

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 16 November 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single Judge

SITUATION IN THE REPUBLIC OF KENYA

IN THE CASE OF

THE PROSECUTOR

***v. FRANCIS KIRIMI MUTHAURA, UHURU MUIGAI KENYATTA and
MOHAMMED HUSSEIN ALI***

CONFIDENTIAL

***Ex parte* available only to the Prosecution, Registry and Defence of Ambassador
Francis Kirimi Muthaura**

**Defence Response to the "Prosecution's Request for Leave to provide Submissions
further to the Appeals Chamber Judgement on the 'Appeal of the Prosecutor against
the decision of Pre trial Chamber II dated 20 July 2011 entitled 'Decision with Respect
to the Question of Invalidating the Appointment of Counsel to the Defence' ' "**

Sources: Defence Team of Ambassador Francis Kirimi Muthaura

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
Mr. Adesola Adeboyejo

Counsel for the Defence

Mr. Karim A. A. Khan QC
Mr. Essa Faal
Mr. Kennedy Ogetto
Ms. Shyamala Alagendra

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

Counsel Support Section

Deputy Registrar

Mr. Didier Preira

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Procedural History

1. On 8 March 2011, by a majority decision, Pre-Trial Chamber II decided to issue summonses to appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the Court.¹
2. On 8 April 2011, all the Suspects voluntarily appeared before the Court for their initial appearance hearing during which, *inter alia*, the Chamber set the date for the commencement of the confirmation of charges hearing for 21 September 2011.
3. On 28 June 2011, the Single Judge, in a *proprio motu* decision, ordered the Prosecutor and the Registrar to submit observations on a possible impediment to Essa Faal's ("Mr. Faal") representation as Counsel for the Defence in the proceedings. She also gave the Mutharua Defence an opportunity to respond by no later than 6 July 2011 should it wish to do so.²
4. On 1 July 2011, the Prosecutor filed his Observations to which he attached 9 annexes in support of his request that the appointment of Mr. Faal be invalidated on the ground of conflict of interest.³
5. On the same date, pursuant to its Order, the Chamber received a report prepared by the Registry's Division of Court Services revealing all actions performed on documents stored in the document storage system "TRIM". In particular, the Court Management Section reported that Mr. Faal did not access any of the confidential documents in the Kenya Situation stored in

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

² ICC-01/09-02/11-138-Conf.

³ ICC-01/09-02/11-150-Conf.

TRIM.⁴

6. On 6 July 2011, the Defence filed the "Response to the 'Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team' ". The filing was re-submitted on 8 July 2011. In the filing, the Defence argued that the Pre-Trial Chamber should dismiss the Prosecutor's objections to the appointment.⁵
7. On 14 July 2011, the Prosecutor filed the "Prosecution's Reply to the 'Defence Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence team' ", in which the Prosecution maintained that the appointment of Mr. Faal should be invalidated.⁶
8. On 20 July 2011, the Pre-Trial Chamber rendered the "Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence" ("Impugned Decision"), in which it decided to dismiss the Prosecution request and ruled that Mr. Faal could continue to represent Ambassador Muthaura in the present case.
9. On 18 August 2011, after considering the submissions of the parties, the Pre-Trial Chamber granted leave to the Prosecution to appeal the Impugned Decision.⁷
10. On 10 November 2011, the Appeals Chamber decided that there was an ambiguity in the Impugned Decision as to whether Mr. Faal had knowledge of any confidential information and in light of those circumstances remitted the matter back to the Pre-Trial Chamber and

⁴ Confidential and *ex parte* Report of the Registrar on access to the case record, 1 July 2011, ICC-01/09-02/11-149-Conf-Exp.

⁵ ICC-01/09-02/11-159-Conf-Exp with annexes.

⁶ ICC-01/09-02/11-172-conf-exp+Conf-exp-Anxs.

⁷ ICC-01/09-02/11-253.

directed it to decide anew whether Mr. Faal's appointment should be invalidated. It instructed the Pre-Trial Chamber to "first clarify whether there was any confidential information of which Mr. Faal was aware. In the case of an affirmative answer, it will need to determine whether it is nevertheless in the interest of justice that Mr. Faal should be part of the Defence." ⁸

11. On 15 November 2011, the Prosecution filed the "Prosecution's Request for Leave to provide Submissions further to the Appeals Chamber Judgement on the Appeal of the Prosecutor against the decision of Pre trial Chamber II dated 20 July 2011 entitled Decision with Respect to the Question of Invalidating the Appointment of Counsel to the Defence". In this filing, the Prosecution requested the Single Judge to grant it leave to make further submissions in light of the decision remanding the matter to the Single Judge.

II. Defence Submissions

12. The Defence submits that the parties have had ample opportunity to make all their submissions both before the Single Judge and the Appeals Chamber. In fact, the Prosecution had been given every opportunity by the Single Judge to make all its submissions and present all its evidence including by allowing the Prosecution to file additional evidence and arguments on 14 July 2011⁹.

13. The Defence is of the view that no new issues arise for consideration by the Single Judge that would necessitate the parties to again address the Single Judge by way of further submissions.

⁸ ICC-01/09-02/11-365.

⁹ ICC-01/09-02/11-172-Conf-Exp.

14. The Defence is also of the view that the Single Judge has enough materials and all the necessary evidence to decide the question remitted to her without the need for the parties to again inundate her with more argumentation about the issues that have already been thoroughly and completely addressed by them.

15. Furthermore, the Defence notes that the Single Judge, who presided over the Confirmation Hearing in this case, is in a position to assess, in light of Mr. Faal's active participation in that hearing, whether or not Mr. Faal had the benefit of any confidential OTP information.

16. The request by the Prosecution will only open the door for another round of unnecessary submissions from the parties without any added value to the information already before the Single Judge

III. Relief Requested

17. In light of the above, the Defence requests the Single Judge to summarily dismiss the request by the Prosecution for leave to make further submissions.

Respectfully Submitted,



Mr. Karim A. A. Khan QC
Lead Counsel

Dated this 16th Day of November 2011

At the Hague, The Netherlands