



Memorandum on the Nairobi Metropolitan Area Transport Authority Bill, 2017

To:

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Cc:

Chairperson,
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About TISA

The Institute for Social Accountability (TISA) is a civil society organization committed towards the achievement of sound policy and good governance in local development, to uplift livelihoods of, especially, the poor and marginalized in Kenya. TISA has been operational since March 2008, and is a locally registered Trust that has engaged with various relevant state and non-state actors in the quest to promote effective local governance in Kenya

Introduction

The main objective of the Bill as articulated in its memorandum of objects and reasons is to “provide a framework for the establishment of the Nairobi Metropolitan Area Transport Authority. The Nairobi Metropolitan Area consists of the County Governments of Nairobi, Kiambu, Machakos, Kajiado and Muranga. The Authority shall oversee the establishment of an integrated, efficient, effective and sustainable transport system within the Metropolitan area.”

Whereas the above objective is laudable, the process leading up to the Bill is unconstitutional due to the follow two key reasons:

1. The Nairobi Metropolitan Transport Authority Order, 2017

TISA notes with great concern that the Bill follows the aforementioned unconstitutional Presidential Order. The principle of separation of powers is a permanent and integral feature of Kenya’s constitutional system. One of the objects of devolution is to enhance checks, balances, and the separation of powers as provided in Article 174 (I). Article 94 provides that the legislative authority is

vested in Parliament and the vesting clause of Article 130 provides that the executive authority be vested in the President, Deputy President and the Cabinet.

Thus the Presidential Order, under legal notice 18 of February 2017, establishing the Nairobi Metropolitan Transport Authority is *ultra vires* the functions of the executive and thus all subsequent agencies existing under the aforementioned executive order are unconstitutional and illegal.

Parliament should jealously guard against the executive attempts to usurp its powers and strive to fulfill its oversight and legislative role by promoting the progressive implementation of the constitution.

2. The process leading up to the Bill, fails to meet constitutional threshold of public participation and intergovernmental relations

Article 174 (c) of the Constitution provides the objects of devolution are among others, to give powers of self-governance to the people and enhance participation of the people in the exercise of the powers of the state and in making decisions affecting them. Section 29 of the Intergovernmental Relations Act, 2012 includes public participation in the process to be followed when negotiating an intergovernmental agreement for the delegation of functions, powers and competencies to either level of government. The section requires that a framework for such public participation be provided for by Regulations, though such Regulations have not yet been enacted section 29 must be understood as seeking to give effect to the provisions of the constitution, which make public participation central in anything done by any one of the two levels of government.

Further, section 26 of the Intergovernmental Relations Act provides for the process of transfer and delegation of power, functions and competencies between the national and county governments. The section provides that such transfer or delegation must be in accordance with a written agreement between the relevant governments after negotiation and conclusion. The section also provides that the agreement must be signed and published in the Kenya Gazette and County gazette before taking effect.¹ It is noteworthy to observe that section 26 further requires that both the National assembly and the county assembly concerned must be notified of the transfer or delegation of the functions or powers.

¹ Section 26 of the Intergovernmental Relations Act, 2012: **26.** (1) A transfer or delegation of powers, functions or competencies under this Part shall be by a written agreement.

(2) The agreement for the transfer or delegation under subsection (1) shall include—

(a) the function, power or competency transferred or delegated; (b) the specific legal provisions supporting the transfer or delegation; (c) the reasons for the transfer or delegation; (d) the performance standards and frameworks in respect of the transfer or delegation; (e) the resourcing framework for delivery of the powers, function or competency transferred or delegated; (f) the capacity of the receiving entity to exercise or perform the powers, function, or competency transferred or delegated; (g) the capacity building framework for enhancing any deficits identified in the entity to which the transfer or delegation has been effected; (h) the method of resolving any dispute that may arise under the agreement; and (i) the terms and conditions for the exercise or performance of the power, function or competency including the time frame

(3) The agreement shall be—

(a) signed by an authorized person or officer; and (b) published in the Kenya Gazette and the county gazette in respect of the county to which it relates, at least fourteen days before the effective date of the transfer or delegation.

(4) The National Assembly shall be notified of the decision to transfer a national government power, function or competency.

(5) A county assembly shall be notified of the decision to transfer a county government power, function or competency.

TISA is concerned with the process surrounding the Nairobi Metropolitan Area Transport Authority Bill, 2017 because there is no evidence for public involvement or the involvement of the respective county assemblies in the Metropolitan Area in the process leading up to the bill.

The public is not preview to any intergovernmental agreement between the national and county governments for the establishment of NAMATA. This lacks of information undermines the public ability to give informed input into the bill. Nevertheless, based on the provisions of the Intergovernmental Relations Act, there ought to be intense intergovernmental consultations not only between the national and county government but also between the national government and all other counties through, for instance, the Council of Governors. This is because the Bill has provisions that assign to the joint Authority revenue raising powers, which may chip into the revenue raising powers assigned to county governments by the constitution.² Further, the Bill also make provision for the financing of the joint authority in a manner that may affect other counties other than those included in the Nairobi Metropolitan Area.³

Therefore, the NAMATA Bill ought to have emanated from an intergovernmental process involving—

- a) cooperation, consultation and negotiation towards the development of an intergovernmental agreement;
- b) the conclusion of an intergovernmental agreement;
- c) Notifications to the National and County Assembly of the resolution to set up a Metropolitan Area and the ensuing institutions
- d) the establishment of the joint Nairobi Metropolitan Area Transport Authority as part of the terms of the intergovernmental agreement; and
- e) the development a Bill to be enacted into a legislation agreed upon by all the governments involved.

With the little information available to the public, it appears that national government skipped the first three steps and jumped to the fourth one to draft a Bill to be enacted into law without going through the other prerequisite stages. Because of this, the Nairobi Metropolitan Area Transport Authority Bill face constitutionality challenges.

In view of the foregoing, we call upon Parliament recall the Bill and subject it to the proper process, failure to which defenders of Kenya's constitutional democracy will be forced to find recourse in the courts.

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² See section 9(1)(c) of the Order and sections 7(1)(d), 28(1), 29 and 30 of the Bill.

³ See sections 15 Of the Order and sections 32 of the Bill.