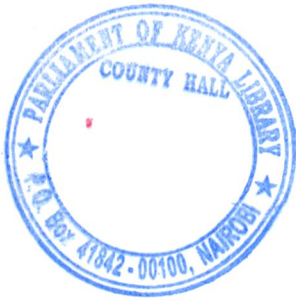


PARLIAMENT OF KENYA



THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT-SIXTH SESSION

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| THE NATIONAL ASSEMBLY PAPERS LAID | |
| DATE: 24 FEB 2022 | DAY: Thurs |
| TABLED BY: Hon. Richard Ote Kenta, MP | |
| CLERK-AT-THE-TABLE: Mainah W. | |

SELECT COMMITTEE ON IMPLEMENTATION

REPORT ON

IMPLEMENTATION STATUS OF THE REPORT OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING ON THE OPTIMIZATION OF REVENUE IN GRAIN HANDLING SERVICES AT THE PORT OF MOMBASA

Directorate of Audit, Appropriations & Other Select Committees
National Assembly
Parliament Buildings

IROBI

February, 2022

Approved for table
24/2/22
H.S.
DSWA

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ABBREVIATIONS

| | |
|------|-------------------------------------|
| AGOL | African Oil and Gas Limited |
| CS | Cabinet Secretary |
| GBHL | Grain Bulk Handling Limited |
| KIC | Kipevu Inland Container EPZ Limited |
| KOT | Kipevu Oil Terminal |
| KPA | Kenya Ports Authority |
| KTL | Kilindini Terminals Limited |
| MGTL | Mombasa Grain Terminal Limited |
| PFTL | Portside Freight Terminal Limited |
| PPPs | Public-Private Partnerships |
| SEZ | Special Economic Zone |

CHAIRPERSON'S FOREWORD

The Select Committee on Implementation scrutinizes resolutions of the House (*including adopted Committee Reports*), petitions and the undertakings given by the National Executive and examines whether such decisions and undertakings have been implemented within sixty (60) days as provided for in the National Assembly Standing Orders and whether such implementation has taken place within the minimum time necessary.

The report of the Departmental Committee on Finance and National Planning was tabled before the House on 26th November, 2020 and adopted on 4th March, 2021.

The Select Committee on Implementation sought to follow up on the implementation status of the aforementioned report and subsequently held a meeting with officials of the Kenya Ports Authority, the implementing agency. The Committee also received written submissions from the National Treasury.

The Committee registers its appreciation to the Offices of the Speaker and the Clerk of the National Assembly for facilitation and support in execution of its mandate and in the production of this report.

Pursuant to Standing Order 199(6), it is my pleasant duty and privilege, on behalf of the Committee on Implementation, to lay this report on the Table of the House.



Hon. Moitalel Ole Kenta, MP

EXECUTIVE SUMMARY

The Select Committee on Implementation scrutinizes resolutions of the House (*including adopted Committee Reports*), Petitions and the undertakings given by the National Executive and examines whether such decisions and undertakings have been implemented within sixty (60) days as provided for in the National Assembly Standing Orders and whether such implementation has taken place within the minimum time necessary.

The report of the Departmental Committee on Finance and National Planning was tabled before the House on 26th November, 2020 and adopted on 4th March, 2021. The Select Committee on Implementation sought to follow up on the implementation status of the aforementioned report and subsequently held a meeting with officials of the Kenya Ports Authority. The Committee also received written submissions from the National Treasury.

The Committee having reviewed the implementation status of the report of the Departmental Committee on Finance and National Planning on the Optimization of Revenue in Grain Bulk Handling Services at the Port of Mombasa and considered the evidence received, observed that the Kenya Ports Authority (KPA) has licensed Portside Freight Services Limited as a second-grain bulk terminal operator within the Port of Mombasa. The Committee also observed that the Kenya Ports Authority was on course in implementing the resolution with regard to the development of critical infrastructure in all ports to continually gain leverage in technology while maximizing the return on investment.

The Committee recommends that the Kenya Ports Authority should consider other qualified firms in other emerging alternative locations at Dongo Kundu SEZ, Lamu Port and Kisumu Port to optimize revenue collection and to cut down on high demurrage costs. The Committee also that the National Treasury and Planning and the Kenya Ports Authority ensures critical infrastructure is installed in all ports to continually gain leverage in technology while maximizing the return on investment. Further, the Kenya Ports Authority should on a quarterly basis report to the National Assembly on the implementation status of the development of critical infrastructure.

1.0 PREFACE

1.1 Establishment and Mandate of the Committee

1. The Select Committee on Implementation is established under Standing Order 209 of the National Assembly Standing Orders.
2. The Committee is charged with scrutinizing the resolutions of the House (*including adopted committee reports*), petitions and the undertakings given by the National Executive and examines whether or not such decisions and undertakings have been implemented and where implemented, the extent to which they have been implemented; and whether such implementation has taken place within the minimum time necessary; and whether or not legislation passed by the House has been operationalized and where operationalized, the extent to which such operationalization has taken place within the minimum time necessary. The Committee may propose to the House, sanctions against any Cabinet Secretary who fails to report to the relevant select Committee on implementation status without justifiable reasons.
3. Standing Order 201 further provides that within sixty days of a resolution of the House or adoption of a report of a select committee, the relevant Cabinet Secretary under whose portfolio the implementation of the resolution falls shall provide a report to the appropriate Committee of the House.
4. The mandate of the Committee is further enhanced by the provisions of Article 153(4) (b) of the Constitution which requires Cabinet Secretaries to provide Parliament with full and regular reports concerning matters under their control.

1.2 Committee Membership

5. The Committee membership comprises -

Chairperson

Hon. Moitalel Ole Kenta, MP
Narok North Constituency

Orange Democratic Movement

Vice-Chairperson

Hon. Godfrey Osotsi, MP
Nominated

Amani National Congress

Members

Hon. Joash Nyamache Nyamoko, MP
North Mugirang'o Constituency

Jubilee Party

Hon. Paul Simba Arati, MP
Dagoretti North Constituency

Orange Democratic Movement

Hon. Alois Lentoimaga, MP
Samburu North Constituency

Jubilee Party

Hon. Benjamin Tayari, MP
Kinango Constituency

Orange Democratic Movement

Hon. (Dr.) James Murgor, MP
Keiyo North Constituency

Jubilee Party

Hon. Johnson Many Naicca, MP
Mumias West Constituency

Orange Democratic Party

Hon. John Muchiri Nyagah, MP

Manyatta Constituency

Jubilee Party

Hon. Feisal Abdalla, MP

Msambweni Constituency

Independent

Hon. Paul Odalo Abuor, MP

Rongo Constituency

Orange Democratic Movement

Hon. Hassan Oda Hulofo, MP

Isiolo North Constituency

Kenya Patriots Party

Hon. Nelson Koech, MP

Belgut Constituency

Jubilee Party

Hon. Joshua Mbithi Mwalyo, MP

Masinga Constituency

Wiper Democratic Movement-Kenya

Hon. Moses Kuria, M.P

Gatundu South Constituency

Jubilee Party

Hon. Richard Onyonka, MP

Kitutu Chache South Constituency

Ford Kenya

Hon. John Wanjiku, MP

Kiambaa Constituency

United Democratic Alliance

Hon. Michael Thoya Kingi, MP

Magarini Constituency

Orange Democratic Movement

Hon. Kihara Peter Kimari, MP

Mathioya Constituency

Jubilee Party

Hon. Charles Ngusya Nguna, MP

Mwingi West Constituency

Wiper Democratic Movement

Hon. Mukuha Gabriel Kago, M.P

Githunguri Constituency

Jubilee Party

Hon. Jared Okello, MP

Nyando Constituency

Orange Democratic Movement

Hon. Silvanus Onyiego Osoro, MP

South Mugirang'o Constituency

Kenya National Congress

1.3 Committee Secretariat

6. The Secretariat facilitating the Committee in executing its mandate comprise of: –

Ms. Tracy Chebet Koskei
Senior Clerk Assistant /Team Leader

Mr. Abdirahman Hassan
Clerk Assistant II

Dr. Donald Manyala, PhD
Research Officer II

Ms. Mercy Wanyonyi
Legal Counsel

Ms. Winnie Kizia
Media Relations Officer

2.0 IMPLEMENTATION STATUS ON THE REPORT OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING ON THE OPTIMIZATION OF REVENUE IN GRAIN HANDLING SERVICES AT THE PORT OF MOMBASA

2.1 Background

7. The Departmental Committee on Finance and National Planning held a fact-finding visit to Grain Bulk Handling Limited (GBHL) on 21st November, 2020, to assess ways of optimization of revenue through the grain handling facilities at the Port of Mombasa.
8. The Committee observed that GBHL operate almost 98% of all grain bulk services at the port of Mombasa and have been in operation since 2002. Further, the Kenya Ports Authority (KPA) has been having one licensed grain bulk handler that is GBHL operating at berths 3 and 4 at the Port of Mombasa with an exclusive mandate that was initially granted and expired on 15th February, 2008.
9. Following the expiry of the exclusive mandate period, there has been an agitation to liberalize grain bulk operations by allowing other additional operators and equally promote competition in the industry. The port of Mombasa has equally experienced exponential growth of grain imports over the last ten (10) years.

2.2 Recommendations by the Departmental Committee on Finance and National Planning

10. The Departmental Committee on Finance and National Planning tabled its report on 26th November, 2020 and made the following recommendations, That :
 - (i) To optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022;
 - (ii) The Process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability;

- (iii) Under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone, the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public-Private Partnerships (PPPs) framework;
- (iv) To promote efficiency in grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment; and
- (v) KPA should continue investing including through the PPP framework in the expansion of the Port facility to accommodate more berths to meet the growing demand within the region.

2.3 Stakeholders Submissions on the implementation status of the the Report

2.3.1 Kenya Ports Authority

11. During the Committee's visit to the Port to ascertain the implementation status of the House Resolutions, Kenya Ports Authority (KPA) submitted a written response on 22nd October 2021 referenced MMN/2/2/49.
12. KPA stated that, in order to optimize revenue collection, KPA has fast-tracked authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.
13. Further, the authority submitted that its Strategic Plan had already recognized the need for a second-grain bulk handler to diversify from the risk of monopoly. Way back in 2017, the Authority identified Dongo Kundu and Lamu Port as potential sites for the facility.
14. The Authority stated that by the time the Finance and Planning Committee visited, KPA had already embarked on the process of identifying the operator to be licensed. Given that the KPA Strategic Plan was widely shared within the industry, several privately initiated proposals for operating a second-grain bulk facility had been received.

15. The Authority reported that the following applicants had identified specific sites of interest to them:- **Kapa Oil Refinery; Africa Ports and Terminals; Multiship International; Mombasa Grain Terminal Limited; Kilindini Terminals Limited; Kipevu Inland Container EPZ Limited; and Portside Freight Terminals Limited.** KPA noted that the Dongo Kundu SEZ is still at the design stage and Lamu Port is still under construction. Both Sites were therefore unattractive to any possible PPP investors.
16. KPA submitted that in order to fast-track the process towards authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022, KPA Management having evaluated all proposals identified the most technically feasible for progression in accordance with the Law.
17. The Technical Committee following detailed analyses recommended that each grain bulk applicant be considered subject to the availability of the berths applied for and the proximity of their physical location for silos as part of technical and commercial feasibility.
18. KPA highlighted the details of the seven (7) proposals and the Technical Committee observations/findings:
- (i) **Kapa Oil Refineries:** Kapa Oil refineries expressed the need to have their bulk storage terminal at the Mombasa Port. The company was particularly interested in the land which is linked to the mainland via the new Port Reitz Dongo Kundu area. Following the proposal, Management observed that KPA does not have adequate land for the construction of an additional storage facility and that there are plans to have a new liquid bulk cargo handling facility near Dongo Kundu which will require a corresponding storage facility to ensure optimization is achieved and wastes of resources curbed.
 - (ii) **Multiship International Ltd:** The company made an application vide a letter Ref. MSIL/nss.KPA.68.11/17 on 23rd November 2017 to be allowed to occupy berths 13 & 14 to discharge grains and fertilizer on dedicated use. The company expressed interest to invest in both portable grain silos and un-loaders that will be movable and temporarily placed along the quayside in the port specifically to serve the Standard Gauge Railway through its wagons within

the port. However, the Authority declined the request vide letter Ref. CDD/PD/3/1/10 dated 6th February 2018 referring to KPA Master planning requirements that these berths were solely committed for container traffic as the development and conversion plans for berth no. 11-14 was underway and construction was expected to be completed in about three years. Consequently Multiship vide their letter dated 6th June 2018 Ref. MSIL/nss.KPA.45/6-18 requested for allocation of a yard adjacent to berth no.5 to build and operate a specialized dry bulk discharge and handling terminal for grains and rehabilitation of shed no.7 and 8 for fertilizer handling dedicated for SGR. Further, Multiship vide their letter Ref. MSIL/nss.KPA. 13/3-19 dated 18th March 2019 submitted a proposal for the development of dedicated grain and fertilizer terminals at the port of Mombasa and SGR Athi-River Green Park Terminus. They specifically requested for: Allocation of space in the port adjacent to berth No. 5 to construct the specialized dedicated SGR dry bulk grain discharging and handling terminal and Shed No.7/8 or 9/10 for rehabilitation to handle bulk fertilizer for dedicated transportation via SGR during discharge from the vessels in the Port. The technical committee observed that the yard adjacent to yard no. 5 is a common user facility for SGR and Meter Gauge Railway (MGR) loading and a temporary storage area for steel and motor vehicles.

- (iii) **Africa Ports and Terminals:** Africa Ports and Terminals vide their letter Ref. APT-COR-2018-004 dated 3rd January 2018 sought an opportunity to engage in Marine activities including transshipment of cargo from mooring buoys to the wharf and vice versa. They also requested for allocation of suitable land for the development of grain and LPG Terminals in Lamu Port. KPA responded vide letter Ref. MCS/4/8/01 dated 16th January 2018 seeking details of the locations/plots identified by Africa Ports and Terminals through their due diligence to be suitable for the proposed investment. Similarly, KPA advised Africa Ports and Terminals that its application would be considered against the Authority's Master Plan and Public Procurement and Asset Disposal Act and Rules. The company was also guided to contact the Head of Corporate Development for the Master plan and the General Manager, Operation as well as the Head of Procurement & Supplies regarding the relevant matters associated with their proposal. Africa Ports and Terminal is yet to submit a response to the above.

- (iv) **Mombasa Grain Terminal Limited (MGTL):** The Mombasa Grain Terminal Limited (MGTL) vide their letter dated 23rd November 2019, requested KPA to grant an irrevocable and unconditional wayleave permission to construct a fertilizer and grain terminal at the old KOT, after the scheduled relocation of KOT in 2021. The proposed project construction by MGTL was envisioned to take 1-2 years. Further, MGTL Sought permission from KPA to allow the company to access the proposed project site, in order to carry out a survey of their design process and determine the wayleave where MGTL equipment (Conveyor Belts and SGR Loading Gantry) will be positioned. The MGTL proposal was analyzed vis-a-vis the KPA master Plan 2018-2047. The Master plan provides that KPA will decommission and demolish the old KOT and establish an additional Berth 19 by 300m, with an associated yard area of 7.5ha. The Berth capacity for Berth 19 is estimated at 450k TEU/yr. The Master plan anticipates that a second grain terminal will be developed in Dongo Kundu by 2023. Further, KPA has planned for the development of a Grain bulk in Lamu Port by 2032 in the event the grain bulk terminal in Dongo Kundu will have reached its maximum capacity. Pursuant to the above, the Technical Committee noted that the old KOT which MGTL has identified to develop a grain and fertilizer terminal, will not be available since KPA has made prior plans to expand Berths 16-18 and establish an additional Berth 19. Moreover, the space at the old KOT will be used for containers only. Therefore, management recommended that the request by MGTL be declined since the old KOT which the company has identified for the development of a grain and fertilizer terminal, is currently in use and prior plans have been made by KPA to use the identified location.
- (v) **Kilindini Terminals Limited (KTL):** The Company vides a letter dated 2nd December 2015 made an application for a wayleave to build and operate a specialized dry bulk discharge and handling terminal for grains at the Port of Mombasa. The terminal would be linked by overhead conveyors directly to the berths. KTL also proposed Berth no.5 and Berths 11 to 14 as sites for the project. KTL projected cargo to be handled as 1 million tons by end of 2020 and increase over the following two years to 1.1 million tons and 1.2 million tons respectively. The application could not however be progressed as the requested berths are not available for bulk grain handling.

(vi) **Kipevu Inland Container EPZ Limited (KIC):** Kipevu Inland Container EPZ Ltd vide letters dated 9th July 2018 and 22nd January 2020, requested KPA to grant a wayleave for installation of a multipurpose conveyor belt system to handle dry bulk cargo at Plot No. MV/VI/4794, at Kibarani adjacent to the Port area. They also proposed to construct a 150,000MT of bulk grain silo storage, 250,000sqft of covered warehouse space and modern container handling equipment. The proposed facility is expected to cater for various dry bulk products that are being imported in large quantities to serve various sectors both within Kenya and the greater African Markets i.e clinker, fertilizer, coal, gypsum & food grains while adopting the latest technology of green terminal with the lowest carbon footprint. Subsequently, KIPÉVU made a presentation on their proposal to the Management of KPA on the 4th of March 2020. In their presentation, KIC EPZ informed Management that they have secured 50 acres of land from Kenya Railway in Athi River to build and operate a modern receiving terminal for bulk volumes hauled via SGR, which is expected to contribute significantly to the reduction of Port congestion. The proposal was analyzed against the KPA Master Plan 2018-2047. The Master Plan anticipates that a second grain terminal will be developed in Dongo Kundu by 2023. Further, KPA has planned for the development of a Grain bulk facility in Lamu Port by 2032 in the event the Grain bulk terminal in Dongo Kundu will have reached its maximum capacity. This was considered as a future plan.

(vii) **Portside Freight Terminal Limited (PFTL):** Portside Freight Terminal Limited (PFTL) vide a letter dated 6th April 2020 sought a license for a bulk grain handling facility at the Port of Mombasa and a wayleave for the development of an overhead conveyor belt through the G-Section area of the Port. The PFTL proposal was evaluated and found to be the most technically and financially feasible since it will be 100% privately funded and the project will pose a minimum conflict with other ongoing and planned KPA developments. In addition, PFTL owns land adjacent to G-Section where the storage silos will be located which makes them the most suitable applicant. In line with section 12 of the KPA Act, management submitted the evaluation report to the Board of Directors during its 382nd Meeting held on 30th November 2020 and 3rd December 2020. The Board deliberated on the PFTL business proposal and resolved:

- (1) A license for grain bulk handling operator at the Port of Mombasa be granted to PFTL;
- (2) A wayleave be issued for the development of an overhead conveyor belt through G-Section Area to PFTL.
- (3) A counterpart team be formed to work with PFTL in developing the island berth.
- (4) The counterpart team to be engaged in firming technical specifications including routing of the overhead conveyors.

Following the Board approval, management obtained concurrence from the Honourable Attorney General and the National Treasury to progress the project under Specially Permitted Procurement Method, Section 114(A) of the Public Procurement and Disposal Act, 2015. Subsequently, an award was made to PFTL and license/wayleave agreements were signed.

19. In constitutional Petition No. E045 of 2021, Okiya Omutata Okoiti has sued KPA and CS National Treasury with interested parties being Kilindini Terminals, Mombasa Grain Terminal Limited, Kapa Oil Refineries, Africa Port & Terminals and Multiship International, Kipevu Inland Container EPZ, Dockworkers Union, and Katiba Institute. The petition challenges the award of the license and wayleave to PFTL.
20. Under the KPA Master Plan (2018-2047) implementation, KPA is still pursuing alternative locations for discharge of grain vessels with the ongoing design and development of Dongo Kundu SEZ, Lamu Port and Kisumu Port. Due to investment and financing constraints, the projects will be undertaken using the PPP Framework.
21. Historically, the licensing and issuance of wayleaves was guided by the legal framework as elaborated hereunder:-
 - (i) **Section 12(2n) of the Kenya Ports Authority Act** gives the Board power to enter into agreements with any person:
 - i. For the Supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary or desirable for the Authority;
 - ii. For the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Authority.

(ii) **Part C (vi) of the Tariff book, General Provisions**, empowers the Authority to enter into an agreement with any person including any company or association or body of persons corporate for the performance or provision by that person of any of the services or facilities which may, ordinarily under the Act, be performed or provided by the Authority and raise charges at such rates or for such amounts as may be mutually agreed between them, and such charges or rates shall apply and be collected as if they were set out in this Tariff Book.

(iii) **The Tariff book under clause 19 on general services** empowers the Authority to issue licenses for 12 consecutive months from the 1st day of the month of issue subject to the conditions notified to licensees from time to time.

(iv) It has been the practice of KPA to grant approvals to private operators to construct wayleaves and licenses in the performance of her duties. Grain and Bulk handling at the port are done either through:

- a) Conventional bagging vide grabs onto bagging plants alongside a ship and onto trucks. Examples of the companies include Multiport Limited and Interglobe.
- b) A mechanized system that uses conveyor belts, pipes and pneumatic suckers from the port to silos/tankage outside the port, an example of companies includes GBHL and Magadi Soda.

22. The Companies whose applications were approved by the Board using KPA Act and KPA Tariff are as follows:

- (i) East Africa Terminal Ltd whose application for wayleave was approved by the Board in 2013.
- (ii) Magadi Soda: - Wayleave through which they have conveyors operating and licenses agreement.
- (iii) Grain Bulk Handling (GBHL):- Approval was granted twice for licenses agreements and infrastructure upgrades.
- (iv) African Oil and Gas Limited (AGOL) whose request for setting up a facility for handling oil and gases was approved by the Board.
- (v) Portside Freight Services Limited: - Approval for setting up a modern conveyor facility at sheds 7 & 8 was approved by the Board.

23. It is envisaged that once Dongo Kundu SEZ and Lamu Port are fully developed, investors will bring in critical infrastructure required for expansion, investment in technology and efficient state-of-the-art grain handling equipment under the PPP framework to meet growing demand and optimize revenue collection.

2.3.2 The National Treasury

24. The National Treasury submitted a written response on 26th January 2022 referenced MOF/TE 200/01 'D' (52) and reported as follows:

- (i) On the recommendation that: in order to optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022; The National Treasury reported that KPA had licensed a second-grain bulk terminal operator within the Port of Mombasa.
- (ii) On the recommendation that: the process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability; The National Treasury reported that KPA followed due process in allocating the second-grain bulk operator at the Port of Mombasa. However, the matter ended up in court. (Appendix VI)
- (iii) On the recommendation that: under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone, the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public-Private Partnerships (PPPs) framework; The National Treasury reported that KPA plans provide for the development of other grain terminals at Dongo Kundu and Lamu Port through Public-Private Partnerships. New opportunities which were not envisioned in the Master Plan 2018-2047 will therefore be considered in the Strategic Plan which is reviewed every five (5) years. KPA has since embarked on the development of the Strategic Plan (2023-2027) to be launched before 31st December 2022 upon approval by the Board of Directors.

(iv) On the recommendation that: To promote efficiency in grain bulk handling in the country, there is a need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment; The National Treasury reported that KPA had put in place measures to ensure that infrastructure matches and exceeds the demand for grain commodities. The Authority is developing the Dongo Kundu berths, measuring 300 meters in length and 15 meters deep while that of Lamu Port will measure 400 meters in length and 17 meters deep to accommodate large vessels to gain from economies of scale. The Berths will be equipped with modern high capacity uploading equipment to ensure effective and efficient discharge of grain cargo operations.

(v) On the recommendation that: KPA should continue investing including through the PPP framework in the expansion of the Port facility to accommodate more berths to meet the growing demand within the region; The National Treasury reported that KPA is constructing the first 3 berths at Port of Lamu to be completed by April 2022. Additionally, the relocation of the Kipevu Oil Terminal which will accommodate 3 large oil vessels will be commissioned by end of March, 2022. The 2nd container terminal Phase 2 is scheduled to be ready by 2022 further increasing KPA's capacity to handle containerized cargo. The Authority remains open to accommodate the most effective and efficient operation model, including Public-Private Partnerships (PPP).

2.4 Implementation status

i. ***To optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.***

25. The National Treasury reported that KPA had licensed a second-grain bulk terminal operator within the Port of Mombasa. KPA also acknowledged having awarded Portside Freight Terminal Limited (PFTL) a license for bulk grain handling facility at the Port of Mombasa and a wayleave for the development of an overhead conveyor through the G-section area of the Port, after their proposal was evaluated and found to be the most technically and financially feasible.

Committee Observation

26. The Committee noted that the Kenya Ports Authority had implemented the resolution. However, a Constitutional Petition No. E045 of 2021 was filed challenging the award of the license and Wayleave to Portside Freight Terminal Limited.

ii. The Process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability.

Implementation status

27. The National Treasury reported that KPA followed due process in allocating the second-grain bulk operator at the Port of Mombasa. However, the matter ended up in court. KPA reported that the Portside Freight Terminal Limited proposal was evaluated and found to be the most technically and financially feasible since it will be 100% privately funded and the project will pose a minimum conflict with other ongoing and planned KPA developments.

Committee Observation

28. The Committee noted that the Kenya Ports Authority had implemented the resolution.

iii. Under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone, the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public-Private Partnerships (PPPs) framework.

Implementation status

29. The National Treasury reported that KPA plans to provide for the development of other grain terminals at Dongo Kundu and Lamu Port through Public-Private Partnerships. New opportunities which were not envisioned in the Master Plan 2018-2047 will therefore be considered in the Strategic Plan which is reviewed every five (5) years. KPA has since embarked on the development of the Strategic Plan (2023-2027) to be launched before 31st December 2022 upon approval by the Board of Directors.

Committee Observation

30. The Committee noted that the Kenya Ports Authority was on course in implementing the resolution with the development of the said infrastructure.

- iv. To promote efficiency in grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment.*

Implementation status

31. The National Treasury reported that KPA had put in place measures to ensure that infrastructure matches and exceeds the demand for grain commodities. The Authority is developing the Dongo Kundu berths, measuring 300 meters in length and 15 meters deep while that of Lamu Port will measure 400 meters in length and 17 meters deep to accommodate large vessels.

Committee Observation

32. The Committee noted that the Kenya Ports Authority was on course in implementing the resolution with the development of the said infrastructure.

- v. KPA should continue investing including through the PPP framework in the expansion of the Port facility to accommodate more berths to meet the growing demand within the region.*

Implementation status

33. The National Treasury reported that KPA is constructing the first 3 berths at Port of Lamu to be completed by April 2022. Additionally, the relocation of Kipevu Oil Terminal which will accommodate 3 large oil vessels will be commissioned by end of March, 2022. The 2nd container terminal Phase 2 is scheduled to be ready by 2022 further increasing KPA's capacity to handle containerized cargo.

Committee Observation

34. The Committee noted that the Kenya Ports Authority is on track to implement the resolution with the development of the said infrastructure.

3.0 COMMITTEE OBSERVATIONS

35. The Committee having reviewed the implementation status of the report of the Departmental Committee on Finance and National Planning on the Optimization of Revenue in Grain Handling Services at the Port of Mombasa and considered the evidence received observed that:

- 1) Kenya Ports Authority (KPA) has licensed Portside Freight Services Limited as a second-grain bulk terminal operator within the Port of Mombasa; and,
- 2) The Kenya Ports Authority was on course in implementing the resolution with regard to the development of critical infrastructure in all ports to continually gain leverage in technology while maximizing the return on investment.

4.0 COMMITTEE RECOMMENDATIONS

The Committee having reviewed the said report and considered the evidence received, recommends that

- (1) **The Kenya Ports Authority should consider other qualified firms in other emerging alternative locations at Dongo Kundu SEZ, Lamu Port and Kisumu Port to optimize revenue collection and to cut down on high demurrage costs;**
- (2) **The National Treasury and Planning and the Kenya Ports Authority ensures critical infrastructure is installed in all ports to continually gain leverage in technology while maximizing the return on investment; and**
- (3) **The Kenya Ports Authority should on a quarterly basis report to the National Assembly on the implementation status of the development of critical infrastructure.**

SIGNED.......... DATE 24/02/2022.....

HON. MOITALEL OLE KENTA, MP

CHAIRPERSON, COMMITTEE ON IMPLEMENTATION

Appendix I: Adoption List

The National Assembly



12th Parliament-6th Session-2022

Committee on Implementation

We, the Members of the Committee on Implementation, have pursuant to Standing Order 199 adopted the Report on Implementation status of the report on optimization of revenue in grain handling services at the port of Mombasa. We affix our signatures to affirm our approval and confirm its accuracy, validity and authenticity.

venue: *Committee Room on 5th Floor Continental House* Date: *Thursday 17th February 2022*

| S/NO. | NAME | SIGNATURE |
|-------|---|------------------|
| 1. | The Hon. Moitalel Ole Kenta, MP – Chairperson | |
| 2. | The Hon. Godfrey Osotsi, MP - Vice Chairperson | <i>Virtually</i> |
| 3. | The Hon. Richard Onyonka, MP | <i>Virtually</i> |
| 4. | The Hon. Alois Musa Lentoimaga, MP | <i>Virtually</i> |
| 5. | The Hon. (Dr.) James Kipkosgei Murgor, MP | <i>Virtually</i> |
| 6. | The Hon. John Muchiri Nyagah, MP | |
| 7. | The Hon. Johnson Manya Naicca, MP | <i>Virtually</i> |
| 8. | The Hon. Moses Kiarie Kuria, MP | <i>Virtually</i> |

| | | |
|-----|-------------------------------------|--------------------|
| 9. | The Hon. Paul Simba Arati, MP | |
| 10. | The Hon. Peter Kimari Kihara, MP | <i>[Signature]</i> |
| 11. | The Hon. Charles Ngusya Nguna, MP | |
| 12. | The Hon. Feisal Abdalla Bader, MP | |
| 13. | The Hon. Gabriel Kago Mukuha, MP | virtually |
| 14. | The Hon. Hassan Oda Hulufu, MP | Virtually |
| 15. | The Hon. Jared Okello, MP | <i>[Signature]</i> |
| 16. | The Hon. Joash Nyamache Nyamoko, MP | |
| 17. | The Hon. Joshua Mwalyo Mbithi, MP | |
| 18. | The Hon. Michael Thoya Kingi, MP | Virtually |
| 19. | The Hon. Nelson Koech, MP | |
| 20. | The Hon. Benjamin Dalu Tayari, MP | virtually |
| 21. | The Hon. Paul Abuor, MP | |
| 22. | The Hon. Silvanus Osoro, MP | virtually |
| 23. | The Hon. John Njuguna Wanjiku, MP | Virtually |

Committee Clerk

Name..... *Abelrahman G. Hassan*

..... *[Signature]*
(Signature)

Date..... *17/02/2022*

Appendix II

Minutes of the Select Committee on

Implementation

**MINUTES OF THE THIRD SITTING OF THE COMMITTEE ON IMPLEMENTATION
HELD ON THURSDAY, 17TH FEBRUARY 2022, IN COMMITTEE ROOM ON FIFTH
FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDINGS, AT 12.00 P.M.**

PRESENT

1. The Hon. Moitalel Ole Kenta, MP - **Chairperson**
2. The Hon. Godfrey Osotsi, MP - **Vice Chairperson**
3. The Hon. Alois Musa Lentoimaga, MP
4. The Hon. Benjamin Dalu Tayari, MP
5. The Hon. Gabriel Kago Mukuha, MP
6. The Hon. Hassan Hulufu, MP
7. The Hon. Jared Okello, MP
8. The Hon. John Muchiri Nyagah, M.P
9. The Hon. John Njuguna Wanjiku, MP
10. The Hon. Michael Kingi, MP
11. The Hon. Peter Kihara, MP
12. The Hon. Silvanus Osoro, MP

ABSENT WITH APOLOGIES

1. The Hon. (Dr.) James Kipkosgei Murgor, MP
2. The Hon. Johnson Many Naicca, MP
3. The Hon. Paul Simba Arati, MP
4. The Hon. Richard Onyonka, MP
5. The Hon. Moses Kuria, MP
6. The Hon. Charles Ngusya Nguna, MP
7. The Hon. Feisal Bader, MP
8. The Hon. Joshua Mbithi Mwalyo, MP
9. The Hon. Joash Nyamache Nyamoko, MP
10. The Hon. Nelson Koech, MP
11. The Hon. Paul Odalo Abuor, MP

IN-ATTENDANCE

COMMITTEE SECRETARIAT

- | | | |
|----------------------------|---|------------------------|
| 1. Ms. Tracy Chebet Koskei | - | First Clerk Assistant |
| 2. Mr. Abdirahman Hassan | - | Second Clerk Assistant |
| 3. Ms. Jane Serem | - | Audio Officer |
| 4. Ms. Zeinab Wario | - | Sergeant-at-arms |

MIN.NO.NA/COI/2022/009: PRELIMINARIES

The Chairperson called the meeting to order at twelve o'clock (12.00 p.m.) and said a word of prayer. The agenda for the meeting was adopted, as proposed and seconded by the Hon. John Nyagah, MP, and the Hon. Jared Okello, MP respectively.

MIN.NO.NA/COI/2022/010: CONFIRMATION OF THE PREVIOUS MINUTES

The following Minutes were confirmed: -

- 1) Minutes of the 53rd Sitting held on Thursday 9th December 2021 were confirmed as a true record of the proceedings having been proposed by the Hon. Jared Okello, MP and seconded by the Hon. Peter Kihara, MP.
- 2) Minutes of the 1st Sitting held on Thursday 27th January 2022 were confirmed as a true record of the proceedings having been proposed by the Hon. John Nyagah, MP and seconded by the Hon. Peter Kihara, MP.
- 3) Minutes of the 2nd Sitting held on Thursday 10th February 2022 were confirmed as a true record of the proceedings having been proposed by the Hon. John Nyagah, MP and seconded by the Hon. Jared Okello, MP.

MIN.NO.NA/COI/2022/011: MATTERS ARISING

The following matters arose from the Minutes of the 53rd Sitting: -

Under MIN.NO.NA/COI/2021/208: Status of the report on improved terms for pensioners

The Committee noted that the National Treasury was yet to provide a comprehensive report on the implementation status of the report of the petition on improved terms for pensioners as directed by the Committee.

In that regard, the Secretariat was asked follow up with the National Treasury to provide an update on the implementation status of the aforementioned report.

MIN.NO.NA/COI/2022/012: CONSIDERATION AND ADOPTION OF THE REPORT ON IMPLEMENTATION STATUS OF THE REPORT ON OPTIMIZATION OF REVENUE IN GRAIN HANDLING SERVICES AT THE PORT OF MOMBASA

The Committee having considered the submissions by the National Treasury and Planning and the Kenya Ports Authority noted the following as the implementation status of the report by the Departmental Committee on Finance & National Planning on the optimization of revenue in grain handling services at the port of Mombasa:

- (i) ***To optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022***

The National Treasury reported that KPA had licensed a second-grain bulk terminal operator within the Port of Mombasa. KPA also acknowledged having awarded Portside Freight Terminal Limited (PFTL) a license for bulk grain handling facility at the Port of Mombasa and a wayleave

for the development of an overhead conveyor through the G-section area of the Port, after their proposal was evaluated and found to be the most technically and financially feasible.

Committee Observation

The Committee noted that the Kenya Ports Authority had implemented the resolution. However, a Constitutional Petition No. E045 of 2021 was filed challenging the award of the license and Wayleave to Portside Freight Terminal Limited.

- (ii) ***The Process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability.***

Implementation status

The National Treasury reported that KPA followed due process in allocating the second-grain bulk operator at the Port of Mombasa. However, the matter ended up in court. KPA reported that the Portside Freight Terminal Limited proposal was evaluated and found to be the most technically and financially feasible since it will be 100% privately funded and the project will pose a minimum conflict with other ongoing and planned KPA developments.

Committee Observation

The Committee noted that the Kenya Ports Authority had implemented the resolution.

- iii. ***Under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone, the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public-Private Partnerships (PPPs) framework.***

Implementation status

The National Treasury reported that KPA plans to provide for the development of other grain terminals at Dongo Kundu and Lamu Port through Public-Private Partnerships. New opportunities which were not envisioned in the Master Plan 2018-2047 will therefore be considered in the Strategic Plan which is reviewed every five (5) years. KPA has since embarked on the development of the Strategic Plan (2023-2027) to be launched before 31st December 2022 upon approval by the Board of Directors.

Committee Observation

The Committee noted that the Kenya Ports Authority was on course in implementing the resolution with the development of the said infrastructure.

- iv. To promote efficiency in grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment.*

Implementation status

The National Treasury reported that KPA had put in place measures to ensure that infrastructure matches and exceeds the demand for grain commodities. The Authority is developing the Dongo Kundu berths, measuring 300 meters in length and 15 meters deep while that of Lamu Port will measure 400 meters in length and 17 meters deep to accommodate large vessels.

Committee Observation

The Committee noted that the Kenya Ports Authority was on course in implementing the resolution with the development of the said infrastructure.

- v. KPA should continue investing including through the PPP framework in the expansion of the Port facility to accommodate more berths to meet the growing demand within the region.*

Implementation status

The National Treasury reported that KPA is constructing the first 3 berths at Port of Lamu to be completed by April 2022. Additionally, the relocation of Kipevu Oil Terminal which will accommodate 3 large oil vessels will be commissioned by end of March, 2022. The 2nd container terminal Phase 2 is scheduled to be ready by 2022 further increasing KPA's capacity to handle containerized cargo.

Committee Observation

The Committee noted that the Kenya Ports Authority is on track to implement the resolution with the development of the said infrastructure.

The Committee, consequently unanimously adopted the report, after it was proposed by the Hon. Peter Kihara, MP, and seconded by the Hon. Jared Okello, MP. The Committee made the following observations and recommendations: -

Committee Observations

1. Kenya Ports Authority (KPA) has licensed Portside Freight Services Limited as a second-grain bulk terminal operator within the Port of Mombasa; and
2. The Kenya Ports Authority was on course in implementing the resolution with regard to the development of critical infrastructure in all ports to continually gain leverage in technology while maximizing the return on investment.

Committee Recommendations

1. The Kenya Ports Authority should consider other qualified firms in other emerging alternative locations at Dongo Kundu SEZ, Lamu Port and Kisumu Port to optimize revenue collection and to cut down on high demurrage costs;
2. The National Treasury and Planning and the Kenya Ports Authority ensures critical infrastructure is installed in all ports to continually gain leverage in technology while maximizing the return on investment; and
3. The Kenya Ports Authority should on a quarterly basis report to the National Assembly on the implementation status of the development of critical infrastructure.


MIN.NO.NA/COI/2022/013: ANY OTHER BUSINESS

Study Visits

The meeting noted that the Committee had not undertaken any foreign travel in the current financial year and resolved to pursue a study visit to Turkey.

MIN.NO.NA/COI/2022/014: ADJOURNMENT

The meeting was adjourned at half past twelve (12.30 p.m.). The next meeting will be held on Thursday 24th February 2022.

Sign.....

Date.....24/02/2022.....

Hon. Moitalel Ole Kenta, MP

(Chairperson)

MINUTES OF THE 44TH SITTING OF THE COMMITTEE OF IMPLEMENTATION HELD ON FRIDAY, 22ND OCTOBER, 2021, IN THE KPA BOADROOM, MOMBASA, AT 2.30 P.M.

PRESENT

1. The Hon. Moitalel Ole Kenta, MP – **Chairperson**
2. The Hon. Godfrey Osotsi, MP - **Vice Chairperson**
3. The Hon. Benjamin Dalu Tayari, MP
4. The Hon. Charles Ngusya Nguna, MP
5. The Hon. Joash Nyamache Nyamoko, MP
6. The Hon. Jared Okello, MP
7. The Hon. Feisal Bader, MP
8. The Hon. Joshua Mbithi Mwalyo, MP

ABSENT WITH APOLOGIES

1. The Hon. Alois Musa Lentoimaga, MP
2. The Hon. (Dr.) James Kipkosgei Murgor, MP
3. The Hon. Moses Kuria, MP
4. The Hon. Richard Onyonka, MP
5. The Hon. John Muchiri Nyagah, M.P
6. The Hon. Johnson Many Naicca, MP
7. The Hon. Paul Simba Arati, MP
8. The Hon. Hassan Hulufu, MP
9. The Hon. John Njuguna Wanjiku, MP
10. The Hon. Mukuha Gabriel Kago, MP
11. The Hon. Michael Kingi, MP
12. The Hon. Nelson Koech, MP
13. The Hon. Peter Kihara, MP
14. The Hon. Paul Odalo Abuor, MP
15. The Hon. Silvanus Osoro, MP

IN ATTENDANCE

1. Amb. John Mwangemi - Ag. Managing Director
2. Mr. Daniel Ogutu - General Manager, Human Resources & Administration
3. Mr. Geoffrey Kavate - Ag. General Manager Finance
4. Mr. Turasha J. Kinyanjui - Ag. General Manager, Board and Legal Services
5. Eng. Vincent Sidai - General Manager, Infrastructure
6. Mr. Haji Masemo - Principal, Corporate Communications Officer
7. Ms. Saumu Lelly - Communications Officer
8. Mr. Charles Odoo - Communications and Protocol Officer
9. Mr. Cosmas Makori - Head of Procurement and Supplies

COMMITTEE SECRETARIAT

- | | | |
|----------------------------|---|------------------------|
| 1. Ms. Tracy Chebet Koskei | - | First Clerk Assistant |
| 2. Mr. Abdirahman Hassan | - | Second Clerk Assistant |
| 3. Mr. Donald Manyala | - | Research Officer II |
| 4. Ms. Jane Serem | - | Audio Officer I |
| 5. Mr. Moses Kariuki | - | Serjeant-at-Arms |

MIN.NO.NA/COI/2021/203

PRELIMINARIES

The Chairperson called the meeting to order at thirty minutes past two o'clock (2.30 p.m.) and said a word of prayer. The agenda for the meeting was adopted, as proposed and seconded by the Hon. Benjamin Tayari, MP, and the Hon. Joshua Mwalyo, MP, respectively. Introductions were made thereafter.

The Chairperson thereafter informed the meeting of the mandate of the Committee as provided for in Standing Order 209 of the National Assembly Standing Orders, which was to follow up on implementation of House resolutions and ensure that the House does not act in vain.

MIN.NO.NA/COI/2021/204

CONFIRMATION OF THE PREVIOUS MINUTES

This Agenda was deferred to the next Sitting.

MIN.NO.NA/COI/2021/205

MEETING WITH THE ACTING MANAGING DIRECTOR, KENYA PORTS AUTHORITY, REGARDING THE IMPLEMENTATION STATUS OF THE REPORT ON THE OPTIMIZATION OF REVENUE IN GRAIN HANDLING SERVICES AT THE PORT OF MOMBASA

The acting Managing Director Kenya Ports Authority and other officials of the Authority appeared before the Committee to brief the Committee on the implementation status of the report by the Departmental Committee on Finance and National Planning on the optimization of revenue in grain handling services at the ports of Mombasa. They informed the Committee as follows; That

In order to optimize revenue collection, KPA has fast-tracked authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.

KPA Strategic Plan had already recognized the need for a second grain bulk handler in order to diversify from the risk of monopoly. Way back in 2017, the Authority identified Dongo Kundu and Lamu Port as potential sites for the facility.

By the time the Finance and Planning Committee visited, KPA had already embarked on the process of identifying the operator to be licensed. Given that the KPA Strategic Plan was widely shared within the industry, several privately initiated proposals for operating a second

grain bulk facility had been received. The following applicants had identified specific sites of interest to them: -

- a. Kapa Oil Refinery,
- b. Africa Ports and Terminals,
- c. Multiship International,
- d. Mombasa Grain Terminal Limited,
- e. Kilindini Terminals Limited,
- f. Kipevu Inland Container EPZ Limited, and
- g. Portside Freight Terminals Limited.

Notably, the Master Plan envisaged development of a second bulk grain handling facility at Dongo Kundu and Lamu Port as stated above. However, the Dongo Kundu SEZ is still at design stage and Lamu Port is still under construction. Both sites were therefore unattractive to any possible PPP investors.

In order to fast-track the process towards authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022, KPA Management having evaluated all proposals identified the most technically feasible for progression in accordance with the Law.

The Technical Committee following detailed analyses recommended that each grain bulk applicant be considered subject to the availability of the berths applied for and the proximity of their physical location for silos as part of technical and commercial feasibility.

The following are the details of the seven (7) proposals and the Technical Committee observations/findings; -

1. Kapa Oil Refineries

Kapa Oil refineries expressed the need to have their own bulk storage terminal at the Mombasa Port. The company was particularly interested in the land which is linked to the mainland via the new Port Reitz Dongo Kundu area. Following the proposal, Management observed that KPA does not have adequate land for construction of additional storage facility and that there are plans to have a new liquid bulk cargo handling facility near Dongo Kundu which will require a corresponding storage facility to ensure optimization is achieved and wastages of resources curbed.

2. Multiship International Ltd

The company made an application vide letter Ref. MSIL/nss.KPA.68.11/17 on 23rd November 2017 to be allowed to occupy berths 13 & 14 to discharge grains and fertilizer on dedicated use. The company expressed interest to invest in both portable grain silos and unloaders that will be movable and temporarily placed along the quayside in the port specifically to serve the Standard Gauge Railway through its wagons within the port. However, the Authority declined the request vide letter Ref. CDD/PD/3/1/10 dated 6th February 2018 making reference to KPA Master planning requirements that these berths

were sorely committed for container traffic as the development and conversion plans for berth no. 11-14 was underway and construction was expected to be completed in about three years.

Consequently, Multiship vide letter 6th June 2018 Ref. MSIL/nss.KPA.45/6-18 requested for allocation of a yard adjacent to berth no.5 to build and operate a specialized dry bulk discharge and handling terminal for grains and rehabilitation of shed no.7 and 8 for fertilizer handling dedicated for SGR. Further, Multiship vide letter Ref. MSIL/nss.KPA.13/3-19 dated 18th March 2019 submitted a proposal for the development of dedicated grain and fertilizer terminals at the port of Mombasa and SGR Athi-River Green Park Terminus. They specifically requested the following:

- Allocation of space in the port adjacent to berth No.5 to construct the specialized dedicated SGR dry bulk grain discharging and handling terminal.
- Shed No. 7/8 or 9/10 for rehabilitation to handle bulk fertilizer for dedicated transportation via SGR during discharge from the vessels in the Port.

The Technical Committee observed that the yard adjacent to Yard No. 5 is a common user facility for SGR and Meter Gauge Railway (MGR) loading and a temporary storage area for steel and motor vehicles.

3. Africa Ports and Terminals

Africa Ports and Terminals vide their letter Ref. APT-COR-2018-004 dated 3rd January 2018 sought for an opportunity to engage in Marine activities including transshipment of cargo from mooring buoys to the wharf and vice versa. They also requested for allocation of suitable land for development of grain and LPG Terminals in Lamu Port.

KRA responded vide letter Ref. MCS/4/8/01 dated 16th January 2018 seeking details of the locations/plots identified by Africa Ports and Terminals through their due diligence to be suitable for the proposed investment. Similarly, KPA advised Africa Ports and Terminals that its application will be considered against the Authority's Master Plan and Public Procurement and Asset Disposal Act and Rules. The company was also guided to contact the Head of Corporate Development for the Masterplan and the General Manager, Operation as well as the Head of Procurement & Supplies regarding the relevant matters associated with their proposal.

Africa Ports and Terminals is yet to submit a response to the above.

4. Mombasa Grain Terminal Limited

The Mombasa Grain Terminal Limited (MGTL) vide a letter dated 23rd November 2019, requested KPA to grant an irrevocable and unconditional wayleave and permission to construct a Fertilizer and Grain Terminal at the old KOT, after the scheduled relocation of KOT in 2021. The proposed project construction by MGTL was envisioned to take 1-2 years.

Further, MGTL sought permission from KPA to allow the company to access the proposed project site, in order to carry out survey of their design process and determine the wayleave where MGTL equipment (Conveyor Belts and SGR Loading Gantry) will be positioned.

The MGTL proposal was analysed vis a vis the KPA Master Plan 2018-2047. The Master plan provides that KPA will decommission and demolish the old KOT and establish an additional Berth 19 by 300 m, with an associated yard area of 7.5ha. The Berth capacity for Berth 19 is estimated at 450k TEU/yr.

The Master Plan anticipates that a second Grain Terminal will be developed in Dongo Kundu by 2023. Further, KPA has planned for the development of a Grain bulk in Lamu Port by 2032 in the event the Grain bulk terminal in Dongo Kundu will have reached its maximum capacity.

The Technical Committee noted that the old KOT which MGTL has identified to develop a Grain and Fertilizer terminal, will not be available since KPA has made prior plans to expand Berths 16-18 and establish an additional Berth 19. Moreover, the space at the old KOT will be used for containers only.

Therefore, Management recommended that the request by MGTL be declined since the old KOT which the company has identified for development of a Grain and Fertilizer terminal, is currently in use and prior plans have been made by KPA to use the identified location.

5. Kilindini Terminals Limited

The company vide a letter dated 2nd December 2015 made an application for a wayleave to build and operate a specialized dry bulk discharge and handling terminal for grains at the Port of Mombasa. The terminal would be linked by overhead conveyors directly to the berths. KTL also proposed Berth no. 5 and Berths 11 to 14 as sites for the project. KTL projected cargo to be handled as 1 million tons by end of 2020 and increase over the following two years to 1.1 million tons and 1.2 million tons respectively. The application could not however not be progressed as the requested berths are not available for bulk grain handling.

6. Kipevu Inland Container EPZ Limited

Kipevu Inland Container EPZ Ltd. Vide letters dated 9th July 2018 and 22nd January 2020, requested KPA to grant a wayleave for installation of a multipurpose conveyor belt system to handle dry bulk cargo at Plot No. MV/VI/4794, at Kibarani adjacent to the Port area.

They also proposed to construct a 150,000MT of bulk grain silo storage, 250,000sqft of covered warehouse space and modern container handling equipment. The proposed facility is expected to cater for various dry bulk products that are being imported in large quantities to serve various sectors both within Kenya and the greater African Markets i.e. clinker, fertilizer, coal, gypsum & food grains while adopting the latest technology of green terminal with the lowest carbon footprint.

Subsequently, KIPEVU made a presentation on their proposal to the Management of KPA on the 4th of March 2020. In their presentation, KIC EPZ informed Management that they have secured 50 Acres of land from Kenya Railway in Athi River to build and operate a

modern receiving terminal for bulk volumes hauled via SGR, which is expected to contribute significantly to reduction of the Port congestion.

The proposal was analyzed against the KPA Master Plan 2018-2047. The Master Plan anticipates that a second grain terminal will be developed in Dongo Kundu by 2023. Further, KPA has planned for the development of a Grain bulk facility in Lamu Port by 2032 in the event the Grain bulk terminal in Dongo Kundu will have reached its maximum capacity. This was considered as a future plan.

7. Portside Freight Terminal Limited

Portside Freight Terminal Limited (PFTL) vide a letter dated 6th April 2020 sought a license for bulk grain handling facility at the Port of Mombasa and a wayleave for the development of an overhead conveyor belt through the G-Section area of the Port.

The PFTL proposal was evaluated and found to be the most technically and financially feasible since it will be 100% privately funded and the project will pose minimum conflict with other ongoing and planned KPA developments. In addition, PFTL owns land adjacent to G-Section where the storage silos will be located which makes them the most suitable applicant.

In line with Section 12 of the KPA Act Management submitted the evaluation report to the Board of Directors during its 382nd Meeting held on 30th November 2020 and 3rd December 2020. The Board deliberated the PFTL business proposal and resolved:-

1. A license for grain bulk handling operator at the Port of Mombasa be granted to PFTL.
2. A wayleave be issued for development of an overhead conveyor belt through G-Section Area to PFTL.
3. A counterpart team be formed to work with PFTL in developing the island berth.
4. The counterpart team to be engaged in firming technical specifications including routing of the overhead conveyors.

Following the Board approval, Management obtained concurrence from the Honourable Attorney General and the National Treasury to progress the project under Specially Permitted Procurement Method, Section 114(A) of the Public Procurement and Disposal Act, 2015.

Subsequently, an award was made to PFTL and license/wayleave agreements signed.

Under the KPA Master Plan (2018-2047) implementation, KPA is still pursuing alternative locations for discharge of grain vessel with the ongoing design and development of Dongo Kundu SEZ, Lamu Port and Kisumu Port. Due to investment and financing constraints, the projects will be undertaken using the PPP Framework.

Historically, the legal framework as elaborated hereunder guided the licensing and issuance of wayleaves: -

1. Section 12 (2n) of the Kenya Ports Authority Act gives the Board power to enter into agreements with any person-
 - i. For the supply, construction, manufacture, maintenance or repair by that

- person of any property, movable or immovable, necessary or desirable for the purposes of the Authority;
- ii. For the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Authority.
2. The Tariff book, empowers the Authority to enter into agreement with any person including any company or association or body of persons corporate for the performance or provision by that person of any of the services or facilities which may, ordinarily under the Act, be performed or provided by the Authority and empowers the Authority to issue various licenses.
 3. It has been the practice of KPA to grant approvals to private operators to construct wayleaves and licenses in performance of her duties. Grain and Bulk handling at the port is done either through: -
 - a. Conventional bagging vide grabs onto bagging plants alongside ship and onto trucks. Examples of the companies include Multiport limited and Interglobe.
 - b. Mechanized system which use conveyor belts, pipes and pneumatic suckers from the port to silos/tankage outside the port. Example of companies includes GBHL and Magadi Soda.

The companies whose applications were approved by the Board using KPA Act and KPA Tariff are as follows;

- a. East Africa Terminal Limited - The Board approved their application for wayleave in 2013 while PPP Act was notwithstanding.
- b. Magadi Soda - Wayleave through which they have conveyors operating and licenses agreement.
- c. Grain Bulk Handling Limited (GBHL) - Approval was granted twice for licenses agreements and infrastructure upgrade
- d. African Oil and Gas Limited (AGOL) - Approval for setting up facility for handling oil and gases was approved by the Board.
- e. Portside Freight Services Limited - Approval for setting up a modern conveyor facility at Shed 7 & 8 was approved by the Board.

It is envisaged that once Dongo Kundu SEZ and Lamu Port are fully developed, investors will bring in critical infrastructure required for expansion, investment in technology and efficient state-of-the-art grain handling equipment under the PPP framework to meet growing demand and optimize revenue collection.

The Management of the Kenya Ports Authority further informed the Committee that;

- i. KPA during their presentation submitted Petition No. E 045 that had been filed in the High Court of Mombasa on 12th August 2021 requesting for an order of prohibition from granting and approving the proposals for way leave and licenses for second grain bulk handling facility at the port of Mombasa. The Committee however noted that it was mere application and there was no order issued hence the matter was not *sub judice*. The Committee instructed KPA to provide further details on the matter e.g.

- court proceedings and orders granted, if any;
- ii. The Committee sought for clarification from the KPA regarding a letter to Kilindini Terminals Limited referenced CDD/2/1/13(56) dated 23rd October 2017, on application to build and operate a bulk grain handling facility at the port of Mombasa, and whether it was consistent with the date of application;
 - iii. The process of identifying a 2nd container terminus was concluded in July 2021;
 - iv. The Authority receives monthly initiatives from people with idea due to speciality of their operations and the idea of having another grain handling operator was in the master plan;
 - v. The Strategic Plan and the Master Plan for KPA are public documents launched within the industry hence companies with capacity applied for the 2nd bulk terminal;
 - vi. The Authority sets up standing committees on each field to consider and evaluate criteria for every project and hire transactional advisors where they don't have the expertise. They also set up a technical team to consider proposals by millers and identify challenges in privately initiated proposals; and
 - vii. An attempt by KPA to tender for the 2nd bulk terminal was cancelled through instructions from the Ministry of Transport, Infrastructure, Public Works, Housing and Urban Development.

The Committee instructed the Authority to provide the following: -

- i. The letter from the Ministry of Transport cancelling the tender for the 2nd bulk terminal;
- ii. The license agreement/arrangement between Grain Bulk Handlers Ltd and KPA signed between the two giving GBHL exclusivity and monopoly for 8 years.

MIN.NO.NA/COI/2021/206: ADJOURNMENT

The meeting was adjourned at 4.30 p.m.

Sign.....

(Chairperson)

Date.....09/12/2021

Appendix III

Report of the Departmental Committee on Finance and National Planning on the Optimization of Revenue in Grain Handling Services at the Port of Mombasa

Approved for tabling

REPUBLIC OF KENYA



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SNA
26/11/2020

THE NATIONAL ASSEMBLY

TWELFTH PARLIAMENT – FOURTH SESSION – 2020

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

THE NATIONAL ASSEMBLY
PAPERS Laid
DATE: 26 NOV 2020 Thursday
TABLED BY: Chairperson - DC
Finance & Planning Hon Wanyonyi MP
A. T. O.

REPORT ON THE OPTIMIZATION OF REVENUE IN GRAIN HANDLING SERVICES AT
THE PORT OF MOMBASA

CLERKS CHAMBERS

DIRECTORATE OF DEPARTMENTAL COMMITTEES

PARLIAMENT BUILDINGS

NAIROBI

NOVEMBER, 2020

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CHAIRPERSON'S FOREWORD

This report contains the findings and recommendations of the Departmental Committee on Finance and National Planning on its fact-finding visit to Grain Bulk Handling Limited (GBHL) which was undertaken on 21st November, 2020.

The objective of the visit was to assess ways of optimization of revenue through the grain handling facilities at the Port of Mombasa. The Committee toured the facilities of GBHL where it was observed that they operate almost 98% of all grain bulk services at the Port of Mombasa and have been in operation since 2002.

Kenya Ports Authority (KPA) has been having one licensed grain bulk handler that is GBHL operating at berths 3 and 4 at the Port of Mombasa with an exclusive mandate that was initially granted and expired on 15th February, 2008. Following this expiry, there has been an agitation to liberalize grain bulk operations by allowing other additional operator(s) and equally promote competition in the industry.

During the past ten (10) years, the Port of Mombasa has equally experienced exponential growth of grain imports (with wheat and grain almost quadrupling). This significant growth has given an impetus on the need to have a second or third or fourth grain bulk handling terminal.

The Committee is grateful to the Offices of the Speaker and Clerk of the National Assembly for the logistical and technical support accorded to it during its sittings. The Committee further wishes to thank Kenya Ports Authority as well as all the stakeholders who made the inspection visit successful. Finally, I wish to express my appreciation to the Honorable Members of the Committee who made useful contributions towards the preparation and production of this report.

On behalf of the Departmental Committee on Finance and National Planning and pursuant to provisions of Standing Order 199(6), it is my pleasant privilege and honour to present to this House the Report on "*the optimization of revenue in grain handling services at the Port of Mombasa*".

Hon. Gladys Wanga, CBS, MP
Chairperson, Departmental Committee on Finance and National Planning

1 PREFACE

1.1 ESTABLISHMENT OF THE COMMITTEE

1. The Departmental Committee on Finance & National Planning is one of the fifteen Departmental Committees of the National Assembly established under *Standing Order 216* whose mandates pursuant to the *Standing Order 216 (5)* are as follows:-

- i. To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- ii. To study the programme and policy objectives of Ministries and departments and the effectiveness of their implementation;
- iii. To study and review all the legislation referred to it;
- iv. To study, access and analyze the relative success of the Ministries and departments as measured by the results obtained as compared with their stated objectives;
- v. To investigate and inquire into all matters relating to the assigned Ministries and departments as they may deem necessary, and as may be referred to them by the House;
- vi. To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order No. 204 (Committee on appointments);
- vii. To examine treaties, agreements and conventions;
- viii. To make reports and recommendations to the House as often as possible, including recommendation of proposed legislation;
- ix. To consider reports of Commissions and Independent Offices submitted to the House pursuant to the provisions of Article 254 of the Constitution; and
- x. To examine any questions raised by Members on a matter within its mandate.

1.2 MANDATE OF THE COMMITTEE

2. In accordance with the Second Schedule of the Standing Orders, the Committee is mandated to consider, public finance, monetary policies, public debt, financial institutions (excluding those in securities exchange), investment and divestiture policies, pricing policies, banking, insurance, population revenue policies including taxation and national planning and development.
3. In executing its mandate, the Committee oversees the following government Ministries and departments:-
 - i. National Treasury and Planning
 - ii. State Department for Devolution
 - iii. Commission on Revenue Allocation
 - iv. Office of the Controller of Budget
 - v. Salaries and Remuneration Commission

1.3 COMMITTEE MEMBERSHIP

4. The Departmental Committee on Finance and National Planning was constituted by the House in December, 2017 and comprises of the following Members: -

Chairperson

Hon. Gladys Wanga, CBS, MP
MP for Homabay County
ODM Party

Vice-Chairperson

Hon. Isaac W. Ndirangu
MP for Roysambu Constituency
Jubilee Party

Hon. Jimmy O. Angwenyi, MP
MP for Kitutu Chache North Constituency
Jubilee Party

Hon. Christopher Omulele, MP
MP for Luanda Constituency
ODM Party

Hon. Shakeel Shabbir Ahmed, MP
MP for Kisumu East Constituency
Independent Member

Hon. Daniel Nanok, MP
MP for Turkana West Constituency
Jubilee Party

Hon. (Dr.) Christine Ombaka, MP
MP for Siaya County
ODM Party

Hon. Andrew Okuome, MP
MP for Karachuonyo Constituency
ODM Party

Hon. David Mboni, MP
MP for Kitui Rural Constituency
CCU Party

Hon. Francis K. Kimani, MP
MP for Molo Constituency
Jubilee Party

Hon. Joseph Oyula, MP
MP for Butula Constituency

ODM Party

Hon. Joshua Kandie, MP
MP for Baringo Central Constituency
MCC Party

Hon. Stanley Muthama, MP
MP for Lamu West Constituency
Jubilee Party

Hon. Edith Nyenze, MP
MP for Kitui West Constituency
WDM-K

Hon. Catherine Waruguru, MP
MP for Laikipia County
Jubilee Party

Hon. James Mwangi, MP
MP for Tetu Constituency
Jubilee Party

Hon. (Prof.) Mohamud Muhamed, MP
MP for Wajir South Constituency
Jubilee Party

Hon. Peter Lochakapong, MP
MP for Sigor Constituency
Jubilee Party

Hon. Qalicha Gufu Wario, MP
MP for Moyale Constituency
Jubilee Party

1.4 COMMITTEE SECRETARIAT

5. The Committee is facilitated by the following Secretariat: -

Ms. Leah W. Mwaura
Senior Clerk Assistant/Head of Secretariat

Ms. Jennifer Ndeto
Principal Legal Counsel 1

Ms. Lauren Wesonga
Clerk Assistant II

Mr. Josephat Motonu
Senior Fiscal Analyst

Mr. Chelang'a Maiyo
Research Officer II

2 INTRODUCTION

6. Globally, the dry bulk trade has grown because of the need for raw materials in several important industries such as steel, aluminum and fertilizer manufacture, among others. A large fleet exists to service this trade. As a result, bulk shipping has become a rapidly expanding sector of shipping industry and bulk tonnage now accounts for about three-quarters of the world's merchant fleet.
7. KPA has been having one licensed grain bulk handler that is GBHL operating at berths 3 and 4 at the Port of Mombasa with an exclusive mandate that was initially granted and expired on 15th February, 2008.

Table 1: GRAINS HANDLED BY GBHL FROM 2015 TO 2020

| Years | Total tonnage handled | No. of Ships |
|-----------------------|-----------------------|--------------|
| 2015 | 2,043,680 | 87 |
| 2016 | 1,939,477 | 81 |
| 2017 | 3,087,643 | 101 |
| 2018 | 2,422,890 | 80 |
| 2019 | 2,792,141 | 85 |
| 2020 | 2,181,766 | 79 |
| TOTAL | 14,467,597 | 513 |
| TOTAL AVG/YEAR | 2,411,266 | 85 |

8. Transportation of bulk commodities has undergone a radical change due to the tremendous increase in size and carrying capacity of vessels. This enormous increase in the volume of cargo has emphasized the need for faster and more efficient handling and storage operations, to exploit economies of scale. The scope of global materials handling industry is incredibly varied, from the supply of single pieces of mobile equipment to dedicated turnkey terminals handling millions of tonnes of major bulk commodities annually.

2.1 ESTABLISHMENT OF GRAIN BULK HANDLERS LIMITED

9. The Grain Bulk Handlers Limited (GBHL) is a private limited company incorporated in 2000 to undertake freight and forwarding services with specialty in cereals handling. The Company has installed its equipment at berths 3 and 4 at the Port of Mombasa in Kenya, with the conveyors leading to the storage elsewhere within the precincts of the port.
10. The company owns and operates a specialized bulk discharge and handling terminal for grain imports. GBHL facilities comprise of the following:-
 - i. Vessel handling facility;
 - ii. Bulk transit terminal;
 - iii. A bulk storage terminal;
 - iv. Bagged warehousing; and
 - v. Local transportation.

11. GBHL provides the following services to importers:-
 - i. Discharge of bulk grain vessels;
 - ii. Bulk silos for transit and long term storage;
 - iii. Delivery to road and rail in bulk and bags;
 - iv. Warehousing for bagged cargo for long term storage; and
 - v. Local transportation provided by a fleet of trucks and trailer units for bagged cargo.
12. GBHL draws its clientele from millers, traders, international food relief organizations such as World Food Programme and Non-Governmental Organizations (NGOs) within the region and elsewhere, among others. Importers are charged with the responsibility of cargo clearance and payment of the requisite duty to the Kenya Revenue Authority (KRA).
13. Introduction of the specialized terminal and the operations of the GBHL promoted effective and efficient handling of grain hence reduced the charges levied to importers by shipping companies on the basis of delayed cargo clearance and mainstreamed port operations.

2.2 AGREEMENT BETWEEN KENYA PORTS AUTHORITY AND GBHL

14. The license agreement relating to the handling of grains, cereals and fertilizers in bulk in the Port of Mombasa was signed on 17th December, 2002 between KPA and GBHL. In the agreement, KPA was given the power to supervise some aspects of the operations and activities of GBHL while GBHL agreed to be supervised and regulated by KPA in relation to certain aspects of the operations referred to in the Agreement.
15. In the Agreement, GBHL would operate in berths 3 and 4 and was required to pay KPA a fixed fee of USD 5,000 per annum which would be paid yearly in advance. The fee would be revised after every five years and the new fee payable by GBHL to KPA would be similar to that payable by other operators undertaking the discharge and storage of commodities in bulk from the Port and as published in the Tariff Book. The fee would be paid without any set-off counterclaim or condition whatsoever and free and clear of any deduction or withholding for or on account of taxes except a deduction or withholding for or on account of any present or future tax which GBHL will be required to pay by law.
16. KPA agreed that the ship contracted by GBHL to discharge commodities from or load commodities into shall be given priority access to the berths (or as the case may be, any one of them) provided that KPA's obligation to give priority access to the berths where the ships in question conform to the limitations applicable to the use of the berths (or as the case may be, any one of them) as notified by KPA to all users of the Port from time to time; and where GBHL has informed KPA in writing at least twenty-four (24) hours before the day as of which it is intended that a ship will dock at the berths (or as the case may be, any one of them).
17. KPA committed that it would not license any person for a period of eight (8) years commencing from 15th February, 2000 to construct, develop and/or operate any facility capable of discharging commodities shipped in bulk from a ship docked at any berth in the Port and which commodities after discharge are stored in bulk in silos, warehouses or other similar storage facilities erected on any other land over which KPA or any person controlled by KPA has management or control. KPA would however permit other persons carrying on operations as bagging plant operators on the quayside and undertaking storage of commodities outside the Port.

18. The tariff rate per tonne (or part thereof) of dry general or dry bulk cargo handled at Mbaraki, bulk bitumen handled via bitutainers, soda ash handled via conveyors would be one Dollar and fifty cents (USD 1.50) while the tariff rate (or part thereof) of cargo handled at Mombasa Old Port or Outports or at other than appointed places unless otherwise stated or cargo handled at Mbaraki, soda ash handled via conveyor would be Dollars nought and fifty cents (USD 0.50). Accordingly, the aggregate of the tariff rates would be two Dollars (USD 2) per tonne (or part thereof).
19. In the Agreement, KPA was not to publish or create a separate category of tariff in respect of the handling of commodities through the Terminal and that the tariff rates applicable to the handling of commodities through the Terminal would at all times and from time to time for the purposes of the application of tariff rates by KPA to users of the Port be categorised with and be regarded as being similar to the operations and services that are undertaken by persons other than GBHL as at the date of signing the Agreement.
20. The Agreement was to remain in force for a period of thirty-three (33) years commencing from and including the start date.
21. The Agreement gave GBHL the powers to:-
 - i. discharge commodities from ships docking at the berths pursuant to contractual arrangements between GBHL and its customers;
 - ii. loading of commodities into ships docking at the berths pursuant to contractual arrangements between GBHL and its customers;
 - iii. handling of commodities at the Terminal and areas adjacent to the Terminal including storage warehousing and bagging together with all necessary documentation and accounting pursuant to contractual arrangements between GBHL and its customers; and
 - iv. loading of commodities onto vehicles and railway wagons for delivery to consignees and other cargo handling operations including all necessary documentation and accounting.
22. KPA and GBHL signed the Second Variation of License Agreement in respect of the License Agreement dated 17th December, 2002 and the Variation of License Agreement dated 13th April, 2008.

3 MEETINGS WITH STAKEHOLDERS

23. The Departmental Committee on Finance and National Planning held meetings with stakeholders on Saturday, 21st November, 2020 in order to seek their opinion on the matter under inquiry. The Committee held meetings with:-
- i. Grain Bulk Handlers Limited (GBHL);
 - ii. Cereal Millers Association (CMA);
 - iii. Kenya Ships Agents Association, Kenya Transporters Association and Kenya Freight Forwarders Association; and
 - iv. Kenya Ports Authority (KPA)
24. The stakeholders submitted as follows:-

3.1 GRAIN BULK HANDLERS LIMITED

In their submission, GBHL stated that:-

25. GBHL was established in 1999 and operationalised in 2000 with the mandate of discharge, storage, bagging or delivery of shipped goods to their clients in Kenya and the Great Lakes Region. Some of its clients include World Food Programme (WFP) and United States Agency for International Development (USAID).
26. Operationalisation of GBHL reduced the amount of spillages experienced when offloading goods from ships hence reducing loss to clients. It also reduced the time that vessels spend at the Port from two weeks to between three and five days hence reducing the demurrage charges paid by its clients and congestion at the Port.
27. GBHL signed two agreements with KPA, the Wayleave Agreement which was signed in 1992 for a period of forty-five (45) years and it gave GBHL authority to pass their conveyor belts on KPA's land; and the License Agreement signed in 2000 for a period of thirty-three (33) years from 1999 which governs the operations of GBHL. In the License Agreement, GBHL is supposed to pay KPA USD 3.85 per tonne handled at the Port. GBHL charges USD 13.5 per tonne in bag and USD 16.5 per tonne in bulk to its clients.
28. GBHL recognized the need to revolutionize the handling of bulk grain and fertilizer imports at the Port of Mombasa. The ambitious project was conceived at a time when the handling of bulk grain imports at Mombasa involved combined use of grabs, vacuators and mobile bagging plants situated at the quayside.
29. This mode of handling was characterized by low vessel discharge rates, heavy spillage during discharge operations, heavy dust emission and poor accounting for discharged quantities thus making the port very expensive for bulk grain importers as well as ship operators/owners.
30. GBHL receives deliveries of bulk cereal imports from around the world at the port of Mombasa in order to meet the ever-increasing demand from millers, traders, NGOs and relief agencies in East and Central Africa, including Great Lakes, Southern Sudan and Somalia.
31. The Company has a storage capacity of 200,000 metric tonnes at the Port of Mombasa and 125,000 metric tonnes at the Nairobi Inland Container Depot. At inception, they handled about 400,000 metric tonnes of grain which has since increased to about 2.7 million metric tonnes in 2019 (an increase of about 7%).

3.2 CEREAL MILLERS ASSOCIATION

In their submission, CMA stated that:-

32. Cereal Millers Association was registered in the year 2000 and operationalized in 2007. It represents 40% of the cereal market in Kenya. There are one hundred and fifty six (156) maize millers and fifty six (56) wheat millers in Kenya.
33. There is a deficit of between 2 million to 2.7 million metric tonnes of wheat in Kenya per annum and there are times when maize is also imported when there is a shortage. It is because of these large amounts of grain imports that CMA recommended that there should be more grain handling companies at the Port of Mombasa because having one handler has led to delays in clearance of cereals and payment of high demurrage charges by clients.
34. GBHL was the only company licensed to handle grains at the Port from the year 2008 to 2009. Additionally, the rates charged to GBHL by KPA were lower than those charged to other conventional handlers and this makes it difficult for other handlers to penetrate the market.
35. KPA Board had approved the licensing of a second grain handling company but KPA was yet to issue the license.

3.3 KENYA SHIPS AGENTS ASSOCIATION, KENYA TRANSPORTERS ASSOCIATION AND KENYA FREIGHT FORWARDERS ASSOCIATION

In their submission, they noted that:-

36. The cost of transportation in Kenya was very high and this was occasioned by cess fees charged by when goods are being ferried across the counties, multiple licenses, unharmonised parking fees among others. The situation has really made road transportation expensive with the attendant cost being passed over to the final consumer.
37. There is need to increase rolling stock by both KPA and GBHL. KPA offered nine free storage days while GBHL offered seven free storage days. The free storage days should be increased in order to make the Port attractive to importers. The regional tracking seals and KRA staff should be increased in order to reduce clearance time at the Port.
38. A lot of emphasis is placed on the use of the Standard Gauge Railway (SGR) as opposed to trucks and this denies trucks business. The market has been monopolised by multinational companies which is against the provision of section 16 of the Merchant Shipping Act, 2009.
39. The government agencies stationed at the Port of Mombasa should be harmonised with a view of avoiding overlapping mandates which results in delayed clearance of goods at the Port.

3.4 KENYA PORTS AUTHORITY

In their submission, KPA stated that:-

40. M/s Grain Bulk Handling Limited holds a lease, way-leave and license agreements from KPA for purposes of bulk grain handling from berth 3 and 4 through an overhead conveyor running across the Port area to their facility outside the Port area at Shimanzi. The original owners of GBHL were Jaffer and Jaffer Limited who changed its name to Grain Bulk Handlers Ltd in 1994 (herein referred to as GBHL).

41. The GBHL facility concept was shared with KPA in 1984 when they sought Way leave to put up a conveyor belt system to the port quay for handling and storage of bulk grain. The Wayleave was granted and concluded in December 1992. The construction of the GBHL facility commenced in December, 1998 and completed in February 2000.
42. From inception the GBHL are multi - user service provider working for other parties on a tariff basis and as per the Agreement GBHL was given a duration of thirty three years from February 2000 with a Fixed fee of USD\$ 5,000.00 per annum payable yearly in advance and revisable every 5 years.
43. The GBHL chartered or ship agents appointed were also to be given priority access to berths 3 and 4. In addition, KPA was not to allow or permit or license any other person to develop or operate a similar facility for a period of 8 years from 15th February, 2000. This was so because it would not be economically rational to create additional capacity and the period was necessary for GBHL to recoup their investment of infrastructure.
44. In February 2008, the exclusivity expired and the KPA Board resolved on 30th April, 2008 that the handling of grain at the Port be liberalized to eliminate monopoly and promote healthy competition. KPA began the process of tendering for a second grain handler but the government cancelled the process for further stakeholder consultation. KPA Board however resolved to license a second grain handler and this will be done by the year 2022.
45. GBHL remains as main grain bulk handler at 98% of the grain imported into the country through the Port of Mombasa.
46. Other players such as Kilindini Terminals limited have applied for a way leave for grain bulk handling. Their proposal is being reviewed to establish viability and optimal location.
47. GBHL pays KPA USD 3.85 per tonne of grains that they handle. The last tariff review was done in 2012 and the next one will be done soon. Other conventional operators pay a tariff of USD 10.4. The table below shows the application of tariff payable to KPA.

APPLICATION OF TARIFFS (PAYABLE TO KPA)

48. Table 2: GBHL rates per ton or part thereof from February 2000 to 1st July 2008:-

| Item | Tariff Rate (USD) |
|---------------|-------------------|
| Stevedoring | 1.50 |
| Shorehandling | 0.50 |
| TOTAL | 2.00 |

49. Table 3: Quayside bulk grain handling operators rates per ton or part thereof for the same period:-

| Item | Tariff Rate (USD) |
|---------------|-------------------|
| Stevedoring | 6.00 |
| Shorehandling | 5.00 |
| TOTAL | 11.00 |

50. The rates were adjusted marginally in 2008 and in 2012 and approved by the Government through the Minister for Transport.

51. GBHL rates per ton or part thereof:-

| Item | Tariff Rate (USD) |
|--------------|-------------------|
| Stevedoring | 1.65 |
| Wharfage | 2.20 |
| TOTAL | 3.85 |

52. Quayside bagging and using own equipment rates per ton or part thereof:-

| Item | Tariff Rate (USD) |
|--------------|-------------------|
| Stevedoring | 4.40 |
| Bagging | 1.00 |
| Wharfage | 5.00 |
| TOTAL | 10.40 |

53. The rationale for the above charges is because KPA tariffs are structured on a through cost-plus-basis giving cognizance to the resource utilization and appropriate profit margin.

54. The difference between GBHL charges and conventional bulk handling is USD 6.55 (10.40-3.85). GBHL benefits from its investment which provide for a more efficient and cost effective handling.

55. Grain Millers pay a handling fee of USD 16 per ton when grains are collected from GBHL. GBHL provides free seven (7) days storage and thereafter pay USD 0.13 per ton per day.

56. It is also noted that GBHL charges to millers exceed what would be paid if the grains were collected directly from KPA by USD 5.6 (16 to 10.4). Since it is a competitive market, millers could be enjoying other advantages at GBHL and hence not collecting their grains from KPA conventional handling methods. *and due advantage to export millers.*

57. In terms of grains handled by GBHL from 2015 to 2020 a total tonnage handled was 14,467,597 tonnes with total number of being five hundred and thirteen (513) as shown in the table below:-

| Years | Total tonnage handled | No. Of Ships |
|-----------------------|-----------------------|--------------|
| 2015 | 2,043,680 | 87 |
| 2016 | 1,939,477 | 81 |
| 2017 | 3,087,643 | 101 |
| 2018 | 2,422,890 | 80 |
| 2019 | 2,792,141 | 85 |
| 2020 | 2,181,766 | 79 |
| TOTAL | 14,467,597 | 513 |
| TOTAL AVG/YEAR | 2,411,266 | 85 |

58. GBHL has a storage capacity of 220,700 tonnes in Mombasa and Nairobi at 134,000 tonnes, with this capacity and calculated with 20 days free storage their annual throughput capacity for Mombasa alone is approximately 4.027 million tonnes.
59. There has been other applicants who have expressed interest in build and operate a specialized dry bulk discharge and handling terminal for grains at the Port of Mombasa including Kilindini Terminals Limited, Kapa Oil Refinery, Africa Ports and Terminals, Multiship International, Kipevu Inland Container EPZ Limited,

4 COMMITTEES' OBSERVATIONS

Following the inspection visit to the Port of Mombasa and from the stakeholders' submissions, the Committee observed that:-

60. Cargo throughput at the Port of Mombasa has been rising over the years driven by the corresponding economic growth of countries that use the port for import and export.
61. Kenya Ports Authority through the Wayleave Agreement of 1992 for a period of forty-five (45) years and a License Agreement entered in 2000 for a period of thirty-three (33) years designated berths 3 and 4 to GBHL to handle grain bulk vessel discharge alongside the conventional dry grain and fertilizer handling that utilize grabs for bagged cargo.
62. GBHL is a private company which commenced operations in 2000 and solely operates a specialized terminal (berths 3 and 4) for handling bulk grain imports and is the sole operator for mechanical bulk grain handling at the Port of Mombasa.
63. GBHL facilities comprise of a vessel handling facility, a bulk transit terminal, a bulk storage terminal bagged warehousing and local transportation services.
64. Terminal/berths 3 and 4 are designated to GBHL but occasionally, the berth serves as a common user facility for purposes of discharging other vessels when idle.
65. The Port of Mombasa has limited berths for handling specialized cargo including dry bulk grain discharge, this shortage is attributed to the congestion experienced at the Port especially during emergency, surge in importation and or humanitarian crisis.
66. Kenya Ports Authority is responsible for providing the critical infrastructure to support the berthing of grain bulk whereas GBHL has installed equipment for discharge of grain vessels and storage facilities.
67. Grain and bulk handling at the Port is done either through GBHL vide conveyor from the port to silos outside the Port; or conventionally by bagging vide grabs onto bagging plants alongside ships and loaded to trucks.
68. Conventional grain bagging is mainly done where there is excess demand for vessel discharge resulting from long queues of ships awaiting clearance hence waiting time and demurrage charges are not deemed economical.
69. GBHL uses highly mechanized systems with dust suppression filters which has resulted in reduced dust emission to the environment, shorter ship dwell times and reduced cargo wastage.
70. GBHL dry bulk handling terminal in Nairobi is complete with a storage capacity of 134, 000 M/T of cargo, the terminal is adjacent to the Athi SGR station. The two institutions entered into a lease agreement on 25th November, 2018 with the aim of allowing GBHL to reside and conduct dry bulk handling without hindrance. The Nairobi terminal is responsible for non-food products such as clinker, coal and fertilizer.

71. The current rates payable for grain bulk handling under the GBHL service is USD 3.85 per M/T as provided for in the KPA Tariff Book while conventional grain bulk handlers are charged USD 10.4 per M/T. This price differentiation has presented a technical barrier to trade and competition.
72. The projected annual growth in grain handling at the Port of Mombasa is 7%. In 2019, the vessel discharge was at 2.7 million metric tonnes compared to 400,000 metric tonnes in 2000.
73. The License Agreement between KPA and GBHL covers a period of 33 years from the signing period in 2000 and the Agreement provides that GBHL will be granted exclusive operation for a period of 8 years from 2000 to allow her recoup expenditure before exploring the licensing of another grain bulk handler at the Port of Mombasa.
74. Kilindini Terminals Ltd (KTL) was granted wayleave subject to several conditions however, according to KPA, KTL has not responded to KPA on the same. KTL have proposed variation of their initial application to change location from berth 11 to berth 5 which has a width of 76 meters while a vessel has an average length of 200 meters making it inadequate for use.

5 COMMITTEE RECOMMENDATIONS

From the above observations, the Committee recommends that:-

75. In order to optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.
76. The process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability.
77. Under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone (SEZ), the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public Private Partnerships (PPPs) framework.
78. To promote efficiency in grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing on the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment.
79. KPA should continue investing including through the PPP framework in expansion of the Port facility to accommodate more berths to meet the growing demand within the region.

SIGNED.....

DATE.....

26th November 2020


HON. GLADYS WANGA, CBS, MP
CHAIRPERSON

DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING

MINUTES OF THE 59TH SITTING OF THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING HELD IN 5TH FLOOR, CONTINENTAL HOUSE ON WEDNESDAY, 25TH NOVEMBER, 2020 AT 02.00 PM

PRESENT

1. Hon. Gladys Wanga, MP - **Chairperson**
2. Hon. Isaac W. Ndirangu, MP - **Vice Chairperson**
3. Hon. Jimmy O. Angwenyi, MGH, MP
4. Hon. Christopher Omulele, MP
5. Hon. Shakeel Shabbir Ahmed, CBS, MP
6. Hon. (Dr.) Christine Ombaka, MP
7. Hon. David M. Mboni, MP
8. Hon. Joseph M. Oyula, MP
9. Hon. Joshua C. Kandie, MP
10. Hon. Edith Nyenze, MP
11. Hon. Catherine Waruguru, MP
12. Hon. James Gichuhi Mwangi, MP
13. Hon. Peter Lochakapong, MP
14. Hon. Qalicha Gufu Wario, MP

ABSENT WITH APOLOGY

1. Hon. Daniel E. Nanok, MP
2. Hon. Andrew A. Okuome, MP
3. Hon. Francis K. Kimani, MP
4. Hon. Stanley M. Muthama, MP
5. Hon. (Prof.) Mohamud Sheikh Mohamed, MP

INATTENDANCE

SECRETARIAT

1. Ms. Leah Mwaura - Senior Clerk Assistant/Head of Secretariat
2. Ms. Lauren Wesonga - Clerk Assistant II
3. Mr. Chelang'a Maiyo - Research Officer II
4. Mr. John Njoro - Serjeant-At-Arms
5. Ms. Mercyline Kerubo - Audio Officer

AGENDA

1. Prayers
2. Communication from the Chairperson
3. Confirmation of Minutes
4. Matters Arising
5. **Meeting to consider and adopt the following reports:-**
 - i. **Report on the inspection visits to KRA Offices to ascertain the impact of revenue enhancement initiatives on revenue collection; and**
 - ii. **Report on the optimization of revenue in grain handling services at the Port of Mombasa.**
6. Adjournment/Date of the next meeting

MIN.NO.NA/F&NP/2020/283: COMMUNICATION FROM CHAIRPERSON

The meeting was called to order at 02.30 p.m. and a prayer was said. The Chairperson then welcomed the meeting to deliberate on the day's agenda.

MIN.NO.NA/F&NP/2020/284: CONFIRMATION OF MINUTES

Agenda deferred

MIN.NO.NA/F&NP/2020/285: CONSIDERATION AND ADOPTION OF THE REPORT ON THE INSPECTION VISITS TO KRA OFFICES TO ASCERTAIN THE IMPACT OF REVENUE ENHANCEMENT INITIATIVES ON REVENUE COLLECTION

The Committee considered the report and adopted it having been proposed and seconded by Hon. Shakeel Shabbir, CBS, MP and Hon. James Gichuhi, MP respectively. The Committee agreed on the following observations and recommendations:-

COMMITTEES' OBSERVATIONS

Following the inspection visits to KRA Offices and OSBPS, the Committee observed that:-

1. Revenue collection points installed with scanners collect more revenue compared to those without scanners but with high traffic. For instance, the Malaba OSBP which is busier than the Namanga OSBP managed to collect revenue of KSh. 2 billion in the FY 2019/20 compared to Namanga which collected KSh. 4 billion in the same FY;
2. Automation of systems has enhanced revenue collection by KRA as there is less human intervention and increased information sharing between the regional offices and with the Times tower centralized monitoring centre;
3. KRA is understaffed with four thousand five hundred (4500) permanent and pensionable staff and one thousand eight hundred (1800) under contract terms. This understaffing has resulted in revenue underperformance due to inadequate staff complement; posing a challenge on service delivery;
4. The Malaba OSBPs lacks decent staff housing forcing the staff to travel long distances to and from work which reduces productivity and puts them in an awkward position where they have to seek accommodation in houses owned by smugglers thereby compromising their integrity;
5. There was huge potential of revenue increase if the OSBPs were made to operate 24hours as it will ease of doing business since there is no limitations of working hours. Traders are able to import and export more. The 24hr operations will also ease congestion as the operating hours will be flexible;
6. KRA installed in Regional Electronic Cargo Tracking Seals (RECTS) where all containerized Transit Cargo & Single Customs Territory (SCT) goods from the port, and excisable goods are tracked under the Regional Electronic Cargo Tracking System (RECTS) Seals. The installation of the cargo tracking system has greatly minimized cases of corruption and theft of goods on transit as there is less or no human intervention and thus improved transparency due to real time information sharing. Before the RECTS, KRA was forced to escort trucks physically to ensure that they reach destination as declared. However, the cargo tracking devices are very few with the Inland Container Deport having only five thousand (5,000) seals). The lack of enough seals has created backlog at the Port of Mombasa and hence the need to invest in additional RECTS;
7. The lack of harmonization of tax on commodities between Kenya and her neighbors has encouraged smuggling of goods into the country especially alcoholic and soft drinks. For

instance, the excise duty payable on alcoholic and soft drinks in Tanzania is relatively lower in comparison to the excise duty charged in Kenya. This has resulted in unscrupulous traders preferring to smuggle the items through the long and porous Kenya-Tanzania Border;

8. The introduction of 10% import duty on non-East African countries has resulted in a decrease in volumes of hardwood imported into Kenya and this may lead to deforestation in the country; and reduction in revenue;
9. There is need to re-examine the Special Economic Zones policy in Kenya and carry out a comparative study between the SEZ policy in Uganda and Rwanda as there were reports of some businesses relocating to these two countries chiefly because of favorable policies and ease of doing business;
10. The cost of electricity for manufacturers in Kenya is high compared to Uganda which has lower prices for electricity in the industrial zones making it a preferred business destination. This could be seen by the increase in the number of manufactured products being imported from Uganda to Kenya e.g. tiles and steel bars;
11. The Malaba OSBP was poorly designed with no parking space for trucks leading to long queues of trucks, the buildings were dilapidated, the paths were not paved and there was no standby generator in case of power failure;
12. The Malaba OSBP had no clean water and the only water available was being pumped from river Malaba for use in sanitation. The contractor did not carry out a feasibility study to assess whether there was a potential for drilling a borehole to supply water to the OSBP;
13. Kenya Ports Authority had twenty-two (22) acres of unutilized land close to the Malaba OSBP that can be utilized for parking of trucks and this will go along in reducing traffic congestion;
14. The road leading to the Busia OSBP was narrow and dilapidated and this leads to long queues of trucks including those carrying explosive material posing a risk in case of an explosion given that there were no fire extinguishers in Busia County;
15. The speedboats used by KRA for surveillance at the Port of Mombasa are old and are unable to effectively monitor illegal activities in the waters and apprehend the tax evaders;
16. All OSBPs did not have coolers in their warehouses hence goods stored awaiting clearance go bad quickly;
17. The long and porous border between Kenya and her Tanzania and Uganda continue to encourage smuggling as the Multi agency teams are unable to provide security surveillance. The cross-border trade continues to undermine revenue collection as the traders use these illegal and unmanned routes.

COMMITTEE RECOMMENDATIONS

From the above observations, the Committee recommends that:-

1. Kenya Revenue Authority should immediately install drive-through scanners and in addition consider purchasing mobile scanners for bulk cargo and smart gates for all One Stop Border Posts. Parliament, through the Departmental Committee on Finance and National Planning should provide this budgetary requirement to be factored through the Supplementary Estimates I 2020/21 with priority on Malaba and Busia One Stop Border Posts and in the long term ensure all OSBPs are adequately equipped with drive-through scanners, mobile scanners for bulk cargo and smart gates;

2. The Kenya Revenue Authority is grossly understaffed at 4500 permanent staff and 1800 staff on contract. The National Treasury should allocate additional funds under the Supplementary Estimates I for 2020/21 to employ additional 2000 staff;
3. The Cabinet Secretary, National Treasury and the Commissioner General, Kenya Revenue Authority, should work out ways of operationalizing all One Stop Border Posts to operate 24 hours a day by the end of the year 2021. There is need for regional diplomatic engagement between Kenya and her neighbors to ensure necessary infrastructure is put in place to facilitate 24 hour operations;
4. The National Treasury should engage with Ministries of Finance in the East African Region during the budget cycle for the FY 2021/2022 in order to harmonize the excise duty charged by respective countries;
5. The Cabinet Secretary for National Treasury should direct Kenya Ports Authority to transfer land owned by Kenya Ports Authority in Malaba to Kenya Revenue Authority for purposes of building a truck parking facility. Once the transfer is done, Treasury should source funding to build the parking facility before the end of 2021;
6. The Cabinet Secretary, National Treasury should provide a report to Parliament on the Status of Special Economic Zone on how they compete with the rest of the East African countries within sixty days upon adoption of the report;
7. The Cabinet Secretary Ministry of Industrialization, Trade and Cooperatives should establish industrial zones where, in consultation with the Cabinet Secretary, Ministry of Energy the cost of electricity shall be subsidized in order to attract investment in the manufacturing sector; Provide a status report on the establishment of industrial zones and the progress made in establishing the same;
8. The National Treasury in consultation with the Departmental Committee on Finance and National Planning should review Tax Laws in the country in order to promote ease of doing business in the country. The amendments should be introduced in the Finance Bill, 2021;
9. The Commissioner General, KRA should include the purchase of regional electronic cargo seals in the Authority's budgets for the Financial years 2021/2022; 2022/2023; and 2023/2024;
10. To effectively combat illegal trade and tax evasion at the Ports of Mombasa and Kisumu, Parliament should allocate funds in Kenya Revenue Authority's budget for the FY 2021/2022 for the purchase of speedboats;
11. Kenya Revenue Authority should budget and purchase cold storage equipment in all One Stop Border Posts to ensure that goods stored in the warehouses are kept in the right conditions before they are dispatched; and
12. Feasibility studies should be carried out to find out the viability of establishing a border post at Shompole as the long and porous border between Namanga and Isebania One Stop Border Posts poses a greater avenue for tax evaders.

**MIN.NO.NA/F&NP/2020/286: CONSIDERATION AND ADOPTION OF THE
REPORT ON THE OPTIMIZATION OF REVENUE
IN GRAIN HANDLING SERVICES AT THE PORT
OF MOMBASA**

The Committee considered the report and adopted it having been proposed and seconded by Hon. Edith Nyenze, MP and Hon. Qalicha Wario, MP respectively. The Committee agreed on the following observations and recommendations:-

COMMITTEES' OBSERVATIONS

Following the inspection visit to the Port of Mombasa and from the stakeholders' submissions, the Committee observed that:-

1. Cargo throughput at the Port of Mombasa has been rising over the years driven by the corresponding economic growth of countries that use the port for import and export.
2. Kenya Ports Authority through the Wayleave Agreement of 1992 for a period of forty-five (45) years and a License Agreement entered in 2000 for a period of thirty-three (33) years designated berths 3 and 4 to GBHL to handle grain bulk vessel discharge alongside the conventional dry grain and fertilizer handling that utilize grabs for bagged cargo.
3. GBHL is a private company which commenced operations in 2000 and solely operates a specialized terminal (berths 3 and 4) for handling bulk grain imports and is the sole operator for mechanical bulk grain handling at the Port of Mombasa.
4. GBHL facilities comprise of a vessel handling facility, a bulk transit terminal, a bulk storage terminal bagged warehousing and local transportation services.
5. Terminal/berths 3 and 4 are designated to GBHL but occasionally, the berth serves as a common user facility for purposes of discharging other vessels when idle.
6. The Port of Mombasa has limited berths for handling specialized cargo including dry bulk grain discharge, this shortage is attributed to the congestion experienced at the Port especially during emergency, surge in importation and or humanitarian crisis.
7. Kenya Ports Authority is responsible for providing the critical infrastructure to support the berthing of grain bulk whereas GBHL has installed equipment for discharge of grain vessels and storage facilities.
8. Grain and bulk handling at the Port is done either through GBHL vide conveyor from the port to silos outside the Port; or conventionally by bagging vide grabs onto bagging plants alongside ships and loaded to trucks.
9. Conventional grain bagging is mainly done where there is excess demand for vessel discharge resulting from long queues of ships awaiting clearance hence waiting time and demurrage charges are not deemed economical.
10. GBHL uses highly mechanized systems with dust suppression filters which has resulted in reduced dust emission to the environment, shorter ship dwell times and reduced cargo wastage.
11. GBHL dry bulk handling terminal in Nairobi is complete with a storage capacity of 134,000 M/T of cargo, the terminal is adjacent to the Athi SGR station. The two institutions entered into a lease agreement on 25th November, 2018 with the aim of allowing GBHL to reside and conduct dry bulk handling without hindrance. The Nairobi terminal is responsible for non-food products such as clinker, coal and fertilizer.
12. The current rates payable for grain bulk handling under the GBHL service is USD 3.85 per M/T as provided for in the KPA Tariff Book while conventional grain bulk handlers are charged USD 10.4 per M/T. This price differentiation has presented a technical barrier to trade and competition.
13. The projected annual growth in grain handling at the Port of Mombasa is 7%. In 2019, the vessel discharge was at 2.7 million metric tonnes compared to 400,000 metric tonnes in 2000.
14. The License Agreement between KPA and GBHL covers a period of 33 years from the signing period in 2000 and the Agreement provides that GBHL will be granted exclusive operation for a period of 8 years from 2000 to allow her recoup expenditure before exploring the licensing of another grain bulk handler at the Port of Mombasa.
15. Kilindini Terminals Ltd (KTL) was granted wayleave subject to several conditions however, according to KPA, KTL has not responded to KPA on the same. KTL have

proposed variation of their initial application to change location from berth 11 to berth 5 which has a width of 76 meters while a vessel has an average length of 200 meters making it inadequate for use.

COMMITTEE RECOMMENDATIONS

From the above observations, the Committee recommends that:-

1. In order to optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.
2. The process of appointing new operator(s) for the grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, 2015 to ensure non-discrimination and accountability.
3. Under the KPA Master Plan of 2018 to 2047, KPA needs to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone (SEZ), the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public Private Partnerships (PPPs) framework.
4. In order to promote efficiency in grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage in technology while maximizing on the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment.
5. KPA should continue investing including through the PPP framework in expansion of the Port facility to accommodate more berths to meet the growing demand within the region.

MIN.NO.NA/F&NP/2020/287: ADJOURNMENT/DATE OF NEXT MEETING

There being no other business to deliberate on, the meeting was adjourned at 04.08 p.m. The next meeting will be held on Tuesday, 1st December, 2020 at 10.00 a.m.

HON. GLADYS WANGA, CBS, MP
(CHAIRPERSON)

SIGNED..........DATE.....26th November 2020.....

REPUBLIC OF KENYA



THE NATIONAL ASSEMBLY

DEPARTMENTAL COMMITTEE ON FINANCE & NATIONAL PLANNING
ADOPTION SCHEDULE FOR THE REPORT ON THE OPTIMIZATION OF REVENUE IN GRAIN
HANDLING SERVICES AT THE PORT OF MOMBASA

DATE: 25TH NOVEMBER, 2020

| NAME | SIGNATURE |
|--|-----------|
| 1. HON. GLADYS WANGA, CBS, MP – CHAIRPERSON | |
| 2. HON. ISAAC W. NDIRANGU, MP – VICE-CHAIRPERSON | |
| 3. HON. JIMMY N. O. ANGWENYI, MGH, MP | Virtual |
| 4. HON. CHRISTOPHER OMULELE, MP | Virtual |
| 5. HON. SHAKEEL SHABBIR AHMED, CBS, MP | |
| 6. HON. DANIEL E. NANOK, MP | |
| 7. HON. (DR.) CHRISTINE OMBAKA, MP | Chubaka. |
| 8. HON. ANDREW A. OKUOME, MP | |
| 9. HON. DAVID M. MBONI, MP | |
| 10. HON. FRANCIS KURIA KIMANI, MP | |
| 11. HON. JOSEPH M. OYULA, MP | |
| 12. HON. JOSHUA KANDIE, MP | |
| 13. HON. STANLEY M. MUTHAMA, MP | |
| 14. HON. EDITH NYENZE, MP | |
| 15. HON. CATHERINE WARUGURU, MP | Virtual |
| 16. HON. JAMES GICHUHI MWANGI, MP | |
| 17. HON. (PROF.) MOHAMUD SHEIKH MOHAMED, MP | |
| 18. HON. PETER LOCHAKAPONG, MP | |
| 19. HON. QALICHA GUFU WARIO, MP | |

Dated as of the

13th day of November

, 2018

KENYA PORTS AUTHORITY

- And -

GRAIN BULK HANDLERS LIMITED

SECOND VARIATION OF LICENCE AGREEMENT

In respect of the Licence Agreement dated 17th December 2002 and the Variation of Licence Agreement dated 13th April 2018

This Second Variation of Licence Agreement is made as of the 13th day of Nov 2018

BETWEEN:

KENYA PORTS AUTHORITY, a body corporate with perpetual succession established under the Kenya Ports Authority Act (Cap. 391) for the purpose hereof, of Post Office Box Number 95009 – 80104, Mombasa (hereinafter referred to as “KPA” which expression shall, where the context so requires, include KPA’s successors in title and permitted assigns); and

GRAIN BULK HANDLERS LIMITED, (Company Number C. 18094) a private liability company incorporated in the Republic of Kenya and of Post Office Box 80469 - 80100, Mombasa (hereinafter referred to as “Company” which expression, where the content so requires includes the Company’s successors in title and permitted assigns)

Each hereinafter, referred to individually as a “Party” and collectively as the “Parties”.

WHEREAS:

- (A) The Parties hereto entered into a Licence Agreement (“Licence Agreement”) dated 17th December 2002 relating to handing of grains cereals and fertilizer in bulk in the Port of Mombasa and the Licence Agreement was varied by the Variation of Licence Agreement (“Variation of Licence Agreement”) dated 13th April, 2018.
- (B) The Parties hereto have agreed to further amend and vary the Licence Agreement and the Variation of Licence Agreement on the terms and conditions set out in this Second Variation of Licence Agreement and to make provision for certain additional matters as stipulated hereunder;
- (C) The Parties have agreed that this Second Variation of Licence Agreement shall form and be construed as being part of the Licence Agreement and the Variation of Licence Agreement.

IN CONSIDERATION of the due and punctual performance of the Company of the covenants and agreements in this Second Variation of Licence Agreement and as further consideration of the payment by the Company to KPA the sums of Kenya Shillings Thirty thousand (Kshs. 30,000/-) (receipt whereof is hereby acknowledged by KPA); now it is hereby agreed that with effect on and from the date hereof the Licence Agreement and the Variation of Licence Agreement shall be amended and varied as follows;



1. **DEFINITIONS**

1.1 Words and expressions defined in the Licence Agreement and Variation of Licence Agreement shall bear the same meanings ascribed to them in the Licence Agreement and the Variation of Licence Agreement wherever used in this Second Variation of Licence Agreement (including the recitals to this Second Variation of Licence Agreement) unless the context otherwise requires.

2. **VARIATION**

2.1 It is hereby agreed by the Parties that with effect on and from the date hereof, the Licence Agreement and the Variation of Licence Agreement shall be amended and varied in the following manner:

2.2 By deleting the entire definition of "Berths" and replacing it with "*Berths*" means the two adjacent berths at the Port known as "*Berth No. 3 and Berth No. 4* measuring a total length of 437 meters from Bollard Number 15 to 34".

2.3 By inserting on the definition of "Wayleave Agreement" to include "the Third Variation Agreement dated 13th of November 2018 and made between KPA and GBHL to read as follows "Wayleave Agreement" means the wayleave agreement dated 24th December, 1992 and made between KPA and GBHL (previously known as jaffer & jaffer Limited) (as amended by the variation agreement dated 6th March, 1998 made between KPA and GBHL), Second Variation Agreement dated 13th April 2018 made between KPA and GBHL and (further amended by the Third Variation Agreement dated 13th day of November 2018 made between KPA and GBHL).

3. **EFFECT OF THE VARIATION ON LICENCE AGREEMENT**

3.1 Save as hereinbefore expressly stated the Licence Agreement and the Variation of Licence Agreement shall continue in full force and effect and all references in the Licence Agreement and the Variation of Licence Agreement to "this Agreement" shall be construed as references to the Licence Agreement and Variation of Licence Agreement as amended and varied by this Second Variation of Licence Agreement.

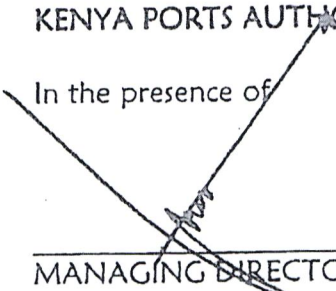
3.2 Where there are any inconsistencies between this Second Variation of Licence Agreement and the Licence Agreement and the Variation of Licence Agreement the terms of this Second Variation of Licence Agreement shall prevail.

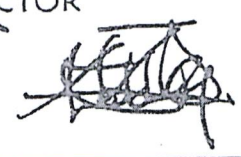
IN WITNESS WHEREOF, this Agreement has been executed by the duly authorized representatives of each Party as of the date first written above.

EXECUTION


SEALED with the Common Seal of
KENYA PORTS AUTHORITY


In the presence of

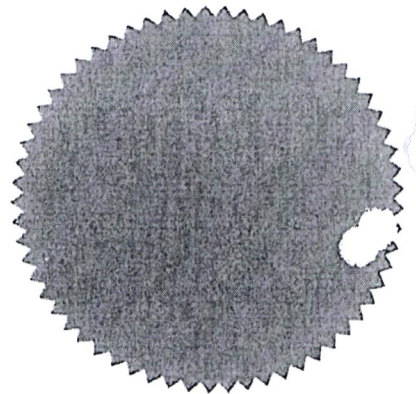
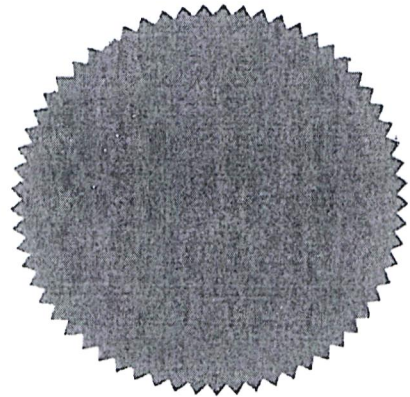

MANAGING DIRECTOR


DIRECTOR/SECRETARY

SEALED with the Common Seal of
GRAIN BULK HANDLERS LIMITED
In the Presence of


MANAGING DIRECTOR


DIRECTOR/SECRETARY



REPUBLIC OF KENYA
MINISTRY OF DOCUMENTS
Nairobi

11th NOVEMBER 2018
153 843 1885 1637
13956


S. K. Mwangi 503

(13)

Dated as of the 17TH day of DECEMBER, 2002

KENYA PORTS AUTHORITY

- and -

GRAIN BULK HANDLERS LIMITED

LICENCE AGREEMENT

relating to the handling of grains cereals and
fertilisers in bulk
in the Port of Mombasa

\$

17 2:30
This Agreement is made as of the 17 day of DECEMBER, 2017

BETWEEN:

1. KENYA PORTS AUTHORITY, a body corporate with perpetual succession established under The Kenya Ports Authority Act (Cap. 391) for the purposes hereof of Post Office Box Number 95009, Mombasa (hereinafter referred to as "KPA" which expression shall, where the context so requires, include KPA's successors in title and permitted assigns); and
2. GRAIN BULK HANDLERS LIMITED (Company Number C.18094) a private limited liability company incorporated in the Republic of Kenya of Post Office Box Number 80469, Mombasa (hereinafter referred to as "GBHL" which expression shall, where the context so requires, include GBHL's successors in title and permitted assigns).

WHEREAS:

- (A) GBHL presently undertakes the Operations at and adjacent to the Port.
- (B) KPA wishes to supervise and regulate certain aspects of the Operations and activities relating thereto.
- (C) GBHL has agreed to be supervised and regulated by KPA in relation to certain aspects of the Operations referred to in this Agreement and on the terms and conditions set out in this Agreement.

IT IS HEREBY AGREED as follows:

1. DEFINITIONS AND INTERPRETATION

- 1.1 In this Agreement (including the recitals of this Agreement) the following expressions shall, unless the context otherwise requires, have the meanings:

"Act" means The Kenya Ports Authority Act (Chapter 391, laws of Kenya);

"Berths" means the two adjacent berths at the Port known as "Berth No. 3" and "Berth No. 4";

"Business Day" means a day (other than a Saturday Sunday or gazetted public holiday in Kenya) on which banking institutions are generally open for the conduct of banking business in Kenya;

"Commodities" means maize rice wheat and other types of grains and cereals and fertilisers;

"Fee" means the fee payable by GBHL to KPA pursuant to Section 2;



"GBHL Charges" means the rates at which GBHL levies charges to its customers for undertaking the Operations on behalf of its customers;

"Land" means the leasehold interest comprised in Title Numbers: Mombasa/Block I/400, 494 and 1948 of which GBHL is the registered proprietor;

"Lease" means the instrument of lease dated 4th November, 1994 and made between KPA and GBHL (previously known as Jaffer & Jaffer Limited) (as amended by a variation of lease dated 6th March, 1998 and made between KPA and GBHL) pursuant to which KPA leased the land comprised in Title Number: Mombasa/Block I/400 to GBHL;

"Operations" means the services and other activities including the discharge handling storage warehousing loading and unloading of Commodities all as more particularly described in Schedule 1;

"Port" means the Port of Kilindini, Mombasa;

"Quayside" means the area abutting the Berths and commonly referred to as the quayside of the Berths;

"Service Levels" mean the performance and other standards set out in Schedule 2;

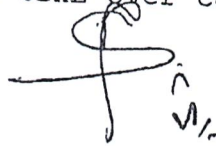
"Ships" means vessel docking at the Berths for the purpose of discharging and/or loading of Commodities;

"Start Date" means the date of this Agreement;

"Tariff Book" means the document known as the "Tariff Book of Harbour Dues and Charges" and published by KPA pursuant to section 30 of the Act;

"Terminal" means the integrated facility for the storage and handling of, inter alia, Commodities in bulk erected by GBHL on the Land together with the mechanical conveyor system referred to in the Wayleave Agreement; and

"Wayleave Agreement" means the wayleave agreement dated 24th December, 1992 and made between KPA and GBHL (previously known as Jaffer & Jaffer Limited) (as amended by a variation agreement dated 6th March, 1998 and made between KPA and GBHL) pursuant to which KPA granted a right of wayleave to GBHL over certain land owned by KPA.



1.2 In this Agreement, unless the context otherwise requires:

- (a) words denoting the singular number only shall include the plural number also and vice versa and words importing the masculine gender include the feminine gender and neuter and vice versa;
- (b) reference to Sections sub-clauses clauses and Schedules shall be construed as references to sections sub-clauses and clauses of and the schedules to this Agreement;
- (c) the expression "person" shall include any legal or natural person partnership trust company joint venture or other body (whether corporate or unincorporate);
- (d) reference to the expression "month" means a calendar month;
- (e) a reference to a statute shall include any statutory extension or modification amendment or re-enactment and any regulations or order made under that statute and any general reference to a statute includes any regulations or orders made under that statute;
- (f) references to the "parties" or "party" means the persons who are parties to this Agreement;
- (g) "Dollars" and "U.S.\$" denote the lawful currency from time to time of the United States of America;
- (h) a reference to "dwt" means dead-weight;
- (i) a reference to "tax" includes any present or future tax duty impost levy or charge of any kind which is imposed by or pursuant to the laws of the Republic of Kenya (and includes any penalty interest or fine in connection therewith);
- (j) a reference to "tonne" and "tonnage" refers to metric tonnes; and
- (k) references to the "Tariff Book" shall include any revision modification or amendment thereto.

1.3 Section headings shall not affect the interpretation of this Agreement.

1.4 References to or to a provision of a document are references to it as duly amended or supplemented before or after the date of this Agreement.

1.5 Any covenant by a party not to do an act or thing shall be deemed to include an obligation not to permit or suffer any such act or thing to be done by another person where that party is or should be aware that such act or thing is being done.

2. THE FEE

2.1 In consideration of KPA undertaking the activities referred to in Section 3, GBHL shall during the subsistence of this Agreement pay to KPA a fixed fee of United States Dollars five thousand (U.S.\$5,000/=) per annum payable yearly in advance, the first payment to be made within thirty (30) days of the Start Date and each subsequent payment to be made on each successive anniversary of the Start Date. The fee payable by GBHL to KPA shall be revisable every five years and the new fee payable by GBHL shall be similar to that payable by other operators undertaking the discharge and storage of Commodities in bulk from the Port and as published in the Tariff Book.

2.2 Payment of the Fee by GBHL to KPA shall be made:

- (a) without any set-off counterclaim or condition whatsoever; and
- (b) free and clear of any deduction or withholding for or on account of taxes except a deduction or withholding for or on account of any present or future tax which GBHL is required by law to make.

2.3 If GBHL is required by law to make any deduction or withholding for or on account of any present or future tax on account of the Fee payable under this Agreement:

- (a) GBHL shall notify KPA as soon as GBHL becomes aware of the requirement;
- (b) GBHL shall pay the tax deducted to the appropriate taxation authority promptly and in any event before any fine or penalty arises;
- (c) unless KPA shall be entitled to a credit for tax paid in respect of such deduction or withholding, the amount due in respect of the payment shall be increased by the amount necessary to ensure that KPA receives and retains (free from any liability relating to the deduction or withholding) a net amount which after the tax deduction is equal to the full amount which KPA would otherwise have received;
- (d) GBHL shall indemnify KPA against any liability of KPA in respect of such taxes; and

- (e) within two (2) months after making any tax deduction GBHL shall deliver to KPA documentary evidence satisfactory to the KPA that the tax had been paid to the appropriate taxation authority.
- 2.4 Any value added tax payable or which may become payable on the Fee shall be for the account of GBHL.
- 2.5 If GBHL fails to make payment of the Fee on the due date for payment GBHL shall pay interest on such sum for the period from (and including) the due date for payment up to the date of actual payment (after as well as before any judgement) in accordance with this clause 2.5. Interest shall be payable at the rate which is five per cent. (5%) per annum above the Dollar LIBOR rate published from time to time by Barclays Bank of Kenya Limited throughout the relevant period. Interest under this clause 2.5 shall accrue from day to day be compounded at the end of each month and shall be paid by GBHL on demand.
- 2.6 If the Fee shall fall due for payment on a day which is not a Business Day payment shall be effected on the immediately following Business Day.
3. SUPERVISION AND REGULATION BY KPA
- 3.1 GBHL agrees that KPA shall be responsible for monitoring Service Levels and reviewing the GBHL Charges from time to time.
- 3.2 In order to enable KPA to undertake the matters referred to in clause 3.1, GBHL shall upon a request in writing from KPA provide to KPA the following information and documents:
- information and documents in relation to the GBHL Charges
- (a) the audited financial statements of GBHL; and
 - (b) GBHL's published tariff rates (including all revisions);
- information and documents in relation to Service Levels
- (a) individual Ship's outturn reports;
 - (b) Monthly Ships' file report; and
 - (c) GBHL's quarterly marketing report.
- 3.3 In the event that KPA shall wish to consult with GBHL on any matter or issue relating to Service Levels and/or the GBHL Charges the following procedures shall be followed:
- (a) KPA shall give at least thirty (30) days prior written notice (hereinafter called the "Request Notice") to GBHL with details of the issues KPA wishes to consult on the reasons for wishing to do so and the actions which KPA would wish GBHL to undertake in the circumstances;

- (b) GBHL on receipt of the Request Notice shall be entitled to make written representations (hereinafter called the "Representation Notice") within fifteen (15) days of receipt of the Request Notice to KPA on the issues and matters set forth in the Request Notice and setting out GBHL's proposals as to the action GBHL would propose be taken and any alternative actions that might be taken or reasons for not taking action. Within five (5) days of receipt by KPA of the Representation Notice, each of KPA and GBHL shall use its best endeavours to consult with each other by telephone or other modes of communication in an attempt to resolve any conflict of views; and
- (c) if the consultation procedures set out in sub-clause 3.3(b) do not result in a resolution then KPA and GBHL shall after the expiry of thirty (30) days from the date of Request Notice appoint senior officers of each of KPA and GBHL to meet in person with a view to resolve any conflict of views and written minutes of such meetings shall be prepared.
- 3.4 GBHL shall implement all matters agreed on between KPA and GBHL in the manner agreed between KPA and GBHL and KPA shall be entitled to make recommendations to GBHL for consideration by GBHL on matters on which any conflict of views cannot be resolved.

4. UNDERTAKINGS OF GBHL

- 4.1 GBHL undertakes that, during the subsistence of this Agreement:
- (a) it will pay the Fee at the times and in manner set out in Section 2;
- (b) (without prejudice to GBHL's rights under the Wayleave Agreement) it will and will procure that its employees perform and observe the rules or regulations governing the terms of access to and from the Port as may be made by KPA from time to time including, without limitation, any rules or regulations regarding:
- (i) the use of roads and other means of access to from and within the Port; and
- (ii) the parking of vehicles at such places within the Port as KPA may from time to time generally permit;
- (c) (without prejudice to GBHL's rights under the Wayleave Agreement) it will not obstruct any service road or other means of access to from or within the Port;

- (d) it will carry out the routine cleaning and clearing of the Quayside and any other areas within the Port following any spillage of Commodities in the conduct of the Operations; and
- (e) it will use all reasonable endeavours to ensure that the Operations are performed in accordance with the Service Levels.

5. AGREEMENTS BY KPA

5.1 In consideration of the agreement by GBHL to be supervised and regulated as set out in Section 3, KPA hereby agrees with GBHL:

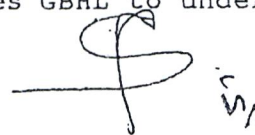
(a) that KPA shall procure that those Ships which GBHL has been contracted to discharge Commodities from or load Commodities into shall be given priority access to the Berths (or, as the case may be, any one of them) provided that KPA's obligation to give priority access to the Berths will only apply in the following cases:

(i) where the Ships in question conform to the limitations applicable to the use of the Berths (or, as the case may be, any one of them) as notified by KPA to all users of the Port from time to time; and

(ii) where GBHL has informed KPA in writing at least twenty-four (24) before the day as of which it is intended that a Ship will dock at the Berths (or, as the case may be, any one of them);

(b) that, subject to paragraph 5.1(c), KPA shall not, and KPA shall procure that no person controlled by KPA shall, permit allow and/or licence any person for a period of eight (8) years commencing from 15th February, 2000 to construct develop and/or operate any facility which is capable of discharging Commodities shipped in bulk from a Ship docked at any berth in the Port and which Commodities after discharge are stored in bulk in silos warehouses or other similar storage facilities erected on any land in or in the vicinity of the Port or on any other land over which KPA or any person controlled by KPA has management or control provided that nothing in this sub-clause 5.1(b) shall prevent KPA from permitting other persons carrying on operations as bagging plant operators on the quayside and undertaking storage of Commodities outside the Port;

(c) KPA hereby permits allows and licences GBHL to undertake and carry on the Operations;

A handwritten signature, possibly 'S', with the initials 'C.M.' written to its right.

(d) that the tariff rates under the Tariff Book which are applicable to the handling of Commodities through the Terminal are as follows:

(i) paragraph 10.5 of Section II of the Tariff Book and which refers to "Dry General or Dry Bulk cargo handled at Mbaraki bulk bitumen handled via bitutainers, soda ash handled via conveyors". The tariff rate per tonne (or part thereof) presently payable is Dollar one and fifty cents (U.S.\$1.50); and

(ii) paragraph 13.7 of Section III of the Tariff Book and which refers to "Cargo handled at Mombasa Old Port, or at Outports, or at other then appointed places unless otherwise stated, or cargo handled at Mbaraki, Soda Ash handled via conveyor". The tariff rate per tonne (or part thereof) presently payable is Dollars nought and fifty cents (U.S.\$0.50).

Accordingly, the aggregate of the tariff rates pursuant to the foregoing sub-clauses 5.1(d)(i) and 5.1(d)(ii) amount to a throughput charge of two Dollars (U.S.\$2.00) per tonne (or part thereof);

(e) that KPA shall not publish or create a separate category of tariff in respect of the handling of Commodities through the Terminal and that the tariff rates applicable to the handling of Commodities through the Terminal shall at all times and from time to time for the purposes of the application of tariff rates by KPA to users of the Port be categorised with and be regarded as being similar to the operations and services which are undertaken by persons other than GBHL as at the date hereof and which are recognised by KPA as falling within the description of operations and services set out in paragraph 10.5 of Section II (in respect of stevedoring services) and paragraph 13.7 of Section III (in respect of shore-handling services) of the Tariff Book;

(f) that the term "quayside" as defined to in the Wayleave Agreement shall include the Berths and the Quayside; and

(g) that nothing in this Agreement shall or shall be deemed to derogate from or in any way limit or vary the rights and obligations of each of KPA and GBHL under the Wayleave Agreement or the Lease or vary or amend the terms and conditions of the Wayleave Agreement and/or Lease and each of the Wayleave Agreement and the Lease shall continue in full force and effect in accordance with its terms without amendment or substitution.

6. REPRESENTATIONS AND WARRANTIES BY KPA

6.1 KPA represents and warrants to GBHL that:

- (a) it has the power to observe and perform its obligations under this Agreement;
- (b) all corporate approvals consents and authorities required by KPA to enter into and perform its obligations under this Agreement have been obtained and remain in full force and effect;
- (c) this Agreement constitutes valid and legally binding obligations of KPA enforceable in accordance with its terms; and
- (d) neither the making of this Agreement nor the compliance with its terms will conflict with or result in a breach of any of the terms conditions or provisions of, or constitute a default or require any consent under, any indenture mortgage charge agreement or other instrument or arrangement to which KPA is a party or by which KPA is bound or violate any of the terms or provisions of the Act or any judgement decree or order of any rule or regulation applicable to KPA.

6.2 The representations and warranties in clause 6.1 shall be deemed repeated by KPA on and as of each day that this Agreement remains in force and effect.

7. REPRESENTATIONS AND WARRANTIES BY GBHL

7.1 GBHL represents and warrants to KPA that:

- (a) it has the power to observe and perform its obligations under this Agreement;
- (b) all corporate approvals consents and authorisations required by GBHL to enter into and perform its obligations under this Agreement have been obtained and remain in full force and effect;
- (c) this Agreement constitutes valid and legally binding obligations of GBHL enforceable in accordance with its terms; and
- (d) neither the making of this Agreement nor the compliance with its terms will conflict with or result in a breach of any of the terms conditions or provisions of, or constitute a default or require any consent under, any indenture mortgage charge agreement or other instrument or arrangement to which GBHL is a party or by which GBHL is bound or violate any of the terms or provisions of GBHL's memorandum and articles of association or any judgement decree applicable to GBHL;

7.2 The representations and warranties in clause 7.1 shall be deemed repeated by GBHL on and as of each day that this Agreement remains in force and effect.

8. ARBITRATION

8.1 In the event of any dispute or difference between the parties arising out of or in connection with this Agreement and the same cannot be settled through negotiation by the parties within twenty one (21) of an offer by one party to the other to negotiate a settlement, the parties agree to attempt to settle the dispute by mediation or in accordance with the Dispute Resolution Centre (DRC) Mediation guidelines, which guidelines are deemed to be incorporated by reference to this clause 8.1. No party may commence any court proceedings or arbitration in relation to such dispute until mediation has terminated. If the dispute has not been settled pursuant to the mediation procedures aforesaid within ninety (90) days from the date when the mediation was instituted, then the dispute shall be determined by three arbitrators in accordance with the Arbitration Act 1995 (Cap. 49). The decision of such arbitrators shall be final and binding in accordance with the Arbitration Act.

9. NOTICES

9.1 Any demand notice or other communication given or made under or in connection with the matters contemplated by this Agreement shall be in writing.

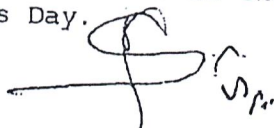
9.2 Any such demand notice or other communication shall be addressed as provided in clause 9.3 and, if so addressed, shall be deemed to have been duly given or made as follows:

(a) if sent by personal delivery, upon delivery at the address of the relevant party set out in clause 9.3;

(b) if sent by registered post five (5) days after the date of posting provided that proof is given that the notice was properly addressed and duly posted by registered post; and

(c) if sent by facsimile, when dispatched provided that the sender has received a receipt indicating proper transmission,

provided that if, in accordance with the above provisions, any such demand notice or other communication would otherwise be deemed to be given or made outside normal working hours on a Business Day in the place of service of the demand notice or other communication it shall be deemed to be given or made at the start of normal working hours on the next Business Day.



9.3 The relevant addressee address and facsimile number of each party for the purposes of this Agreement, subject to clause 9.4 are:

for KPA, to:

P.O. Box 95009
Mombasa

Attn: Managing Director
Fax No: 011-311867

for GBHL, to:

P.O. Box 80469
Mombasa

Attn: Executive Chairman
Fax Nos: 011-316845, 011 230232

9.4 A party may notify the other party to this Agreement of a change to its name address or facsimile number for the purposes of clause 9.3 provided that such notification shall only be effective on:

- (a) the date specified in the notification as the date on which the change is to take place; or
- (b) if no date is specified or the date specified is less than ten (10) days after the date on which notice is given, the date falling fifteen (15) Business Days after notice of any such change has been given.

10. DURATION

10.1 This Agreement shall remain in force for a period of thirty three (33) years commencing from (and including) the Start Date.

11. COSTS

11.1 Each party shall bear its own costs incurred in the negotiation preparation and execution of this Agreement provided that GBHL shall pay the stamp duty which is payable on or in connection with this Agreement.

12. ASSIGNMENT

12.1 No party shall be entitled to assign any of its rights or transfer any of its obligations hereunder without the prior written consent of the other party.

13. NO PARTNERSHIP

13.1 Nothing in this Agreement shall constitute or be deemed to constitute GBHL the agent or partner of KPA for any purpose whatsoever.

14. MISCELLANEOUS

14.1 This Agreement constitutes the entire agreement between the parties and no amendment or addition to this Agreement shall have any force or effect unless approved by the Board of Directors of each party and is reduced to writing and duly executed by both parties.

14.2 Each party shall during the term that this Agreement remains in full force and effect and subsequent to its termination keep confidential documents data and information concerning the activities business methods and other information of the other party which is provided under the terms of this Agreement or which comes into its possession as a result of this Agreement.

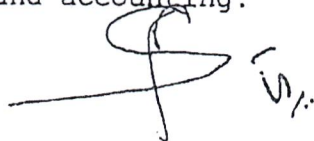
15. GOVERNING LAW

15.1 This Agreement shall be governed by and construed in accordance with the laws of the Republic of Kenya.

SCHEDULE 1

DESCRIPTION OF OPERATIONS

1. Discharge of Commodities from Ships docking at the Berths pursuant to contractual arrangements between GBHL and its customers.
2. Loading of Commodities into Ships docking at the Berths pursuant to contractual arrangements between GBHL and its customers.
3. Handling of Commodities at the Terminal and areas adjacent to the Terminal including storage warehousing and bagging together with all necessary documentation and accounting pursuant to contractual arrangements between GBHL and its customers.
4. Loading of Commodities onto vehicles and railway wagons for delivery to consignees and other cargo handling operations including all necessary documentation and accounting.

A handwritten signature consisting of a large, stylized 'S' followed by the initials 'S.M.' to its right.

SCHEDULE 2

SERVICE LEVELS

1. Discharge of Commodities from Ships

GBHL will use its best endeavours to reach an average through vessel rate of 7,000 dwt per weather working day.

2. Handling of Commodities at the Terminal

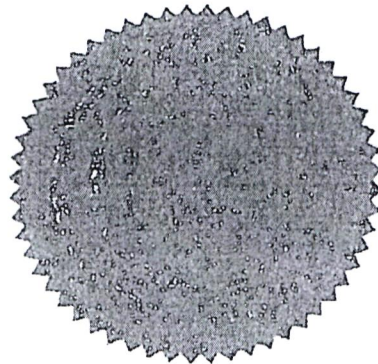
GBHL will use its best endeavours to reach an average daily delivery rate of 3,500 tonnes per weather working day, subject to availability of transport.

IN WITNESS WHEREOF this Agreement has been duly executed by the parties hereto as of the day and year first above written.

SEALED with the Common Seal of
KENYA PORTS AUTHORITY
in the presence of:

Managing Director

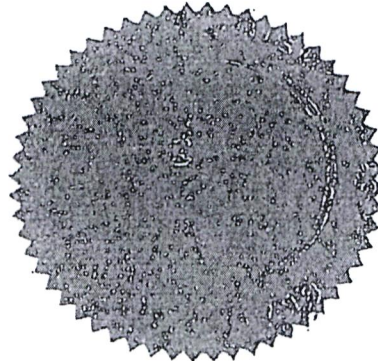
Secretary



SEALED with the Common Seal of
GRAIN BULK HANDLERS LIMITED
in the presence of:

Director

Director/Secretary



REPUBLIC OF KENYA
AGENCY IN CHARGE
MOMBASA

230pm 17-12-10

Office of the Managing Director



Kenya Ports Authority

P. O. Box 95009 - 80104 Mombasa, Kenya
Telephone: +254 (41) 2113497
+254 (41) 2113838
Mobile: +254 720 312211
+254 720 202424
+254 733 337941 - 6
Telefax: +254 (41) 2230906
Website: www.kpa.co.ke

CDD/2/1/13(56)

23rd October 2017

Mr. Mohamed Islam
The Director
Kilindini Terminals Limited
P.O. Box 87074
MOMBASA

Dear *Mohamed,*

APPLICATION TO BUILD AND OPERATE A BULK GRAIN HANDLING FACILITY AT THE PORT OF MOMBASA

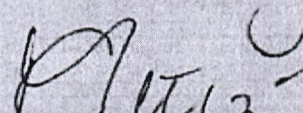
The above subject matter and your application dated 10th February 2017 to build and operate a bulk grain handling facility at the Port of Mombasa refers.

We would like to inform you that the KPA Board, at its 334th Regular meeting, approved your application to be granted a way leave to operate at Berth 11 subject to conforming to the following:

- a) The Standard Gauge Railway (SGR) port relief line operations
- b) Berths 11-14 rehabilitation designs and development plans; and
- c) Fulfillment of the requirements of the PPP Act 2013 and other regulatory obligations.

In view of the above, you will be required to comply with the PPP Act 2013 on privately initiated investment proposals.

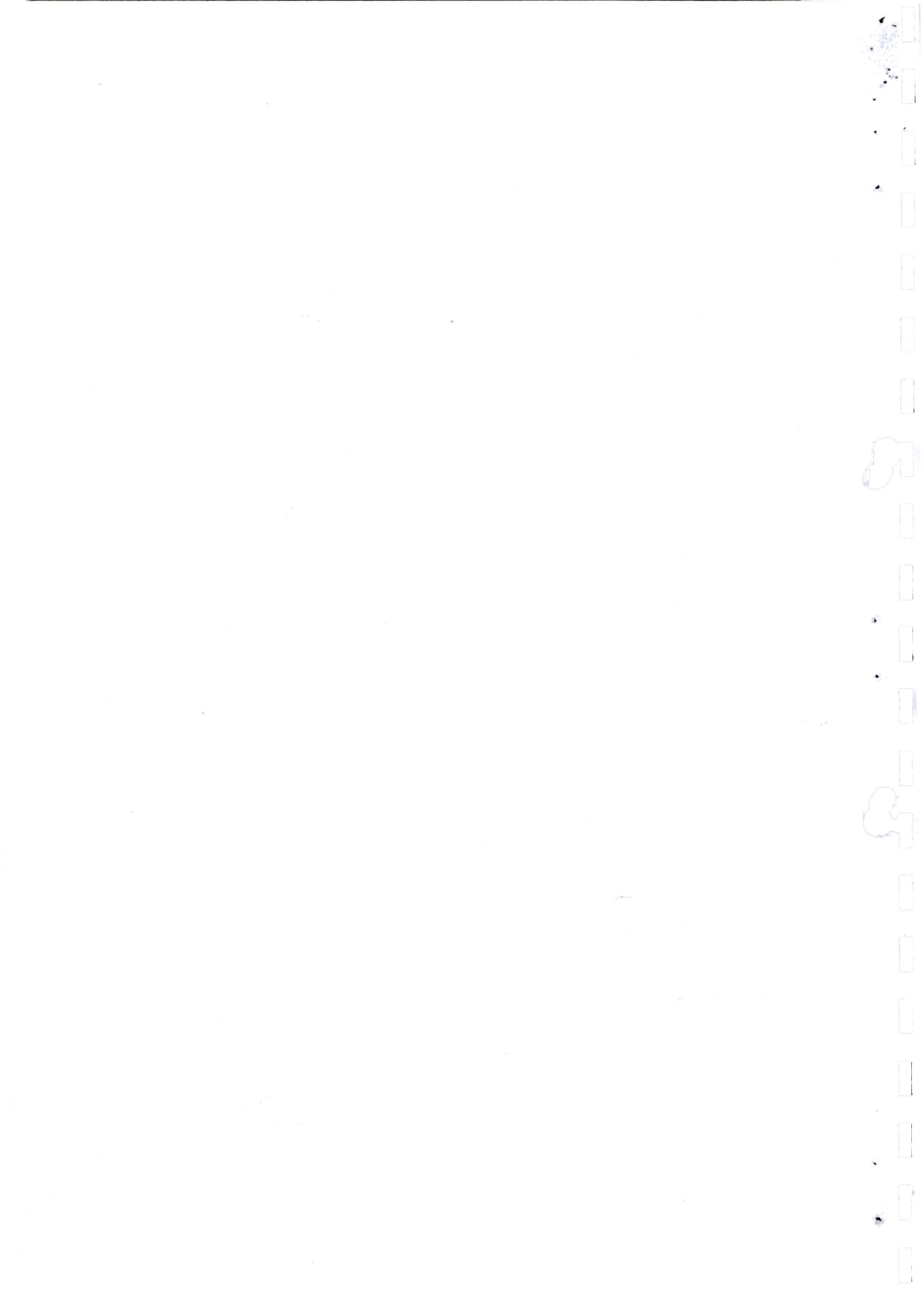
Yours *Sincerely,*


Catherine Mturi-Wairi
MANAGING DIRECTOR

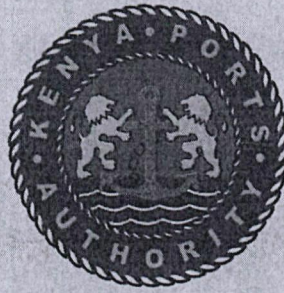
Appendix IV

Submissions from the Kenya Ports

Authority



Office of the Managing Director
MMN/2/2/49



Kenya Ports Authority

P. O. Box 95009 - 80104 Mombasa, Kenya.
Telephone: +254 (41) 2113497
 +254 (41) 2113838
Mobile: +254 720 312211
 +254 720 202424
 +254 733 337941 - 6
Telefax: +254 (41) 2230906
Website: www.kpa.co.ke

22nd October 2021

Ms. Serah M. Kioko

The Clerk
National Assembly
Clerk's Chambers
Parliament Buildings
P.O. Box 41842 - 00100
NAIROBI

MEETING REGARDING IMPLEMENTATION STATUS OF HOUSE RESOLUTIONS

With reference to your letter NA/DAASC/COI/2021/(110) letter dated 4th October 2021, our response is as follows: -

In order to optimize revenue collection, KPA has fast-tracked authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022.

KPA Strategic Plan had already recognized the need for a second grain bulk handler in order to diversify from the risk of monopoly. Way back in 2017, the Authority identified Dongo Kundu and Lamu Port as potential sites for the facility.

By the time the Finance and Planning Committee visited, KPA had already embarked on the process of identifying the operator to be licensed. Given that the KPA Strategic Plan was widely shared within the industry, several privately initiated proposals for operating a second grain bulk facility had been received. The following applicants had identified specific sites of interest to them:

-

- a. Kapa Oil Refinery,
- b. Africa Ports and Terminals,
- c. Multiship International,
- d. Mombasa Grain Terminal Limited,
- e. Kilindini Terminals Limited,
- f. Kipevu Inland Container EPZ Limited and
- g. Portside Freight Terminals Limited.

Notably, the Master Plan envisaged development of a second bulk grain handling facility at Dongo Kundu and Lamu Port as stated above. However, the Dongo Kundu SEZ is still at design stage and Lamu Port is still under construction. Both sites were therefore unattractive to any possible PPP investors.

In order to fast-track the process towards authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022, KPA Management having evaluated all proposals identified the most technically feasible for progression in accordance with the Law.

The Technical Committee following detailed analyses recommended that each grain bulk applicant be considered subject to the availability of the berths applied for and the proximity of their physical location for silos as part of technical and commercial feasibility.

The following are the details of the seven (7) proposals and the Technical Committee observations/findings; -

1. Kapa Oil Refineries

Kapa Oil refineries expressed the need to have their own bulk storage terminal at the Mombasa Port. The company was

particularly interested in the land which is linked to the mainland via the new Port Reitz Dongo Kundu area. Following the proposal, Management observed that KPA does not have adequate land for construction of additional storage facility and that there are plans to have a new liquid bulk cargo handling facility near Dongo Kundu which will require a corresponding storage facility to ensure optimization is achieved and wastages of resources curbed.

2. Multiship International Ltd

The company made an application vide their letter Ref. MSIL/nss.KPA.68.11/17 on 23rd November 2017 to be allowed to occupy berths 13 & 14 to discharge grains and fertilizer on dedicated use. The company expressed interest to invest in both portable grain silos and un-loaders that will be movable and temporarily placed along the quayside in the port specifically to serve the Standard Gauge Railway through its wagons within the port. However, the Authority declined the request vide our letter Ref. CDD/PD/3/1/10 dated 6th February 2018 making reference to KPA Master planning requirements that these berths were sorely committed for container traffic as the development and conversion plans for berth no. 11-14 was underway and construction was expected to be completed in about three years.

Consequently, Multiship vide their letter 6th June 2018 Ref. MSIL/nss.KPA.45/6-18 requested for allocation of a yard adjacent to berth no. 5 to build and operate a specialized dry bulk discharge and handling terminal for grains and rehabilitation of shed no.7 and 8 for fertilizer handling dedicated for SGR. Further, Multiship vide their letter Ref. MSIL/nss.KPA. 13/3-19 dated 18th March 2019 submitted a proposal for the development of dedicated grain and fertilizer terminals at the port of Mombasa and SGR Athi-River Green Park Terminus. They specifically requested the following:

- Allocation of space in the port adjacent to berth No.5 to construct the specialized dedicated SGR dry bulk grain discharging and handling terminal
- Shed No. 7/8 or 9/10 for rehabilitation to handle bulk fertilizer for dedicated transportation via SGR during discharge from the vessels in the Port.

The Technical Committee observed that the yard adjacent to Yard No. 5 is a common user facility for SGR and Meter Gauge Railway (MGR) loading and a temporary storage area for steel and motor vehicles.

3. Africa Ports and Terminals

Africa Ports and Terminals vide their letter Ref. APT-COR-2018-004 dated 3rd January 2018 sought for an opportunity to engage in Marine activities including transshipment of cargo from mooring buoys to the wharf and vice versa. They also requested for allocation of suitable land for development of grain and LPG Terminals in Lamu Port.

KPA responded vide letter Ref. MCS/4/8/01 dated 16th January 2018 seeking details of the locations/plots identified by Africa Ports and Terminals through their due diligence to be suitable for the proposed investment. Similarly, KPA advised Africa Ports and Terminals that its application will be considered against the Authority's Master Plan and Public Procurement and Asset Disposal Act and Rules. The company was also guided to contact the Head of Corporate Development for the Masterplan and the General Manager, Operation as well as the Head of Procurement & Supplies regarding the relevant matters associated with their proposal.

Africa Ports and Terminals is yet to submit a response to the above.

4. Mombasa Grain Terminal Limited (MGTL)

The Mombasa Grain Terminal Limited (MGTL) vide their letter dated 23rd November 2019, requested KPA to grant an irrevocable and unconditional wayleave and permission to construct a Fertilizer and Grain Terminal at the old KOT, after the scheduled relocation of KOT in 2021. The proposed project construction by MGTL was envisioned to take 1-2 years.

Further, MGTL sought permission from KPA to allow the company to access the proposed project site, in order to carry out survey of their design process and determine the wayleave where MGTL equipment (Conveyor Belts and SGR Loading Gantry) will be positioned.

The MGTL proposal was analyzed vis a vis the KPA Master Plan 2018 – 2047. The Master plan provides that KPA will decommission and demolish the old KOT and establish an additional Berth 19 by 300 m, with an associated yard area of 7.5ha. The Berth capacity for Berth 19 is estimated at 450k TEU/yr. (Refer to KPA Master Plan, Page 47).

The Master Plan anticipates that a second Grain Terminal will be developed in Dongo Kundu by 2023 (Refer to KPA Master Plan, Page 64). Further, KPA has planned for the development of a Grain bulk in Lamu Port by 2032 in the event the Grain bulk terminal in Dongo Kundu will have reached its maximum capacity (Refer to KPA Master Plan, Page 85).

Pursuant to the above, the Technical Committee noted that the old KOT which MGTL has identified to develop a Grain and Fertilizer terminal, will not be available since KPA has made prior plans to expand Berths 16 – 18 and establish an additional Berth 19. Moreover, the space at the old KOT will be used for containers only.

Therefore, Management recommended that the request by MGTL be declined since the old KOT which the company has identified for development of a Grain and Fertilizer terminal, is currently in use

and prior plans have been made by KPA to use the identified location.

5. Kilindini Terminals Limited

The company vide their letter dated 2nd December 2015 made an application for a wayleave to build and operate a specialized dry bulk discharge and handling terminal for grains at the Port of Mombasa. The terminal would be linked by overhead conveyors directly to the berths. KTL also proposed Berth no. 5 and Berths 11 to 14 as sites for the project. KTL projected cargo to be handled as 1 million tons by end of 2020 and increase over the following two years to 1.1 million tons and 1.2 million tons respectively. The application could not however not be progressed as the requested berths are not available for bulk grain handling.

6. Kipevu Inland Container EPZ Limited (KIC)

Kipevu Inland Container EPZ Ltd. vide their letters dated 9th July 2018 and 22nd January 2020, requested KPA to grant a wayleave for installation of a multipurpose conveyor belt system to handle dry bulk cargo at Plot No. MV/VI/4794, at Kibarani adjacent to the Port area.

They also proposed to construct a 150,000MT of bulk grain silo storage, 250,000sqft of covered warehouse space and modern container handling equipment. The proposed facility is expected to cater for various dry bulk products that are being imported in large quantities to serve various sectors both within Kenya and the greater African Markets i.e. clinker, fertilizer, coal, gypsum & food grains while adopting the latest technology of green terminal with the lowest carbon footprint.

Subsequently, KIPEVU made a presentation on their proposal to the Management of KPA on the 4th of March 2020. In their presentation, KIC EPZ informed Management that they have

secured 50 Acres of land from Kenya Railway in Athi River to build and operate a modern receiving terminal for bulk volumes hauled via SGR, which is expected to contribute significantly to reduction of the Port congestion.

The proposal was analyzed against the KPA Master Plan 2018-2047. The Master Plan anticipates that a second grain terminal will be developed in Dongo Kundu by 2023. Further, KPA has planned for the development of a Grain bulk facility in Lamu Port by 2032 in the event the Grain bulk terminal in Dongo Kundu will have reached its maximum capacity. This was considered as a future plan.

7. Portside Freight Terminal Limited (PFTL)

Portside Freight Terminal Limited (PFTL) vide their letter dated 6th April 2020 sought a license for bulk grain handling facility at the Port of Mombasa and a wayleave for the development of an overhead conveyor belt through the G-Section area of the Port.

The PFTL proposal was evaluated and found to be the most technically and financially feasible since it will be 100% privately funded and the project will pose minimum conflict with other ongoing and planned KPA developments. In addition, PFTL owns land adjacent to G-Section where the storage silos will be located which makes them the most suitable applicant.

In line with Section 12 of the KPA Act Management submitted the evaluation report to the Board of Directors during its 382nd Meeting held on 30th November 2020 and 3rd December 2020. The Board deliberated the PFTL business proposal and resolved: -

1. A license for grain bulk handling operator at the Port of Mombasa be granted to PFTL.
2. A wayleave be issued for development of an overhead conveyor belt through G-Section Area to PFTL.

3. A counterpart team be formed to work with PFTL in developing the island berth.
4. The counterpart team to be engaged in firming technical specifications including routing of the overhead conveyors.

Following the Board approval, Management obtained concurrence from the Honourable Attorney General and the National Treasury to progress the project under Specially Permitted Procurement Method, Section 114(A) of the Public Procurement and Disposal Act, 2015.

Subsequently, an award was made to PFTL and license/wayleave agreements signed.

In Constitutional Petition No. E045 of 2021 Okiya Omutata Okoiti has sued KPA and CS National Treasury with interested parties being Kilindini Terminals, Mombasa Grain Terminal Limited, Kapa Oil Refineries, Africa Port & Terminals and Multi ship International, Kipevu Inland Container EPZ, Dockworkers Union and Katiba Institute. The petition challenges the award of the license and wayleave to PFTL.

Under the KPA Master Plan (2018 – 2047) implementation, KPA is still pursuing alternative locations for discharge of grain vessel with the ongoing design and development of Dongo Kundu SEZ, Lamu Port and Kisumu Port. Due to investment and financing constraints, the projects will be undertaken using the PPP Framework.

Historically, the licensing and issuance of wayleaves was guided by the legal framework as elaborated hereunder; -

1. **Section 12 (2n) of the Kenya Ports Authority Act** gives the Board power to enter into agreements with any person-
 - i. For the supply, construction, manufacture, maintenance or repair by that person of any property, movable or immovable, necessary or desirable for the purposes of the Authority;

- ii. For the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Authority.

2. **Part C (vi) of the Tariff book, General Provisions,** empowers the Authority to enter into agreement with any person including any company or association or body of persons corporate for the performance or provision by that person of any of the services or facilities which may, ordinarily under the Act, be performed or provided by the Authority and raise charges at such rates or for such amounts as may be mutually agreed between them, and such charges or rates shall apply and be collected as if they were set out in this Tariff Book. (Benefit to KPA)

3. **The Tariff book under clause 19 on general services** empowers the Authority to issue various licenses. It states....

'Unless otherwise provided for in this tariff book, the following licenses/fees shall be required and may be issued on application. Licenses shall be for 12 consecutive months from the 1st day of month of issue and are subject to the conditions notified to licensees from time to time.' Sic


4. **It has been the practice of KPA** to grant approvals to private operators to construct wayleaves and licenses in performance of her duties. Grain and Bulk handling at the port is done either through;

- a. Conventional bagging vide grabs onto bagging plants alongside ship and onto trucks. Examples of the companies include Multiport limited and Interglobe.
- b. Mechanized system which use conveyor belts, pipes and pneumatic suckers from the port to silos/tankage outside the port. example of companies includes GBHL and Magadi Soda.

The companies whose applications were approved by the Board using KPA Act and KPA Tariff are as follows;

- a. East Africa Terminal Ltd.-Their application for wayleave was approved by the Board in 2013 while PPP Act was notwithstanding.
- b. Magadi Soda- Wayleave through which they have conveyors operating and licenses agreement.
- c. Grain Bulk Handling Limited (GBHL)-Approval was granted twice for licenses agreements and infrastructure upgrade
- d. African Oil and Gas Limited (AGOL)- Approval for setting up facility for handling oil and gases was approved by the Board.
- e. Portside Freight Services Limited – Approval for setting up a modern conveyor facility at Shed 7 & 8 was approved Board.

It is envisaged that once Dongo Kundu SEZ and Lamu Port are fully developed, investors will bring in critical infrastructure required for expansion, investment in technology and efficient state-of-the-art grain handling equipment under the PPP framework to meet growing demand and optimize revenue collection.


Amb. John Mwangemi
Ag. MANAGING DIRECTOR

Appendix V

Submissions from the National Treasury and Planning

37
(2) CHEBEI
Please check
from
27/1/22



(1) DAASC
8
25/1/22

REPUBLIC OF KENYA
THE NATIONAL TREASURY AND PLANNING

Telegraphic Address: 22921
FINANCE – NAIROBI
Fax No. 315779
Telephone: 2252299

THE NATIONAL TREASURY
P.O. Box 30007 - 00100
NAIROBI
KENYA

When replying please quote

Ref: MOF/TE 200/01 'D' (52)

Date: 26th January, 2022

Mr. Michael Sialai, CBS
Clerk of the National Assembly
Parliament Buildings,
Nairobi

Dear *Sialai*

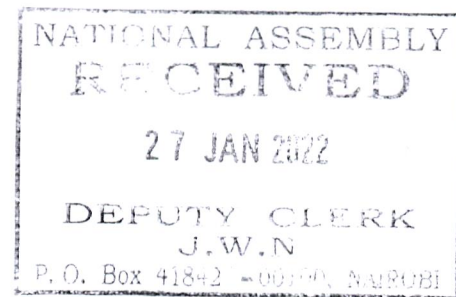
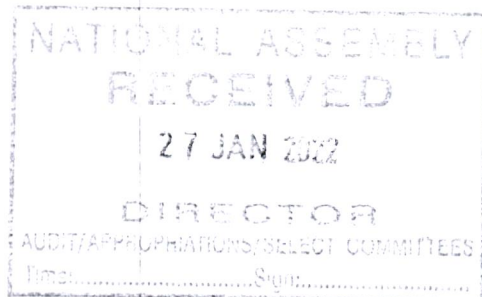
Ref: Submission of Written Response and Request for postponement of a Meeting with the National Assembly Select Committee on Implementation

We refer to your letter No. NA/DAASC/CO1/2-022/ (001) dated 17th January, 2022. The Cabinet Secretary, National Treasury and Planning has been invited for a follow-up meeting with the Select Committee on Implementation on Thursday, 27th January, 2022 in Committee Room on 5th Floor, Continental House, Parliament Buildings at 10.00a.m.

The agenda of the meeting is to apprise the Committee on the implementation status of the Report of the Departmental Committee on Finance and National Planning regarding optimization of Revenue in Grain Handling Services at the Port of Mombasa.

However, due to exigencies of work, the Cabinet Secretary is not in a position to attend the said meeting as scheduled. This is therefore to let you know of this situation and seek your indulgence to request the Committee to reschedule this meeting to a later date in a fortnight.

Attached herein is the National Treasury's written Submission for your perusal and reference.



We sincerely apologize for any inconveniences this might have caused.

Yours



Hon. Nelson Gaichuhie, CBS
Chief Administrative Secretary / National Treasury

A WRITTEN SUBMISSION ON THE IMPLEMENTATION STATUS OF THE REPORT BY THE DEPARTMENTAL COMMITTEE ON FINANCE AND NATIONAL PLANNING REGARDING THE OPTIMIZATION OF REVENUE IN THE GRAIN HANDLING SERVICES AT THE PORT OF MOMBASA

The Kenya Ports Authority (KPA) has implemented recommendations of the Committee as summarized in the table below: -

| No. | Recommendation | Action by KPA |
|-----|---|--|
| 1. | In order to optimize revenue collection, KPA should fast-track authorization of design, development and commissioning of other grain bulk handlers to enhance efficiency and effectiveness in the grain handling business by 2022. | KPA has licensed a second grain bulk terminal operator within the Port of Mombasa. |
| 2. | The process of appointing new operator(s) for grain bulk handling services in the country must be fair, open, transparent and adhere to the Public Procurement and Asset Disposal Act, to ensure nondiscrimination and accountability. | KPA followed due process in allocating the second grain bulk operator at the Port of Mombasa. However, the matter has ended up in court. A copy of the Court order on Constitutional Petition No. E045 of 2021 is hereby attached for ease of reference. |
| 3. | Under the KPA masterplan of 2018 to 2047, KPA need to pursue alternative locations to discharge grain vessels particularly at the Dongo Kundu Special Economic Zone (SEZ), the upcoming Lamu and Kisumu Ports with consideration on space and business model applicable under the Public Private Partnerships (PPPs) framework. | KPA plans provide for development of other grain terminals at Dongo Kundu and Lamu Port through Public Private Partnerships. This will be guided by the Port Master Plan and the Strategic Plan. changes arising from market dynamics. New opportunities which were not envisioned in the Master Plan 2018 - 2047 will therefore be considered in the Strategic Plan which is reviewed every five (5) years. KPA has since embarked on development of the Strategic Plan (2023 – 2027) to be launched before 31 st December 2022 upon approval by the Board of Directors. |
| 4. | To promote efficiency in the grain bulk handling in the country, there is need for the government to provide critical infrastructure to continually expand and sustainably gain leverage on technology while | KPA has put in place measures to ensure that infrastructure development matches and exceeds the demand for grain commodities. The Authority is developing the Dongo Kundu berths, measuring 300 metres and 1.5 metres deep while that of Lamu Port, will measure 400 metres in length and 17 metres deep to accommodate large |

| | |
|---|---|
| | <p>maximizing on the return on investment. Such critical infrastructure includes wide berths and state of the art vessel handling equipment.</p> |
| <p>5. KPA should continue investing including through the PPP framework in the expansion of port facility to accommodate more berth to meet the growing demand within the region.</p> | <p>vessels to gain from economies of scale. The Berths will be equipped with modern high capacity uploading equipment to ensure effective and efficient discharge of grain cargo operations.</p> <p>KPA will continue to invest in infrastructure development at Mombasa Port, Lamu Port and Dongo Kundu to enhance its capacity ahead of demand.</p> <p>The Authority is constructing the first 3 berths at Port of Lamu to be completed by April 2022. Additionally, relocation of Kipevu Oil Terminal which will accommodate 3 large oil vessels will be commissioned by end of March, 2022. The 2nd container terminal Phase 2 is scheduled to be ready by 2022 further increasing KPA's capacity to handle containerized cargo.</p> <p>The Authority remains open to accommodate the most effective and efficient operation model, including Public Private Partnerships (PPP).</p> |

Yours


Hon. Nelson Gaichuhie, CBS
Chief Administrative Secretary / National Treasury

Appendix VI

Constitutional Petition No. E045 of 2021

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTION PETITION NO. E045 OF 2021

IN THE MATTER OF: ARTICLES 10,20, 22, 23 (3), 27, 47, 165 (3) (d) (ii), 201, 227, 258
OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: SECTIONS, 3 AND 4, PART V OF THE PUBLIC
PROCUREMENT AND ASSET DISPOSAL ACT 2015

AND

IN THE MATTER OF: ARTICLE 10 OF THE UNIVERSAL DECLARATION OF
HUMAN RIGHTS

AND

IN THE MATTER OF: PUBLIC PRIVATE PARTNERSHIP ACT

AND

IN THE MATTER OF: LEADERSHIP AND INTEGRITY ACT 2012

IN THE MATTER OF: THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF: THE KENYA PORTS AUTHORITY ACT

AND

IN THE MATTER OF: KENYA PORTS AUTHORITY MASTER PLAN 2019

AND

IN THE MATTER OF: THE LICENCE FOR OPERATION OF A SECOND BULK
GRAIN HANDLING FACILITY AT THE PORT OF MOMBASA

BETWEEN

OKIYA OMTATAH OKOITI.....PETITIONER/APPLICANT

-VERSUS-

KENYA PORTS AUTHORITY.....1ST RESPONDENT

CABINET SECRETARY

MINISTRY OF NATIONAL TREASURY AND PLANNING.....2ND RESPONDENT

PORTSIDE FREIGHT TERMINALS LIMITED.....1ST INTERESTED PARTY

*Received on 17/8/21
by Githu Nyugui*

17 AUG 2021

[Signature]

| | |
|---|----------------------------------|
| PORTSIDE FREIGHT TERMINALS LIMITED..... | 2 ND INTERESTED PARTY |
| KILINDINI TERMINALS LIMITED | 3 RD INTERESTED PARTY |
| MOMBASA GARIN TERMINAL LIMITED..... | 4 TH INTERESTED PARTY |
| KAPA OIL REFINERY..... | 5 TH INTERESTED PARTY |
| AFRICA PORTS AND TERMINALS | 6 TH INTERESTED PARTY |
| KIPEVU INLAND CONTAINER EPZ LIMITED | 7 TH INTERESTED PARTY |
| DOCKERS WORKERS UNION..... | 8 TH INTERESTED PARTY |

ORDER

(In Open Court Before Honourable Justice R. Nyakundi on 16th August, 2021)

THIS MATTER COMING UP for hearing of the Applicant's Notice of Motion dated 29th June, 2021 for Orders **THAT:-**

1. That this Honourable Court be pleased to certify this Application as urgent and service hereof be dispensed with in the first instance and same be heard on priority basis during the August vacation.
2. The pending the inter-partes hearing and determination of this Application this Honourable Court be pleased to grant a temporary conservatory order staying the implementation, procurement and award of a license by the 1st Respondent to the 1st Interested party for the development of a second bulk grain handling facility pursuant to the 2nd Respondent's approval dated 28th June, 2021 granting the 1st Respondent authority for the use of Specially Permitted Procurement Procedure for this purpose.
3. The Court gives any other directions at it may deem just and fit to grant.
4. That the Costs of the Application be borne by the Respondents.

UPON PERUSING the Notice of Motion dated 16th August, 2021 brought under certificate of urgency under Articles 10,22,23,47,165,201,227 of the Constitution of Kenya, Section 3, 4, 7, 9 and 11 of the Fair Administrative Action Act, Section 3, 4 and 114 (a) of the Public Procurement and Asset Disposal Act 2015, Rule 4,23 and 24 of the Constitution of Kenya(Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013) and all enabling provisions of the law) in the absence of both parties;

IT IS HEREBY ORDERED: -

1. **THAT** the matter be and is hereby certified urgent Exparte in the first instance.
2. **THAT** the Certificate and Notice of Motion be admitted and be heard during the vacation.
3. **THAT** the Certificate and the Chamber Summons be admitted and heard during the vacation.
4. **THAT** pending the inter-partes hearing and determination of this Application a temporary conservatory order be and is hereby issued staying the implementation, procurement and award of a license by the 1st Respondent to the 1st Interested party for the development of a second bulk grain handling facility pursuant to the 2nd Respondent's approval dated 28th June, 2021 granting the 1st Respondent authority for the use of Specially Permitted Procurement Procedure for this purpose.
5. **THAT** the substantive motion dated 12th August, 2021 be heard on 27th August, 2021 before Ogola J.
6. **THAT** the petitioner be at liberty to file skeleton submissions on the canvassing the Notice of Motion on the merits of it.

GIVEN under my hand and seal of this Honourable Court at Mombasa on this 16th day of August, 2021



DEPUTY REGISTRAR
HIGH COURT OF KENYA - MOMBASA

Penal Notice: Any person being served with this order willfully disobeys the same, such party shall be cited for contempt of court and if liable be imprisoned for a period not exceeding six months or to a fine

