



Original: English

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

Date: 01 September 2011

PRE-TRIAL CHAMBER II

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

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF
THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI
KENYATTA AND MOHAMMED HUSSEIN ALI

PUBLIC

**DEFENCE OBSERVATIONS FOR THE PURPOSES OF ESTABLISHING THE
FINAL SCHEDULE OF THE CONFIRMATION HEARING**

Source: Defence

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, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim A.A. Khan QC and Kennedy
Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

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

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. PROCEDURAL BACKGROUND

1. On 8 March 2011, the Pre-Trial Chamber (the "PTC") issued its Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali' issuing, by a majority, summons for all three accused.¹
2. On 6 April 2011, the Single Judge issued her "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (the "6 April 2011 Decision").²
3. The initial appearance took place on 8 April 2011. At this hearing the PTC scheduled the confirmation hearing to take place on 21 September 2011.
4. On 20 July 2011, the Single Judge issued her "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing" in which she ordered the parties to indicate whether they intended to call live witnesses at the confirmation of charges hearing.³
5. 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", limiting the number of the witnesses to be called to testify by the Defence at the confirmation of charges hearing to a maximum of two witnesses for each suspect.⁴

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Prosecutor's Application for Summons to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 8 March 2011, ICC-01/09-02/11-01.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Setting the Regime for Evidence Disclosure and Other Related Matters, 6 April 2011, ICC-01/09-02/11-48.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing", 20 July 2011, ICC-01/09-02/11-181.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., 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, 10 August 2011, ICC-01/09-02/11-226.

6. On 15 August 2011, the Defence for Uhuru Kenyatta submitted its “Defence Submission Pursuant to 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’, 10 August 2011.”⁵
7. On 30 August 2011, the Single Judge issued her “Decision Requesting Observation on the Schedule for the Confirmation of Charges Hearing”,⁶ in which she *inter alia* requested the Defence teams to submit by Friday, 2 September 2011, 16h00, their observations for the purposes of establishing the final schedule of the hearing by detailing, in particular, the following:
 - i. whether they intend to raise questions or challenges concerning jurisdiction or admissibility, pursuant to rule 122(2) of the Rules, and/or to raise objections or make observations concerning issues related to the proper conduct of the proceedings prior to the confirmation hearing pursuant to rule 122(3) of the Rules;
 - ii. the estimate of the time required for the presentation of the arguments and evidence, including audio and video based evidence and geographical maps, if any, as well as the questioning of witnesses, within the time frame indicated in paragraph 8.”⁷

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Submission Pursuant to 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’, 10 August 2011, 15 August 2011, ICC-01/09-02/11-238-Conf-Exp.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting Observation on the Schedule for the Confirmation of Charges Hearing, 30 August 2011, ICC-01/09-02/11-272.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision Requesting Observation on the Schedule for the Confirmation of Charges Hearing, 30 August 2011, ICC-01/09-02/11-272, at p. 6.

II. SUBMISSIONS

8. The Defence for Uhuru Kenyatta informs the Pre-Trial Chamber of the following:

- (i) The Defence intends to raise challenges concerning both jurisdiction and admissibility;
- (ii) The Defence intends to raise objections to the admissibility of documents contained within the Prosecution's list of evidence;
- (iii) The Defence has requested an adjournment of the confirmation hearing;
- (iv) The Defence has requested leave to alter the identity of its *viva voce* witnesses.

9. The Defence provides the following time estimates for the presentation of evidence and arguments:

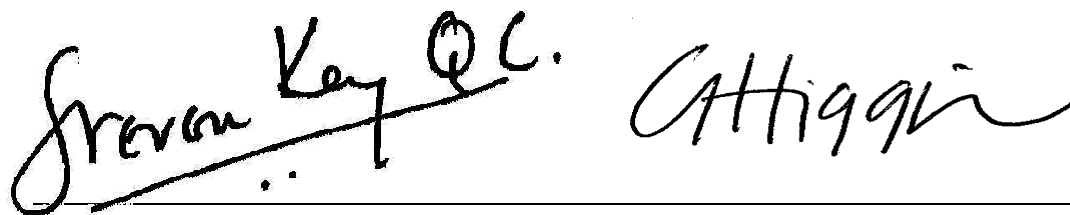
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| (i) Opening statement | 4 hours |
| (ii) Argument on Jurisdiction and Admissibility | 3 hours |
| (iii) Examination-in-chief of <i>viva voce</i> witness 1 | 12 hours |
| (iv) Examination-in-chief of <i>viva voce</i> witness 2 | 8 hours |
| (v) Presentation of other written and video evidence | 4 hours |
| (vi) Cross-examination of <i>viva voce</i> witness 1 | |
| Muthaura team | 4 hours |
| (vii) Cross-examination of <i>viva voce</i> witness 2 | |
| Muthaura team | 2 hours |
| (viii) Cross-examination of <i>viva voce</i> witness 1 | |
| Ali team | 4 hours |
| (ix) Cross-examination of <i>viva voce</i> witness 2 | |
| Ali team | 2 hours |

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|------|---|---------|
| (x) | Oral submissions on the Prosecution's evidence
and mode of liability | 4 hours |
| (xi) | Closing Submissions | 4 hours |

10. The Defence has noted the timetable established by the Court for the Kenya 1 case. This includes hearings on Saturdays and late into the evenings. The court is requested to take into account the following dates to enable counsel to participate:

- (i) Both counsel in the Uhuru Kenyatta team are speaking at an international conference arranged by them on behalf of their Chambers at 9 Bedford Row, London, England on Saturday 1 October 2011. Counsel are central to this event. Steven Kay QC is the leader of the 9 Bedford Row international practice group.⁸ The conference has been arranged since June 2011, and counsel therefore request the court not to sit on that date and to leave sufficient time for them to travel from Den Haag to London on Friday 30 September.

⁸ See www.9bedfordrow.co.uk



Handwritten signatures of Steven Kay QC and Gillian Higgins. The signature of Steven Kay QC is on the left, and the signature of Gillian Higgins is on the right. A horizontal line is drawn below the signatures.

Steven Kay QC and Gillian Higgins
On behalf of Uhuru Muigai Kenyatta

Dated this, Thursday 1 September 2011

At Nairobi, Kenya