

Financial Services Sector Report

Q3 2024



REPORT OF REGULATOR CIRCULARS, GUIDELINES, LEGAL NOTICES, POLICIES, PRACTICE NOTES AND REQUESTS FOR STAKEHOLDER COMMENTS OR PUBLIC PARTICIPATION FROM 1ST JULY 2024 TO 30TH SEPTEMBER 2024

1. BANKING

On 18th September 2024, the Central Bank of Kenya ('CBK') [published](#) the [draft Climate Risk Disclosure Framework for the Banking sector](#) ('the Framework'), as part of its ongoing efforts to promote sustainability in the financial sector. The Framework is designed to assist commercial banks in disclosing climate-related risks, ensuring consistent and comparable reporting, by updating and providing additional guidance to the CBK Guidance on Climate-Related Risk Management, 2021. The Framework is in alignment with global best practices such as the International Financial Reporting Standards (IFRS) S2 which requires banks to report both on physical risks (e.g., extreme weather events) and transition risks (e.g. policy changes and technological advancements), and the Basel Committee on Banking Supervision principles. The Framework addresses various key components including:

- a) **Governance** – in line with the “fit for purpose” criterion used by the CBK in determining climate governance, this Framework requires banks to demonstrate how their governance body is fit for purpose. In addition, it is necessary to define the management’s role in the governance processes, controls, and procedures used to monitor, manage and oversee climate-related risks and opportunities.
- b) **Strategy** – banks will be required to embed climate risks and opportunities into their business strategy. This

provides a comprehensive understanding of how an entity manages climate-related risks and opportunities by requiring disclosures on the following information:

- i. the climate-related risks and opportunities expected to impact the entity's prospects;
 - ii. the present and future effects of these climate-related factors on the entity's business model and value chain;
 - iii. how these factors influence the entity's strategy and decision-making, including details on its climate-related transition plan;
 - iv. the impacts of these factors on the entity's financial position, performance, and cash flows for the reporting period; and
 - v. the resilience of the entity's strategy and business model to climate-related changes and uncertainties, based on identified risks and opportunities.
- c) **Risk Management** – banks should disclose information about their climate-related risk management policies and processes which are crucial in understanding a bank's approach in identifying, assessing, prioritizing, and monitoring climate-related risks and opportunities.
 - d) **Metrics and Targets** – the disclosure of climate-related metrics and targets indicates a bank’s internalization of climate-related risks and opportunities across its strategy, governance and risk management.

The Framework is currently subject to public and stakeholder feedback until 31st October 2024.

SACCOS

On 9th July 2024, the Sacco Societies Regulatory Authority ('SASRA') published [guidelines](#) for regulated SACCOs on combating money laundering, terrorism financing and proliferation financing. The guidelines outline the relevant legislative and regulatory frameworks, pursuant to the provisions of the Proceeds of Crime and Anti-Money Laundering Act (Cap 59A, Laws of Kenya) and the Prevention of Terrorism Act (Cap 59B, Laws of Kenya), for regulated SACCOs to assist them in identifying, assessing and mitigating the risks of money laundering, terrorism financing, and proliferation financing within the sector.

The key requirements from the guidelines include:

- i. SACCOs must undertake due diligence on new and existing members, including identification and verification of members, verification of beneficial ownership;
- ii. SACCOs must register with the Financial Reporting Centre ('FRC') via the FRC's portal at https://goaml.frc.go.ke/goAML_Prod/Home;
- iii. SACCOs must report to the FRC any suspicious transaction or activity within 2 days of forming suspicion, and submit weekly reports on all cash transactions equivalent to or exceeding USD 15,000, whether or not they appear to be suspicious; and
- iv. SACCOs must submit an annual compliance report, to be received by the FRC not later than 31st January of the following year.

¹ Any donation in that year of income to a charitable organization whose income is exempt from tax under paragraph 10 of the First Schedule to this Act, or to any project approved by the Cabinet Secretary responsible for matters relating to finance;

² Subject to Section 26, the income of an institution, body of persons or irrevocable trust, of a public character established solely for the purposes of the relief of the poverty or distress of the public, or for the advancement of religion or education.

LEGISLATIVE REVIEW – SUBSIDIARY LEGISLATION

INVESTMENTS

Income Tax Act (Charitable Organisations and Donations Exemption) Rules, 2024 ([LN 105_2024.pdf \(kenyalaw.org\)](#))

The Income Tax Act (Charitable Organisations and Donations Exemption) Rules, 2024 ("Rules") were published on 18th June 2024 pursuant to section 130 of the Income Tax Act ("Act") that empowers the Cabinet Secretary for National Treasury and Economic Planning to make rules prescribing anything which is to be prescribed under, and generally for carrying out the provisions of the Act.

i. Objectives of the Rules

The object of the rules is to:

- a) prescribe a procedure for determining the allowability of donations under section 15(2)(w) of the Act¹; and
- b) prescribe the procedure for the application for, and processing, granting and retention of an exemption from income tax under paragraph 10 of Part 1 of the First Schedule to the Act.²

ii. Requirements for exemption

The income of a charitable organisation ³which accrued in or was derived from Kenya shall be exempt from tax to the extent that the Commissioner ⁴is satisfied that the income of that charitable organisation:

- a) is to be expended in Kenya; or

³ "Charitable Organisation" means an institution, body of persons or irrevocable trust of a public character established— (a) under the relevant written law solely for the purposes of the relief of poverty, or distress of the public, or for the advancement of religion or education; and (b) in Kenya or whose headquarters is situated in Kenya;

⁴ "Commissioner" means—the Commissioner General appointed under section 11 (1) of the Kenya Revenue Authority Act (Cap.469)

- b) is to be expended for charitable purposes⁵ which result in the benefit of the residents of Kenya.

However, the rules above do not apply to the income of a charitable organisation which accrued in or was derived from Kenya and consists of gains or profits from a business unless such gains or profits are applied solely to such charitable purposes and—

- a) the business is carried on in the course of the actual execution of the charitable purposes of the charitable organisation; or
- b) the work in connection with such business is mainly carried on by beneficiaries under the charitable purposes of the charitable organisation; or
- c) the gains or profits consist of rents (including premiums or any similar consideration in the nature of rent) received from the leasing or letting of land and any chattels leased or let therewith.

iii. Establishment of a Charitable Organisation

A charitable organisation shall be considered to have been established solely for charitable purposes only if:

- a) it is organized and operated exclusively for one or more of the charitable purposes; and
- b) its charitable purposes are directed towards public benefit and result in the benefit to the residents of Kenya.

iv. Tests for Charitable Organisations

a. Organisational Test

The organisational test is one of the key requirements an organization must meet to

qualify for tax exemption. A charitable organisation shall be considered to have been organized exclusively for one or more charitable purposes if the governing document of that charitable organisation:

- i. limits the objects of the charitable organisation to one or more charitable purposes;
- ii. does not expressly empower the charitable organisation to engage in activities which are not in furtherance or supportive of one or more charitable purposes;
- iii. prohibits the charitable organisation from providing private benefits, directly or indirectly,
- iv. restricts the use of the charitable organisation's assets to the charitable purpose for which it was founded; and
- v. upon dissolution, requires the charitable organisation to transfer its assets to another charitable organisation with similar objects.

b. Operational Test

A charitable organisation shall not be considered to be operated exclusively for one or more charitable purposes unless the organisation engages primarily in activities which accomplish the charitable purpose for which it was founded and the organization.

c. Public benefit

The purpose and activities of charitable organisations shall be considered to be for public benefit if:

- a) the purpose and activities are beneficial in a manner that the beneficiaries are identifiable and

⁵ "Charitable Purpose" means a purpose which falls within paragraph 10 of Part 1 of the First Schedule to the Act

- can attest to the said benefits when required;
- b) the benefits of the charitable activities are related to the charitable organisation's purpose;
- c) the charitable organisation's purpose and activities benefit the specified target groups, or
- d) the public in general, or a sufficient section of the public;
- e) people living in poverty are not excluded from the opportunity to benefit.

d. Charitable Purpose

Organizations must be established for charitable purposes that benefit the public. These purposes include;

- a) the relief of poverty;
- b) the relief of distress of the public;
- c) the advancement of religion; or
- d) the advancement of education.

vi. Application

Charitable organizations must submit various documents, including;

- a) a certified copy of the governing documents of the applicant including rules, constitution, trust deed, memorandum and articles of association;
- b) a certified copy of the registration documents of the applicant;
- c) audited financial statements of the applicant for the period of three years immediately preceding the application;
- d) a schedule of assets of the applicant including the corresponding values of the assets;
- e) certified copies of bank statements of the applicant for the period of three years immediately preceding the application;

- f) an introduction letter detailing the name, nature and principal activities of the applicant from the office of the County Commissioner of the county where the head office of the organisation is located; and
- g) the applicant's impact report, etc.

A charitable organisation applying for the exemption for the first time shall require to have been in operation for at least one year and an application for a renewal of exemption shall be made at least six months before the expiry of the current exemption.

vii. Income Tax Exemption Certificate

The Commissioner shall, where an applicant has complied with all the requirements of Rules, issue the applicant with a tax exemption certificate valid for a period of five years.

You may find a copy of the Rules here ([LN 105 2024.pdf \(kenyalaw.org\)](#))

LEGISLATION BILLS PUBLISHED BETWEEN JULY-SEPTEMBER 2024

INTRODUCTION

A. National Assembly Bills

Between the period of July- September below are the published National Assembly bills.

1. The Kenya Revenue Authority (Amendment)(No. 2) Bill, 2024- **N/A**
2. The Environmental Professionals Institute of Kenya Bill, 2024- **N/A**
3. The Division of Revenue (Amendment)(No. 2) Bill, 2024 **N/A**
4. The Supplementary Appropriation (No. 2) Bill, 2024- **N/A**
5. The Computer Misuse and Cybercrime (Amendment) Bill, 2024- **N/A**

6. The Horticultural Crops Authority Bill, 2024 - **N/A**

7. The Tax Procedures (Amendment) Bill, 2024- **Applicable**

N/A- means the bill does not touch on financial services and is not applicable for the purpose of this report.

B. Senate Bills

Between the period of October- December below are the published Senate bills.

1. The Tobacco Control (Amendment) Bill, 2024- **N/A**

2. The Public Fundraising Appeals Bill, 2024- **N/A**

3. The County Tourism Bill, 2024- **N/A**

4. The Protection of Critical Infrastructure Bill, 2024- **N/A**

5. The County Governments (Amendment) Bill, 2024- **N/A**

6. The County Library Services Bill, 2024- **N/A**

7. The Street Naming and Property Addressing System Bill, 2024- **N/A**

8. The Religious Organisations Bill, 2024- **N/A**

9. The Sports (Amendment) Bill, 2024- **N/A**

10. The Constitution of Kenya (Amendment)(No. 2) Bill, 2024- **N/A**

FINANCE

The Tax Procedures (Amendment) Bill, 2024 ([find link here](#))

Reintroduction of tax amnesty

The bill aims to reintroduce a tax amnesty period that will end on 30 June 2025. This follows the expiration of the previous tax amnesty period on 30 June 2024. This initiative is designed to boost revenue collection while promoting tax compliance.

The reintroduction of tax amnesty provides tax payers with the opportunity to pay their

principal taxes while benefitting from a waiver on any accrued penalties and interest.

Once the bill becomes law, tax payers with outstanding liabilities are highly encouraged to take advantage of this tax waiver.

Introduction of tax relief on account of tax recovery challenges

The bill proposes to introduce of tax relief measures by granting the Commissioner General, Kenya Revenue Authority with powers to recommend tax relief in cases where recovering such taxes would be impractical, burdensome, costly or inequitable.

The Commissioner General must refer such cases to the Cabinet Secretary, National Treasury for consideration and approval for either partial or full tax relief. A notice will subsequently be published in the gazette every four (4) months detailing the affected tax payers, the reasons for the relief, and the amount of abandoned taxes.

Checks and balances

The Bill grants the National Assembly an oversight role by requiring the gazette notice be presented for their consideration. Ultimately, the National Assembly has the authority to either approve or annul the notice.

Computation of time

The bill proposes that non-working days i.e., Saturday, Sunday and public holidays, be excluded from assessment when computing the period for raising an objection and filing appeals.

HIGHLIGHTS OF THE RELEVANT CASE LAW FOR THE FINANCIAL SERVICES SECTOR

FINTECH & TAX

Liquid Telecommunications Kenya Limited v Commissioner of Domestic Taxes (Tax Appeal E587 of 2023) [2024] KETAT 1149 (KLR) (1 August 2024) (Judgment)

Brief facts:

Liquid Telecommunications Kenya Limited (the 'Appellant') is a private company in Kenya. The dispute in this appeal arose when the Appellant sought refunds for income years 2015, 2016, 2017, and 2018. The Respondent reviewed these claims and noted that some of them pertained to credits under **Section 42** of the **Income Tax Act Cap 470**, which involved special arrangements, while the credits claimed by the Appellant were unrelated to this section of the law.

As a result, the Respondent issued an additional assessment in a letter dated 29th January 2021. The Appellant contested this assessment on 25th February 2021. The Respondent subsequently issued an Objection Decision on 1st August 2023, rejecting the refund claim.

Dissatisfied with this decision, the Appellant appealed to the Tax Appeals Tribunal.

Appellant's case:

The Appellant argued that between August 2016 and August 2019, it requested refunds for income tax overpayments for the years 2015 to 2019 through iTax, in accordance with **Section 47 (1)** of the Tax Procedures Act 2015.

On 29th January 2021, the Appellant claimed that the Respondent issued assessments regarding the Appellant's Corporate Income Tax credits under **Section 42** of the Income Tax Act (ITA), based on the premise that these amounts had already been applied against the refund

requests. The Appellant objected to these assessments on February 25, 2021.

The Respondent, through a letter dated 1st August 2023, rejected the Appellant's refund claims entirely. The Appellant contended that the Respondent's failure to issue a Refund Decision within the required ninety days meant the refund application should be considered granted by default. The Appellant sought the following:

- a) to have the Respondent's decision dated 1st August 2023, rejecting the refund claims, set aside in full; and
- b) to have the refund application deemed approved, with interest as stipulated under the Tax Procedures Act.

Respondent's case:

The Respondent stated that the Appellant did not provide the necessary documents to verify the refunds' validity. According to **Section 59** of the Tax Procedures Act 2015, the Appellant was required to provide records to determine its tax liability. The Respondent claimed that the Appellant failed to supply adequate supporting documents to prove the transactions occurred.

Furthermore, the Respondent argued that the Appellant did not present sufficient evidence to support its claim or to defend its position before the Tribunal. This failure, the Respondent argued, was contrary to **Section 56** of the Tax Procedures Act, which places the burden on the Appellant to demonstrate that a tax decision is incorrect.

Held

The Tribunal noted that the Respondent suggested the Appellant's Objection might have been invalid and required supporting documentation. However, under **Section 51 (4)** of the Tax Procedures Act at the time, the Respondent was obligated to promptly notify

the Appellant in writing if the Objection was deemed invalid and request validation.

Since the Respondent did not issue an Objection Decision or request documentation from the Appellant within the 60-day period as specified in **Section 51 (11) (a) and (b)** of the Tax Procedures Act, the Appellant's Notice of Objection dated 25th February 2021, was deemed allowed by operation of law.

Consequently, the Tribunal determined that the Respondent's Objection Decision issued on 1st August 2023, was time-barred according to **Section 51 (11)** of the Tax Procedures Act, making the Appellant's objection valid by default. The Tribunal ruled that the Respondent's decision, which also rejected the refund applications, was void due to being issued beyond the statutory period, and thus, the Appellant's refund application was allowed. The Tribunal concluded that the refund claimed by the Appellant was due and payable.

Implication:

The Tax Appeals Tribunal's ruling underscores the importance of adhering to statutory deadlines in tax refund processes. The Tribunal determined that the Respondent's decision to reject Liquid Telecommunications Kenya Limited's refund claims was invalid because it was issued beyond the statutory period. Consequently, by default, the Appellant's refund claims were granted. This case highlights that timely and proper procedural actions are crucial for both tax authorities and taxpayers to ensure fair and legal outcomes.

BANKING

Premier Credit Limited v Brigid Chemutai Sielei (Commercial Appeal E206 of 2020) 2024 KEHC 10275 (KLR) (Commercial & Tax) (15 August 2024) (Judgement)⁶

BACKGROUND:

Premier Credit Limited (hereafter, "**Premier Credit**") and Brigid Chemutai Sielei (hereafter, "**the Borrower**") executed a loan agreement pursuant to which Premier Credit lent the Borrower Kshs.250,000.00, repayable in 84 months at an interest of 2.53% per month, which translates into an annual interest rate of 30.36%. Under the terms of the loan agreement, the total amount to be repaid by the Borrower would be Kshs.896,784. The Borrower repaid Kshs.256,224.00.

The Borrower contended that the interest rate charged by Premier Credit was exorbitant and unconscionable.

In a decision rendered by the Small Claims Court on 21 November 2022, the Adjudicator found that the interest rate charged by Premier Credit was unconscionable and directed that the loan of Kshs.250,000.00 be subjected to a 13% interest rate based on the prevailing bank interest rates. Dissatisfied with this decision, Premier Credit appealed to the High Court.

PREMIER CREDIT'S CASE:

In support of its appeal, Premier Credit argued that:

1. The interest rate in the loan agreement was voluntarily agreed upon by the Borrower, and the court had no basis to interfere with the contract terms.
2. The Small Claims Court exceeded its mandate by applying a bank interest rate

⁶

<https://kenyalaw.staging.laws.africa/akn/ke/judgment/kehc/2024/10275/eng@2024-08-15> [Accessed on 16 September 2024]

of 13%, despite Premier Credit not being a bank.

3. The evidence and legal submissions it provided before the trial court were not given due consideration and that the court misapplied legal principles in its judgment.

BORROWER'S CASE:

The Borrower supported the decision of the Small Claims Court, arguing that:

1. the interest rate charged was unconscionable and exorbitant, leading to a situation where the total repayment was more than three times the original loan amount.
2. Small Claims Court's decision to apply the prevailing bank interest rate was fair and reasonable.

HELD:

The High Court upheld the decision of the Small Claims Court. The appellate judge found that:

1. Given that the total repayment amount would be more than 3 times the loan amount, the interest rate of 30.36% per annum was exorbitant and unconscionable.
2. Whereas courts do not generally interfere with freedom of contract, they have a duty to intervene where the terms of a contract are unconscionable, excessively unfair, or oppressive.
3. Citing the Court of Appeal's decision in **Margaret Njeri Muiriri v Bank of Baroda (Kenya) Limited**, the court emphasized that it will not hesitate to refuse to enforce contracts that are substantively unconscionable.
4. The Small Claims Court was correct in subjecting the loan amount to an interest

rate of 13% in line with the prevailing bank interest rates at the time the loan agreement was executed.

CONCLUSION & IMPLICATION:

The High Court dismissed Premier Credit's appeal with costs to the Borrower.

The decision highlights that contracts with oppressive or exorbitant terms, especially those related to interest rates in loan agreements, are subject to court intervention in the interest of fairness.

The decision sets an important precedent for financial institutions, especially those in the microfinance and lending sectors, with respect to the enforceability of lending agreements. Specifically, it highlights the following key points:

1. Lenders must ensure that the interest rates they charge on loan advances are reasonable and in consonance with prevailing industry standards to avoid the risk of judicial interference.
2. Notwithstanding that a borrower voluntarily executed a loan agreement, courts may still intervene to restore fairness if the terms, particularly those around interest rates, are oppressive or unconscionable.
3. Financial institutions should be mindful of drafting fair and transparent contracts. Terms that are perceived as overly harsh, oppressive, or commercially unreasonable could be struck down by courts.
4. The judgment emphasizes the need for credit providers to comply with industry guidelines, including interest rate caps or regulatory frameworks, to avoid litigation risks.



NOTARIES PUBLIC • COMMISSIONERS FOR OATHS • PATENT AGENTS

OFFICES: 1st Floor, Wing B, Capitol Hill Square, Off Chyulu Road, Upper Hill, Nairobi

POSTAL ADDRESS: P. O. Box 8418-00200, Nairobi Kenya

TELEPHONE: +254 20 869 7960 / +254 20 259 6994/ +254 71 826 86 83

EMAIL: mman@mman.co.ke WEBSITE: www.mman.co.ke