

LEGAL TUSSLE ON THE AFFORDABLE HOUSING LEVY - PART 2; COURT OF APPEAL KENYA



A.BACKGROUND

The introduction of the housing levy through the amendment of the Employment Act by Section 84 of the Finance Act 2023 was initially challenged at the High Court. On 28th November 2023, the Court entered judgment to the effect that the introduction of the levy was unconstitutional and consequently issued prohibitory orders against the charging, deduction and collection of the levy.

Read more in our part one analysis of the legal tussle on the affordable housing levy (High Court of Kenya) Attach link of the case here [**High Court Ruling**](#).

Aggrieved by the said decision, the Kenya Revenue Authority and the National Treasury applied for stay orders and further requested for a 45-day period to file formal stay application at the Court of Appeal. This request was allowed by the High Court and stay orders thereto granted. **The 45 days lapsed on 10th January 2023.**

The aggrieved parties subsequently appealed to the Court of Appeal and additionally lodged a formal application seeking to stay the prohibitory orders as earlier issued by the High Court.

Upon the lapse of the 45 days, the Kenya Revenue Authority requested for a temporary extension of the stay orders. The Petitioners also filed an application seeking to have the 45-day stay orders declared unconstitutional.

B. APPLICATION FOR EXTENSION OF THE 45 DAY STAY ORDER

ARGUMENTS BY THE PETITIONERS

The petitioners, having lodged an application seeking to have the High Court's 45 days stay orders declared unconstitutional, also opposed the request to have these orders extended arguing that: -

- a) It was wrong for the High Court, having declared the Affordable Housing Levy Unconstitutional and prohibiting its implementation, to suspend the implementation of its verdict;
- b) The High Court lacked jurisdiction to tamper with its own decision, this jurisdiction belonged to the Court of Appeal; and
- c) The 45-day stay order was illegal, and that should the Court of Appeal extend the same, it will be actively participating in an illegality.

ARGUMENTS BY THE KENYA REVENUE AUTHORITY AND NATIONAL TREASURY

The KRA and the National Treasury on the other hand in support of its request for an extension argued that: -

- a)It would suffer irreparable loss since the uncollected levy could not be recovered even if it won the appeal; and
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- b)It had already started work on the affordable housing program which stood to be stalled and occasion loss of jobs since the money meant to pay the workers was supposed to be generated from the levy.

The Court of Appeal did not pronounce itself on the issue of extension of the stay orders leaving affected taxpayers in uncertainty.

C. IMPORT OF THE LAPSE OF THE HIGH COURT'S 45-DAY STAY ORDER

There being no formal pronouncement by the Court of Appeal on this issue, the legal effect of the lapse was that after 10th January there were no orders staying the prohibitory order by the High Court.

As a result, the prohibitory orders against the charging and collection of the housing levy became operational on 10th January 2024.

This legally meant that the charging, levying or in any way collecting the Affordable Housing Levy was prohibited as per paragraph 221 of the High Court Orders of 28th November 2023 as of 10th January 2024.

D. APPLICATION FOR STAY ORDERS AGAINST THE HIGH COURT'S PROHIBITORY ORDERS

In terms of the application for stay of execution of the prohibitory orders as filed by the KRA and the National Treasury at the Court of Appeal, the Court determined the same and issued its ruling on 26th January 2024.

KRA'S AND NATIONAL TREASURY'S ARGUMENTS

- KRA argued that it had filed an appeal that raised arguable grounds that would be rendered nugatory should the prohibitory orders not be stayed;
- Tax is a continuous and annual mechanism therefore the uncollected levy would not be recovered should its appeal succeed. Taxpayers on the other hand have a remedy of getting refunds for overpaid taxes should the government's appeal fail;
- It would be in the public's interest for the prohibitory orders to be stayed pending the appeal;

- Should the stay application be refused the projects commenced under the affordable housing program would stall as a result jobs would be lost; and
- It had a right to maintain the status quo until the determination of the appeal.

PETITIONERS' ARGUMENTS

- The Government could recover unpaid taxes by backdating the tax obligation as it has done in the past;
- No outcomes derived from actions or laws declared Unconstitutional could be justified in the Public's Interest. The Public Interest lied in the fidelity of the Constitution;
- The levy being a novel tax, no prejudice would be occasioned to the Government if the orders for stay were refused;
- Irreparable harm would occur if the orders of stay were granted because allowing collection of taxes which may be nullified by the Court would render the appeal nugatory;

- The effect of the declaration of Unconstitutionality of the levy was that the levy was illegal and unlawful, therefore allowing the application for stay would be condemning taxpayers to an illegal tax regime;
- The introduction of the Affordable Housing Bill (AHB) in Parliament by the applicants meant that the applicants had conceded to the High Court's judgment and the issue of the housing levy was moot; and
- The Government should not have entered into contracts commissioning the Affordable Housing Program as it was aware the legal provision on the levy was under judicial scrutiny.

E. ISSUES FOR DETERMINATION

The Court of Appeal considered all the arguments raised and identified several issues for determination and determined them as follows: -

- On the issue of whether the appeal was arguable. The Court noted that the Applicant (KRA) needed only to demonstrate one arguable ground for which they did. The Court, therefore, held that the appeal was arguable;
- On the issue of whether the appeal would be rendered nugatory. The Court sought to balance between preserving the status quo pending the hearing of the appeal and the consequences of suspending the orders of the High Court. The Court, therefore, held that since no evidence was placed before it in support of the jobs that will be lost or contracts signed to implement the Affordable Housing Project, it was therefore not proven that the appeal would be rendered nugatory; and

- On the issue of public interest, the Court held that public interest was represented by constitutional values therefore applications of public interest must conform with the Constitution.

F. COURT'S RULING

In arriving at its decision in terms of the stay application by KRA and the National Treasury, the Court of Appeal ruled that if the stay orders sought were granted before the determination of the appeal and if the Court eventually upholds the High Court's judgment, then there would be decisions that will have been undertaken under the unconstitutional law that may not be reversible.

Consequently, the court found that it would be in the public's interest to not grant the stay sought. To this end, the application for stay was dismissed.

G.IMPACT OF THE RULING ON AFFECTED TAXPAYERS

The import of the Court of Appeal's ruling is that the prohibitory orders issued by the High Court remained in place. As such the Kenya Revenue Authority was prohibited from charging and/or collecting the housing levy.

With the failure of the Court of Appeal to issue stay orders, employees and employers are therefore under no obligation to deduct the 1.5% levy from their gross salary and the employers are not under any obligation to remit.

Indeed, the Federation of Kenyan Employers has additionally issued an advisory advising the employers not to deduct the levy unless the Court of Appeal rules otherwise after the hearing of the substantive appeal or should the government challenge the Appellate court's ruling and obtain orders reversing the same.

Without overlooking the legal consequence of the ruling, we caution taxpayers and advise they note that, should the Government's appeal succeed the KRA might seek to retrospectively collect the levy from its effective date (1st July 2023) including penalties and interest. It is therefore imperative to consider this in deciding how to proceed as an employer.

H.REFUND TO TAXPAYERS

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On whether the taxpayers are entitled to a refund on the levy collected so far is an issue that will be determined once the appeal is determined, to avoid rendering the appeal nugatory.

We note however that the housing levy being a novel tax and with the KRA claiming it is an agent that collects the levy and forwards the same to the Ministry of Lands, there is no framework in place on how to apply for a refund.

As such, KRA must anticipate refund applications as a cause of action and liaise with the Ministry of Lands on the framework to be adopted.

I. CONCLUSION

We note that the Court of Appeal is yet to make its final decision on the substantive appeal. The future of the housing levy implementation in Kenya will depend on the outcome of this appeal. We will keep an eye on this issue for further developments.

We however note that the National Assembly published the Affordable Housing Bill 2024 on 4th December 2023. In the next analysis we delve into the proposed legal provisions under the AHB, how this will work, a comparison of AHB and the current Affordable Housing Levy which has since been declared unconstitutional pending the hearing and determination of the Court of Appeal substantive appeal and the Supreme Court stay order application.

At the moment, the Affordable Housing Levy remains unconstitutional and not chargeable effective 26th January 2024 when the COA issued its ruling dismissing KRA's application for stay orders.

Until a stay order is issued by the Supreme Court as per the intended appeal by the Speaker of the National Assembly or until the issuance of a ruling by the COA declaring the Affordable Housing Levy as Constitutional, legally no Affordable Housing Levy should be deducted from 26th January 2024 when the Court pronounced itself on the issue.

LET'S TALK

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