



**AFFORDABLE
HOUSING ACT:
POLITICAL ACT OR
GROUNDBREAKING
LEGISLATION?**

Aug-24



Children in schools are usually taught that the basic needs of a human being are food, shelter and clothing. Of course, as one advances through the various education levels, the basic needs are expounded upon with some needs being reclassified as luxuries while others remain a necessity. Nonetheless, the classification of housing as a basic human need has remained constant as a necessity.

This is further emphasized in the Kenyan Constitution that protects the right to access adequate and accessible housing. The Constitution does not just protect the right to any kind of housing; it protects the right to quality housing. Living in a poorly built or shanty house is not in line with the right to accessible and adequate housing. Understandably, providing quality housing to people is quite an expensive undertaking even for the Government. Therefore, the Constitution provides that the Government is to continuously take progressive steps to realize the right to housing.

The current Kenya Kwanza Government enacted the Affordable Housing Act, No.2 of 2024 (the “Act”) as its answer to the housing problem in the country.

This alert provides a brief, simple and informative outlook on the Act.

Background

The Act was assented to by the President of the Republic on the 19th of March 2024. It was promulgated with the objective of providing the legislative framework that would govern the financing, construction and allocation of affordable houses by the Government.

Specifically, it was enacted as a reaction to the determination of the High Court in Constitutional Petition E181 of 2023 that declared Section 84 of the Finance Act 2023 unconstitutional due to the lack of a comprehensive legal framework and that it placed an unfair burden on the salaried Kenyans. The Finance Act of 2023 had introduced the Affordable Housing Levy through an amendment of the Employment Act. Therefore, the Act comes in to take into account the judgment of the High Court and it does so by repealing the amendment to the Employment Act on the affordable housing levy.

Presently the Government has published the Affordable Housing Regulations, 2024 (the “**Draft Regulations**”).

Imposition of the Housing Levy

The Act creates and imposes the housing Levy (the “**Levy**”). The Levy is imposed at the rate of 1.5% of:

- i. The gross salary of the employee.
- ii. The gross income received by a person that is not a salary.

Gross income is the total amount a person has received without deducting any statutory deductions such as taxes or expenses.

This Levy is to be collected and paid to the Kenya Revenue Authority (“**KRA**”) on or before the 9th day after the end of the month that the gross income was received. For employees, it will feature as a deductions alongside other existing statutory deductions such as PAYE, NSSF, NHIF (to soon be replaced with the SHIF).

It is the responsibility of employers to deduct and remit the amount from the employee’s gross salary. In addition to that, the employer is expected to then match that the amount they deducted from the employee as Levy and remit it to KRA. Once they have done so, they themselves are then exempted from having to deduct 1.5% of their gross income and remit to KRA in other words the employer will not be required to pay the Levy for his/her employees and then for himself/herself. The reasoning of this exemption stems from the fact that for each employee they remit the Levy for, they must themselves remit a similar amount

to KRA. In simpler terms, KRA receives 3% of the employee's gross income for the Levy where the first 1.5% is deducted from the employee's gross pay and the remaining 1.5% is deducted from the employer's income.

In addition to that, the employer can claim the amount deducted as an allowable deduction under the Income Tax Act thus reducing their taxable income. The employee on the other hand is entitled to affordable housing relief thereby reducing the amount that shall be subjected to PAYE.

Curiously, not all income will be subjected to the Levy. The Draft Regulations exempt the following class of income from the Levy:

- i. Income derived from the pension or gratuity paid to a person upon the termination of a contract;
- ii. Reimbursement of medical expenses, travel and accommodation for work-related activities;
- iii. Income from insurance compensation;
- iv. Income exempt from the Levy or income tax by an Act of Parliament.

Failure to remit the Levy as and when it is due attracts a penalty at the rate of 3% per month of the amount in default.

Creation of the Affordable Housing Fund

The monies deducted as the Levy are all channeled into the Affordable Housing Fund (the "**Fund**"). A fund in general can be defined as a basket where resources for set objective are put together. In this instance, the Fund is created by the Act to enable the designing, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure.

Similar to all funds developed by Acts of Parliament, the Fund shall be managed by a board which will be a body corporate capable of suing and being sued in its own name

The Fund shall be utilized to among others develop and maintain affordable housing units, institutional units such as hostels and the associated infrastructures such as access roads, drainage and sewer lines.

The Role of the County Governments

Under the Constitution, housing is a devolved function meaning it is the responsibility of each of the 47 Counties to address matters of housing in their respective Counties.

The Act addresses this issue by creating the County Rural and Urban Affordable Housing Committee (the "**Committee**") in each of the 47 Counties. The duty of the Committee is mainly to advise the County Governor on affordable housing in the County.

Construction of the Affordable Houses

The acquisition of public land for the building of affordable houses is to be done in accordance with the Land Act which will involve the National Land Commission as a key player in the implementation of the program. Land held by the County Governments are generally not available for allocation unless the board to the Fund has carried out public participation and held stakeholder engagements with the affected communities in the County.

Interestingly, the board is mandated by the Act to promote the use of local resources available in the locality of the construction of the affordable houses which including the use of the locally available materials and manpower. The justification is that the affordable housing program is expected to spur local economic activity by benefitting local factories, hardware stores and other small businesses.

Where the affordable housing units are to be built in an informal settlement such as a slum, the board has the mandate of:

- i. Issuing a notice to the residents of the settlement;
- ii. Put in place mechanisms for the resettlement of the residents; and
- iii. Offer the residents of the settlement the first right of purchase of the units.

Allocation of the Affordable Houses

Once built, the houses will become available for allocation to a natural person; not a company. Furthermore, the person must be an adult citizen of Kenya and has not previously been allocated an affordable housing unit. In essence it is one house to one person.

The person would be required to make an application to the board and pay the requisite deposit of 10% of the purchase price for the land. For those who are unable to pay the deposit, they can acquire deposit assistance by making an application to the board. To qualify for deposit assistance the person must have a monthly income of less than Kshs.20,000, is able to demonstrate that the affordable housing unit shall be their primary place of residence and demonstrate that the expected monthly repayment will be less than 30% of their monthly income.

Upon completion of payments, the board with the Cabinet's approval shall transfer ownership of the affordable housing unit to the applicant. The registration of the transfer of ownership of the unit will be in accordance with the Sectional Properties Act where the title will reflect ownership of the apartment and not the land in which the apartment sits.

The Act places restrictions on the owner of the affordable housing unit in that he/she cannot sell nor agree to sell the unit without prior written approval from the board and at least 8 years has passed since the completion of payment of the purchase price except where the unit was purchased through a mortgage agreement. Further restrictions are placed in selling the unit as the prospective purchaser must be eligible to purchase that unit and the board gets priority in purchasing the unit.

Once allocated a housing unit, they are at liberty to apply for a change of the unit. This is done through an application to the board. The person seeking to change the affordable housing unit must ensure that they qualify for allocation of the unit they are applying for and that they surrender their allocated units in good 'tenantable' condition.

Where a person has been in default of their monthly payments for four consecutive months, the Board:

- i. Repossess the unit;
- ii. Reallocate the housing unit to another eligible person;
- iii. Change the defaulter's affordable housing unit to a lower value unit; or
- iv. Restructure the payment agreement with the defaulter.

Conclusion

From the above brief overview, it is clear that the Act seeks to provide the framework to provide affordable housing for Kenyans, however, at its core it fails to embrace the principle of devolution as the County Governments play a very marginal role in the program. Furthermore, the Act appears to be more of a reaction to the declaration of unconstitutionality of the Levy under the Finance Act of 2023 and the haste to ensure that the 1.5% deductions are anchored in law and continue to be deducted. The Act is still in its infancy stages of implementation and its effects whether positive or negative are yet to be fully realized even as Kenyans continue to be deducted the Levy from their gross income.

The Act is presently under challenge at the *High Court Constitutional and Human Rights Division in numerous constitutional petitions; E154, E173, E176, E181, E191 & 11 of 2024 with Petition No. E154 of 2024 Gakenyis & 4 others v Cabinet Secretary Lands & 4 others* being the lead file. The 25th of September 2024 has been set as the date for highlighting of submissions. Our team will keenly follow the proceedings and provide an update in due course.

**This legal alert is for information purposes only. Legal advice should be sought on the views expressed herein. Please do not hesitate to contact us in case of any questions.*

Wamaitha Gichamba & Co. Advocates

**Cool Breeze Gardens, Office No. F, Muthaiga
Thika Superhighway**

P.O. BOX 11622-00400, NAIROBI

TEL: +254 731 965 951/ +254719 311 563

Email:

wamaitha@wamaithagichambaadvocates.com

Website: <https://wamaithagichambaadvocates.com/>



**Dorcas Wamaitha
Managing Partner**