REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS

MACHAKOS LAW COURTS

ELRC APPEAL NO. E009 OF 2024

TAMU MILLERS LIMITED ---------- APPELLANT

-VERSUS-

FARIS MUNIANGI BARASA ----------RESPONDENT

CORAM

Before Lady Justice Jemimah Keli,

C/A Otieno

RULING

1. The applicant filed the instant application by way of Notice of Motion dated under Order 12, Order 17 rule (1) and (2), Order 18 Under section 1A, 1B and 3A of the Civil Procedure Act and Under Order 9 Rule 9 (a), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules) for ORDERS:-
    a. Spent
    b. THAT the honorable court be pleased to arrest the Ruling slated for 13th March, 2026 pending hearing and determination of this application.

c. THAT this Court be pleased to set aside the entire proceedings of 16th January, 2026, if any and order that the matter be re-heard or appear afresh.

d. THAT the recorded audio call and its transcript by the Appellant be struck out and dismissed and if not, the said Advocate Ahmed be cross examined.

e. THAT the Hon. Lady Justice Jemimah Wanza Keli do recuse herself and the matter be placed before the Nairobi ELRCA President for further directions.

f. THAT the costs of this application be provided for.

2. Grounds of the application

a) THAT on 17th December 2025 only the Applicant availed himself in Court and the matter was marked as a last adjournment for the Appellant.

b) THAT the Applicant who has never missed Court followed with the Court Registry on 16th January 2026 and was informed that the Court was not sitting and that subsequent dates would be updated in the Judiciary CTS.

c) THAT the Applicant never served with a mention Notice for 6th February 2026 and in any case, the under was shocked, flabbergasted and insulted when he was served a voice recording purporting to be a conversation between him and the Respondent.

d) THAT the said voice recording is AI generated and therefore an abomination that should not even be mention; the Applicant denies ever making such a call nor is the voice or sound his.

e) THAT the Court had only directed parties to produce an Mpesa Statement and ID and no Application was ever filed seeking for leave to re-open the case and file new evidence in the form of a voice recording or call log.

f) THAT the manner in which these proceedings have been conducted is highly prejudicial, discriminatory, an abuse of the Court process, an injustice and unfairness upon the Applicant.

g) THAT this Honourable Court is called upon to provide a fair playing field to the Applicant by Arresting the ruling slotted for 13th March 2026 and re-open the case for further hearing.

h) THAT there is extreme conflict of interest as the Advocate in conduct of this matter, Dayib is a son in law to the Respondent's owner and majority shareholder, Affey Mohamed Abdi.

i) THAT it is apparent even to a layman that the said Advocates will go to extreme lengths to secure a victory for their beloved father in law.

j) THAT in what world would the opposing Counsel engage the opposing party in the absence of his Counsel, without leave of Court, record the alleged phone call and produce it to Court long after the parties have been heard? It amounts to professional misconduct, is illegal and a crime as evidence has been fabricated and false information uttered.

k) THAT were the Court to entertain and admit such evident and block the Applicant from being heard, it would taint the Court's image and suggest that the Honourable Court that swore to stand with the Truth is in bed with the devil.

l) THAT substantive justice requires that a party should not be condemned unheard and justice should be done to all irrespective of status.

m) THAT it is in the interest of justice that the Ruling be arrested and the suit be heard afresh.

3. The application was supported by the affidavit of the applicant sworn on the 24th February 2026.

4. The court on the 13th march 2026 gave direction on the disposal of the application. There was no response. The applicant relied on their application.

DECISION

5. The Application was brought under Order 12 of the Civil Procedure Rules- '*ORDER 12 - HEARING AND CONSEQUENCE OF NON-ATTENDANCE,* ***Hearing from day to day [Order 17, rule 1]***

(1) Once the suit is set down for hearing, it shall not be adjourned unless a party applying for adjournment satisfies the court that it is just to grant the adjournment.

(2) When the court grants an adjournment it shall give a date for further hearing or directions'. Further, the applicant invoked [Order 17, rule 2], on Notice to show cause why suit should not be dismissed, ORDER 18 - HEARING OF SUIT AND EXAMINATION OF WITNESSES. Order 9, rule 9'9. Change to be effected by order of court or consent of parties **[**When there is a change of advocate, or when a party decides to act in person having

previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

(a) upon an application with notice to all the parties; or.' The applicant further invoked the inherent power of the court and oxygen principles under section 1,1A, 1B and 3A of the Civil Procedure Act. None of the provisions is on recusal.

6. The legal basis of recusal can be seen in The Constitution of Kenya (2010): Specifically Article 50(1), which guarantees every person the right to a fair and public hearing before an independent and impartial court or tribunal. The Judicial Service (Code of Conduct and Ethics) Regulations, 2020: Regulation 21 mandates that a judge must disqualify themselves in any proceeding where their impartiality might reasonably be questioned. Kenyan courts (notably the Supreme Court in *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013]*) apply an **objective test** rather than a subjective one. **The Question:** Would a reasonable, fair-minded, and informed member of the public, knowing all the facts, have a reasonable apprehension that the judge would not be impartial? It is not enough for a litigant to simply feel the judge is biased; there must be a "legitimate basis" for that fear. The Supreme Court stated as follows in Rai case-'The object in view, in the recusal of a judicial officer, is that justice as between the parties be uncompromised; that the due process of law be realized, and be seen to have had its role; that the profile of the rule of law in the matter in question, be seen to have remained uncompromised.'' Further the Supreme Court relied on an American case, Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) where it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice. The Supreme Court stated that such a broad test is adopted too in South African Defence Force and Others v. Monnig and Others (1992) (3) SA 482 (A), p.491:"The recusal right is derived from one of a number of rules of natural justice designed to ensure that a person accused before a court of law should have a fair trial." The evidence in

support of the recusal was in the supporting affidavit of the applicant which is reproduced as below-

'I, FARIS MUNIANGI BARASA an adult of sound mind and of Post Office No. 4094 NAIROBI in the Republic of Kenya do hereby make oath and state as follows; - 1. THAT I am the Applicant herein well versed with the conduct of this matter and having it explained to me by my Advocates on record, which advise I verily believe to be true. 2. THAT the Appellant filed an application for review of the Court's judgment in the lower Court a year or more after the judgment had been delivered. 3. THAT the Application for review which was misguided and an attempt to Appeal through the back door was dismissed with Costs and the Appellant Appealed the same vide the instant Appeal. 4. THAT subsequent to filing the said Appeal the Appellant was directed by the Court to deposit the entire decretal sum in Court, as security. 5. THAT the funds were deposited in Court and upon the Court hearing the Appeal, the same was dismissed with Costs by the Hon. Justice Byram Ongaya. 6. THAT the Appellant informed the Judge that they would be filing an Appeal at the Court of Appeal and the Court directed that the funds would be released to the Respondent automatically f the Appeal had not been filed within 3 months. 7. THAT over three months lapsed and no Appeal at the Court of Appeal had been filed; my Advocates on record filed an application seeking to have the deposited funds released to me as had been directed by the Court. 8. THAT upon being served with that Application to have the deposited funds released to me, the Applicants filed their own Application alleging that I had been paid Kshs. 100,000/= and agreed to sign an agreement to have the deposited sum that amounted to over Kshs. 1,400,000/= be released to them 9. THAT delay tactics, frustration and intimidation

followed such that I had to run and hide for my life, until present. 10. THAT the Appellant always forced that the matter be heard in open Court, either to expose me or just to frustrate me and make it impossible for me to prosecute the matter. 11. THAT the Court was informed of the insecurity and threats to my life and a prayer was made that the matter be concluded as a matter of urgency as the Court had enough evidence to deliver a ruling and in any case, Applications can and are usually heard by way of averments and submissions; we failed to understand why such a simple matter necessitated over 10 Court attendances and why the Appellant was so confident not to appear in Court several times while they themselves forced the open Court hearing. 12. THAT it was also disclosed that the Appellant's Advocate by the name Dayib is a son in law to the Respondent's owner and director Afey Mohamed Abdi and therefore the amount of conflict of interest is insane and too high to warrant a fair trial and justice. 13. THAT on 17th December 2025 the Appellants failed to appear in Court, my Advocates protested and stated that perhaps the Court had sufficient evidence and material to issue a ruling date for the Applications which had dragged on for far too long to amount to a denial of justice. 14. THAT the Honourable Lady Justice directed that the matter would be heard on 16th January 2026 and the same was marked as the last adjournment for the Appellant. 15. THAT my Advocates on record received information from the Court registry that the Court would not be sitting on 16th January 2026 and that the dates would be updated in the CTS. 16. THAT I reiterate that I never made the said call nor have I ever been in touch with the Appellant's Advocates. 17. THAT the Court had previously directed that the Appellant provide the alleged Mpesa statement and that I would be required to appear in Court with an Original ID, even though it was never stated that I was impersonating anyone or that I was not Faris

Muniangi Barasa who had worked for Afey Mohamed Abdi for over 7 years. 18. THAT no Application was ever filed seeking for leave to produce extra material nor am I aware of the Court admitting the alleged voice call as evidence in my absence and further directing that a transcript of the alleged voice call be produced, without even confirming that the transcript is a true copy. 19. THAT the last adjournment issued on 17th December 2025 applied to the Appellant who was absent and not to me and in any case, having never missed to attend Court, the Court should have issued another Hearing date and directed the Appellant to serve us if indeed the Court was sitting. 20. THAT the none attendance if any was not deliberate and not my mistake and if any mistake was done, it was a mistake by Counsel who informed me that the Court would not be sitting. 21. THAT it is trite law that mistakes of Counsel should not be visited upon an innocent litigant. 22. THAT the Court should arrest the said Ruling and issue a further hearing date in a weeks time and further direct that the alleged parties in the transcribed voice message should be cross examined. 23. THAT the Court should direct the Appellant do file an Application seeking to have the voice message produced as evidence, and should the Court grant the said prayers, it should direct that a voice examination report be produced by a voice examiner. 24. THAT should the voice examiner rule that the voice message produced is false and AI produced, I retain my right to initiate criminal and professional misconduct proceedings against the said party who prepared and spoke in the alleged voice message. 25. THAT the Court should distance itself from such things and strike out any evidence that was produced without leave and in the absence of the other party. 26. THAT there has been no inordinate delay in bringing forth this application before this Honourable Court since having knowledge of the matter having proceeded ex-parte. 27. THAT I verily believe that no

prejudice will be suffered by the Appellant/Respondent if this Honourable Court sets aside the proceedings of 16th January, 2026, and have the Appellant and his Advocate be cross-examined by my Advocates on Record herein. 28. THAT it is in the interest of justice if the orders sought are granted.' The court finds nowhere did the applicant ask the court to recuse itself, yet that is the evidence in support of the application. The applicant had the burden to prove the reason for the recusal to warrant the court's consideration grant of the order of recusal sought. The court established the application is not supported by the affidavit thus the prayers are baseless.

7. This is a court of record. On the 17th December 2025, the court, in the presence of all parties, issued a date of 16th January 2026 for further hearing. The court did not sit due to exigencies of duty. The court delegated its Court assistant to inform all parties who had logged in virtually on the 16th January 2026 that the court would sit on 20th January 2026. Indeed majority of the parties appeared on the set date. The date of 16th January 2026 was for a physical hearing, thus it is not far-fetched to believe the applicant that he was informed by the registry the court was not sitting. The court sat on the 20th January 2026, and only the respondent/appellant appeared. The respondent informed the court that it had filed audio, and the court ordered the transcription to be filed and served, and proceeded to issue a ruling date. That was in order as on the date of hearing, the court, in the absence of the other party, may proceed and close the case and issue a decision date. The allegations on recusal are not supported by the affidavit. The application did not meet the test in American case, Perry v. Schwarzenegger, 671 F. 3d 1052 (9th Circ. February 7, 2012) where it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person, this being a "well-informed, thoughtful observer who understands all

the facts", and who has "examined the record and the law"; and thus, "unsubstantiated suspicion of personal bias or prejudice" will not suffice.'(cited with approval by the Supreme Court in Supreme Court in *Jasbir Singh Rai & 3 Others v. Tarlochan Singh Rai & 4 Others [2013]*). The application for recusal is found to be baseless and is disallowed.

8. The applicant in the affidavit has sought the court to set aside directions on the ruling and proceedings of 16th January 2026. The court's position is that the proceedings are for 20th January 2026. In the interest of justice, the court sets aside the ex parte proceedings of 20th January 2026 and orders status quo ante 17th December 2026. The audio was filed without leave of the court, and thus, to be admitted as evidence, the appellant ought to make a formal application for the same.

9. In the upshot, the court found no merit in the application for recusal. The application for recusal is disallowed. In the interest of justice, the court set aside all proceedings of 20th January 2026 and ordered status quo ante as at 17th December 2026. The audio was filed without the court's leave and is not admitted as evidence. The court finds that the matter has unnecessary delayed. The court orders the parties to appear for further proceedings as ordered on 3rd October 2025, specifically for further cross- examination of the applicant on the filed MPESA statement by the appellant, and the production of the original ID by the applicant. I make no order as to costs in the application. Further hearing on 5th June, 2026.

10. It is so ordered.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT NAIROBI THIS 8TH MAY, 2026.

JEMIMAH KELI,

JUDGE.

IN THE PRESENCE OF:

C/A -Otieno

Applicant – Nekesa h/b Ngigi

appellant – Ochola h/b Daiyb