

Tax alert

Court of Appeal Maintains Housing Levy Suspension by the High Court

Summary

This alert brings to your attention the Court of Appeal's ruling of 26 January 2024 in the case of **The National Assembly & Another (Applicants) vs Okiya Omtatah Okoiti & others (Respondents)** Consolidated Civil Application No. E577 of 2023.

The application arose from the High Court's decision that sections 76, 77, 78, 84, 87, 88 and 89 of the Finance Act, 2023 are unconstitutional.

The Appellate court has rendered its decision, dismissed the said applications and upheld the High Court's judgment. Further, the Court has directed that the substantive appeals be heard expeditiously so that the issues raised in the appeals can be resolved with finality.

Background

On 26 June 2023, the President assented to the Finance Act, 2023 (the Act). The Act came into effect on various dates listed as 1 July 2023, 1 September 2023 and 1 January 2024.

Since coming into effect, the Act has attracted Eleven (11) constitutional petitions challenging the process leading to its enactment and constitutionality of various provisions within it.

The National Assembly and the Cabinet Secretary for National Treasury and Economic Planning and the Attorney General opposed the consolidated petitions maintaining that the enactment of the Finance Act was constitutional.

In a judgment dated 28 November 2023, the High Court declared sections 76, 77, 78, 84, 87, 88 and 89 of the Finance Act, 2023 unconstitutional. The contentious sections provide for among other things, introduction of 1.5% Housing Levy. However, the Court upheld the constitutionality of sections 30 to 38 and 47 (compulsory VAT registration for digital service importers and introduction of import VAT on various goods) of the Finance Act, 2023.

The National Assembly, the Attorney General and CS, National Treasury, aggrieved by the High Court's decision, appealed to the Court of Appeal. At the same time, the aggrieved Applicants sought a temporary order to suspend the effects of the judgment. The High Court allowed a stay of judgement up to 10 January 2024 pending the hearing and determination of an appeal filed in the Court of Appeal.

Applicants' grounds

At the Court of Appeal, the Applicants sought conservatory orders on the following grounds:

- i. The Applicants had filed an appeal that was arguable thus satisfied the first limb of tests under Rule 5(2)(b) of the Court of Appeal Rules;
- ii. The uncollected housing levy for the period of the declared invalidity cannot be recovered should the appeal succeed thus rendered nugatory;
- iii. The public had the remedy of getting tax rebates for overpaid taxes if the appeal does not succeed;
- iv. The government has entered into binding contracts which if breached, the government will be required to pay damages for breach of contract;
- v. Sections 88 and 89 of the Finance Act, 2023 affects over 1,000 statutory instruments that if not kept alive, would affect various institutions to the detriment of the public and not possible to be reconstituted;
- vi. Public interest favours the issuance of a stay pending determination of appeal and or enactment of appropriate legislation to address issues raised;

The Applicants sought to persuade the Court of Appeal to issue conservatory orders suspending the High Court judgment pending determination of appeal filed in the Court of Appeal.

The Respondents' arguments

On their part, the Respondents contended that:

- i. The Constitution of Kenya does not grant any court the power to suspend a finding of unconstitutionality of a statute;
- ii. Section 53(8) of the Public Procurement and Assets Disposal Act prohibit public entities from procuring anything without a budget thus all contracts as argued by the Applicants are illegal and a nullity;
- iii. Government can recover unpaid taxes by backdating the tax obligations as it has done in the past;
- iv. The Respondents appear to have conceded the impugned judgment by introducing the Affordable Housing Bill, 2023 in Parliament;
- v. The Kenya Revenue Authority (KRA) is inconsistent. On one hand they seek stay to avoid being in contempt of the orders issued by the High Court while they also affirm that they are capable of refunding the money if the appeal is not successful;
- vi. A stay of execution does not extend to illegalities through interim applications, and nothing can therefore be nugatory;
- vii. Allowing the application would condemn innocent Kenyans to an illegal tax regime.

The Court's findings

The Court of Appeal has dismissed the Application as follows:

- a) The argument by the Applicants that the appeal will be rendered nugatory on the basis that it is not possible to backdate the taxes in the event the appeal succeeds, fails. The High Court in **Civil Application No. 304 of 2023** backdated taxes and continued to collect during the pendency of proceedings in the High Court.
- b) Not even a single contract was brought forth as evidence thus the arguments on breach of contracts, fails.
- c) The argument that some government departments may shut down and that jobs could be lost on the lack of a stay on the section relating to statutory instruments also fails for lack of evidence. Furthermore, parliament can re-enact the statutory instruments.
- d) The court cannot suspend sections 30 to 38 and 47 (a) (v) of the Finance Act, 2023 on an application without hearing the appeal on merits. If the appeal succeeds, the sections would be annulled and vice versa.
- e) For public interest purposes, this case is distinguishable from the determinations in **Communications Commission of Kenya & 5 others vs Royal Media Services Limited & 5 others (Supra) and Civil Application No. E583 of 2023 or The Cabinet Secretary, Ministry of Health vs. Joseph Enock Aura & 13 others**. Here, the intended appeal is challenging a final judgment while in the High Court in the cases cited related to an order issued ex-parte before hearing the case on merit.
- f) Further, the Court can only suspend declarations of invalidity under limited circumstances and moreso to give parliament an opportunity to bring the impugned legislation into line will only be granted under certain circumstances.

The presumption of constitutional validity in respect of the impugned sections was extinguished the moment the trial Court issued the declaration, and it would not be in public interest to grant a stay whose effect is to allow a statute that has been found to be constitutionally infirm to continue in law pending the hearing of the appeal.

The Court has affirmed that public interest lies in awaiting the determination of the appeal. Consequently, the Court of Appeal dismissed all the Four (4) consolidated applications.

Our opinion

The Court of Appeal's decision has affirmed its previous position on application for stay where a declaration of unconstitutionality has been rendered by another court.

The immediate legal consequence of this decision is that employers are in the meantime not required to deduct or remit the housing levy.

While the court has not addressed the issue of whether the collected housing levy for the period July 2023 to date should be refunded to taxpayers, by ordering an expedited determination of the substantive appeal, the expectation is that the issue of refund or collection in arrears by KRA, will be addressed by the court upon final determination of the substantive issues.

Subject to any further appeal decision to the contrary, taxpayers remain guided by the interpretations and findings of the Court of Appeal in this ruling.

KPMG is happy to assist on any issues arising from this decision.

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