State Capture Unlimited: The Intrigues Inside the Battle to Control Mombasa’s Second Container Terminal

By David Ndii

Sometime in the late 80s, at the tail end of the era of the state commanding the heights of the economy, the Moi government had an idea—to establish a national shipping line. The business case seemed straightforward enough. The country was leaking a substantial amount of its meagre foreign exchange earnings to foreign shipping lines that were ferrying our imports and exports. The total value of shipping services in 1986 was in the order of $230 million (Sh3.7 billion) equivalent to 10 per cent of the country’s $2.2 billion (Sh43 billion) foreign exchange earnings (the exchange rate was Sh16 to the US$). Saving some of this money looked like a splendid idea. As always, the devil is in the detail.

The country was not in a position to buy vessels. The plan was to establish what is referred to in the industry as a Non-Vessel Owning Common Carrier (NVOCC) that would lease space on third-party vessels, essentially a glorified freight forwarding company. The Kenya National Shipping Line (KNSL) was incorporated in 1987 as a joint venture, with Kenya Ports Authority and UNIMAR, a German investor, owning 70 per cent and 30 per cent, respectively (UNIMAR later sold half its stake to DEG, a development finance institution of the German government). KNSL began operations in 1988 by establishing a partnership with Mediterranean Shipping Company (MSC) to charter space on MSC ships plying the Mombasa-Europe route, calling in at Lisbon, Le Havre, Antwerp, Rotterdam, Hamburg and Felixstowe among other ports in that general geographic region.

Business did not go as planned. Chartering slots on ships and hiring containers was easy, getting customers, not so. KNSL quickly racked up debt with the shipping lines and with container leasing companies for slots and containers that it was leasing and not using. But even had business gone according to plan, it is doubtful that it would have saved the country much foreign exchange. At the time, the Mombasa terminal was handling 120,000 TEUs (twenty-foot equivalent units) of containerised freight annually. The total cost of shipping a container to or from Europe would have been in the order of $900, a total of $108 million annually. Even had KNSL been able to secure a monopoly and get a 10 per cent trade margin, which is doubtful, it would have earned the country just over $10 million, about 0.5 per cent of the foreign exchange earnings.

In 1996, Heywood Shipping, an entity linked to MSC, acquired a stake in KNSL. The exact circumstances and nature of the transaction are hazy but it appears that this was part of a restructuring that may have involved converting debt to equity and bringing in MSC as a strategic partner. Heywood Shipping does not appear to be an operating business. An internet search brings up the name in the company registry of the Isle of Man, a British offshore tax haven, which may or may not be of the same company.

Nothing was heard of KNSL for two decades, although to be sure, it had not been making headlines even before. Then, out of the blue, in August 2018, it was reported that the Government had signed a Memorandum of Understanding (MoU) with MSC to revive KNSL. The reports indicated that the government was eyeing a slice of the Sh300 million ($3 billion) that it claimed the country was paying foreign companies for shipping. As usual, the Jubilee numbers are exaggerated. The $3 billion is about right for the total imports of services, of which shipping represents less than a third ($830 million in 2017 according to WTO data). I have two observations. First, this is the same reasoning that had motivated KNSL's establishment three decades earlier. What has changed? Second, MSC was already a shareholder and strategic partner of KNSL. Why then was the Government signing an MOU with MSC on the same? The plot would soon unfold.

In March 2019 the government introduced an amendment to the Merchant Shipping Act to give the Transport Cabinet Secretary power to exempt government entities from some provisions of the statute. The particular provision that needed to be circumvented prohibits a shipping line from operating port facilities. In competition law and policy, this clause is used to prevent vertical integration, the control of many stages in a business chain by one firm to undermine competition. If for example, a manufacturer also controls distribution and retail, it can use its market power to choke competitors by restricting supply and/or overpricing its goods. A shipping line that also operates port facilities can frustrate competitor shipping lines similarly by making it advantageous to use its seamless services while providing competitors with shoddy services. Yet this is precisely what this amendment was about: to pave way for KNSL to be awarded a concession to operate the second container terminal at the Port of Mombasa, referred to in the industry as CT2.

The CT2 facility has been built by the Government with debt financing from Japan. The first phase was completed in 2016. Under the financing agreement, CT2 would be leased out to an independent operator selected through a competitive process. In 2014, the Government invited port operators to make their bids. Several international port operators applied, but the process was cancelled before completion—but not before eliciting uncharacteristically pointed objections from the usually reticent Japan. Long after the bids had closed, the government sought to introduce new conditions that would have opened up financing of the second phase even though the government had already signed a financing agreement with Japan. In a letter to the Treasury, the resident representative of the Japanese aid agency, JICA, talked of their "obligation to assure accountability and transparency in the process", and warned that mishandling of the process would jeopardise future assistance to Kenya.

In early 2017, it emerged that the government had entered into a bilateral agreement with the United Arab Emirates in which the UAE was to extend a loan of $275 million (Sh28 billion) for improvements to the port at Mombasa, including "enhancing operational and business efficiencies within the Second Container Terminal." In return, the state-owned port operator, Dubai World, would get the concession for the second container terminal. Dubai World was one of the bidders in the cancelled tender, and according to media reports, it had emerged second. This particular deal seemed to have been designed to circumvent competitive bidding through a 'government-to-government' transaction. For whatever reason, it also floundered.

This brings us to the KNSL transaction. Like the UAE agreement, the revived KNSL is devised to circumvent competitive bidding under the guise that KNSL is a state entity. KNSL shareholding stands at 53 per cent Kenya Ports Authority (KPA) and 43 per cent Heywood Shipping. Heywood Shipping has two directors on the board of KNSL: a Mr Peter Reschke and a Captain G. Cuomo. The MoU between the Government and MSC was signed by a Captain Giovanni Cuomo, designated as Vice President. It seems reasonable to assume that Captain G. Cuomo and Captain Giovanni Cuomo are one and the same person.

Financial capacity is one of the standard requirements for concessionaires in public-private partnerships (PPP). According to the 2017 audit, KNSL made a loss of Sh44.7 million, up from Sh37 million the previous year. It had revenues of Sh723,000 against expenses of Sh45 million. On the balance sheet, it has accumulated a deficit of Sh376 million. In short, KNSL is insolvent. The audit is qualified, and the Auditor General's basis for adverse opinion runs to a couple of pages. KNSL is a shell, and to all intents and purposes, a Trojan horse for MSC.

It has been reported that the business case for single-sourcing MSC is to leverage on the concession to create seafaring jobs for Kenyans on MSC's ships. Media reports say that MSC has committed to employing several Kenyans on its cruise liners, and to docking them in Mombasa thereby creating more jobs. These may be good intentions, but single-sourcing an operator and stifling competition is not the way to go about it. MSC will be in a position to leverage its position to undermine competitors. The competitors will lose market share in Mombasa but they are unlikely to take it lying down. For transit freight in particular, the competitors are likely to respond by undercutting MSC in competing ports, notably Dar es Salaam, and even Djibouti. Far from enhancing Mombasa as the pre-eminent port in the region, vertical integration will undermine it.

It is worth noting that even as the Government railroads this transaction, it is woefully short of investors for the Lamu port project. So far, the government has completed one of the three berths that it is building—out of a total of 32 in the plan. It is shopping for private investors to build and operate the other 29. The government is also shopping for an operator for the berths that it will have built. According to its website, MSC has a subsidiary—Terminal Investments Limited—that invests in, and manages container terminals. Given that MSC has been a joint venture partner in the KNSL all these years, it is intriguing that the Government has failed to persuade them to take up the Lamu opportunity as either operator, or investor or both.

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We are compelled to infer that someone is out to reap where they have not sown. The initial meddling with the first tender sought to not only influence the award of the operating concession, but to also prevent the Japanese Government from financing the second phase. We infer from this that there was another financier lined up who was amenable to paying the hefty kickbacks that are standard operating procedure for Jubilee mega-infrastructure projects. The deal with the UAE and Dubai Ports had embedded private interests written all over it. The KNSL Trojan horse is the third bite at the cherry.

There is only one office with the power to subvert the competitive bidding process consistently and incessantly, and there are no prizes for guessing which one it is. This is Uhuru Kenyatta's racket. From the now ill-fated dairy industry regulations to the floundering *Huduma Namba,* we have learned that wherever you see presidential political capital being expended, family business is involved. Indeed an MP friend remarked the other day that the only business that Parliament is transacting these days is Kenyatta family business.

What we need to know is the what and the how. First, we should demand full disclosure of the ownership and beneficial interests of Heywood Shipping. The two Heywood directors on the KNSL board need to swear affidavits that they have not entered into any agreement to transfer such interest to anyone else in the future. Kenyatta should be asked to declare that he and his family have no current or future beneficial interest in Heywood and MSC.

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A direct beneficial interest in Heywood is by no means the only route that Kenyatta can use to profit from the infrastructure. We know that the terminal integrates with the SGR railway. The railway terminates in Naivasha where the Kenyatta family has extensive landholdings positioned to benefit from the anticipated dry port business. We have seen Uhuru Kenyatta personally offering land for freight stations to Uganda and South Sudan leaders; whether this is public or private land, we do not know, but it does beg the question why Uganda would build a facility in Naivasha if, as we are told, the railway is to be integrated with the revamped meter-gauge rail all the way to the Uganda border.

Even without a pecuniary interest in the KNSL transaction, a seamless operation that transfers all the freight logistics to Naivasha is sufficient motivation for Kenyatta to pursue the capture of the terminal as aggressively as he is doing. We may also have our answer as to why the Government is not enticing MSC to Lamu. Kenyatta does not own land there.

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