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

Date: 05 September 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

**Defence Motion for an Adjournment of the Confirmation Hearing Scheduled for
21 September 2011**

Source: Defence of General Mohammed Hussein Ali

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 A.A. Khan QC, Kennedy Ogeto
and Essa Faal

Counsel for Uhuru Muigai Kenyatta:

Steven Kay QC and Gillian Higgins

Counsel for Mohammed Hussein Ali:

Evans Monari, Greg Kehoe, John Philpot
and Gershom O. Bw'omanwa

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**

States' Representatives

Amicus Curiae

REGISTRY

Registrar

Ms. Silvana Arbia, Registrar

Deputy Registrar

Mr. Didier Daniel Preira, Deputy
Registrar

Victims and Witnesses Unit

Counsel Support Section

Detention Section

**Victims Participation and Reparations
Section**

Other

I. Introduction

1. On 20 April 2011, the Single Judge issued the “Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties” (the “Second Disclosure Decision”), in which she established the calendar for disclosure setting out the various time limits for service by the Defence and Prosecution as well as deadlines for the submission of properly justified proposals for redactions.¹
2. On 26 August 2011, the Muthaura team filed “Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be Ordered to Re-File an Amended DCC and LoE” (“Preliminary Motion”).² A corrigendum of the Preliminary Motion was filed on 28 August 2011.³
3. On 29 August 2011, the Defence for Uhuru Kenyatta and Mohammed Hussein Ali jointly filed “Defence Request for a Status Conference concerning the Prosecution’s disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute” (the “Joint Defence Request”).⁴ In this filing, the Defence set forth to the Pre-Trial Chamber the scale of the disclosure of new evidence by the Prosecution on 19 August 2011 and the major changes in the allegations against Uhuru Kenyatta in the DCC arising from the

¹ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Decision on the ‘Prosecution’s application requesting disclosure after a final resolution of the Government of the Republic of Kenya’s admissibility challenge’ and Establishing a Calendar for Disclosure Between the Parties, 20 April 2011, ICC-01/09-02/11-64.

² Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Preliminary Motion Alleging Defects in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC & LoE, 26 August 2011, ICC-01/09-02/11-268.

³ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Corrigendum to “Defence Preliminary Motion Alleging Defence in the Document Containing the Charges (DCC) and List of Evidence (LoE) and Request that the OTP be ordered to re-file an Amended DCC and LoE”, 28 August 2011, ICC-01/09-02/11-268-Corr + Anx.

⁴ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Defence Request for a Status Conference Concerning the Prosecution’s Disclosure of 19th August 2011 and the Document Containing the Charges and Article 101 of the Rome Statute, 29 August 2011, ICC-01/09-02/11-270 + Anx.

disclosure. The Defence therein made a request to the Pre-Trial Chamber for a status conference in the week of 29 August 2011.

4. On 2 September 2011, the Defence for Uhuru Kenyatta filed “Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for an Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses” (the “Kenyatta Motion”) wherein the Defence requested an adjournment of the Confirmation of Charges Hearing for a period of 3 months.
5. On 2 September 2011, the Prosecution submitted its amended DCC.⁵
6. The Defence for General Mohammed Hussein Ali (the “Defence”) files this motion to join the Kenyatta Motion in so far as it seeks an adjournment of the Confirmation of Charges Hearing.

II. Submissions

7. The Defence reiterates the contents of the Joint Defence Request and in particular emphasizes the section headed “(iii) Substantial New Allegations in the Disclosure and the DCC”. Defence maintains that the sheer volume and extensive change in the direction of the Prosecutor’s case, which arises exclusively from the last scheduled disclosure on 19th August 2011 has made it difficult for the Defence to effectively prepare its case in the short period.
8. The Defence adopts the arguments set forth in paragraphs 15, 16, 17, 18, 19, 20, 21, 22 and 23 of the Kenyatta Motion in so far as they apply to Mohammed Hussein Ali.
9. The Defence further agrees with the Defence for Mr. Kenyatta that the new issues raised in the DCC and the last batch of the Prosecution Disclosure

⁵ Pre-Trial Chamber II, Prosecutor v Muthaura et al., Prosecution's Amended Document Containing the Charges and List of Evidence Submitted Pursuant to Article 61(3) and Rule 121(3), (4) and (5), 2 September 2011, ICC-01/09-02/11-280+AnxA+Conf-AnxB.

require sufficient time to be scrutinized by the Defence before the confirmation of charges hearing. In that regard, the Defence submits that an adjournment is warranted to ensure fairness of the proceedings.

III. Conclusion

27. For the foregoing reasons, the Defence requests that:

- (i) the Confirmation Hearing scheduled for 21 September 2011 be adjourned for a period of 3 months;
- (ii) the Defence date for filing its list of evidence be appropriately altered to reflect a date 15 days before the revised confirmation date identified by the Pre-Trial Chamber; and
- (iii) An order be issued that the disclosure due to be submitted on 5 September 2011 be held by the Registry and PTC only, and not communicated to the Prosecution until there has been a decision upon the Applications for an Adjournment.

Respectfully submitted,



Evans Monari and Gershon Otachi Bw'omanwa
On behalf of Mohammed Hussein Ali

Dated this 5th day of September 2011

At Nairobi, Kenya