

**UNITED
NATIONS**



International Residual Mechanism for
Criminal Tribunals

Case No. MICT-13-38-Misc.2

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 ASSETS**

The Office of the Prosecutor:

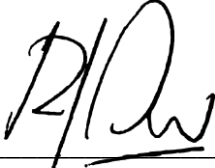
Serge Brammertz
Rashid Rashid
Rupert Elderkin

Counsel for the Applicants

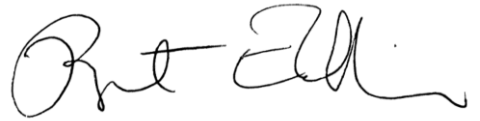
Peter Robinson

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

Word Count: 32



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 Assets, 29 April 2021 (confidential).

UNITED
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International Residual Mechanism for
Criminal Tribunals

Case No. MICT-13-38-Misc.2

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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 ASSETS**

The Office of the Prosecutor:

Serge Brammertz
Rashid Rashid
Rupert Elderkin

Counsel for the Applicants

Peter Robinson

1. The Motion for an order concerning frozen assets¹ 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. The Applicant's claims are not supported by the documentation submitted. Given the Applicants' failure to establish the most basic information, this deficient Motion should be summarily dismissed.

4. Critical elements of the Motion remain unsubstantiated. The Applicants list allegedly frozen bank accounts and real property across three countries and two continents that they allege are owned or co-owned by three people and an estate with 14 heirs. They claim ownership or partial ownership over these assets without producing any identity document, power of attorney, proof of executorship, bank records, deeds, wills or any other documentation on which their relationship to these assets could be assessed. Nor have the Applicants established that any of these assets are currently frozen on the basis of the ICTR Prosecutor's request or the Mechanism's arrest warrant. At most, the national judicial decisions included the confidential annex indicate that certain assets were frozen at the time of those decisions.

5. In other respects, the Motion is contradicted by the underlying declaration. In the public Motion, the Applicants claim that Félicien Kabuga has "no financial or ownership interest" in the frozen accounts or real property (not jointly owned with his wife).³ However, in his confidential declaration, Applicant Donatien Nshimyumuremyi admits that his father,

¹ Prosecutor v. Kabuga, Case No.MICT-13-38-Misc.2, Motion for Order Concerning Frozen Assets, 15 April 2021 ("Motion"). Also Prosecutor v. Kabuga, Case No.MICT-13-38-Misc.2, Order Assigning a Single Judge, 26 April 2021.

² The Prosecution has filed this Response confidentially because it addresses materials that the Applicants have filed confidentially. A public redacted version will be filed shortly.

³ Motion, paras.5 (p.3), 12.

Félicien Kabuga, was the source of all of the money and property in question. He explains how Félicien Kabuga transferred the money as a “gift” to him around August 1994 and that he used the money to look after himself and other family members.⁴ He details how he distributed these funds to the other Applicants, [REDACTED].⁵[REDACTED].⁶

6. Likewise, the Applicants fail to offer any basis for their assertion that the assets held jointly in the names of Félicien Kabuga and his wife Josephine Mukazitoni, or a portion of them, would be included in her estate.⁷ It is common for joint bank accounts to include a right of survivorship, whereby the surviving spouse becomes the full owner of the account. The same holds true for the real property in Kenya, which the Kenya Court of Appeal found to be co-owned in “joint tenancy,”⁸ meaning that the surviving spouse would retain full title of the property on the death of the other. Such jointly held assets do not ordinarily become part of the estate of the deceased spouse. Based on the limited information provided, it is likely that Félicien Kabuga is now the sole owner of these assets.

7. Since the Applicants have not established that any of the assets belong to them, they cannot show that their rights that have been prejudiced by either the Prosecution’s actions pursuant to Rule 40 or the 29 April 2013 Warrant of Arrest⁹ ordering the freezing of Félicien Kabuga’s assets pursuant to Mechanism Rule 63(D).

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

8. To the extent that the Applicants are seeking to lift provisional measures 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 measures decided at a point in time are still justified given, *inter alia*, the stage of the

⁴ Motion, Confidential Annex A, paras.3, 7. *Also*, paras. 4, 5.

⁵ Motion, Confidential Annex A, paras.3, 7. *Also*, paras. 4, 5.

⁶ Motion, Confidential Annex A, paras. 7.

⁷ *See* Motion, para.18. *Also* Motion, paras.5 (p.2), 5 (p.3), 12, 17.

⁸ *See Josephine Mukazitoni v. Attorney General of the Republic of Kenya* (Criminal Appeal 128 of 2009), 25 September 2015, eKLR, paras.34-35 (<http://kenyalaw.org/caselaw/cases/view/113757/>).

⁹ *Prosecutor v. Kabuga*, Case No.MICT-13-38, Warrant of Arrest and Order for Transfer Addressed to all States, 29 April 2013 (“Arrest Warrant”).

investigation and the expected results”.¹⁰ Only then can a third party seek judicial review of the Prosecutor’s decision.

9. 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.¹¹ While the Prosecution accepts that assets 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 assets and that further action pursuant to the Rules was not warranted.

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

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

11. If these assets 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.¹² Transfers made to close family members as purported gifts before an indictment was issued have been included in the Registry’s indigence assessments.¹³

¹⁰ 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.

¹¹ Contra, Motion, second para.6 on p.3.

¹² See e.g. *Prosecutor v. Kvočka et al.*, Case No.IT-98-30/1-A, Decision on Review of the 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.

¹³ 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

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

12. In taking any action in relation to frozen assets potentially 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.

13. 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.

14. Contrary to the Applicant’s submissions, the Mechanism is not “without power to order restitution in this case”.¹⁴ The ICTR decisions relied on by the Applicants concerned *amicus curiae* requests to file written briefs about restitution and other matters during trial. In rejecting these requests, the Chambers recognised that an order of restitution was possible at the end of the case, while at the same time noting that there was no charge of unlawful taking of property in the indictment.¹⁵

15. In addition, pursuant to Rule 130, victims and others 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 assets 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

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)).

¹⁴ Motion, para. 15.

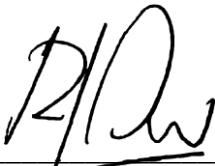
¹⁵ E.g. *Prosecutor v. Musema*, Decision on an Application by African Concern for Leave to Appear as *Amicus Curiae*, 17 March 1999, para. 10; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on *Amicus Curiae* Request by African Concern, 23 March 2004, paras.8-10. *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, Decision on *Amicus Curiae* Request by the Rwandan Government, 13 October 2004, para. 6.

include, for example, preserving these assets pursuant to Rule 129(A) or giving notice to victims' groups in the states where the assets 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.

E. Conclusion

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

Word Count: 1826



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Dated this 29th day of April 2021
Arusha, Tanzania



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