

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No. ICC-01/09-01/11 OA 5

Date: 27 September 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

**IN THE CASE OF THE PROSECUTOR v. WILLIAM SAMOEI RUTO AND
JOSHUA ARAP SANG**

Public Document

**Decision on Mr Ruto's request for reconsideration of the "Decision on the
request for suspensive effect"**

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 William Samoei Ruto
Mr Karim A.A. Khan
Mr David Hooper

Counsel for Mr Joshua Arap Sang
Mr Joseph Kipchumba Kigen-Katwa
Ms Caroline Buisman

REGISTRY

Registrar
Mr Herman von Hebel

shs

The Appeals Chamber of the International Criminal Court,

In the appeal of the Prosecutor against the decision of Trial Chamber V(a) entitled “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial” of 18 June 2013 (ICC-01/09-01/11-777),

Having before it the “Defence request for reconsideration of the ‘Decision on the request for suspensive effect’ and variation of time limits pursuant to Regulation 35 of the Regulations of the Court” of 23 September 2013 (ICC-01/09-01/11-977),

Renders unanimously the following

DECISION

Mr Ruto’s request for reconsideration of the “Decision on the request for suspensive effect” is dismissed.

REASONS

I. PROCEDURAL HISTORY

1. On 18 June 2013, Trial Chamber V(a) (hereinafter: “Trial Chamber”), by majority,¹ Judge Herrera Carbuccion dissenting,² granted the request of William Samoei Ruto (hereinafter: “Mr Ruto”) for permission to not be continuously present during his trial, with the exception of specified hearings, in order to enable him to perform his functions of state as Deputy President of Kenya, while still remaining personally subject to the jurisdiction of the Court for the purposes of the inquiry into his individual criminal responsibility in respect of the crimes over which the Court has jurisdiction (hereinafter: “Impugned Decision”).³

¹ “Decision on Mr Ruto’s Request for Excusal from Continuous Presence at Trial”, ICC-01/09-01/11-777.

² “Dissenting Opinion of Judge Herrera Carbuccion”, ICC-01/09-01/11-777-Anx2.

³ Impugned Decision, paras 1-3.

Shs

2. On 18 July 2013, the majority of the Trial Chamber, Judge Eboe-Osuji dissenting, granted the Prosecutor leave to appeal the Impugned Decision under article 82 (1) (d) of the Statute.⁴

3. On 20 August 2013, the Appeals Chamber granted⁵ the Prosecutor's request for suspensive effect⁶ (hereinafter: "Decision on Suspensive Effect").

4. On 23 September 2013, in view of the security situation in the Republic of Kenya, the Trial Chamber excused Mr Ruto from attending the trial and, finding that "it ha[d] no discretion to continue the trial in Mr Ruto's absence as a function of the Appeals Chamber's suspensive effect decision", adjourned the proceedings.⁷

5. On 23 September 2013, Mr Ruto requested, *inter alia*, that the Appeals Chamber reconsider its Decision on Suspensive Effect⁸ (hereinafter: "Mr Ruto's Request"). Mr Ruto indicates that, in light of recent events in Kenya, Mr Ruto was "excused from proceedings for a period of one week (subject to review) in order to return to Kenya to attend to his constitutional duties".⁹

6. Mr Ruto submits that "[t]hese events constitute '*new facts or circumstances*' which demonstrate that reconsideration of the Decision [on Suspensive Effect] is warranted to avoid unsatisfactory and unintended consequences such as delays in proceedings or interruptions to the testimony of witnesses".¹⁰ Mr Ruto contends that "the interests of victims and witnesses are implicated by the present situation" and the stated preference of the Trial Chamber and the Victims and Witnesses Unit is to continue with the testimony of the witness who is currently testifying notwithstanding his absence.¹¹ Mr Ruto recalls his "previous submissions regarding the practical and legal effect which [his] absence will have on proceedings and again points to the

⁴ "Decision on Prosecution's Application for Leave to Appeal the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", ICC-01/09-01/11-817; "Dissenting Opinion of Judge Eboe-Osuji", ICC-01/09-01/11-817-Anx.

⁵ "Decision on the request for suspensive effect", 20 August 2013, ICC-01/09-01/11-862 (OA5).

⁶ "Prosecution appeal against the 'Decision on Mr Ruto's Request for Excusal from Continuous Presence at Trial'", 18 June 2013, ICC-01/09-01/11-831 (OA5).

⁷ Transcript of Hearing, 23 September 2013, ICC-01/09-01/11-T-37-CONF-ENG, p. 7, line 21 - p. 9, line 4.

⁸ "Defence request for reconsideration of the 'Decision on the request for suspensive effect' and variation of time limits pursuant to Regulation 35 of the Regulations of the Court", ICC-01/09-01/11-977 (OA5).

⁹ Mr Ruto's Request, para. 3.

¹⁰ Mr Ruto's Request, para. 6.

¹¹ Mr Ruto's Request, para. 4.

shs

precedent provided by the Bemba case which provides assurance that proceedings can continue in the absence of an accused without serious consequences for the integrity of proceedings”.¹² Mr Ruto argues that “[I]f lifting the suspensive effect of the [I]mpugned [D]ecision, will leave [his] attendance or otherwise [...] to the discretion of the Trial Chamber consistent with its statutory duties including those set out in [a]rticle 64 of the Rome Statute”, a result which “will correctly balance all the competing interests presently at issue in a fair and efficient manner”.¹³

7. Following an order from the Appeals Chamber,¹⁴ the Prosecutor filed her response to Mr Ruto’s Request¹⁵ (hereinafter: “Prosecutor’s Response”) submitting that the new facts raised therein have no bearing on the Appeals Chamber’s reasons for granting suspensive effect, namely “to avoid irreparably tainting the proceedings by holding a trial on an incorrect legal basis and avoid the difficulties that may arise should witnesses who testify in Mr Ruto’s absence be unwilling or unable to testify again, if the [Impugned Decision] is reversed”.¹⁶ The Prosecutor further contends that Mr Ruto’s Request “appears to be an attempt to lead policy arguments on the merits of the appeal after the opportunity for submissions has closed”.¹⁷ The Prosecutor notes that Mr Ruto is “not here voluntarily, but on compulsion of a summons, and risks arrest if he defaults” and that “he is an accused person before the Court and, while presumed innocent, cannot expect that life will continue as normally [and] will have to make the necessary arrangements to attend [his] trial”.¹⁸ Finally, the Prosecutor indicated that [REDACTED].¹⁹

II. MERITS

8. The Appeals Chamber notes Mr Ruto’s submissions that “[a]ccording to this Court’s jurisprudence, reconsideration of a decision may be appropriate where the

¹² Mr Ruto’s Request, para. 9.

¹³ Mr Ruto’s Request, para. 10.

¹⁴ “Order on the filing of a response to Mr Ruto’s request for reconsideration”, 24 September 2013, ICC-01/09-01/11-982 (OA5).

¹⁵ “Prosecution Response to the ‘Defence request for reconsideration of the “Decision on the request for suspensive effect” and variation of time limits pursuant to Regulation 35 of the Regulations of the Court””, 25 September 2013, ICC-01/09-01/11-987-Conf (OA5), public redacted version is also available, ICC-01/09-01/11-987-Red.

¹⁶ Prosecutor’s Response, paras 1, 3.

¹⁷ Prosecutor’s Response, para. 6.

¹⁸ Prosecutor’s Response, para. 7.

¹⁹ Prosecutor’s Response, para. 5.

Shs

applying party shows ‘new facts or circumstances that may influence that decision’, or when decisions ‘are manifestly unsound and their consequences are manifestly unsatisfactory’” (footnotes omitted).²⁰ As a preliminary matter, the Appeals Chamber notes that it has never addressed the question of whether or under what circumstances the Appeals Chamber may reconsider its prior decisions. For the purposes of the present request, it is deemed unnecessary to do so, as the Appeals Chamber is, in any event, not persuaded by Mr Ruto’s arguments in support of his request for reconsideration.

9. The Appeals Chamber recalls that, if the suspensive effect of the present appeal were to be lifted, “Mr Ruto’s absence from the trial would be permitted, in principle, following the delivery of the opening statements” and that “Mr Ruto’s presence would not be required at hearings at which witnesses are scheduled to testify, unless his attendance is otherwise specifically mandated by the Trial Chamber”.²¹

10. The Appeals Chamber, in its Decision on Suspensive Effect, noted the Prosecutor’s concerns with regard to proceeding on the basis of an incorrect legal framework and the difficulties that may arise should witnesses who testified in Mr Ruto’s absence be unwilling or unable to return to testify again, if the Impugned Decision were to be overturned and the trial had to restart in Mr Ruto’s presence.²² The Appeals Chamber therefore found that “the consequences of implementing the Impugned Decision prior to the issuance of the judgment on the Prosecutor’s Appeal, would be difficult to correct and may be irreversible”.²³ The Appeals Chamber considers that this reasoning is still valid. The difficulties that may arise if the proceedings continued in Mr Ruto’s absence, should the Impugned Decision be overturned, are still the same. Accordingly, Mr Ruto’s Request is dismissed.


²⁰ Mr Ruto’s Request, para. 5, citing decisions of Trial Chamber I and Pre-Trial Chamber III.

²¹ Decision on Suspensive Effect, para. 9.

²² Decision on Suspensive Effect, para. 10.

²³ Decision on Suspensive Effect, para. 10.

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



Judge Sang-Hyun Song
Presiding Judge

Dated this 27th day of September 2013

At The Hague, The Netherlands