

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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No: ICC-01/09 OA2
Date: 13 September 2012

THE APPEALS CHAMBER

Before: Judge Sang-Hyun Song, Presiding Judge
Judge Sanji Mmasenono Monageng
Judge Akua Kuenyehia
Judge Erkki Kourula
Judge Anita Usacka

SITUATION IN THE REPUBLIC OF KENYA

Public Redacted Version

**Prosecution's comments on the "CONFIDENTIAL APPLICATION WITH
CONFIDENTIAL ANNEXES OF DR. DAVID NYEKORACH- MATSANGA FOR
THE DISQUALIFICATION OF THE PROSECUTOR PURSUANT TO ARTICLE
42(8) OF THE STATUTE"**

Source: Office of the Prosecutor

Document to be notified in accordance with regulation 31 of the *Regulations of the Court* to:

The Office of the Prosecutor

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Introduction

1. In accordance with the Appeals Chamber's direction,¹ the Prosecution hereby provides its comments on the "Confidential Application with Confidential Annexes of Dr. David Nyekorach-Matsanga for the Disqualification of the Prosecutor Pursuant to Article 42 (8) of the Statute", dated 28 May 2012 ("Application").²
2. Dr. Matsanga contends that because he believes that the Prosecution has received information from individuals who are hostile to him, and because he himself has filed a complaint against the Prosecutor and publicized it on his website, it follows that the Prosecutor lacks impartiality with respect to Mr. Matsanga and should be disqualified from investigating him pursuant to Article 42(8).
3. Dr. Matsanga's claims are frivolous and fail as a matter of law.

Background

4. On or about 1 March 2012, Dr. Matsanga knowingly sought to reveal the identity of an individual he believes to be protected Witness 4 in the case of *The Prosecutor v. Francis Kirimi Muthaura and Uhuru Muigai Kenyatta* on his website, www.africaworldmedia.com.³ Dr. Matsanga posted the purported name and photograph of the witness, as well as confidential statements made by him.⁴ Although the Office of the Prosecutor (OTP) immediately contacted Dr. Matsanga by phone and email to request that he remove the material from his website⁵ [REDACTED], he refused to do so. Contrary to Dr. Matsanga's

¹ Order on the submission of comments by the Prosecutor on the "CONFIDENTIAL APPLICATION WITH CONFIDENTIAL ANNEXES OF DR. DAVID NYEKORACH-MATSANGA FOR THE DISQUALIFICATION OF THE PROSECUTOR PURSUANT TO ARTICLE 42 (8) OF THE STATUTE", 5 June 2006, ICC-01/09-88-Conf-Exp.

² ICC-STA42-01/12-I-Conf-Exp-Anxl.

³ The Prosecution neither confirms nor denies whether Dr. Matsanga correctly identified Witness 4, an issue that is not relevant to the resolution of this Application.

⁴ [REDACTED].

⁵ Dr. Matsanga admits that he was contacted on 1 March 2012. See paragraph 24 of the Application.

assertion⁶, the identity of Witness 4 was not in the public domain before 1 March 2012.

5. As Dr. Matsanga well knows, the OTP is presently investigating him for possible violations of Article 70 of the Statute and interviewed him on 12-13 April 2012, in the presence of counsel, as a part of its investigation. One day before the interview, Dr. Matsanga finally removed the confidential information purportedly identifying Witness 4 from his website, some six weeks after he posted it and the OTP requested its removal.

Submissions

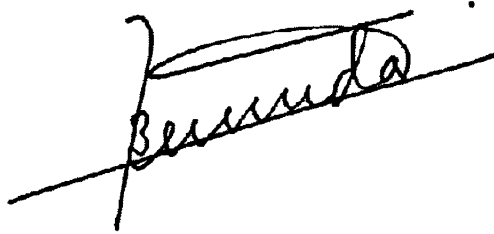
6. The Application is replete with false statements and unsubstantiated claims. This Court need not, however, address or resolve any of the factual assertions made by Dr. Matsanga, for the Application fails as a matter of law.
7. In effect, Dr. Matsanga claims that because he imagines that the Prosecution has received information from [REDACTED], individuals whom Dr. Matsanga claims are biased against him, and because Dr. Matsanga has filed a 'complaint' against the Prosecutor and publicized it on his website, then the Prosecutor lacks independence and impartiality and should be disqualified from investigating Dr. Matsanga's conduct.
8. This logic hardly merits a response. What Dr. Matsanga describes falls well within the ordinary functions of the Prosecutor. If it required disqualification, it is hard to imagine a case that the Prosecutor could work on.
9. In any investigation, the Prosecutor will have to consider the potential biases of witnesses. Without confirming whether or not the Prosecution has in fact received information from [REDACTED] individuals identified by Dr. Matsanga, any bias that *they* may have against Dr. Matsanga cannot simply be imputed to the Prosecutor.

⁶ Paragraph 23 of Application.

10. Further, Dr. Matsanga's 'complaint' against the Prosecutor in relation to the Kenya cases, in which he lacks both standing and knowledge of the correct facts, cannot be a basis to disqualify the Prosecutor. If that were the case, any person under investigation could disarm the Prosecutor simply by complaining about his conduct. Article 42 plainly requires more.
11. In sum, because the Application does not allege facts that could cast a reasonable doubt on the Prosecutor's impartiality, which is the sole ground for disqualification under Article 42,⁷ it should be dismissed. In addition to seeking the Prosecutor's disqualification, the Application asks the Appeals Chamber to order various disclosures with regard to the OTP's investigation. There is neither a basis in law nor any justification for these requests, and they should also be denied.
12. Finally, the Application and these comments should retain their confidential, *ex parte*, classifications because the Application (i) contains information that purports to reveal the identity of a protected Prosecution witness; (ii) makes defamatory allegations against [REDACTED], which could cause them irreparable harm if publicized; and (iii) reveals the identities of Prosecution staff.⁸
13. For these reasons, the Prosecution respectfully requests the Appeals Chamber to (i) summarily dismiss the Application; and (ii) order that the Application, and these comments, retain their confidential, *ex parte*, classifications.

⁷ Article 42(7) of the Statute.

⁸ Judgment on the appeal of the Prosecutor against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements", 13 May 2008, ICC-01/04-01/07-475, paras 89-108.

A handwritten signature in black ink, appearing to read 'Bensouda', is written over a horizontal line. The signature is stylized with a large initial 'B' and a long horizontal stroke.

Fatou Bensouda,
Prosecutor

Dated this 13th day of September, 2012
At The Hague, The Netherlands