

**UNITED
NATIONS**



International Residual Mechanism for
Criminal Tribunals

Case No. MICT-13-38-Misc.1

Date: 25 June 2021

Original: English

BEFORE THE SINGLE JUDGE

Before: Judge Mahandrisoa Edmond Randrianirina

Registrar: Abubacarr Tambadou

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC

**NOTICE OF FILING OF PUBLIC REDACTED VERSION OF
PROSECUTION RESPONSE TO MOTION FOR ORDER
CONCERNING FROZEN BANK ACCOUNTS**

The Office of the Prosecutor:

Serge Brammertz
Rashid Rashid
Rupert Elderkin

Counsel for the Applicants

Peter Robinson

1. The Prosecution hereby files a public redacted version of its Prosecution Response to Motion for Order Concerning Frozen Bank Accounts.¹

Word Count: 47



Rashid/Rashid
Senior Trial Attorney



Rupert Elderkin
Senior Trial Attorney

Dated this 25th day of June 2021
At Arusha, Tanzania

¹ Prosecution Response to Motion for Order Concerning Frozen Bank Accounts, 28 April 2021 (confidential with confidential Annex A and confidential and *ex parte* Annexes B and C).

UNITED
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International Residual Mechanism for
Criminal Tribunals

Case No. MICT-13-38-Misc.1

Date: 28 April 2021

Original: English

BEFORE THE SINGLE JUDGE

Before: Judge Mahandrisoa Edmond Randrianirina

Registrar: Abubacarr Tambadou

PROSECUTOR

v.

FÉLICIEN KABUGA

PUBLIC REDACTED VERSION

**PROSECUTION RESPONSE TO MOTION FOR ORDER
CONCERNING FROZEN BANK ACCOUNTS**

The Office of the Prosecutor:

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1. The Motion for an order concerning frozen bank accounts¹ should be summarily dismissed. The Motion is manifestly insufficient because it fails to substantiate the factual basis for the relief requested.² To the extent that the third-party Applicants are seeking judicial review of actions taken under ICTR Rule 40(A)(iii), the Motion is also premature because they have not seized the Prosecutor with any determination that could be judicially reviewed.

2. In any event, before any frozen assets are released by the Mechanism, the Registrar should be given the opportunity to assess whether they belong to or can be attributed to Félicien Kabuga for the purposes of determining indigency. Care should also be exercised to avoid any prejudice to the rights of victims to restitution and/or compensation.

A. The Applicants have not established a factual basis supporting their claims

3. Neither of the two documents submitted in support of the Motion establishes a sufficient factual basis to warrant any action by the Mechanism. Given the manifest failure to establish the most basic information, this deficient Motion should be summarily dismissed.

4. The Applicants claim that they own two bank accounts that have been frozen since 2003. However, they have not filed any identity documents, powers of attorney, bank records or any other evidence demonstrating the existence of these two accounts or their interest in them. The factual basis of the filing rests on the declaration of the First Applicant, Francois Ngirabatware. The Second Applicant, Catherine Mukakayange, is silent. The 2012 letter from ICTR Chief of Prosecutions offers little additional support.³ No evidence is offered in support of the allegation that a Mechanism decision is needed for any purpose.⁴ Nor have the Applicants established that the accounts are presently blocked on the basis of the ICTR Prosecutor's request or the Mechanism's arrest warrant.

5. The Prosecution is reviewing the ICTR records to ascertain whether any of the information can be verified through Prosecution records. Based on the documents reviewed to date, the Prosecution has reason to believe that both accounts in question may be joint accounts held in the names of Applicant Ngirabatware and his (ex-)wife, Félicien Kabuga's

¹ *Prosecutor v. Kabuga*, Case No.MICT-13-38-Misc.1, Motion for Order Concerning Frozen Bank Accounts, 14 April 2021 (confidential) ("Motion"). Also *Prosecutor v. Kabuga*, Case No.MICT-13-38-Misc.1, Order Assigning a Single Judge, 26 April 2021.

² The Prosecution has filed this Response confidentially because it is responding to a confidential Motion. A public redacted version will be filed shortly. [REDACTED]

³ The Prosecution files a more legible copy of this letter as Confidential Annex A.

⁴ See Motion, Annex B, para.7.

daughter.⁵ The Prosecution also has a record detailing money being transferred between the two accounts.⁶ Neither account is in the name of the Second Applicant, Catherine Mukakayange.

6. The evidence of joint ownership of one or both of these accounts and the transfer of money between them, casts serious doubt on the Applicants' unsubstantiated claims that "Félicien Kabuga was not the source of any of those funds and has no interest whatsoever in any of those funds"⁷ and that these accounts "are not assets of Félicien Kabuga and he has no interest in them whatsoever."⁸ At the very least, these connections, together with the Applicants' failure to explain the provenance of the money in either account, warrant further detailed inquiry.

7. In light of other information available to the Prosecution, there are reasons to believe that Félicien Kabuga is the source of the wealth distributed to his children and their families, including the two accounts in question.⁹ Such transfers of wealth within his family do not extinguish Félicien Kabuga's interests.

8. Since the Applicants have not established that the money in either account belongs to them, they cannot show that their rights that have been prejudiced by either the ICTR Prosecutor's Rule 40 actions or the 29 April 2013 Warrant of Arrest¹⁰ ordering the freezing of Félicien Kabuga's assets pursuant to Mechanism Rule 63(D). The Motion should therefore be dismissed.

B. Requests for release of funds seized pursuant to ICTR Rule 40(A)(iii) should be first directed to the Prosecutor

9. To the extent that the Applicants are seeking to lift a provisional measure requested by the ICTR Prosecutor under ICTR Rule 40(A)(iii), the Motion should also be summarily dismissed because the Applicants have failed to follow the required procedure. Before seeking judicial review, the request must be brought first to the Prosecutor. The Appeals Chamber has confirmed that "it is the responsibility of the Prosecutor to inquire whether provisional

⁵ See e.g. [REDACTED]

⁶ E.g. [REDACTED].

⁷ See Motion, Annex B, paras.3-4.

⁸ See Motion, para.11.

⁹ See Prosecution Response, [REDACTED].

¹⁰ *Prosecutor v. Kabuga*, Case No.MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to All States, 29 April 2013 ("Warrant of Arrest").

measures decided at a point in time are still justified given, *inter alia*, the stage of the investigation and the expected results”.¹¹ Only then can a third party seek judicial review of the Prosecutor’s decision.

10. Contrary to the Applicants’ suggestion, the Prosecution’s position on any future request is not dictated solely by the fact that Félicien Kabuga has been arrested.¹² While the Prosecution accepts that bank accounts frozen exclusively for the purpose of preventing the escape of a suspect under ICTR Rule 40(A)(iii) should be released after the suspect is arrested, both ICTR Rule 40(A)(iii) and Mechanism Rule 37(A)(iii) further authorise the Prosecutor to take “all necessary measures to prevent injury to or intimidation of a victim or witness, or the destruction of evidence.” To address any such request, the Prosecutor would have to be satisfied that the remaining reasons set out in the Mechanism Rule 37(A)(iii) no longer justified the freezing of the account and that further action pursuant to the Rules was not warranted.

C. No accounts should be released until the Registrar can assess whether Félicien Kabuga has an interest in these accounts

11. Before the Mechanism takes any steps in relation to these accounts, the Registrar should be given time to determine whether Félicien Kabuga is the source of or retains any interest in the money in these accounts. No actions should be taken to release any claim to the money in these accounts until the Registrar’s inquiry into the Accused’s means has been completed.

12. If these funds are attributable to Félicien Kabuga, they may be used in calculating his financial means and in determining whether, and to what extent, the Accused is able to remunerate counsel. In assessing the indigence of an accused person, the Registrar is entitled to include assets that were transferred from an accused to another person.¹³ Transfers made to

¹¹ Misc-Kabuga Family-01-A, Decision (Appeal of the Family of Felicien Kabuga Against Decisions of the Prosecutor and the President of the Tribunal), 22 November 2002, p.4.

¹² *Contra*, Motion, para.11.

¹³ See e.g. *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-A, Decision on Review of Registrar’s Decision to Withdraw Legal Aid from Zoran Žigić, 7 February 2003, para.47 (“In assessing the means of an accused person, the Registrar is in any event entitled to take into account the value of assets in the hands of other person where those assets have been purchased with means which the accused has freely disposed of.”). Also *Prosecutor v. Krajišnik*, Case No.IT-00-39-PT, Decision on the Defence’s Motion for an Order Setting Aside Registrar’s Decision Declaring Momčilo Krajišnik Partially Indigent for Legal Aid Purposes, 20 January 2004, para.22.

close family members as purported gifts before an indictment was issued have been included in the Registry's indigence assessments.¹⁴

D. Any orders relating to Félicien Kabuga's assets should take the rights of victims into account

13. In taking any action in relation to frozen accounts potentially containing assets belonging to or attributable to Félicien Kabuga, the Mechanism should exercise the utmost caution to give effect to the Rules and avoid prejudicing the rights of victims to eventually obtain restitution and compensation.

14. Pursuant to Mechanism Rules 122(B) and 129, the Trial Chamber may order restitution when it "finds the accused guilty of a crime and concludes from the evidence that unlawful taking of property by the accused was associated with it." Although the Prosecution has focused its allegations in the Indictment on crimes directed against people rather than property, this does not exclude the possibility that Félicien Kabuga could be convicted of a crime involving an associated unlawful taking or destruction of property which may eventually warrant an order of restitution.

15. In addition, pursuant to Rule 130, victims and other persons claiming through the victim may rely on the Trial Judgement to bring claims for compensation through national courts and other competent bodies.

16. In considering any action to lift a freeze on funds that may be attributed to Félicien Kabuga, the Mechanism should take care to avoid any actions that may eventually hinder victims' access to future restitution or compensation as envisaged in the Rules. This may include, for example, preserving these accounts pursuant to Rule 129(A) or giving notice to victims' groups in the states where the funds are located and to the Government of Rwanda to ensure that victims are afforded a reasonable opportunity to lodge their own claims against these funds before any Mechanism freeze is lifted and the funds are dispersed.

¹⁴ *E.g. Prosecutor v. Praljak*, Case. No.IT-04-74-T, Decision [of Registrar], 22 August 2012, Appendix I, para.65 ("the Accused is incorrect in asserting that his financial circumstances prior to his indictment are irrelevant for the purpose of assessing his ability to remunerate counsel. Moreover, 'A visible transfer of assets into the hands of someone the Accused considers immune from the Registry's claims, and for no consideration, falls well within the meaning of concealing.'" (internal references omitted)).

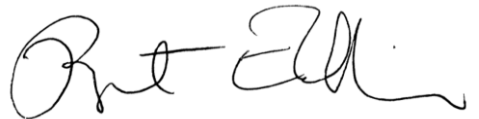
E. Conclusion

17. For the reasons set out above, the Motion should be dismissed.

Word Count: 1718



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Dated this 28th day of April 2021
Arusha, Tanzania



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