



Original: English

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

Date: 02 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

Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the “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” to Confidential Inter Partes

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 HISTORY

1. On 8 March 2011, the Chamber, by a majority, decided to summon Francis Kirimi Muthaura ("Mr. Muthaura"), Uhuru Muigai Kenyatta ("Mr. Kenyatta") and Mohammed Hussein Ali ("Mr. Ali") to appear before the International Criminal Court.¹ The suspects voluntarily appeared before the Court at the initial appearance held on 8 April 2011.
2. On 4 April 2011, the Single Judge issued the "Decision on Variation of Summons Conditions".²
3. On 7 April 2011, the Single Judge issued the "Decision Setting the Regime for Evidence Disclosure and Other Related Matters" (the "Disclosure Decision"), whereby, inter alia, principles as to the disclosure of evidence between the parties and its communication to the Chamber have been established.³
4. 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".⁴
5. On 12 May 2011, the Single Judge issued the "Decision on the Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal."⁵

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

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on Variation of Summons, 4 April 2011, ICC-01/09-02/11-38.

³ Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01. 3 Pre-Trial Chamber II, "Decision Setting a New Date for the Initial Appearance", ICC-01/09-02/11-8; ICC-01/09-02/11-T-1-ENG.

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 Kenya's admissibility challenge' and Establishing a Calendar for Disclosure, 20 April 2011, ICC-01/09-02/11-64.

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the Defence Request for Variation of Decision on Summons or in the Alternative Request for Leave to Appeal, 12 May 2011, ICC-01/09-02/11-89

6. On 12 July 2011 the Pre-Trial Chamber issued the “Redacted First Decision on the Prosecutor’s Request for Redactions and Related Requests”.⁶
7. On 19 August 2011 the “Prosecution filed the 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 to Article 61(3) and Rule 121(3)”;⁷ the “Prosecution's Fourth Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b)”;⁸ and the “Prosecution’s Third Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b) and Potentially Exculpatory Evidence Pursuant to Article 67(2) and Second Communication to the Defence of Redacted Material Subject to Disclosure Pursuant to Rule 77”.⁹
8. On 2 September 2011 the Defence for Uhuru Kenyatta filed publicly its Application 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 With Confidential *Ex Parte* Annex 1 and Confidential *Ex Parte* Annex 2.

⁶ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Redacted First Decision on the Prosecutor’s Request for Redactions and Related Requests, 12 July 2011, ICC-01/09-02/11-165-Conf-Red

⁷ Pre-Trial Chamber II, Prosecutor v Muthaura et al., “Prosecution filed the 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 to Article 61(3) and Rule 121(3)”;⁷ 19 August 2011, ICC-01/09-02/11-257-AnxA + AnxA + Conf-Anxs B~C1toC5 :

⁸ 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), 19 August 2011, ICC-01/09-02/11-259-Conf + Conf-Anxs

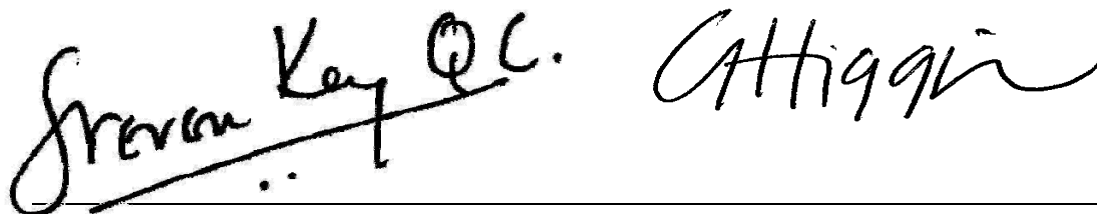
⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution’s Third Communication to the Defence of Redacted Incriminating Evidence Pursuant to Article 61(3)(b) and Potentially Exculpatory Evidence Pursuant to Article 67(2) and Second Communication to the Defence of Redacted Material Subject to Disclosure Pursuant to Rule 77, 19 August 2011, ICC-01/09-02/11-258-Conf

II. SUBMISSIONS

9. The Defence requests the Pre-Trial Chamber to vary the status of confidential *ex parte* Annexes 1 and 2 filed on 2nd September 2011. Given the nature and scope of the information contained therein and its direct relevance to all parties to the proceedings, the Defence requests the Pre-Trial Chamber to vary the status of both annexes to confidential, *inter partes*.

III. RELIEF REQUESTED

10. The Defence respectfully requests the Pre-Trial Chamber to vary the confidential *ex parte* status of Annexes 1 and 2 to confidential *inter partes*.



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