



Original: **English**

No.: **ICC-01/09-02/11**

Date: **16 August 2011**

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN KENYA

THE PROSECUTOR

v.

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

Public

Application on Behalf of Ambassador Francis K. Muthaura to join the “Request for Leave to Appeal on Behalf of Uhuru Kenyatta the ‘Order to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses,’ 10 August 2011

Source: Counsel for Francis Kirimi Muthaura (the “Applicant”)

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo

Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:

Karim A. A. Khan QC, Essa. M. Faal,
Kennedy Ogetto & Shyamala Alagendra

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC & Gillian Higgins

Counsel for Mohammed Hussein Ali:

Evans Monari , Gershom Otachi & John
Philpot

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

Ms. Paolina Massida

**The Office of Public Counsel for the
Defence**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia

Counsel Support Section

Mr. Esteban Peralta Losilla

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Ms. Fiona McKay

Other

I. Background

1. On 20 July 2011, the Single Judge issued the “Decision Requesting the Parties to Submit information for the Preparation of the Confirmation of Charges Hearing”,¹ in which Her Honour ordered the parties to indicate by 5 August 2011, whether they intend to call live witnesses at the confirmation of charges hearing, and, if so, to submit information detailing the subject-matter and the scope of the proposed testimony of each witness.²
2. In compliance with the Single Judge’s Order, the Defence filed its “Submission by the Defence Team of Ambassador Francis K. Muthaura in Preparation for the Commencement of the Confirmation Hearing”³ on 5 August 2011. In its submission, the Defence notified the Single Judge of its intention to present 8 *viva voce* witnesses, and detailed the subject-matter and scope of the testimony of each of the proposed *viva voce* witnesses in Annex A appended to its Submission.
3. On 8 August 2011, the Defence filed its “Defence Application for Permission to add an additional Witness to its List of *vive voce* witnesses it intends to present at the Confirmation Hearing pursuant to Regulation 35 of the Regulations of the Court.”⁴ In its Request, the Defence sought permission for extension of time to submit an additional witness, not available at the time of filing its submission on 5 August 2011, to be included in its list of *viva voce* witnesses for the confirmation hearing.⁵
4. On 10 August 2011, the Single Judge issued the “Order to the Defence to Reduce the Number of Witnesses to Be Called to Testify at the Confirmation of Charges Hearing and To Submit an Amended List of *Viva Voce* Witnesses”, in which Her Honour granted the Defence’s request for extension of time and also ordered the

¹ ICC-01/09-02/11-181

² *Ibid*, p. 8. See also, para. 12

³ ICC-01/09-02/11-215+Conf-Exp-AnxA

⁴ ICC-01/09-02/11-223+Conf-Exp-AnxA

⁵ ICC-01/09-02/11-223+Conf-Exp-AnxA

Defence to reduce its number of witnesses to be called to testify to a maximum of two at the confirmation hearing and to file an amended list of *viva voce* witnesses indicating their names and scope and subject-matter of their proposed questioning by 15 August 2011.⁶

5. In justifying the reduction of the proposed witnesses, the Single Judge reasoned that the equal rights of the three suspects would be 'properly respected' if the number of *viva voce* witnesses were to be reduced and reliance be placed on written statements of other witnesses without the need to call them to testify live before the Chamber.⁷ In these circumstances, the Single Judge concluded that the maximum number of potential witnesses to be called by the respective Defence teams was 'manifestly excessive and disproportionate for the purpose of the Confirmation of Charges Hearing.'⁸ Accordingly, the Single Judge ordered the reduction in the number of proposed *viva voce* witnesses to be called to testify at the confirmation hearing to two per each Defence team.

II. Submissions

6. The Defence for Ambassador Francis Muthaura files this application to join the Request for leave to appeal filed by the Defence team of Uhuru Kenyatta (ICC-01/09-02/11-242) on the 15th August 2011.⁹
7. The Defence submits that the issue identified in the Request for leave to appeal, limiting each Defence team to calling only two *viva voce* witnesses for the confirmation hearing, clearly arises from the Single Judge's Order.¹⁰ The

⁶ ICC-01/09-02/11-226

⁷ *Ibid*, para. 21

⁸ *Ibid*, para. 13

⁹ This Application is filed in accordance with Regulation 33 (1)(d) of the Regulations of the Court. This Regulation states that "Documents shall be filed with the Registry, at the latest, on the first working day of the Court following expiry of time limit. The Order sought to be appeal was filed on the 10th August 2011.

¹⁰ The Defence also notes the "Defence Request for Leave to Appeal 'Order to Reduce the Number of Witnesses to be called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of Viva Voce Witnesses' " (ICC-01/09-02/11-239) filed by the Ali Defence Team on 15 August 2011, which identifies essentially the same issue for leave to appeal as that identified in the Application of the Muthaura Defence Team. The Defence of Ambassador Muthaura likewise supports the submissions put forward in this Application by the Ali Defence Team.

Kenyatta Request correctly identifies that the issue impacts the fair and expeditious conduct as well as the outcome of the confirmation hearing. In these circumstances, resolution of the issue may materially advance the proceedings.¹¹ The Single Judge's order viewed as a whole restricts the rights of the Defence to mount and present an effective case at the upcoming confirmation hearing without taking into account the individual circumstances of each defence case in a confirmation hearing involving multiple suspects.

III. Relief Sought

8. For reasons detailed in the Kenyatta request, the Defence respectfully requests the Single Judge to grant leave to appeal the "Order to Reduce the Number of Witnesses to be Called to Testify at the Confirmation of Charges Hearing and to Submit an Amended List of *Viva Voce* Witnesses."

Respectfully submitted,



Karim A.A. Khan QC

Lead Counsel for Ambassador Francis K. Muthaura

Dated this 16th Day of August 2011

At Nairobi, Kenya

¹¹ ICC-01/09-02/11-242, paras. 12 to 22.