

# PUBLIC FINANCE

## LEGAL TAKE

SUPREME COURT SUSPENDS THE  
COURT OF APPEAL DECISION  
RENDERING THE FINANCE ACT  
2023 UNCONSTITUTIONAL



ADVOCATES

in association with

Pr1merio

The Supreme Court has today issued conservatory orders suspending the Court of Appeal decision that found the Finance Act 2023 unconstitutional. Through motions filed by the CS National Treasury, the AG, the National Assembly and the Speaker of the National Assembly, they seek to have the Court of Appeal decision suspended pending hearing and determination of their appeal before the Supreme Court.



Their grounds include:

1. their appeal is arguable, stating that the Court of Appeal did not consider its previous decision in **Pevans East Africa Ltd & anor v Chairman, BCLB and 7 others [2018]** with respect to Money Bills;
2. the nullification of the Finance Act 2023 shall cause a revenue shortfall of K.Shs.214B. It would also require extensive updating of revenue collection systems;
3. the Court of Appeal decision creates a constitutional crisis by preventing the government from collecting and allocating funds, which is likely to lead to a cessation of public services; and
4. the application was in the public interest as it affects the entire Kenyan population.



In response, the respondents opposed the motion on the following grounds:

- the government is empowered to adjust and reduce the expenditure of public funds, the same way it did once the President refused to accede to the Finance Act 2024;
- suspending the decision would be akin to rewarding the government for violating the Constitution; and
- it would generally be against public interest if the orders sought were granted as the Kenyan population would continue to be subjected to unlawful taxation pending hearing and determination of the appeal before the Supreme Court.

In making its determination, the Supreme Court made the following key decisions:

- the element of public interest does not outweigh the legal requirement for a party to prove that should the conservatory orders not be met, the appeal would be rendered nugatory and that the appeal is arguable;
- the applicants had an arguable appeal, based on the arguments on the extent and place of public participation and whether Parliament can amend bills after public participation;
- considering the far reaching implications of the declaration that the entire Finance Act 2023 is unconstitutional, the appeal may be rendered nugatory should the conservatory orders not be issued;
- it would be in the public interest to grant the conservatory orders to maintain the stability in the budget and appropriation process



This decision means that all provisions (including all taxes) imposed by the Finance Act, 2023 resume effect as from today pending the hearing and determination of the appeal before the Supreme Court. Nonetheless, any actions taken in compliance with the Court of Appeal decision prior to today's date is still considered lawful.





# C O N T R I B U T O R S

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