

**Legal Tussle on The
Affordable Housing Levy –
Part 4
Analysis of the Affordable
Housing Act 2024**

A. INTRODUCTION

Following the High Court's judgment that declared the Affordable Housing Levy as initially proposed in the Finance Act 2023 unconstitutional, the Government responded by introducing the Affordable Housing Bill, 2023.

This Bill sought to rectify the issues raised by the Court and provide a legal framework for the implementation of the affordable housing programs.

Read more on this in our detailed analysis of these contests in **Part 1, Part 2** and **Part 3** 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](#)
- [LEGAL TUSSLE ON THE AFFORDABLE HOUSING LEVY-Part 3;INTRODUCTION OF THE AFFORDABLE HOUSING BILL 2023](#)

On 19th March 2024, the President assented to the Bill, officially making it law. Below we analyze the provisions of the now Affordable Housing Act 2024 ("the Act").

B. ANALYSIS OF THE AFFORDABLE HOUSING ACT

This Act seeks to provide a comprehensive legal framework for the implementation of the affordable housing levy in the promotion of accessible and equitable housing opportunities for all citizens.

Commencement Date

The Act outlines a dual commencement date for its provisions as follows: -

- Sections 4 and 5 of the Act, which pertain to the charging clauses, commenced immediately upon the Bill's assent on 19th March 2024; and
- All other remaining Sections are scheduled to commence on a future date, which is to be gazetted by the Cabinet Secretary responsible for matters relating to affordable housing.

Definition of Affordable Housing Unit

Section 2 of the Act defines an affordable housing unit to refer to: -

1. A social housing unit, which is a house targeted to a person whose monthly income is below **KShs.20,000**.
2. An affordable housing unit, which is a house targeted to a person whose monthly income is between Shs.24,000 and **KShs.149,000**;
3. An affordable middle-class housing unit, which is targeted to persons whose monthly income is over **KShs 149,000**; or
4. A rural affordable housing unit, which is targeted to a person living in any area which is not an urban area.

Definition of levy and introduction of a Charging Clause

Section 4 of the Act defines the Levy as the Affordable Housing Levy imposed at the rate of 1.5% of the gross salary of an employee or the gross income of a person received or accrued which is not subject to the levy as salary.

Section 5 obligates employers to match the 1.5% of employees' deductions by remitting an equivalent amount.

The responsibility to deduct and remit the levy charged on gross salary is placed on the employer and where the employer defaults on payment or remittance of the levy, a penalty of 3% of the unpaid amount is imposed and sought to be recovered as a civil debt.

With regards to timing, the Act requires the levy to be paid to the collector no later than the end of the month in which the gross salary was due or the gross income was received.

This provisions are effective 19th March 2024.

Exemption from the levy

The Act prevents double taxation for employers who are paying matching contributions to their employees by exempting them from paying the levy on their gross income.

The Act further grants discretionary authority to the Cabinet Secretary for National Treasury on the recommendation of 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.

Administration and management of the levy**• Collector**

The Act appoints the Commissioner-General of the Kenya Revenue Authority as the levy collector, with the responsibility of forwarding the collected levy to the Affordable Housing Fund ("the Fund").

• The Affordable Housing Fund

Section 8 of the Act establishes the Fund to be managed by the Affordable Housing Board ("the Board").

The Fund is to receive monies deducted as levies, gifts, grants, or donations, income from its investments or accrued by the fund from the performance of its functions, monies appropriated by the National Assembly for the Fund's purpose, voluntary contributions and loans approved by the Cabinet Secretary for National Treasury. Further, all proceeds of sale, rent, and interest are to be paid into the Fund.

Section 10 sets out the purpose of the Fund as follows: -

1. To provide funds for the design, development, and maintenance of affordable housing, institutional housing, and associated social and physical infrastructure;
2. To facilitate the provision of funds for affordable housing and affordable housing schemes in the promotion of home ownership;
3. To provide low-interest loans for the acquisition of affordable houses within the approved affordable housing scheme;
4. Develop long-term finance solutions for the development and take off of affordable housing;
5. Facilitate development of institutional housing units;
6. Provide funds for maintenance of land or building, estate or interest for any of the purposes of the fund;
7. Fund any other activities incidental to the furtherance of the objects of the Fund; and
8. Facilitate the provision of services to the projects under the management of the Fund.

Implementation of the Affordable Housing

Allocation of Land

The Act incorporates the provisions of the Land Act in the allocation of public land for the implementation of the affordable housing scheme and development of institutional housing scheme. Land held by the County Government is however, not to be allocated unless the Board has carried out public participation and stakeholder engagement with the affected community within the county.

Displacement of residents

Section 47 of the Act provides that where an affordable housing project is to be implemented on land on which exists a settlement, the Board is required to issue a notice of the intended implementation of the project, to the residents in the settlement, put in place a mechanism for the resettlement of the residents, and offer to the residents in that settlement the first right of purchase of a unit in the project.

Eligibility criteria for allocation of affordable housing units

The criteria for eligibility will be as prescribed in the Act's regulations to be gazetted by the Cabinet Secretary responsible for matters relating to affordable housing in consultation with the Board.

Once a person meets the criteria and is desirous of an affordable housing unit, the Act requires that they make an application to the Board in the specified manner. This application is to be accompanied by proof of the requisite deposit, the applicant's copy of National Identity card, a copy of Incorporation Certificate in case of a body corporate, KRA PIN Certificate and tax compliance certificate.

In allocation of the affordable units, the Act requires that priority is to be given to marginalized persons, vulnerable groups, youths, women and persons with disabilities.

Loans for the purchase of housing units

The Act provides that the interest rate or administration fee for a loan issued under the Act will be payable on a reducing balance and at a rate prescribed by the Cabinet Secretary responsible for matters relating to affordable housing.

Voluntary Savings

Section 52 of the Act allows for eligible persons to make voluntary savings with the Fund for purposes of raising a deposit towards allocation of an affordable housing unit. The Act requires the Administrator of the Fund to open separate bank accounts for the savings and any interest arising from investment of the savings to be credited to this account.

Further, the Administrator is to issue an account number to each person making a voluntary savings.

The Act further allows a person who has made a voluntary saving and has not been allocated an affordable housing unit to withdraw their savings by issuing a 90 day's written notice to the agency for a refund with any accrued interest or applying to the Board for approval of the issuance of an affordable mortgage to develop a rural affordable housing unit and that the applicant agrees to have their saved deposits and the land upon which the unit is to be built to be used as collateral.

Ownership of affordable housing units

The Act requires the Board, with approval from the Cabinet Secretary to transfer the ownership of an affordable housing unit to a qualified applicant upon completion of payment of the agreed price.

The Registrar is not allowed to register a transfer of any housing unit under the Act without the written consent of the Board. The certificate of the Board that the unit has been sold to an individual is conclusive evidence of consent.

Part IX of the Act establishes the following offences and penalties: -

1. 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 Act. A person who commits this offence will on conviction be liable to a fine not exceeding Kshs.20 million shillings or imprisonment of a term not exceeding 10 years or both and an additional mandatory fine if as a result of engaging in the offence the person received a quantifiable benefit or any other person suffered a quantifiable loss.
2. Failure to give information or giving inaccurate, misleading, or falsified information required under the Affordable Housing Act; and
3. 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 shall be held liable and on conviction to a fine not exceeding Kshs.10 million or imprisonment of a term not exceeding 5 years or both.

Regulations

The Act allows the Cabinet Secretary responsible for matters relating to affordable housing to make Regulations for better implementation of the provisions of the Act. Some of the matters that the Regulations may prescribe as listed under Section 59 of the Act include: -

- The criteria for exemptions;
- The criteria for eligibility of allocation of affordable housing units;
- The requisite deposit for the housing units;
- Identification documents accompanying the application for a unit;
- Criteria for change of affordable housing unit;
- The provision relating to off-take of affordable housing units;
- The application and integration of technology-based platforms in the administration and management of affordable housing schemes; and
- The interest rate or administration fee for a loan.

Amendment and transitional provisions

The Second Schedule of the Act amends the following Acts:-

1. Sections 31B and 31C of the Employment Act 2007 which were introduced by the Finance Act 2023 as an amendment to the Employment Act are repealed;
2. The Income Tax Act CAP 470 is amended as follows:
 - Section 15(2) is amended by introducing a new paragraph (ga) after paragraph (g). This new paragraph allows for the deduction of expenditure incurred by a person carrying on a business in the payment of the Affordable Housing Levy. This amendment is in an incentive to encourage contribution in the affordable housing initiative.
 - Section 30A is amended by the introduction of subsection (1A) immediately after subsection (1) which provides that, a resident individual who can prove that they paid the affordable housing levy in a specific year of income will be entitled to the affordable housing relief at the rate of 15% but shall not exceed Kshs.108,000 per annum. This is an incentive to taxpayers to encourage them to contribute in the affordable housing program.
 - The Third Schedule is amended under Paragraph 9 by substituting the word three with one point five. This amendment reduces the turnover tax for the informal sector from 3% to 1.5%.

3. The Kenya Revenue Authority Act is amended under Part II of its First Schedule by introducing Paragraph 15 immediately after Paragraph 14. This amendment introduces the Affordable Housing Act as a regulatory framework by adding it to the list of written law relating to revenue.

4. The Affordable Housing Fund regulations are revoked under Section 61 of the Act and all monies that were held by the National Housing Corporation before commencement of this Act are to vest in the Affordable Housing Fund and should be deposited in the Fund. 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 Acts of Parliament, are now deemed to be commitments or obligations made under the Affordable Housing Act.

D. CONCLUSION

The Act has tried to take into consideration various concerns raised by stakeholders during the public participation exercise. However, we have identified some areas in the Act that could benefit from further consideration and clarification: -

- Capping the levy contribution to a certain amount – We note that the Act's imposition of a levy on the gross pay will result in severe taxation on the employed Kenyans especially the high income earners and result in potential disputes due to un-uniform monthly remittance. In that regard we recommend capping the contribution to a certain amount
- Informal sector compliance – We note that the Act aims to tax income outside employment but lacks a clear strategy for ensuring compliance in the informal sector. This could be covered subsequently through Regulations.
- We note that the requirement for a 90-day notice for a refund together with any accrued interest on the voluntary savings is a relatively long notice period.
- Penalty Provisions – We note that the penalty of 3.0% to be imposed on employers on the total unpaid amount is severe and could place additional financial strain on employers. We recommend for reconsideration of the penalty rate to a lower rate.

LET'S TALK

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