

**Cour
Pénale
Internationale**



**International
Criminal
Court**

Original: English

No.: ICC-01/09-02/11
Date: 5 September 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
URGENT**

**Decision on the Extension of Time Limit for Disclosure under Rule 121(6) of the
Rules of Procedure and Evidence**

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 Khan, Essa Faal and Kennedy
Ogetto

Counsel for Uhuru Muigai Kenyatta
Steven Kay and Gillian Higgins

Counsel for Mohammed Hussein Ali
Evans Monari, John Philpot and
Gershom Otachi Bw'omanwa

Legal Representatives of the Victims
Morris Azuma Anyah

Legal Representatives of the Applicants

Unrepresented Victims

**Unrepresented Applicants for
Participation/Reparation**

**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”) of the International Criminal Court (the “Court”)¹ hereby issues this decision on the extension of time limit for disclosure under Rule 121(6) of the Rules of Procedure and Evidence.

1. On 8 March 2011, the Chamber, by majority, decided to summon Francis Kirimi Muthaura (“Mr. Muthaura”) Uhuru Muigai Kenyatta (“Mr. Kenyatta”) and Mohammed Hussein Ali (“Mr. Ali”) (collectively “the Suspects”) to appear before the Court.² Pursuant to this decision, the Suspects voluntarily appeared before the Court at the initial appearance hearing held on 8 April 2011,³ during which, *inter alia*, the Chamber scheduled the commencement of the confirmation of charges hearing for Wednesday, 21 September 2011.⁴

2. On 6 April 2011, the Single Judge issued the “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”.⁵

3. 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 “20 April 2011 Calendar Decision”), wherein the Prosecutor was ordered, *inter alia*, “to file in the record of the case as soon as possible and no later than Friday, 19 August 2011 the Document Containing the Charges and the List of Evidence as required by rule 121(3) of the Rules”. The Defence was also ordered to disclose to the

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 ICC-01/09-02/11-T-1-ENG.

⁴ ICC-01/09-02/11-T-1-ENG, page 14, lines 11 to 15.

⁵ Pre-Trial Chamber II, “Decision Setting the Regime for Evidence Disclosure and Other Related Matters”, ICC-01/09-02/11-48.

Prosecutor the evidence they intend to present at the confirmation hearing and the list of this evidence, no later than 5 September 2011.⁶

4. On 2 September 2011, the “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” was submitted, together with 6 annexes, filed “confidential *ex parte*” (the “Application for Adjournment”).⁷

5. On 5 September 2011, the Single Judge issued the “Decision on the ‘Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses to Confidential Inter Partes’” (the “Decision on Reclassification”),⁸ wherein the Registrar was ordered to reclassify annexes 1, 1A, 1B, 1C and 1D to the Application for Adjournment as “confidential *ex parte*, Prosecutor and Defence of Uhuru Muigai Kenyatta”.⁹

6. On 5 September 2011, the Chamber issued the “Decision on the ‘Defence Application for a Limited Extension of Time’”, wherein the Defence of Mr. Muthaura was granted an extension of three hours beyond the established deadline to disclose

⁶ “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”, ICC-01/09-02/11-64, p. 13.

⁷ ICC-01/09-02/11-281 and confidential *ex parte* annexes 1, 1A, 1B, 1C, 1D, 2.

⁸ Pre-Trial Chamber II, ICC-01/09-02/11-291.

⁹ Pre-Trial Chamber II, “Decision on the ‘Request by Defence of Uhuru Kenyatta for the Pre-Trial Chamber to vary the status of Ex Parte Confidential Annexes 1 and 2 of the Application by the Defence for Uhuru Kenyatta under Articles 61(3) and 67(1)(a) for Adjournment of the Confirmation Hearing Scheduled for 21 September 2011 and Request for Alteration to their Selected Viva Voce Witnesses to Confidential Inter Partes’”, ICC-01/09-02/11-291, p. 4.

the evidence they intend to present at the confirmation hearing and the list of this evidence, in compliance with the 20 April 2011 Calendar Decision.¹⁰

7. On 5 September 2011, the Defence of Mr. Ali filed the "Request for Extension for Submission of Disclosure" ("Mr. Ali Request for Extension of Time"), in which it seeks "a two hour extension for submitting its disclosure to the Prosecutor and Registry".¹¹ The Defence of Mr. Ali contends that it "received three pieces of evidence today from Kenya by way of the VWU at 1430h".¹²

8. On the same date, the Defence of Mr. Kenyatta filed the "Urgent Defence Request of on Behalf of Uhuru Kenyatta for Directions Concerning Disclosure to the Co-Defence teams of Materials to be Relied upon at the Confirmation Hearing which are the Subject of a Court Order to the Registry not to Disclose to Mr. Muthaura and Mr. Ali, and Request for Additional Time to Amend the Relevant Metadata",¹³ wherein it submits that "[i]n order to ensure compliance with the reasoning of the Reclassification Decision, the Defence has requested the Registry not to disclose these materials and other connected materials to the Co-Defence by 4 pm today."¹⁴ The Defence requests "additional time beyond the 4pm deadline in which to amend the meta-data in relation to the items".¹⁵ Subsequently, the Defence of Mr. Kenyatta filed the "Urgent Defence Request for a Retrospective Extension of Time to File Disclosure with the Registry", in which it "requests that the Pre-Trial Chamber grants a retrospective extension of time in relation to the Defence Disclosure of 5 September 2011 ("Mr. Kenyatta's Request for Extension of Time").¹⁶

9. Also on 5 September 2011, the Defence of Mr. Muthaura filed the "Defence Application for a Limited Further Extension of Time to file its List of Evidence" ("Mr.

¹⁰ Pre-Trial Chamber II, "Decision on the 'Defence Application for a Limited Extension of Time'", ICC-01/09-02/11-289.

¹¹ ICC-01/09-02/11-296.

¹² ICC-01/09-02/11-296, para. 2.

¹³ ICC-01/09-02/11-294.

¹⁴ ICC-01/09-02/11-294, para. 5.

¹⁵ ICC-01/09-02/11-294, para. 6.

¹⁶ ICC-01/09-02/11-298.

Muthaura Request for Extension of Time”), in which it requests a “further extension of 5 hours in order to allow it to file its complete list of evidence and serve the same on the Prosecution and the Registry by mid-night”.¹⁷ The Defence team for Mr. Muthaura essentially advances the same arguments in support of its previous request for extension of time limit, namely technical obstacles to upload the material to be disclosed to the Prosecutor.¹⁸

10. The Single Judge notes regulation 35(2) of the Regulations of the Court (the “Regulations”). According to regulation 35(2) of the Regulations, first sentence, “the Chamber may extend or reduce a time limit if good cause is shown”. Pursuant to the second sentence of the same regulation, “after the lapse of a time limit, an extension of time may only be granted if the participant seeking the extension can demonstrate that he or she was unable to file the application within the time limit for reasons outside his or her control”.

11. With regard to Mr. Ali’s Request for Extension of Time, the Single Judge considers that the reception time of the evidence mentioned by the Defence team of Mr. Ali and the necessity for the Defence to evaluate the material to be eventually disclosed to the Prosecutor prevented it from meeting the established deadline. Accordingly, the Single Judge is of the view that Mr. Ali’s Request for Extension of Time is to be granted and the deadline for the Defence of Mr. Ali to file its list of evidence in compliance with the 20 April 2011 Calendar Decision is extended until 23:59 hours on 5 September 2011.

12. As for Mr. Kenyatta’s Request for Extension of Time, the Single Judge is satisfied that the necessity to amend the meta-data in relation to the items which are object of the Decision on Reclassification constitutes good cause within the meaning of regulation 35(2) of the Regulations. Accordingly, Mr. Kenyatta’s Request for Extension of Time is to be granted and the deadline for the Defence of Mr. Kenyatta to complete

¹⁷ ICC-01/09-02/11-297, para. 9.

¹⁸ ICC-01/09-02/11-297, paras 7-8.

the filing of its list of evidence, by amending the meta-data of the items identified, is extended until 23:59 hours on 5 September 2011.

13. Finally, with regard to Mr. Muthaura Request for Extension of Time, the Single Judge considers that the same impediments that constituted good cause and justified the first extension of time limit requested by the Defence of Mr. Muthaura, prevented the Defence team from meeting the extended deadline. Thus, it is the view of the Single Judge that a further extension of time until 23:59 hours on 5 September 2011 may be granted.

FOR THESE REASONS, THE SINGLE JUDGE HEREBY

grants the Defence team of Mr. Ali until 23:59 hours on 5 September 2011 to file its list of evidence in compliance with the 20 April 2011 Calendar Decision;

grants the Defence team of Mr. Kenyatta until 23:59 hours on 5 September 2011 to complete the filing of its list of evidence, by amending the meta-data of the items which are object of the Decision on Reclassification;

grants the Defence team of Mr. Muthaura until 23:59 hours on 5 September 2011 to file its list of evidence in compliance with the 20 April 2011 Calendar Decision;

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



Judge Ekaterina Trendafilova
Single Judge

Dated this Monday, 5 September 2011

At The Hague, The Netherlands