

# FORCE MAJEURE IMPLICATIONS ON LEASES, SALE TRANSACTIONS AND CONSTRUCTION

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# Force Majeure

This is a civil law  
concept

No statutory or  
common law  
application in Kenya

Needs to be  
expressly provided  
for to apply in  
Kenya

# Tests for force majeure

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- A party pleading force majeure must prove:
  - The failure was due to an impediment beyond a party's control
  - The party relying on it cannot be reasonably expected to have taken the impediment and its effects into account on that party's ability to perform the contract
  - The party could not have reasonably avoided or overcome the effects of the impediment

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# Frustration

The doctrine of frustration under common law may be applied where the performance of a contract is rendered impossible due to the occurrence of events beyond the control of the parties to the contract, including acts done by persons not party to the contract.

# Case Law

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- ***Kenya Airways Limited v Satwant Singh Flora [2013] eKLR***

“The mere fact that a contract has been rendered more onerous does not of itself give rise to frustration”

- ***Lucy Njeri Njoroge v Kaiyahe Njoroge [2015]eKLR***

“...There... must be ”such a change in the significance of the obligation that the thing undertaken would, if performed be a different thing from that contracted for.”

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# Key points on frustration



The event in question must be fundamental to the terms of the contract, and do more than simply make it less convenient or more expensive to perform the contract.



Invoking the doctrine of frustration has the effect of the contract automatically terminating and both parties are released from any further performance under the contract.

# Impact on commercial landlords-Decision Making Risk Matrix

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- Impact of the pandemic on tenants.
- Do the tenants have an express force majeure provision in their leases?
- Whether rent reduction will have the intended effect?
- What is the remaining term of the lease?
- Whether the rent concession is affordable and less than the consequences of a tenant's breach.
- Whether the lease restructuring should be on the basis of a rent deferral.

# Impact on commercial landlords-Decision Making Risk Matrix

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- Whether other payments (service charge/marketing expenses/car park license fees) are included?
- What will be the period of the concession (if any)?
- Whether the tenant has received a previous concession and whether they should be entitled to a further concession?
- Can the landlord terminate the rent concession agreement if the tenant does not fulfil their end of the bargain?
- What benefits can the landlord obtain under a lease restructuring, either permanently or temporarily ?

## Impact on sale and purchase agreements

Does the sale agreement have a force majeure provision?

If so, is there an exclusion for unavailability of funds?

Is the completion of the sale subject to satisfaction certain conditions eg due diligence and/or procurement of bank finance?

Can the buyer rely on any delays in satisfying the aforesaid conditions to terminate the agreement?

If the sale is completed, what is the impact of delays in registering transfer/ charge on receiving the purchase price?

# Issues to consider in construction contracts

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- Does the pandemic allows contractors to trigger force majeure, change in law and/or variation relief under the construction contracts?
- Do these provisions have territorial limitations?
- If the Contractor can in fact lawfully trigger any of these provisions, what remedies are available?
- Is the Contractor entitled to extension of time, increased costs and even possibly termination rights?
- If so, how is the extension of time, costs and/or termination compensation calculated?

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# IMPLICATIONS OF CHANGES IN LEGISLATION AFFECTING REAL ESTATE

8<sup>th</sup> May 2020

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## Laws impacting real estate

Laws in force  
but not due to  
Covid-19

Laws in force  
due to Covid-  
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Laws being  
proposed due  
to Covid-19

# Laws in force but not due to Covid-19

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- Business Laws (Amendment) Act 2020
  - Amended various statutes including the Law of Contract Act, the Land Act and the Land Registration Act
  - An instrument processed and executed electronically shall be deemed to be validly executed
  - Allows Registrars to dispense with verification process if document has been electronically executed
  - Requirement for electronic registries
  - Introduces electronic stamping
  - Dispenses with the requirement for affixing of the company seal

# Covid-19 - Public Health Act

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Public Health (Covid-19  
Restriction of Movement  
of Persons and Related  
Measures) Rules 2020

Public Health  
(Prevention, Control and  
Suppression of Covid-  
19) Regulations 2020

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## Public Order (State Curfew) Order, 2020

The Order applies between the hours of 7.00 pm and 5.00 am.



# Covid-19 – Protocols for Management of Restaurants and Eateries during the period of Covid-19 Pandemic April 2020

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- Review of earlier restrictions on the operation of restaurants and eateries
- Now extend to transport and delivery of food, ingredients and food products, food workers, retail food premises and staff canteens
- Operating hours between 5.00 am and 4.00 pm
- Screening, hygiene measures and social distancing

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# Covid-19- Tax Laws

Tax Laws (Amendment) Act, 2020

# Covid-19 Proposed Legislation

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- Pandemic Response Management Bill, 2020
- Land Registration (Electronic Transaction) Regulations, 2020
- The NCA has prepared the Standards for Management of Construction Sites and Welfare of Workers

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# TAX CHANGES IN THE ERA OF COVID-19

08/05/2020

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## President's Measures

On 25 March 2020, the President announced some measures designed at cushioning Kenyans from the impact of **COVID-19** to mitigate shocks arising from the impact of the pandemic.



# Major highlights

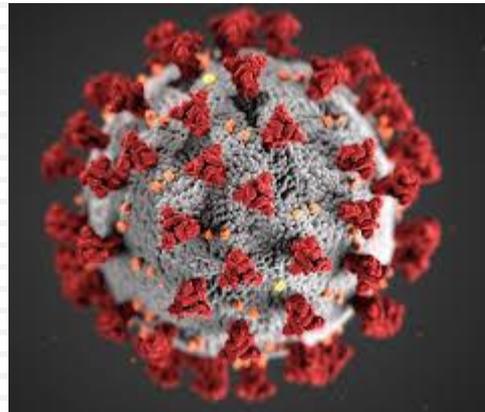
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- VAT
  - the standard VAT rate be reduced to 14% from 1 April 2020.
  - verified VAT refunds of approximately KES 10 billion to be released by KRA immediately.
- Others included in the Tax Laws (Amendment) Act, 2020



# Tax Laws (Amendment) Act, 2020

The Tax Laws (Amendment) Act, 2020 (the Act) was aimed at making certain fiscal changes to the taxation regime as a response to the Covid-19 pandemic.



# Major highlights

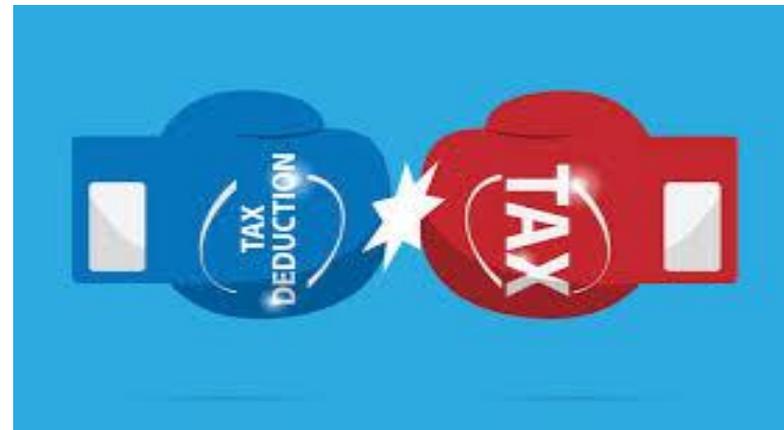
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## □ PAYE

- ▣ income of KES 24,000 (approx. USD 225) or less be exempt from PAYE; and
- ▣ the top PAYE rate of 30% be reduced to 25%.

## □ Corporation Tax

- ▣ standard rate of corporation tax has been reduced from 30% to 25 %.



# Major highlights

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- Repeal of the Second Schedule to the ITA:
  - ▣ **hotel buildings** – 50% in the 1<sup>st</sup> year down from 100%;
  - ▣ **buildings used for manufacture** – removal of 150% allowance and the 100% allowance in the 1<sup>st</sup> year;
  - ▣ **hospital buildings** – newly introduced at 50% in the 1<sup>st</sup> year;
  - ▣ **educational buildings including student hostels** – 10% p.a. down from 50% in the 1<sup>st</sup> year; and
  - ▣ **commercial buildings** – 10%p.a. down from 25% p.a.



# Major highlights (contd)

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- Removal of VAT exemption on transfer of business on a going concern basis – impact on transfer of rental businesses
- Removal of VAT exemption related to the transfer of assets into real estate's investment trusts (REITs) and asset backed securities
- Pension scheme funds can now be utilized to purchase residential houses.



# The Finance Bill, 2020

The Finance Bill, 2020 was published on 5 May 2020 (the **Bill**). The proposals in the Bill can be seen to target an increased tax base with introduction of new taxes and proposals to remove certain exemptions



# Major Proposals

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- Introduction of a minimum tax at 1% of the turnover of a person
- Increase in the highest limit of rental income subject to RRI at 10% from KES 10m to KES 15m.
- Proposal to remove tax deductions allowed in respect to contributions made to a registered HOSP and to further tax the income of a HOSP.
- Expenditure incurred on the construction of social infrastructure such as public school, hospital, roads not be included as allowable deductions

# Major Proposals

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- New requirements for input VAT claims – VAA to be *legitimized*
- Introduction of a voluntary tax disclosure programme



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