



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, Mwilu; DCJ & VP, Wanjala, Njoki, & Ouko SCJJ)*

**APPLICATION NO. E024 OF 2025**

**-BETWEEN-**

**PETER MWANGI GICHUKI T/A**

**HIGH FLYER PUBLISHERS ..... 1<sup>ST</sup> APPLICANT**

**FORTUNE PRINTERS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**-AND-**

**ANTONY KIAI T/A**

**HIGH FLYER SERVICES AND PUBLISHERS ..... 1<sup>ST</sup> RESPONDENT**

**HIGH FLYER SERVICES AND**

**PUBLISHERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

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*(Being application for review of the decision of the Court of Appeal at Nairobi (Karanja, Gatembu, & Nyamweya JJ. A) delivered on 25<sup>th</sup> July 2025 in Civil Appeal (Application) No. E003 of 2021 denying grant of certification and leave to appeal to the Supreme Court on grounds of general public importance under Article 163 (4) (b) of the Constitution)*

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**Representation:**

Mr. Kahuthu for the Applicants  
*(Kahuthu and Kahuthu Advocates)*

Mr. Kamau Muturi for the Respondents  
*(G. K. Muturi & Co. Advocates)*

## **RULING OF THE COURT**

**[1] UPON PERUSING** the Notice of Motion dated 6<sup>th</sup> August 2025 and filed on 26<sup>th</sup> August 2025, brought under Article 163(4)(b) of the Constitution, Section 15B of the Supreme Court Act and Rule 33(2) of the Supreme Court Rules seeking orders *inter alia* that the Supreme Court does: *review and set aside the decision of the Court of Appeal in Nairobi Civil Application No. E003 of 2021 declining to certify the questions as raising matters of general public importance; grant leave to the applicants to appeal against the decision of the Court of Appeal in Nairobi Civil Appeal No. E003 of 2021; and order that the leave so granted operate as stay of execution of the orders resulting from the impugned judgment; and*

**[2] UPON CONSIDERING** the applicant's grounds as stated in the application and the supporting affidavit sworn by the 1<sup>st</sup> applicant on 6<sup>th</sup> August 2025, where the applicants contend that it is necessary for the Supreme Court to clarify the following issues: the right to register a trademark that was previously used jointly by both parties, the subsequent registration of the said trademark by one party without the prior knowledge of the other; the implications of one party concealing the registration of a jointly used trademark while allowing the other party to continue its use even after registration; and bearing in mind that the Court of Appeal introduced and relied on new facts and evidence, whether the appellate court erred in violating their constitutional right to fair trial. Subsequently, the applicants aver that these substantial questions of law have significant public interest that transcends the parties and thereby need to be settled by this Court; and

**[3] UPON FURTHER CONSIDERATION** of the applicants written submissions dated 21<sup>st</sup> August 2025 and filed on 26<sup>th</sup> August 2025, reiterating their earlier arguments and adding that: there is no binding precedent on the conditional legality of registering a previously jointly used mark, whether non-disclosure in such registration constitutes a misrepresentation or fraud, and the legal rights of co-users in such circumstances; they cite the decision of ***Steyn Vs Ruscone*** (Application 4 of 2012) [2013] KESC 11 (KLR) to buttress their arguments: and

**[4] HAVING REGARD** to the respondents' replying affidavit sworn by the 1<sup>st</sup> respondent and written submissions both dated 3<sup>rd</sup> October 2025 and filed on 9<sup>th</sup> October 2025 opposing the application on grounds that the omission on the part of the applicants to annex a draft Petition of Appeal or draft grounds is fatal; this is because it deprives both the Court and the respondents an opportunity to evaluate the precise issues the applicants seek to have certified as matters of general public importance; inevitably, the Court cannot be invited to speculate on vague and generalised assertions;

**[5] NONETHELESS**, the respondents argue that the allegation that the Court of Appeal relied on new facts and evidence, as well as doctored documents is without basis; in view of the fact that the court limited itself to the two questions before it; namely, a dispute between private parties contesting the exclusive use of trademark No. 60247, and the award of Kshs. 20 Million in damages; as a result, they affirm that these are private commercial rights enforceable only between the parties, with no bearing on the wider public; concerning the violation of the applicants' right to fair trial, the respondents submit that it is misplaced as the proper forum for recourse was the Court of Appeal because this Court cannot be converted into a further appellate forum to reopen factual disputes under the guise of a fair trial claim; to that end, that the application is misconceived, unmerited and fails to meet the strict constitutional threshold for certification as raising a matter of general public importance; and

**[6] HEEDFUL OF** the provisions of Article 163 (4) (b) and (5) of the Constitution, Section 15B of the Supreme Court Act, and Rule 33 of the Supreme Court Rules 2020; and appreciating that this Court has authoritatively laid down the guiding principles governing the certification of a matter as one involving general public in the *Steyn Case (supra)* and reaffirmed them in *Bell Vs Moi & another* (Application 1 of 2013) [2013] KESC (KLR); and

**[7] HAVING CONSIDERED** the totality of the application, response, and submissions of the parties **WE NOW OPINE** as follows:

- (i) Article 163 (5) of the Constitution, confers upon this Court authority to review the certification decision made by the Court of Appeal, with the power to affirm, vary, or overturn it.
- (ii) What gave rise to the dispute was a business relationship in which, between 2004 and 2006, the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent were business partners in an entity incorporated as *High Flyer Services Limited*. They engaged in the publication of books under a series known as *Comprehensive Topical*. Upon parting ways in 2006, the parties continued to publish books separately, and the 1<sup>st</sup> respondent proceeded to register a trademark depicting a flying eagle carrying three books in its talons with the phrase “High Flyer Series”.
- (iii) In 2011, it came to the 1<sup>st</sup> respondent’s attention that the 1<sup>st</sup> applicant had published and was selling a book titled “*Combined Encyclopaedia Standard 8*” using his trademark, which book was alleged to be substantially similar to a book compiled and published by the 1<sup>st</sup> respondent in 2007. The respondents subsequently instituted a suit before the High Court alleging trademark infringement and the tort of passing off, and sought *inter alia*, a permanent injunction and damages against the applicants. The applicants, in turn, filed a defence and counterclaim, alleging fraud in the registration of a name jointly used and owned, and non-disclosure of the registration of the trademark.
- (iv) The High Court determined that the respondents’ actions amounted to stealing a match from the applicants, since both had used the mark “*High Flyer Series*” in their company and continued to use it in their respective publications even after registration of the trademark. In addition, the court awarded the applicants Kshs. 20 Million for the loss of business and other incidental losses or expenses.
- (v) On appeal, the Court of Appeal allowed the respondents appeal. It found that, although the 1<sup>st</sup> applicant was aggrieved that the 1<sup>st</sup> respondent had not informed him of the trademark registration, the law only required the

respondent to advertise the application in the Kenya Gazette or the KIPJ journal, which he had done. He had no duty to inform the 1<sup>st</sup> applicant or any other person of his intentions to register the trademark. Further, the court noted that the 1<sup>st</sup> applicant not only copied the 1<sup>st</sup> respondent's book, *Combined Encyclopaedia Standard 8*, but also used the 1<sup>st</sup> respondent's trademark, constituting infringement. In turn, regarding the award of Kshs. 20 Million, the court found that the applicants had not specifically pleaded the same as loss of business in their counterclaim.

- (vi) Disgruntled, the applicants sought before the Court of Appeal leave to appeal to this Court on the basis that its intended appeal involves matters of general public importance. In its ruling, the court had this to say:

***“17. It is notable in this respect that the applicants have not set out any uncertainty caused by the law or previous decisions of this court or Supreme Court on the process of registration of trademarks, whether previously in use or otherwise, and this law was aptly set out in the judgment sought to be appealed. In addition, the applicants appear to be dissatisfied with the conclusions reached by this court, and challenge the factual basis of the said conclusions. It is evident that the conclusions were based on the evidence placed before the court, in that particular appeal, and to this extent the intended appeal, therefore, does not transcend the circumstances of that particular case.”***

- (vii) We discern no basis to interfere with the Court of Appeal's finding for the following reasons. The issues highlighted by the applicants, as captured at paragraph 2 above, primarily concern the unilateral registration of a trademark that was previously in use jointly without notice or consent of the other party. This issue does not transcend the specific circumstances of the parties. It neither goes beyond the litigants' private interests to bear

a wider public significance, nor does it raise substantial points of law that have crystallized through the judicial hierarchy so as to qualify for certification. Furthermore, mere apprehension of a potential miscarriage of justice by the Court of Appeal cannot, in itself, justify the grant of certification, and the applicants have failed to demonstrate the contrary.

- (viii) In the end, there is no justification to warrant our disturbing the Court of Appeal's finding that the application fell short of the threshold set out in the ***Steyn*** and ***Bell Cases***. In the absence of certification, the prayer relating to stay of execution is devoid of basis and accordingly fails. We say no more on it.
- (ix) Absent of any compelling reason to depart from the principle, costs follow the event, and guided by ***Rai & 3 others Vs Rai & 4 others*** [2014] KESC 31 (KLR), the respondents are entitled to costs.

**[8] CONSEQUENTLY**, for the reasons aforesaid, we make the following Orders:

- (i) ***The Notice of Motion dated 6<sup>th</sup> August 2025 and filed on 26<sup>th</sup> August 2025 is hereby dismissed.***
- (ii) ***The Ruling of the Court of Appeal delivered on 25<sup>th</sup> July 2025 denying leave to appeal to this Court is hereby upheld.***
- (iii) ***Costs of this application shall be borne by the applicants.***

It is so ordered.

**DATED and DELIVERED at NAIROBI this 20<sup>th</sup> day of February, 2026.**

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**M. K. KOOME  
CHIEF JUSTICE & PRESIDENT  
OF THE SUPREME COURT**

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**P. M. MWILU**  
**DEPUTY CHIEF JUSTICE & VICE**  
**PRESIDENT OF THE SUPREME COURT**

.....  
**S. C. WANJALA**  
**JUSTICE OF THE SUPREME COURT**

.....  
**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....  
**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

**I certify that this is a true copy of the original**

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

