



**Mwangi t/a High Flyer Publishes & another v Kiai t/a High Flyers  
Services and Publishers & another (Civil Appeal (Application)  
E003 of 2021) [2025] KECA 1385 (KLR) (25 July 2025) (Ruling)**

Neutral citation: [2025] KECA 1385 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL (APPLICATION) E003 OF 2021  
W KARANJA, SG KAIRU & P NYAMWEYA, JJA  
JULY 25, 2025**

**BETWEEN**

**PETER GICHUKI MWANGI T/A HIGH FLYER PUBLISHES ..... 1<sup>ST</sup> APPLICANT  
FORTUNE PRINTERS LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ANT' TONY KIAI T/A HIGH FLYERS SERVICES AND  
PUBLISHERS ..... 1<sup>ST</sup> RESPONDENT  
HIGH FLYER SERVICES AND PUBLISHERS LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for the certification and leave to appeal to the Supreme Court with against the judgment of this Court (H. Omondi, Ali-Aroni & J. Mativo JJA) delivered on 12th July 2024 in NAI Civil Appeal No. E003 of 2021)*

**RULING**

1. The applicants herein are aggrieved by a judgment delivered by this Court (H. Omondi, Ali-Aroni & J. Mativo JJA) on 12<sup>th</sup> July 2024 in Civil Appeal No. E003 of 2021, which allowed an appeal filed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents herein, and set aside the decision of the High Court at Nairobi (Chemitei J.) dated 20<sup>th</sup> December 2019 and delivered in HCCC No. 45 of 2011. The High Court had dismissed the 1<sup>st</sup> and 2<sup>nd</sup> respondents' suit against the applicants for the infringement and passing off of their trademark No. xxx, a permanent injunction and damages, and partially allowed the applicants' counterclaim in which they had sought orders that the trademark No. xxx be deregistered and they are awarded aggravated and general damages for loss of business. The said trademark No. xxx comprised of an image of a flying eagle holding three books by its talons and with the phrase High Flyer Series next to it.



2. It was not disputed by the parties in the Court of Appeal that the 1<sup>st</sup> respondent and the 1<sup>st</sup> appellant worked together between 2004 and 2006 in a business known as High Flyer Service, and later registered a Company known as High Flyer Services Limited. While they were in business together, the 1<sup>st</sup> respondent and 1<sup>st</sup> applicant published revision books that bore the brand name “Comprehensive Topical”, and which had a mark of three standing books on the cover with the initials “HFS”, and which mark was not registered as trademark. The 1<sup>st</sup> respondent and 1<sup>st</sup> applicant parted ways in November 2006, and each separately continued in the same business of publishing revision series.
3. The respondents’ claim was that the 1<sup>st</sup> respondent then registered the trademark No. 60247 on 2<sup>nd</sup> November 2006, and thereafter used his company, being the 2<sup>nd</sup> respondent, to among other activities publish, sell, and distribute books under the said trademark, while the applicants continued to publish books under the previous brand namely “Comprehensive Topical”. However, that in 2011, the 1<sup>st</sup> respondent not only stopped using the “Comprehensive Topical” brand on his books, but also published and started selling a book known as Combined Encyclopaedia Standard 8 using the respondents’ trademark, which was similar to a book the 1<sup>st</sup> respondent had compiled and published in 2007, and further copied the design, name, content, pictures, and colour of the respondents’ books including an image of a flying eagle holding a manuscript with its talons with the phrase “High Flyer Series” next to it.
4. On their part, the applicants’ case was that the 1<sup>st</sup> respondent illegally and fraudulently registered the trademark ‘High Flyer Series’ without the 1<sup>st</sup> applicant’s knowledge, yet the mark had been extensively marketed and used by High Flyer Services and High Flyer Services Limited, which was co-owned by the 1<sup>st</sup> applicant and the 1<sup>st</sup> respondent. They detailed in evidence how their business was thereafter crippled by ex parte orders granted to the respondents and even though the orders were later lifted, by the respondents subsequently referring the matter to the Copyright Board, which consequently confiscated finished books and unfinished materials from the applicant’s business.
5. After hearing the parties, the High Court found that the actions of the respondents amounted to stealing a march from the applicants since both had used the mark “High Flyer Series” as a business brand in their company together; and both still used the same in their various publications years later even after registration of the trademark, and awarded the applicants Kshs. 20 million for the loss of business and other incidental losses or expenses.
6. On appeal, this Court considered two issues, namely whether the trial court erred by failing to consider whether there was infringement of trademark No. xxx and by awarding the applicants damages of Kshs. 20 million for loss of business. The Court considered the provisions of sections 2, 7, 20 and 21 of the Trademarks Act and various judicial decisions, to find that whereas the 1<sup>st</sup> applicant was aggrieved that the 1<sup>st</sup> respondent had not informed him of the registration of the trademark, the law only required the 1<sup>st</sup> respondent to advertise the application for registration of the trademark in the Kenya Gazette or the KIPJ journal, which he effected, and once this was done, he had no duty to inform the 1<sup>st</sup> applicant or any other party in any other form that he had intentions of registering the trademark.
7. Further, that the 1<sup>st</sup> applicant not only copied the 1<sup>st</sup> respondent’s book; the Encyclopaedia for Standard 8, but also used the 1<sup>st</sup> respondent’s trademark which was an infringement, and the 1<sup>st</sup> respondent’s trademark of a brown flying eagle holding three books by its talons with the phrase “High Flyer Series” and the 1<sup>st</sup> applicant’s mark of a brown flying eagle holding a manuscript with its talons and the phrase “High Flying Series” are so similar as to confuse. Lastly, that the respondents could not be faulted for orders granted to them by a competent court and actions of the authorised bodies after they reported the infringement of their trademark, and the applicants did not specifically plead loss



of business in their counterclaim, and the same should have been tabulated and evidence in support provided and the award for loss of business was without any legal or factual basis. With these findings, this Court set aside the judgment of the High Court and substantially allowed the respondents' appeal and claim, save for the prayer for damages, which it found was not supported by evidence.

8. The said judgment precipitated the lodging of an application dated 25<sup>th</sup> July 2024 in this Court by the applicants which is the subject of this ruling, and in which they seek orders of stay of execution of the judgement delivered on 12<sup>th</sup> July 2024, and that their intended appeal against the judgment be certified as one that transcends the litigation interest of the parties. Hence, that the judgment requires the Supreme Court's intervention and input on grounds of general public importance. The application is expressed as being brought under Article 163(4) of *the Constitution*, sections 3A and 3B of the *Appellate Jurisdiction Act*, and Rules 1(2),5(2)(b),41,42 and 43 of the Court of Appeal Rules; and is supported by an affidavit sworn on even date by Peter Gichuki Mwangi, the 1<sup>st</sup> applicant, and Antony Kahuthu, the applicants' advocate.
9. The applicants fault the Court of Appeal for ignoring the fact that the appeal filed in the Court of Appeal was founded on doctored documents by the 1<sup>st</sup> respondent who misled the Court by concealing true material facts; and for ignoring the evidence of the applicants and in particular their Defence and Responses showing prior use of the mark by the applicants and proof of loss of business and damages thereof. Therefore, that their intended appeal seeks a determination of what relief a party has when the Court of Appeal either inadvertently or otherwise overlooks evidence in matters initiated in the High Court, and relies on extraneous matters, thereby violating the right to a fair trial.
10. The respondents opposed the application by way of a replying affidavit sworn on 11<sup>th</sup> March 2025 by the 1<sup>st</sup> respondent, who stated that he is also a director of the 2<sup>nd</sup> respondent. On the prayer for stay execution of the judgement, the respondents averred that Rule 5(2)(b) of the Court of Appeal Rules confers powers to this Court to hear interlocutory applications before the main appeal that is pending before the Court of Appeal is heard and determined and does not confer power to entertain any application on the merits or otherwise of a suit after judgment has been delivered. Therefore, that this Court is functus officio as it pertains to matters regarding the determination of the application for stay of execution after it delivered its judgment on 12<sup>th</sup> July 2024. Furthermore, the suit between the parties involves the determination of a dispute between private individuals and the right to the exclusive use of the trademark registered as No. 60247 which had a bearing on the parties only, and the intended appeal subject of certification does not raise any issues that transcend the litigation interest of the parties and thus cannot be interpreted as being of public interest.
11. Specifically, that the ground that the appeal filed in the Court of Appeal was founded on doctored documents by the 1<sup>st</sup> respondent is unfounded and baseless and the same does not qualify as a reason for certification of a matter as being of general public importance; the ground that the applicants' right to fair trial was violated when the Court relied on extraneous matters not on evidence which led to a biased outcome ought to have been raised in an application to strike out the extraneous matters, and an apprehension of miscarriage of justice does not qualify as reason for granting certification; and *the Constitution* and the statutes are clear on the remedies available to parties who are aggrieved by the decision of the Superior Courts to address the question raised for judicial intervention namely, the relief a party has when the Court of Appeal inadvertently or otherwise overlooks evidence litigated in the High Court. Accordingly, that the matter subject of certification does not raise any point of law that is substantial, whose determination shall have a bearing on public interest and does not satisfy the legal requirements of Article 163(4)(b) of *the Constitution*.



12. We heard the application at a virtual hearing held on this Court’s online platform on 13<sup>th</sup> March 2025, during which learned counsel Mr. Kahuthu appeared for the applicants, while learned counsel Mr. G. Nyanjwa appeared for the respondents. Mr. Kahuthu indicated he was abandoning the prayer for stay of execution of this Court’s judgment, and would rely on written submissions dated 18<sup>th</sup> March 2025. Counsel reiterated the issues raised in the applicants’ pleadings, and while citing the guidelines set out by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi Ruscone*, (2013) eKLR and *Standard Chartered Financial Services Limited vs Manchester Outfitters & 2 Others*, Civil Application E00l of 2023, submitted that the applicants seek intervention and input of the Supreme Court in determining the question of the process leading to the registration of a trademark that was previously in use, as its impact and consequences are substantial and broad-based, transcending the litigation-interest of parties and bearing upon public interest.
13. Mr. Nyanjwa on his part relied on written submissions dated 17<sup>th</sup> March 2025 wherein the averments made in the respondents’ replying affidavit were reiterated to submit that the test set out in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi Ruscone*, (supra) had not been met by the applicants.
14. The issue that presents for determination is whether the intended appeal to the Supreme Court raises a matter of general public importance, and is therefore eligible for certification as such to warrant leave to appeal. We note in this regard that Mr Kahuthu appears to have conceded that this Court has no jurisdiction to grant the order of stay of execution of the impugned judgment sought by the applicants. It was in this respect held by this Court in *Dickson Muricho Muriuki vs Timothy Kagondu Muriuki & 6 others* (2013) eKLR that Rule 5(2)(b) of the Court of Appeal Rules confers power to this Court to hear interlocutory applications pending the hearing and determination of the main appeal before it, and does not confer power to this Court to entertain any application on the merits or otherwise of a suit after judgment.
15. On the prayer for certification, this application is brought arising from the provisions of Article 163(4) of *the Constitution* which provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this Constitution; and in any other case where the Supreme Court or the Court of Appeal certifies that a matter of general public importance is involved. The criteria for certification of a matter as one of general importance was laid down by the Supreme Court in *Hermanus Phillipus Steyn vs. Giovanni Gneccchi Ruscone*, (supra) as follows:

“...a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation- interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not close, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.”
16. The Supreme Court further enunciated the principles for determining whether a matter of general public importance thus:
  - i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;



- 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 a substantial one, the 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 Courts below, and must have been the subject of judicial determination;
  - iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
  - v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of *the Constitution*;
  - vi. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;
  - vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.”
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.
18. Arising from the above stated reasons, the issues and question raised by the applicants in our view do not qualify as substantial questions of law or matters of general public importance, nor are they capable of transcending the dispute between the parties in this particular case. The applicants’ Notice of Motion dated 25<sup>th</sup> July 2024 is accordingly found not to have merit and is dismissed with costs to the respondents.
19. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF JULY 2025.**

**W. KARANJA**

.....

**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**



.....

**JUDGE OF APPEAL**

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

Signed

**DEPUTY REGISTRAR.**

