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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

With Confidential *Ex Parte* (available only to Pre-Trial Chamber) Annex 1 and 2

**Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a)
for an Adjournment of the Confirmation Hearing Scheduled for 21 September
2011 and Request for Alteration to their Selected Viva Voce Witnesses**

Source: Defence

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
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I. PROCEDURAL BACKGROUND

1. On 15 December 2010, the Prosecutor submitted the “Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali” (the “Article 58 Application”).¹
2. 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 suspects.²
3. On 6 April 2011, the Single Judge issued her “Decision Setting the Regime for Evidence Disclosure and Other Related Matters” (the “First Disclosure Decision”) which set out the principles governing disclosure.³
4. The initial appearance took place on 8 April 2011. At this hearing the Pre-Trial Chamber (the “PTC”) scheduled the confirmation hearing to take place on 21 September 2011.
5. 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 Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”), in which she established the calendar for disclosure setting out the various time limits for

¹ Pre-Trial Chamber II, The Situation in the Republic of Kenya, Prosecutor’s Application Pursuant to Article 58 as to Ambassador Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali, 15 December 2010, ICC-01/09-31-Conf-Exp and its annexes.

² Pre-Trial Chamber II, 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.

³ 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.

service by the Defence and Prosecution as well as deadlines for the submission of properly justified proposals for redactions.⁴

6. On 20 July 2011, the Single Judge ordered the Defence to notify the Chamber if they wished to call any *viva voce* witnesses at the confirmation hearing and if so, to identify the subject-matter and scope of their evidence.⁵
7. On 10 August 2011, the Pre-Trial Judge ordered the Defence to reduce the number of live witnesses they wished to call at the confirmation hearing to a maximum of two per Defence team and to notify the Pre-Trial Chamber by 15 August 2011 of the identity of their witnesses.⁶
8. The Prosecution has disclosed to evidence to the Defence on the following dates: 3 June 2011,⁷ 24 June 2011,⁸ 19 July 2011,⁹ 25 July 2011,¹⁰ 29 July 2011,¹¹ 8 August 2011,¹² 19 August 2011,¹³ and 25 August 2011. The Prosecution

⁴ 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.

⁵ Pre-Trial Chamber II, "Decision Requesting the Parties to Submit Information for the Preparation of the Confirmation of Charges Hearing", ICC-01/09-02/11-181, para. 8.

⁶ 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.

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 3 June 2011, ICC-01/09-02/11-100 + Anxs A~D & G + Conf-Anxs E, F & H.

⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication of the Disclosure of Potentially Exculpatory Evidence and Second Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 24 June 2011, ICC-01/09-02/11-135 + Anxs A ~ C and Conf-Anxs D - E.

⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's First Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), Potentially Exculpatory Evidence Pursuant to Article 67(2) and Material Subject to Disclosure Pursuant to Rule 77, 19 July 2011, ICC-01/09-02/11-179-Conf and Conf-Anxs A-G

¹⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Second Communication to the Defence of Redacted Potentially Exculpatory Evidence Pursuant to Article 67(2), 25 July 2011, ICC-01/09-02/11-193-Conf + Conf-AnxA

¹¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Third Communication of the Disclosure of Incriminating Evidence and Rule 77 Materials to the Defence, 29 July 2011, ICC-01/09-02/11-204 + AnxA&B + Conf-AnxC

¹² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Second Communication of the Disclosure of Potentially Exculpatory Evidence and Fourth Communication of the Disclosure of Rule 77 Materials to the Defence, 8 August 2011, ICC-01/09-02/11-221 + AnxA + Conf-AnxB.

disclosed the Document Containing the Charges, (the “DCC”), List of Evidence to be relied on at the confirmation hearing and related analysis tables on 19 August 2011.¹⁴

9. The PTC has to date issued five decisions upon the Prosecution’s redaction proposals on the following dates: 12 July 2011,¹⁵ 22 July 2011,¹⁶ 4 August 2011,¹⁷ 17 August 2011,¹⁸ and 19 August 2011.¹⁹
10. On 26 August 2011, the Muthaura team filed “Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be Ordered to Re-File an Amended DCC and LoE” (“Preliminary Motion”).²⁰ This motion addressed defects in the DCC, the LoE and the timing and manner of the OTP’s disclosure. A corrigendum of the Preliminary Motion was filed on 28 August 2011.²¹
11. On 29 August 2011, the Defence for Uhuru Kenyatta and Mohammed Ali jointly filed “Defence Request for a Status Conference concerning the Prosecution’s disclosure of 19th August 2011 and the Document Containing the Charges and

¹³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Fourth Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b), ICC-01/09-02/11-259-Conf + Conf-Anxs

¹⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Document Containing the Charges, List of Evidence and Comprehensive In-Depth Analysis Chart of Evidence Included in the List of Evidence Submitted Pursuant to Article, 19 August 2011, ICC-01/09-02/11-257-AnxA + AnxA + Conf-Anxs B~C1toC5

¹⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions, 12 July 2011, ICC-01/09-02/11-165-Conf-Red.

¹⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Second Decision on the Prosecutor’s Request for Redactions, 22 July 2011, ICC-01/09-02/11-178-Conf-Red.

¹⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Third Decision on the Prosecutor’s Request for Redactions, 4 August 2011, ICC-01/09-02/11-205-Conf-Red.

¹⁸ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Forth Decision on the Prosecutor’s Request for Redactions, 17 August 2011, ICC-01/09-02/11-236-Conf-Red.

¹⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted Fifth Decision on the Prosecutor’s Request for Redactions, 19 August 2011, ICC-01/09-02/11-245-Conf-Red.

²⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE, 26 August 2011, ICC-01/09-02/11-268.

²¹ Pre-Trial ChamberII, Prosecutor v Muthaura et al., Corrigendum to “Defence Preliminary Motion Alleging Defence in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC and LoE”, 28 August 2011, ICC-01/09-02/11-268-Corr + Anx.

Article 101 of the Rome Statute”.²² In this filing, the Defence set forth to the Pre-Trial Chamber the scale of the disclosure of new evidence by the Prosecution on 19 August 2011 and the major changes in the allegations against Uhuru Kenyatta in the DCC arising from the disclosure. The Defence therein made a request to the Pre-Trial Chamber for a status conference in the week of 29 August 2011.

II. NEW ISSUES ARISING FROM DISCLOSURE OF 19TH AUGUST 2011 AND BREACHES OF ARTICLE 61(3)

12. The Defence herein repeats the section headed “(iii) Substantial New Allegations in the Disclosure and the DCC” and the detailed “Annex 1” from the filing of 29th August 2011.²³ In this section, the Defence sets out the full extent of the recent disclosure in so far as it applies to Uhuru Kenyatta. This motion also revealed the volume and extensive change in the direction of the Prosecutor’s case, which arises exclusively from the last scheduled disclosure on 19th August 2011.
13. The evidence underpinning the DCC substantially relies upon the statements of four confidential witnesses. These statements were disclosed by the Prosecution for the first time on 19 August 2011 and significantly change the substance and direction of the case against Uhuru Kenyatta. The Defence files Ex Parte Confidential Annex 1 in order to bring matters to the attention of the Pre Trial Chamber that are directly relevant to the evidence adduced by the Prosecutor on 19 August and to the Defence request for an adjournment of the confirmation hearing.

²² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute, 29 August 2011, ICC-01/09-02/11-270 + Anx.

²³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Annex 1 to Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute, 29 August 2011, ICC-01/09-02/11-270-Anx1

14. The late disclosure of this evidence significantly prejudices the fair trial rights of Uhuru Kenyatta as provided in Article 61(3) of the Rome Statute. The timing of the service of this disclosure has prevented him and his legal team from having adequate, reasonable and sufficient time to investigate previously un-forecast evidence. Such reasonable time is necessary in order to allow the Defence to prepare effectively for the confirmation process. At present, the scheduled confirmation hearing on 21 September 2011 requires the Defence to serve their list of evidence and analysis of the legal charges by 5 September 2011.²⁴ The evidence to be served by the Kenyatta Defence on that date will now be incomplete. The Defence will not have had sufficient time to investigate and obtain their own evidence to challenge that of the Prosecution at confirmation, a right protected at the ICC.²⁵ The Pre-Trial Chamber is specifically directed to the grounds and justification set out in Ex Parte Confidential Annex 1.

15. Confirmation hearings are to be conducted in a manner that ensures the protection of the rights of the Suspects.

16. Article 61(3) of the Statute requires that within a reasonable time before the hearing, the person shall:
 - (a) be provided with a copy of the document containing the charges on which the Prosecutor intends to bring the person to trial; and
 - (b) be informed of the evidence on which the Prosecutor intends to rely at the hearing.

17. Rule 121(2)(b) requires the Pre-Trial Chamber to

“hold status conferences to ensure that disclosure takes place under satisfactory conditions. For each case, a judge of the Pre-Trial Chamber

²⁴ 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, at p. 13.

²⁵ Article 61(6); Rule 121(6)

shall be appointed to organize such status conferences, on his or her own motion, or at the request of the Prosecutor or the person.”

18. Article 67(1)(b) protects the following fundamental rights of the Suspect:

“(b) To have adequate time and facilities for the preparation of the defence and to communicate freely with counsel of the accused's choosing in confidence;”

19. The Kenyatta Defence team has had insufficient time to respond to both the Prosecution's DCC and the new, wide-ranging and totally un-forecast evidence, upon which the DCC is based. The disclosure regime and obligations upon the Defence require that evidence must be ready several days before it is to be disclosed in order to ensure adequate time to upload the information into the Ringtail system and thereafter incorporate into the document of analysis of the charges. This effectively gives the Defence approximately 12 days to respond to the disclosure of 19 August and the DCC. This is inconsistent with the notion of “reasonable time” as required by Article 61(3) of the Rome Statute.

20. The requirement that disclosure be provided under satisfactory conditions as set out in Rule 121(2)(b) and referred to explicitly in the Status Conference on 18 April 2001, has not been fulfilled in this case. The Defence cites HHJ Trendafilova's clear position in relation to the 30 day disclosure deadline and the fact that the Prosecution should not wait until this deadline to disclose the DCC, list of evidence and substantive evidence it seeks to rely on:²⁶

I m sorry, your concerns are valid and they have been acknowledged in our disclosure decision where the Chamber made a special point that 30 days does not mean that 30 days before the commencement of the confirmation hearing the Prosecutor should come with a DCC and a list of

²⁶ Status Conference Tr. Page 14

evidence and with the disclosure of the evidence that it relies upon, it intends to rely upon during the confirmation hearing. So this is a general policy that this Chamber has been following and this is the purpose of establishing a disclosure calendar.”

21. Furthermore, the Single Judge also acknowledged that confirmation hearings may be postponed.²⁷ During the hearing, the Defence made it clear that disclosure must take place in a manner that allows for sufficient time to read, prepare and reply to the material disclosed.²⁸
22. In the Decision Establishing a Calendar of Disclosure Between the Parties,²⁹ the Pre- Trial Chamber also clearly set out the following:

“....the disclosure from the Prosecutor to the Defence shall be completed 30 days before the date of the hearing at the latest. However, under article 51(5) of the Statute, the provision of rule 121(3) of the Rules is to be read against the backdrop of, and subject to statutory provisions that guarantee the rights of the Defence and, in particular, the right of the suspects to have adequate time for a meaningful preparation of their defence pursuant to article 67(l)(b) of the Statute. In this respect, the Single Judge recalls article 61(3)(b) of the Statute which provides that the person shall be informed *within a reasonable time before the confirmation hearing* of the evidence on which the Prosecutor intends to rely at the hearing. In the same vein, rule 76 of the Rules establishes that the Prosecutor shall provide the Defence with the names of witnesses whom he intends to call to testify as well as the copies of any prior statements made by them *sufficiently in advance to enable the adequate preparation of the defence.*”³⁰

²⁷ Status Conference Tr. P.11

²⁸ Status conference Tr. P.14

²⁹ 20 April 2011

³⁰ Decision 20 April 2011, It should be noted that the emphasis in italics is contained in the original text and indicates the poignancy of the issue.

23. The Single Judge has regularly referred to the need for an expeditious procedure.³¹ It is clear from the timetable set in the Kenya 1 case that expedition is paramount in the Court's consideration.³² The Defence submits however that the right to an expeditious procedure³³ does not constitute an overarching right that can be used to defeat other fair trial guarantees and rights of the Defence. The right to an expeditious hearing cannot be upheld at the expense of a fair procedure. The Defence concern is that the Pre-Trial Chamber for the sake of its court timetable will retain the date for commencement of the confirmation hearing at the expense of the fair trial rights of the Suspects.
24. Having considered the material disclosed, the Defence for Uhuru Kenyatta submits that a period of 3 months is required to deal with the issues arising from Ex Parte Confidential Annex 1. This period has been carefully considered as appropriate after having regard to reasons for the need for expedition, consideration of all the parties in the case including victims, as well as fairness to the Suspects. After consultation (without disclosing the matters contained in Ex Parte Confidential Annex 1) with counsel for the co-accused who similarly object to the time given to consider and process the last batch of Prosecution disclosure and the DCC, they do not object to the requested adjournment and will file separately on this issue.

III. VIVA VOCE WITNESSES

25. The Defence filed its confidential document naming two *viva voce* witnesses as permitted by the Pre-Trial Chamber, on 15 August 2011.³⁴ This was pursuant to

³¹ Decision 20 April 2011

³² Pre-Trial Chamber II, Prosecutor v Ruto et al., Decision on the Schedule for the Confirmation of Charges Hearing, 25 August 2011, ICC-01/09-01/11-294.

³³ Article 67(1)(c)

³⁴ 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.

the order of the Pre-Trial Judge on 10 August 2011.³⁵ The Defence was required to name the *viva voce* witnesses before the substantial disclosure of 19 August 2011. The Defence submitted that the naming of these witnesses at that stage was without prejudice to their right to revise their selection if the need should arise due to further disclosure in the case.³⁶

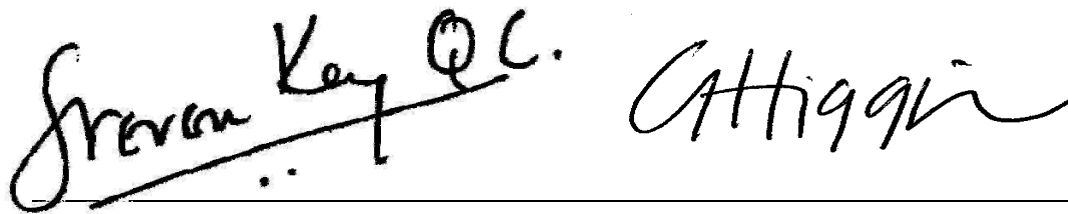
26. As a result of the disclosure of 19 August, which reveals a change in the nature of the Prosecution's case, the Defence is forced to seek leave to change the selection of its *viva voce* witnesses and submits Ex Parte Confidential Annex 2 which sets out the reasons and substance for the revision.

IV. RELIEF REQUESTED

27. The Defence requests that:
- (i) the Confirmation Hearing scheduled for 21 September 2011 be adjourned for a period of 3 months;
 - (ii) the Defence date for filing its list of evidence be appropriately altered to reflect a date 15 days before the revised confirmation date identified by the Pre-Trial Chamber; and
 - (iii) the Prosecutor not be allowed to amend its DCC and list of evidence submitted on 19 August 2011, save with leave of the Court.

³⁵ 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.

³⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Submission on Behalf of Uhuru Kenyatta on the Nature and Scope of the Confirmation Hearing and the Calling of Live Evidence, with Confidential *ex-parte* Annexes, 5 August 2011, ICC-01/09-02/11-216, at para. 23; 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.



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, Friday 2 September 2011

At Nairobi, Kenya