For Immediate Release

High Court Issues Orders on the Implementation of the National Infrastructure Fund

Nairobi, 23 July 2026: The High Court has delivered a major ruling in favour of public accountability, placing the newly operationalised National Infrastructure Fund, 2026, under strict judicial and financial observation, following a petition and application by Katiba Institute.

In a ruling delivered this morning, Hon. Lady Justice Patriciah Nyaundi, SC, affirmed that the constitutional challenges raised by Katiba Institute against the National Infrastructure Fund Act, 2026, are weighty, arguable, and deserve a full hearing on their merits. Recognising the risk of unchecked government spending while the case is pending, the Court agreed that immediate intervention was necessary to ensure the Petition, and its sought reliefs are not rendered meaningless.

While Katiba Institute had applied to temporarily halt the implementation of the National Infrastructure Fund Act, 2026 in its entirety, Justice Nyaundi determined that a targeted, less intrusive order would better serve the public interest. The Court permitted the operationalisation of the Act to proceed but committed the National Treasury to mandatory transparency requirements intended to enforce strict constitutional compliance.

Under the Court's orders, the Cabinet Secretary for the National Treasury must comply with the following directives:

- **Immediate Certified Disclosure:** By 24 August 2026, the CS must file in Court and serve upon the Petitioners comprehensive accounts of the Fund from its date of commencement, fully certified by the Auditor-General.
- **Detailed Financial Tracking:** The submitted accounts must detail every fund received, the exact dates deposits were made into the Central Bank of Kenya (CBK) accounts or commercial bank accounts operated under Section 40 of the Act, and a complete record of all transactions, expenditures, and allocations drawn from the Fund.
- **Mandatory quarterly reporting:** To ensure ongoing oversight, the National Treasury must continue filing these certified accounts and detailed transaction reports in Court every three months, consecutively, starting 30 November 2026, until the final determination of the petition.

"We welcome the High Court's decisive intervention to safeguard public resources and enforce financial transparency" said Nora Mbagathi, Executive Director at Katiba Institute. "We will formally notify all relevant state offices of their binding obligations under this court order and will rigorously scrutinise every account and report filed. We remain steadfast in our commitment to ensuring that the Constitution is respected in the implementation of this Fund, as we await the final determination of our petition."

Relevant excerpts from the Ruling

1. **On whether the Petition raises arguable constitutional issues**

Without pronouncing on the ultimate validity of those claims, I am satisfied that the issues raised touching on the constitutionality of the statutory framework, the scope of legislative authority and alleged derogation from constitutional safeguards, are neither frivolous, nor insubstantial. They present bona fide questions that properly fall within the court's mandate to interrogate the constitutionality of legislation. I am therefore persuaded that the Petition meets the threshold of an arguable constitutional Petition.

2. **On whether the Petition risks being rendered meaningless unless the Court intervenes**

I am persuaded that absent the court's intervention at this juncture, the Petition risks being rendered academic, and therefore of no practical consequence. The statutory scheme at issue contemplates ongoing and substantial financial transactions, some of which have already occurred and others that are imminent. If those processes continue unchecked while constitutional questions remain unresolved, the Petitioners' challenge may be overtaken by events in a manner that deprives the court's eventual determination of meaningful effect. The conservatory jurisdiction exists precisely to prevent such an outcome to ensure that the court's final orders, if merited, are not reduced to hollow declarations, incapable of redressing the alleged constitutional harm.

3. **Whether it is in the public interest to issue the conservatory orders <u>as framed</u>**

In this case, the balance of convenience does not favor a blanket prohibition on operalisation of the Act. Rather, it favors ensuring that any ongoing activities of the fund are conducted transparently within public view and subject to constitutional safeguards so that the Court's eventual determination is not rendered ineffectual.

…the Petition raises way to constitutional questions, but the statutory scheme also contemplates ongoing public interest in projects. A complete halt would intrude significantly into executive functions and risk creating the very lacuna the Respondents caution against. The fund is yet to be operationalized as both the investment policy and the business plan are not developed and adopted.

The proper constitutional balance consistent with public interest, separation of powers, and the need to preserve the efficacy of the court's final orders, lies in permitting, continued formalization of the fund, subject to strict, transparency measures, including public disclosure of all deposits, withdrawals and transactions, and adherence to constitutional oversight mechanisms. Such calibrated relief ensures that the fund's activities remain visible, accountable, and constitutionally compliant, pending determination of the Petition, without imposing a disruptive blanket bar on the statutory framework.

Accordingly, pending, the hearing and determination of the Petition, the following conservatory orders will issue: the 1st Respondent is hereby directed to file in Court, and serve upon the Petitioners within 30 days of this order, and not later than the 24th of August 2026, accounts certified by the Auditor General in relation to the National Infrastructure Fund from its date of commencement. The said accounts shall detail all funds received, the exact dates deposited into the Central Bank of Kenya accounts, or any commercial bank accounts operated under section 40 of the Act, and all transactions, expenditures, or allocations drawn from the fund. The Respondent shall continue to file the said accounts including the transaction reports in Court every 3 months, consecutively, effective 30th November 2026, pending the final determination of this Petition.

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