



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: F. MUGAMBI, J**  
**CIVIL SUIT NO. E571 OF 2025**

**BETWEEN**

**NEXTGEN MALL MANAGEMENT CO LTD .....  
PLAINTIFF**

**VERSUS**

**IDLE IBRAHIM ..... 1<sup>ST</sup>  
DEFENDANT**

**GAD AWUONDA ..... 2<sup>ND</sup>  
DEFENDANT**

**NIMESH CHAUHAN ..... 3<sup>RD</sup>  
DEFENDANT**

**BRAMWEL JUMA ..... 4<sup>TH</sup>  
DEFENDANT**

**LILIAN MACHARIA ..... 5<sup>TH</sup>  
DEFENDANT**

**ALEX MUEMA ..... 6<sup>TH</sup>  
DEFENDANT**

**SHANJAY BHUDIA ..... 7<sup>TH</sup>  
DEFENDANT**

**SHRIKESH KANBAR ..... 8<sup>TH</sup>  
DEFENDANT**

**STANLEY KIMANI ..... 9<sup>TH</sup>  
DEFENDANT**

**DAMARIS ONDUSO ..... 10<sup>TH</sup>  
DEFENDANT**

**BETTY WANYOIKE ..... 11<sup>TH</sup>  
DEFENDANT**

## **RULING**

### **Background and Introduction**

1. This Ruling determines the Preliminary Objection dated 10<sup>th</sup> September 2025, raised by the Defendants. The objection is directed against the Plaintiff's application and Plaint, both dated 2<sup>nd</sup> September 2025. The Defendants have anchored their objection on three principal grounds.
2. First, it is contended that the present suit is *sub judice*, in that it raises issues substantially similar to those already pending determination in **MCCC No. E690 of 2023** and **ELC Civil Suit No. E063 of 2023: Stanley Kimani and Others V Nextgen Management Mall Co. Ltd and Others**, as well as **ELC No. E072 of 2023**, which was subsequently withdrawn. Secondly, the Defendants urge that the suit is *res judicata*, the matters herein having been conclusively determined in **ELC No. E002 of 2023: Nextgen Mall Management Co. Ltd v. Idle Ibrahim and Others**. Thirdly, the Defendants challenge the competency of the supporting Affidavits. They maintain that the deponent therein is not a director

of the Plaintiff, thereby offending the mandatory requirements of **Order 4 Rule 1(4) of the Civil Procedure Rules**.

3. I have carefully considered the Preliminary Objection as raised, together with the written submissions filed by both parties in support thereof and in opposition thereto.

### **Analysis and Determination**

4. It is trite law that for a Preliminary Objection to succeed, it must raise a pure point of law. This principle was firmly established in the *locus classicus* case of **Mukisa Biscuit Manufacturers Ltd V Westend Distributors Ltd, (1969) EA 696**. The Supreme Court in **Aviation & Allied Workers Union Kenya V Kenya Airways Ltd & 3 Others, [2015] eKLR** reaffirmed that a preliminary objection may only be raised on a pure question of law, discernible where there is no proper contest as to the facts. The objection herein is predicated primarily upon the doctrines of *sub judice* and *res judicata*, both of which constitute pure points of law. Having considered the submissions of the parties, the issues for determination are:

- i. Whether the supporting Affidavits are defective for want of authority.*
- ii. Whether the application and suit are res judicata;*
- iii. Whether the application and suit are sub judice;*

**(i) Competency of the Affidavits:**

- 5.** The Defendants challenge the competency of the Affidavits sworn in support of the application and Plaintiff, asserting that the deponent is neither a director nor shareholder of the Plaintiff and lacked authority to swear them. The Plaintiff did not address this issue in its submissions.
- 6. *Order 4 Rule 1(4) of the Civil Procedure Rules*** requires that where a corporation is a party to proceedings, the verifying affidavit shall be sworn by an officer duly authorized under the seal of the corporation. No such authority has been exhibited in respect of the deponent, Sandra Gitia. The jurisprudence on the effect of such an anomaly is however well settled.

7. In **Kenya Aerotech Ltd V City Council of Nairobi, Nairobi High Court Civil Suit No. 411 of 2012** this Court, Odunga, J (as he then was), stated:

***“As properly submitted by the defendant, under Order 4 rule 1 (4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed. The failure to file the same maybe ground for seeking particulars assuming that the said authority does not form part of the plaintiff's bundle of documents which common sense dictates it should. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure***

***to file the same with the plaintiff or with the the Registrar of Companies, as the requirement is extended by the defendant, does not invalidate the suit. I associate myself with the decision of Kimaru, J in Republic vs Registrar General and 13 others Misc. Application No. 67 of 2005 [2005] eKLR and hold that the position in law is that such a resolution by the Board of Directors of a company may be filed anytime before the suit is fixed for hearing as there is no requirement that the same be filed at the same time as the suit. Its absence, is therefore, not fatal to the suit, at least not at this stage.***

8. In light of the existing jurisprudence, I am persuaded that the anomaly identified in respect of the Affidavits sworn by Sandra Gitia, while irregular, is not in itself fatal to the suit at this

interlocutory stage. Such authority may be furnished at any time before the matter is set down for hearing.

**(ii) Res Judicata:**

9. The Defendants further argue that the matter before the Court is *res judicata*, having been determined in **Milimani ELC No. E002 of 2023**. The Plaintiff however contends that the issues were not substantially heard on their merits and that **ELC No. E072 of 2023** was withdrawn for want of jurisdiction.

10. The Supreme Court in **John Florence Maritime Services Limited & Another V Cabinet Secretary Transport & Infrastructure & 3 Others, (Petition 17 of 2015) [2021] KESC 39**

**(KLR)** restated the elements of *res judicata*:

**(a) existence of a former judgment or final order;**

**(b) the judgment or order was on merit;**

**(c) the judgment or order was rendered by a court of competent jurisdiction;**

**(d) identity of parties, subject matter, and cause of action in both suits.**

**11.** The onus lay squarely upon the Defendants to establish, with clarity, the elements necessary to sustain a plea of *res judicata*. From the material placed before this Court, it is not evident that a final judgment on the merits was delivered in the matters cited. Indeed, the averment that **ELC No. E072 of 2023** was withdrawn for want of jurisdiction has not been controverted, and therefore stands unchallenged. In the absence of proof of a final and conclusive determination on the merits by a court of competent jurisdiction, the plea of *res judicata* cannot be sustained.

**(iii) Sub Judice:**

**12.** The Defendants contend that the present matter raises issues similar to those in **Milimani ELC No. E063 of 2023** (pending before Angote, J) and **MCCC No. E690 of 2023**. The Plaintiff on the other hand argues that it is not a party to the ELC matter and that the issues in **MCCC No. E690 of 2023** are purely contractual and distinct from the present matter.

- 13. *Section 6 of the Civil Procedure Act*** is couched in mandatory terms, barring courts from proceeding with a matter directly and substantially in issue in a previously instituted suit between the same parties or those claiming under them, pending before a court of competent jurisdiction.
- 14.** From a thorough examination of the pleadings filed in the present matter, it is manifest that both the application and the Complaint dated 2<sup>nd</sup> September 2025 emanate from a dispute touching on the management and control of Next Gen Mall (the suit premises). The contest is essentially between Next Gen Management Company Ltd and Next Gen Owners Association. The injunctive orders sought are aimed at restraining the Defendants from convening or proceeding with a planned Annual General Meeting (AGM), from tabling financial reports, conducting audits, and generally from interfering with the Plaintiff's management and administration of the suit premises.
- 15.** The Defendants, in their Replying Affidavit sworn on 10<sup>th</sup> September 2025, have annexed pleadings from other suits previously instituted in respect of

the same property. Upon careful consideration, it is evident to this Court that the orders issued by the Environment and Land Court on 26<sup>th</sup> April 2023 in **ELC No. E063 of 2022** substantially overlap with the present matter. In that suit, the central issue for determination was likewise the rightful management and governance of Next Gen Mall. Indeed, the ELC, in its interlocutory orders, directed the incorporation of **Nextgen Commercial Center** pending the hearing and determination of the matter before it.

- 16.** This Court's attention has further been drawn to the Orders issued in **MCCC No. E690 of 2023** on 4<sup>th</sup> April 2023. Those Orders, upon close scrutiny, clearly relate to the exercise of management powers and control over the suit property, including the collection of service charge and the engagement of service providers within the premises. The overlap between the issues in that matter and those presently before this Court is evident, as both concern the governance and administration of Next Gen Mall.

- 17.** The Plaintiff has submitted that it is not a party to the matter pending before the Environment and Land Court. This contention, however, is of no assistance to the Plaintiff, as the statutory bar under **Section 6 of the Civil Procedure Act** extends beyond the narrow confines of party identity and encompasses matters where the issues in dispute are directly and substantially the same. The provision is designed to prevent multiplicity of suits and to safeguard against conflicting decisions on the same subject matter.
- 18.** In the present case, the parties cited across the various suits, including **Next Gen Mall, Next Gen Management Company Ltd, Next Gen Mall Owners Association, Next Gen Mall Owners Committee, and Next Gen Office Suites Limited**, are all litigating over the same subject matter which is the management rights and control of **Next Gen Mall**, the suit property designated as **L.R. No. 209/18648, Nairobi**. Although the suits have been filed under different case numbers and occasionally involve slightly varied configurations of parties, the disputes are in substance directed to one core issue: the lawful authority to

administer, manage, and exercise control over the operations of the commercial complex.

**19. Section 6 of the Civil Procedure Act** is sufficiently wide to encompass such circumstances. Allowing the parallel suits to proceed would inevitably create the risk of divergent judicial pronouncements on identical questions, a situation that undermines the orderly administration of justice and militates against the expeditious resolution of disputes. Accordingly, this Court finds that the instant suit is caught by the doctrine of *sub judice*.

### **Disposition**

**20.** Accordingly, the Preliminary Objection succeeds on the ground of being *sub judice* and for that reason, the Plaint and application dated 2<sup>nd</sup> September 2025 are hereby struck out with costs

**DATED, SIGNED AND DELIVERED IN NAIROBI  
THIS 12<sup>TH</sup> DAY OF MAY 2026.**

**F. MUGAMBI  
JUDGE**

**Delivered in presence of:**

Mulaku for the plaintiff  
Langat for the defendant  
Court Assistant: Lillian & Gloria

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