

**UNITED
NATIONS**



International Residual Mechanism
for Criminal Tribunals

Case no.: MICT-13-38-Misc.1

Date: 21 February 2022

Original: French

BEFORE THE SINGLE JUDGE

Before: Judge Mahandrisoa Edmond Randrianirina
Registrar: Mr Abubacarr Tambadou
Decision rendered on: 21 February 2022

THE PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**DECISION ON SECOND MOTION FILED BY FÉLICIEN
KABUGA'S FAMILY FOR RETURN OF FROZEN ASSETS AND
SEIZED PROPERTY**

Office of the Prosecutor

Mr Serge Brammertz

Counsel for Applicants

Mr Peter Robinson

Counsel for Félicien Kabuga

Mr Emmanuel Altit

I, MAHANDRISOA EDMOND RANDRIANIRINA, Judge of the International Residual Mechanism for Criminal Tribunals (“Mechanism”) and Single Judge in this case;¹

CONSIDERING that Félicien Kabuga, initially indicted by the International Criminal Tribunal for Rwanda (“ICTR”) on 26 November 1997 and whose operative indictment was confirmed on 13 April 2011 and amended on 1 March 2021,² was arrested in France on 16 May 2020 and transferred to The Hague branch of the Mechanism on 26 October 2020;³

CONSIDERING that on 14 October 2021, *inter alia*, I denied the first motion filed by Mr François Ngirabatware and Ms Catherine Mukakayange (“Applicants”) for the restitution of assets that were frozen while Kabuga was a fugitive (“Assets”)⁴ as being premature, on the grounds that these Assets, belonging at least in part to Kabuga, and/or originating from funds of which he is the source, were *prima facie* relevant to the Registrar’s assessment of the indigence of the Accused in the main case⁵ and that the documents provided did not establish the rights of the Applicants to these Assets, nor their unavailability;⁶

BEING SEISED of a second motion filed on 3 January 2022 by the Applicants, who restated their request for the unfreezing of Assets and noted, in particular, that the Registrar and the Prosecutor, to whom they had transmitted additional information and documents in order to demonstrate the origin of these Assets, had had sufficient time to investigate the source of the funds concerned;⁷

¹ Order Assigning a Single Judge, 29 April 2021 (original English version filed on 26 April 2021), p. 1.

² *The Prosecutor v. Félicien Kabuga*, Case no. ICTR-97-22-I, Decision Confirming the Indictment, 26 November 1997; *The Prosecutor v. Félicien Kabuga*, Case no. ICTR-98-44B-I, Amended Indictment, 14 April 2011; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-PT, Second Amended Indictment, 1 March 2021 (public with confidential Annex).

³ *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-I, Order Scheduling an Initial Appearance, 10 November 2020 (original English version filed on 8 November 2020), pp. 1 to 3.

⁴ Motion for Order Concerning Frozen Bank Accounts, 6 August 2021 (original English version filed on 14 April 2021; confidential with confidential Annexes A and B, public redacted version filed on the same day), paras 1, 3, 4 and 11 to 13, Annex B, para. 1.

⁵ *The Prosecutor v. Félicien Kabuga*, Cases no. MICT-13-38-Misc.1, MICT-13-38-Misc.2 and MICT-13-38-Misc.3, Decision on Motions Filed by Félicien Kabuga’s Family for Return of Frozen Assets and Seized Property, 14 October 2021 (“Decision of 14 October 2021”), pp. 5, 6 and 8. I noted that Kabuga still benefited from duty Counsel in the main case and that litigation regarding the maintenance of the Applicants’ frozen Assets was not the appropriate forum to discuss the issue of Kabuga’s representation. See Decision of 14 October 2021, pp. 5 and 6; *The Prosecutor v. Félicien Kabuga*, Case no. MICT-13-38-PT, Decision on Matters Related to Félicien Kabuga’s Representation, 12 April 2021 (original English version filed on 1 April 2021) (“Decision of 1 April 2021”), para. 18

⁶ See Decision of 14 October 2021, p. 6.

⁷ Second Motion for Order Concerning Frozen Bank Accounts, 3 January 2022 (public, with confidential Annex E) (“Second Motion”), paras 1, 2, 11 to 14, 17 to 28, and Annexes A to D.

NOTING the bank statement of 22 December 2021 produced by the Applicants in support of the Second Motion, which, they claim, confirms their rights to the Assets as well as their unavailability;⁸

NOTING the Prosecutor's submission, filed on 18 January 2022 as a confidential document, requesting that the Second Motion be denied on the grounds that it does not demonstrate the origin of the funds concerned and that the bank statement produced in support of the Second Motion as well as the documents transmitted to the Prosecutor and the Registrar, appear to be forged and suggest the Applicants' desire to obstruct the administration of justice;⁹

NOTING the notification filed on 21 January 2022 by Counsel for the Applicants, Mr Peter Robinson, wherein he informed me of the withdrawal of the Second Motion and of the termination of his representation of the Applicants pursuant to Article 5 of the Code of Conduct;¹⁰

CONSIDERING that, in light of the Notification of 21 January 2022 and of the entire case-file before me, it is appropriate to summarily dismiss the Second Motion;

CONSIDERING further, that the Mechanism, in the exercise of its inherent power under Rule 90 of the Rules of Procedure and Evidence ("Rules"), sanctions any conduct that wilfully and knowingly interferes with the administration of justice;

CONSIDERING that the case-file before me reveals that the bank statement of 22 December 2021 produced in support of the Second Motion as well as the documents transmitted to the Prosecutor and Registrar in order to demonstrate the origin of the Assets contain obvious and flagrant signs of forgery and that the presentation by the Applicants of such manifestly incorrect evidence is prejudicial to the proper administration of justice;

CONSIDERING furthermore that, pursuant to Rules 2 and 47 (A) of the Rules, a Single Judge who finds that that the conduct of a Counsel is offensive, abusive, or otherwise obstructs the proper conduct of the proceedings, or that a Counsel is negligent or otherwise fails to meet the standard of professional competence and ethics in the performance of his duties, the Chamber may, after giving Counsel due warning and giving Counsel an opportunity to be heard, determine that Counsel is no

⁸ Second Motion, paras 15, 25, and Annex E.

⁹ Prosecution Response to Second Motion for Order Concerning Frozen Bank Accounts, 18 January 2022 (confidential, with confidential Annexes A to L and confidential and *ex parte* Annexes M and N), paras 1 to 12, and Annexes A to M.

¹⁰ Withdrawal of Second Motion for Order Concerning Frozen Bank Accounts, 21 January 2022 ("Notification of 21 January 2022"), paras 1 and 2. *See also* Code of Professional Conduct for Defence Counsel Appearing before the Mechanism and Other Defence Team Members (MICT/6/Rev.1), 14 May 2021 ("Code of Conduct").

longer eligible to represent a suspect or an accused before the Mechanism or refuse audience to that Counsel;

CONSIDERING also that, in the course of providing representation to a client, Counsel shall act with competence, skill, care, honesty and loyalty,¹¹ Counsel shall not knowingly make an incorrect statement of material fact or law to the Mechanism or offer evidence which Counsel knows to be incorrect¹² and that it shall be Professional Misconduct for Counsel to engage in conduct involving fraud or engage in conduct which is prejudicial to the proper administration of justice;¹³

CONSIDERING that, in this case, there are grounds to believe that the presentation of manifestly fraudulent and incorrect evidence before the Mechanism by Counsel for the Applicants reveals, at the very least, a lack of due diligence and a lack of professionalism and ethics in the performance of his duties;¹⁴

CONSIDERING, moreover, that on 5 May 2016, the Appeals Chamber concluded in *The Prosecutor v. Augustin Ngirabatware*, Case no. MICT-12-29 that Counsel for the Applicants had violated decisions granting protective measures to witnesses and cautioned counsel to “exercise greater care” and to check the trial record accordingly before contacting any witnesses;¹⁵

CONSIDERING that on 3 September 2019, in *The Prosecutor v. Radovan Karadžić*, Case no. MICT-13-55, the President of the Mechanism issued a warning to Counsel for the Applicants, who had sought to select the Judge who would determine his client’s motions and had initiated contact with a particular Judge, for breaching the Code of Conduct;¹⁶

CONSIDERING that Counsel for the Applicants is currently the subject of an investigation pursuant to a decision issued on 20 September 2021 in *The Prosecutor v. Anselme Nzabonimpa et al.*, Case no. MICT-18-116, in order to determine whether contempt proceedings or other disciplinary action is warranted due to “grave concerns of repeated professional and ethical lapses”

¹¹ See Code of Conduct, Articles 6 and 10 (A).

¹² See Code of Conduct, Article 18 (B). Counsel may refuse to offer evidence if Counsel makes a reasoned determination that the material in question is irrelevant or lacks probative value. See Code of Conduct, Article 18 (E).

¹³ See Code of Conduct, Article 29 (iii) and (iv).

¹⁴ See also Code of Conduct, Article 32.

¹⁵ See *The Prosecutor v. Augustin Ngirabatware*, Case no. MICT-12-29, Decision on Prosecution’s Motion Regarding Protected Witnesses and Ngirabatware’s Motion for Assignment of Counsel, 2 June 2016 (confidential; made public by an order of 25 September 2019; original English version filed on 5 May 2016), paras 24, 26, 27.

¹⁶ See *The Prosecutor v. Radovan Karadžić*, Case no. MICT-13-55, Decision on Motion to Compel the Registrar to File a Motion, 3 September 2019, pp. 5 and 6.

and evidence of prohibited indirect contact with protected witnesses and unauthorised communication with a client in detention using contraband communication devices;¹⁷

CONCLUDE that, pursuant to Rule 90 (C) of the Rules, I am bound to refer to the President the matter of presenting evidence that is manifestly fraudulent in order for another Single Judge to be able to rule independently whether contempt proceedings or any other disciplinary action against the Applicants and Mr Peter Robinson are warranted, including potentially notifying the relevant national courts in matters of bank fraud or reporting to the professional body to which Counsel for the Applicants belongs;

CONSIDERING finally that, in keeping with Article 5 (A) (i) and (C) of the Code of Conduct, Counsel may terminate representation if the client has used Counsel's services to perpetrate a crime or a fraud, but he cannot withdraw if the client has not given notice of their intention to conduct their own defence, engaged different counsel, or if the Registrar has not assigned duty counsel, unless the Single Judge grants leave for Counsel to discontinue the representation immediately;¹⁸

CONCLUDE that, taking into account the preceding, it is appropriate to grant leave for Mr Peter Robinson to discontinue representation of the Applicants immediately;

FOR THE FOREGOING REASONS,

DENY the Second Motion;

GRANT LEAVE for Mr Peter Robinson to discontinue representation of the Applicants immediately; and

REFER to the President, pursuant to Rule 90 (C) of the Rules, the matter of the presentation before the Mechanism of manifestly fraudulent and incorrect evidence by the Applicants and by Mr Peter Robinson.

¹⁷ See *The Prosecutor v. Anselme Nzabonimpa et al.*, Case no. MICT-18-116-T, Order Referring a Matter to the President, 11 October 2021 (original English version filed on 20 September 2021), pp. 1 to 4; *The Prosecutor v. Anselme Nzabonimpa et al.*, Cases no. MICT-18-116-R90.1 & MICT-18-116-T, Order Assigning a Single Judge to Consider a Matter Pursuant to Rule 90 (C), 17 January 2022 (original English version filed on 8 October 2021), p. 1; *The Prosecutor v. Anselme Nzabonimpa et al.*, Case no. MICT-18-116-R90.1, Order Directing the Registrar to Appoint an *Amicus Curiae* to Investigate Pursuant to Rule 90 (C) (ii), 18 January 2022 (original English version filed on 25 October 2021), pp. 1 to 4.

¹⁸ I recall that the term "client", as defined in the Code of Conduct, includes any person who has engaged Counsel or has been assigned Counsel by the Registry for the purposes of legal representation before the Mechanism. See Code of Conduct, p. 3.

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

21 February 2022,
Arusha (Tanzania)

The Single Judge

/signed/

Mahandrisoa Edmond Randrianirina

[Seal of the Mechanism]