


AFFIDAVIT

I, Dennis Ole ITUMBI, Kenyan ID No./Passport No. 22219958 make this affidavit in support of my application to Pre-Trial Chamber II of the International Criminal Court for a ruling on the legality of my arrest occasioned by an investigation conducted by the Office of the Prosecutor into allegations of offences against the administration of justice pursuant to article 70 of the Rome Statute.

After having been informed by my counsel of the penalties prescribed under the Rome Statute for giving false testimony, I hereby solemnly declare that all the facts and assertions set out in the section of my application entitled "*Relevant Factual Background*" are the truth, the whole truth and nothing but the truth.

Signature:



Date: 21/09/2012

Place, Nairobi, Kenya

Mr. Dennis Ole Itumbi ("the Applicant") hereby requests that the learned Pre-Trial Chamber rule on the legality of his arrest in the context of a police investigation conducted at the behest of the Office of the Prosecutor ("OTP") at the International Criminal Court ("ICC").

Factual Background

On 1 September 2011, the confirmation hearings in Kenya case ICC-01/09-01/11 commenced followed, three weeks thereafter, by the confirmation hearings in Kenya case ICC-01/09-02/11.

On 17 October 2011, the website "*Institute for War and Peace Reporting*" published the following comments:

*"Prosecutor Luis Moreno Ocampo says the court is conducting investigations on social media users who are interfering with the justice process, "Those involved in attacking.. witnesses....we will find them. We are working on these blog people, and we will get them," Ocampo told IWPR. "We can prosecute them. I would like to warn them if they are involved in tampering [with] witnesses they could be [held] accountable before the ICC."*¹

On 16 March 2012, the Kenyan digital news website "*Standard*" reported as follows:

"Louis Moreno-Ocampo has focused his lenses on the Kenyan case writing a letter to Attorney General over intimidation of witnesses. In the complaint to the AG, ICC raised concern over the hacking of email accounts of a person of interest to the Office of the Prosecutor".

¹ <http://iwpr.net/report-news/icc-cases-threatened-social-media-leaks> (last accessed 20.9.12).

In the same article the Kenyan Attorney General – Mr. Githu Muigai (“the Attorney General”) was reported to have stated as follows:

"The Office of the Prosecutor of the ICC has drawn [the] attention [of] the AG of Kenya to the following complaints: hacking of email accounts of a person of interest to the Office of The Prosecutor, intimidation of Office of The Prosecutor witnesses," Prof Muigai said in a statement".²

On 22 March 2012, at 19:20 or thereabouts, the Applicant was stopped by at least a dozen gun-toting law enforcement officers while traveling in the Gunthuri district of Embu, Kenya. After being bundled into the back seat of a police car, the Applicant was driven to the headquarters of the Central Investigation Department of the Kenyan police force (“the Kenyan CID”) in Nairobi. At no stage was the Applicant informed of the statutory basis for his arrest and, instead of being read his rights, was subjected to a barrage of questions such as why he was “disturbing” ICC witnesses and whether the laptop which had been seized from him was used for “hacking”.

On 23 March 2012, after spending the night in police detention without any access to a lawyer, the Applicant was interviewed by three detectives of the Kenyan CID. The Applicant recalls that he was interrogated on the following issues:

- (i) Whether he knew any ICC Witnesses;
- (ii) Whether he was familiar with “RV Pundit” (the username of an individual frequenting www.nipate.com - a Kenyan internet forum devoted to contemporaneous politics including developments in the Kenya Situation at the ICC);

² <http://www.standardmedia.co.ke/?articleID=2000054159&pageNo=1> (last accessed on 20.9.12).

- (iii) Whether he was familiar with "True RV" (another username on www.nipate.com);
- (iv) Whether he had hacked the email accounts of ICC witnesses;
- (v) Whether he was familiar with the owners of www.nipate.com;
- (vi) Whether he had been in contact with any ICC witness;
- (vii) Whether he had accessed the ICC website;
- (viii) Whether he had in his possession material from the ICC;
- (ix) How he would hack a website, and;
- (x) How many ICC witness statements he had in his possession.

On 26 September 2012, the Applicant was released from police custody without having once been brought before a judge for review of the legality or the conditions of his detention. At no stage was the Applicant presented with a judicial warrant authorizing his arrest or the subsequent search and seizure which was executed on his domestic premises. The only official document with which he was presented was a charge sheet which recorded that he had been interrogated on suspicion of having obtained illegal access to confidential information in contravention of the Kenyan Communications Amendment Act (2008).³

Subsequent to his release, the Applicant was informed by the Kenyan CID as follows:

- (1) that the case file against had stalled pending the formal recording of a complaint by the ICC – presumably a statement to be taken from a representative of the OTP, and;

³ It is interesting to note that the Applicant was not informed that he was suspected of having committed offences contrary to the Kenyan International Crimes Act (2008).

- (2) that the OTP had requested that the Kenyan CID forward it copies of the Applicant's interview and the results of the forensic examination of the Applicant's electronic media.

On 6 September 2012, the Appeals Chamber of the ICC issued the public-redacted version of its *"Decision on the Request for Disqualification of the Prosecutor in the Investigation against Mr David Nyekorach-Matsanga"* in which it noted that the OTP did not object to making public its confidential investigation being conducted against the same David Nyekorach-Matsanga ("Matsanga").⁴

On 12 September 2012, herein undersigned counsel ("Counsel") wrote to the Prosecutor of the International Criminal Court ("the Prosecutor") and asked to know whether the OTP had initiated an investigation against the Applicant for crimes allegedly committed under article 70 of the Rome Statute.

On 13 September 2012, the OTP replied to Counsel stating that it was under no obligation to inform him as to *"the status of any alleged investigation it may or may not be undertaking"*.

On 19 September 2012, Counsel wrote to the Kenyan Attorney General requesting that he close the police file concerning the Applicant on the grounds that there was no case to answer. Furthermore, Counsel requested that the Attorney General forward copies of all correspondence received by the Kenyan authorities from the OTP which prompted the arrest and subsequent interrogation of the Applicant.

⁴ ICC-01/09-96-Red at para. 9.