

ENS' Kenya in brief

Below, please find issue 4 of ENS' Kenya in brief, a snapshot of the latest tax developments in Kenya.

Corporate commercial

Welcome to the fourth issue of ENS' Kenya in brief, focusing on the latest legal and regulatory updates across Kenya's corporate commercial, real estate, and banking and finance industries.

- **Corporate and Commercial**

The County Licensing (Uniform Procedures) Act, 2024

The principal objective of the [County Licensing \(Uniform Procedures\) Act, 2024](#), which shall become effective after six months from date of Gazettement (28 June 2024), is to establish standard uniform procedures for licensing by county governments in order to eliminate inconsistencies and reduce the administrative burden faced by businesses operating in multiple counties, who previously had to navigate different rules and fees in each county. By creating uniform licensing procedures, the law seeks to address issues like multiple licenses and double levies, making the licensing process more cost-effective and transparent. It also ensures public participation in setting licensing fees and mandates counties to move toward electronic license applications for efficiency. The law is a welcome milestone since it aims to create the certainty that businesses need to ensure they can plan around the set government policies.

- **Banking and Finance**

Supreme Court Decision on the interpretation of Section 44 of the Banking Act

The Supreme Court in its decision in [Supreme Court Petition Number E005 of 2023 Stanbic Bank Kenya Limited versus Santowels Limited](#) rendered on 28 June 2024 held

that banks and financial institutions regulated under the Banking Act are barred from increasing interest rates on loans without the approval of the Cabinet Secretary responsible for Finance. Section 44 of the Banking Act states that *“No institution shall increase its rate of banking or other charges except with the prior approval of the Cabinet Secretary.”*

The Supreme Court acknowledged conflicting interpretations of section 44 of the Banking Act regarding whether banks need Cabinet Secretary approval to raise interest rates on loans. The court clarified that:

1. The term "rate of banking" under section 44 includes interest rates charged by banks on loans and facilities.
2. The repeal of section 39 of the Central Bank of Kenya Act and section 33B of the Banking Act did not fully liberalize interest rates. These sections only addressed interest rate caps, while section 44 plays a distinct, complementary role, ensuring that banks are regulated to prevent the exploitation of loan consumers and to maintain reasonable interest rates.

The implication of this judgement is that it renders increases which have not been approved by the Cabinet Secretary unenforceable.

ESG: The Kenya Green Finance Taxonomy

The Central Bank of Kenya (CBK), on 12 April 2024, published the [Draft Kenya Green Finance Taxonomy](#) (KGFT) which aims to provide guidance to financial institutions, investors and other market participants in making informed green investment or financing decisions by identifying and promoting environmentally friendly options. It serves as a tool for market participants to classify whether specific activities are “green” or environmentally sustainable, in line with internationally recognised standards. This is in line with Kenya’s commitment to global climate goals.

Currently, there is no regulation in Kenya requiring taxonomy alignment and therefore the use of the KGFT will be voluntary ahead of any mandatory regulation. However, financial institutions may be encouraged to begin aligning their portfolios with the KGFT in advance to help achieve the country’s climate objectives. [ENS | Kenya](#) will continue to monitor the developments relating to the KGFT and regulations in the ESG sector and provide updates.

- **Tax**

Finance Bill 2024

[The Finance Bill 2024](#) (“**the bill**”) was introduced to the National Assembly on 9th May 2024. The Bill sought to implement major tax reforms aimed at improving tax compliance and expanding the tax base. Notable proposals included the introduction of a motor vehicle tax, introduction of withholding tax on goods supplied to public entities, repeal of provisions on Digital Service Tax and introduction of Significant Economic Presence Tax, certain contributions to medical funds and housing levy being tax-deductible expenses, adjustments to VAT registration thresholds, the imposition of VAT on bread and certain financial services, the introduction of a minimum top-up tax for multinational groups and various adjustments on excise duty.

However, these measures were met with widespread public opposition and protests across the country. In response, the government made amendments to the Bill, including the removal of the proposed VAT on bread, certain financial services, and the motor vehicle tax. Despite these concessions, the Bill remained highly unpopular among the public.

The Bill was passed by Parliament on June 25, 2024, but President William Ruto bowed to pressure from Kenyans after several protests and declined to sign the Finance Bill. Subsequently, the Bill was withdrawn after an amendment to delete all its provisions was passed in Parliament.

Finance Act 2023

A recent Court of Appeal judgement, in the case of *National Assembly & Another v Okiya Omtata Okoiti & 55 others* declared the [Finance Act 2023](#) (the “**Finance Act**”) unconstitutional. The Finance Act was enacted into law on 26 June 2023 despite widespread public resistance. Key features of the Act include the rise in Value Added Tax on fuel products from 8% to 16%, the introduction of the housing levy, and the addition of new tax brackets targeted at higher earners. This led to the filing of 11 constitutional petitions filed at the High Court challenging the constitutionality of the provisions of the Act and the enactment of the Act. On 28 November 2023, the High Court issued a determination on a petition to declare the Finance Act unconstitutional. The decision of the High Court was as follows:

1. the provisions of the Finance Act introducing the affordable housing levy were unconstitutional;
2. it dismissed the petitions challenging the legislative process leading to the passing of the Finance Act on the basis that:
 - there was sufficient public participation on the Finance Bill 2023;

- estimates of revenue were included in the Appropriations Bill, 2023 and Appropriations Act, 2024; and
- that the concurrence of the Senate was not required in passing of the Finance Bill.

Following an appeal to the above judgement, the Court of Appeal on 31 July 2024, rendered a decision declaring the entire Finance Act unconstitutional. Subsequently, the Supreme Court issued a stay against the judgment allowing for continued operationalisation of the Finance Act pending hearing and determination of the appeal, allowing the government to continue collecting taxes under this law. The Supreme Court cited public interest and the need to maintain stability in the budgeting process as reasons for its ruling. [ENS | Kenya](#) continues to monitor this and will provide an update once the judgment is delivered by the Supreme Court.

Fringe Benefit Tax

For the purposes of section 12B of the Income Tax Act, the Market Interest Rate is 16%. This rate shall have been maintained from the previous year's quarter ending June. The rate is applicable for the three months of July, August, and September 2024. KRA will be expected to publish in the next month the new deemed Interest rate that will be applicable for the final quarter of the year.

Deemed Interest Rate

For purposes of section 16(2)(ja) of the Income Tax Act, the prescribed rate of interest is 16%. This rate is applicable for the months of July, August, and September 2024. Withholding tax rate of 15% on the deemed interest shall be deducted and paid to the Commissioner within five working days following the computation.

Low-Interest Benefit

For purposes of Section 5(2A) of the Income Tax Act, the prescribed rate of interest is 16%. This rate is applicable for the months of July, August, September, October, November and December 2024. ([Read Full Public Notice here](#))

- **Health**

Social Health Insurance Fund

The High Court on 12 July 2024 delivered its judgment in the case of [Aura v Cabinet Secretary, Ministry of Health & 11 Others \[2024\] eKLR](#) on the constitutionality and legislative process of the Social Health Insurance Act, 2023 (SHIA). The High Court declared sections 26(5) and 27(4) of the SHIA unconstitutional for infringing on the

right to emergency medical treatment. Additionally, section 38 was invalidated for breaching constitutional principles of transparency, accountability, and public participation in financial matters. The court also found that the enactment of the legislation lacked adequate public participation. The National Assembly was granted 120 days to amend the unconstitutional provisions and conduct proper public participation, failing which the legislation would be rendered null and void. The Social Health Insurance Fund established under the SHIA is currently expected to be operational effective 1 October 2024.

- **Environment**

NEMA to begin enforcing Waste Separation Regulations on individuals and corporates from 8 July 2024

The Environmental Management and Coordination Authority ("**EMCA**") will now impose fines of KES 20,000 on individuals and KES 200,000 on corporate entities that fail to comply with the requirement to segregate non-hazardous waste into organic and inorganic categories. Effective immediately, both public and private sector entities are required to ensure that waste is sorted using appropriately labelled and color-coded bins, containers, and bags. This follows the lapse of a 90-day moratorium issued on 8 April 2024, mandating the segregation of organic waste generated by households, businesses, and public events into 100% biodegradable bags or bin liners. Such waste must be collected and transported to designated Material Recovery Facilities for further processing.

Additionally, the Authority will enforce the ban on plastic bags, requiring individuals and businesses to use only biodegradable bags for waste disposal. Non-compliance by individuals may result in fines up to KES 20,000 or imprisonment for a term not exceeding six months. Corporate entities found in violation will face fines amounting to at least 5% of their net income from the previous tax year or a minimum of KES 5 million, whichever is higher. Furthermore, corporate officers responsible for non-compliance could be personally fined up to KES 200,000.

Integration of extended producer responsibility in EIA/EA Reports

On 22 July 2022, the Sustainable Waste Management Act came into effect, signalling a pivotal shift in environmental responsibility on waste management towards circular economy. Section 13 of this Act requires every producer to bear mandatory Extended Producer Responsibility ("**EPR**") to reduce pollution and environmental impacts arising from products introduced into the Kenyan market and waste arising therefrom.

Through a [Public Notice dated 27 March 2024](#), the National Environmental Management Authority ("NEMA") mandated all environmental experts to enhance the integration of EPR obligations within both Environmental Impact Assessment ("EIA") and Environmental Audit ("EA") Reports with regard to institutional and post-consumer waste management. This would enable a comprehensive evaluation of environmental impacts associated with the lifecycle of the proponent's products and waste arising therefrom.

- **Miscellaneous Amendments**

[The Statute Law \(Miscellaneous Amendments\) \(No. 2\) Bill, 2023](#) (the "Amendment Bill") was assented into law on 24 April 2024 and came into force on 26 April 2024 upon gazettelement in the Kenya Gazette. The Statute Law (Miscellaneous Amendments) Act, 2024 (the "Amendment Act") introduces changes to 16 statutes. For a more detailed analysis on the key highlights of the Amendment Act, please read our article [here](#).

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