



PRESS RELEASE

SECRET FILING IN THE HIGH COURT OF KENYA BY THE HONOURABLE UHURU KENYATTA'S ICC LAWYER AGAINST MOBILE PHONE COMMUNICATION COMPANIES SAFARICOM AND AIRTEL.

Kenyans for Peace with Truth and Justice (KPTJ) is a coalition of over 30 Kenyan and East African legal, human rights, and governance organizations, together with ordinary Kenyans and friends of Kenya who convened in the immediate aftermath of 2007's presidential election debacle.

KPTJ is drawn to two constitutional petitions filed at the High Court of Kenya by Mr. Stephen Kay, one of the lawyers for President Uhuru Kenyatta against Safaricom and Airtel touching on the criminal proceedings at the International Criminal Court. Mr. Kay is represented in the two cases by the law firm of Ogeto, Otachi & Company Advocates. Efforts by KPTJ to get actual details to be enjoined in the main suit have been frustrated and met with opacity within the judiciary.

We would like to make the following observations:

In principle, it is lawful for suits to be presented and heard secretly. However it is important to reiterate the constitutional position on this matter on the correct procedures in relation to the filing based on the constitutional provision on secret hearings, determining the secrecy of a proceeding and the steps involved.

It is our opinion that, court proceedings unless on extremely defined specifications in law are supposed to take place in open and rights of public participation upheld as provided by Article 50 of the Kenya Constitution 2010.

Article 50(1) of the constitution stipulates as follows:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

The Constitution also recognizes that there are times when the demands of justice dictate for a private hearing. Thus, Article 50 (8) provides as follows:

This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

Anybody seeking a private hearing ought to make a case for it based on various arguments stipulated in the Constitution such as the need to protect witnesses or other vulnerable persons or that public policy requires a closed hearing.

The Judiciary should also consider Article 50(4) which provides as follows:

Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.

It would be difficult to give effect to this provision in a suit that implicates third parties, if the suit is heard in private. Furthermore, the relief sought may put the witnesses and victims participating in the ICC case at risk.

From the foregoing, KPTJ calls upon the High Court of Kenya to uphold the Constitution of Kenya and ensure the interests of justice are protected. The orders that the lawyer for His Excellency President Uhuru Kenyatta is seeking can be provided by the ICC. All those whose rights or interests may be affected by the Suit/ Petition should be aware of the issues being raised, preferably through an open process and can thus move to protect those interests.