

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09 OA 2

Date: 22 April 2013

THE APPEALS CHAMBER

Before:

Judge Sang-Hyun Song, Presiding Judge

Judge Sanji Mmasenono Monageng

Judge Akua Kuenyehia

Judge Erkki Kourula

Judge Anita Ušacka

SITUATION IN THE REPUBLIC OF KENYA

Public Document

**Decision on the request for reconsideration of the decision on the request for the
disqualification of the Prosecutor in the investigation against Mr David
Nyekorach-Matsanga**

Shs

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

The Office of the Prosecutor
Ms Fatou Bensouda, Prosecutor
Mr Fabricio Guariglia

Counsel for Mr Nyekorach-Matsanga
Mr Charles A. Taku

REGISTRY

Registrar
Mr Herman von Hebel

Shs

The Appeals Chamber of the International Criminal Court,

Having before it the “Motion of Mr David Nyekorach Matsanga for Reconsideration of Decision on Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga dated 11 July 2012 *with Public Annexes A, B, C as PUBLIC documents. Annex A letter to OTP PUBLIC, Annex B status conference one as Public document, and Annex C status conference two as PUBLIC.* Case No. ICC-01/09 OA 2” of 5 April 2013 (ICC-01/09-110),

After deliberation,

Renders unanimously the following

DECISION

- 1) The Registrar shall reclassify ICC-01/09-110-AnxA as confidential, *ex parte*, available to the Prosecutor and Mr Nyekorach-Matsanga only.
- 2) Mr Nyekorach-Matsanga’s request for reconsideration is dismissed.

REASONS

1. On 11 July 2012, the Appeals Chamber rendered its decision on the request by Mr David Nyekorach-Matsanga (hereinafter: “Mr Nyekorach-Matsanga”) for the disqualification of the Prosecutor pursuant to article 42 (8) of the Statute¹ (hereinafter: “Decision of 11 July 2012”). The Appeals Chamber found that the request for disqualification was directed against Mr Luis Moreno-Ocampo (hereinafter: “Mr Moreno-Ocampo”), based on his alleged direct and personal interest in the investigation of Mr Nyekorach-Matsanga,² and noted that Mr Moreno-Ocampo’s term of office began on 16 June 2003 and, pursuant to article 42 (4) of the Statute, lasted for nine years, and therefore ended on 15 June 2012.³ Observing that Mr Moreno-

¹ “Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga”, ICC-01/09-96-Conf-Exp (OA 2), a public redacted version was issued on 6 September 2012, ICC-01/09-96-Red.

² Decision of 11 July 2012, para. 18. *See also* para. 15.

³ Decision of 11 July 2012, para. 19.

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Ocampo had left office, the Appeals Chamber considered that the request to disqualify him had been rendered moot and therefore dismissed it as such.⁴

2. On 5 April 2013, Mr Nyekorach-Matsanga filed the “Motion of Mr David Nyekorach Matsanga for Reconsideration of Decision on Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga dated 11 July 2012 *with Public Annexes A, B, C as PUBLIC documents. Annex A letter to OTP PUBLIC, Annex B status conference one as Public document, and Annex C status conference two as PUBLIC.* Case No. ICC-01/09 OA 2”⁵ (hereinafter: “Request”). Mr Nyekorach-Matsanga requests the Appeals Chamber to reconsider the Decision of 11 July 2012, with the ultimate goal of disqualifying the “new Chief Prosecutor”, Ms Fatou Bensouda⁶ (hereinafter: “Ms Bensouda”). Mr Nyekorach-Matsanga submits, *inter alia*, that “[t]his application is [...] based on new evidence provided by the Chief Prosecutor that directly confirms and corroborates most of the information provided to the Appeals Chamber in support of the Applicant’s application to disqualify the Chief Prosecutor from conducting investigations against the Applicant”.⁷

3. As a preliminary matter, the Appeals Chamber considers that Annex A to the Request, which was filed publicly, reveals the identities of staff of the Office of the Prosecutor. It is recalled that in the Decision of 11 July 2012, the Appeals Chamber found that such information should not be publicised⁸ and Mr Nyekorach-Matsanga should not, therefore, have filed such information publicly. Accordingly, the Registrar is ordered to reclassify Annex A as confidential, *ex parte*, available to the Prosecutor and Mr Nyekorach-Matsanga only.

4. Furthermore, as a general matter, the Appeals Chamber notes that the Request does not comply with regulation 36 (3) of the Regulations of the Court as regards the line spacing and the average word limit per page. The Appeals Chamber also notes that the Request contains, *inter alia*, duplicate paragraph numbering.⁹

⁴ Decision of 11 July 2012, para. 19.

⁵ ICC-01/09-110.

⁶ Request, para. 12 and second para. 13 *et seq.*

⁷ Request, second para. 22.

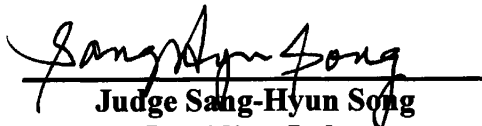
⁸ Decision of 11 July 2012, para. 10.

⁹ The Request contains three paras 3, two paras 4, twice paras 13-15 and two paras 22.

Finally, with regard to the substance and style of the submissions, the Appeals Chamber considers that it is incumbent upon the applicant to provide submissions in as comprehensible a manner as possible in order for the Appeals Chamber to determine the validity of the arguments. The Appeals Chamber encourages Mr Nyekorach-Matsanga to exercise more diligence in this regard when filing documents before the Court.

5. Turning to the substance of the Request, the Appeals Chamber notes that Mr Nyekorach-Matsanga seeks the reconsideration of the Decision of 11 July 2012 with the aim of disqualifying the current Prosecutor, Ms Bensouda. The Appeals Chamber recalls that the Decision of 11 July 2012 was made in relation to Mr Moreno-Ocampo. It dismissed, as moot, Mr Nyekorach-Matsanga's request for disqualification because Mr Moreno-Ocampo's term of office had ended. Therefore, even if the Appeals Chamber were to reconsider the Decision of 11 July 2012 (and without determining under which circumstances, if any, the Appeals Chamber would do so), the disqualification of the current Prosecutor could not be the result of such reconsideration because the Decision of 11 July 2012 did not pertain to her. Accordingly, the Appeals Chamber dismisses the Request.

Done in both English and French, the English version being authoritative.


Judge Sang-Hyun Song
Presiding Judge

Dated this 22th day of April 2013

At The Hague, The Netherlands