

**IN THE HIGH COURT OF TANZANIA  
IN THE DISTRICT REGISTRY OF MWANZA  
AT MWANZA**

**LAND APPEAL No. 01 OF 2021**

*(Arising from District land and Housing Tribunal for Mwanza at Mwanza in Application  
for Execution No. 474C of 2019)*

**BETWEEN**

**ELIADA PHINIAS MACHUMU ..... APPELLANT**

**VERSUS**

**CHRISTINA MAU ..... RESPONDENT**

**JUDGMENT**

*09/03/2021 & 19/07/2021*

**W. R. MASHAURI, J;**

This appeal is emanating from the decision of the District Land and Housing tribunal for Mwanza in application for execution No. 474B of 2019. Hon. Masao, chairperson. Being dissatisfied with the ruling of the District Land and Housing Tribunal, the appellant Eliada Phinias Machumu now appeals to this court on the following grounds of appeal: -

1. That, the tribunal grossly erred in fact and law by determining execution without hearing the parties on the application for execution, after dismissing the preliminary objection raised by the appellant.

2. That, the Tribunal grossly erred in law and fact by entertaining the execution without hearing and determine application for stay of execution filed by the appellant (Application No. 474C of 2019).
3. That, the tribunal grossly erred in fact and law by entertaining the application which was not proper for failure to include the party which was in the original decree under which execution order was sought.
4. That. That, the Tribunal grossly erred in law and fact by entertaining the application while the respondent (then applicant) had no locus stand.
5. That, the tribunal grossly erred in law and fact by deciding the matter against before it while down grading the weight of evidence on record which were brought by the applicant indicating the substantial amount of money had been paid by the appellant. Thus the appellant prays for the following reliefs: -
  - (a) That the decision of the District Land and Housing Tribunal for Mwanza at Mwanza in application for execution No. 474B be reversed or alternatively be tried de-novo.
  - (b) That, an order be issued for the Trial Tribunal to hear both parties before giving its ruling.



- (c) That, the respondent be ordered to pay costs of this appeal as well as costs in the trial tribunal.
- (d) Any other relief(s) this court may deem fit and just to grant.

The appellant in this appeal is represented by Mr. Kinango, Advocate and the respondent by Ostack Mligo learned counsel.

When the appellant served the respondent with the appeal, the respondent has filed notice of preliminary objection to the effect that, (i) this matter is Res-judicata as it contravenes section 9 of the CPC Cap. 33 R.E. 2019. (ii) That, this appeal contravene the deed of settlement recorded as consent judgment which was entered at the Trial Tribunal as per Regulation 18(1)(2)(3) of the Land Disputes Courts (The District Land and Housing Tribunal GN. No.174 of 2003).

- (e) Any other relief this court may deem just and fit to grant.

However, before hearing of this appeal commenced, the respondent filed notice of preliminary objection to the effect that;

- (i) This matter is Res-judicata as it contravene section 9 of the CPC Cap. 33 R.E. 2019.

This point of preliminary objection has been argued by way of filing written submissions.

In his submission in support of the points of preliminary objection, the learned counsel for the respondent has abandoned the 2<sup>nd</sup> point of preliminary objection and remained with the 1<sup>st</sup> point which states that, this matter is Res-judicata as it contravenes section 9 of the CPC Cap. 33 R.E. 2019.

In support of that point of preliminary objection, the learned counsel for the respondent submitted that, this Land Appeal No. 1 of 2021 filed in this court by the appellant is arising from the decision of preliminary objection registered as 474C of 2019 which was raised by the appellant at the trial court, following the application for execution No. 474B of 2019 which was filed by the respondent after a final determination of Land Application No. 474 of 2016 which was settled by deed of settlement filed in the trial Tribunal on 8/02/2019 and recorded by the Trial court on 19/02/2019 as "*consent judgment*." That the said deed of settlement was voluntarily entered by the parties by virtue of the provisions of Regulation 18(I) of the Land Disputes courts (The District Land and Housing Tribunal GN. No. 174 of 2003 which provides that: -



*"Where parties at any state of proceedings have agreed to settle the matter before the Tribunal, the chairman may enter consent judgment or order upon such terms as may be agreed by parties."*

That, the settlement deed which was reached and signed by both parties had settled the dispute to its finality. The appellant was therefore duty bound to perform her obligation as was agreed in clauses 3,4, 5, 6 and 7 of the deed of settlement. Which state That: -

3. That, the parties to this agreement have agreed that, the applicant shall pay the costs which the 1<sup>st</sup> respondent has incurred during entertaining the case No. 476 of 2016 the total amount of Shs. 1,500,000/=.
4. That, the applicant has agreed to refund the 3<sup>rd</sup> party Shs. 15,000,000/= and Shs. 1,500,000/= which make a total sum of Shs. 16,500,000/= which in execution of this agreement to be paid within three installments to the buyer of the house in dispute as follows: -
5. That, the 1<sup>st</sup> instalment of Shs. 5,000,000/= to be paid on or before 30/03/2019.
6. That, the 2<sup>nd</sup> instalment of Shs. 5,750,000/= to be paid on or before

30/03/2019.

7. That, the 3<sup>rd</sup> instalment of Shs. 5,750,000/=.

It was agreed under clause 9 of the deed of settlement as follows: -

9. That, failure of the applicant to pay the money in accordance with the schedule indicated at paragraph 5, 6 and 7, above, of this memorandum of settlement the same shall be marked failed.

Therefore, the house in dispute shall continue to be owned by the buyer as it was auctioned by the 2<sup>nd</sup> respondent. This court shall be in a position of to declare the lawful owner of the house indispute and both parties with consent agreed that, there shall be no any hind of suit or appeal thereof.

That, as stated under clause 9 of the settlement deed, it is clear that, no any suit shall be filed or no appeal shall arise thereof. That, this appeal is originated from matters which were settled and finally determined by mutual agreement.

That, this land appeal No. 1 of 2021 is arising from Land Application No. 474 of 2016 which was determined to its finality, preliminary objection No. 474 of 2019 which also was determined to its finality as shown above.



In reply to the submission by counsel for the respondent, the learned counsel for the appellant submitted and/or agreed that, the parties in this appeal entered into an agreement which was later adopted as decree of the Tribunal.

That, in their compromise agreement, the appellant was given time to pay the said amount of money by installments. That, while instalments were yet due, the appellant had paid substantial amount of money as agreed. To the appellant dismay while the appellant was executing the compromise agreement, the appellant raised preliminary points of objection on tenability of the application for execution alleging inter-alia that, the application for execution was premature as the applicant was paying the amount of money as agreed. That the applicant had no locus standi to institute the execution proceedings against the appellant as the house was handed over to third party in case of default and not the respondent, as per copy of notice of preliminary objection annexure GEM "I".

That, the appellant in this appeal also filed an application for execution No. 474C of 2020 and in that application the appellant demonstrated in her affidavit how she was paying the agreed amount by instalment as per application for stay (sic) annexure GEM. 2. That, in the said stay of execution

the applicant attached copies of bank statements (pay in slip to back up her allegation). The application for stay of execution was however dismissed despite of strong legal arguments given by the appellant.

That, it is a position at law that, once a preliminary objection is dismissed while there is application for stay of execution, the tribunal ought to hear and determine the pending application for stay of execution before granting execution order while the stay is pending. However, this was not the case as the tribunal ought to proceed to hear the application on merit. That the appellant ought to be given opportunity to show cause why execution should not be taken against her.

And at that point in time the appellant was to be accorded opportunity to show the tribunal what she had paid and what had remained and why.

That, after dismissal of the preliminary objections irregularity. The tribunal proceeded to determine the application for execution without hear any party to that matter.

In such circumstance the appellant was forced to lodge this appeal in which the respondent has lodged the preliminary objection that, this appeal is Res-judicata.



That, the Res-judicata doctrine is with its origin based under section 9 of the CPC Cap. 33 R.E. 2019 which provides that: -

9 – No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim.

That, Res-judicata bars endless litigation between same parties on the same issue. That, this current appeal does not fall within the four corners of Application No. 474 of 2016 which was determined by compromise agreement.

This appeal and Application No. 474 of 2016 are different application and they are not related with one another. That, the issue before the tribunal was consent judgment in Application No. 474 of 2016. In this appeal, the appellant is challenging the decision in Misc. Application No. 474 C of 2019 in which the appellant was condemned unheard.

That, the appellant's appeal is not against the Consent Judgment between the parties (Land Application No. 474 of 2019). The appeal is against execution order in Miscellaneous Application No. 474C of 2019 in

which the parties were not heard. That in this ruling, the tribunal ordered the appellant to pay the whole amount of money. That, if the parties were give right to be heard, the tribunal could have determined otherwise.

That, according to Mulla, the code of Civil Procedure, 16<sup>th</sup> Edition volume I, authorized by Socil Paul et al at page 175, manuscript highlight the difference between matters that are directly and substantially in issue and matters that are collaterally and incidentally to the mater in issue.

That, matters directly and substantially in issue-every matter in respect of which relief is claimed in a suit is necessary a matter directly and substantially.

That, where the parties to the suit are not the same, res-judicata does not apply even if the issue (existence or relationship of partnership or employment) are the same, but where the parties in a suit are the same as in the former suit and the judgment in the former suit has not been appealed from and allowed to be final, it is binding on the parties and they cannot be allowed to be final, it is binding on the parties and they cannot be allowed to go behind it in subsequent suit.



Having so submitted, learned counsel for the appellant finally submitted that, a plea of Res-judicata is not applicable in this matter.

He therefore prayed the court to dismiss the PO raised by respondent with costs.

The issue is whether this matter is res-judicature.

The doctrine of Res-judicata is hinged on section 9 of the CPC Cap. 333 R.E. 2019 which provides that: -

9 –No court shall try a suit whose subject matter is substantially and directly the same as the subject matter which was tried in another suit. The doctrine bars litigation on a point which has been a subject of litigation in a previous suit. It is intended to prevent harassment of the parties by each other.

summarily, the doctrine is based on a need to give finality to judicial decisions. It is a principle which demands that a party should not be vexed twice on the same point or matter.

As a principle it applies both to past and future litigations.

Under section 9 of the CPC Cap. 33 R.E. 2019, there are four requirements for the doctrine to apply.

1. That, the matter which is directly and substantially in issue in the present case must also have been directly and substantially in issue in a former suit. (see Karsan v/s Brogha (1953) 20EACA74.
2. That, the previous suit must have been finally and conclusively determined.
3. That, the former suit and the subsequent suit must be shown to be between the same parties or parties claiming under the same title.
4. That, the previous suit was determined by a court of competent jurisdiction.

Notwithstanding all that I have recorded in my ruling above it is astonished to see that, on 18/05/2021. This court received a complaint letter from the appellant Eliada Phinias Machumu dated 05/05/2021 complaining that, her name Eliada Phinias Machumu has been being used in various cases including this Land Appeal No. 01 of 2021 arising from application for execution No. 474C which was filed in the District Land and Housing Tribunal for Mwanza at Mwanza and one Joseph Kinango advocate is appearing on her behalf.



That, in Appeal No. 1 of 2021 arising from Land Case No. 474C is alleged that, the said Appeal No. 1 of 2021 is originating from Case No. 474C arising from the decision of Mwanza District and Housing Tribunal for Mwanza.

In fact, her letter dated 05/05/2021 appear and reads as follows: -

ELIADA PHINIANCE MACHUMU  
DAR ES SALAAM  
SIMU: 0688 422 660  
05/05/2021

MH: MASHAURI,  
MAHAKAMA KUU YA TANZANIA  
KANDA YA MWANZA

YAH: JINA LANGU KUTUMIKA KATIKA MASHAURI MBALIMBALI LIKIWEMO  
SHAURI LA RUFAA NAMBA 1/2021 (LINALOTOKANA NA SHAURI NAMBA 474C  
LILILOKUWA KATIKA BARAZA LA ARDHI NA NYUMBA MWANZA)

Mh. Jaji

Rejea kichwa cha habari hapo juu.

Mimi naitwa Eliada Phinias Machumu. Ninaishi katika jiji la Dar es Salaam Manispaa ya TEMEKE, ninajishuhulisha na shughuli za ujasilia mali.

Mh. Jaji, Ninaandika barua hii nikiwa na masikitiko makubwa sana, kuhusiana na mashauri tajwa hapo juu.

Kwa ufupi naomba kueleza masikitiko yangu kama ifuatavyo: -

Mh. Jaji katika mahakama yako limefunguliwa shauri la rufaa namba 1/2021 linalotokana na shauri Namba 474C katika Baraza la Ardhi na Nyumba Mwanza. Mimi nimeandikiwa kufungua shauri katika baraza hilo, baadaye kuonekana kutoridhika na maamuzi ya baraza hilo la Ardhi na Nyumba na kwamba nimeamua kukata rufaa katika mahakama kuu ya Tanzania Kanda ya Mwanza. Pia katika shauri hili nimeonekana kama mrufani, na nina wakili anayeniwakilisha ambaye ni wakili Msomi Joseph Kinango. Shauri hili lipo mbele yako na limepangwa kusikilizwa tarehe 6/5/2021, mbele ya Mh. Jaji Mashauri.

Mhe. Jaji nimesikitishwa sana na jambo hili kwa sababu: -

- (a) Sijawahi kufungua shauri la rufaa Namba 1/2021 katika mahakama yako, wala sijawahi kufanya mawasiliano na wakili yoyote kuendesha shauri au kesi yoyote inayonihusu mimi katika mahakama yako, na sijawahi kuweka wakili kufungua shauri lolote katika chombo chochote katika mahakama ya Tanzania na pia baraza la ardhi na nyumba Mwanza pia sijawahi kumwona wala kumfahamu wakili ambaye anaonekana mahakamani kuniwakilisha mimi.
- (b) Nimeshitushwa sana nilipoambiwa kuwa nina kesi katika mahakama yako na ndipo nilipoandika barua hii kuijuza mahakama yako tukufu kuwa mimi sijui hiyo kesi mwanzo na hata mwisho wake ni kitu ambacho kimenipa mshangao mkubwa kuhusu jambo hili. Hivyo naiomba mahakama yako tukufu ifanye uchunguzi kuhusu jambo hili.

Kwa ushahidi kuwa ni mimi Eliada Phinias Machumu ninaambatanisha nakala ya kitambulisho changu cha mpiga kura. Nimeandika haya nikiwa na akili timamu na yote nilioandika ni kweli tupu. Ee Mwenyezi Mungu nisaidie.



Ni matumaini yangu kuwa ombi langu litapokelewa na kufanyiwa kazi kwa mujibu wa sheria.

Sgd.

.....  
ELIADA PHINIAS MACHUMU

On 31/05/2021 the matter appeared before me for hearing, and Mr. Ostaki Mrigo, Advocate appeared for the respondent.

Mr. Kinango, Advocate for the appellant Eliada Phinias Machumu did not appear.

Mr. Ostaki learned counsel for the respondent however informed the court that, before this matter was called in this court for hearing in this morning, the learned counsel for the applicant was present. That, one time he told Mr. Ostaki would left away and return back in a short time to attend his case and he left away to the place he alone was aware, and during the time the case was called in court for hearing, the learned counsel for the applicant was yet returned.

That, he sent a message to him and said would not appear as he was before another court.

On her part, the complainant Eliada Phinias Machumu admitted to have filed this complaint letter to this court complaining against the learned counsel (msomi) Mr. Joseph Kinango who is purporting to represent her in this case while she don't know him, nor did she ever employed him to appear in court on her behalf.

That she appeared in court to say that Mr. Kinango learned counsel is not her advocate and that she is absolutely don't known him. That, she don't have any case in this court nor does she ever appeared in Case No. 474C in the District Land and Housing Tribunal, for Mwanza.

On her side, the respondent Christina denied to have known the appellant who is accusing her but she don't accuse her. That she knows her advocate Ostaki Mrigo who has been representing her since November, 2015 in Land Case No. 474C in which it seemed was sued by Eliada.

In rejoinder, Miss Eliada Phinias Machumu (Appellant) said that, she has never ever appeared in the District Land and Housing Tribunal. That, she is not concerned with this case. That she was just a wife of one Bagaila who was sued by the respondent Christina Mau. That, she is not concerned



with any case against her former husband Bagile Chiguku who divorced her. That he ever phoned her and urged her to say that the house is her property.

That, former husband Mr. Bagile has been forging her signature purporting to show that she is still lawful wife of him, the fact of which is not true.

Upon heard this submission by the appellant Eliada Phinias Machumu, Mr. Ostaki counsel for the respondent submitted in rejoinder that, in the District Land and Housing Tribunal for Mwanza, Eliada opened Case No. 474C but she never appeared in court and she agreed that the said house was bought and she agreed to refund the money and when Eliada agreed that the house was bought, they agreed to settle the matter through deed of settlement and she did not fulfill her obligation and upon failed to refund the money, the respondent filed an application for execution of the consented decree which was arose from the deed of settlement of which was recorded a consent judgment.

Finally, Mr. Ostaki Mrigo advocate for the respondent submitted that, since this court is vested with revisional jurisdiction, he prayed the court to revise this case and quash the proceedings of the purported trial tribunal

which are nully and void ab initio. Another interlocutory issue for determination in this appeal is whether the original Land Case No. 474C was filed in the tribunal by the purported appellant Eliada Phinias Machumu.

Having carefully followed the submissions by the purported parties in this appeal as well as hearing the arguments of the parties in particular the appellant Eliada Phinias kind the respondent Christina Magu as well as a complaint letter by Eliada Phinias Machumu dated 05/05/2021. I have gathered that, there is no such a case with No. 474C ever filed in the DLHT for Mwanza by the appellant Eliada against the respondent.

In her submission before me the appellant Eliada said has never ever appeared in the District Land and Housing Tribunal to attend Land Application No. 474C upon which this appeal No. 1 of 2021 lie. That, it is her former husband Bagile Chiguku who is concerned with the case. That the said Bagile Chiguku was her husband but later on he divorced her. And it appears that, when her former husband divorced her, he sold the house they had built during their marriage. And when he knew that he sold the house unlawfully he phoned the appellant and urged her to say that the house was her property.



And it appears the house was bought by the respondent Christina Mau. And it is quite apparent that, upon unlawfully sold the house to Christina Mao, the appellant's husband Bagile Chiguku pretending to be Eliada Phinias Machumu filed a fictitious Land Case No. 474C in the tribunal against the buyer of the house Christina who in conspiracy with the appellant's husband and advocate Joseph Kinango pretended to be advocate of Eliada Phinias Machumu and that she lost the case in the DLHT for Mwanza and has now appealed before this court in this appeal No. 1 of 2021, when the parties appeared before me on 31/05/2021, the respondent Christina said she don't know the appellant who sued her and that she is also never accused the appellant.

On her part the appellant Eliada Phinias Machumu said she never ever appeared in the DLHT for Mwanza suing the respondent Christina in Land Case No. 474C and lost her case nor did she file this appeal against the decision of the DLHT in Land Case No. 474C.

On my part, I am satisfied with the appellant that the Case No. 474C and this Appeal No. 1 of 2021 have been fictitiously made by the appellant's former husband who forged her signature as she allergies with an intention to shift a burden to the appellant to pay the house which was sold by the

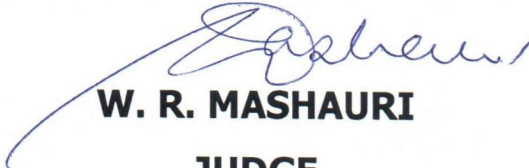
appellant's former husband. There is therefore nothing what is called Land Case No. 474 as well as Civil Appeal No. 1 of 2021.

On that regard, I declare the purported proceedings in both Land Case No. 474 and the purported Land Appeal No. 1 of 2021 a nullity. The same are hereby set aside.

From the look of events, this appeal is allowed with costs to Appellant for want of necessary parties.

No order s to costs is made.



  
**W. R. MASHAURI**  
**JUDGE**

**19/07/2021**



Date: 19/07/2021

Coram: Hon. W. R. Mashauri, J

Appellant:

Respondent:

B/c: Elizabeth Kayamba

**Court:** Ruling delivered in court in presence of the appellant Eliada Phinias Machumu and in absence of the respondent Christina Mau this 19<sup>th</sup> day of July, 2021, respondent to be informed of the outcome and explained of her right to appeal.



A handwritten signature in blue ink, appearing to read "W. R. Mashauri", is written over the printed name.

**W. R. MASHAURI**

**JUDGE**

**19/07/2021**