IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: GITHINJI, AZANGALALA & J. MOHAMMED, JJ.A.)

CIVIL APPLICATION NO. SUP 9 OF 2015

BETWEEN

GLENCORE ENERGY (U.K.) LIMITED..... APPLICANT

AND

KENYA PIPELINE COMPANY LIMITED…..... RESPONDENT

(Being an application by the Respondent in Civil Appeal No. 67 of 2014 for a certificate that a matter of general public importance is involved pursuant to Article 163(4) of the Constitution

in Civil Appeal No. 67 of 2014)

RULING OF THE COURT

[**1**] This is an application under **Article 163(4) (a)** and **163(4)(b)** of the **Constitution** and **Rule 31** of the **Supreme Court Rules** for certification that the applicant's intended appeal involves matters of general public importance and that the applicant may lodge an appeal to the Supreme Court against the whole of the judgment of this Court in **Civil Appeal No. 67 of 2014**.

The application is supported by the grounds on the body of the application and by the affidavit of **Andrew Gibson,** a Director of **Glencore Energy U.K. Limited**, the applicant herein.

The application is opposed by the respondent on the grounds contained in the replying affidavit sworn by **Stanley Manduku** – the Acting Company Secretary of the respondent.

[**2**] The applicant is an international commodity company incorporated and carrying on business in the United Kingdom. The respondent owns, maintains and operates a system of pipeline, receipt, storage and transportation of petroleum products imported into Kenya by various oil companies.

By a **Transportation and Storage Agreement (TSA**) dated 8th December, 2001, made between **Triton Petroleum Company Limited** (**Triton**) and the respondent, the respondent agreed to receive, store and/or transport petroleum products imported into Kenya and to deliver them to Triton on terms and conditions contained in the said Agreement. By a **Collateral Financing Agreement** (**CFA**) dated 7th July 2004, made between Triton and the respondent, the parties agreed in effect, that with a view to facilitate the financing by financiers of the purchase and importation of Triton's petroleum products and their storage by the respondent pursuant to TSA, the respondent would only release the petroleum products from its custody on the express instructions of the authorised signatories of such financiers and, that, in

the meantime, the respondent would issue to financiers regular statements of such financers' entitlements at agreed specified intervals.

[**3**] The applicant averred in the plaint that following the CFA, it agreed to and did finance the purchase from it by Triton, of the specified quantities of petroleum products and that pursuant to the CAF, the respondent, by a letter dated 21st December, 2006 recognized the applicant as the sole signatory for purposes of CFA and acknowledged that any release and/or transfer of petroleum products deposited in its facility and financed by the applicant shall be made by the respondent only upon receipt of the written authorization from the applicant. The applicant further averred in effect, that out of 72,284 metric tons (mts) deposited into the respondent's facility on various occasions, the respondent effected deliveries from time to time on the applicant's instructions leaving a balance of

31,752.9 mts which respondent held in its custody as bailee to the applicant's order and which quantity the respondent ultimately denied holding.

[**4**] The applicant's claim against the respondent was for a declaration that it had title to and an immediate right of possession to 31,752.39 mts and that the respondent as bailee of the said quantity was bound to hold the same to the applicant's order. In the alternative, the applicant claimed for immediate delivery and damages for breach of duty by the respondent as bailee, or for conversion of 31,752.39 mts.

[**5**] By its amended defence the respondent admitted entering into the TSA and CFA with Triton but averred that the ownership of the petroleum products under provisions of Clause 4.2 of TSA remained vested in Triton. The respondent denied knowledge of the financing transactions between the applicant and Triton but admitted confirming the contents of the letter dated 21st December, 2006 save that the letter contained terms and conditions offered by Triton to the respondent. The respondent further denied that it received petroleum products as a bailee of the applicant and averred that in the light of provision of Section 80 (1) of the Energy Act by which the applicant was prohibited from conducting the business, inter alia, of importation, exportation, wholesale and retail and transportation of petroleum products, any delivery of petroleum products could only have been effected to Triton.

As regards the claim for delivery of 31,752.39 mts, the respondent pleaded that the petroleum products were released upon instruction by Triton in its capacity as the owner of the products under the TSA or alternatively, as joint bailor with the applicant.

[**6**] Upon hearing the evidence and the submissions of the respective counsel, the High Court identified four main issues for determination viz:

a. Whether at all times ownership of the suit product remained in Triton.

b. whether the defendant attorned in wiring as bailee to the plaintiff on the terms that it would hold in storage the petroleum products the suit product herein to the order of the plaintiff and that the plaintiff had sole authority to release the said products from such storage.

c. Whether the plaintiff is precluded from claiming delivery of the suit products by reason of section 80 of the Energy Act.

d. whether the defendant is liable to the plaintiff to pay the value of the said 31752.39 metric tons in the sum of US Dollars 40,330,379.75.

On the first issue, the court relying on Clause 4.2 of the TSA made a finding that ownership remained in Triton. On the second issue, the court after reviewing the relevant law and having regard to the respondent's confirmation in writing of the terms and conditions of the Triton's letter dated 21st December, 2006 made a finding that the respondent was a bailee of the applicant by virtue of bailment by attornment. On the 3rd issue, the court made a finding of fact that Triton was involved in importation while the applicant only came in as a financier; that Triton made delivery of the petroleum products to the

respondent for the transport and storage, and concluded that the applicant was not guilty of any illegality under Section 80 of the Energy Act.

On the last issue, the court made a finding that the respondent was liable and ultimately entered judgment for the appellant for USD 40,330,389.75 with interest at 3% from the date of filing suit and thereafter at court rates from date of judgment until payment in full.

[**7**] The respondent appealed to this Court against the judgment and decree on grounds that the High Court erred by, *inter alia*,

a. holding that the appellant was a bailee of the respondent by attornment and a bailee for Triton.

b. holding that the respondent was merely the financier of Triton.

c. failing to appreciate that any bailment by attornement in the respondent's favour would be contrary to express provisions of section 80 of the Energy Act.

d. …..

e. failing to appreciate the respondents own witness testimony to the effect that it retained title and ownership and in fact traded and was paid contrary to express provisions of the Energy Act.

f. …..

g. …..

The applicant filed a notice of the grounds for affirmation of the decision of the High Court to the effect that Section 80 of the Energy Act could not be so construed as to lead to arbitrary deprivation of the respondent's property in gas oil without compensation contrary to Article 40(2) and (3) of the Constitution or in a manner which would lead to unjust enrichment of the appellant, its agents or representatives.

[**8**] The appellate court after hearing submissions by respective counsel concluded that the central issue in the appeal was the relevance and consequence of the application of Section 80 of the Energy Act to the transactions in dispute and added:

> ***"There is no denying, however that all the issues raised such as the ownership of the oil in question as well as whether there was bailment by attornment are not only relevant to the consideration of the question of illegality, but are ultimately trumped by it, should it be found to exist."***

[**9**] Section 80(1) aforesaid provides:

> ***"A person shall not conduct a business of importation, refining, exportation, wholesale, retail, storage or transportation of petroleum except under and in accordance with the terms and conditions of a valid licence".***

The Court considered the TSA including Clause 4.2 thereof, CFA, the letter of 21st December, 2006 by Triton, the documentation relating to deliveries of petroleum products in issue including bills of lading, crafted and supplied by the applicant and analyzed the transactions involving oil products delivered and concluded in part:

> ***"It seems clear to us that the actual importation of gas oil in Kenya was done by the respondent. We have not been shown nor have we been able to find any documents showing that Triton did the actual importation. Once the oil was offloaded its storage at the appellant's facility was facilitated by the TSA between Triton and the appellant. While in tank the***

respondent had full rights to the gasoil, and from its own documentation, it reserved the right of disposal.

No evidence of any kind was placed before the trial court to show that the title even passed to Triton. Indeed, all the documents show that from the consignment we have endevoured to trace in detail herein which was typical of others; the sale was directly from the respondent to Total Kenya…….

All indications are that the respondent was the owner, held title to and sold oil products directly to Total Kenya without any real sale to Triton. All references to Triton as a buyer are easily falsified as being merely decorative as it did not have title to and appears not to have made any payments for oil products….

Triton was no more than a conduit and facilitator of the entry of the respondent's products into the appellant's system. Triton described itself to the appellant as owner and held itself out to be the owner and was so referred to by the respondent, but in point of fact and in the eyes of the law, the true efficacious title holder and owner was the respondent."

[**10**] Having so found the Court faulted the trial judge's finding that oil products belonged to Triton. The court next considered the issue of illegality and concluded:

"We are amply satisfied that by an elaborate scheme hatched and executed by itself while using Triton as a front, cover and cloak, the respondent entered and traded in the Kenyan oil market without a licence, a fragrant illegality. That illegality defeats all its claims herein against the appellant…."

On the issue of bailment by attornment, the court said that the finding on the true ownership and illegality had disposed of the issue. It, however, observed that it agreed with the law on bailment by attornment as propounded in the authorities cited but was of the view that the authorities were of no assistance to the respondent's case in the circumstances.

On the submission that the rejection of the applicant's plea would be tantamount to unconstitutional deprivation of property, the Court stated that the Constitution cannot protect rights supposedly acquired through violation of the law. The upshot was that the appeal was allowed with costs.

[**11**] The applicant has formulated in the application and in the written submission the issues which it considers to be of general public importance as hereunder:

i. Whether the doctrine of incorporation of terms by reference applies to Kenya. It is submitted that it is a matter of general public importance as to whether incorporation by reference is part of the law of Kenya or as found by the Judge in the judgment, the terms must be expressly incorporated and only bind the immediate parties to the contract and that the meaning and interpretation of section 3(5) of the Law of Contract Act which enacts the common law principles of incorporation by reference will have to be considered.

ii. Ownership and title – it is submitted that whether ownership of goods in a Sale of Goods Contract is dependent on title to the goods is a matter of general public importance and that under S.21(2) of the Sale of Goods Act the seller is entitled to reserve the right of disposal even if it has parted with possession.

iii. Assignment - It is submitted that whether by assignment of the price the assignee takes over the burden of the contract is a matter of general public importance.

iv. Illegality – It is contended that an illegal transaction has to be the basis of law in the claim of defence and has to be pleaded and that what happens when the principle is invoked without pleading is a matter of general public importance.

v. Denial of a right to fair hearing:

It is submitted, *inter alia*, that it is a matter of general public importance whether the Court having decided to consider the issue of illegality on the basis of a piece of evidence on record was required to investigate the same and to offer the applicant an opportunity to respond to the same and to place evidence in response on the record and whether by failing to do so, the applicant was denied the right to fair hearing.

[**12**] In reply, the respondent submitted, amongst other things, that the Court found that the applicant had retained title throughout; that the court did not hold that international or national party cannot contract to retain title in the goods in Kenya; that the court did not hold that section 21 of the Sale of Goods Act was not to be applied; that there is no substantial point of law with uncertainty raised by the applicant; that the points of law raised are limited to the particular case and to the particular contract; that the points raised are ordinary grounds and deal with the application of well settled law, that the constitutional issues raised are now issues which do not arise directly from the judgment and that the applicant merely wishes to invite the Supreme Court to correct what, in its view, are errors of law and is disputing the court's determination of fact in contestation between the parties.

[**13**] The principles which guide the Court in deciding whether to grant certification were stated by the Court of Appeal in **Hermanus Phillipus Steyn v Giovanni Gucchi Ruscone,** ***Civil Application No. 4 of 2012 [2012] eKLR*** and approved by the Supreme Court in the majority decision on **Hermanus Phillipus Steyn v Giovanni Gucchi Ruscone - Supreme Court Application No. 4 of** 2012 2013 eKLR (see also **Isaack M'Inanga Kieba v Isaya Theuri M'Lintari & Another – Supreme Court Application No. 46 of 2014**).

The Supreme Court in **Hermanus Phillipus Steyn's** case (supra) said in part:

> ***"(i) ..***
>
> ***(ii) where the matter in respect of which certification is sought raises a point of law the intending appellant must demonstrate that such a point is substantial one determination of which will have a significant bearing on the public interest.***
>
> ***(iii) Such question or questions of law must have arisen in the court or court below and must have been the subject of judicial determination."***

In respect of commercial transactions, the test is not whether a large sum of money is involved in litigation or that a difficult question of commercial law arose. The test is whether substantial point or points of law arises that transcend the circumstances of the particular case thus, not merely affecting the rights of the particular litigants, but a decision which would guide and bind a substantial section of commercial community in their commercial relations.

[**14**] In this case the applicant's suit was based on two agreements – TSA and CFA between the respondent and Triton on one hand, and on contract of sale and financing between it and Triton on the other hand. The suit was, in addition, based on the letter dated 21st December, 2006 written by Triton to the respondent, the contents of which were confirmed by the respondent allegedly thereby constituting the respondent a bailee of the applicant by attornment. The respondent admitted entering into the agreement with Triton but denied knowledge of the contract between the applicant and Triton relating to sale and financing. The respondent also admitted confirming the contents of the agreement dated 21st December, 2006 but asserted that in terms of the two agreements with Triton, Triton was the owner of the petroleum products and that it was not a bailee of the applicant.

[**15**] We have already adverted to the findings of the High Court and of this Court on the issue of ownership of gasoil and the findings consequential upon ownership. It is apparent that whereas the High Court based its finding mainly on the TSA the appellate court considered broadly the characteristics of the contracts between Triton and the respondent and the mode of performance of the contract including

how the sale was effected and paid for. It is apparent that the findings of the appellate court were based on its own appreciation of the entire evidence. The appellate court in essence found that the foundation of facts on which the applicant's case rested on liability of a bailee by attornment was inconsistent with evidence and inaccurate facts and stated its own version of the correct scenario.

[**16**] We have considered the points of law raised. The principles of incorporation by reference, the doctrine of ownership, bailee by attornment and assignment would be relevant and maybe applicable in the factual setting as was pleaded by the applicant in the plaint. However, the appellate court rejected the factual setting as pleaded and arrived at its own independent finding of facts on the true character of the transactions. For those principles of law to apply, the findings of fact by the appellate court as to the true character of the transactions in issue would have to be reversed. It follows that by raising those legal issues the applicant would ostensibly or indirectly be appealing against the finding of primary facts by the appellate court.

In any case, the appellate court did not make any finding of law inconsistent with principle in Section 3(1) and 21 of the Sale of Goods Act or with the principle of bailment by attornment. Indeed, in respect of the latter principle, the appellate court specifically agreed with the settled law but stated that the law was not of any assistance to the applicant in the circumstances of the case.

On the principle of illegality, it is clear from the applicant's submissions that the gist of the complaint is the erroneous application of the principle to the circumstances of the case. Furthermore, the application of the principle was based on the findings of fact by the appellate court, which was in contention between the parties to the suit.

[**17**] In conclusion, we are satisfied that the decision of the appellate court was substantially based on the peculiar facts of the case as determined by the appellate court. The points of law formulated are not substantial and only affect the rights of parties to the dispute and not the rights of the larger business community. Furthermore, it is apparent that the applicant's real complaint is essentially against the non application or erroneous application of settled principles of law as opposed to judicial pronouncements of conflicting legal principles. In a nutshell, the complaints are against the misapprehension of facts and the law and of apprehension of miscarriage of justice.

In the premises, the applicant has not satisfied the threshold for certification. Accordingly, the application is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 17th day of June, 2016.

E.M. GITHINJI

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JUDGE OF APPEAL

F. AZANGALALA

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JUDGE OF APPEAL

J. MOHAMMED

……

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR