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LEGAL ALERT



**The Finance Act, 2023 is Constitutional: An
Analysis of the Supreme Court's Decision on the
Finance Act, 2023**



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Introduction

In the final judicial chapter of what has been protracted litigation concerning the Finance Act, 2023 (“the Act”), the Supreme Court (“the Court”) has reversed the Court of Appeal’s Judgment that had found the entire Act to be unconstitutional. While reinstating the Act, the Court however concurred with findings from the Court of Appeal on the mootness of section 84 of the Act concerning the Affordable Housing Levy, and the unconstitutionality of sections 76, 78, and 87 of the Act, which amended provisions in the Kenya Roads Act, 1999, and the Unclaimed Financial Assets Act, 2011.

Background and Litigation History

The High Court

Immediately after the assent of the Act, eleven (11) petitions were lodged before the High Court, all of which challenged its constitutionality. The High Court in a Judgment delivered on 28th November 2023, initially declared certain provisions unconstitutional. The High Court further affirmed that the Act qualified as a money Bill and found that public and stakeholder participation had been both substantial and adequate.

The Court of Appeal

The High Court’s decision precipitated the filing of appeals and cross-appeals, which were consolidated. In its Judgment delivered on 31st July 2024, the Court of Appeal declared the entire

Act unconstitutional. In so doing, the Court of Appeal cited a lack of public participation on sections introduced after initial public input, Parliament’s failure to provide reasons for accepting or rejecting proposals to the Act at its Bil stage, and the absence of revenue estimates approved by Parliament in the Appropriation Act, 2023, before the enactment of the Act.

The Supreme Court

The dissatisfied parties moved to the Supreme Court and filed three (3) appeals, along with two (2) cross-appeals by the successful parties, with the Court called upon to determine whether the Act complied with prescribed constitutional and legal standards. The Court distilled nine (9) key issues for determination. In dismissing a preliminary objection that the appeals were improperly before the Court for failing to specify the limbs of its appellate jurisdiction under Article 163 (4) of the Constitution, the Court affirmed its jurisdiction under Article 163 (4) (a) of the Constitution.

Key Findings of the Court

The Court noted that sections 23 and 79 of the Act were minor technical amendments, while sections 18, 21, 24, 26, 32, 38, 44, 47, 69, 72, 80, 81, 82, 83, 85, 86, 100, 101, and 102 were substantive amendments. The Court determined that the fact that new provisions were introduced after public participation is not a question as to whether they should be subjected to a fresh round of public participation. The Court observed that the contested sections were introduced by parties



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who participated in the public participation and the National Assembly by way of amendments proceeded to incorporate them thereby actualizing the requirements that public participation should be real and meaningful. The Court further observed that the Petitioners did not challenge the position taken by the National Assembly on this issue. In this regard, the Court held that when substantive amendments follow public participation, Parliament is not required to conduct additional public participation. Further, the Court considered that given the time-sensitive nature of the Finance Bill 2023, it was impractical to subject these amendments to another round of public participation.

On the question of whether the High Court has the requisite jurisdiction to test the legality of policy decisions in the legislative process, the Court further held that while policy matters typically reside within the domains of the executive and the legislature, Courts might intervene to ensure compliance with the Constitution. It emphasized that the High Court retains residual jurisdiction under Article 165 (3) (b) and (d) of the Constitution.

The Court further held that while there is no express obligation on Parliament to provide reasons for accepting and/or rejecting proposals made during a public participation exercise, reasonable measures must however be put in place to guide how Parliament considers and treats the proposals received. The Court determined that there was no basis to declare the entire Act unconstitutional emphasizing that public participation was conducted in accordance

with the Constitution and the threshold of reasonable measures were met.

The Court also dismissed the cross-appeals seeking reliefs for a tax refund stating that the claim could not succeed since the Court of Appeal had erred in declaring the entire Act unconstitutional.

Concurrence with the Court of Appeal and High Court Findings

While reversing the unconstitutionality finding, the Court nonetheless agreed that sections 84 of the Act on the Affordable Housing Levy and section 88 and 89 of the Act on the Statutory Instruments Act were no longer relevant having been addressed by specific legislative amendments to the concerned legislation. Further, the Court affirmed the Court of Appeal's findings that sections 76 and 78 of the Act, amending section 7 of the Kenya Roads Act, 1999, and section 87 of the Act, amending Section 28 of the Unclaimed Assets Act, 2011, were unconstitutional, as they were not directly related to a money Bill.

The Court also observed that both the High Court and the Court of Appeal correctly and determined the Act to be a money Bill under Article 114 of the Constitution, exempting it from the concurrence process under Article 110 (3) of the Constitution. Agreeing with these prior findings, the Court further took note of correspondence between the Speakers of the two Houses of Parliament, which confirmed that the Bill did not pertain to County Governments.



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Considerations on Unconstitutionality

The Court provided guidelines to be considered and factored in when a statute or part thereof is declared unconstitutional as the Court's hands are not tied when dispensing justice.

Firstly, there is a general but rebuttable presumption that a statutory provision is consistent with the Constitution. Secondly, the party that alleges inconsistency has the burden of proving such a contention. Thirdly, in construing whether statutory provisions or part thereof offend the Constitution, Courts must subject the same to an objective inquiry as to whether they conform to the Constitution. In addition, Courts must identify the object and purpose of the impugned statute, specify which provision is unconstitutional by comparing it to the Constitution, and clearly explain the grounds for its finding. It must also consider the implications of that declaration and, if necessary, suspend its application for a set period to allow Parliament to amend the law to achieve its purpose without being unconstitutional or to remove the unconstitutional provision.


Once a declaration of invalidity is issued and in determining whether to issue a suspension of the declaration of invalidity in a statute, a Court should be guided to avoid disruptive legal gaps, ensure suspension serves fair and equitable remedy, uphold government stability, balance the litigant's right to immediate relief against broader societal impacts, and accounting for potential hardship and the government's responsiveness to rectifying the law.

Recommendations to the Legislature

Noting a lacuna in the law on public participation, the Court recommended that Parliament should establish a legislative framework to regulate public participation as required by the Constitution. The Court also recommended that all versions of a Bill be accessible to the public at each legislative stage and suggests implementing reasonable measures to consider public input during participation exercises.

Conclusion

The Supreme Court's decision extinguished the stay of execution Orders granted on 20th August 2024 and effectively restored the provisions of the Act that had been declared unconstitutional. The Government is thus able to continue collection of taxes under the framework of the Finance Act, 2023. The recommendation that Parliament should come up with legislation on public participation does not provide a definitive remedy on the recurring issue as to what satisfies public participation, and it is likely that contentious litigation on the issue might recur, before Parliament enacts the intended legislation. We await to see whether Parliament will take its cue and enact an appropriate law on public participation, which would hopefully put this contentious issue to rest.



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Lilian Renee Omondi

Partner



ORARO & COMPANY

ADVOCATES

An Affiliate Member of AB & DAVID AFRICA



ACK Garden Annex, 6 Floor, 1 Ngong Avenue

P. O. Box 51236-00200, Nairobi, Kenya.

T: +254 709 250 000

E: legal@oraro.co.ke

www.oraro.co.ke

