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**SUPREME COURT GRANTS
STAY ON COURT OF
APPEAL'S DECISION
DECLARING THE
FINANCE ACT, 2023
UNCONSTITUTIONAL**

LEGAL ALERT

AUGUST 2024

Supreme Court Grants Stay on Court of Appeal's Decision Declaring the Finance Act, 2023 Unconstitutional

Background

In a significant development, the Supreme Court of Kenya (Koome CJ & P., Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ) in a consolidated Ruling in *SC Petitions Nos. 31, 32, & 33 of 2024*, has issued a Conservatory Order suspending and staying the Judgment delivered by the Court of Appeal (M'Inoti, Murgor & Mativo, JJA) on 31st July 2024, which had declared the Finance Act, 2023 (the "Act") unconstitutional.

Background

The Act faced legal challenges soon after its enactment, with eleven (11) Petitions filed in the High Court, that is *Okoiti & 6 Others vs. Cabinet Secretary for The National Treasury and Planning & 3 Others; Commissioner General, Kenya Revenue Authority & 3 Others (Interested Parties)* (Petitions Nos. E181, E211, E217, E219, E221, E227, E228, E232, E234, E237 & E254 of [2023] (Consolidated)) [2023] KEHC 25872 (KLR).

The Petitioners took issue with the legislative process leading up to the enactment of the Act, together with the Constitutionality of several provisions within the Act. The High Court (Majanja, Meoli & Mugambi, JJ) by a Judgment delivered on 28th November 2023 initially declared some provisions of the Act unconstitutional, but the entire Act remained largely intact.

The High Court's Judgment provoked six (6) appeals and three (3) cross-appeals at the Court of Appeal in *The National Assembly & Another vs. Okiya Omtatah Okoiti & 55 Others, Civil Appeals Nos. E003, E016, E021, E049, E064 & E080 of 2024 (Consolidated)*. Upon hearing the matter, the Court of Appeal in its Judgment delivered on 31st July 2024 declared the entire Act unconstitutional on the grounds that there was a lack of public participation in connection with the sections of the Act that were introduced post the initial public participation, further that Parliament failed to give reasons for rejecting or adopting proposals to the Act at its Bill stage, and finally that the Appropriation Act, 2023 did not include estimates of

revenue approved by Parliament before the enactment of the Act.

This decision prompted the National Treasury, the Attorney General, and other government entities to file the three (3) consolidated Appeals in the Supreme Court, seeking Conservatory and/or stay Orders of the Court of Appeal's Judgment.

Grounds for Stay

One ground advanced in support of the stay Applications was that the Court of Appeal misinterpreted the procedure for enacting a Money Bill as outlined in Article 114 of the Constitution and the Public Finance Management Act, 2012. It was also urged that the Court of Appeal decision also contradicted the Court's earlier position on requirements for public participation. Furthermore, it was argued that the decision compelled the government to rely on the Finance Act, 2022 for revenue collection, due to the withdrawal of the Finance Bill, of 2024. Additionally, it was contended that the consolidated Appeals' significance to public interest warranted the issuance of the stay Orders.

Supreme Court's Ruling

In its Ruling, the Supreme Court acknowledged that the Court of Appeal's decision could severely disrupt government operations, the government having argued that nullifying the Act would cause an immediate revenue shortfall of KES 214 Billion, thereby harming public services, threatening economic stability, and possibly triggering a Constitutional crisis.

Regarding the arguability of the intended appeal, the Supreme Court noted that presenting just one arguable point is enough to satisfy the requirement. The Supreme Court indicated that issues such as the role and scope of public participation in the legislative process, the criteria for declaring a statute unconstitutional, and whether Parliament can amend Bills after public participation were all arguable points deserving of the Supreme Court's consideration.

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Given the uncertainty about revenue-raising measures and the potential challenges that both levels of government would face, along with the broad impact of declaring the entire Act unconstitutional, the Court was concerned that the consolidated Appeals could become moot. Additionally, upon preliminary review, the Court was not convinced that the consequences of such a declaration could be undone if the consolidated Appeals succeeded.



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Considering the severity of these concerns, and in line with Section 23A of the Supreme Court Act and the decision in *Board of Governors, Moi High School, Kabarak & another vs. Bell & 2 Others*(Petition 6 & 7 of 2013 & Civil Application 12 & 13 of 2012 (Consolidated)) [2013] KESC 12 (KLR), the Court issued a Conservatory Order pending the hearing and determination of the consolidated Appeals thus halting the implementation of the Court of Appeal's Judgment until the consolidated Appeals are heard and resolved.

The consolidated Appeals are scheduled for hearing on 10th and 11th September 2024. We will follow the proceedings and note to keep you abreast with developments.

Implications of the Ruling

With the Finance Bill, 2024 withdrawn, the stay issued by the Supreme Court temporarily reinstates the Finance Act, 2023 as the current operative law on government's revenue collection. This allows the government to continue revenue collection and fiscal operations under the Act's legislative framework. The Act therefore remains in force, and all taxes collected under this Act are valid.

Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact Lilian Renee Omondi, Partner, (renee@oraro.co.ke) or your usual contact at our firm, for legal advice.



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