REPUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KIAGE, GATEMBU & M'INOTI JJA.)

CIVIL APPEAL NO. 67 OF 2014

BETWEEN

KENYA PIPELINE COMPANY LIMITED …….…….....APPELLANT

AND

GLENCORE ENERGY (U.K.) LIMITED ……..……. RESPONDENT

(Being an appeal from the Judgment and Decree of the High Court of Kenya at Nairobi (Commercial & Admiralty Division)

(Ogola, J.) dated 26th November, 2012

in

HCCC NO. 244 OF 2009)

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JUDGMENT OF THE COURT

This is an appeal by Kenya Pipeline Company Limited (the appellant) from the judgment and decree of the High Court of Kenya (E. Ogola, J.) delivered on 26th November 2012 whereby the learned judge had awarded GLENCORE ENERGY UK LTD (the respondent) some USD 40,330,379.75 being assessed

> ***"damages for breach of duty and/or breach of duty as a bailee and/or conversion of 31,752.39 mts the property of [the respondent] a bailor."***

The sum was to attract interest at 3% per annum from the date of filing suit and at court rates from the date of judgment until payment was made in full. The respondent was also to have costs and interest.

That judgment followed the trial of a claim commenced by the respondent by way of a plaint filed at the High Court on 8th April 2009. In that plaint the respondent was described as a limited liability company incorporated in the United Kingdom with its main office at 50, Barkeley Street, London, W1J8HD, while the appellant was registered in Kenya and owns, maintains and operates a system *inter alia*, of pipelines,

receipt, storage and transportation inland of petroleum products imported into Kenya for marketing by various oil companies. The plaint went on to refer to a Transportation and Storage Agreement (TSA) dated 8th December 2001 between the appellant and one Triton Petroleum Company Limited (Triton) whereunder, the appellant would receive, store and/or transport petroleum products imported into Kenya and deliver them to Triton. It also made reference to a Collateral Financing Agreement (CFA) dated 7th July 2004 between the same two parties whereunder in recognition of the interest of financiers for Triton's oil importation business, the appellant would not release oil products in its custody without the express instructions of such financiers.

It was pleaded further that following that CFA, to which the respondent was not a party, the respondent financed "the purchase of Triton from the [respondent]" some stated quantities of petroleum products on terms that;

> ***"(i) the plaintiff will sell the said quantities of petroleum products to Triton but will retain the ownership of the same in each case until either Triton or its sub-purchaser has paid the purchase price in full;***
>
> ***(ii) pending such payment, the said products shall be held in storage by the defendant to the plaintiff's order and shall only be released to Triton or its sub-purchaser on the express authorization of the plaintiff's authorized signatories;***
>
> ***(iii) pending such payment, Triton will ensure that the defendant accepts in writing the plaintiff's interest in the said products whilst the same are held in the defendant's custody and that 'any transfers or releases (of the said products) are to be authorized' by the plaintiff; and***
>
> ***(iv) upon receipt of the full payment, the plaintiff will 'issue a stock transfer certificate' in the prescribed form to Triton and the appropriate release notification to the defendant."***

By a letter dated 21st December 2006, under the hand of its Mr. Yagnesh S. Devani and copied to the appellant, Triton advised the respondent that;

> **"By signing and returning a copy of this letter, KPC [the appellant] recognizes that Glencore Energy UK Ltd is the sole signatory for purpose of collateral Financing Agreement and therefore, any releases and/or transfers of the petroleum products deposited into the KPC facility financed by Glencore shall be made by KPC only upon receipt of written authorization from Glencore. This arrangement can be revoked only upon the written instructions of Glencore Energy UK. Ltd."**

In the event, the appellant did on 28th December 2006 confirm its agreement to the contents of that letter, which confirmation was copied to the respondent. With that arrangement in place, various quantities of gasoil totaling 72,284 metric tonnes were received at the appellant's storage facility at Kipevu Mombasa in the months of May and June 2008 aboard some four vessels namely

'SPT Navigator', *'Elka Aristotle'*, *'Artic Blizzard'* and *'Kara Sea'*. Several deliveries were effected by the appellant on the respondent's instructions leaving a balance of 31,752.39 metric tonnes which figure was confirmed by the appellant on 10th December 2008. That amount was also confirmed by a firm known as SGS Kenya Limited which did weekly inspections on behalf of the respondent between 24th November 2008 and 31st December 2008.

On 19th December 2008, Triton was placed under receivership.

The dispute between the parties herein was triggered by the appellant's letter dated 5th January 2009 addressed to the respondent. In it, the appellant recalled and rescinded its confirmation as to the stock of gasoil it held stating that the confirmation on 10th December 2008 was erroneous. The correct position,

asserted the appellant, was that the quantity it held for the respondent was nil, an assertion it repeated on 9th January 2009. This prompted the respondent to demand the immediate return or delivery of 31,752.390 metric tonnes of gasoil. When the demand was not complied with, the respondent filed suit claiming the value of the said gasoil as the loss and damage it suffered at the hands of the appellant.

It attached a monetary value of USD 40,330,379.75. Its specific prayers as set out in the plaint were for;

> ***"(a) A declaration that out of the total stocks of gasoil held by the defendant, the plaintiff has title to and an immediate right of possession to 31,752.39 mts and that the defendant as bailee of the said quantity is bound to hold the same to the plaintiff's order;***
>
> ***(b) Alternatively, an order that the defendant do give immediate delivery of 31,752.39 mts of gasoil to the plaintiff or its nominee or pay the value of the same;***
>
> ***(c) An order restraining the defendant, its servants or agents from releasing, transferring, alienating or otherwise dealing with any gasoil in its possession in such a way as to reduce the overall stocks held by the defendant to a level below 31,752.39 mts save with the plaintiff's express written consent or by order of this Honourable Court;***
>
> ***(d) Damages for breach of duty and/or breach of duty as a bailee and/or conversion of 31,752.39 mts, the property of the plaintiff as bailor.***
>
> ***(e) Costs of an incidental to this suit."***

In answer to the respondent's claim, the appellant filed a statement of defence dated 28th July 2009. After discovery was done and pursuant to a consent dated 14th June 2010, the appellant filed an amended statement of defence on 16th June 2010. In that defence as amended were contained various averments in answer to the respondent's claim including, that it held no stocks of petroleum on its own account but only for oil marketing companies with which it had transport and storage agreements and were duly compliant with the licensing requirements under **Section 80** of the **Energy Act**. With regard to the transactions subject of the suit, the Respondent averred that the TSA between itself and Triton provided at **clause 4.2** that the ownership in the petroleum products at all times remained vested in Triton and this was the case whether or not they were financed by third parties.

The respondent added that the CFA at clause 1 expressly stated that it did not supercede the TSA and as such, whatever financing arrangements Triton entered into with third parties, in this case the respondent, ownership of the product, as far as the respondent was concerned, remained with Triton. The appellant then averred that its written confirmations of the terms contained in the letters by Triton had to be construed subject to the TSA and that only Triton, or Triton jointly with the respondent, could properly bring a suit founded on the appellant's representations.

As to the claim in bailment, the respondent's answer as contained in paragraph 7, 8 and 9 of the amended defence was as follows;

> ***"7. The contents of paragraph 7 and 8 of the plaint are admitted subject to the averments in paragraphs 3, 4 and 5 above (now 4, 5 and 6 of this Amended Statement of Defence). Any confirmations given by the defendant and as alluded to in paragraphs 7 and 8 of the plaint were and are to be construed as being subject to the terms and provisions of the Transport and Storage Agreement. Save further to add that the letter described at paragraphs 7 and 8 of the plaint was addressed to the defendant by Triton and contained terms and conditions offered by Triton to the defendant. Consequently, the defendant avers that only Triton, or Triton jointly with the plaintiff can properly rely or bring suit on the representation (s) described at paragraph 7 of the plaint.***
>
> ***8. In response to paragraph 9 of the plaint, the defendant denies that it received any petroleum***

product as bailee to the plaintiff, and puts the plaintiff to strict proof thereof. The defendant specifically denies that the plaintiff was entitled to delivery of the petroleum products the subject-matter of this suit, pursuant to bailment, in light of the provisions of section 80(1) of the Energy Act, by which the plaintiff at all times material to this suit was prohibited from conducting the business of importation, refining, exportation, wholesale, retail, storage or transportation of petroleum. Consequently, any delivery of the petroleum product could only have been effected to Triton. In further response thereto, the defendant therefore does not hold or continue to hold any petroleum product as bailee to the plaintiff. At all material times, product remained the property of Triton pursuant to clause 4.2. of the Transport and Storage Agreement.

9. ALTERNATIVELY, the defendant avers that if it received any petroleum product as bailee, it did so both to the plaintiff and Triton under the terms of the TSA, the CFA and the limitations of section 80(1) of the Energy Act, which rendered the plaintiff incapable of demanding delivery of the product, or otherwise dealing with it in any manner regulated by the aforesaid section. The defendant avers that the petroleum product the subject-matter of this suit was delivered to it as bailee to the plaintiff and Triton as joint bailers. Consequently, the defendant avers that the plaintiff can only sue together with Triton who is its joint bailor."

(Underline in original)

The appellant denied and contested the physical inspections of stock allegedly conducted by SGS Kenya Limited stating it was a stranger to the said inspections and could not be held responsible on the basis of the alleged measurements or inspections of third parties. It stated that its letters indicating that the stock on account of Triton was nil was a mere conveying of the actual position on the ground ***"consequent upon Triton's dealing with the said petroleum products such as to alter the stock position earlier indicated by the [appellant].***" It contended at paragraph 13 that Triton so dealt with the stocks ***"in its capacity as owner of the products under the TSA or alternatively in its capacity as joint bailor with the [respondent]".***

In response to the averment in the plaint that it had failed, or neglected to comply with the demand to return or deliver the "missing" products, the appellant stated as follows;

"14. Paragraph 14 of the plaint is denied. The defendant was and is unable to comply with the demand for immediate return or delivery of 31,752.390 mts of gasoil as these petroleum stocks were released upon the instructions to Triton who retained ownership of the petroleum product stocks claimed by the plaintiff herein and dealt with the same upon delivery. The defendant further avers that, in any event, any demand for immediate return or delivery of the petroleum product subject-matter of this suit by the plaintiff, could not be complied with in view of the provisions of section 80(1) of the Energy Act.

15. In further answer to paragraph 14 of the plaint, the defendant avers the plaintiff should look to joint bailor and/or Triton for the return or delivery of the petroleum products, which in view of the provisions of the TSA and section 80 of the Energy Act would have been impossible for the defendant to effect."

(Underline in original)

The appellant raised the alternative plea that any damage or loss suffered by the respondent, which the appellant denied, was a consequence of actions by Triton as owner of the petroleum products under the TSA or, alternatively, as joint bailor to the plaintiff [respondent], to take away the petroleum products held in its account. Any action in bailment against it to recover the petroleum products in question could only be taken by Triton or Triton jointly with the plaintiff in their capacity as joint bailors.

The defence concluded with the averment that the respondent failed to take reasonable steps to mitigate its losses, which were not admitted, by continuing to finance Triton despite non-payment by Triton of debts accruing from June 2008 to November 2008. It was prayed that the respondent's suit be dismissed

with costs. In response to that amended defence, the respondent filed an amended reply to amended defence dated 18th June 2010. At paragraph 2 thereof it averred that it was not a party to the TSA or to the CFA and that that its financing the purchase, importation and storage of petroleum products by Triton, was not conducting the business of "importation, storage or transportation of petroleum" and consequently did not require to be licenced under **Section 80** of the Energy Act.

The respondent then averred at paragraph 3 as follows;

> ***"3. With further reference to paragraphs 3, 4 and 5 of the Amended defence as well as with reference to paragraphs 6 and 7 of the Amended Defence, the plaintiff avers that;***
>
> ***(i) its claim against the defendant, as pleaded in the plaint, is not based either on the T&SA or on the CFA; it is based on the terms of the four letters referred to in paragraph 8 of the plaint whereby the defendant became a bailee by attornment of the quantities of gasoil referred to in the said four letters and expressly and unequivocally undertook to the plaintiff not to release any part of the said quantities save only on the written authorization of the plaintiff through its named representatives.***
>
> ***(ii) if, as is contended (but is hereby denied), that the ownership of the petroleum products stored at the defendant's facilities remained at all material times with Triton, the defendant, at Triton's request, expressly acknowledged and agreed by way of attornment that it would hold the said products to the plaintiff's order and would only release or transfer the same on the written authorization of the plaintiff through its named representatives.***
>
> *(Underline in original).*

Finally, the respondent averred that the appellant as bailee by attornment was estopped from denying the respondent's rights in respect of the disposal and/or release of the gasoil in dispute, including by pleading the alleged right or title of Triton to the same.

When the matter went to trial after some preliminaries, each side called a single witness who testified and was cross examined, at length, by opposing counsel. Submissions were made before the learned judge and various authorities were cited to him before he made his decision, the subject of this appeal.

The learned judge extracted the four issues which he considered to be germane to the determination and disposal of the suit out of the separate lists of issues that the parties had filed. These four main issues, as the learned judge referred to them were;

> ***"(a) Whether at all material times ownership of the suit product remained in Triton.***
>
> ***(b) Whether the defendant attorned in writing as bailee to the plaintiff on the term 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 (sic) 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 31,752.39 metric tons in the sum of US Dollars 40,330,379.75."***

On those issues the learned judge found as proved that the ownership to the gasoil subject of the suit at all times remained in Triton. He also found that the appellant was, by reason of having acknowledged in writing that it held the said gasoil at the order of the respondent, liable as a bailee of the respondent by virtue of bailment by attornment.

On the preclusive applicability of **Section 80** of the Energy Act, the learned judge found and held that it

was Triton that was involved in the importation of the gasoil in dispute and the respondent came in only as a financier. He found that when it came to the storage of the suit product, ***"it is also clear that Triton made the delivery of the suit product to the defendant for transport and storage."*** So finding, the learned judge concluded that the appellant had not substantiated the allegations that the respondent was guilty of an illegality under that provision of law.

On the final issue, the learned judge found that by purporting to release the gasoil to Triton without authorization from the respondent, the appellant breached the terms of its undertaking and consequently became liable to the respondent in the resultant loss and damages arising from breach of that undertaking.

The learned judge then gave judgment in the terms already adverted to herein.

The appellant was aggrieved by that judgment. It filed a notice of appeal and later a record of appeal. In its memorandum of appeal dated 4th April 2014, the appellant complained that the learned judge had erred by *inter alia*,

> ***(a) holding that the appellant was a bailee of the respondent by attornment and a bailee to Triton.***
>
> ***(b) holding that the respondent was merely the financier of Triton.***
>
> ***(c) failing to appreciate that any bailment by attornment in the respondent's favour would be of contrary to the express provisions of Section 80 the Energy Act.***
>
> ***(d) awarding damages on contract value having held market value to apply.***
>
> ***(e) failing to appreciate the respondent's 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) failing to appreciate the respondent's continued supply of gasoil to Triton for six months after default of payment.***
>
> ***(g) failing to take into account the mitigating factor of the respondents having received some USD 30,869547 from Triton months before it was placed under receivership."***

The appellant therefore prayed that the judgment and decree of the High Court be set aside and instead the respondent's suit be dismissed with costs.

The respondent exercised its rights under **rule 94** of the Court of Appeal **Rules 2010** and filed a Notice of Grounds for Affirming the Decision. The grounds were to the effect that **Section 80** of the Energy Act cannot and/or could not be so construed as to lead to the arbitrary deprivation of the respondent's property in the gasoil in dispute without compensation contrary to **Article 40 (2)** and **(3)** of the Constitution of Kenya 2010 or in a manner that would result in the unjust enrichment of the appellant or its agents or representatives. Moreover, the appellant cannot be allowed to found a defence on an alleged illegality unknown and unaccepted by the respondent.

When the appeal came up for hearing, **Mr. Pheroze Nowrojee S.C,** appeared with **Mr. Fred Ngatia** and **Mr. John Ohaga** learned counsel for the appellant, while **Mr. George O. Oraro S.C**. appeared with **Mr. Geoffrey G. Muchiri**, learned counsel for the respondent. **Mr. Oraro S.C.** intimated at the outset, for the record, his readiness to proceed before the Court as constituted, the respondent's earlier request for a five-judge bench, highly contested by the appellant, not having found favour with the President of the Court to whom it had been addressed. At any rate, it was not granted. It was also agreed by both sides that they were at liberty to make reference to the written submissions they each had filed notwithstanding that the appeal was proceeding by way of oral submissions.

Rising for the appellant, **Mr. Nowrojee** submitted that the respondent's entire case was founded upon

four letters that passed between Triton and the appellant. These were dated 6th May 2008, 5th June 2008, 26th June 2008 and 7th August 2008. The respondent in fact referred to those letters at paragraph 8 of its plaint. Counsel posited, however, that the true picture of what was happening was that there was more than mere financing between the respondent and Triton which, he pointed out pointedly, was not sued by the respondent. He submitted that other documents became highly relevant to the unraveling of the truth about the transactions.

Drawing the Court's attention to the contract dated 6th June 2008 dealing with the gasoil aboard *SPT Navigator* that appears on page 212 of the record of appeal, **Mr. Nowrojee** pointed out a number of salient features which cut across and are common to all four consignments subject to the litigation between the parties. The contract is drafted or prepared by the respondent and sent to Triton. The gasoil is to be delivered and discharged at Kipevu, Mombasa. The gasoil is for "Triton, onward Sale to Total Kenya." The seller is the respondent. The buyer is Triton.

Senior counsel then proceeded to submit that in so far as the oil was delivered in Kenya for storage and onward sale, every transaction involving it must perforce be in conformity with Kenyan law. He submitted further that the respondent had no contract and no direct arrangement with the appellant. The documents revealed, however, in counsel's view, that it was entirely possible for the respondent to release the product directly to Total Kenya without Triton receiving a drop of that oil. The payment by Total Kenya was directly to the respondent either in Paris or in New York. Indeed, the title and risk in the product delivered remained with the respondent until it gave release instructions for the same to be released directly to Total Kenya. As it retained title all the while, never passing it to Triton, it was open to it to use the gasoil as it pleased for domestic as well as export sales. It retained the right to sell in Kenya and did in fact sell to Total Kenya either wholesale or retail. All the documents showed that the gasoil was always intended for onward delivery to Total Kenya and this amounted to trading in oil in Kenya which was not only impermissible, but also illegal and punishable under **Section 80** of the Energy Act as the respondent did not have the requisite licence.

Mr. Nowrojee posited further that the description of Triton as the buyer was a fiction meant to mask the true character of the transaction as a direct sale by the respondent to Total Kenya. The four letters on which the respondent founded its claim against the appellant were, in fact, the very instruments that were deployed by the respondent to evade the operation of the Energy Act by which Parliament sought to regulate the oil industry in Kenya. Consequently, counsel argued, it was not open to the respondent to raise an estoppel as no estoppel can arise against a statute and, by the same token, there is no way the respondent could claim or receive damages on the back of a flagrant violation of a statute. He concluded this part of the submissions by asserting that the learned judge erred on all the four issues he identified and in particular in awarding damages that did not lie in law or equity as equity, could not aid those whose hands were murky. He stated that there was a patent illegality facilitated by the respondent by setting up an elaborate structure supported by a document it drew to use a proxy in the name and person of Triton to create acknowledgment of rights in the oil products within the appellant's storage facilities. On the ground of illegality alone, counsel concluded, the Court was entitled to interfere with the learned judge's findings.

The theme of illegality was pressed further by **Mr. Ngatia** who started by stating that the TSA executed on 8th December 2001 between the appellant and Triton stating at clause 4.2 that the ownership of the petroleum products remained vested in Triton was never amended or re-done. The side agreement dated 7.7.04 by which Triton indicated that it would be seeking financing of its products did not, and could not, supercede the TSA, in counsel's submission. He emphasized that when *SPT Navigator* was loaded at Sikka India with 16,000 metric tonnes of gasoil, that consignment was being sold by the respondent to Total Kenya. Reference to "purchase from Triton" was a ploy meant to simulate a legal transaction. The use of Triton's name though no title passed to it, was calculated to allow the respondent to obtain accommodation for its product at the appellant's facilities.

Mr. Ngatia strongly disputed the learned judge's finding that the respondent was merely a financier of Triton as no evidence was tendered and no proof made of any financing. He criticized the learned judge for stating that it is Triton that made delivery of the gasoil to the appellant at Kipevu, when all the

evidence clearly showed that delivery was by ships ordered by the respondent, which owned the oil. The respondent took advantage of accommodations that could only be accessed by licensed dealers in the country and engaged in transactions unavailable to it by reason of being unlicenced. Therein lay the illegality. Counsel cited this Court's decision of **STANDARD CHARTERED BANK KENYA LTD Vs. INTERCOM SERVICES LTD & 4 OTHERS** [2004]e KLR for the proposition that no court in this country can aid a party who is guilty of an illegality as well as the old case of **SCOT Vs. BROWN, DOERING McNAB & CO.** [1892] 2 QB 724 where the English Court of Appeal held that an action founded on an illegal contract could not be maintained.

Counsel maintained that the respondent, a foreign company, was engaging in partial sales and trading in oil products in an orchestrated scheme to side-step the mandatory provisions of the Energy Act as evidenced by the record of stock-transfers from Kipevu to oil companies that it directed and controlled. All along the respondent kept, controlled and sold the gasoil under the guise that it belonged to Triton, which it allowed powers of decreasing its stocks while commensurately increasing Total Kenya's stocks. For precisely this reason, when Triton acted within those broad powers in a way adverse to the respondent's interests, the resultant loss, if any, would have to lie right where it fell – on the respondent. The respondent could therefore not take umbrage under the law of bailment to defeat the statute.

Turning from illegality which was the main thrust of the appellant's case before us, **Mr. Ngatia** reiterated that the learned judge was wrong to hold that Triton was the owner of the subject gasoil when all evidence pointed to the respondent. He also criticized the learned judge for fixing the value of the said gasoil by reference to 4th July 2008 which counsel referred to as 'a mythical date' while there was evidence that as late as September 2008, the respondent was still releasing or transferring oil. He also took issue with the learned judge's failure to act on and factor into his judgment the sum of USD 8 million which the respondent through its witness admitted to have been an unjustified over-payment. That sum, added to the letter of credit in favour of the respondent worth USD 32 million meant that its claim of USD 40 million stood fully extinguished. For this reason, the judgment that the respondent obtained was a wholly undeserved windfall and counsel urged us to set it aside.

Rising to oppose the appeal, **Mr. Oraro** first submitted that the case the appellant presented before us in this appeal is different from its case in the court below, by which we understood him to mean that the illegality angle was not the central aspect of the appellant's defence at the High Court. Senior Counsel submitted that as soon as the oil arrived in Mombasa, it became Triton's, and added that the CFA between it and the respondent was a supplier's credit arrangement which was an acceptable form of financing of an otherwise simple sale of goods agreement between the two. It was thus governed by **Section 21** of the Sale of Goods Act Cap 31, Laws of Kenya, whereunder a seller may reserve the right of disposal, and property in goods does not pass until the terms imposed by the seller have been met. One of those preconditions was that the appellant was to give its irrevocable undertaking not to release the gasoil without the prior written authorization of the respondent. Making reference to Halsbury's Laws of England 4th Edn. 2005, re issue Vol. 3(1) (Lexis Nexis Butterworths) at P72, **Mr. Oraro** asserted that the appellant thereby became the respondent's bailee by attornment. He added that in the present case *'title was transferred from Triton to Glencore but only for purposes of release'*.

Senior Counsel was emphatic that **Section 80** of the Energy Act did not prohibit the right of a seller to hold on to goods until he was paid. He however stated that whereas one needed a licence to import oil into Kenya the importer in the present case was not the respondent, but Triton. The latter then sold the same but assigned the proceeds of sale to the respondent, which was nothing peculiar.

Referring to the stock-schedules that were placed before the trial court, Mr. Oraro submitted that they were operated by the appellant on behalf of Triton and the respondent. In allowing the stock subject of this litigation to 'disappear', the appellant fundamentally violated the CFA under which it was obliged to recognize the respondent as the financier. As such, the issue of ownership of the gasoil was completely irrelevant since once Triton gave the respondent the right to give instructions as to the release of the gasoil, Triton became a stranger to the goods.

Counsel then lambasted the appellant for altering the character of its case in that it had in its defence

pleaded that the oil belonged to Triton and had not pleaded illegality. He nevertheless submitted that what is forbidden for an unlicenced person is the conducting of business in oil which denotes "active transactional activity." When asked by the Court whether there was a document that showed that it is Triton that imported the gasoil into the country, counsel's response was that none was in the record because Triton was not a party. He was firm, however, that the respondent did not import oil into Kenya.

Submitting on the respondent's grounds for affirming the decision of the High Court, **Mr. Oraro** asserted that to conclude that the respondent by holding a right of release over the gasoil violated **Section 80** of the Energy Act would go against **Article 42** of the Constitution, the Sale of Goods Act and two hundred years of the common law. He therefore besought us to dismiss the appeal and uphold the judgment of the High Court which he lauded as being correct in every respect including the dollar rate of conversion used, and the rate of interest.

Replying to the respondents submissions, **Mr. Nowrojee** cast the crux of the matter before us as that of a statutory bar to a new bailee who has no licence in Kenya who could not therefore be the beneficiary of an attornment. Moreover, no constitutional right was implicated and there was no question of deprivation of property. He posited that a person without a licence was in no position to lay a claim whether in damages or restitution. He was firm that no question of unjust enrichment arose as the appellant never had the benefit of the gasoil in question. Counsel concluded by stating that whatever the legality of the documents relied on by the respondent when they were executed, there was a mandatory duty to comply with **Section 80** of the Energy Act, and this the respondent had not done.

The response was then taken up by **Mr. Ohaga** who emphasized that the appellant had no knowledge of the sale agreements between Triton, Total Kenya and the respondent, and had no knowledge in particular that the respondent had reserved and therefore retained title as it sold to Triton. This explained the initial defence it filed. He proceeded to chide the respondent for purporting to both approbate and reprobate on the issue of title to the subject gasoil, stating that it could not be both the owner and the financier of the said products contemporaneously. He was categorical that in so far as it retained title and remained owner, then the respondent had in fact imported the product into the country and therein lay its contravention of **Section 80** of the Energy Act.

Stating that the respondent's claim against the appellant had been predicated in part on alleged negligence on the part of the appellant, **Mr. Ohaga** submitted that in so far as the respondent was studiously denying importation of the gasoil and ownership thereof contrary to the Energy Act, then its claim had to fail as there could be no claim in negligence by one who had no legal ownership or possessory title to the property in question. He cited in aid the decision of the former English House of Lords in **LEIGH & SULLAVAN LTD Vs. ALIAKMON SHIPPING CO. LTD THE ALIAKMON** [1986] AC 785.

In response to the respondent's assertion that failure to award it redress for conversion of the gasoil would be tantamount to a constitutionally impermissible deprivation of its right to property, **Mr. Ohaga** submitted that as far as the appellant was concerned, the real owner of the product was Triton and it is to Triton that the same was delivered so there was no wrongdoing by, and no culpability could attach to, the appellant. Counsel then proceeded to profer a theory for the respondent's failure or omission to enjoin Triton in the proceedings: to have done so would have led to a full disclosure of the real nature and character of the illegal transactions between the two companies. It was due to this opacity engineered by the respondent, epitomized by its keeping away from view the purported sale agreements between itself and Triton that the appellant could only raise the available defence of illegality by amendment after discovery. At any rate, added counsel, the court is obligated to deal with the issue of illegality at any time it is brought to its attention whether or not pleaded though in this case it was actually pleaded. For that proposition he relied on the case of **FESTUS OGADA Vs. HANS MOLLIN** [2009]eKLR where this Court took the position that even if the issue of illegality were to come to a court's attention by a side wind, the court must ensure it deals with it so as not to aid any flouters of the law to benefit from their illegal acts, which would be offensive to public policy.

Mr. Ohaga rested his submissions by insisting that at the heart of the dispute before court was an elaborate scheme and a pretended cause of action hatched and executed by the respondent to benefit from

an illegal importation and sale of diesel products in Kenya contrary to the express prohibition in **Section 80** of the Energy Act. To counsel, the Bills of Lading that appear in the supplementary record of appeal show beyond dispute that the importer of the gasoil was, always and only, the respondent and not Triton. He thus urged us to allow the appeal with costs.

Consistent with our duty on a first appeal as set out in **Rule 29(1)** of the Court of Appeal Rules, we have re-appraised, independently re-evaluated and freshly analyzed the evidence and the entire record so as to make our own independent inferences and conclusions of fact. It is a task we have undertaken mindful that we are dealing with the cold letter of the record without the advantage the trial judge had of having seen and heard the live witnesses as they testified, and we make due allowance for that. We accordingly do not lightly interfere with the trial judge's findings of fact save where, as correctly pointed out in the respondent's written submissions, the findings are based on no evidence, or on a misapprehension of the evidence or where the trial judge acted on wrong principles and is shown to have been demonstrably wrong in the conclusions he arrived at. (See **PETERS Vs. SUNDAY POST LTD** [1958] E.A 424. **SELE & ANOR Vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS** [1968 E.A 123; **MWANASOKONI Vs. KENYA BUS SERVICES LTD** [1985] KLR 931 and **SUSAN MUNYI Vs. KESHAR SHIANI** [2013]e KLR).

Upon a full consideration of this matter we have come to the conclusion that the central issue in the appeal is the relevance and consequence of the application of **Section 80** of the Energy Act to the transactions subject of the dispute between the parties. The appellants' contention is that the respondent's claim at the High Court ought to have failed as it was based on an illegality, an assertion vigorously resisted by the respondent. There is no denying, however, that all the other 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.

Before launching into the analysis of that central issue, we find it convenient to address the question of unjust enrichment as raised before us and before the court below by the appellant. The appellant's complaint is that the learned judge ought not to have entered judgment in the sum of USD 40,330,379.75 as ***"damage for breach of duty or breach of its duty as bailee and/or conversion of 31,752.39MTS the property of the [President] as bailor."*** The basis for this complaint is that from the invoices issued by the respondent (USD 69,030,909.78) and the payments it received for oil products, (USD 37,570,077.06) the value of the 'lost' oil was USD 31,460,832.72 and not the sum claimed in the plaint, which the learned judge awarded. That much is clear from the evidence of James Mallinder, the respondent's sole witness. Cross-examined by Mr. Imende, learned counsel then for the appellant, that witness had this to say;

> ***"The difference between invoices issued and the payments received is USD 31,460,832.72. What we are claiming however in the plaint is USD 40,330,379.75. If I add the amount received and the amount pending I get a difference of over USD 8,000,000.***
>
> **…**
>
> ***If the court grants what I claim, and considering what I have been paid, there will be an excess of more than USD 8,000,000. I have no explanation for this …."***
>
> *(Our emphasis)*

Mr. Malinder was unable to explain that excess claim and that mystery remained right up to the hearing of the appeal. When we asked counsel for the respondent whether there was an explanation for it anywhere in the record, he was unable to direct us to any. We have no hesitation in concluding, by the application of simple arithmetic, that the respondent's claim for USD 40,330,379.75 was wholly without foundation and the learned judge was in patent error in entering judgment on the basis of that erroneous sum. The only sum the respondent could properly have claimed, on its own showing, was USD 31, 460,832.72, and no more.

We now turn to the much vexed issue of ownership of the oil products subject of this litigation while in tank at the appellant's storage facilities in kipevu, Mombasa. We must observe that on this issue both parties before us have blown hot and cold. The statements and submissions made have at times been inconsistent or plain contradictory. The question does have far-reaching ramifications as it impacts both the issue of bailment by attornment and the alleged illegality of the transactions upon which the respondent's claims were founded.

It is not in dispute that as between the appellant and Triton, there was extant at all material times a TSA dated 8th December 2001 between Triton and the appellant whereunder Triton would use the appellant's system of pumping, receipt, storage and delivery facilities for the transportation of petroleum products between locations within Kenya from a point of entry to a point of delivery. On ownership, clause 4.2 of that TSA provided as follows;

> **"4.2. The ownership in all petroleum products tendered for Transportation and storage shall at all times remain vested in Triton Petroleum Co. Limited."**

There was no mention of financing or of any other role played by the respondent or any other party. Financing was introduced by the Side Agreement Number 1, or the CFA, dated 7th July 2004. In clause (e) of its recital, the CFA provided;

> ***"Triton Petroleum Ltd has now requested and KPC has agreed to allow them have (sic), any of its positive entitlement stocks as so required to be used for collateral financing."***

In terms of the interaction between the CFA and the TSA, clause 1 stated;

> ***"This agreement shall be read in conjunction with the Transportation and Storage Agreement and shall in no matter supercede the provisions and requirements of the said Transportation and Storage Agreement."***

Once again, the respondent was not a party and nor was it mentioned in the CFA which essentially conferred upon the financier rights to control release of the petroleum products from the appellant's system by, *inter alia*, requiring its prior written authorization.

On 21st December 2006, Triton wrote to the appellant making reference to the TSA and the CFA aforesaid. It then recognized the respondent and invited the appellant to do likewise, in the following terms;

> ***"By signing and returning a copy of the letter, KPC recognizes that Glencore Energy UK Ltd is the sole signatory for purposes of Collateral Financing Agreement and therefore, any releases and/or transfers of the petroleum products deposited into the KPC facility financed by Glencore. This arrangement can be revoked only upon the written instructions of Glencore Energy UK Ltd."***

The letter forwarded the names and e-mails of some seven individuals, including James Mallinder, who could so sign and was duly signed for and on behalf of the appellant (by its sole witness at the trial H.K. Wambua) and copied to the respondent. It is common ground, however, that the appellant was not party to and did not, in fact, see any agreements for the actual financing of any consignment of petroleum by the respondent for Triton.

With those arrangements in place, it would seem that no less than ten deliveries of petroleum products were made into the country aboard various vessels between 27th January 2007 and 16th June 2008. It is the deliveries aboard *SPT Navigator* on 22nd April 2008; *Kara Sea* on 25th April 2008, *Elka Aristotle* on 13th May 2008 and *Arctic Blizzard* on 11th June 2008 that are the subject of this litigation.

Whose were these deliveries?

Whatever the pleadings and submissions by the parties may say, and they both speak ambiguously, it is quite easy to establish through the available documentation where the legal ownership of the oil resided. We begin with the importer and analyse the bills of lading appearing in the supplementary record of appeal. A tracing and analysis of the transaction involving the oil product aboard just one of the vessels, the *MV. Kara Sea*, should suffice to give a clearer picture of what transpired herein. That vessel was loaded with quantities of petroleum products at the port of Mina Al Ahmadi in Kuwait, for delivery at the port of Mombasa *to the order of Chevron Products Company of USA*. The Bill of Lading, dated 25th April 2008, was then endorsed by Chevron Products Company to the order of the respondent.

The ship docked in Mombasa on 8th May 2008 and Triton wrote to the appellant the day before informing it of the arrival of the cargo and making reference to the TSA and the CFA of July 2004 with the result that release of the products by the appellant shall be at the written authorization of the respondent. The transaction between Triton and the respondent was captured in a communication regarding the same that came from the respondent to Triton, *inter alia*, as follows;

> "**Ref: <u>ITT Mombasa, Gasoil Delivered by Kera Sea During 8- 10 May 2008 for Triton Onward Sale to Total Kenya Ltd</u>**
>
> **SELLER: GLENCORE BUYER: TRITON**
>
> **DELIVERY: In one or more by Intank Transfer (ITT) at the Kipevu Oil Storage Facility (KOSF) Mombasa Ex-Delivery per MT Kara See Scheduled Arrival at Discharge Port of 8 - 10 May immediately After Discharge the oil will be held to Glencore's order under Terms and Conditions of Triton's contract with Kenya Pipeline Company dated November 1998.**
>
> **<u>Title and Risk" Title and risk in the product delivered under this contract shall remain with Glencore until Glencore issues the release notification to Kenya Pipeline Company to release the product Directly to Total Kenya Ltd.</u>**
>
> **<u>Miscellenous: The seller reserves the right at all times to utilize the gasoil under this contract for its own use, either for internal sales or for export, under advise to the buyer and the buyer undertakes to assist the seller at it's request</u>**
>
> **…**
>
> **Each party further acknowledges that it will not be entitled to remedies in respect of breach of the express terms of the contract or warranty in respect of any representations, warranties, statements or undertakings which may have been made prior to the contract being entered into.**
>
> **This contract is not intended to give any third party the right to enforce any of its terms."**
>
> *(Our emphasis)*

That document was prepared by the respondent. It had appended to it a Draft Payment Undertaking meant to be executed by Total Kenya Ltd confirming purchase of cargo from Triton and undertaking to make payment in US Dollars to BNP Paribas, New York to the attention of James Abraham. Also appended was a Draft Deed Assignment by which Triton would irrevocably and absolutely assign all rights to any proceeds or monies payable by Total Kenya for the petroleum products in question. The final document, Appendix 3, was a draft Stock Transfer confirmation to be issued to Triton by the respondent that read as follows;

> **"We certify that title of [insert quantity] Mtons of [insert Grade] in tank, seller's storage Tank No [insert Tank No.] at the Kipevu Oil Storage Facility (KOSF) Mombasa transferred to Total Kenya Ltd on behalf of Triton Petroleum Co. Ltd, Nairobi Per Glencoree Energy UK LTD contract dated ….. with Triton Petroleum Co. Ltd.**

Authorised Signatory

For Glencore Energy UK LTD."

It is those documents, crafted and supplied by the respondent that governed and evidenced the transactions involving the greater portion of the oil products subject to these proceedings.

What are we to make of them?

It seems clear to us that the actual importation of the gasoil into Kenya was done by the respondent. We were not shown, nor have we been able to find, any documents showing that Triton did the actual importation. Once the oil was off- loaded, 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 ever passed to Triton. Indeed, all the documents show that from the consignment we have endeavoured to trace in detail herein, which was typical of others, the sale was directly from the respondent to Total Kenya. That much is testified to by, *inter alia,* a memorandum dated 18th July 2008 from the respondent to Triton titled 'Amendment' and which we reproduce in full;

"**WE CERTIFY THAT TITLE OF 9,553.11 (1,507.24 +**

5,733.42 + 2,266.58 + 45.87,) TONS MIN/MAX OF GASOIL IN TANK IN SELLER'S STORAGE TANKS AT THE KIPEVU OIL STORAGE FACILITY (KOSF) MOMBASA (WHICH WAS DISCHARGED BY 'KARA SEA 6-14 MAY 2008.) IS TRANSFERRED TO TOTAL KENYA LIMITED, NAIROBI ON 18 JULY 2008 AS PER GLENCORE ENERGY UK LTD'S AGREEMENT

REGARDS

MARTIN GRAHAM GLENCORE ENERGY UK LTD"

A letter dated the same 18th July 2008 from the respondent to the appellant is to the same effect and clearly indicates that quantities of gasoil ex-"Kara Sea" were released and title passed to Total Kenya Ltd. At no point did title pass to Triton. Not even on temporary or intermediate basis. It is instructive that in numerous letters and e-mails from the respondent following the "disappearance" of the gasoil that is subject to this matter, the respondent refers to the gasoil as "our oil stocks", or "our gasoil deliveries" or "our misappropriated oil." In his testimony in court, while being cross-examined by

Mr. Nyaoga learned counsel then for the appellant, Mr. Mallinder stated revealingly as follows;

"The subject matter of the suit belongs to the plaintiff [the respondent]. I also testified that the plaintiff was a financier. Plaintiff was both the owner and financier of the project."

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 reference to Triton as the buyer are easily falsified as being merely decorative as it did not have title to and appears not to have made any payment for the oil products and certainty not those that were off loaded by *MV. Kara Sea*.

Even for the cargo that was not indicated as intended for Total Kenya Ltd or any other ultimate buyer by prior contractual arrangement between Triton and the respondent, the retention of title is an inescapable conclusion. An example is the oil imported aboard the *SPT Navigator***.** The importer was the respondent. By a letter dated 30th May 2008, the respondent confirms to Triton the transaction between them concluded on 8th May 2008. In it, is stated that;

"Seller will have the right to retain ownership and dispose of oil if payment not made after 30

days from due date."

Under Title and Risk it provides;

> ***"Title and risk in the product delivered under this contract shall remain with Glencore until Glencore issues the stock transfer certificate (in appendix 1) to Triton."***

Not a single Stock Transfer Certificate passing title and risk from the respondent to Triton was exhibited or otherwise availed before the trial court. None is in the record and this only adds credence to the conclusion we have reached that there never was any sale of the product to Triton. Triton was no more than a conduit and facilitator of the entry of the respondent's product into the appellant's system Triton described itself to the appellant as the 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.

This position is not entirely inconsistent with the respondent's assertion of reservation of the right of disposal and the reliance by Senior Counsel **Mr. Oraro**, on **Section 21** of the Sale of Goods Act, only that whereas it contends that its right of disposal flows from its position as a bailor by attornment and not an owner, we have found and hold that it flowed from ownership as we have set out.

That provision of the law is to this effect;

> ***"21(i) where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled; and in that case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee, or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."***

The conclusion is inevitable that the respondent was always the seller and always retained title until Total Kenya Ltd fulfilled the conditions the respondent had imposed. In that environment, and given what we have already stated, Triton by reason of having access to the appellant's storage facilities, was in no greater position than would be any carrier, bailee or custodier. It had no title and the learned judge was therefore in error to hold that the oil products belonged to Triton.

What we have said so far provides the answer to the question of illegality which, to our mind, was not a peripheral issue or one of belated introduction. As we have pointed out already, the Amended Statement of Defence expressly cited **Section 80(1)** as prohibiting the respondent from conducting the business of or dealing in petroleum and was hoisted as to defeat the respondent's claim in its entirety. The provision is couched in mandatory prohibitory terms;

> ***"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."***

Under Part IV of the Act, there are expansive provisions relating to the application for, grant, transfer, revocation and registration of licences among other things. The statute represents a legitimate governmental function to regulate the petroleum industry within Kenya. Its provisions are binding and violation or contravention thereof attracts penal consequences. And it is plain to see that the respondent did import gasoil into the country on dates after the commencement of the Act on 7th July 2007. Indeed, all the transactions subject of the litigation, (being part of a total of nine which in one letter the respondent calls its 'commercial transactions') occurred while the statute was in force. For all the attempts to mask the transactions as involving oil products the property of Triton, there is no question that the respondent was active in the Kenya oil market, operating under the thin disguise of Triton to do that which it was prohibited to do not having sought nor obtained a licence. Those activities were patently illegal. And illegality has its consequences.

In **STANDARD CHARTERED BANK Vs. INTERCOM SERVICES LTD & 4 OTHERS** (supra), this Court, differently constituted, accepted the submissions made that once an issue of a breach of a statute is brought to the attention of the Court in the course of proceedings, then in the interest of justice the Court must investigate it because the court's fundamental role is to uphold the law. The court upheld and endorsed the old English case of **HOLMAN Vs. JOHNSON** (1775-1802) All ER 98 where Chief Justice Mansfield stated;

> ***"The principle of public policy is this:***
>
> ***Ex dolo malo no ovitur actio . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."***

We respectfully agree with that pronouncement of the law that still speaks unmistakably more than two centuries later. What the English courts could not do to assist a lawbreaker, Kenyan courts and courts anywhere, should not do.

There is a consistent line of decisions of this Court where it has set its face firmly and resolutely against those who would breach, violate or defeat the law then turn to the courts to seek their aid. The Court has refused to lend aid or succour and has refused to be an instrument of validation for such persons. We still refuse. See **MISTRY AMAR SINGH Vs. KULUBYA** [1963] EA 408, **HEPTULA Vs. NOOR MOHAMMED** [1984] KLR and **FESTUS OGADA Vs. HANS MOLLIN** (supra). In the last case the Court stated, and we are content to merely restate it as good law, that no court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality.

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 flagrant illegality. That illegality defeats all its claims herein against the appellant and the learned judge should have so found. In failing to do so despite pleadings and strident pleas by the appellant, he fell into error and must be reversed.

Our findings about the true ownership of the oil products subject of this litigation as well as our finding on illegality wholly dispose of the claim based on bailment by attornment. We did nonetheless consider the authorities cited by learned counsel for the respondent and whereas we agree with the law as propounded in *Halbury's Laws of England* (supra), **HAWES & ANOR Vs. WATSON & ANOR** [1824] 2 LJ. KB105, **GOSLING Vs. BIRNIE** [1831] 9 LJ. KB 105 and **SYEDS Vs. HAY** [1791] 100 E.R. 1008, we do not find them to be of assistance to the respondent's cause in the circumstances. We would have been interested to know if any authority existed for the proposition that a bailor by attornment's rights can defeat those of the original bailor or ostensible owner as opposed to a third party, but none was cited before us. In any event it would not have availed much, even had it existed, in the face of the mortal flaw of illegality.

It must also follow that the respondent's plea that a rejection of its claim would be tantamount to an unconstitutional deprivation of property is also untenable. The Constitution cannot possibly protect rights supposedly acquired through violation of law. It espouses and commands a respect for the rule of law and enjoins courts to do justice in accordance with the law. The argument is thus for rejection.

The illegality aside, it is a tad cynical for the respondent, upon burning its fingers in a scheme it consummated with Triton in the shadow of the statute to now turn around and sue the appellant which, on the evidence of the respondent's own witness, was largely unaware of and definitely not a party to the finer details of their dealings. The respondent dealt very closely, intimately even, in corporate terms, with Triton. The gasoil in question having been released to Triton, it is most strange that no effort was made to seek recompense in that direction. It may be that Triton went into receivership but is hardly the whole

story. It is not lost to us that the respondent and Triton entered into a compact of mutual immunization from any suit based on tort which may be the more plausible explanation for their non suit and the attendant blind spots in the suit the former mounted. At any rate, if would not serve the interests of justice in the face of indisputable illegality, to saddle the appellant, virtuous though it be not, with the losses incurred as a result of the dalliance between the respondent and Triton. That loss must lie where it fell.

The upshot is that this appeal succeeds and is allowed with costs. Consequently, the judgment and decree of the High Court is hereby set aside, and substituted with an order dismissing the respondent's claim with costs.

We are most grateful to counsel for the depth of learning and industry they displayed in their filings as well as in the erudite and cogent submissions they made before us.

Dated and delivered at Nairobi this 27th day of March, 2015.

P.O. KIAGE

……...…

JUDGE OF APPEAL

S. GATEMBU KAIRU

……...…

JUDGE OF APPEAL

K. M'INOTI

……...…

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR