

Tax Alert

Supreme Court of Kenya Declares Finance Act, 2023 as Constitutional



Summary

This alert highlights the Supreme Court of Kenya's judgment delivered on October 29, 2024, in the case of ***The Cabinet Secretary for the National Treasury and Planning & Others v. Okiya Omtatah Okoiti & Others ("the Judgment")***.

The Supreme Court has partially allowed the appeal, declaring the Finance Act, 2023 (the Act) constitutional, and in so doing, overturning the previous ruling by the Court of Appeal, which had deemed the entire Act unconstitutional.



Background

The Supreme Court's decision arose from a consolidated appeal concerning the legislative process that led to the enactment of the Finance Act, 2023. Following Presidential assent on June 26, 2023, eleven (11) petitions were filed in the High Court challenging the Act's constitutionality.

Petitioners argued that certain provisions of the Act exceeded the scope of a money Bill and that the legislative process lacked proper concurrence from both the National Assembly and the Senate. The Petitioners also contended that public participation was inadequate and that amendments made after public input were not subject to further consultation. Ultimately, they sought a declaration that the Act was unconstitutional or that specific provisions were invalid.

In its ruling, the High Court declared several sections of the Finance Act, 2023 unconstitutional, including provisions related to the Kenya Roads Act and the Unclaimed Assets Act. The court prohibited the collection of the Affordable Housing Levy and dismissed other claims, ordering each party to bear its own costs.

On appeal, the Court of Appeal upheld the High Court's findings regarding the unconstitutionality of certain sections and the lack of public participation in the amendments. It affirmed that the enactment process violated various constitutional provisions and the Public Finance and Management Act, rendering the Act fundamentally flawed. Consequently, the entire Act was declared unconstitutional, prompting an appeal to the Supreme Court by the Cabinet Secretary for the Treasury, the Attorney General, the Kenya Revenue Authority, the National Assembly, and the Speaker of the National Assembly.

Appellants' Arguments

The Appellants argued before the Supreme Court that the Finance Act, 2023 was properly enacted. They emphasized that the proposed taxes fell within the government's authority, were intended to fund the fiscal year's budget. They also stated that the public participation conducted was sufficient, asserting that submissions were reviewed despite the limited timeline for passing the Bill. Additionally, they asserted that the Bill was a "money Bill" that did not involve matters concerning counties, and therefore, concurrence from the Senate was not required.

Respondents' Arguments

The Respondents maintained that the Act violated constitutional requirements for public participation, arguing that numerous amendments introduced at later stages were not subjected to further public consultation. They further argued that the Act improperly bypassed the Senate despite addressing matters affecting counties, and that specific provisions like the affordable housing levy were discriminatory and unconstitutional, disproportionately impacting lower-income earners. The Respondents also claimed that the failure to include revenue and expenditure estimates in the Appropriation Act flawed the entire budget-making process.

Issues for Determination

The Supreme Court identified the following issues for consideration:

- i. Whether the Court had jurisdiction to hear and determine SC Appeals Nos. E032 and E033 of 2024.
- ii. Whether the Finance Act, 2023 was subject to the concurrence process outlined in Article 110(3) of the Constitution.
- iii. Whether fresh public participation is required when Parliament amends provisions of a Bill or introduces new provisions after initial public consultation.
- iv. Whether Parliament is obligated to provide detailed reasons for accepting or rejecting views following public participation, and whether a failure to do so invalidates the legislative process.
- v. Whether the Appropriation Act, 2023 included the revenue estimates.
- vi. Whether the validity of Section 84 of the Finance Act, 2023 (Affordable Housing Levy) is moot.
- vii. Whether a court can assess the legality of policy positions taken by the Executive and Parliament in the legislative process, and if so, whether the contested sections of the Finance Act concerning various tax legislations are unconstitutional.
- viii. What factors should a court consider when declaring a statute unconstitutional, and what consequential orders should be issued following such a declaration?



Supreme Court's Determination

The Supreme Court has partially allowed the consolidated appeal and made the following findings:

- i. **Jurisdiction:** The Court confirmed its jurisdiction to determine SC Petition Nos. E032 and E033 of 2024 under Article 163(4)(a) of the Constitution, noting that the matter raised constitutional questions addressed by the lower courts.
- ii. **Affordable Housing Levy:** The issue concerning the Affordable Housing Levy was deemed to have been overtaken by events in view of the enactment of the Affordable Housing Act, 2024 which aligns with Article 43(1)(b) on access to affordable housing.
- iii. **Refund of Taxes:** The Court rejected the request for a tax refund, stating that the Court of Appeal erred in declaring the entire Finance Act unconstitutional.
- iv. **Public Participation:** The Court ruled that Parliament is not required to conduct additional public participation for amendments stemming from previous feedback, as this could hinder the passage of important Bills.
- v. **Revenue Estimates:** The Court clarified that, under Article 221(6) of the Constitution, revenue estimates are distinct from the Appropriation Act and must be presented beforehand. The revenue estimates in the Finance Act, 2023, were properly tabled before the National Assembly.
- vi. **Money Bill:** The Court determined that the Finance Bill qualifies as a money Bill according to Article 113(3) and Article 114(3) of the Constitution.
- vii. **Unrelated Amendments:** The amendments to the Kenya Roads Act and the Unclaimed Financial Assets Act were ruled unconstitutional, as they were neither incidental nor directly related to a money Bill.

Ultimately, the Court issued final orders that set aside the Court of Appeal's findings which had previously declared the entire Finance Act, 2023 unconstitutional.

Our Opinion on the Judgment

The Supreme Court's ruling brings to a close a lengthy litigation process regarding the Finance Act, 2023. This judgment establishes a clear legal framework for the country, providing both taxpayers and authorities with definitive guidance.

The decision addresses key debates, facilitating the smoother implementation of tax policies without the uncertainty of ongoing legal challenges. For the Kenyan taxpayer, it is crucial to recognize that the key tax changes introduced by the Finance Act, 2023 remain in effect, and compliance with these changes should be actively pursued.

Some key changes introduced by the Finance Act, 2023 include:

- i. Capital gains tax on qualifying indirect property transfers.
- ii. Introduction of a withholding tax on digital content monetization at 5% for residents and 20% for non-residents.
- iii. Tightening of payment deadlines for withholding tax, withholding VAT, and excise duty.
- iv. Reduction of the corporate income tax rate for branches from 37.5% to 30%.
- v. New employment income tax bands, introducing 32.5% and 35% PAYE rates for high-income earners.
- vi. Mandatory eTims compliance for the deductibility of expenses for corporate income tax purposes.

For more details on the Finance Act, 2023, please check [KPMG Finance Act, 2023 Analysis](#). If you have any questions, feel free to reach out to us at taxandregulatory@kpmg.co.ke



Contacts

Should you have any inquiries on the above, please feel free to reach us through:

Sandeep Main

Partner/Director
Tax and Regulatory Services
KPMG Kenya
E: sandeepmain@kpmg.co.ke

Lydia Abala

Senior Manager
Tax and Regulatory Services
KPMG Kenya
E: labala@kpmg.co.ke

home.kpmg/ke/en/home



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