



**Excellent Logistics Limited v OXX Energy Limited & another (Tribunal  
Case E031 of 2022) [2024] KEET 396 (KLR) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEET 396 (KLR)

**REPUBLIC OF KENYA  
IN THE ENERGY & PETROLEUM TRIBUNAL  
TRIBUNAL CASE E031 OF 2022  
D.K MWIRIGI, VICE CHAIR, B.H WASIOYA & F.S IBRAHIM, MEMBERS  
MARCH 26, 2024**

**BETWEEN**  
**EXCELLENT LOGISTICS LIMITED ..... CLAIMANT**  
**AND**  
**OXX ENERGY LIMITED ..... 1<sup>ST</sup> RESPONDENT**  
**ENERGY AND PETROLEUM REGULATORY AUTHORITY .... 2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

**Procedural History**

1. Excellent Logistics Limited (“the Claimant” or “ELL”) filed this Claim against Oxx Energy Limited (“the 1st Respondent” or “OEL”) and the Energy and Petroleum Regulatory Authority (“the 2nd Respondent” or “EPRA” or “the Authority”).
2. The Claimant is a limited liability company duly incorporated under the provisions of the Companies Act, Cap. 486, Laws of Kenya (repealed) with its registered office and principal place of business at Nairobi within the Republic of Kenya.
3. The 1st Respondent is a limited liability company duly incorporated under the provisions of the Companies Act, Cap. 486, Laws of Kenya (repealed) with its registered office and principal place of business at Nanyuki and elsewhere within the Republic of Kenya.
4. The 2nd Respondent is a body corporate established under Section 9 of the [Energy Act](#) No. 1 of 2019 with perpetual succession, a common seal and capable of suing and being sued in its own name.
5. Hearing of the case was scheduled to close on 8th February 2024, by which date the 2nd Respondent had not filed any response and following its application, parties by consent agreed to reopen the case.



Consequently the 2nd Respondent filed its response and called one witness who testified on 27th February 2024 and thereafter filed submissions dated 29th February 2024.

6. The Claimant and the 1st Respondent were given up to 11th March 2023 to file any further submissions in reaction to the 2nd Respondent's response and submissions. Both the Claimant and the 1st Respondent filed their supplementary submissions dated 8th March 2024.

## **B. CLAIMANT'S CASE**

7. The Claimant states that at all material times to this claim the Claimant was and still is the registered owner of the Trade Marks Nos. 84976 (E-GAS), 102003 (ENERGY GAS), 102004 (FAMIGAS), 102005 (UNIGAS), 102006 (254 GAS) all in class 4 (the said Trade Marks). As such, the Trade Marks are protected as well-known Trade Marks by virtue of section 15A of the [Trade Marks Act](#) (Cap 506), Laws of Kenya.
8. The Claimant has consistently and extensively used the said Trade Marks in East and Central Africa and particularly in Kenya, where the Marks have been used for liquefied petroleum gas (LPG) and other related products. As a result, its products have acquired great reputation and goodwill and have become well known and are associated with it.
9. Accordingly, when members of the public see branding or design promoted under or by reference to the words "E-GAS", "ENERGY GAS", "FAMIGAS", "UNIGAS" or "254 GAS" or anything strikingly similar thereto, they take the same to be goods of the Claimant and no other.
10. Sometimes in October, 2019 it came to the Claimant's knowledge and attention that the 1st Respondent in utter disregard and breach of business etiquette and trade practice, was infringing on the Claimant's registered Trade Marks.
11. The 1st Respondent was involved in unlawful collection of the Claimant's empty branded LPG cylinders from the market and thereafter refilling them before distributing and passing off the gas as the Claimant's for the 1st Respondent's own commercial benefit, without the consent of the Claimant.
12. Particulars of the infringement includes:
  - a. Unlawfully re-filling LPG into the Claimant's branded cylinders without prior written consent from the brand owner;
  - b. Engaging in wholesale or retailing of filled cylinders belonging to the Claimant without written consent from the brand owner;
  - c. Being in possession of LPG cylinders bearing the marking of the Claimant's brand without written consent from the brand owner;
  - d. Selling LPG cylinders belonging to the Claimant.
13. The illegal refilling and offering to the public of the Claimant's cylinders with LPG was calculated to:
  - a. Deceive consumers that the 1st Respondent's products are associated with the Claimant or that the Claimant has approved its activities, and amounts to the tort of passing off.
  - b. Mislead, and take unfair commercial advantage of the goodwill and reputation of the Claimant's well-known Trade Marks with a view to leading members of the public to believe that the 1st Respondent's LPG offered to the public is that of the Claimant, connected with



the Claimant, and/or offered in association or collaboration with the Claimant, contrary to the Trade Marks Act (Cap 506), Laws of Kenya.

14. At all material times of the 1st Respondent's aforesaid actions the Claimant was the proprietor of the aforesaid Trade Marks, which are very distinctive and well-known.
15. Subsequent to the Claimant's acquisition of proprietorship over the well-known Trade Marks, the 1st Respondent, unlawfully and without prior written consent from the Claimant, has been:
  - a. Engaged in re-filling LPG into cylinders for which the Claimant is the brand owner.
  - b. Engaged in wholesale and/or retailing of filled cylinders belonging to the Claimant.
  - c. In possession of LPG cylinders bearing the marking of the Claimant's brand.
  - d. Selling LPG cylinders bearing the marking of the Claimant's brand.
16. The foregoing illegal activities by the 1st Respondent have resulted in the general public being confused as to the origin of the LPG products marketed by the 1st Respondent and/or caused the public to believe that there is a connection between the 1st Respondent's LPG products and those of the Claimant which is, in fact, not the case.
17. The continuous illegal activities by the 1st Respondent have had grave consequences to the Claimant's business in that:
  - a. The 1st Respondent continues taking unfair advantage of the world-wide goodwill and reputation enjoyed by the Claimant's well-known Trade Marks;
  - b. There is a high likelihood of confusion among users of LPG in Kenya who are not able to identify the source of the products and related products when offered by two competing entities;
  - c. There is breach of all known tenets of consumer protection law, competition law and the Constitution of Kenya, which enshrine the consumer's right to be correctly informed of the origin of products and services.
18. The Claimant duly complained to the 2nd Respondent, in its capacity as the entity with statutory mandate to regulate the LPG industry, to invoke its powers and impose necessary sanctions against the 1st Respondent but the 2nd Respondent failed or ignored to take any action, thereby, by omission, aided and abetted the unlawful activities of the 1st Respondent.
19. The 2nd Respondent is therefore in breach of its statutory duty and has by necessary implication failed to protect the Claimant from unfair trade practices being perpetuated by the 1st Respondent.
20. Particulars of 2nd Respondent's breach of statutory duties include failing to:
  - a. Investigate the Claimant's complaints relating to the infringement of its Trade Marks by the 1st Respondent;
  - b. Investigate the Claimant's complaints relating to the passing off of its products by the 1st Respondent;
  - c. Take any action against the 1st Respondent for illegally refilling the Claimant's branded cylinders;
  - d. Issue any orders to stop the 1st Respondent from collecting and/or being in possession of the Claimant's cylinders;



- e. Enter and inspect the 1st Respondent's premises where the illegal refilling, storage and selling of the Claimant's cylinders is undertaken;
  - f. Impose any sanctions and/or fines against the 1st Respondent as shall be appropriate in the circumstances of the case.
21. The main complaint made by the Claimant against the 2nd Respondent is that the latter, despite having the statutory mandate to enforce the regulations under the [Energy Act](#) 2019, particularly those relating to illegal refilling and possession of cylinders, had failed to enforce the same and in the process exposed the Claimant to unfair trade practices perpetuated by the 1st Respondent.
  22. The Claimant has suffered loss amounting to KShs. 268,667,260.00 as at June 30, 2022, which it holds the Respondents herein jointly and severally liable.
  23. The Financial Loss was assessed by P. Mokeira of Yomlem Investments and broken down as detailed below:

Item Description Amount Demanded

1. Anti Counterfeit 33,437,340
  2. Trademarks 191,872,498
  3. Business Goodwill 29,500,000
  4. Advertisement and Marketing 4,235,396
  5. Unfair Competition 2,786,445
  6. Loss of Income from Gas Filling 3,833,136
  7. Loss of Income from Sale of Cylinders 216,000
  8. Market Loss 2,786,445
- Total 268,667,260

Each of the items is explained in the following paragraphs.

24. Under the [Anti-Counterfeit Act](#) the Claimant makes a claim of KShs. 33,437,340 being twelve times the value of 604 x 6kg and 39 x 13 kg ELL branded cylinders seized in the raid conducted by EPRA officers on the defendant's premises on the 14th May 2020. The assumption is that each of these cylinders should be refilled once every month hence the annual value of cylinders seized.
25. Under the Kenya [Trade Marks Act](#), it is an offence to sell any goods to which a registered trademark is falsely applied. ELL is the registered owner of below brands which were illegally held by the first defendant.
26. The Claimant therefore wishes to claim from the 1st Respondent KShs. 191,872,498 for illegally holding, filling and falsely using ELL registered trade mark through the cylinders found in their premises. The sum claimed is equal to the drop in sales for the year 2020 compared to 2019, which drop is attributable to loss of business from negative publicity and perception created to customers due to illegal sale of substandard and/or low quality gas by OEL using the Claimant's lawfully registered trademarks.
27. OEL took advantage of the Claimant's business goodwill which is the value found in our company's good name and recognition. The business assets of ELL in 2020 were KShs. 538,028,729 against the



- projected business cash flow for the next 12 months for the same period in 2021 at KShs. 567,528,729. The good will amount for the business is therefore KShs. 29,500,000.
28. Monthly advertisement and marketing expenses for the 604 x 6kg and 39 x 13 kg ELL branded cylinders found at the 1st defendant's premises would amount to KShs. 222,916 being 8% of the total value of cylinders recovered (i.e. KShs. 2,786,445). The marketing expenses from May 2020 to November 2021, a period of 19 months, amount to KShs. 4,235,396.
  29. The 1st Respondent engaged in deceptive business practices that economically harmed ELL through duping ELL customers that the gas being sold to them indeed originated from the Claimant's filling plant. ELL wish to claim from OEL KShs. 2,786,445 for unfair competition. The figure is based on the total value of the Claimant's cylinders found at the 1st Respondent's premises.
  30. ELL is seeking compensation for the loss of business income occasioned by the illegal holding of 655 ELL branded cylinders for a period of 19 months to November 2021.
  31. Normally, the Claimant's cylinders rotate in the market at least once a month from the time they are filled and released in the market till it comes back to the plant for the next refill. For the period of 19 months, the cylinders should have been filled 19 times. Consequently, given the profit of KShs 288 and KShs. 624 for the 6 kg and 13kg cylinders, respectively, the compensation demanded is KShs. 3,833,136.
  32. Thirty percent (30%) of the Claimant's total procured cylinders are normally sold to the first time clients who don't own cylinders every four months. This then means that ELL lost the opportunity to sell cylinders to the new customers since these cylinders have been held by OEL for more than 19 months. We demand compensation of KShs, 216,000 being the amount to have been realized because ELL projected that it would have sold all the cylinders within a period of 12 months.
  33. The Claimant demands a sum of KShs. 2,786,445 being market loss claim on account of its capacity and ability to penetrate the market to increase its market share being infringed by the 1st Respondent through illegally holding and its cylinders.
  34. The Claimant prays for judgment against the Respondents jointly and severally for:-
    - a. A permanent injunction restraining the 1st Respondent whether by itself servants, agents, employees and/or assigns, from trading, advertising, marketing, possessing the Claimant's empty branded LPG cylinders or cylinders closely resembling or incorporating the Claimant's Trade Marks.
    - b. A permanent injunction restraining the 1st Respondent whether by itself, servants, agents, employees and/or assigns, from trading in and/or from passing off the Respondent's LPG products or branding, advertising and related services as those of, sourced from or associated with the Claimant.
    - c. An order directing the 1st Respondent to immediately cease and desist from the use of any word/device, similar or identical to the Claimant's branded LPG cylinders or any manner incorporating the words similar to the Claimant's Trade Marks in relation to goods and services in Class 4 or in any manner howsoever.
    - d. An order directing the 1st Respondent to give an unconditional undertaking to the Claimant that it will not in anytime in future, use in Kenya or elsewhere any word/device similar or identical to the Claimant's Trade Marks or marks incorporating the words similar to Claimant's Trade Marks.



- e. An order directing the 1st Respondent to deliver up to the Claimant unconditionally and at its own costs all LPG cylinders, stationary, promotional materials, printed materials, advertising billboards and any other materials bearing or incorporating the Claimant's Trade Marks or any other mark confusingly similar to the Claimant's mark.
- f. An order directing the 1st Respondent to remove all references similar to the Claimants' TradeMark in relation to its property or business or any other dealings over the internet and social media websites.
- g. An order directing the 2nd Respondent to commence investigations into the 1st Respondent's illegal activities of refilling the Claimant's branded cylinders and thereafter passing them off as those of the Claimant.
- h. An order directing the 2nd Respondent to forthwith close down the 1st Respondent's premises where the illegal refilling, storage and selling of the Claimant's Cylinders is undertaken.
- i. General and Aggravated Damages against the Respondents.
- j. Costs of this Claim.
- k. Interest thereon.

### **C. First Respondent's Response And Counter-claim**

35. The 1st Respondent opposes the appeal by the Claimant and avers that:
- a. The claim is misconceived and a non-starter for want of particulars.
  - b. At all material times to this claim, the 1st Respondent and the Claimant were members of an association known as the Energy Dealers Association ("EDA" or "the Association").
  - c. Members of EDA entered into an agreement dated 1st July 2016, which agreement allowed parties to collect and re-fill LPG cylinders belonging to members from the market without any discrimination.
  - d. Parties to the agreement explicitly agreed to other members collecting their cylinders from the market and re-filling them. It is worth noting that the said cylinders are normally exchanged with a full cylinder at the point of purchase. This means that each member who held another member's cylinders did so in lieu of its own cylinders that were in the market.
36. Pursuant to the foregoing, the 1st Respondent has in its custody five hundred and twenty-three (523) 6kg and thirty nine (39) 13 kg LPG cylinders belonging to the Claimant which it collected from the market in exchange of its own cylinders when the Claimant was a party to the aforesaid agreement.
37. The Claimant therefore has an equivalent number of gas cylinders belonging to the 1st Respondent pursuant to the agreement dated 1st July 2016.
38. At unknown time, the Claimant left the Association and the agreement dated 1st July 2016. However, it did not inform other members and specifically the 1st Respondent of its departure. The 1st Respondent learnt of the Claimant's departure from the agreement unofficially and since then has not been collecting their cylinders from the market.
36. The coming into operation of Legal Notice Number 100 of 2019 did not in any way extinguish the members' obligations under the EDA agreement as alleged by the Claimant. The Claimant not



having officially withdrawn from the Association was bound by the terms of the agreement even after the coming into force of LN No. 100 of 2019.

37. The Claimant is well aware of the current situation as explained herein. In view of the fact that the 1st Respondent exchanged its own cylinders for the Claimant's cylinders in the market, the Claimant is well aware that it is required to reimburse the 1st Respondent the cost of the cylinders specified at paragraph 36 herein and collect the same from the 1st Respondent. However, the Respondent is not willing to reimburse the 1st Respondent.
38. The 1st Respondent has incurred storage charges of KShs. 150,000/- per month or part thereof which the Claimant should also settle prior to collecting the cylinders.
39. The 1st Respondent has never breached the Claimant's trademarks or passed them off. Indeed, the 1st Respondent is an established market player with its own trademarks that are doing better than the Claimant's. The Claimant's claim is misconceived and meant to ensure that the Claimant is unjustly enriched by failing to pay for the cylinders in the custody of the 1st Respondent.
40. The 1st Respondent therefore prays that the Claimant's claim be dismissed with costs and judgement be entered in favour of the 1st Respondent in terms of the following prayers:
  - a. A sum of KShs 4,350,000 being storage charges as at February 2023 and accumulating at KShs.150,000 per month or part thereof until payment in full.
  - b. Interest on (a) above at court rates until payment in full.
  - c. A sum of KShs 1,572,800 being the value of the five hundred and twenty-three (523) 6kg and thirty-nine (39) 13 kg LPG cylinders belonging to the Claimant which the 1st Respondent has in its custody.
  - d. Interest on (c) above at court rates until payment in full.
  - e. An order that upon payment of the sums claimed in paragraphs (a), (b), (c) and (d) above, the Claimant collects from the 1st Respondent the said cylinders within seven days failing which the 1st Respondent may dispose off the cylinders as uncollected goods.
  - f. In the alternative to prayers (a), (b), (c) and (d) above, a declaration do issue that the said five hundred and twenty three (523) 6kg and thirty nine (39) 13 kg LPG cylinders are the property of the 1st Respondent with effect from the date of this order and judgement be entered against the Claimant for a sum of KShs. 150,000 per month from September 2020 until the date of this order being storage charges.
  - g. Costs of and incidental to the original action and counter-claim with interest thereon.

#### **D. Second Respondent's Response**

44. The 2nd Respondent states that the complaint by the Claimant was brought to its notice vide letter dated 23rd April 2020, and consequently visited the 1st Respondent's facility on 14th May 2020 to assess the complaint.
45. The 2nd Respondent noted a dispute between the Claimant and the 1st Respondent regarding the cylinders exchanged pursuant to the EDA agreement and proceeded to engage both parties in a series of email conversations in a bid to amicably resolve the dispute.
46. It is the 2nd Respondent's position that the dispute emanated from the EDA agreement in which the Claimant was previously a member.





47. The 2nd Respondent vide an email dated 26th November 2020, instructed the Claimant to collect its empty cylinders from the 1st Respondent's premises in Nanyuki and in case of any challenge, the Claimant was required to inform the Authority.
48. On 2nd December 2020, the 2nd Respondent was served with a Complaint and accompanying documents dated 2.12.2020 wherein the 2nd Respondent was faulted for breach of its statutory duties to investigate and act upon the Claimant's complaint relating to the infringement of its trademark by the 1st Respondent.
49. The High Court on 6th October 2021 struck out the previous proceedings between parties and referred it to the Energy and Petroleum Tribunal as the proper body to determine the dispute.
50. The 2nd Respondent avers that the Energy Act, 2019 and the Energy (Complaints and Dispute Resolution) Regulations, 2012 stipulate various dispute resolution mechanisms to be employed in case a dispute is escalated to the 2nd Respondent.
51. In particular Section 11(i) of the Energy Act, 2019 gives the Authority mandate to investigate disputes or complaints between parties while the Energy (Complaints and Dispute Resolution) Regulations, 2012 state that such disputes ought to be referred to mediation.
52. It is the 2nd Respondent's position they were able to act on the Claimant's complaint expeditiously without any unreasonable delay through an impromptu visit to the 1st Respondent's premises on the 14th May 2022 to assess the nature of the complaint and resolve the dispute between both licensees.
53. The 2nd Respondent noted that there existed conflicts between the Claimant and the 1st Respondent over claims of unauthorized refilling which emanated from the EDA agreement where both were members.
54. Prior to the enactment of the Energy Act, 2019, the Energy Regulatory Commission was mandated under Section 80 of the Energy Act, 2006 to license any person conducting LPG business in Kenya.
55. Regulation 14 of the Energy (Liquefied Petroleum Gas) Regulations of 2009 made it mandatory for any person undertaking the business of filling and wholesale of LPG in cylinders to be a member of the LPG Cylinder Exchange pool and to accept or recognize for exchange of a cylinder belonging to another member.
56. However, the enactment of the Petroleum (Liquefied Petroleum Gas) Regulations, 2019, abolished the mandatory cylinder exchange pool, putting firms in charge of their cylinders following concerns of a rise in illegal refilling.
57. The 2nd Respondent in exercise of its powers under Section 11 (e) of the Energy Act, 2019 to make and enforce directions to ensure compliance with the Act and with the conditions of licences issued under the Act has on several occasions written to all the LPG dealers and brand owners to comply with the Energy Act, 2019 and subsequent regulations.
58. Vide letter dated 24th March 2022, the 2nd Respondent directed all LPG facilities and brand owners who are still in possession of the competitor cylinders and who are yet to collect their empty cylinder despite previous communication to declare and arrange for collection of the empty cylinders.
59. Vide the above stated letter, LPG owners were required to collect their branded cylinders from competitors within twenty-one days from the declaration date failure to which it will be assumed that the brand owner has forfeited the cylinders.





60. The 2nd Respondent's directives were not adhered to as the Claimant failed to report the progress of this matter.
61. Regulation 7 (1) of the Energy (Complaints and Disputes Resolution) Regulations, 2012 states that, in the event that any complaint is not resolved to the satisfaction of the complainant, after exhausting the complaints handling procedures established pursuant to Regulation 5, the parties may declare a dispute, and both or any of them may refer it to the Commission for recourse.
62. Regulations 9, 10 and 11 of the Energy (Complaints and Disputes Resolution) Regulations stipulates the process and procedure to be complied with by the parties in case of any dispute between the licensees and third parties.
63. The 2nd Respondent wishes to respond that the Claimant was disinclined to resolve the dispute using the available channels provided under the law.
64. The 2nd Respondent further avers that the dispute has only been reported once vide letter dated 23rd April 2020 to the Authority. The Authority has since conducted various surveillance inspections on the Claimant's and 1st Respondent's facilities on various dates.
65. Arising from the above stated surveillance inspections conducted on 16th and 18th November 2021, it was found that both the Claimant's and the 1st Respondent's premises were operating in accordance with the terms and conditions of their valid licences issued by the 2nd Respondent.
66. In exercise of its statutory mandate, the 2nd Respondent has heightened surveillance operations against LPG facilities to aid in consumer safety and has from time to time listed non-compliant facilities operating illegal LPG activities in the country.
67. The 2nd Respondent has further encouraged the public to report suspected cases of illegal LPG trade through the hotline number 0709 336 000 which is operational during official working hours, the Authority's USSD code (\*363#) and SMS service code (40850).
68. The 2nd Respondent continues to conduct periodic surveillance and enforcement operations in order to protect the LPG traders and consumers against the effects of the illicit trade of illegal refilling of rival LPG cylinders.
69. The 2nd Respondent is ready to work with the Claimant and the 1st Respondent to engage in crackdowns to end the war against illegal refilling of LPG in cylinders as enforcement is a continuous and boundless process.
70. The 2nd Respondent hereby avers that it has no statutory power to adjudicate over trademarks and intellectual property disputes.
71. The 2nd Respondent avers that the Claimant's Statement of Claim raises no allegations and is moot.
72. Any direction to award the orders prayed for by the Claimant or anything done or intended to be done in pursuance thereof would be prejudicial.
73. Without prejudice to the foregoing, the 2nd Respondent prays:
  - a. That this cause be dismissed and costs of the matter be provided for.
  - b. For any other orders as the Honorable Tribunal may deem just and fit to grant.
74. In its submissions dated 29th February 2024, the 2nd Respondent reiterated the particulars of its breach of statutory duties as alleged by the Claimant, being failure by the 2nd Respondent to:



- a. Investigate the Claimant's complaints relating to the infringement of its Trade Marks by the 1st Respondent;
  - b. Investigate the Claimant's complaints relating to the passing off of its products by the 1st Respondent;
  - c. Take any action against the 1st Respondent for illegally refilling the Claimant's branded cylinders;
  - d. Issue any orders to stop the 1st Respondent from collecting and/or being in possession of the Claimant's cylinders;
  - e. Enter and inspect the 1st Respondent's premises where the illegal refilling, storage and selling of the Claimant's cylinders is undertaken;
  - f. Impose any sanctions and/or fines against the 1st Respondent as shall be appropriate in the circumstances of the case.
75. The 2nd Respondent then identified two issues for determination, being:
- a. Whether the Claimant has exhausted the dispute resolution mechanisms as envisaged under the Energy Act, 2019.
  - b. Whether the Authority has performed its statutory duty.

**(A) Whether the Claimant has exhausted the dispute resolution mechanisms as envisaged under the Energy Act, 2019**

76. It is evident that the nature of allegations against the 1st and 2nd Respondent arose from a complaint reported to the 2nd Respondent vide letter dated 23rd April 2020.
77. The 2nd Respondent acted expeditiously without any unreasonable delay through an impromptu visit to the 1st Respondent's premises on the 14th May 2022 to assess the nature of the complaint and resolve the dispute between both licensees.
78. The 2nd Respondent vide an email dated 26th November 2020, instructed the Claimant to collect its empty cylinders from the 1st Respondent's premises in Nanyuki and in case of any challenge, the Claimant was required to inform the Authority. However, the Claimant never provided any response or feedback to the 2nd Respondent.
79. The Claimant did not exhaust the Dispute Resolution Mechanisms set out in Energy Act, 2019 and Energy (Complaints and Disputes Resolution) Regulations, 2012. The Claimant's decision to institute these proceedings in this court amounts to forum shopping and is an abuse of court process.
80. The 2nd Respondent submits that the Claimant has come before the Tribunal without exhausting the alternative remedies available to them. Exhaustion of alternative remedies is a constitutional imperative under Article 159 (2)(c) of the Constitution and it has also been exemplified by emerging jurisprudence on the subject.
81. The doctrine of exhaustion of alternative remedies was further explained by the Court of Appeal in *Geoffrey Muthinja Kabiru and 2 Others vs. Samuel Munga Henry and 1756 Others* (2015) eKLR as follows:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be for of



last resort and not the first port of call the moment a storm brews. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. The Ex Parte Applicants argue that this accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution.”

**(B) Whether the Authority has performed its statutory duty**

82. Under the Energy Act, 2019, the 2nd Respondent:
- a. is mandated to license all LPG dealers and regulate the trade and distribution of LPG in Kenya;
  - b. is mandated to investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions;
  - c. possesses extensive powers, including the mandate to enforce directions ensuring compliance with the Energy Act and regulations thereunder.
83. Be that as it may, the 2nd Respondent is vested with the ability to utilize negotiated compliance, particularly noteworthy as of the year 2020 when the Claimant lodged the complaint, given the relative novelty of the LPG regulations to industry users.
84. Negotiated compliance serves as a mechanism to foster mutually agreeable resolutions and settlements through dialogue and discussions between the Regulator, licensees and other stakeholders. This collaborative approach is designed to address regulatory compliance issues in a manner that upholds principles of fairness, transparency and efficiency, thereby supporting the effective operation of the regulatory framework established by the Act.
85. The aforementioned approach was applied in the matter involving the Claimant and the 1st Respondent, as evidenced by the letter provided by the 2nd Respondent to all LPG dealers on the 24th of March 2022.
86. The contents of the mentioned letter were explicit, requiring all LPG dealers to disclose competitor cylinders in their possession. This directive is in line with the Petroleum (Liquefied Petroleum Gas) Regulations, 2019, which prohibits unauthorized refilling of LPG cylinders belonging to other brand owners without the necessary consent.
87. Additionally, the letter specified that LPG dealers unable to release competitor cylinders were obligated to provide reasons for retaining such cylinders. Failure to retrieve branded cylinders from competitors would result in the assumption that the licensee had forfeited their right.
88. The 2nd Respondent submitted that the Claimant failed to adhere to the directives outlined in the aforementioned letter and the email dated 26th November 2020 and hastily approached the court for alternative remedies in a matter where the 2nd Respondent has already issued instructions.
89. Additionally, the Claimant has failed to present any evidence indicating their compliance with the directive to return competitor cylinders to other market participants. Consequently, there is a necessity for negotiated compliance and a harmonious resolution of the dispute between the Claimant and the 1st Respondent.
90. It was submitted that the 2nd Respondent has fulfilled its statutory mandate and cannot be criticized. The alleged faults listed by the Claimant are thus mere conjecture with no substantial foundation.



## E. Claimant's Supplementary Submissions

91. The Claimant herein had filed its submissions on 21st February, 2024, following the conclusion of the hearing of this case on February 7, 2024. It is imperative to note that at the time the Claimant filed the said submissions, the hearing of the case had closed without the participation of the 2nd Respondent.
92. However, following an Application by the 2nd Respondent, the parties by consent agreed to reopen the case and consequently the 2nd Respondent called its witness who testified on 27th February, 2024. The 2nd Respondent thereafter filed its submissions dated 29th February, 2024.
91. The instant submissions are therefore meant to address and respond to the legal issues raised in the testimony and submissions of the 2nd Respondent.
92. In analyzing the evidence presented to this Tribunal, it is imperative to consider the nature and extent of complaints made by the Claimant against the 2nd Respondent and weigh them against the rebuttal of the latter to appreciate whether the Claimant has proved its case to the required standards.
93. PW 1 in his evidence narrated to the court the chronology of the complaints that began in 2019 after they noticed decline in the sales of their branded gas cylinders and set up a field team.
94. The field team then received information that the 1st Respondent was in possession of Claimant's LPG cylinders and which it was illegally refilling and selling to the customers within Nyeri and Laikipia Regions.
95. They reported the matter to EPRA who informed them that their officers had raided the 1st Respondent's premises and indeed found their branded cylinders stored there without their express consent or knowledge.
96. The Claimant then dispatched its Head of Security (PW 2) to visit the premises and he found that whereas some of the cylinders had been damaged/defaced/counterfeited, the rest were in good condition. However, since the matter was now actively being handled by EPRA they left the cylinders in the premises expecting that once an inventory had been taken and evidence gathered the 2nd Respondent would prefer criminal charges against the 1st Respondent and that they would be called as witnesses at the appropriate time to testify at such a trial.
97. Within the same month the Claimant discovered that the 2nd Respondent had unlawfully been issuing their competitors with licences authorizing them to store and offer for wholesale their branded LPG Cylinders. That was when the Claimant realized that the reason their sales were declining was because their competitors were illegally refilling and selling LPG in their branded cylinders.
98. On 21st November 2019 the Claimant wrote to the Director General EPRA seeking an explanation as to why he was licensing the Claimant's competitors to undertake wholesale of LPG in cylinders belonging to a brand owner without the prior written consent of the brand owner submitted to the Authority. That letter was served upon the Director General's Office on the same date. However, the 2nd Respondent neither responded nor revoked the licences and thus the illegal refilling continued unabated.
99. On 11th December 2019, the Claimant received a letter from EDA purporting to respond to the complaint written to EPRA. This was despite the fact that the letter to the 2nd Respondent had neither been copied to EDA nor raised any issue touching on the Association to warrant their unsolicited involvement.



100. EDA demanded that the Claimant formally withdraws the complaint made to EPRA within seven days or risk its membership to the Association terminated.
101. Meanwhile despite “the raid” carried out in November 2019 in the 1st Respondent’s premises the 2nd Respondent did not prefer any criminal charges against the culprit but had instead allowed it to remain with the cylinders. The action continued causing huge losses to the Claimant’s business as they were now facing shortage of empty cylinders to refill and sale to their customers.
102. On 6th March 2020 the Claimant wrote to EPRA requesting for their permission to collect their empty cylinders recovered during the raid and which for inexplicable reasons had remained in the 1st Respondent’s premises all this time. This would go down to mitigate the business losses the Claimant was incurring and also allow them put the cylinders in the market.
103. No response came from the 2nd Respondent and it now became apparent that EPRA was unwilling and reluctant to charge the 1st Respondent in court with the offence of illegal refilling and offering for sale branded cylinders without consent of the brand owner.
104. On 9th March 2020, the Claimant received a letter from EDA addressed to EPRA informing the Authority that the Claimant had ceased membership of the Association and should desist from refilling and trading in EDA members cylinder brands.
105. In the meantime, the 1st Respondent having been emboldened by the inaction of EPRA, continued with increased vigor and impunity in its illegal activities of refilling and selling the Claimant’s branded cylinders.
106. On 24th March 2020, the Claimant’s Head of Security encountered the 1st Respondent’s truck Registration Number KCS 241Z loading E-Gas cylinders at a gas retail shop in Naromoru town trading under the name of Black B Electronics.
107. The Claimant upon learning of the aforesaid illegal activities once again informed the 2nd Respondent, in its capacity as the Industry Regulator, to investigate the matter with the expectation that the Regulator would take appropriate action including raiding the premises where the cylinders were being stored and/or refilled and thereafter prosecute the 1st Respondent as required by the law.
108. No action was taken against the 1st Respondent prompting the Claimant to write a protest letter to the 2nd Respondent complaining against the perceived protection the Authority was according the Claimant’s competitors and thus giving them unfair advantage over the Claimant.
109. The Claimant also demanded that if the Authority was unable or unwilling to crack the whip, then to allow the Claimant also to refill all brands of cylinders so that they can exert some semblance of leverage against the unscrupulous traders enjoying EPRA protection.
110. On 14th May, 2020 following the Claimant’s relentless complaints to EPRA and with the evidence gathered thus far, its field team led EPRA officers, Mr. Richard Kiranka and Ms. Brigid Bosibori from Nyeri, who raided the 1st Respondent’s premises in Nanyuki.
111. On accessing the 1st Respondent’s facility they found hundreds of empty E-Gas cylinders at their yard and also six (6) 6kg cylinders that had been illegally refilled and were ready for dispatch among other cylinders belonging to other companies like Afrigas, Total and K-Gas. These refilled cylinders had been loaded into another truck Registration Number KCW 421H belonging to the 1st Respondent.
112. It should be noted that the same Mr. Richard Kiranga who conducted the raid was the witness called by 2nd Respondent at the hearing. In his cross-examination he denied that they had raided the premises



but instead stated that they had conducted a routine inspection and found empty branded cylinders belonging to the Claimant.

113. When asked to produce an Inventory or Site Visit Form of what was found in the premises, the witness stated that he did not have it.
114. Interestingly at paragraph 8 (b) in his statement, the witness admits that in reaction to the Claimant's complaint they visited the 1st Respondent to assess the complaint but despite alluding to an alleged Site Visit Report purportedly marked "EPRA 3", no such document was annexed.  
  
Incidentally, on the document filed and served, the page is blank. The omission cannot be accidental but a deliberate and conscious decision not to avail it as its production probably would have been injurious to the 2nd Respondent's claims.
91. It should be noted that whereas the witness told the Tribunal that their visit to the 1st Respondent's facility was normal routine inspection, in his statement he said that they went to assess the complaint by the Claimant.
92. The question that then remains unanswered becomes where is their finding or report of that visit?
93. The Claimant's witness (PW 2) who accompanied the 2nd Respondent's officials and was present during the visit to the 1st Respondent's premises on 14th May 2020 told the court they had just entered the premises when the two officers received a call from EPRA Nairobi and ordered to leave.
94. He told the court that no arrest or confiscation of the branded cylinders was made or any action taken against the 1st Respondent then or even thereafter hence the present claim.

## **F. Analysis And Determination**

121. Having considered the documents on record and submissions made by both the Claimant and the 1st and 2nd Respondents herein as well as the law, we have established that the issues for determination are:
  - a. Whether the 1st Respondent was involved in unlawful collection of the Claimant's empty branded LPG cylinders from the market, refilling them as well as distributing and passing off the gas as the Claimant's.
  - b. Whether the 2nd Respondent is in breach of its statutory duty by failing or ignoring to take any action, thereby, by omission, aiding and abetting the unlawful activities of the 1st Respondent.
  - c. Whether the Claimant is entitled to all or any of the reliefs sought in its Claim.

### **(A) Whether the First Respondent is involved in illegal activities of collection of the Claimant's empty branded LPG cylinders from the market, refilling them as well as distributing and passing off the gas as the Claimant's.**

122. It is not disputed that the 1st Respondent was found to be in possession of five hundred and twenty-three (523) 6kg and thirty nine (39) 13 kg LPG cylinders belonging to the Claimant.
123. It is the 1st Respondent's contention, which the 2nd Respondent agrees with, that they acquired the subject cylinders when both the 1st Respondent and the Claimant were members of EDA and signatories to an agreement dated 1st July 2016 that allowed any member of the CA Association to collect and re-fill LPG cylinders belonging to other members from the market without any discrimination.





122. The 1st Respondent goes on to state that at an unknown time, the Claimant left the Association but did not inform other members and specifically the 1st Respondent of its departure. After the 1st Respondent unofficially learnt of the Claimant's departure from EDA, it stopped collecting the Claimant's cylinders from the market.
123. In addition, the 1st Respondent avers that the Claimant is well aware that it is required to reimburse the 1st Respondent the cost of the subject cylinders and collect the same from the 1st Respondent which the Claimant is reluctant to do.
124. The 2nd Respondent states that on 26th November 2020, they instructed the Claimant to collect its empty cylinders from the 1st Respondent's premises in Nanyuki and in case of any challenge, the Claimant was required to inform the Authority. That instruction was not complied with, neither did the Claimant revert to the Authority.
125. Those activities which were at the centre of the Claimant's complaint would, if proven, be punishable in accordance with Section 99 of the Petroleum Act, 2019 which provides that:
  - (1) A person who
    - (a) (b)
    - ..
    - (m) refills, rebrands, trades or otherwise deals with liquefied petroleum gas cylinders of another licensee for gain without the said licensee's prior written consent commits an offence and shall on conviction, be liable to a fine of not less than ten million shillings, or a term of imprisonment of not less than five years, or to such fine and imprisonment.
  - (2) A person who attempts to do any such thing as mentioned in subsection (1) commits an offence and shall on conviction, be liable to a fine of not less than
    - (a) ....
    - (b) five million shillings, or a term of imprisonment of not less than five years, or to such fine and imprisonment.
128. As demonstrated by the Claimant in its Supplementary Submissions at paragraphs 114 to 118 herein above, the 1st Respondent was involved in illegal activities of collection of the Claimant's empty branded LPG cylinders from the market, refilling them as well as distributing and passing off the gas as the Claimant's.

**(B) Whether the 2nd Respondent is in breach of its statutory duty by failing or ignoring to take any action, thereby, by omission, aiding and abetting the unlawful activities of the 1st Respondent.**

129. Perusal of the documents on record reveals that whereas the matter before the Tribunal emanates from the Claimant's letter to the 2nd Respondent dated 23rd April 2020, unlawful activities in the LPG industry were brought to the 2nd Respondent's attention by the Claimant vide letter dated 21st November 2019.
130. However, there is no record of any action by the 2nd Respondent pursuant to its powers under Section 11 (i) to (o) of the Energy Act, 2019. Those provisions empower the Authority to:
  - i. investigate and determine complaints or disputes between parties over any matter relating to licences and licence conditions under this Act;





- j. enter, inspect and search any premises where an offence is being committed or is suspected to have been committed;
- k. issue orders or directions to ensure compliance with this Act;
- l. impose such sanctions and fines not exceeding one hundred thousand shillings per violation per day for a maximum of thirty days;
- m. enter, inspect and search any premises at which any undertaking relating to petroleum operations is carried out or an offence is being committed or is suspected to have been committed;
- n. issue orders either requiring acts or things to be performed or done, prohibiting acts or things from being performed or done, and may prescribe periods or dates upon, within or before which such acts or things shall be performed or done or such conditions shall be fulfilled in furtherance of its powers under the law relating to petroleum;
- o. impose such sanctions and civil fines not exceeding five hundred thousand shillings per violation per day to secure compliance with orders issued under the law relating to petroleum.

131. In the subject letter dated 23rd April 2020, the Claimant:

- a. Raised concerns about the Claimant's cylinders being illegally refilled by their competitors, with protection by the 2nd Respondent's staff.
- b. Reiterated that the 2nd Respondent was aware that the Claimant was no longer a member of EDA.
- c. Demanded that the 2nd Respondent stops the Claimant's competitors from refilling its cylinders, and arrests and prosecutes them accordingly.

132. The 2nd Respondent in their reply and submissions stated that the dispute regarding the possession of the Claimant's cylinders by the 1st Respondent originated from the fact that, for some time, both parties belonged to EDA and were signatories to an agreement that allowed exchange of cylinders amongst members of the Association.

133. From the Claimant's letter to EDA dated 17th December 2019 and another one dated 14th February 2020 to EDA and copied to the 2nd Respondent, it was apparent that the Claimant was no longer a member of the Association and that unlawful activities in the LPG industry were going on. As noted in paragraph 130, there is still no record of any action by the 2nd Respondent in connection with the said illegal activities.

134. In reaction to the Claimant's letter dated 23rd April 2020, the 2nd Respondent states that they: (a) Proceeded to engage both parties in a series of email conversations in a bid to amicably resolve the dispute.

- b. Acted on the Claimant's complaint expeditiously without unreasonable delay through an impromptu visit to the 1st Respondent's premises on the 14th May 2022 to assess the nature of the complaint and resolve the dispute between both licensees.
- c. Instructed the Claimant on 26th November 2020 to collect its empty cylinders from the 1st Respondent's premises in Nanyuki and in case of any challenge, the Claimant was required to inform the Authority.



135. On record are two emails regarding the 2nd Respondent's instructions for the Claimant to collect their cylinders from the 1st Respondent. Both emails are dated 26th November 2020, a whole 217 days after the 2nd Respondent received the Claimant's complaint.
136. Even if that instruction were to be considered a determination of the complaint, it is in our view, too little too late, in so far as it:
- a. Only addressed possession by the 1st Respondent of the Claimant's cylinders, but was silent on other matters complained of in the subject letter, including alleged illegal refilling of those cylinders and the consequences thereof.
  - b. Was made way out of the statutory timelines provided in Section 23 (1) of the Energy Act, 2019, rendering it a nullity.
137. In another letter dated 6th March 2020 and received by the 2nd Respondent on 9th March 2020, the Claimant informed EPRA that it had been notified that the 2nd Respondent's officers had in November 2019 raided the premises of the 1st Respondent and found the Claimant's and other competitors' cylinders thereat, without the brand owners' consents.
138. The letter goes on to state that those illegal activities by the 1st Respondent were causing huge business losses to the Claimant due to unavailability of their cylinders to their customers.
139. There is no record of the 2nd Respondent's reaction to the Claimant's letter dated 6th March.
140. It becomes our irresistible conclusion that the 2nd Respondent failed or ignored to take appropriate action against the 1st Respondent as by law required, thereby, by omission, aiding and abetting the illegal activities of the 1st Respondent.

**(C) Whether the Claimant is entitled to all or any of the reliefs sought in its Claim.**

141. The Claimant, through the witness statement by its Director Mr. Fredrick Ngugi Ndungu, prays for General and Aggravated Damages as at 30th June 2022 amounting to KShs. 268,667,260 as itemized in eight headings under paragraph 23 herein above.
142. The first item falls under the Anti-Counterfeit Act where the Claimant makes a claim of KShs. 33,437,340 being twelve times the value of 604 x 6kg and 39 x 13 kg ELL branded cylinders seized in the raid conducted by EPRA officers on the 1st Respondent's premises on the 14th May 2020. The Tribunal disallows the multiplier of 12, reducing the award under this item to KShs. 2,786,445.
143. The second item relates to the Kenya Trade Marks Act, arising from which, the Claimant claims from the 1st Respondent KShs. 191,872,498 for illegally holding, filling and falsely using ELL cylinders found in the 1st Respondent's premises. The sum claimed is equal to the drop in sales for the year 2020 compared to 2019, which drop the Claimant attributes to loss of business from negative publicity and perception created to customers due to illegal sale of substandard and/or low quality gas by OEL using the Claimant's lawfully registered trademarks.
144. It is common knowledge that incomes from businesses fluctuate over years for various reasons. It is highly unlikely that the drop of KShs. 191,872,498 was solely on account of the reasons given, and in any case the Claimant has not proven the alleged substandard and/or low quality gas by OEL. This claim is therefore disallowed.
145. The third item in the claim for KShs 29,500,000 relates to the 1st Respondent taking advantage of the Claimant's business goodwill. The Tribunal is not persuaded by the Claimant that this is a valid claim.



146. Fourthly, the Claimant claims advertisement and marketing expenses of KShs. 222,916 per month for the 604 x 6kg and 39 x 13 kg ELL branded cylinders found at the 1st Respondent's premises for a period of 19 months, amounting to KShs. 4,235,396. The Tribunal is not persuaded by the Claimant that this is a valid claim.
147. The fifth item in the claim relates to unfair competition, whereby the Claimant demands KShs. 2,786,445 on the allegation that the 1st Respondent engaged in passing off its gas if it originated from the Claimant's filling plant.
148. The sixth item regards Loss of Income from Gas Filling, whereby the Claimant states that each of its cylinders rotates in the market at least once a month from the time they are filled until they come back to the plant for the next refill. For this the Claimant demands KShs. 3,833,136, which we find too ambitious, and are of the view that half of that amount, KShs. 1,916,063 is more realistic.
149. The seventh item in the claim relates to Loss of Income from Sale of Cylinders on the premise that, every four months, thirty percent (30%) of the cylinders procured by the Claimant total are normally sold to the first time customers who don't own cylinders. The Claimant projects that it would have sold all the cylinders in the custody of the 1st Respondent in twelve months, making profits of KShs. 300 and KShs. 800 on the 6kg and 13kg cylinders, respectively to realize a total of KShs. 216,000.
150. The final item in the claim relates to Market Loss whereby the Claimant demands a sum of KShs. 2,786,445 on account of reduction of its capacity and ability to increase its market share by the 1st Respondent through illegally holding its cylinders.
151. In the final analysis, the Tribunal allows the Claimant's demand from the 1st Respondent of General and Aggravated Damages as at 30th June 2022 amounting to KShs. 10,491,398.

## **G. DISPOSITION**

152. In the end therefore, having given due consideration to the pleadings and submissions on record, and the law, and taking into account the circumstances of this case, the Tribunal finds that:
  - a. The 1st Respondent was involved in illegal activities of collection of the Claimant's empty branded LPG cylinders from the market, refilling and distributing them and passing off the gas as the Claimant's.
  - b. The 2nd Respondent failed or ignored to take appropriate action against the 1st Respondent as by law required, thereby, by omission, aiding and abetting the illegal activities of the 1st Respondent.
153. The Tribunal therefore makes the following orders:
  - a. The 1st Respondent to deliver up to the Claimant unconditionally and at its own costs all LPG cylinders in its custody belonging to the Claimant.
  - b. The 1st Respondent to pay the Claimant General and Aggravated Damages amounting to KShs. 10,491,398 as at 30th June 2022.
  - c. The costs of the Claimant to be borne equally by the 1st and 2nd Respondents.

**DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 2024.**

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**MS. DORIS MWIRIGI - VICE CHAIRPERSON**



.....

**ENG. BUGE HATIBU WASIOYA MEMBER**

.....

**MR. FEISAL SHARIFF IBRAHIM - MEMBER**

