

**Cour
Pénale
Internationale**



**International
Criminal
Court**

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

Date: 25 October 2013

TRIAL CHAMBER V(B)

Before: Judge Kuniko Ozaki, Presiding
Judge Robert Fremr
Judge Chile Eboe-Osuji

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. UHURU MUIGAI KENYATTA***

URGENT

PUBLIC REDACTED VERSION

**Defence Application to Vacate the 12 November 2013
Date for the Commencement of Trial**

Source: Defence for President Uhuru Muigai Kenyatta

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

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I. INTRODUCTION

1. The Defence for Mr Kenyatta ('Defence') hereby applies to vacate the date of trial set by Trial Chamber V(B) ('Chamber') for 12 November 2013.
2. The grounds for this application are as follows:
 - i. The need for the Prosecution to investigate the facts and matters raised by the Defence Application for a Permanent Stay of Proceedings due to Abuse of Process ('Abuse of Process Application') filed on 10 October 2013;¹
 - ii. The need for the Chamber to hold an evidential hearing to determine the facts of the Abuse of Process Application;
 - iii. The need for the Chamber to make a decision on the Abuse of Process Application before the commencement of trial;
 - iv. The need for the parties to investigate the [REDACTED], which is capable of affecting the outcome of the case; and
 - v. The need for Mr Kenyatta to carry on with essential duties of Presidency currently arising from the terrorist attack in Nairobi Westgate shopping mall which require him to fulfil national and international duties.
3. Without prejudice to the Abuse of Process Application and the remedy requested therein, the Defence submits that in the circumstances and for the reasons set out below, the trial should not commence before 12 February 2014.

¹ ICC-01/09-02/11-822.

4. This application is filed confidentially as it concerns protected witnesses and contains information about ongoing Defence investigations. A public redacted version is filed concurrently.
5. This application is filed urgently due to the imminence of the 12 November 2013 date for the commencement of trial.

II. PROCEDURAL HISTORY

6. On 9 July 2012, the Chamber set the date for the commencement of trial as 11 April 2013.² In the same order, the Chamber asked the parties to collaborate on the joint instruction of experts, and ordered the Prosecution to submit a report on such discussions by 31 October 2012.³
7. On 31 October 2012, the Prosecution reported that it had no objection to the appointment of a joint expert to [REDACTED].⁴
8. On 7 March 2013, the Chamber issued its 'Order concerning the start date of trial,' in which it vacated the trial commencement date of 11 April 2013 and provisionally set the new date for start of trial as 9 July 2013.⁵ The Chamber noted that sufficient time was required for the resolution of serious issues, including the impact of delayed disclosure by the Prosecution on the Defence's ability to prepare for trial.⁶

² ICC-01/09-02/11-451, para. 25.

³ ICC-01/09-02/11-451, para. 17.

⁴ ICC-01/09-02/11-515, para. 15.

⁵ ICC-01/09-02/11-677.

⁶ ICC-01/09-02/11-677, [REDACTED].

9. On 20 June 2013, the Chamber vacated the 9 July 2013 trial date, and set the trial commencement date as 12 November 2013.⁷ In this decision, the Chamber noted that the Prosecution's failure to disclose significant volumes of evidence until the very last moment, coupled with requests for 'delayed disclosure in respect of such a significant number of its witnesses,'⁸ resulted in the Defence not having been afforded sufficient time to prepare its case.
10. On 10 October 2013, the Defence filed its Abuse of Process Application.⁹ A public redacted version was filed concurrently. The Defence requested the Chamber to stay the proceedings permanently on the basis of an abuse of process or order an evidential hearing before the start of trial to determine the issue. The deadline for the Prosecution to respond to the Abuse of Process Application is 1 November 2013, eleven days before the trial is due to commence.

III. SUBMISSIONS

A. Abuse of Process

i. The need for the Prosecution to investigate the facts and matters raised by the Abuse of Process Application

11. The Abuse of Process Application raises complex and interrelated issues concerning a serious, sustained and wide-ranging abuse on the process of the Court carried out by (a) Prosecution witness OTP-118 and Prosecution intermediary [REDACTED], and (b) Prosecution witnesses OTP-11 and OTP-12. The abuse of process argument set out in the Abuse of Process Application is

⁷ ICC-01/09-02/11-763.

⁸ ICC-01/09-02/11-763, para. 31.

⁹ ICC-01/09-02/11-822.

based upon both Prosecution and Defence evidence obtained during the course of ongoing investigations over the past twelve months.

12. The Prosecution's duty under Article 54 of the Rome Statute requires the Prosecution to extend its investigation to cover 'all facts and evidence relevant to an assessment of whether there is criminal responsibility under this Statute, and, in doing so, investigate incriminating and exonerating circumstances equally.' The Defence acknowledges that in order for the Prosecution to fulfil its duty 'to establish the truth,' and provide a meaningful response to the Abuse of Process Application, the Prosecution must be in a position to investigate the allegations raised, which evidently requires the provision of adequate time.

ii. The need for the Chamber to hold an evidential hearing to determine the facts of the Abuse of Process Application

13. In the event the Chamber is not minded to grant an immediate stay of the proceedings on the basis of the written pleadings filed by the Defence,¹⁰ the Defence has submitted that the only alternative manner in which to determine this application is to hold an evidential hearing *before* the commencement of trial.¹¹ The holding of an evidential hearing on abuse of process would require the calling of live witnesses, including OTP-118, Prosecution intermediary [REDACTED], OTP-11 and OTP-12.
14. Such a hearing would also necessitate the vacation of the current trial date as it would require the hearing of substantial evidence on the interrelated issues set out in the Application and a reasoned decision thereafter by the Chamber.

¹⁰ ICC-01/09-02/11-822.

¹¹ ICC-01/09-02/11-822.

iii. The need for the Chamber to make a decision on the Abuse of Process Application before the commencement of trial

15. The Defence submits that a decision on the Application to Stay the Proceedings should be made *before* the commencement of trial, as substantively, the arguments and evidence presented by the Defence are capable of resulting in a permanent stay of the proceedings. To commence the trial before a determination has been made may result in a waste of both valuable court time and resources in the event that the proceedings are permanently stayed.¹²

B. [REDACTED] Investigations and Analysis

i. Importance of the evidence

16. The Single Joint Expert of the parties ('SJE'), [REDACTED], has discovered that, contrary to the representations of [REDACTED]. This evidence is therefore highly relevant in these proceedings and is capable of establishing the truth in this case in which there are wholesale issues of credibility. It is highly relevant in determining the truth as to the presence and participation of key Prosecution Mungiki witnesses at particular events and other persons described by those witnesses as having been present. This evidence does not concern or relate to victims or witness victims.
17. This type of evidence is used in major criminal investigations throughout the world and should, if available, as it is, be included within an ICC investigation and trial.

¹² The Defence notes the recent concerns of the Appeals Chamber regarding commencing trial 'on the basis of an incorrect legal framework,' ICC-01/09/01/11-862, para. 10.

ii. Difficulties faced during [REDACTED] investigations necessitating adjournment

18. [REDACTED].

19. [REDACTED].

20. [REDACTED].

iii. Further Defence investigations that must be undertaken as a result of [REDACTED]

21. [REDACTED].

22. [REDACTED]:

i. [REDACTED]

[REDACTED].

ii. [REDACTED]

[REDACTED].

[REDACTED].

iii. [REDACTED]

[REDACTED].¹³

iv. [REDACTED]

23. [REDACTED].

24. [REDACTED].

v. [REDACTED]

25. [REDACTED].

C. Current Presidential Duties

26. The terrorist attack at the Westgate shopping mall in Nairobi on 21 September 2013 has been justifiably recognised as a national and international crisis.¹⁴ The incident and situation caused significant loss of life. The deceased are Kenyan nationals and nationals of other States. Since the attack, Kenya's duty to enforce peace in the region has been enhanced due to its responsibility to its citizens and the international community.¹⁵ Many commentators have correctly viewed this situation as one in which Kenya is involved in a war with radical Islamist groups who view the State as an enemy as a result of its international peace enforcement measures in Somalia.¹⁶ Many Kenyan residents fear a further violent escalation of this conflict.¹⁷

¹³ Further to communications sent to the Prosecution on 8 and 28 August 2013, on 24 September 2013, the Defence sent revised terms of reference regarding [REDACTED]. On 3 October 2013, the Defence sent a follow-up letter to the Prosecution stating that [REDACTED].

¹⁴ The Guardian, *Kenya Westgate atrocity is al-Shabaab's way of escalating Somali conflict*, 23 September 2013.

¹⁵ The Guardian, *Kenya attack is product of brutal power struggle within al-Shabaab*, 22 September 2013.

¹⁶ UPI, *The al-Shabaab Westgate raid – A Forewarning*, 18 October 2013; International Herald Tribune, *Somalia's Shebab: Regional threats after Westgate Attack*, 18 October 2013.

¹⁷ The Guardian, *Kenya's Somalis fear violent backlash in the wake of Westgate terror attack*, 26 September 2013.

27. The international connections of the terrorist groups are apparent.¹⁸ Non-Somali Kenyans have been reported to constitute approximately ten *per cent* of Al Shabaab's fighting force.¹⁹ The United Nations Security Council has repeatedly expressed its concern at the threat to regional stability posed by violent groups in Somalia,²⁰ and particularly condemned the terrorist acts perpetrated by Al Shabaab.²¹ The Security Council has also repeatedly recognised the critical role to be played by Kenya and other regional United Nations Member States in quelling the instability in Somalia.²²
28. There is a clear threat to regional security as the current terrorist assault is part of a pattern of attacks that have taken place in the recent past involving the same protagonists,²³ with other terrorist groups on occasion adopting similar tactics.²⁴
29. Aside from the normal duties of office as Head of State, the situation as briefly set out above demonstrates the nature of the current terrorism crisis and the national and international dimensions involved. The context is very clear: this is a global conflict which commenced in 1998, but as a result of the scale of the attacks in the US on 9 September 2001, developed into international warfare. It has now spread from being an Al-Qaeda based conflict to include other militant Islamist groups who are opposed to good order in the world and intent upon committing serious organised violence. Mr Kenyatta has a clear and obvious duty on behalf of the Government of Kenya to exercise leadership in dealing

¹⁸ ITV News, *Al-Shabaab video reveals British Connections to group behind Kenya attack*, 16 October 2013; New York Times, *Norway Investigates Possible Assailant in Kenya Mall Siege*, 18 October 2013.

¹⁹ Reuters, *Special Report: In Africa, a militant group's growing appeal*, 30 May 2012.

²⁰ UN Security Council Resolutions 2111 (2013), 2093 (2013), 2060 (2012) and 2036 (2012). Security Council Press Statement on Somalia, 13 September 2013, AFR/2692.

²¹ Statement by the President of the Security Council, 13 May 2013.

²² UN Security Council Resolutions 2102 (2013), 2093 (2013), 2073 (2012) and 2036 (2012).

²³ BBC News, *US embassies in Africa bombed*, 7 August 1998.

²⁴ The Telegraph, *Nairobi assault: Kenyan terrorist attacks since 1980*, 21 September 2013.

with this issue.²⁵ There is a continuous, unrelenting and entirely necessary responsibility to ensure the security of his people and the security of the international community. As Head of State, Mr Kenyatta has been required and will continue to be required, to provide leadership and to use his decision-making powers to ensure fulfilment of his role under Article 132 of the Constitution of Kenya.

30. Mr Kenyatta is currently in a situation whereby he is briefed on a continuous and daily basis by national security agencies and international security agencies in respect of relevant matters within the State and outside its borders relating to the global terrorist threat that is faced. He must make important decisions on behalf of his nation in the interests of the security of his people. Kenya is the lead nation undertaking the security of the region under the African Union Mission in Somalia. The international nature of this mission, which has ramifications beyond the continent of Africa, requires him to be available for consultation and to also consult, in relation to this ongoing crisis. This necessitates, on behalf of the people of Kenya and the international community, that Mr Kenyatta is free and accessible for important briefings and meetings at this time as well as ensuring the communication by him of directives and orders to others.
31. At this current time, the commencement of the trial on 12 November 2013, when President Kenyatta is required in Kenya for key meetings, consultations and decision-making tasks, is not in the interests of either the citizens of Kenya or the international community.

²⁵ The Standard Digital News, *Kenya 'at war' with al Shabaab, faces security questions*, 28 September 2013.

IV. RELIEF

32. For the reasons set out above, the Defence requests the Chamber to:

- i. Vacate the 12 November 2013 date for the commencement of trial, and postpone the commencement of trial until at least 12 February 2014;
- ii. Order the Prosecution to submit any response to this application within seven days, pursuant to Regulation 35(2) of the Regulations of the Court; and
- iii. Issue an expedited Decision on this matter.

Respectfully submitted,



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Steven Kay QC and Gillian Higgins

On behalf of Uhuru Muigai Kenyatta

Dated this 25th day of October 2013

At London, England