

National Assembly inquiry into the use of the Standard Gauge Railway

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The Departmental Committee on Transport, Public Works and Housing has called for an inquiry into the use of Standard Gauge Railway (SGR).

The inquiry, according to the clerk of the National Assembly, stems from:

1. Request for a statement regarding the government directive to the public to have all containerized cargo and local import destined for Nairobi and the hinterland to be transported via SGR.
2. Request for a statement on the forced railing of cargo from Mombasa to the Naivasha Inland Container Depot by SGR
3. Compulsory transportation of cargo through the SGR.

Notably, the committee seeks submissions from the government on:

1. The legality of past directives on cargo transportation by SGR.
2. Social-economic impact of cargo transportation by SGR.
3. Could the government explore ways and means of ensuring that the transporters and stakeholders use the SGR willingly?

However, the committee has confined and designed inputs from stakeholders -- like the civil society organizations -- to only complement the use of SGR, irrespective of its illegality. The committee, in its letter, set the stakeholders' scope as: **“What would you recommend to the Ministry on the use of SGR that will promote mutual benefit for the government and the stakeholders/citizenry?”**

We wish to state as follows:

1. In the wake of Court of Appeal ruling in the civil appeal number 13 of 2015, a three-judge bench – Martha Koome, Gatembu, and Jamila Mohammed – declared the SGR contract between Kenya and China, illegal (see attached ruling). Details of numerous SGR directives, which this committee is seeking, arises from an illegal contract that birthed the train and its operations. Therefore, at no point should this committee discuss illegality. The SGR directives should not exist.
2. The subjects of the committee's inquiry are matters active in court under petition 159 of 2018 (see attached petition).
3. The government issued SGR directives without public participation, offending the Constitution.
4. The SGR directives have had the effect of transferring port and logistical services to Embakasi and Naivasha Inland Container Depot (ICDs) resulting in the economic recession of Mombasa economy. The directives contravene the provisions of the Constitution in making public policy and economic decisions that would have an impact on the lives and welfare of the people whom those decisions are to affect and their overall economy.

5. There is no evidence that the government has placed mitigation measures to provide alternative livelihoods to those that have been adversely affected by the SGR directives.
6. The SGR directives are bolstered by an agreement between Kenya Ports Authority (KPA) and Kenya Railways Corporation (KRC) entered on September 30, 2014, where KPA was obligated to consign to KRC as a carrier of a set volume of freight under the commencement of SGR operations at Embakasi ICD. The impugned agreement acted in violation of the right for fair administrative action since the decision has adverse economic consequences to communities living within Mombasa. The agreement also hurts the rights of importers and traders by unduly affecting their ability to access cargo, denying them the opportunity to choose where they desire to access their cargo, and forcing them to incur additional costs. The SGR directives, therefore, should not exist – no compromise about this.
7. The impugned agreement, contrary to the Constitution, denies residents of Mombasa – and Coast -- proximate coastal services within their region. It further inhibits the social and economic development of the region.
8. Kenya is a liberal economy and persons are entitled to freely choose whichever vessels they desire to use in their trade.
9. KPA, KRC, Attorney General and Transport and Infrastructure Cabinet Secretary have never given lawful reasons for their actions of forcing all cargo onto SGR, adversely affecting the economic welfare of person using the port services or living in Mombasa.
10. The SGR directives, which have resulted in the transfer of Mombasa port services to Nairobi and Nakuru, contravenes Article 174 of the Constitution, which sets out as one of the objects of the devolution to be to promote the social and economic development and provision of proximate, easily accessible services.
11. 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.

Recommendations

The prayers sought in the petition 159 of 2018, should be invoked in this inquiry to the extent that is applicable.

Conclusion

The committee asked: **What would you recommend to the Ministry on the use of SGR that will promote mutual benefit for the government and the stakeholders/citizenry?**

Based on the listed grounds -- coupled by a court ruling declaring SGR contract illegal -- the SGR directives should not exist, no discussion over illegality.