sup> respondent filed their response to the statement of claim where they admitted that a break-in incident did occur, but denied knowing the contents of the goods or properties inside the appellant's shop. They further confirmed that the theft incident was reported at Thika police station, who were undertaking investigations in a bid to apprehend and make arrest of those involved and thus the suit had been filed prematurely before conclusion of the said process.
4. The 1<sup>st</sup> respondent further averred that they were not to blame for the incident, and pointed a finger at the 2<sup>nd</sup> respondent given that they were the once responsible for manning the security of the leased premises. They thus gave notice that they would institute third party proceedings, seeking indemnity from the said security firm. The 1<sup>st</sup> respondent did subsequently issue the third-party notice and the 2<sup>nd</sup> respondent did file their response to the said notice stating that they were indeed contracted to provide security within the leased premises but categorically denied that the service extended to all tenants and their goods since it was limited to guarding the main entrance and/or exits.
5. They further stated that they had undertaken a security consultancy/audit of the entire premises before the said theft incident and wrote a detailed security survey and risk assessment report dated 28<sup>th</sup> February 2023 detailing their observations on how security could be enhanced within the leased premises. It was their considered opinion that the 1<sup>st</sup> respondent needed to hire 9 guards to man the premises but, in their wisdom, the 1<sup>st</sup> respondent had opted to only hire 4 guards (two in the morning and two at night), who were solely mandated to guard the main entrance and checking on motor vehicle movement. This arrangement obviously was not adequate given that the building consisted of two blocks.
6. The 2<sup>nd</sup> respondent further confirmed that the thief incident did occur on the 2<sup>nd</sup> floor of the leased premises, where they were not mandated to secure and/or patrol and therefore could not be held liable for the incident that occurred. The third-party claim was therefore defective, bad in law as there was no cause of action maintainable as against them. They thus urged the court to dismiss the said claim.
7. The trial court, heard all parties, whose evidence mirrored the pleading, and witness statements filed, considered the submissions filed and held that the 1<sup>st</sup> respondent was not entitled to indemnity from the 2<sup>nd</sup> respondent having failed to prove any breach of contract of service and/or negligence in the performance of their obligation. Further the appellant did prove negligence on the part of the 1<sup>st</sup> respondent, but their claim for special damages was not proved to the required standard and therefore was dismissed. Each party was to bear their own costs.

## **B. The Appeal**

8. Being dissatisfied with the said award, the appellant filed his memorandum of appeal dated 2<sup>nd</sup> October, 2024, raising sixteen (16) grounds of appeal, which are basically repetitive and unnecessary, because the jest thereof is that the learned trial magistrate erred in law by finding that the claim for special damages was not proved to the required standard, yet they had provided a receipt dated 30<sup>th</sup> November, 2023 showing purchases of the stolen items.
9. The Appellant thus did pray that this Appeal be allowed, the judgment of the trial court be set aside and that they be awarded special damages of Kshs.760,000/= plus costs of both the primary suit and this Appeal.

## **C. Analysis and Determination**

10. I have considered this appeal, the parties respective submissions filed, and the impugned judgment. I have also considered the decisions relied on and perused the trial court's record. This being an appeal



from the Small Claims Court, it is important to point out that Section 38 of the *Small Claims Court Act* provides that appeals from the said court shall be only on issues of law. An appeal limited to matters of law does not permit the appellate court to substitute the tribunal's decision with its own conclusions based on its own analysis and appreciation of the facts.

11. The only issue which arises in this appeal is whether the appellant sufficiently proved the special damages claimed of Ksh.760,000/=. It is trite law that special damages must be specifically pleaded and proved. In *Hahn vs. Singh*, Civil Appeal No. 42 of 1983 [185] KLR 716, the Court of Appeal held as follows;

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

12. In *Union Bank of Nigeria PLC v Alhaji Adams Ayabule & another* (2011) JELR 48225 (SC) (SC 221/2005 (16/2/2011)), Mahmud Mohammed, JSC. delivering the judgment of the supreme court of Nigeria stated:

I must emphasize that the law is firmly established that special damages must be pleaded with distinct particularity and strictly proved and as such a court is not entitled to make an award for special damages based on conjecture or on some fluid and speculative estimate of loss sustained by a plaintiff.... Therefore, as far as the requirement of the law are concerned on the award of special damages, a trial court cannot make its own individual arbitrary assessment of what it conceives the plaintiff may be entitled to. What the law requires in such a case is for the court to act strictly on the hard facts presented before the court and accepted by it as establishing the amount claimed justifying the award.

12. The learned trial magistrate holding that the appellant had failed to demonstrate the extent of the loss incurred and that no valuation or inventory was produced was a misdirection as the appellant had specifically pleaded and itemized the goods stolen and indicated their total value in their pleadings. The 2<sup>nd</sup> respondent investigation report dated 6<sup>th</sup> February 2024 also confirmed the same. Further during the hearing CW2 Johnson Mumbo, who was also a director of the appellant company confirmed that he had bought the said items in November 2023 and produced a receipt dated 30<sup>th</sup> November, 2023 from plug- point electronics to prove the purchase.
13. Further to hold that CW2 had no relation with the claimant as at the time of purchase of the said items was also a glaring misdirection as CW2 uncontroverted evidence had confirmed that he was a director of the appellant company and was the one manning the shop thereby establishing the nexus. Finally, the receipt produced clearly established that the items bought were various play stations and their components, though indicated as PSS and thus could not have been termed as different from the items stolen. On a balance of probability, the special damages were sufficiently proved and ought to have been awarded. See *William Kabogo Gitau Vs George Thuo & 2 others* (2010) 1KLR 526.

#### **D. Disposition**

14. Having arrived at the above finding, I do find and hold that this Appeal has merit and the same is allowed. The judgment of the learned trial magistrate dated 9<sup>th</sup> September, 2024 issued in Milimani Small Claims court SCC/E1384/2024 is hereby set aside and substituted with an award of Kshs.760,000/= in favour of the appellant, plus interest thereon at court rate from the date of filing the claim until date of payment in full.



15. The Appellant will have costs of this appeal assessed at Kshs.120,000/= all inclusive plus costs of the primary suit.

16. It is so ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MARSABIT THIS 17<sup>TH</sup> DAY OF MARCH, 2026.**

**FRANCIS RAYOLA OLEL**

**JUDGE**

Delivered on the virtual platform, Team this 17<sup>th</sup> day of MARCH, 2026.

In the presence of: -

N/A .....Appellant

N/A ..... Respondent

Mr. Jarso..... Court Assistant

