

THE FATE OF THE HOUSING LEVY: COURT OF APPEAL RULING IN CIVIL APPLICATION NO. E577 OF 2023



COURT OF APPEAL RULING ON HOUSING LEVY.

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Section 84 of the Finance Act introduced the housing levy. The trial court found the levy to be unconstitutional on the ground that it was unfair, arbitrary, and discriminatory as it targeted a section of Kenyans. In addition, there was no legal framework to govern the imposition and administration of the levy. Despite this, the High Court stayed its own decision until 10th January 2024 hence collection of the housing levy proceeded. This precipitated the filing of the application for stay of execution and/or conservatory orders pending the hearing and determination of the appeal against part of the judgement and decree of the High Court (Majanja, Meoli & Mugambi JJ).

The Applicants' case.

It was the applicants' case that if the court did not grant the orders in this application, the governments projects initiated under the affordable housing programme will stall, the government risks litigation for breach of contractual agreements, the anticipated revenue of Kshs. 73,000,000,000/= to be collected by government will be lost, there will be loss of jobs and above all, if the appeal was not successful, the taxpayers would get rebates for over taxation.

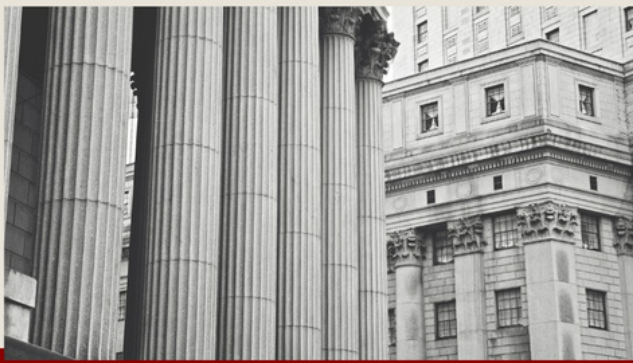
Respondents' case

A summary of the Respondent's position in response was that the Constitution does not grant power to suspend a finding of unconstitutionality of a statute. Honourable Okiya Omtata's counter argument was that the applicants cannot rely on the argument that they will be sued for breach of contract since section 53(8) of the Public Procurement and Asset Disposal Act prohibits procurement without a budget.

BACKGROUND

The Finance Act, 2023 was assented by the president on 26th June 2023. Prior to the presidential assent, an application had been filed before the High Court seeking conservatory orders which were granted. Dissatisfied by this decision, the Respondents appealed the decision and sought suspension of the conservatory orders which the Court of Appeal granted in civil application No. 304 of 2023.

Upon certification of the matter as one of general Public Importance, the Chief Justice empanelled a bench of three judges who heard and determined the petition in ***Okiya Omtata Okoiti and 51 others vs Cabinet Secretary for National Treasury Planning and 6 others, Constitutional Petition No. E181 of 2023***. This decision declared various sections of the Finance Act, 2023 unconstitutional that is; sections 76, 77, 78, 84, 87, 88 and 89 and upheld the constitutionality of sections 30 to 38 and 47 of the same Act.



BREAKDOWN OF THE HOUSING LEVY RULING

Court of Appeal's decision & what it means.

Furthermore, the constitutional validity of the Bill was challenged from the onset therefore no diligent person would have entered into a contract based on its provisions.

The Respondents also argued that the position of tax payers receiving rebates was contradictory since the CS Treasury had posited that the government will not be able to refund the money. According to the Respondents, the government could backdate the tax obligations if the appeal was successful, a similar action taken previously.

On the claim for litigation for breach of contract, loss of jobs and closure of government departments, Mr Theuri on behalf of the LSK submitted that no evidence had been adduced before the court to substantiate these claims.

The Respondents submitted that laws declared unconstitutional cannot be justified in the public interest. Public interest lies in fidelity to the law. The constitution being the grundnorm dictates that any law that is inconsistent with it is null and void. Therefore, allowing the stay would be more of condemning innocent Kenyans to an illegal tax regime which is not in the public interest.

In considering whether the Court should grant the orders sought;

Rule 5(2)(b) of the Court of Appeal Rules confers the Court of Appeal the jurisdiction to order a stay of execution of an order pending appeal.

The court relied on the case of Charles Munga N Bichage v Richard Nyagaka Tungi & 2 other as reiterated in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 Others, that established the principles that guide the court in granting an order of stay as follows: “the applicant must have an arguable case, the appeal will be rendered nugatory if stay is not granted and it is in the public interest to grant an order of stay.”

The applicant must have an arguable case.

With respect to the question of what amounts to an arguable case, the court relied on the position in the case of **Stanley Kangethe Kinyanjui v Tonny Keter & Others [2012] eKLR**. **The court stated that; “An arguable case is not necessarily one that must succeed but one which ought to be argued fully before the court and is not frivolous.”** The court found that all the applicants satisfied this ground.

The appeal will be rendered nugatory if stay is not granted.

The question of whether an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen is reversible or irreversible and whether damages will reasonably compensate the aggrieved party. The guiding test is the balance between the status quo pending the hearing of the intended appeal and consequences of suspending declarations made by the trial court.

The applicants' argument that the appeal will be rendered nugatory due to the impossibility of backdating the taxes in the event the appeal succeeds was found not to be plausible. This is due to the fact that the government had backdated taxes previously in civil application No. 304 of 2023.



The court further dismissed the applicants' argument that the government is likely to face suits for breach of contracts entered in implementing the Affordable Housing Project. This was premised on the fact that the applicants had not submitted any contract to support these assertions. Similarly, the argument that some government departments would be shut down and jobs lost was struck down on the basis that no details of the alleged jobs were availed before court to that effect.

Whether public interest is in favour of granting an order of stay of execution?

Public interest as a legal principle is founded on public good. The court stated that public interest is represented by constitutional values. Article 2(4) of the Constitution underscores the supremacy of the Constitution. In line with this Article, any law found ultra vires should be invalidated immediately.

The Court relied on the case of ***Law Society of Kenya v Kenya Revenue Authority [2017] eKLR***. Where it was held that: ***"It follows that once a law has been declared unconstitutional, it has no business remaining in the lawbooks. The fundamental issue that follows is under what circumstances if at all a court can suspend an order declaring a legislation to be invalid."***

The court also declared that suspending the declaration of invalidity to give Parliament an opportunity to bring the impugned legislation or legislative provision into line with its constitutional obligations will be warranted when: ***striking down the legislation without enacting something in its place would pose a danger to the public or the rule of law.***

The court eventually reached the determination that the suspension sought was not in public interest. To this effect, the presumption of constitutional validity lapsed when the declaration was issued by the High Court.

Commentary on the judgement

The court's decision is a relief to employers and employees until a final determination is made by the Court of Appeal or Supreme Court as this matter will potentially go through the apex court. The implementation of the housing levy fund might also be derailed as the High Court in Kisumu on 19th December 2023 issued a conservatory order stopping public participation of the Affordable Housing Bill 2023 pending further directions.

The court's emphasis on public interest is also notable. It remarked that it will not be in the public interest to grant an order of stay whose effect is to allow a law declared unconstitutional to continue being in the law books. If the order were to be granted then eventually the Court of Appeal affirms the invalidity, then all actions done pursuant to that law would have no legal basis.

The Court in the end directed the appeals be heard expeditiously and we shall be on the lookout for the decision of the main appeal which may agree or not agree with the High Court.

