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No.: ICC-01/09-02/11
Date: 20 November 2013

TRIAL CHAMBER V(B)

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

SITUATION IN THE REPUBLIC OF KENYA

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

Public

**Prosecution response to the public redacted version of the Defence's
14 November 2013 "observations" (ICC-01/09-02/11-856-Red)**

Source: The Office of the Prosecutor

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

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1. Defence filing ICC-01/09-02/11-856-Red (“Observations”) is another attempt to delay the Accused’s trial. It should be rejected on both procedural and substantive grounds.
2. **Procedurally**, the Observations amount to an improper reply and should be disregarded on this basis.
3. The Observations constitute a “reply” within the meaning of Regulation 24(5) because they advance arguments in support of the Defence’s stay application,¹ and contest issues raised in the Prosecution’s response to the stay application.² Styling the submissions as “observations” rather than a “reply” does not change this analysis; it is the substance of a document that counts, not its title.
4. Regulation 24(5) requires a party wishing to reply to a response to seek “leave of the Chamber”. The Defence failed to do so. The appropriate remedy is for the Chamber to disregard the Observations.
5. A decision in this case provides the relevant precedent.³ During the litigation over the updated Document Containing the Charges, the Defence filed a supplementary submission without seeking leave from the Chamber.⁴ The Chamber refused to consider the submission, ruling that it was “filed without authorisation and its content shall not be considered”.⁵ The Chamber should reach the same conclusion here and should disregard the Observations as improperly filed.

¹ See ICC-01/09-02/11-856-Red, para. 11.

² See ICC-01/09-02/11-856-Red, para. 12.

³ ICC-01/09-02/11-584.

⁴ ICC-01/09-02/11-584, para 9.

⁵ ICC-01/09-02/11-584, para 9.

6. **Substantively**, the Observations should be rejected because they are an attempt to delay the adjudication of the stay application, when there is no basis to do so.
7. The Observations suggest that the stay application should not be ruled upon until “the completion of both parties’ further investigations”, and after further submissions at a “date to be determined in the future”.⁶ This amounts to a request for a potentially open-ended delay, in a case that has already been delayed three times.
8. The Defence’s position – that the case should not proceed until both parties’ investigations are completed – would enable the Defence to delay trial indefinitely simply by asserting that its investigation was incomplete. The Chamber has previously found that “the Defence’s on-going investigations into . . . Prosecution intermediaries” are “part of the Defence’s ordinary preparations”, which do not justify a delay in trial.⁷
9. There is no basis for a delay in this context because, even if all the Defence’s allegations regarding P-0118’s alleged contact with Defence witnesses are ultimately borne out, those allegations still do not warrant a stay.
10. As explained in the Prosecution’s opposition to the stay application,⁸ the “drastic remedy” of a stay may be granted only if there is no “lesser remedy” available to ensure the integrity of the proceedings.⁹ Even if the Defence’s allegations regarding P-0118 are ultimately borne out, lesser remedies would enable any prejudice from the alleged misconduct to “be relieved against by the Trial Chamber in the trial process”.¹⁰ As in *Lubanga*, the appropriate remedy may “lie in the Court’s approach to the evidence in

⁶ ICC-01/09-02/11-856-Red, paras 2, 7.

⁷ ICC-01/09-02/11-763-Red, para 34.

⁸ ICC-01/09-02/11-848-Red, paras 79-80.

⁹ ICC-01/04-01/06-2690-Red2, para 168; *see also* ICC-01/04-01/06-2582 OA 18, paras 55, 61.

¹⁰ ICC-02/05-03/09-410, para 114.

question, and particularly the extent to which it is to be relied on”,¹¹ as well as providing the Defence with the opportunity to present evidence and make submissions in support of its contentions. The possibility of such lesser remedies prevents the grant of a stay, irrespective of the outcome of the investigations into P-0118’s alleged conduct.¹²

11. In sum, the inquiry regarding P-0118 is a discrete issue that can be dealt with in parallel to the Accused’s trial. It need not displace or delay it.

12. Similarly without merit is the suggestion that adjudication of the stay application should be delayed because the Defence desires more time to investigate the “interference with justice by [REDACTED], Witnesses 11 and 12 and other alleged Mungiki ‘insiders’”.¹³ As explained in the Prosecution’s opposition, the Defence fails to offer any credible evidence that these individuals have interfered with the administration of justice.¹⁴ The Defence’s failure to satisfy its evidentiary burden should not be rewarded by a grant of more time to try to rehabilitate its arguments. The stay application should stand or fall on the basis of the current factual record.

Conclusion

13. For the foregoing reasons, the Observations should be disregarded and the Chamber should rule on the Defence’s stay application without delay.



Fatou Bensouda,
Prosecutor

Dated this 20th day of November 2013
At The Hague, The Netherlands

¹¹ ICC-01/04-01/06-2690-Red2, para 204.

¹² See ICC-01/09-02/11-848-Red, paras 79-90.

¹³ ICC-01/09-02/11-856-Red, para 11.

¹⁴ ICC-01/09-02/11-848-Red, paras 91-124.