



PRE-TRIAL CHAMBER I

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul
Judge Cuno Tarfusser

SITUATION IN KENYA

THE PROSECUTOR

v.

**FRANCIS KIRIMI MUTHAURA
UHURU MUIGAI KENYATTA &
MOHAMMED HUSSEIN ALI**

Public Document

Defence Response to Prosecution's Application for leave to appeal the "Decision on the 'Prosecution's application requesting disclosure after a final resolution of the Government of Kenya's admissibility challenge' and Establishing a Calendar for Disclosure" (ICC-01/09-02/11)

Source: Counsel for Francis Kirimi Muthaura (the "Applicant")

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

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Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

The Office of Public Counsel for Victims

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Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
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Other

I. PROCEDURAL BACKGROUND

1. On 31 March 2011, the Government of Kenya filed its “Application on behalf of the Government of the Republic of Kenya pursuant to Article 19 of the ICC Statute” to challenge the admissibility of the proceedings (the “GoK Application”).¹
2. On 14 April 2011, the “Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge” was filed in which the Prosecution sought to suspend their disclosure obligations pending a final determination of the Government of Kenya’s Article 19 application. (The “Application for Deferral of Disclosure”).²
3. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” in which the Single Judge rejected the Application for Deferral of Disclosure (the “Impugned Decision”).³
4. On 26 April 2011, the “Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure” (ICC-01/09-02/11)” (the “Application for Leave”)⁴ was filed.
5. The Prosecution sought leave to appeal on the following contended issue, namely, “[w]hether the Decision affects the Prosecution fair trial right” (the “Issue”).⁵

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application on behalf of the Government of The Republic of Kenya pursuant to Article 19 of the ICC Statute, 31 March 2011, ICC-01/09-02/11-26.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ 14 April 2011, ICC-01/09-02/11-56.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69.

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Application for leave to Appeal the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the

II. LEAVE TO FILE INTERLOCUTORY APPEAL

6. The right to file an interlocutory appeal under Article 82(1)(d) of the Rome Statute (the “Statute”) is an exceptional remedy, which is only available if the party satisfies the Chamber that strictly defined conditions are met.⁶
7. The decision must involve (a) an issue that would significantly affect (i) both the fair and expeditious conduct of the proceedings (ii) or the outcome of the trial; and (b) in the opinion of the Pre-Trial Chamber, an immediate resolution by the Appeals Chamber may materially advance the proceedings.⁷
8. The definition of an ‘issue’ under Article 82(1)(d) of the Statute is an identifiable subject or topic requiring a decision for its resolution, not merely a question over which there is disagreement or conflicting opinion. An appealable issue must emanate from the ruling of the decision concerned and does not merely represent an abstract question or a hypothetical concern.⁸
9. The Defence respectfully request that the PTC reject the Prosecution’s Application for Leave to appeal since the Prosecution have failed to demonstrate that the impugned decision affects the fair and expeditious conduct of the proceedings, for which an immediate resolution by the Appeals Chamber may materially advance the proceedings.

Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure (ICC-01/09-02/11), 26 April 2011, ICC-01/09-02/11-69 at para. 7.

⁶ Pre-Trial Chamber II, Prosecutor v. Muthaura et al, ‘Decision on the “Prosecution’s Application for Leave to Appeal the Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohamed Hussein Ali”’, 1 April 2011, ICC-01/09-02/11-27, at para 6; see also, Decision on Prosecutor’s Application for Leave to Appeal in part Pre-Trial Chamber II’s Decision on the Prosecutor’s Applications for Warrant of Arrest under Article 58, 19 August 2005, ICC-02/04-01/05-20, at para. 19; this approach was followed equally by Pre-Trial Chamber I, Decision on the Prosecution and Defence applications for leave to appeal the Decision on the confirmation of charges, 24 May 2007, ICC-01/04-01/06-915 at para. 20; see further, Trial Chamber II, Decision on the Prosecutor’s Application for Leave to Appeal the Decision on Redactions Rendered on 10 February 2009, 6 March 2009, ICC-01/04-01/07-946-tENG, at para. 11.

⁷ Article 82(1)(d) of the Statute.

⁸ Pre-Trial Chamber III, Prosecutor v Bemba, Decision on the Prosecutor’s application for leave to appeal Pre-Trial Chamber III’s decision on disclosure, 25 August 2008, ICC-01/05-01/08-75, at para. 11.

III.SUBMISSIONS

10. Properly considered, the Prosecution application amounts to no more than a disagreement with the impugned decision. Under the guise of an application for leave to appeal, the Prosecution include a litany of complaints centred primarily around issues of witness protection and cost.
11. In assessing the merits or otherwise of the Prosecution application, it is appropriate to recall that at the Initial Hearing held on 8 April 2011, the Prosecutor accepted without comment or qualification, the decision of the PTC to commence the confirmation hearing on 21 September 2011.⁹ He did not argue that it was premature to set a confirmation date until after the Government of Kenya's Article 19 application had been finally determined. In agreeing to the date set for confirmation, the Prosecutor must be taken to have accepted that he would discharge all his disclosure obligations, as required under the Rome Statute and applicable Rules of Procedure and Evidence. At no time has the Prosecutor requested for a postponement of the Confirmation Hearing pending the final decision of the Article 19 application. It is trite to say that a confirmation hearing simply cannot take place without disclosure being served upon the defence. The Prosecution's application must be viewed in this context.
12. The Prosecution make several incorrect assertions in their application. The assertion that the Single Judge acted "without exercising discretion, but as a strict matter of legal interpretation"¹⁰ does not constitute an appealable error. As the Appeals Chamber has affirmed, Chambers are obliged to apply the rules of interpretation as set out in Article 31(1) of the Vienna Convention on the Law of Treaties.¹¹ Similarly, the suggestion that "it is the first time a Chamber considered that steps in the process leading to confirmation must go forward even when admissibility challenge is pending"¹² is inaccurate. For example, Pre-Trial Chambers I and II have permitted variation for leave to appeal pursuant to Regulation 35.¹³ In *Lubanga*, the Defence appealed a decision on

⁹ ICC-01/09-02/11-T-1-ENG pages 14 to 15.

¹⁰ ICC-01/09-02/11-69, para. 6.

¹¹ The Situation in the Democratic Republic of the Congo, Judgment on the Prosecutor's Application for Extra-ordinary Review of Pre-Trial Chamber I's 31 March 2006 Decision Denying Leave to Appeal, 13 July 2006, ICC-01/04-168, para. 33.

¹² ICC-01/09-02/11-69, para. 8.

¹³ Prosecutor v. Thomas Lubanga Dyilo, Oral Decision found in Transcript of 25 August 2006-Decision on the specific request by the Defence for suspension of time-limits for three pending filings. See also;

admissibility prior to the confirmation hearing. Although the Defence later withdrew their appeal, there was no suspension of proceedings, and no suspension of disclosure by the Prosecution as long as that application was pending. Similarly, in the Bemba case, the Appeals Chamber rejected a Defence request to suspend proceedings until the Defence appeal on admissibility was finally determined.¹⁴ In the present case, the Impugned Decision correctly reflects the provisions of the Statute and the jurisprudence of this Court in circumstances where a State challenges admissibility pursuant to Article 19 of the Statute. There is nothing in the Application that justifies leave to appeal being granted.

13. As far as the substance of the Prosecution's application is concerned, it discloses a disregard for the relevant statutory provisions as well as to the range of legal options open to it to address witness protection concerns on a case-by-case basis as determined by the Single Judge in her calendar for disclosure between the parties. Without identifying and exhausting the wide range of legal measures available, it is premature for the Prosecution to assert that the Impugned Decision as a whole affects its fair trial rights.¹⁵ The Prosecution Application must fail on this ground as well.
14. The Prosecution allege that the Impugned Decision affects fairness of the proceedings in multiple ways. Despite this, the core of the Prosecution application consists of repeating arguments relating to purported witness protection concerns, the cost of such measures as well as the elaborate protection system which it may have to institute in time for the confirmation hearing. The conclusion drawn by the Prosecution is that the Decision thus leaves them in the unfair position where they may have to sacrifice "the probative force of [their] case" in order to avert harm to their witnesses.¹⁶ In short, the Prosecution have effectively treated the Impugned Decision as one dealing solely with a protective measures request, when the impugned Decision elaborately provides avenues for the Prosecution to seek redaction and other measures in accordance with the time-lines established therein.

Prosecutor v. Kony, Decision on the Prosecutor's motion for Clarification and Urgent Request for Variation of the time-limit Enshrined in Rule 155, 18 July 2005, ICC-02/04-01/05-18.

¹⁴ ICC-01/05-01/08-817, para. 11. The Chamber held that a suspensive effect was not necessary in the circumstances of the case.

¹⁵ See fn 14 for a discussion of the range of legal options available to the Prosecution without recourse to appellate intervention at this stage of the proceedings.

¹⁶ ICC-01/09-02/11-69, paras. 14 to 17.

15. The Defence are compelled to conclude that these arguments are all speculative in any event, and will be dealt with appropriately by the Chamber when they arise in accordance with the time-lines established by the Impugned Decision for the request of such measures. As such, the speculative fears and concerns advanced by the Prosecutor do not affect the fair conduct of the proceedings. Rather, the Impugned Decision enhances the fair conduct of the proceedings by, *inter alia*, ensuring timely and efficient disclosure in a manner which addresses witness protection concerns, and further directing the Prosecution to avail themselves of Article 19(8) of the Rome Statute, in order to preserve evidence and initiate certain investigative steps. In separating suspension of investigation in accordance with Article 19(7) from a suspension of judicial proceedings, the Single Judge correctly and fairly concludes that the Statute does not provide for the suspension of disclosure.

16. The Prosecution's arguments to substantiate their claim that the identified issue affect the expeditious conduct of the proceedings are without merit. The Prosecution allege that they may be forced to seek a postponement of the confirmation hearing if they choose not to take intrusive protective measures at this time. For similar reasons, they argue that taking such procedural steps may be futile if the case is deemed to be inadmissible.¹⁷ These allegations do not arise out of the Impugned Decision. The Impugned Decision rejects the Prosecution's request for suspension of disclosure on the basis of the Statute, and nothing more. Initiating protective measures for witnesses is envisaged both by the Statute and in the Impugned Decision. Both require the Prosecutor to make his case for requesting protective measures on a case-by-case basis. Disclosure is an obligation under the Statute. Contrary to the Prosecution's submission, timely disclosure in the manner set out in the Impugned Decision would significantly expedite the proceedings in a manner which ultimately addresses witness protection concerns.

17. In all its arguments, the Prosecution have failed to establish that if leave to appeal is not granted on the contended issue, they would suffer irreparable prejudice, which if not addressed by the Appeals Chamber, would significantly affect the fair and expeditious conduct of the proceedings or the outcome of trial. The Impugned Decision correctly recognises and directs the Prosecution to other legal avenues available under the Statute. In particular, Articles 19(8) as well as other provisions regulating redactions and other

¹⁷ ICC-01/09-02/11-69, paras. 19 and 20.

protective measures are referred to.¹⁸ In giving effect to the relevant provisions, in particular Articles 19(7), the Single Judge reiterated and applied the provisions of Article 21(3) which makes provision for the applicable law before the International Criminal Court. That provision emphasises that the Court shall apply the Statute... and other founding instruments, failing which it shall import other forms of interpretation. The Prosecution's contention that the Single Judge applied strict statutory interpretation is without merit and fails to consider or apply the requirements of Article 31(1) of the Vienna Convention on the Law of Treaties. Instead, what the Prosecution seek to do is to compel the Single Judge to substitute an express provision in the Statute under the guise of "discretion". Such an approach is without merit and, the Defence respectfully submit, provide another justification militating in favour of dismissing the Prosecution's leave to appeal application.

IV. Immediate Resolution by the Appeals Chamber of the identified issue would not materially advance the proceedings

18. The Prosecution fail to demonstrate that immediate resolution by the Appeals Chamber of the purported issue would materially advance the proceedings.¹⁹ The opposite is true: an appeal at this stage would interrupt the disclosure process, and consequently delay the proceedings.
19. An appeal on the identified issue would not materially assist the proceedings because it is premature given the range of legal options available to the Prosecution to address their witness protection concerns. Rather, it will delay the proceedings.
20. Any suggestion that the identified issue has an effect on the outcome of the trial is abstract, speculative and without foundation. The Impugned Decision does not bar the Prosecution from seeking protective measures and initiating some investigative activities. On the contrary, it encourages the Prosecution to take the statutory steps available to ensure smooth progress for the confirmation hearing. The Prosecution's disagreement as to the Single Judge's determination as to when these steps should take place is not an appealable issue.

¹⁸ ICC-01/09-02/11-64, paras.8, 16, 17 and 18 amongst others.

¹⁹ ICC-01/09-02/11-69, paras. 21 to 22.

V. Conclusion

21. For all the reasons detailed in the paragraphs above, the Defence request that the Prosecution's application for leave to appeal the Impugned Decision be dismissed.

Respectfully Submitted,



Mr. Karim A. A. Khan, QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 2nd Day of May 2011

At Nairobi, Kenya