

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MILIMANI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 111 OF 2017**

**HUNKAR TRADING CO. LIMITED** ..... **PLAINTIFF**  
**VERSUS**  
**TOTAL KENYA LIMITED** ..... **DEFENDANT**

**JUDGEMENT**

1. This matter involves a commercial dispute situated at the intersection of contract law, the statutory regulation of the energy sector, and the common law torts of detinue and conversion.
2. The Plaintiff approached this court by way of a Plaint dated 15 March 2017, subsequently amended on 30 December 2020. The Plaintiff, a limited liability company incorporated in Kenya, is engaged in the business of filling, trading, and distributing LPG cylinders. The Plaintiff alleges that the Defendant, a leading oil marketing multinational, illegally confiscated and detained 4,425 of the Plaintiff's LPG gas cylinders. The Plaintiff contends that this detention constitutes an illegal seizure, detinue, trespass to goods, and economic sabotage, effectively crippling its business operations by removing its essential tools of trade from circulation.
3. The Plaintiff seeks the following reliefs against the Defendant:
  - (a) A mandatory injunction directing the Defendant to hand over all the Plaintiff's cylinders it is holding, namely 2,528 6kg cylinders and 1,895

- 13kg cylinders, after testing, verification, repairing, painting, and re-validation at the Defendant's cost.
- (b) An order for the Defendant to pay the costs of testing, verification, and repair.
  - (c) In the alternative, judgment for the sum of Kshs. 14,588,093.75, being the assessed replacement cost of the cylinders.
  - (d) A permanent injunction restraining the Defendant from withholding the Plaintiff's cylinders.
  - (e) General damages for detinue, trespass to goods, economic sabotage, and unfair trade practice.
  - (f) Interest and costs.
4. The Defendant entered appearance and filed a Statement of Defence and Counterclaim dated 29 November 2017, which was subsequently amended on 18 June 2021. The Defendant admits to withholding the cylinders but vigorously defends the action on the basis of a right of lien. The Defendant avers that the Plaintiff is indebted to it in the sum of Kshs. 6,732,922.22, arising from cylinder exchange deficits accumulated between 2014 and 2016. The Defendant contends that under the common law and by virtue of the Plaintiff's acquiescence, it was entitled to retain the cylinders until the outstanding debt was fully extinguished.
5. By way of Counterclaim, the Defendant seeks judgment against the Plaintiff for the sum of Kshs. 6,732,922.22 plus interest at commercial rates, and a mandatory injunction compelling the Plaintiff to pay the outstanding sum.
6. The suit proceeded to hearing. The Plaintiff called Mr. Jackson Kariuki Kahungura (PW1), its Chairman and Director, as its sole witness. The Defendant called Ms. Soila Kigera (DW1), its Legal Officer, as its sole witness. The Court has had the benefit of comprehensive trial bundles, witness statements, and the submissions.

**Background**

7. The dispute is anchored in the operations of the LPG Cylinder Exchange Pool, a mechanism established under Regulation 14(1) of the Energy (Liquefied Petroleum Gas) Regulations, 2009 (Legal Notice No. 121 of 2009). The purpose of the pool was to facilitate the liberalization of the LPG market by allowing consumers to exchange cylinders of any brand at any retail outlet, thereby promoting competition and consumer convenience.
8. Both the Plaintiff and the Defendant were members of this Exchange Pool and signatories to the LPG Cylinder Exchange Pool Agreement dated 1 February 2012 (hereinafter "the Agreement") and the associated LPG Cylinder Exchange Pool Operations Procedures (hereinafter "the Operations Procedures").
9. Under the Agreement and Operations Procedures, the movement of cylinders was strictly regulated. When a consumer returned an empty cylinder belonging to Brand A, for example Hunkar, to a retail outlet owned by Brand B, for example Total, Brand B was obligated to accept it. Brand B would then transport the cylinder to a designated collection point. Brand A was then required to collect its cylinders from the collection point within a specified timeframe. If Brand B collected more of Brand A's cylinders than Brand A collected of Brand B's, a financial deficit would arise. The clearinghouse mechanism required the net deficit to be settled via invoice.
10. It is common ground that between June 2015 and March 2016, the Plaintiff accumulated a significant deficit in its account with the Defendant. The Defendant issued invoices which remained unpaid beyond the stipulated credit period.
11. By a letter dated 10 March 2016, the Defendant wrote to the Plaintiff demanding settlement of an outstanding balance of Kshs. 7,772,458.58, noting that Kshs.

4,994,501.74 was overdue. The letter threatened legal action if payment was not made within 14 days.

12. In response, the Plaintiff did not settle the debt in cash. Instead, it forwarded ten post-dated cheques totalling approximately Kshs. 5.9 million to the Defendant. These cheques were dated to mature between April 2016 and December 2016.
13. The Defendant, by a letter dated 6 April 2016, rejected this mode of payment. The Defendant returned six of the post-dated cheques, arguing that the Agreement required payment within 35 days of invoicing and that the issuance of post-dated cheques spanning eight months was an impermissible unilateral extension of the credit period. The Defendant demanded immediate payment via current cheques or Electronic Funds Transfer (EFT).
14. Following the impasse, a meeting was held between the parties on 4 July 2016. Minutes or subsequent conduct indicate that during this meeting, the Defendant informed the Plaintiff of its decision to withhold the Plaintiff's cylinders until the debt was fully settled. The Plaintiff's witness, PW1, admitted in cross-examination that he attended this meeting and came to an arrangement regarding the holding of cylinders.
15. Consequently, the Defendant retained possession of 4,425 cylinders belonging to the Plaintiff. The Plaintiff, despite admitting the existence of the debt (though disputing the interest component), failed to clear the balance. Instead, on 16 March 2017, the Plaintiff instituted this suit, alleging that the retention of the cylinders was illegal and claiming the replacement value of the goods.

### **The Plaintiff's Case**

16. The Plaintiff's case is premised on the sanctity of the statutory and contractual framework governing the Exchange Pool. PW1 submitted that the Agreement provided a self-contained code for the handling of cylinders. He relied heavily

on Clauses 12.6, 12.7, and 15 of the Agreement, which mandate that a member holding another member's cylinders must return them to a collection point within 7 days.

17. The Plaintiff argues that the Agreement provides specific penalties for non-compliance, including monetary fines for holding cylinders beyond 14 days. The Plaintiff contends that the Defendant's resort to self-help by seizing cylinders to enforce a debt was *ultra vires* the Agreement and constituted the tort of detinue.
18. On the debt, the Plaintiff admits that amounts were owed but argues that the Defendant levied illegal penal interest not sanctioned by the Energy Regulatory Commission (ERC). The Plaintiff asserts that by rejecting the post-dated cheques, the Defendant acted maliciously to manufacture a default and justify the continued strangulation of the Plaintiff's business—conduct the Plaintiff terms economic sabotage.
19. Regarding damages, the Plaintiff claims Kshs. 14,588,093.75 as special damages. The logic advanced is that the cylinders, having been held in open storage for over seven years, have been exposed to the elements (sun, rain, corrosion) and are now effectively scrap. The Plaintiff claims the cost of replacing these cylinders as a total loss.

### **The Defendant's Case**

20. The Defendant submits that the Plaintiff is a recalcitrant debtor who seeks to use the judicial process to avoid legitimate obligations. The Defendant emphasizes that the debt of Kshs. 6,732,922.22 is indisputable and was admitted by PW1 under oath.
21. The Defendant's central legal defence is the right of lien. It argues that under the common law, a person in lawful possession of goods is entitled to retain them until debts associated with those goods (or the general balance of account in a commercial relationship) are paid. The Defendant cites *Unibilt*

***Kenya Ltd v Mukhi and Sons Ltd 2 EA 340*** to support the proposition that a lien is a shield that entitles the creditor to retain possession.

22. Furthermore, the Defendant relies on the doctrine of estoppel by acquiescence. It argues that during the meeting of 4 July 2016, the Plaintiff was expressly informed of the retention of cylinders and did not object, thereby effectively agreeing to the lien as security for the debt. Having induced the Defendant to believe the arrangement was acceptable, the Plaintiff cannot now sue for detinue.
23. On damages, the Defendant argues that the Plaintiff has failed to strictly prove the special damages as required by law (citing ***Capital Fish Kenya Ltd v Kenya Power & Lighting Company Ltd eKLR***). The Defendant points out that no valuation report, expert evidence, or purchase invoices were produced to substantiate the claim that the cylinders are destroyed or to prove their value.

### **Analysis & Determination**

24. Having carefully considered the pleadings, the evidence adduced, and the detailed submissions by counsel, I find that the following issues fall for determination:
- a) Whether the Plaintiff is indebted to the Defendant, and if so, is the imposition of interest lawful;
  - b) Whether the Defendant possessed a lawful Right of Lien over the Plaintiff's cylinders, either by statute, contract, or common law;
  - c) Whether the detention of the cylinders constitutes the tort of Detinue or Conversion;
  - d) Whether the Plaintiff has proved its claim for Special Damages amounting to Kshs. 14,588,093.75 to the required standard of strict proof;
  - e) Whether the Plaintiff is entitled to General Damages for economic sabotage or unfair trade practice;
  - f) What reliefs are appropriate in the circumstances?

### The Indebtedness and Interest

25. The existence of the debt is the fulcrum upon which the Defendant's Counterclaim and defence of lien rests. I must first determine the validity and quantum of this debt.
26. The LPG Cylinder Exchange Pool Operations Procedures provide a clear mechanism for the settlement of exchange deficits. Clause 4 (Cylinder Exchange Methodology), particularly sub-clauses (viii) and (ix), stipulates:
- (viii)...the member who has collected more cylinders than they have received will be entitled to payment for the cylinders in deficit at the prevailing quarterly refundable deposit that has been set.*
- (ix) The member will then invoice for the cylinders that are in deficit and payment should be received within 35 days from the date of invoice. After 35 days, an interest will be levied at the rate of 2% per month.*
27. The evidence before the court establishes that the Defendant issued invoices to the Plaintiff for deficits accrued between 2014 and 2016. The Defendant's Statement of Account (Exhibit 5) shows a running balance culminating in the counterclaim amount.
28. The Plaintiff's witness, PW1, made unequivocal admissions during cross-examination. When asked about the debt, he stated:

*"I do not owe them the money... Reconciliation was done and the outcome was that the plaintiff made some payment to the defendant by 10 post dated cheques. The cheques amounted to 5,978,156/=."*

29. However, in the same breath, he admitted:

*"The cheques were post dated. They were between 13 April and 13 December... I have never made the payment to date. I did not have the cash at the time they made the demand."*

30. By issuing cheques for approximately Kshs. 5.9 million, the Plaintiff admitted liability for at least that amount. The contention regarding interest appears to be the only point of divergence.

31. I have examined the Operations Procedures. They expressly authorize the levy of interest at 2% per month on overdue invoices. This is a contractual term binding on all members of the Pool. The Plaintiff cannot now claim that the interest is illegal or unauthorized when it is explicitly provided for in the governing document signed by the parties. The rate of 2% per month (24% per annum) is consistent with commercial rates for unsecured debts and is not penal in nature.

32. Furthermore, the Plaintiff's argument that the Defendant acted maliciously by rejecting post-dated cheques is legally unsound. A cheque is a bill of exchange payable on demand (Section 73 of the Bills of Exchange Act). A post-dated cheque is, in essence, a request for credit. The Agreement required payment within 35 days of the invoice. The Plaintiff's attempt to pay via cheques dated up to December 2016 was a unilateral attempt to vary the contractual terms. A creditor is not obliged to accept a payment method that differs from the contract unless they expressly agree to the variation. The Defendant was within its rights to reject the post-dated cheques and demand immediate payment of the overdue sums.

33. The Defendant has pleaded a specific sum of Kshs. 6,732,922.22 in its Counterclaim. The Plaintiff has not tendered a forensic audit or an alternative calculation to challenge the arithmetic of this figure, beyond a general denial. In civil litigation, where a specific liquidated sum is pleaded and supported by a statement of account, and the debtor admits indebtedness generally but fails to particularize the error, the Court is entitled to enter judgment for the proved sum.
34. I, therefore, find that the Plaintiff is indebted to the Defendant in the sum of Kshs. 6,732,922.22. The Defendant succeeds on this limb of the Counterclaim.

#### The Right of Lien

35. The most contentious legal issue in this suit is whether the Defendant was entitled to withhold the Plaintiff's cylinders as security for this debt. The Defendant asserts a right of lien.
36. A lien is a right at common law for a person in possession of goods belonging to another to retain possession until a debt due to him is satisfied. **Halsbury's Laws of England, 4th Edition, Vol 28, Para 502** defines it as:

*A right at Common Law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied.*

37. Liens are generally classified into particular liens and general liens. A particular lien arises where the debt was incurred in respect of labor or skill applied to the specific goods retained, for example, a mechanic repairing a car). A general lien is a right to retain goods for a general balance of account between the parties. General liens are not favored by the common law because they interfere with the free flow of commerce and grant a priority to one creditor over

others without public notice. They typically arise only by custom of trade or by express contract.

38. In this case, the Defendant did not apply labour or skill to improve the cylinders; it merely held them as part of the exchange pool logistics. Therefore, a particular lien does not arise. The Defendant must rely on a general lien.
39. The Defendant relies heavily on ***Unibilt Kenya Ltd (Under Receivership) v Mukhi and Sons Ltd 2 EA 340***. In that case, the Court upheld a lien exercised by a clearing and forwarding agent over a client's goods. However, a close reading of ***Unibilt case*** reveals a critical distinction: the contract in that case expressly provided that the Defendant "shall have a general as well as a particular lien on all goods for unpaid account".
40. In the present case, I have scoured the LPG Cylinder Exchange Pool Agreement and the Operations Procedures. There is no express clause granting members a lien over competitors' cylinders for unpaid exchange deficits.
41. The relationship between the parties is governed not just by contract, but by the Energy (Liquefied Petroleum Gas) Regulations, 2009. The Exchange Pool is a statutory creation designed to ensure the interoperability of cylinders for the benefit of the public.
42. Clause 12.6 of the Agreement mandates:
- "A member who has collected cylinders belonging to another member shall at his own cost transport the said cylinders to a designated collection point within 7 calendar days."*
43. Clause 12.7 is prohibitory:

*"A member is also prohibited from holding other members cylinders (outside of the initial 7 days) at any other location except a designated collection point."*

44. Clause 15(d) forbids members from:

*"Procuring the removal or withdrawal of another member's cylinder from circulation or in any other way from being accessible to the owner..."*

45. Further, the Operations Procedures prescribe specific penalties for holding cylinders beyond 14 days (Kshs 50,000 per outlet) and for withdrawing competitors' cylinders (Kshs 1,000,000).

46. The legal maxim *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of another) is applicable here. The regulatory scheme expressly provides remedies for non-payment of debts: invoicing and penal interest (2% per month) (Clause 4(ix)). It also provides for the suspension or expulsion of defaulting members. It does not provide for a lien. On the contrary, it expressly penalizes the retention of cylinders.

47. Where a contract, and subsidiary legislation, imposes a positive statutory duty to return goods within a specific time (7 days), that duty is inconsistent with the existence of a common law right to retain the goods indefinitely. The statutory mandate to circulate cylinders overrides the common law right of lien, especially where the lien would defeat the public policy objective of the Regulations (ensuring LPG availability).

48. I, therefore, find that the Defendant did not have a statutory or contractual right of lien. The detention of the cylinders was, *prima facie*, a breach of the Agreement and the Regulations.

### Estoppel by Acquiescence

49. However, the analysis does not end there. The Defendant argues that the Plaintiff agreed to the lien. DW1 testified that at a meeting on 4 July 2016, the Plaintiff was informed of the decision to withhold cylinders and did not object.

50. PW1 admitted this in cross-examination:

*"We discussed how we would make payments and the cylinders. They told me that they would hold the cylinders until the payment was made. I came to an arrangement with them."*

51. This brings into play the equitable doctrine of estoppel. By coming to an arrangement in July 2016, the Plaintiff effectively consented to the Defendant's possession of the cylinders as security for the debt. This consent validated the Defendant's possession at that material time, shielding the Defendant from liability for detinue for that period. The principle of *volenti non fit injuria* applies.

52. However, a lien, or a consensual retention arrangement, is a right of defence and not a right of action (**Unibilt case**). It is a shield, not a sword. It entitles the creditor to hold the goods, not to keep them forever or allow them to rot. Furthermore, consent can be withdrawn.

53. When the Plaintiff demanded the return of the cylinders and subsequently filed this suit on 16 March 2017, it effectively revoked any consent or arrangement previously made. At that point, the Defendant's continued retention of the cylinders—in the face of the statutory prohibition and the Plaintiff's demand—became unlawful. The Defendant should have sought to attach the cylinders through judicial process rather than engaging in indefinite extra-judicial self-help.

54. I, therefore, hold that while the Defendant's possession was initially consensual (between July 2016 and March 2017), it became unlawful upon the filing of this

suit. The Defendant had no valid lien to justify the detention for the subsequent seven years.

### Detinue and Conversion

55. The tort of Detinue consists of the wrongful withholding of the plaintiff's goods. It requires the plaintiff to prove that they have an immediate right to possession and that the defendant, having possession, refused to return the goods upon demand.
56. The tort of Conversion involves dealing with goods in a manner inconsistent with the rights of the true owner, intending to deny the owner's right or to assert a right inconsistent with it.
57. Having found that the lien was not sustainable in law after the revocation of consent, the Defendant's continued refusal to return the 4,425 cylinders constitutes Detinue. The Plaintiff is the undisputed owner of the brand and the cylinders. The Defendant is holding them without a valid legal justification.
58. In *Kenya Breweries Ltd v Godfrey Odoyo [2010] eKLR*, the Court of Appeal affirmed that in an action for detinue, the plaintiff is entitled to the return of the goods or their value, plus damages for their detention. The court emphasized that demand and refusal are essential elements, both of which are present here.

### Special Damages

59. The Plaintiff seeks Kshs. 14,588,093.75 as special damages, representing the replacement cost of the 4,425 cylinders. The Plaintiff argues that due to the long detention in open weather conditions, the cylinders are wholly destroyed or depleted and must be replaced.
60. It is a cardinal principle of law that special damages must be specifically pleaded and strictly proved. This principle was famously articulated by Lord

Bowen in *Ratcliffe v Evans* 2 QB 524 and has been consistently applied by Kenyan courts.

61. In *Capital Fish Kenya Ltd v The Kenya Power & Lighting Company Ltd [2016] eKLR*, the Court of Appeal held:

*“...it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that*

*“... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”.*

62. I have examined the evidence tendered by the Plaintiff to support this colossal claim of Kshs 14.5 million. The evidence is woefully deficient. The Plaintiff did not produce a single invoice, Local Purchase Order (LPO), or receipt showing the purchase price of a 6kg or 13kg cylinder. The figure of Kshs 14.5M appears to be a mathematical estimate based on unproven unit costs. PW1 testified that the cylinders were kept in the open. However, no expert report was tendered. There is no inspection report from the Kenya Bureau of Standards or a licensed cylinder validator confirming that the cylinders are scrap. Steel cylinders are durable assets; they can often be re-validated, sandblasted, and repainted. To claim 100% replacement cost without technical evidence of total loss is to ask the Court to speculate.

63. Under Sections 107-109 of the Evidence Act, the burden of proof lies on the Plaintiff. The Plaintiff has failed to discharge this burden.

64. Furthermore, the Plaintiff had a duty to mitigate its loss. The Plaintiff admitted owing money. It could have paid the Kshs 6.7M debt to secure the release of its Kshs 14.5M assets. By refusing to pay an admitted debt for years, the Plaintiff contributed to the situation where its assets remained in the Defendant's custody.
65. Consequently, the claim for Kshs. 14,588,093.75 fails for lack of strict proof. I cannot award a specific sum of money as replacement cost when neither the cost of the item nor the fact of its total destruction has been proved by documentary evidence.

#### General Damages and Economic Sabotage

66. The Plaintiff claims general damages for economic sabotage and unfair trade practices.
67. In ***Peter Mark Gershom Ouma v Nairobi City Council [1976] KR 304***, the Court held that where a legal right is invaded, general damages may be awarded even without proof of specific pecuniary loss. The Court awards damages for the invasion of the legal right.
68. The Plaintiff has suffered the loss of use of its tools of trade for over seven years. This is a violation of its property rights under Article 40 of the Constitution. The detention of 4,425 cylinders from a smaller player in the market by a dominant player like the Defendant does have the effect of distorting competition, which the Energy Act and the Competition Act seek to prevent.
69. However, the term 'economic sabotage' suggests a malicious intent to destroy. The evidence here suggests a commercial dispute gone wrong. The Defendant

was attempting to recover a valid debt. The Plaintiff was refusing to pay. Both parties dug in their heels.

70. While I have found the detention post March 2017 to be unlawful, the Plaintiff's own conduct in defaulting on the debt and acquiescing to the initial arrangement significantly mitigates the Defendant's culpability. The Plaintiff is not a clean hands litigant.
71. Taking all factors into account, I find that an award of nominal general damages for the tort of detinue is appropriate to vindicate the Plaintiff's proprietary rights. I assess this at Kshs. 500,000/=. This figure aligns with awards in similar cases of wrongful retention of goods where special damages were not proved.
72. Accordingly, judgment is entered in the following terms:
- (i) A mandatory injunction is hereby issued compelling the Defendant to release and hand over to the Plaintiff all the 4,425 LPG Cylinders (comprising 2,528 6kg cylinders and 1,895 13kg cylinders), as is, currently in its possession within 30 days from the date of this Judgment.
  - (ii) The Plaintiff's claim for special damages of Kshs. 14,588,093.75.
  - (iii) The Plaintiff is awarded general damages for detinue in the sum of Kshs. 500,000/=.
  - (iv) On the counterclaim, Judgment is entered for the Defendant against the Plaintiff for the sum of Kshs. 6,732,922.22, being the outstanding debt.
  - (v) This sum shall attract interest at court rates from the date of filing the Counterclaim until payment in full.

- (vi) The monetary award in favor of the Plaintiff shall be set off against the monetary award in favor of the Defendant.
- (vii) The Defendant shall not levy execution for the monetary judgment until it has fully complied with Order (i) above.
- (viii) Each party shall bear its own costs of this suit.

**Dated and Delivered at Nairobi this 13 day of February 2026**

**HELENE R. NAMISI  
JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Plaintiff: Mr Kangethe  
For the Defendant: Mr Biko Angwenyi  
Court Assistant: Lucy Mwangi