Your Ref: NA/DCS/TPWH/CORR/2020/ (029)
August 10, 2020

Michael R. Sialai
The Clerk of the National Assembly
Nairobi

Dear Mr. Sialai,

RE: INQUIRY BY THE DEPARTMENTAL COMMITTEE ON TRANSPORT, PUBLIC WORKS AND HOUSING INTO THE USE OF THE STANDARD GAUGE RAILWAY
Reference is made to a letter dated August 3 from your office by Ms. Sarah Kioko, titled as above, availed to us through social media. The letter is calling for participation from honorable members of parliament from coast region (an amorphous region of representation non-existent in law), private sector stakeholders and ministry and government agencies.

First, we wish to applaud the move by the Committee on Transport, Public Works and Housing to conduct an inquiry into the use of the Standard Gauge Railway (SGR). This demonstrates the fact that parliament has awoken to the realities of a struggling economy in the coastal counties of Mombasa, Kwale and Kilifi, following the decision by the ministry and government agencies to move operations upcountry courtesy of the SGR.

However, we take note of the fact that your office left out the civil society and members of the community in this important conversation. Consequently, the participation is not public as expressed in law, but rather an engagement between Parliament, the Executive and business stakeholders around the transport and logistics ecosystem. This exclusive engagement is illegal and goes against the principles of public participation, accountability, and human rights. While the governors of Mombasa, Kwale and Kilifi have all been copied in the letter, we also take note that there is no time allocation for the counties to make presentations on the inquiry, nor an indication of an appropriate platform for them, further making a mockery on the principles of devolution as enshrined in law.

We wish to notify you that the matter in discussion is of a major concern to all parties in the listed counties. To begin with, many Kenyans have lost their jobs and livelihoods after the ill-fated executive decision dubbed Take-or-Pay. It is, therefore, necessary that these workers be heard through their respective associations. Additionally, there are numerous court cases on the matter as residents relied on the law to address their concerns. The contribution of the Law Society of Kenya, Mombasa branch will thus bring important perspectives to this conversation. Further, Mombasa county government collaborated with the University of Nairobi and did a research on the subject. The findings and opinion of the county government will indeed inform the committee on the realities on the ground.
It is public knowledge that the civic society has conducted research, held town hall meetings with the affected members of the community and created awareness on the plight of the people of Mombasa after implementation of the said directive. In the process of time, we have collected data on the problem and successfully filtered it to identify the effects of the decision to move port operations upcountry. Indeed, we will be happy to table our findings to the committee.

Perhaps to demonstrate our stake in the matter, we would like to point out the major grievances and matters arising as we know them:

**Forced movement of Cargo is against traders and importers’ human rights.** Businesses are driven by profitability. To this end, business owners make decisions to lower costs and maximize profits. The traders are within their economic rights to make these decisions. The take-or-pay directive that forced traders to use the SGR infringed on the rights to make choices that favor their business.

The forced evacuation of cargo via the SGR has disproportionately affected and discriminated against residents of the coastal counties by denying them a critical source of livelihoods. The directive, issued without public participation, has resulted in the transfer of port services to economically better-off counties like Nairobi and Nakuru. Thousands of truck owners and drivers are no longer needed to haul cargo, clearing and forwarding services have become redundant and related sectors such as spare parts dealers, mechanics, truck washes, accommodations, restaurants, food vendors, among others, have all suffered losses. This contravenes Article 174 of the Constitution, which sets out as one of the objects of the devolution to be the promotion of social and economic development and provision of proximate, easily accessible services. The directives further violate the Constitution by not involving and engaging those most likely to be affected in the making of public policy and economic decisions that would have an impact on their lives and welfare. It further inhibits the social and economic development of the region. The object of devolution requires in Article 174 (h) facilitation of decentralization of State organs, their functions, and services from capital, Nairobi. The SGR directives recentralize port services to Nairobi in violation of the Constitution.

**Movement of cargo is expensive and inefficient.** Government documents that proposed the SGR and the conventional objective of an inland dry port, point to improved efficiency as goods move faster and lower costs associated with rail transport. Sadly, the cost of building the SGR was too high, thereby making it expensive to use for the traders. Further, the inland dry port in Nairobi was not ready to handle the heavy traffic. This slowed operations in Nairobi and increased by threefold the time it took to get imported goods.

**Decision to move port operations upcountry was abrupt, discriminatory, non-inclusive and poorly executed.** The government did not involve the community through public participation and tendering process was covered in mist. To date, the contractual agreement between government of Kenya and the People’s Republic of China is not public, nor is it clear, despite an Access to Information request by Okoa Mombasa. The Executive has denied all media reports about the contract. The conventional way of doing dry ports is to establish one 50km to 100km away from the existing port to ease traffic but still support the local economy. The decision to
take the dry port 420 kilometers away and recentralize operations was non-procedural and against the spirit of devolution.

**Transfer of port operations upcountry is too costly economically for the county.** According to the research done by the University of Nairobi School of Business, Mombasa is losing over SH300 billion annually since the transfer of operations upcountry. This has resulted in job losses, business closures and economic suffering of the people of Mombasa. The cost of the take-or-pay directive is too expensive on the people of Mombasa, Kwale and Kilifi.

**The mandate of the national government, ministry, and agencies in making such executive decisions is contested.** There is a matter in court (Petition 158 of 2018) as residents of Mombasa seek the interpretation of article 186 (c) of the Fourth Schedule of the Constitution of Kenya 2010, which gives the mandate of running the port to the county governments. Therefore, for the national government to continue making sweeping decisions concerning the port reveals judicial infidelity.

Moving forward, our proposals would be thus:

a) That the ministry and national agencies **cease the forced movement of cargo** immediately and respect the economic rights of the traders, transporters, and the people of Mombasa.

b) As part of the inquiry, the Departmental Committee on Transport, Public Works, and Housing must hold a meeting with Mombasa residents and members of Civil Society Organizations in the county over the subject. The meeting should be in Mombasa – and done before the committee produces its report.

c) That parliament, in consultation with all stakeholders, including the residents of the coastal counties, **develops a plan to immediately restore and revitalize the economy of the three counties – Mombasa, Kwale and Kilifi.** This plan should include but not be limited to the allocation of an economic stimulus package to be determined jointly by all stakeholders.

d) That the ministry **expedites the construction of the Dongo Kundu** special economic zone to compensate for the income lost to Nairobi and Naivasha dry ports.

We look forward to an appropriate time slot in the said meeting to share with the committee our findings and proposals as highlighted above.

Sincerely,

Ernest Cornel

**On Behalf of Okoa Mombasa and Muslims for Human Rights (MUHURI)**

**CC:**

Phosing Losiakou,
Chairperson,
Departmental Committee on Transport, Public Works, and Housing,
National Assembly.