

LEGAL TUSSLE ON THE AFFORDABLE HOUSING LEVY - PART 1; HIGH COURT OF KENYA



A. BACKGROUND

The Finance Act 2023 introduced the Affordable Housing Levy charged at 1.5% of the gross monthly salary of an employee. **This was effective 1st July 2023.**

The provisions of Section 84 of the Finance Act (housing levy provision) amended the Employment Act 2017 by requiring that each employee and employer shall pay a monthly levy known as the Affordable Housing Levy (AHL). The purpose of the levy was also set out to be, to provide funds for the development of affordable housing and associated physical infrastructure as well as provide affordable home financing to Kenyans.

Additionally, the levy rates were set out to be;

- Employees are to contribute 1.5% of their gross monthly salary; and
- Employers are to contribute 1.5% of their employees' monthly salaries.

An obligation to remit the deductions was placed on the employer within a timeline of not later than nine working days after the end of the month in which payments were due. Failure to remit attracted a penalty equivalent to 2% of the unpaid funds for every month that remains unpaid.

B. LEGAL CONTEST

The levy has since faced legal challenges with the first being at the High Court in Nairobi vide Consolidated Petition Nos. E181 of 2023. This Petition marked the beginning of the dispute over the housing levy in Kenya which at the time of publishing this article a Notice of Appeal had been filed at the Supreme Court by the Speaker of the National Assembly.

C. HIGH COURT PETITION

The petition at the High Court was premised on the grounds that;

PETITIONERS' ARGUMENTS

The introduction of the housing levy intended to be imposed on salaries of employees was unconstitutional and violated the following Articles of the Constitution of Kenya: -

a) Article 27 – which provides for equality and protection against discrimination. By targeting formal employees, the levy promoted inequality by subjecting formal employees to discrimination;

b) Article 160 (4) – which restricts the variation of remuneration and benefits payable to Judges;

c) Article 250 (8) – which restricts the variation of remuneration and benefits payable to Commissioners identified under Article 248(2) that is Commissioners of the Parliamentary Service Commission, Teachers Service Commission, Judicial Service Commission, the Commission of Revenue Allocation among other commissions;

d) Article 209 which sets out the category of taxes which does not include the housing levy, therefore the levy lacks an enabling statute

e) Article 201(a) - failure to subject the levy provision to public participation violated the principles guiding all aspects of public finance;

f) Article 114(3) – which sets out the contents of a Finance Bill and provides restriction on what a money bill may deal with, the levy does not form part of the intended aspects of a money bill;

g) Article 220 (1)(a) & 221 -The petitioner argued that the law required that revenue should be equal to the expenditure within a financial year. The estimates that were presented to Parliament on the backdrop of the levy did not contain the estimates of the revenue.

h) Articles 96 (1), (2) & 110 (3) - The petitioners argued that the introduction of the levy through the Finance Act, was illegal because the Finance Bill did not pass through the Senate as required by law.

The petitioners further argued that the mandatory affordable housing levy threatened the socio-economic interests of Kenyans.

They argued that there was no rationale for the Government to force its citizens to contribute to a mandatory scheme in a country where most of its citizens were already grappling with harsh economic times due to the existence of multiple layers of taxes.

That the effect of the levy was to take money from taxpayers without clear guarantees and a legal framework as to how they will benefit. It was cruel, unreasonable, inhuman, and degrading to levy a blanket tax on employee salaries based on deductible percentages without consideration of their existing contractual obligations.

Based on the above, the petitioners sought to have the levy declared unconstitutional and its implementation prohibited.

D. KENYA REVENUE AUTHORITY'S ARGUMENTS

The Respondents in support of the levy argued that: -

- a) The principle of taxation is not only lawful, constitutional, and legitimate, but is also a necessary mechanism for the National Government to raise revenue to meet its recurrent expenditure;
- b) Through their sovereign powers under Article 1 of the Constitution, the Kenyan Citizens empowered the National Treasury and Planning Ministry to create legislative proposals in the form of the Finance Act;
- c) In the formulation of the Finance Act, the legislative procedure was followed, the bill was submitted to Parliament and tabled before the National Assembly and approved by the Budget and Appropriations Committee following extensive public participation before approval by the National Assembly and tabled before Parliament;
- d) The proposal within the Finance Act was within provisions of the Constitution, particularly Articles 109 (1), (2), and (3);
- e) The Finance Bill had no direct bearing on matters concerning Counties and consequently, the Senate has no role in the Finance Bill since matters related to national tax are the preserve of the National Assembly;

- f) The Finance Act was procedurally enacted and it dealt with raising revenue and incidental matters and did not require prior concurrence by the Speakers of the National Assembly and the Senate;
- g) The Imposition of the levy is constitutional and legitimate and the legal exercise of Government power which is vested in the National Government as per Articles 209 and 210 of the Constitution;
- h) Taxation measures enacted by Parliament enjoyed the presumption of Constitutionality;
- i) The Affordable Housing Program is intended to ensure access by Kenyan Citizens to social economic rights and in particular realization of Article 43 on social economic rights; and
- j) The introduction of the levy is progressive, equitable, and fairly borne through a progressive taxation regime that offers vertical equity.

E.HIGH COURT'S JUDGEMENT

Based on the submissions above, the High Court vide judgement delivered on 28th November 2023, issued prohibitory orders, prohibiting the KRA from charging, levying, or in any way collecting the Affordable Housing Levy.

Subsequently, the Kenya Revenue Authority (KRA) requested the High Court for stay orders against the orders suspending the charge and collection of the housing levy. The purpose of the stay as argued by KRA was to allow it to rework its systems and deal with the November salaries and levy deductions which had already been processed.

Additionally, KRA noted that it needed 30 days to decide in the event aggrieved taxpayers applied for refunds.

The High Court granted the requested orders limited to a period of 45 days ending 10th January 2024.

F. IMPACT OF JUDGEMENT AND STAY ORDERS ON AFFECTED TAXPAYERS

Although the High Court's judgment declared the Affordable Housing Levy unconstitutional and prohibited the deduction thereto, a stay was issued in favour of the KRA.

The implication of the said stay orders was that although the housing levy had been declared unconstitutional, the KRA still had the mandate to charge and collect the same from taxpayers until the lapse of the said orders. Although this created a legal absurdity, the discretionary powers of the Court to grant stay orders cannot be overlooked.

The Respondents since filed an appeal at the Court of Appeal against the High Court's decision declaring the Affordable Housing Levy unconstitutional.

In the next article, we shall provide an analysis of the ruling of the Court of Appeal in respect of the application for extension of stay orders as sought by the KRA and the National Treasury.

LET'S TALK

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