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**A COMPREHENSIVE
ANALYSIS OF KENYA'S
AFFORDABLE HOUSING ACT**

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A Comprehensive Analysis of Kenya's Affordable Housing Act, 2024

1. Introduction

Affordable housing is a cornerstone in securing economic and social rights for citizens, according to the Constitution of Kenya¹. Providing reasonably priced dwellings plays a fundamental role in ensuring that all members of society have access to a basic human need – shelter.

The Affordable Housing Programme (AHP) was established in 2017 as a vital component of the 'Big Four Agenda'.² The AHP aimed to provide 500,000 affordable homes for Kenyans in all 47 counties by 2022. However, the aim was far from met at the end of the 5-year period, with an estimated 13,529 units delivered and limited delivery in the social housing category, accounting for less than 3.0% of the projected target.³ When President William Ruto took office in 2022, he upheld the project, making it one of six foundational pillars of his government's strategy, intending to deliver 200,000 housing units each year, or one million dwellings, in five years. Since his inauguration, the President has launched various affordable housing projects, including Shauri Moyo A, Kings Boma Estate, Gichugu, and, most recently, the Bahati and Milimani affordable housing developments in Nairobi, Kiambu, Nakuru, and Kakamega counties, respectively.⁴

2. Background

The Ruto-led government developed and tabled its first Finance Act in 2023, within which the government introduced a housing levy to achieve affordable housing initiatives. Section 84 of the Act introduced the affordable housing levy for all salaried employees and their employers, anchored in the Employment Act, 2007 amendment. The purpose of the levy was to provide funds for the development of affordable housing and associated social and physical infrastructure, as well as to provide affordable home financing to Kenyans.⁵ Further, the levy was exclusively for developing affordable housing and associated social and physical infrastructure and providing affordable home financing to Kenyans.⁶ Soon after the President assented to the Finance Act, 2023, in June 2023, the government, through the Kenya Revenue Authority (KRA), began deducting the affordable housing levy as a statutory obligation by salaried employees and employers.

In November 2023, the High Court of Kenya, in Petition E181 of 2023, declared Section 84 of the Finance Act unconstitutional. Part of the Court's reasoning was that:

¹ Article 43 of the Constitution of Kenya,

² The Big Four Agenda. Available at <https://big4.delivery.go.ke/>

³ The Progress of Affordable Housing in Kenya. Available at <https://cytonn.com/media/article/the-progress-of-affordable-housing-in-kenya>

⁴ Ibid.

⁵ Section 84 (2), Finance Act, 2023.

⁶ Section 84 (3), Finance Act, 2023.

- i. The introduction of the affordable housing levy through amendment of the Employment Act by Section 84 of the Finance Act, 2023, lacked a comprehensive legal framework in violation of Articles 10⁷, 201⁸, 206⁹ and 210¹⁰ of the Constitution.
- ii. Further, the imposition of the housing levy against persons in formal employment to the exclusion of other non-formal income earners to support the national housing policy was without justification, unfair, discriminatory, irrational, and arbitrary and in violation of Articles 27¹¹ and 201 (b)(i)¹² of the Constitution.

The government appealed the decision to the Court of Appeal. First, it sought to extend the conservatory order on the government's levy collection, which allowed KRA to collect the housing levy until 10 January 2024. The Court of Appeal upheld the status quo, and the judges stated that a final decision would be reached during the hearing scheduled for 26 January 2024. On that day, the Appellate Court declined to extend the High Court's order on implementing the housing levy and instead decided to wait for the conclusive determination of the entire appeal hearing, where the constitutionality of the housing levy would be thoroughly assessed before making a final decision. The Court reasoned that it was in the public interest to avoid any irreversible damage if Kenyans continued to remit monies if, eventually, the Court affirmed the High Court's findings that the levy was unconstitutional. **That decision meant that the government, through KRA, could no longer deduct salaried employees and employers.**

3. The Affordable Housing Act, 2024: Reintroduction of the Housing Levy

On 19 March 2024, the President signed into law the Affordable House Act, which intended to give effect to Article 43(1)(b) of the Constitution and provide a framework for development and access to affordable and institutional housing, among other things.

3.1 Salient Features of the Act and their Implications

The Affordable Housing Act 2024 is a unique legislation designed to give the national executive a comprehensive legal framework for collecting the housing levy.

(a) Date of operation

Sections 1 (a) and 1 (b) provide a framework for when the provisions of the Affordable Housing Act will come into effect. Notably, Sections 4 and 5 of the Act on imposition of the housing levy and the employer's obligation commenced operations on the date of assent. All the other Sections of the Act will come into operation on such date prescribed by the Cabinet Secretary responsible for affordable housing by notice in the Gazette.

⁷ Article 10 provides for national values and principles of governance.

⁸ Article 201 provides for principles of public finance

⁹ Article 206 provides for consolidated Fund and other public funds.

¹⁰ Article 210 provides for imposition of tax.

¹¹ Article 27 provides for equality and freedom from discrimination

¹² The provision is to the effect that the burden of taxation shall be shared fairly.

(b) Definition of terms

Section 2 interprets or defines key terms in the Act.

1. Affordable housing has been defined as housing that is adequate and costs not more than thirty per cent of the income of a person per month to rent or acquire.
2. Affordable housing scheme means the construction of affordable housing units, including other social amenity, infrastructure or services and the acquisition, laying out, subdivision and development of land within the scheme area necessary for social welfare and trading.
3. Institutional housing is housing that is adequate and affordable for public institutions such as universities, colleges, police, defence forces, government pool housing and prisons.

Section 2 (2) defines categories for affordable housing units by providing that

- a) a social housing unit is a house targeted to a person whose monthly income is below twenty thousand shillings;
- b) an affordable housing unit is a house targeted at a person whose monthly income is between twenty thousand and one hundred and forty-nine thousand shillings;
- c) affordable middle-class housing unit is middle to high income housing targeted at persons whose monthly income is over one hundred and forty-nine thousand shillings;
- d) rural affordable housing unit is a house targeted at a person living in any area which is not an urban area.
- e)

(c) Establishment of the Affordable Housing Levy

Section 4 provides for the imposition of affordable housing levy. To that effect, the levy will be deducted at the rate of 1.5% of;

- a) the gross salary of an employee; or
- b) the gross income of a person, received or accrued, who is not an employee.

(d) Establishment of the Affordable Housing Fund

Section 10 (1) states that the purpose of the Affordable Housing Fund (hereinafter, 'the Fund') is to provide coffers for the design, development and maintenance of affordable housing, institutional housing and associated social and physical infrastructure. Subject to Section 12, the Affordable Housing Board¹³ (hereinafter, 'the Board') may, with the approval of the Cabinet Secretary in charge of the Treasury, invest any income that is not immediately required. Further, with the approval of the Cabinet Secretary in charge of the Treasury, the Board may also borrow funds to advance the objectives of the Act.¹⁴

¹³ The Affordable Housing Board is established under Section 16 of the Act.

¹⁴ Section 13, Affordable Housing Act, 2024.

(e) Role of the County Governments

The Fourth Schedule of the Constitution provides for the distribution of functions between the National and County Governments. Under Part 1 (20) of the schedule, the national government is mandated to develop a housing policy. Correspondingly, the county government is assigned to progress county planning and development, including housing.¹⁵ In cognisance of the devolved role, Part 4 of the Affordable Housing Act enlists the role of the county government in affordable housing by establishing a county rural and urban affordable housing committee. The committee will be available in all counties. It will play several roles, including developing a framework for attaining affordable housing in the county in consultation with the Affordable Housing Board and advising the governor on affordable housing programmes within the county.

(f) Allocation of Land

Land acquisition is paramount in the realm of affordable housing due to its significant impact on overall project feasibility and cost. Subject to Section 41 (1), the Land Act 2012 will guide the allocation of public land to implement the affordable housing scheme and the development of institutional housing schemes. Additionally, land held by a county government will not be allocated unless the Board has carried out public participation and stakeholder engagement with the affected community within the county.¹⁶

The Affordable Housing Act also allows the Board to enter into agreements to develop affordable housing units with a national government agency,¹⁷ as well as public¹⁸ and private¹⁹ institutions. Such agreements will include a mortgage scheme to provide financing for the off-take of affordable housing units.²⁰

(g) Eligibility Criteria and Application for Affordable Housing Unit

Section 48 (1) stipulates that a person is eligible for the allocation of one affordable housing unit if the person meets the criteria prescribed in the regulation. Further, a person will be required under Section 49 (2) to accompany the application for a housing unit with proof of requisite deposit as the government prescribes, proof of identification, incorporation certificate for corporate bodies, KRA personal identification number (PIN) and tax compliance certificate.

¹⁵ Fourth Schedule, Part 2 (8) (d), *Constitution of Kenya 2010*.

¹⁶ Section 41 (2), *Affordable Housing Act, 2024*.

¹⁷ Section 42 (1), *Affordable Housing Act, 2024*.

¹⁸ Section 43, *Affordable Housing Act, 2024*.

¹⁹ Section 44 (1), *Affordable Housing Act, 2024*.

²⁰ Section 45 (1), *Affordable Housing Act, 2024*.

(h) Voluntary Savings

Section 52 (1) asserts that an eligible person may make voluntary savings with the Fund to raise a deposit towards the allocation of an affordable housing unit. The administrator of the Fund will open a separate bank account, and number where voluntary savings will be kept, and any interest arising from the investment of voluntary savings shall be credited to this account. The savings are withdrawable if any account holder has not been allocated an affordable housing unit.²¹

4. The Implication: Analysis of the Act

Commencement date:

The law was assented on 19 March 2024. The implication is that employers will deduct the housing levy in the next payroll in March 2024.

Definitions

The definition or interpretation section in legislation clarifies and provides meanings for terms used throughout the law, ensuring consistency in interpretation and application. They promote legal certainty, prevent ambiguity, and facilitate effective implementation and enforcement of statutes. Further, defining classes for housing units based on income levels and rural status is crucial in affordable housing projects. It ensures equitable access to housing for diverse socio-economic backgrounds and geographic regions. Accommodating low, middle, and high-income earners and rural dwellers promotes inclusivity, reduces urban-rural disparities, and fosters sustainable development.

Deposits

The requirement for proof of deposit for the housing levy, coupled with the potential inability to raise the deposit or unwillingness to take a loan under Section 51 of the Act, presents significant challenges for individuals seeking access to affordable housing. It raises concerns about equity and inclusivity in housing initiatives, particularly for lower-income earners and those with limited financial resources. The current system does not adequately address the needs of individuals who cannot afford the deposit or choose not to take on additional debt.

The Fund and its Contributors

The deduction will be remitted to the Affordable Housing Fund after collection by the KRA. The affordable housing levy deductions for salaried employees and non-formal income earners will be vital for fostering shared responsibility in addressing housing challenges. Including all income groups ensures non-discrimination and promotes social equity. Salaried employees and non-formal income earners contribute to society and should have equal access to affordable housing. Implementing the levy reflects a collective effort towards a common goal, distributing the financial burden fairly across the population.

²¹ Section 52 (4) (a), Affordable Housing Act, 2024.



One of the key concerns surrounding the affordable housing levy is its lack of clarity regarding its collection from non-formal employees, including those in the ‘Jua Kali’ sector and transportation industries, who make up a large portion of Kenya’s income earners. Determining how much an informally employed person should pay towards the levy would be a complex and challenging task for the government compared to the straightforward deductions made from the salaries of formally employed individuals. Informally employed individuals only pay indirect taxes such as license fees and VAT. Without clear and practical guidelines, the legislation may have only included informal employees in the levy to comply with the High Court’s ruling, with little chance of successful implementation. Addressing this issue is crucial for ensuring fairness and effectiveness in revenue collection for affordable housing initiatives, necessitating proactive measures to create tailored mechanisms suited to the unique characteristics of non-formal employment sectors.

The provision allowing the Board to invest income and borrow funds for affordable housing initiatives could be crucial for ensuring the sustainability and effectiveness of the Fund. By leveraging financial resources through investments and borrowing, the Fund can maximise its impact in designing, developing, and maintaining affordable housing projects and associated infrastructure. Further, the Fund is not part of the Consolidated Fund under Article 206 (1) of the Constitution but a separate fund by an Act of Parliament as provided under Article 206 (1) (a) of the Constitution. This separation of the Fund from the Consolidated Fund under the Constitution underscores a dedicated purpose and autonomy in managing resources for affordable housing. The autonomy is essential for meeting Kenyan citizens’ diverse and evolving housing needs.

Indeed, while the provision granting the Board authority to invest income and borrow funds for affordable housing initiatives is essential for enhancing the Fund’s sustainability and effectiveness, it also opens the door to potential abuse. With such broad powers, the Board must operate with utmost transparency, accountability, and fiduciary responsibility. It necessitates robust oversight mechanisms and adherence to ethical standards to ensure that funds are utilised judiciously and in the best interest of all citizens. Additionally, clear guidelines and regulations should be established to govern investment and borrowing activities, with regular audits and reporting requirements to promote accountability. Ultimately, while these powers offer opportunities for maximising the impact of the Fund, stringent safeguards are imperative to prevent misuse and uphold public trust in managing resources earmarked for affordable housing initiatives.

County Committees: Housing Mandate

As per the Constitution, the mandate for housing is shared between the national and county governments. The national government is responsible for developing a housing policy, outlined in Part 1 (20) of the Fourth Schedule. Meanwhile, under Part 2 (8) (d) of the same Schedule, county governments are mandated to plan and develop housing within their respective jurisdictions.

The establishment of county rural and urban affordable housing committees under the Affordable Housing Act is crucial for effectively implementing housing policies at the local level. By involving county governments, the committees will ensure that housing initiatives are tailored to each region’s needs and circumstances. This decentralisation of de-

cision-making empowers local authorities to address housing challenges more efficiently and responsively. It fosters collaboration between national and county governments, promoting coordination and synergy in pursuing affordable housing goals. Ultimately, the involvement of county governments enhances the effectiveness and inclusivity of affordable housing initiatives across Kenya's diverse regions.

Land Acquisition

The provisions on land acquisition highlight the importance of adhering to legal frameworks, particularly the Land Act 2012, to ensure transparent and lawful allocation of public land for affordable housing projects. The requirement for public participation and stakeholder engagement in county-held land allocations accentuates the importance of community involvement and buy-in. Furthermore, the Act's provision for partnerships with national government agencies and private institutions, coupled with mortgage schemes, enhances the affordability and accessibility of housing units, fostering collaboration and innovation in addressing Kenya's housing challenges while ensuring compliance with legal requirements.

An issue of concern revolves around the hasty acquisition of public land meant for other critical public services, such as schools, universities, and hospitals, to construct "affordable housing". The resulting development often yields profits for the developers while the homes built are ultimately owned by private individuals, including those from middle to upper-income brackets. This calls for a nationwide dialogue on the importance of public land for purposes other than housing. Although the aim of providing affordable housing is commendable, the conversion of public land for eventual private gain raises questions about due process, social justice and the need to keep public land public and for public benefit.

Any such proposition must be justified and undergo rigorous public participation, with appropriate measures to ensure affordable housing benefits are directed towards those most in need. Moreover, public engagement and stakeholder involvement are crucial in guaranteeing that community interests are represented and safeguarded. Ultimately, the conversation should emphasise inclusivity and equity to ensure affordable housing initiatives address the housing needs of all income levels.

Lack of Regulations

While Section 48 (1) outlines eligibility criteria for affordable housing unit allocation, the absence of prescribed regulations impedes the practical implementation of this provision. Section 49 (2) requires specific documentation for application. However, without detailed regulations specifying these requirements, clarity and consistency in the application process are lacking. The government must prioritise drafting and enacting regulations to provide clear guidance and ensure affordable housing units' fair and efficient allocation.

Whereas Section 52 (1) allows eligible individuals to make voluntary savings with the Affordable Housing Fund, the provision **lacks assurance** of housing allocation. Despite diligent saving, there's no guarantee of securing a housing unit. This raises concerns about transparency and accountability in the allocation process. Additionally, the fate of contributions made through the housing levy remains unclear if individuals are unable to access housing units despite savings.

5. Conclusion

In the whirlwind of legal uncertainty surrounding the housing levy's legality, Kenya has embarked on a journey from legal limbo to decisive legislative action. With a pending appeal case casting shadows of doubt, the government's strategic move to enact the comprehensive Affordable Housing Act has reshaped the landscape of housing policy.

At the crux of the matter lies the High Court's pivotal reasoning, pinpointing the levy's legal framework deficiencies and discriminatory nature. This judicial scrutiny acted as a catalyst, propelling the government to address contentious issues, including the role of county governments, land allocation, imposing the levy on salaried and non-formal income earners and eligibility criteria.

However, amidst these strides, three lingering and crucial questions remain: first, does everyone contributing to the Fund stand a chance at securing a housing unit? Despite the Act's provisions, clarity on housing unit allocation seems elusive. Second, what happened to the collections by KRA without proper legal backing, which led to the declaration of the unconstitutionality of the levy by the High Court? Will Kenyans have a refund through tax relief? Third, what happens to the County land, which was previously earmarked for the programme, without the involvement of the committees proposed in the new legislation?

There is a dire need for transparency and accountability. Public participation in formulating regulations and proactively disclosing information can foster trust and ensure equitable housing access. Additionally, robust oversight mechanisms are crucial to prevent potential abuses of power and ensure fair distribution of housing resources.

Also, the government must prioritise measures to safeguard non-formal and low-income earners from disproportionate burdens. Exploring alternative funding mechanisms and ensuring inclusivity in housing initiatives are paramount. As Kenya charts its course towards a future of equitable and accessible housing, it must navigate the intricate balance between legal compliance and effective governance. Through decisive action and a commitment to transparency, Kenya can pave the way for a housing sector that serves all its citizens equitably, leaving behind the shadows of legal uncertainty and embracing a brighter future of housing justice for all.

NOTES:

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