

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
THE CIVIL APPELLATE DIVISION
(Coram: A.C. Mrima, J.)
CIVIL APPEAL NO. E014 OF 2025

-between-

DEVYANI FOOD INDUSTRIES KENYA LIMITED.....
APPELLANT

-versus-

BRIMS SYSTEMS AFRICA LIMITED.....
RESPONDENT

[Being an Appeal from the Judgment and Decree of Hon. C. K. Ireri, RM/Adjudicator in Nairobi Small Claims Court Commercial Case No. E2456 of 2024 delivered on the 13th March 2025]

JUDGMENT

Background:

1. On 7th January 2021, *Brim Systems Africa Limited*, the Respondent herein, and *Devyani Food Industries Kenya Limited*, the Appellant herein, entered into an agreement where the Respondent installed and maintained GPS tracking devices on the Appellant's fleet of motor vehicles.
2. The Appellant made a payment of Kshs. 178,470/= on 4th May 2023. However, the Respondent contended that there was an outstanding balance and subsequently filed a claim in the Small Claims Court at Milimani in Nairobi being *SCCCMM Case. No. E2456 of 2024* [hereinafter referred to as '**the suit**'] seeking recovery of Kshs. 779,700/= on account of the lease and maintenance fees.
3. The Appellant defended the claim by alleging that between March and September 2023, the tracking devices persistently malfunctioned and transmitted inaccurate data, frustrating business operations. After hearing the matter, the trial Court found the claim proved and entered judgment in favour of the

Respondent as prayed. It was that decision that prompted the instant appeal.

The Appeal:

4. Through a Memorandum of Appeal dated 11th April 2025, the Appellant raised the following grounds of appeal: -
 1. *That the Honourable Adjudicator erred in law by failing to properly allocate the burden of proof to the Respondent, who had exclusive control and technical expertise over the tracking devices, and by requiring the Appellant to prove the functionality of devices they did not control. The Adjudicator further erred by not recognizing the Respondent's failure to provide technical reports, expert assessments, or verifiable data supporting the functionality of the impugned devices during the leased period.*
 2. *That The Honourable Adjudicator erred in law in failing to consider or give proper weight to credible evidence adduced by the Appellant, such as email correspondence and termination of the contract, demonstrating the persistent malfunction of the tracking devices during the lease period, which evidence was neither challenged nor rebutted by the Respondent.*
 3. *That the Honourable Adjudicator erred in law by disregarding the Appellant's evidence and submissions, resulting in a decision that was inconsistent with established legal principles and amounted to a miscarriage of justice and unjust enrichment of the Respondent.*

The Submissions

5. The Appellant urged its case further through written submissions dated 7th August 2025. It argued that the trial Court misallocated the burden of proof. Relying on Sections 107 and 112 of the Evidence Act, the Appellant contended that the functionality of the tracking devices was a fact peculiarly within the knowledge and control of the Respondent, who had exclusive access to diagnostic data and service logs. Seeking

aid from the decision in *Joginder Auto Services Ltd -vs- Mohammed Shaffique & Mohammed Parvez Saroya* [2001] eKLR the Appellant asserted that the trial Court should have drawn an adverse inference against the Respondent for withholding such crucial evidence.

6. Further to the foregoing, the Appellant submitted that its evidence of device malfunction, presented through emails dated 23rd and 29th June 2023 and a termination notice dated 11th October 2023, was uncontroverted and should have been accepted as truth. To buttress the assertion, it referred to the case of *Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others* [2009] eKLR and *Charanlal Shah -vs- Augustine Kubende* [1986] KLR 495.
7. The Appellant further argued that disregarding the above evidence sanctioned unjust enrichment, contrary to the holding in *Nelson Kazungu Chai -vs- Pwani University* [2014] eKLR, and violated constitutional rights under Articles 50(1), 46(1)(b), and 40(1). The Appellant prayed that the appeal be accordingly allowed.

The Respondent's case:

8. *Brim's Systems Africa Limited* challenged the appeal through written submissions dated 10th October 2025. From the outset, it asserted that the Adjudicator properly applied the rules on the burden and standard of proof. It was its case that pursuant to Sections 107, 109, and 112 of the Evidence Act, as appreciated alongside the decision in *Evans Nyakwana -vs- Cleophas Bwana Ongaro* [2015] eKLR, the evidential onus lay on it to prove the contract and sums due. It was its position that it duly discharged its evidentiary burden by adducing invoices, statements of account, and proof of partial payment. The Respondent averred that the Appellant, having physical possession of the GPS systems, bore the burden to substantiate any alleged malfunction, which it failed to do with expert reports or service logs.

9. On the issue of uncontroverted evidence, the Respondent relied on the case of *Trust Bank Ltd -vs- Paramount Universal Bank Ltd & 2 Others* [2009] eKLR and the one in *Charanlal Shah -vs- Augustine Kubende* [1986] KLR 495 to state that uncontroverted evidence must still be credible and consistent with pleadings. It further cited *Gichinga Kibutha -vs- Caroline Nduku* [2018] eKLR to show that unrebutted evidence must still discharge the burden of proof.
10. The Respondent dismissed the constitutional claims, invoking *Judicial Service Commission -vs- Mbalu Mutava & Another* [2015] eKLR to advance the argument that a fair hearing does not guarantee success for a party. In direct contradiction of the Appellant's position, the Respondent argued that the Appellant's continued retention of the devices without payment constituted unjust enrichment. To that end, it referred to the case of *Wahome -vs- Wanjiku* [2025] KEHC.
11. Finally, the Respondent sought costs. It drew support from the case of *Supermarine Handling Services Ltd -vs- Kenya Revenue Authority* [2010] eKLR where it was observed that costs are not meant to punish but to compensate a successful party for trouble taken in litigation.

Analysis:

12. Having appreciated the grounds of appeal and the disputants rival submissions, the sole issue that emerges for determination is whether the trial Court properly applied the burden of proof and incidence of burden. As there is no doubt the issue is one of law, then this Court is properly seized of jurisdiction by dint of Section 38(1) of the Small Claims Court Act. [See ***J N & 5 Others -vs- Board of Management, St. G School Nairobi & Another*** [2017] eKLR, ***M'riungu and Others -vs- R*** [1982-88] 1 KAR 360 on what entails a point of law].
13. The entirety of the instant appeal revolves around the trial Court's application of Sections 107, 108 and 109 of the Evidence Act. The said provisions provide thus;

107. Burden of proof.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

14. The above provisions govern the aspect of the burden of proof. For clarity, there are two limbs of the burden of proof being *the legal burden of proof* and the *evidential burden of proof*. Whereas the legal burden of proof is always static on the claimant, the evidential burden of proof initially rests on the claimant, but may shift to the other party depending on the weight of evidence adduced by the claimant. A detailed discussion on this aspect was undertaken by the Supreme Court in **Raila Amolo Odinga & another v IEBC & 2 others** {2017} eKLR and the Court of Appeal in **Mbuthia Macharia - vs- Annah Mutua Ndwiga & another** [2017] eKLR.
15. Coming back to the case at hand, the trial Court found it undisputed that a valid contract existed and that devices were installed on the Appellant's vehicles. At that point in time, the evidential burden of proof shifted to the Appellant to disprove the finding. In doing so, the Appellant advanced the defence of malfunction. While the Appellant argued that Section 112 of the Evidence Act shifted the burden to the Respondent due to

special technical knowledge, the physical tracking devices were in the Appellant's possession.

16. The Adjudicator then observed that the Appellant only provided a schedule of allegedly malfunctioning vehicles *via* email but failed to provide substantive evidence beyond that schedule to prove actual malfunction. The question that now begs for an answer is whether the Appellant's evidence shifted the evidential burden back to the Respondent. The trial Court found that the Respondent failed to discharge its evidential burden.
17. As captured above, in an attempt to prove that the devices were non-functional, the Appellant produced an email to the Respondent containing a schedule of allegedly malfunctioning devices fitted in its various vehicles. That was all. There was no further evidence thereto. Neither were the devices produced in evidence nor any technical report detailing the extent of malfunctioning, if any, was produced. With such evidence at hand, the trial Court was right in finding that the Appellant failed to discharge the evidential burden of proof which had shifted to it. As such, this Court finds and hold that the trial Court's finding in favour of the Respondent was correct. The Appellant, therefore, failed to prove that the devices fitted into its vehicles were not functional and that the contract could not be honoured.
18. Having found as much, the appeal is, hence, unmerited.

Disposition:

19. As I come to the end of this ruling, I wish to apologize to the parties for the late delivery of this decision which was to be in February 2026. The delay was occasioned by my engagement at the Judicial Service Commission where I serve as a Commissioner given that the Commission has been running interviews since December 2025 to date. Once again, galore apologies.
20. Deriving from the above conclusions, the following final orders hereby issue: -

[a] The appeal is dismissed in its entirety.

[b] The judgment in *Milimani [Nairobi] Small Claims Commercial Case No. E2456 of 2024* is hereby affirmed.

[c] Costs of this appeal to the Respondent.

Orders accordingly.

DELIVERED, DATED and SIGNED at NAIROBI this 30th day of April, 2026.

**A.C. MRIMA
JUDGE**

Judgment virtually delivered in the presence of:

Mr. Maina, Learned Counsel for the Appellant.

No appearance for the Respondent.

Michael/Amina – Court Assistants.