



Original: English

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

Date: 08 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 NOTICE OF WITHDRAWAL OF ITS REQUEST FOR AN
ADJOURNMENT 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 suspects.¹
2. 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.
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 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 service by the Defence and Prosecution as well as deadlines for the submission of properly justified proposals for redactions.²
4. The Prosecution has disclosed to evidence to the Defence on the following dates: 3 June 2011,³ 24 June 2011,⁴ 19 July 2011,⁵ 25 July 2011,⁶ 29 July 2011,⁷ 8

¹ 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.

² 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.

³ 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.

⁴ 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.

⁵ 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

August 2011,⁸ 19 August 2011,⁹ and 25 August 2011. The Prosecution 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 2011.¹⁰

5. The PTC has to date issued five decisions upon the Prosecution’s redaction proposals on the following dates: 12 July 2011,¹¹ 22 July 2011,¹² 4 August 2011,¹³ 17 August 2011,¹⁴ and 19 August 2011.¹⁵
6. 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”).¹⁶ 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 2011.¹⁷

⁶ 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

⁷Pre-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

⁸ 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.

⁹ 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

¹⁰ 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

¹¹ 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.

¹² 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.

¹³ 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.

¹⁴ 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.

¹⁵ 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.

¹⁶ 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.

¹⁷ Pre-Trial Chamber II, 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

7. 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 Article 101 of the Rome Statute".¹⁸ 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.
8. On 1 September 2011, the Defence for Mr. Uhuru Kenyatta (the "Defence") filed its "Application by the Defence for Uhuru Kenyatta under Article 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and request for Alteration to the Selected Viva Voce Witnesses" (the "Kenyatta Application"),¹⁹ in which it requested the PTC to *inter alia* adjourn the confirmation hearing for a period of three months as a result of the disclosure of 19 August 2011, which reveals a change in the nature of the Prosecutions case.²⁰
9. On 3 September 2011, the Defence for Ambassador Muthaura filed its "Defence Application for Adjournment of the Confirmation Hearing or in the Alternative, extension of Time to file an Amended List of Evidence" (the Muthaura Application"), in which it requested the Single Judge to adjourn the

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.

¹⁸ 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.

¹⁹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application by the Defence for Uhuru Kenyatta under Article 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and request for Alteration to the Selected Viva Voce Witnesses, with confidential *Ex-Parte* Annex 1 and Confidential *Ex-Parte* Annex 2 1 September 2011, ICC-01/09-02/11-281+Conf-Exp-Anxs.

²⁰ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Application by the Defence for Uhuru Kenyatta under Article 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and request for Alteration to the Selected Viva Voce Witnesses, with confidential *Ex-Parte* Annex 1 and Confidential *Ex-Parte* Annex 2 1 September 2011, ICC-01/09-02/11-281+Conf-Exp-Anxs, at paras 26-27.

confirmation hearing for a minimum of eight weeks and /or in the alternative to grant an extension of time within which to file an amended list of evidence.²¹

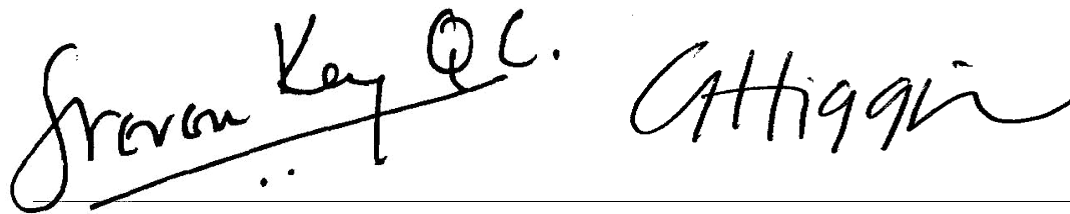
10. On 6 September 2011, the Defence for Ambassador Muthaura filed its "Muthaura Defence Notice of Withdrawal of its Request for Adjournment of the Confirmation Hearing, (the Mutharua Withdrawal)",²² in which it stated that it had assessed that the necessity for the requested adjournment had been largely addressed by the extensions granted by the Single Judge.

II. REQUEST

11. The Defence for Uhuru Kenyatta seeks to withdraw the request for an adjournment of the confirmation hearing proceedings filed on 1 September 2011. As a result of the Defence submissions in Confidential Ex Parte Annex 1 to the filing made on that date and further investigation, the Defence is satisfied that it has addressed the issues raised by the Prosecutor in its last disclosure of evidence on 19 August 2011.

²¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Mutharua Defence Notice of Withdrawal of its Request for Adjournment of the Confirmation Hearing, 3 September 2011, ICC-01/09-02/11-285.

²² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Mutharua Defence Notice of Withdrawal of its Request for Adjournment of the Confirmation Hearing, 6 September 2011, ICC-01/09-02/11-302.



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 8 September 2011
At London, UK