



**COURT OF APPEAL  
DECLARES THE  
FINANCE ACT 2023  
UNCONSTITUTIONAL**

Aug-24



The months of June and July 2024 have been a very trying moment for Kenya's Government and an arguably transformative one for Kenya. The Government experienced an unprecedented rejection of the Finance Bill 2024 by predominantly the Generation Z and millennial age-groups. The demonstrations forced the Government to completely withdraw the Finance Bill 2024 with the President going a step further by dissolving and reconstituting his cabinet.

As at the time the Finance Bill 2024 was rejected, the consequence was that the statutory amendments introduced by the Finance Act 2023 (the "Act") would be the basis for supporting the budget for the fiscal year 2024-2025.

No sooner had the Finance Bill 2024 been rejected than the Court of Appeal (the "COA" or the "Court") hit the Government with yet another setback by declaring the Act unconstitutional. The judgment delivered on the 31<sup>st</sup> of July 2024 by the three bench judges, predominantly highlighted the inadequacy of meaningful public participation.

## **1. Background of the Act**

The Finance Bill of 2023 (the "Bill") was assented to by the President on the 26<sup>th</sup> of June 2023 thus becoming the Act. Immediately thereafter, it became the subject of 11 Constitutional Petitions which were all filed at the High Court, Constitutional and Human Rights Division, Nairobi, namely, Petition Numbers E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 and E254 all of 2023 (the "Petitions"). The Petitions were consolidated with the lead file being Petition Number *E181 of 2023, Okiya Omtata and Others vs the Cabinet Secretary for the National Treasury and Planning and Others*.

The High Court delivered its judgment on the 28<sup>th</sup> of November 2023 in which it declared some provisions of the Act unconstitutional notably the housing levy as espoused under the Act. The Government, however, remedied this by enacting the Affordable Housing Act, No.2 of 2024.

Aggrieved by the judgment, the Government appealed to the Court of Appeal in Civil Appeal E003 of 2024 (the "Appeal"). Similarly, the petitioners filed a cross-appeal with the key intent to have the entire Act declared unconstitutional. It is the Appeal that has now varied the decision of the High Court by declaring the entirety of the Act unconstitutional.

## **2. Summary of the Judgment**

The Appeal broke down the issues for determination as follows:

- a. Whether the High Court's declaration that the housing levy and the amendments to Statutory Instruments Act to be unconstitutional had been rendered moot*

The Court found that the enactment of the Affordable Housing Act, No.2 of 2024, resolved the unconstitutionality of the affordable housing levy under the Act. Similarly, the Statutory Instruments (Amendment) Act of 2024 cured the unconstitutionality of S.89 of the Act which had amended the Statutory Instruments Act. Consequently, the housing levy is fully in force and has not been affected by the Appeal.

- b. Whether the Act was a Money Bill and whether it contained provisions which ought not to have been included in a Money Bill contrary to Articles 114 (3) & (4)*

The Court asserted that the Act was a Money Bill. Under articles 114(3) of the Constitution, a money bill deals with matters of taxes, Government loans, appropriation and investment of public money and imposition of charges on public land. The Court held that the amendments to the Kenya Roads Board Act and Unclaimed Assets Act were unconstitutional on the basis that the said amendments ought not to have been introduced through a Money Bill.

The Court's reasoning was that an amendment does not qualify to be a part of a Money Bill (as contained under Article 114(3) of the Constitution) simply because it has the financial bearing of public money.

*c. Whether the Act included provisions which were not in the Finance Bill, 2023, which were subjected to public participation.*

Parliament had introduced 18 new substantial amendments at the third reading before the Act was assented to. The said amendments were not subjected to public participation. The High Court declared the amendments as constitutionally sound on the basis that Members of Parliament can introduce amendments to a bill without requiring public participation to be conducted on those amendments.

The COA disagreed with the High Court noting that the 18 amendments were completely new amendments which were not subjected to the first and second reading as well as public participation. This was unconstitutional and also contrary to the legislative process. It is imperative to note that the COA did not outlaw introduction of amendments during the third reading, what it declared unconstitutional were amendments that were completely new and different from the Bill that was presented for public participation and the views given by the public. The COA maintained that it was a mischievous act for Parliament to sneak in completely new provisions at the third reading without subjecting the said provisions to public participation. An example of the new amendments was the insertion of the provision that Kenya Revenue Authority ("KRA") Deputy Commissioners can only be appointed by the Board to the Authority.

*d. Whether the Senate ought to have been involved in the enactment of the Act*

The High Court deemed the Bill to be a Money Bill and therefore solely fell within the ambits of the National Assembly. The COA agreed with this decision and held that the Senate did not need to be involved in the enactment of the Bill.

*e. Whether there was sufficient public participation in the enactment of the Act and whether Parliament is obligated to give reasons for adopting or rejecting views given by members of the public during public participation*

The High Court did establish that public participation had sufficiently occurred stating that Parliament had no obligation to give written reasons for adopting or rejecting any proposal received from the public.

The COA disagreed with the High Court and decided that Parliament must give reasons for adopting and rejecting public proposals. This is to ensure that public participation is meaningful and to enhance transparency and accountability of Parliament. The failure to do this rendered the entire legislative process leading to the Act flawed and therefore unconstitutional.

*f. Whether estimates of revenue and estimates of expenditure were included in the Appropriation Act in accordance with the Constitution and the Public Finance Management Act*

The COA found that the proper legislative procedure had not been followed since by the time the Bill was in the 2<sup>nd</sup> Reading Stage, the Cabinet Secretary in charge of Treasury had yet to present the Budget Proposal to the National Assembly as required by under Article 220(1) (a) and 221 as read with S.37, S.39 and S.40 of the Public Finance Management Act. Therefore, the Act was void as it lacked the legal foundation to stand on.

*g. Whether the High Court has jurisdiction to intervene in policy matters*

The COA held that Article 165(3)(d)(i) and (ii) granted the High Court jurisdiction to intervene in policy matters that infringe the Constitution.

### 3. Consequences of the Appeal

First and foremost, it is important to highlight that a Finance Act is an amendment act. It primarily makes changes to the already subsisting tax and other legislation including the Income Tax Act, the Excise Duty Act, the Tax Procedures Act and the Value Added Tax Act.

The declaration that the Act is unconstitutional does not mean that the Government cannot collect taxes. The major effect is felt in the revenue estimates since a Finance Bill is primarily geared towards increasing revenue collection by amending various legislations touching on tax and/or incidental to the collection of taxes.

Presently, as there is no legally operating Finance Act 2023 and 2024, the tax laws lawfully in force are the laws as amended by the Finance Act, 2022.

The table below contains a brief summary of some salient amendments that are now unconstitutional

Amendment	Description and Impact
<b><u>eTims</u></b>	<p>eTims was introduced in a bid to enhance tax accountability. It would serve as a live monitoring tool for the KRA. The amendment made it mandatory that for any expenditure that a business would claim as a deductible expense, an eTims invoice would need to be generated.</p> <p>Consequently, all invoices not generated via eTIMS will be admissible in claiming deductible expenses.</p>
<b>Introduction of PAYE tax rate of 32.5% and 35%</b>	<p>The Act introduced new tax brackets for the application of PAYE for employees earning between Kshs.500,000 and Kshs.800,000 at a graduated PAYE rate of 32.5% and 35% respectively.</p> <p>The rate of 30% that was applicable before the Act is in effect the applicable rate.</p>
<b>Non-resident companies to pay corporation tax of 30%</b>	<p>The Act had reduced the corporation tax non-resident companies were subjected to from 37.5% to 30%.</p> <p>It is now the case that non-resident companies will be taxed at a rate of 37.5%.</p>
<b>Turnover tax</b>	<p>The Act lowered the threshold for turnover tax to Kshs.25 million from Kshs.50 million and increased the rate to 3% from 1%.</p> <p>The threshold has been reverted to Kshs. 50M and the rate to 1%.</p>
<b>Digital content monetization</b>	<p>The Act introduced withholding tax on monetized digital content at the rate of 5% for resident persons and 20% for non-residents/foreigners and this has now been abolished.</p>
<b>16% VAT on fuel</b>	<p>The Act increased VAT on fuel from 8% to 16%. The judgment reverts the VAT rate to 8%.</p>
<b>VAT on LPG</b>	<p>The Act zero-rated LPG gas.</p> <p>The applicable rate now stands at 8%</p>

0% VAT on exported services	The Act had zero-rated VAT on exported services. The judgment reverts the rate back to 16% and this is a blow to the service industry which offers services out of Kenya.
Excise duty on betting	The Act increased excise duty from 7.5% to 12.5% and accordingly, the rate goes back to 7.5%.

#### 4. Conclusion

The declaration that the Act is unconstitutional is indeed a setback for the Government. More importantly, there is currently no constitutional nor statutory basis for taxpayers to account for the taxes under the Act.

The aftermath of the judgment is that there is now uncertainty on the remission of taxes under the Act. The Federation of Kenya Employers raised this issue taking note that the KRA had yet to adjust the iTax system to align with the judgment. The Energy and Petroleum Regulatory Authority is another entity immediately impacted by the judgment as it regulates the price of petroleum products in the country.

The Government has in the meantime appealed to the Supreme Court and sought stay of execution orders which are yet to be granted. What can be said without any doubt is that the Government will have to acknowledge that all its actions are bound by the Constitution and that falling short of the constitutional requirements will open it up to constitutional petitions.

*\*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.*

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