

Legal Tussle on The Affordable Housing Levy – Part 3

Introduction of the Affordable Housing Bill 2023

A. INTRODUCTION

The High Court's judgement of 28th November 2023 on the petition challenging the constitutionality of the Affordable Housing Levy (AHL, levy) highlighted several flaws of the AHL legal provisions. In response to these flaws, the Government through the Affordable Housing Bill, of 2023 ("the Bill") took steps to rectify the flaws raised.

The AHL was introduced by the Finance Act 2023 as a government initiative aimed at the realization of Article 43 (b) of the Constitution, through the provision of affordable housing solutions. The AHL has been subject to legal contest at the High Court and Court of Appeal.

Read more on this in our detailed analysis of these contests in **Part 1** and **Part 2** of this series below:

- [LEGAL TUSSLE ON THE AFFORDABLE HOUSING LEVY - Part 1; HIGH COURT OF KENYA](#)
- [LEGAL TUSSLE ON THE AFFORDABLE HOUSING LEVY - Part 2; COURT OF APPEAL KENYA](#)

In this article we shall provide an analysis of the provisions of the Bill and our recommendations.

B. FLAWS POINTED OUT BY THE HIGH COURT

In holding the AHL as unconstitutional, the High Court in its Judgment noted that the levy not only violated the Constitution but also went against the taxation principle of certainty. Some of the flaws as observed by the Court included: -

- The lack of a comprehensive framework for the administration of the levy— there was no rational explanation for how the levy was to be administered;
- The levy was discriminatory and unfair as it violated the provisions of Articles 27 and 201 (b) (i) of the Constitution - There was lack of a clear justification why the tax was levied on persons in formal employment to the exclusion of all other non-formal income earners; and
- The levy created tax uncertainty – There was no definition of levy under the Employment Act 2017 or the Finance Act 2023.

With the High Court's judgment highlighting the myriad of issues affecting the AHL, the Government took steps to address these issues through the Affordable Housing Bill, 2023 ("the Bill")

The Bill was tabled in Parliament on 7th December 2023 with public participation on the same being set to commence on 9th December 2023 and ran up to 28th December 2023.

However, on 18th December 2023, a petition was filed at the High Court in Kisumu seeking for the court to quash the intended public participation of the Bill on the grounds that it was in contempt of Court orders declaring the levy as unconstitutional.

The High Court delivered its judgment on 4th March 2024 dismissing the referenced petition noting that the public participation conducted in respect of the Bill was proper and constitutional.

The National Assembly passed the Bill on February 21st, 2024, with amendments aimed at addressing concerns raised by stakeholders during the public participation exercise. The Bill was referred to the Senate for its consideration.

On 22nd February 2024 during the first reading of the Bill in the Senate, the Bill was committed to the Standing Committee on Roads, Transportation and Housing. This Committee subsequently issued an invitation to the public for submission of written memoranda. At the time of publication of this article, the Senate is yet to vote on the Bill.

C. ANALYSIS OF THE BILL

The Bill seeks to provide a comprehensive legal framework (The Affordable Housing Act) for the implementation of the Affordable Housing levy. Additionally, the Bill aligns itself with the legal certainty requirement hence curing the lack of certainty in taxation while ensuring adherence to Article 27 and 201 (b) (i) of the Constitution on equality and fairness.

Definition of Levy and Introduction of a Charging Clause

Section 4 of the Bill seeks to introduce the definition of Levy as the Affordable Housing Levy. The said levy is imposed at the 1.5% of the gross salary of an employee, the gross income of a person received or accrued which is not subject to the levy as salary, to be paid to the Commissioner of the Kenya Revenue Authority as the collector.

Section 5 of the Bill seeks to have the employer remit an amount equivalent to the amount deducted from the employee's gross salary. This means that an employer is required to match the 1.5 % deduction.

The responsibility to deduct and remit is placed on the employer and where the employer defaults on payment or remittance of the levy, the Bill seeks to impose a penalty of 3% of the unpaid amount.

Notably, the Bill seeks to impose the levy not only on the gross salary of employees but also on the income of a person received or accrued and which is not subject to levy as an employee. This cures the discriminative aspect of the levy as it was before and now making the levy applicable to all taxpayers. We however note that the Bill is silent on the status of the levy on foreigners employed by Kenyan employers.

Further, the framework for implementation of the same on persons not within the formal sector has not been defined.

The Bill defines affordable housing to mean housing that is adequate and costs not more than 30% of the income of a person per month to rent or acquire. This could mean that any housing, no matter how expensive, can technically be considered affordable if the rent or mortgage payments are less than 30% of what a person earns each month. We note that this definition creates ambiguity and leaves room for different interpretations.

Exemption from the Levy

The Bill seeks to grant discretionary authority to the Cabinet Secretary for National Treasury in consultation with the Cabinet Secretary for matters relating to Affordable Housing, to provide for the exemption from the levy to any income or class of income or any person or category of persons. The Bill has not provided the list or requirements for eligibility for the exemption. However, it grants the Cabinet Secretary for matters relating to housing the discretion to make regulations setting out the criteria for exemption.

Collector

The Bill identifies the Kenya Revenue Authority or any other person appointed by the Cabinet Secretary for the National Treasury as the levy collector, with the responsibility of forwarding the collected levy to the Affordable Housing Fund (“the Fund”).

The Affordable Housing Fund

The Bill seeks to establish the Fund to be managed by the Affordable Housing Board (“the Board”). The fund shall receive monies deducted as levies, gifts, grants, or donations, income from its investments or accrued by the fund from the performance of its functions, and monies appropriated by the National Assembly for the Fund’s purpose. The purpose of the fund is set out as: -

- To provide funds for the development and maintenance of affordable housing and associated infrastructure;
- To facilitate the development of an affordable housing scheme;
- To provide low-interest loans for the acquisition of affordable houses within the approved affordable housing scheme; and
- Develop long-term finance solutions for the development and take off of affordable housing;

Affordable Housing Board

Section 12 of the Bill establishes the Affordable Housing Board, which is a corporate body with a common seal. The Board’s member shall consist of: -

- a non-executive chairperson appointed by the president;
- a Chief-Executive Officer with no voting rights;
- the Principal Secretary to the National Treasury;
- three other persons appointed by the Cabinet Secretary for Treasury and as nominated by the Council of Governors, COTU, and the Federation of Kenya Employers; and
- three persons, not public officers who possess qualifications in built environment, finance, or law.

The Board shall be responsible for overseeing the development of affordable housing in Kenya, maintenance and rehabilitation of affordable housing projects, advising the Cabinet Secretary for Treasury on relevant matters, and allocation of the funds.

The establishment of the fund and the board provides an administrative framework intending to ensure checks and balances by providing for their separate responsibilities. The allocation of the funds by the Board is also capped and set out in the following percentages: -

- 30% of the fund is allocated to the National Housing Corporation for the development, maintenance, rehabilitation and off-take of affordable housing projects;
- 30% allocated to slum upgrading;
- 30% to institutional housing projects;
- Up to 2% to the levy collector; and
- Up to 2% to the Board for its administrative duties.

Notably, while providing for the requirements for the board members, the Bill emphasizes qualification in built environment, finance, and law matters which is commendable as it will encourage competence and diversity among the board members.

The Bill additionally caps the tenure of the Board members, while setting out the regulations for the conduct of the Board’s affairs. Transparency is also encouraged under the Bill by requiring the Board members to disclose any conflict of interest and restricting members with conflicting interests from taking part in any discussion or voting on any question relating to the matter where a conflict of interest exists.

Administrator of the Fund

The Bill seeks to appoint the Chief Executive Officer of the Board as the administrator of the Fund with the responsibility to: -

- Supervise the day-to-day administration of the fund;
- Open and operate the accounts of the fund with approval of the National Treasury and the Board;
- Be the custodian of assets, property, and equipment of the fund;
- Implement policies approved by the Board;
- Prepare a statement of accounts relating to the Fund showing the expenditure incurred from the fund; and
- Prepare estimates of annual revenue and expenditure of the fund for approval by the board.

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The applications for housing units are to be made to approved agencies and are accompanied by the applicant's copy of National ID, KRA PIN Certificate, and proof of requisite deposit of 10% of the value of the unit.

Although the Bill defines agency as the institutions allocated monies for affordable housing, of note is that the clause mentions the National Housing Corporation and State departments responsible for institutional housing projects and rehabilitation and offtake projects under the Public Finance Management

If beneficiaries of the affordable housing project seek a change in allocated housing units, they are required to make a formal application to the specific agency through which they made an application for a housing unit setting out the request for unit alteration and loan repayment transfer.

Loans for the purchase of housing units

The Bill seeks to introduce a loan application provision for persons desirous of purchasing the units.

Applicants who have been issued with the loan are also issued with a loanee account number.

The loan application shall be made to relevant agencies who have the responsibility to review the application and can either allow or reject it with reasons. The repayment period is as per the period set out in the specific loan agreement.

The interest rate for the loans is based on a reducing balance and is set at: -

- 3% for social housing units and affordable housing units; and
- Up to 9% for affordable and market housing units.

Savings

Section 38 of the Bill introduces an option for eligible persons to voluntarily save with an agency in a bid to raise a deposit towards the allocation of a housing unit.

The Agency is required to open separate bank accounts for the voluntary savings monies and any interest accruing from investment of the voluntary saving is credited to the account. Additionally, the Bill allows for the withdrawal of the savings upon giving a 90-day notice to the agency for a refund together with any accrued interest.

Financial Provisions

In line with its intent to ensure financial prudence, and encourage transparency and accountability the Bill seeks to have the accounts of the Fund audited and reported upon as per the Public Audit Act.

The Bill also sets out requirements for the Board and the administrator of the Fund as follows: -

- The Administrator should cause to be kept proper books and records of account of the income, expenditure, and assets of the Fund;
- The Administrator should ensure that within three months from the end of each financial year, submit to the Auditor-General the accounts of the Fund together with a statement of the income and expenditure of the Fund during the financial year and a statement of the assets and liabilities of the Fund on the last day of the financial year; and
- The Board should inform the public of its activities and operations through regular publications.

Offences

The Bill seeks to make it an offense to: -

- Misappropriate any funds or assets of the Fund or assist any person in misappropriating or applying the funds in a manner other than the manner provided in the Affordable Housing Act;
- Failure to give information or give inaccurate, misleading, or falsified information required under the Affordable Housing Act; and
- Any person in possession, control over, or access to any document or information relating to applications or granting of loans communicates anything therein to any person other than the authorized person and in accordance with the Act.

Any person who commits the above offenses shall be held liable and on conviction to a fine not exceeding 10 million or imprisonment of a term not exceeding five years or both.

Amendment and Transitional Provisions

The Bill seeks to amend the Employment Act 2007 by repealing Sections 31B and 31C which were introduced by the Finance Act 2023 as an amendment to the Employment Act.

This repeal infers that any payments made or actions taken under the repealed sections are considered to have been made or taken under the provisions of the Affordable Housing Act.

Furthermore, any commitments or obligations made by the national government regarding affordable housing, in accordance with the previous Act of Parliament, are now deemed to be commitments or obligations made under the Affordable Housing Act.

D.OUR RECOMMENDATIONS

The Government's initiative to create a robust legal framework for the affordable housing levy is commendable. However, we have identified some areas in the Bill that could benefit from further consideration and clarification: -

- **Scope of Levy** - We note that the Bill does not distinguish between Kenyan and foreign employees, creating uncertainty about its scope.
- **Definition of Affordable Housing** – we note that the Bill's definition of affordable housing is ambiguous and could be interpreted broadly. We suggest refining this definition to provide more clarity.
- **Basing the 1.5% on gross pay instead of basic pay** – We note that the Bill's imposition of levy on the gross pay will result in severe taxation on the employed Kenyans and result in potential disputes due to un-uniform remitted levy's monthly as the base will keep changing. This should be revised to basic pay.
- **Informal Sector Compliance** – We note that the Bill aims to tax income outside employment but lacks a clear strategy for ensuring compliance in the informal sector. This maybe covered subsequently through Regulations as the Bill seeks to empower the Cabinet Secretary responsible for matters relating to affordable housing, in consultation with the Board to make regulations for its implementation.
- **Eligibility Criteria** - We note that the Bill allows any Kenyan citizen over 18 with an ID card to apply for affordable housing, provided they can meet the deposit requirements. However, we recommend a more structured eligibility and allocation process that prioritizes individuals with greater housing needs, such as those without homes or living in informal settlements.
- **Penalty Provisions** –we emphasize that the proposed penalty of 3.0% of the total unpaid amount is severe and could place additional financial strain on employers. We recommend that a reduced penalty would balance compliance enforcement with economic realities. While the purpose of penalties is to ensure compliance, we note that the 3% penalty is extremely harsh and with the potential to cause financial strain on already overburdened employers. We further note that a penalty rate of 1% will still achieve compliance without adversely affecting the employers.

TAX ALERT

- **List of Approved Agencies** -The Bill does not specify the agencies responsible for processing applications, which could confuse prospective applicants. Providing a clear list of these agencies would ensure a transparent and accessible application process.

E. CONCLUSION

To this end, we note that the Affordable Housing Bill of 2023 is a significant step towards rectifying the flaws identified by the High Court in the AHL. The success of the Bill will largely depend on the government's ability to effectively engage with stakeholders, address raised concerns, and ensure compliance with the regulations.

Despite the ongoing legal contest, it is evident the commitment to providing affordable housing solutions remains a priority for the Government and we anticipate further developments on the Levy.

LET'S TALK

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