

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

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

Date: 20 July 2011

PRE-TRIAL CHAMBER II

Before: Judge Ekaterina Trendafilova, Single 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

**Decision with Respect to the Question of Invalidating the Appointment of
Counsel to the Defence**

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

The Office of the Prosecutor
Luis Moreno-Ocampo, Prosecutor
Fatou Bensouda, Deputy Prosecutor

Counsel for Francis Kirimi Muthaura
Karim A. Khan, Kennedy Ogetto and
Essa Faal

Legal Representatives of the Victims

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Réparation**

**The Office of Public Counsel for
Victims**

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

States Representatives

Amicus Curiae

REGISTRY

Registrar & Deputy Registrar
Silvana Arbia, Registrar
Didier Preira, Deputy Registrar

Defence Support Section

Victims and Witnesses Unit

Detention Section

**Victims Participation and Reparations
Section**

Other

Judge Ekaterina Trendafilova, acting as Single Judge on behalf of Pre-Trial Chamber II (the "Chamber")¹ of the International Criminal Court (the "Court"), issues this decision with respect to the question of invalidating the appointment of Mr. Essa Faal ("Mr. Faal") as a member of Mr. Francis Kirimi Muthaura's Defence team ("Mr. Muthaura's Defence"). The present decision is classified as public although it refers to the existence of documents and, as the case may be, to a limited extent to their content, which have been submitted and are currently treated as confidential *ex parte*, Prosecutor and/or Defence. The Single Judge considers that the references made in the present decision are required by the principle of publicity and judicial reasoning. Moreover, those references are not inconsistent with the nature of the documents referred to and have been kept to a minimum.

I. Procedural History

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura, Uhuru Muigai Kenyatta, and Mohammed Hussein Ali to appear before the Court on 7 April 2011.²
2. On 18 March 2011, the Chamber issued a decision setting 8 April 2011 as the new date for the initial appearance hearing.³ The initial appearance took place on the new date.
3. On 28 June 2011, the Single Judge ordered the Prosecutor and the Registrar to submit observations on a possible impediment to Mr Faal's representation as Counsel for Defence in the proceedings with which the Chamber is currently seized,

¹ Pre-Trial Chamber II, "Decision Designating a Single Judge", ICC-01/09-02/11-9.

² Pre-Trial Chamber II, "Decision on the Prosecutor's Application for Summonses to Appear for Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali", ICC-01/09-02/11-01.

³ Pre-Trial Chamber II, "Decision Setting a New Date for the Initial Appearance", ICC-01/09-02/11-8.

by no later than 1 July 2011.⁴ She also ordered that, should Mr. Muthaura's Defence wish to respond, it must do so, by no later than 6 July 2011.⁵

4. On 1 July 2011, the Prosecutor filed his observations together with 9 annexes appended thereto, in which he provided the Chamber with information that tend to prove the existence of conflict of interest, as far as Mr. Faal continues to represent Mr. Muthaura and his appointment is maintained (the "Prosecutor's Observations" or the "Observations").⁶ On the same date, the Chamber received a report prepared by the Division of Court Services within the Registry revealing all actions performed on documents stored in the document storage system TRIM (the "Registry's Report"). In particular, the Court Management Section (the "CMS") checked whether: a) Mr. Faal received notification emails sent in the Kenya situation and the cases related thereto; b) he viewed confidential and under seal documents concerning the Kenya situation and the cases related thereto; and c) whether he had real time access to the transcripts of "closed proceedings".⁷

5. On 4 July 2011, Mr. Muthaura's Defence requested an extension of page limit to respond to the Prosecutor's Observations.⁸ The request was rejected on the same date.⁹

6. On 6 July 2011, Mr. Muthaura's Defence responded to the Prosecutor's Observations employing an incorrect type face of the document,¹⁰ and on 7 July 2011,

⁴ Pre-Trial Chamber II, "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", ICC-01/09-02/11-138-Conf, p. 4.

⁵ Pre-Trial Chamber II, "Order to the Prosecutor and the Registrar to Submit Observations Regarding a Potential Impediment to Defence Representation", ICC-01/09-02/11-138-Conf.

⁶ ICC-01/09-02/11-150-Conf and its annexes.

⁷ ICC-01/09-02/11-149-Conf-Exp and its annex.

⁸ ICC-01/09-02/11-154-Conf.

⁹ Pre-Trial Chamber II, "Decision on the 'Defence Request for extension of page limit pursuant to Regulation 37(2) of the Regulations of the Court'", ICC-01/09-02/11-155-Conf..

¹⁰ ICC-01/09-02/11-159-Conf-Exp and its annexes.

the Single Judge ordered Mr. Muthaura's Defence to "re-submit its response [...] no later than [...] 8 July 2011".¹¹

7. On 8 July 2011, Mr. Muthaura's Defence re-submitted its response, in which it requested that the Single Judge "dismiss the objections" contained in the Prosecutor's Observations as a matter of priority (the "Defence's Resubmitted Response").¹²

8. On 12 July 2011, the Prosecutor requested leave to reply to the Defence's Response, which was notified to the Chamber on 13 July 2011 (the "Prosecutor's Request for Leave to Reply" or the "Reply").¹³ On the same date, the Single Judge granted the Prosecutor's Request for Leave to Reply to the extent that the Chamber receives his reply, by no later than 14 July 2011.¹⁴

9. On 14 July 2011, the Chamber received the Prosecutor's Reply (the "Prosecutor's Reply" or the "Reply"), in which he requested that the Chamber invalidate Mr. Faal's contested appointment.¹⁵

II. Applicable Law

10. The Single Judge notes article 21(1) (a), (2) and (3) of the Rome Statute, rule 22(3) of the Rules of Procedure and Evidence and articles 1, 7(4), 12(1)(b), 16(1) and 24(1) of the Code of Professional Conduct for counsel (the "Code of Conduct") and regulation 23 *bis* of the Regulations of the Court (the "Regulations").

¹¹ Pre-Trial Chamber II, "Order to the Defence of Francis Kirmi Muthaura on the Re-submission of the Defence Response to the 'Prosecution's Request to Invalidate the Appointment of Counsel to the Defence Team'", ICC-01/09-02/11-161-Conf-Exp.

¹² ICC-01/09-02/11-163-Conf-Exp.

¹³ ICC-01/09-02/11-169-Conf-Exp.

¹⁴ Pre-Trial Chamber II, "Decision on the 'Prosecutor's Request for leave to Reply to the 'Defence Response to the Prosecution's Request to Invalidate the Appointment of Counsel to the Defence team'", ICC-01/09-02/11-170-Conf.

¹⁵ ICC-01/09-02/11-172-Conf-Exp and its annexes.

III. The Single Judge's Determination

Preliminary Issues

11. At the outset, the Single Judge recalls that the proceedings concerning the possible invalidation of Mr. Faal's appointment to join Mr. Muthaura's Defence team was triggered by the Chamber *proprio motu*. This approach is driven by the fact that the Chamber is keen to preserve the integrity of the proceedings to the effect that they are conducted in a fair and transparent manner, respecting the rights of both parties involved. Thus, the Single Judge shall decide on the subject-matter *sub judice* in view of this principal approach.

12. Consistent with this principal approach, and before delving into the merits of the subject matter, the Single Judge wishes to point out that decisions and orders of the Chamber must be fully complied with by all parties and participants to the proceedings. In this context, the Single Judge recalls the Prosecutor's Request for Leave to Reply, and the decision issued granting it, to the extent that the Chamber receives his reply, by no later than 14 July 2011.

13. The Single Judge noticed that although the Prosecutor filed the actual document containing the Reply on time, the annexes appended thereto were only filed with the CMS 51 minutes after the deadline has expired. Moreover, the Prosecutor has also failed to provide the Chamber with the reasons for this delay in accordance with regulation 35 of the Regulations. In the absence of a justified request from the Prosecutor, the Single Judge should, in principle, disregard the said annexes in its final examination. However, due to the delicacy and significance of the subject matter under consideration, the Single Judge deems it essential to consider the entirety of the filings, for the sake of having the full picture beforehand. This, in turn, shall assist the Single Judge to take a well informed decision on the subject matter *sub judice*.

Merits

14. Turning to the merits, the Single Judge notes that one of the key issues that the Prosecutor relies upon at the opening of his Observations, is the issue of “appearance of conflict of interest”, which in his opinion, necessitates the “suspension” or “invalidation” of Mr. Faal’s appointment as Defence counsel in the case against Mr. Muthaura.¹⁶

15. In this regard, the Single Judge recalls article 12(1)(b) of the Code of Conduct according to which, a counsel shall not represent a client in a case, where he/she “was involved or was privy to confidential information as a staff member of the Court relating to the case in which counsel seeks to appear”.

16. Thus, based on the said provision, which is the *lex specialis* in this case, the Single Judge considers that the core issue *sub judice* is not actually whether there is “an appearance of conflict of interest”. Rather, the issue that requires determination first is whether Mr. Faal was “privy to confidential information as a staff member of the Court relating to the case” of Mr. Muthaura. If the answer is in the affirmative, Mr. Faal shall not continue to represent Mr. Muthaura, since there would certainly be a potential or even an actual conflict of interest within the meaning of articles 7(4), 16(1) and 24(1) of the Code of Conduct.

17. The Court’s statutory provisions, including the Code of Conduct, do not define the scope of the expression “privy to confidential information”. However, in addressing requests of similar nature, Trial Chambers III and IV adopted the standard of “*de minimis* confidential information”, which requires a proof that the person concerned “became aware of more than”¹⁷ the “minimal” confidential information relevant to the case under consideration. The information is deemed *de*

¹⁶ ICC-01/09-02/11-150-Conf, paras 4-8.

¹⁷ Trial Chamber III, “Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team”, ICC-01/05-01/08-769, para. 42; Trial Chamber IV, “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-168, para. 16.

minimis if it is “so insignificant that a court may overlook it in deciding an issue”.¹⁸ Thus, to prove *a contrario* that the person concerned “became aware of more than *de minimis* confidential information”, the facts presented should reveal that at least he/she was aware of confidential information of some significance to the case *sub judice*, which prompts the Chamber to invalidate the person’s continuous involvement with the opposite party (Defence). The Single Judge does not see a reason to deviate from the Court’s existing jurisprudence regarding this matter and, accordingly, endorses the same standard as adopted by the other Chambers and as developed by the Single Judge in this paragraph.

18. Turning to the facts as presented by both parties, the Single Judge recalls that in his Observations the Prosecutor avers, as a principal argument, that Mr. Faal “had ongoing access to confidential ex-parte information [...] to which the Defence Team was excluded”.¹⁹ According to the Prosecutor, Mr. Faal also received “weekly internal reports that summarized confidential filings, decisions, hearings and other matters”.²⁰

17. The Single Judge is not persuaded by the Prosecutor’s arguments given that upon review of the Prosecutor’s Observations and Reply as well as the annexes appended thereto, there is a lack of proof that Mr. Faal actually was aware of confidential information concerning the case of the *Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, let alone *de minimis* information.

19. In particular, in his Observations, the Prosecutor appended nine annexes to prove his allegations, none of which actually reveals that Mr. Faal was privy to confidential information of the *case* within the meaning of article 12 (1)(b) of the Code of Conduct. On the contrary, most of the annexes embody exchanges between the Deputy Prosecutor and the Chief Counsel Support Section or between the Lead Counsel for

¹⁸ Bryan A. Garner (ed.), *Black’s Law Dictionary*, 7th ed., (1999), p. 443 ; see also A. Fellmeth/M. Horwitz, *Guide to Latin in International Law* (OUP, 2009), p. 76.

¹⁹ ICC-01/09-02/11-150-Conf, paras 2, 7 and 10.

²⁰ ICC-01/09-02/11-150-Conf, paras 2, 15

the Defence and the Chief Counsel Support Section. Another annex is a copy of Mr. Faal's resignation letter.

20. This leaves the Single Judge with three annexes appended to the Prosecutor's Observations (A, F and H), which appear to be of some relevance. With respect to annex A, which is a declaration of a Trial Lawyer at the office of the Prosecutor, the Single Judge considers that the information provided therein concerning a discussion concerning the 'case hypothesis' and its weaknesses between that Trial Lawyer and Mr. Faal is too general in nature and unsupported by concrete facts which could reveal that Mr. Faal was privy to confidential information related to this case. In this respect, the Single Judge concurs with the Defence that a 'case hypothesis' is a developing document and is subject to change and that at this stage of the proceedings the information related thereto is probably known to the Defence.²¹ The same holds true in relation to annexes F and H appended to the Prosecutor's Observations. Annex F entails by way of an email that Mr. Faal was in charge of the Prosecution Division *in lieu* of the Deputy Prosecutor for three days in October 2008 and for four days in November 2010. This does not in itself sufficiently prove that he was privy to confidential information related to the *case* against Mr. Muthaura within the meaning of article 12(1)(b) of the Code of Conduct. Annex H appended to the Prosecutor's Observations on the other hand, refers to the minutes of a meeting of the Prosecution Division held in April 2010. Although the situation of the Republic of Kenya was discussed in this meeting, it is clear from the annex that Mr. Faal was not present.

21. Moreover, in the Prosecutor's Reply and the six annexes appended thereto, the Prosecutor has also failed to prove that Mr. Faal became aware of more than the *de minimis* confidential information. The Prosecutor mainly relies on two annexes including emails from two members of his office requesting Mr. Faal's advice. According to the relevant annexes, one email was directly addressed to Mr. Faal by

²¹ ICC-01/09-02/11-163-Conf-Exp, paras 31-32.

Ms Cynthia Tai, while the other, the Prosecutor alleges, was forwarded to Mr. Faal by Ms Shyamala Alagendra.

22. With respect to Ms Cynthia Tai's email, the Single Judge observes that the email merely referred to a question of a legal nature and even more one that is related to the companion case of the *Prosecutor v. William Samoei Ruto, Henry Kiprono Kosgey and Joshua Arap Sang* as opposed to the present case. Furthermore, Mr. Faal has not responded to the said email, as acknowledged by the Prosecutor.²²

23. As to the email sent by Ms Shyamala Alagendra, the Prosecutor himself acknowledges that the "confidential information contained in [it][...] is plainly not critical".²³ Moreover, the Prosecutor advances the argument that despite the insignificance of the email's content, Mr. Faal's position and his relationship with his colleagues shows that "he was inevitably exposed to, and consulted on, confidential information in the Kenya case".²⁴ This assertion rests on a speculation rather than on an actual proof of being aware of confidential information concerning the case against Mr. Muthaura.

24. The Prosecutor further invokes the issue of Mr Faal's access to weekly reports including summary of two confidential *ex parte* filings related to one of the Kenya cases. Upon review of annex 3 appended to the Prosecutor's Reply, which refers to the alleged information, the Single Judge observes that the summary is confined to the proceedings, which relates to issues triggered by the suspects of the companion case. Even then, the information provided in this report is very general in nature and provides a limited summary of the interpretation and development of the law by Pre-Trial Chamber II in two of its public decisions.

25. The Prosecutor also claims that as a matter of principle, a lawyer who left his Office should not be allowed to "immediately join the Defence team in a case that was active". Citing a number of national jurisdictions as well as article 21(1)(c) of the

²² ICC-01/09-02/11-172-Conf-Exp, para. 8.

²³ ICC-01/09-02/11-172-Conf-Exp, para. 7.

²⁴ ICC-01/09-02/11-172-Conf-Exp, para. 7.

Statute, the Prosecutor proposes that the Court should be guided by the practice of some national jurisdictions which set a time bar to the person's subsequent involvement with the Defence team.

26. In this regard, the Single Judge considers that the reference to the general principles of law as proposed by the Prosecutor is erroneous. Article 21(1)(a) of the Statute places the Statute, the Rules and the Elements of Crimes on the top of the hieratical structure of the applicable law. Thus, articles 21(1)(b) and (c) come into play only if article 21(1)(a) of the Statute does not solve the legal matter.

27. The Single Judge considers that the Court's statutory documents do not prohibit a staff member from the Office of the Prosecutor to join the Defence. Nor do they set a time bar for such an involvement. Accordingly, in the absence of any prohibitive rule to that effect, the person is free to do so subject to the limitations dictated by the existing statutory provisions including those referred to in the Code of Conduct. Furthermore, even assuming that there is a *lacuna* in the Statute and the Rules, a general principle of law cannot be extracted on the basis of examining only five national jurisdictions, the practice of which is even inconsistent.

28. The problem raised by the Prosecutor that "safe guards" should be "put in place [...] in the context of a small office like the Prosecution Division",²⁵ cannot justify that the Chamber act as a legislative body in the sense of setting a time bar that is not envisaged by the Court's statutory provisions.

29. The Single Judge having examined the Prosecutor's Observations, Reply and the annexes related thereto as well as the Defence's Resubmitted Response including the appended annexes, is of the view that the Prosecutor has failed to satisfy the required standard of proof that Mr. Faal was aware of more than the *de minimis* confidential information. This conclusion is even supported by the Registry's Report which shows that, although Mr. Faal was on the notification list of confidential filings, he had never accessed a confidential document concerning the case of the *Prosecutor v*

²⁵ ICC-01/09-02/11-172-Conf, para. 32.

*Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali.*²⁶ The same conclusion equally finds support in the unequivocal assertions of Mr. Faal in that he does not know or has no knowledge of any confidential investigative or prosecutorial policies pertaining to the present case as alleged by the Prosecutor.²⁷ In the absence of any reasons “doubting [Mr. Faal’s] integrity”, the Single Judge is entitled “to rely on his clear undertakings”.²⁸

30. Finally, the Single Judge wishes to caution the Defence that although Mr. Faal may continue to be involved in the present case as the facts presented do not support the Prosecutor’s allegations, the Chamber shall keep the issue decided in this decision under continuing review. If the Chamber identifies throughout the proceedings that any significant facts were not available at the time of this current assessment, and which reveal that Mr. Faal was privy to confidential information, it shall not hesitate to invalidate his appointment. As such, the present decision should not be perceived as a *carte blanche* encouraging practices that might compromise the interest of justice in the future.

²⁶ ICC-01/09-02/11-149-Conf-Exp and its annex.

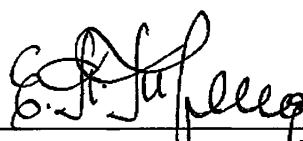
²⁷ ICC-01/09-02/11-150-Conf-AnxD1.

²⁸ Trial Chamber III, “Decision on the ‘Prosecution’s Request to Invalidate the Appointment of Legal Consultant to the Defence Team”, ICC-01/05-01/08-769, para. 45; Trial Chamber IV, “Decision on the Prosecution’s Request to Invalidate the Appointment of Counsel to the Defence”, ICC-02/05-03/09-168, para. 22. This argument was also advanced by the Defence, ICC-01/09-02/11-163-Conf-Exp, para. 11.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

- a) rejects** the Prosecutor's request;
- b) decides** that Mr. Essa Faal may continue to represent Mr. Muthaura in the case against him;
- c) requests** the Prosecutor and the Defence for Mr. Muthaura to consider which submissions and annexes that may be reclassified as public, by no later than **Tuesday, 26 July 2011**.

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Wednesday, 20 July 2011

At The Hague, The Netherlands