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

Date: 23 March 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Presiding Judge
Judge Hans-Peter Kaul, Judge
Judge Cuno Tarfusser, Judge

SITUATION IN THE REPUBLIC OF KENYA

**IN THE CASE OF
*THE PROSECUTOR v. FRANCIS KIRIMI MUTHAURA,
UHURU MUIGAI KENYATTA AND MOHAMMED HUSSEIN ALI***

Public Document

**Defence Submissions on the Variation of Summons Conditions for Francis
Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali**

Source: Defence

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

The Office of the Prosecutor

Mr. Luis Moreno-Ocampo, Prosecutor
Ms. Fatou Bensouda, Deputy Prosecutor

Counsel for the Defence

Counsel for Francis Kirimi Muthaura:
Karim Khan and Kennedy Ogetto
Counsel for Uhuru Muigai Kenyatta:
Steven Kay QC and Gillian Higgins
Counsel for Mohammed Hussein Ali:
Evans Monari and Gershom Otachi

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants
(Participation/Reparation)**

**The Office of Public Counsel for
Victims**

**The Office of Public Counsel for the
Defence**

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Mr. Didier Daniel Preira, Deputy
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Counsel Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 7 March 2011, Pre-Trial Chamber II (hereinafter “the Chamber”) issued “*Decision on the Prosecutor’s Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*” (hereinafter “the Decision”).¹

2. In the Decision, the Chamber issued summonses with conditions attached to attend the Court for Francis Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (hereinafter “the Applicants”). The Chamber ordered the Applicants at page 24 of the decision:

“(i) to have no contact directly or indirectly with any person who is or is believed to be a victim or a witness of the crimes for which Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali have been summoned ;”

3. The Applicants request the Chamber to vary the above stated condition as in its current form, it prevents them from contacting directly, or indirectly *defence* witnesses or people they believe to be *defence* witnesses. Whilst the Defence takes the view that the Pre-Trial Chamber only intended the condition detailed above to restrict the Applicants from contacting persons they believe to be *prosecution* witnesses and that this limitation was omitted by inadvertence, the Defence provide additional argument on this issue, to cater for the possibility that the Pre-Trial Chamber did intend the condition to prevent the Applicants from contacting putative defence witnesses or people they do not believe to be prosecution witnesses.

¹ ICC-01/09-02/11-01 – Situation in the Republic of Kenya – *In the case of the Prosecutor v. Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*.

II. The Law

4. The applicable law relating to the issuance of a summons is Article 58 (7) of the Statute:

“...If the Pre-Trial Chamber is satisfied that there are reasonable grounds to believe that the person committed the crime alleged and that a summons is sufficient to ensure the person's appearance, it shall issue the summons, with or without conditions restricting liberty (other than detention) if provided for by national law, for the person to appear...”

5. It is the Applicants' submission that, if the Pre-Trial Chamber intended the condition to operate in an unrestrictive form (so as to prevent the Applicants from contacting putative defence witnesses) the Chamber would have erred.

III. Legal Submissions

6. The basic premise of the Defence (that the impugned condition was intended to only restrict the Applicants from contacting prosecution witnesses) is born from a simple reading of the Statute. The Statute allows the Applicants to conduct investigations and to challenge evidence of the Prosecution. The Applicants are expressly permitted to present evidence at the confirmation hearing, pre trial. (Article 61(6) (b)-(c)). If the condition was as wide as currently drafted, it would prevent the Applicants from speaking to any witnesses pre-trial, make impossible the calling of any witnesses at confirmation in the event they wished to exercise their Article 67(1)(d) right to conduct their Defence in person, and accordingly would amount to a violation of the rights provided for in Article 61(6). The Applicants would not be allowed to do that which the Prosecution is permitted to do.
7. Accordingly, the Applicants submit that the impugned condition as currently drafted (i) interferes with their right to participate in their case preparation

and (ii) their right to call and examine witnesses under the same conditions as the Prosecution (Article 67(1)(e)).

8. The Appeals Chambers of the ICC has confirmed that any restrictions of the rights of the Defence must accord with the principles of necessity and proportionality.² The Applicants submit that the impugned condition restricts their fundamental rights in a manner that is neither necessary nor proportionate.
9. In terms of necessity, there is no consideration in the Decision as to why this condition, which restricts the Applicants from being in contact with defence witnesses, or people they believe to be such witnesses, is necessary. The ICC Appeals Chamber has held that if it is possible to protect the interest and security of witnesses by less restrictive measures, then the Chamber should adopt the measure which is the least intrusive to the rights of the defence.³
10. In terms of proportionality, it is submitted that the impugned condition should be amended to restrict contact only between the Applicants and prosecution witnesses. To impose further restriction in the context of defence witnesses disproportionately interferes with the ability of the Applicants to prepare for future court proceedings and their right to a fair trial. A prohibition against witness interference has already been provided in condition (ii) which requires the Applicants to “refrain from corruptly influencing a witness, obstructing or interfering with the attendance or testimony of a witness, or tampering with or interfering with the Prosecution's collection of evidence”.

² Prosecutor v. Lubanga, Judgment on the appeal of Mr. Thomas Lubanga Dyilo against the decision of Pre-Trial Chamber I entitled First Decision on the Prosecution Requests and Amended Requests for Redactions under Rule 81, ICC-01/04-01/06-773, 14 December 2006, at para 33, See also Trial Chamber decisions: Prosecutor v. Lubanga Decision inviting the parties' observations on applications for participation of a/0001/06 to a/0004/06, a/0047/06 to a/0052/06, a/0077/06, a/0078/06, a/0105/06, a/0221/06, a/0224/06 to a/0233/06, a/0236/06, a/0237/06 to a/0250/06, a/0001/07 to a/0005/07, a/0054/07 to a/0062/07, a/0064/07, a/0065/07, a/0149/07, a/0155/07, a/0156/07, a/0162/07, a/0168/07 to a/0185/07, a/0187/07 to a/0191/07, a/0251/07 to a/0253/07, a/0255/07 to a/0257/07, a/0270/07 to a/0285/07, and a/0007/08, Doc. ICC-01/04-01/06-1308, 6 May 2008 at page 8.

³ Prosecutor v. Katanga and Ngudjolo, Judgment on the appeal of Mr Germain Katanga against the decision of Pre-Trial Chamber I entitled "First Decision on the Prosecution Request for Authorisation to Redact Witness Statements" ICC-01/04-01/07-476, 13 May 2008, at para 59.

11. The Applicants reiterate that the principle of equality of arms should be respected from the outset and the Prosecution should not have an unfair advantage. By restricting generically the Applicant's right to contact a person who is "believed to be a ... witness", the Chamber gives the Prosecutor an unfair advantage in the proceedings and denies the Applicants their right to a fair hearing guaranteed under the Rome Statute.

IV. Relief Sought

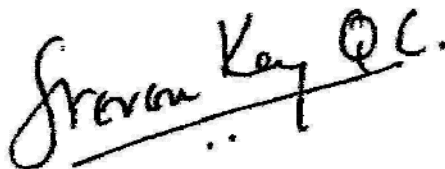
12. For the foregoing reasons, the Applicants request the Chamber to replace the word "witness" in impugned condition (i) with the words "prosecution witness", thereby affirming their right to meet potential defence witnesses.

Respectfully submitted,

Karim Khan on behalf of Francis Kirimi Muthaura



Steven Kay QC on behalf of Uhuru Muigai Kenyatta



Evans Monari on behalf of Mohammed Hussein Ali

A handwritten signature in black ink, appearing to read 'Evans Monari', with a small superscript 's' above the final 'i'.

Dated this Wednesday, 23 March 2011

At Nairobi, Kenya