IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

PROBATE AND ADMINISTRATION APPEAL NO. 15 OF 2021

(C/f Probate and Administration Appeal No.4 of 2020 of the District Court of Rombo at Mkuu originally Probate and Administration Cause No. 17 of 2020 of Mengwe Primary Court.)

VELDA LINA MSANGI

(As the lawful Attorney of MAGRETH MSANGI.....APPELLANT

VERSUS

BARLAS ANTHONY SHAO.....1ST RESPONDENT

THADEUS GILLIARD MOYE.....2ND RESPONDENT

JUDGMENT

12 /7/2022 & 05/8/2022

SIMFUKWE, J.

This Appeal emanates from Probate Appeal No. 4 of 2020 of Rombo District Court. The historical background of the matter as captured from the records is to the effect that the respondents herein applied for letters of administration in respect of the estate of their deceased relative Rogatius Anthony Shao before Mengwe Primary Court (the trial court). The court issued citation and one Ms. Velda Lina Msangi came up with the

power of Attorney representing Magreth Msangi praying that Ms. Magreth Msangi should be included as co-administratrix. The respondents objected Ms. Magreth Msangi's prayer. The trial court heard the parties for and against the application of joining as the appellant herein as co-administratrix. Finally, Ms. Magreth's prayer to be joined as co-administratrix was dismissed and the trial court appointed the respondents herein as administrators.

Ms. Magreth Msangi was dissatisfied with the decision of the trial Court, through her representative (appellant) she appealed before the district court of Rombo (1st appellate court) unsuccessfully. Still aggrieved, she has knocked the doors of this court on the following grounds:

1. *THAT, the learned Honorable Magistrate erred in law and fact by finding that the primary court had jurisdiction on entertaining the Probate and Administration Cause No. 17/2020.*
2. *THAT, the learned Honorable Magistrate erred in law and fact when completely failed to construe the evidence on record and eventually dismissed Appellant's prayers.*
3. *THAT, the learned Honorable Magistrate erred both in law and fact when disregarded on his findings the facts that the Appellant is a legal and lawful wife of the deceased. (sic)*

The appeal was argued orally, the appellant was represented by Mr. Moses Mahuna and Ms Helen Mahuna, learned counsels, while the respondents were represented by Mr. Julius Focus, learned counsel.

In support of the 1st ground of appeal in respect of jurisdiction, Mr. Mahuna submitted to the effect that their contention before the 1st appellate court was to the effect that the trial court never had jurisdiction to entertain a probate matter which was instituted before it. He submitted that had the 1st appellate magistrate examined well the proceedings of the trial court he could have discovered that the trial court had no jurisdiction over the matter on the following reasons:

***First*, section 18 of the Magistrates' Courts Act, Cap 11 (MCA)** as amended from time to time, empowers the primary court to entertain civil matters which concern customary and Islamic law. **Section 19(1)(c)** of the MCA provides clearly that when the primary court entertains issues of probate and administration shall be governed by the **5th Schedule of the MCA** (supra).

The learned advocate referred to **Rule 1(1) of the 5th Schedule of the MCA** which provides that where the governing law is customary or Islamic the primary court shall have powers to exercise jurisdiction where the deceased at the time of his death had a fixed place of abode.

Mr. Mahuna averred that the determinant factor of the primary court to exercise its jurisdiction is whether the deceased had a fixed place of abode within the jurisdiction of that particular primary court. He commented that the two lower courts never considered the fixed place of abode of the deceased in order to determine whether the trial court had jurisdiction or not. That, when considering the fixed place of abode, the court should look at the death certificate of the deceased which provides reliable information while filling Form No. 1. Furthermore, he said that in the death certificate of the deceased Rogatus Anthony Shayo, it is indicated

that the fixed place of abode of the deceased is Kijichi at Dar es Salaam. It was his argument that the death certificate is used to procure the personal particulars of the deceased and his last known address. However, Form No.1 which amounts to a pleading before the primary court vary that primary piece of evidence as it states that the last place of abode is Mamsera Rombo. It was the opinion of Mr. Mahuna that had the court considered the death certificate which mentioned the last place of abode to be Kijichi Dar es Salaam, should have not entertained the matter merely by relying on the facts filled in Form No. 1. He referred the court to the case of **Fabian Robinson Bisaya, PC Probate Appeal No. 2 of 2019 HC Tabora** (Unreported) at page 18-19 where it was held that:

> *"As amply denoted above in determining the jurisdiction of a trial Primary Court on administration of estate cases, regard is given not only to Form No.1 but also to minutes of a family meeting, death certificate, documents on ownership of properties if any, documents showing the deceased 's residence, place of employment and or business and testimonies given by the respective witnesses."*

Mr. Mahuna submitted further that all witnesses before the trial court thus PW1, 2nd appellant, PW2 and all witnesses testified about a landed property located at Kijichi Dar Es Salaam which compliments the death certificate which indicates the last known address of the deceased. Also, in Form No. 1 the said property is listed.

Mr. Mahuna re-cited the case of **Fabian Robinson** (supra) which elaborates what fixed place of abode means, at page 19 of the judgment it was stated that:

> *"The fixed place of abode within the local limits of the court's jurisdiction is not restricted to the actual residence of the deceased at a time of his death, but includes ownership of any immovable property within the jurisdiction of the trial Primary Court."*

He argued that in this case the only mentioned immovable property of the deceased was the property at Kijichi Dar es Salaam which is not within the jurisdiction of Mengwe primary court since the jurisdiction of the primary court is within the jurisdiction of the district which establishes it. To cement this point, he cited the case of **Hadija Said Matika vs Awesa Said Matika, PC Civil Appeal No. 2 of 2016** at page 10-11, HC at Mtwara.

In that respect the advocate for the appellant stated that apart from the fact that Form No. 1 mentioned some of the properties of the deceased, the point of contention is that the only property which was proved to the point of ownership was the property at Kijichi Dar es Salaam.

Submitting on another limb, the learned advocate argued that in determining jurisdiction of the primary court the first appellate court considered one component that the deceased and his wife slaughtered a goat when they went to sanctify and renew their marriage vows. The District Court said that by that act, the deceased was practicing customary rituals of Chaga tribe. Therefore, the trial court had jurisdiction to entertain the matter.

Mr. Mahuna also stated that the trial court did not consider the issue of jurisdiction completely and that the issue was brought up on appeal. He urged this court to consider the death certificate of the deceased which states that the deceased was a Christian. Also, Form No. 1 states that the deceased was a Christian who embraced Chaga way of life. In the circumstances, that statement bring up another issue of hybrid mode of life thus Christianity and customary mode of life. In that regard, Mr. Mahuna remarked that the lower courts should have considered a mode of life first as it could not apply both. That, which mode of life was dominant should have been determined. The only item which was used is that of slaughtering a goat which the 1st appellate court was of the view that not every slaughtered goat means customary mode of life. Thus, the first appellate court misdirected itself. He opined that had the first appellate court considered evidence of witnesses especially at page 6 of the trial court judgment, that the deceased was residing at Dar es Salaam and had a house at Dar es Salaam. That the deceased had resided in Uganda and Angola for foreign mission, he used to go to South Africa for treatment and medical check-up. That the deceased contracted Christian marriage with the appellant. After separation they went to church to bless their marriage and bless their wedding bands and eventually, they became customary practitioners. That, evidence show that the deceased went to Rombo when he was sick after being intolerant of Dar es Salaam weather. Thereafter, the deceased's life was dominated by modern life. Thus, the first appellate court erred by concluding that the deceased embraced customary mode of life.

It was further submitted that; it is not a deniable fact that the deceased was buried under Catholic rites who are very strict. The learned counsel

referred to the case of **Benson Benjamin Mengi and 3 Others vs Abdiel Reginald Mengi and Another, Probate and Administration Cause No. 39 of 2019** (HC) at page 16-19 where the court discussed at length how to consider mode of life test. At page 18 unlike in the instant matter the deceased Reginald Mengi had several instances. At page 19 Modern life style of the deceased Dr. Reginald Mengi was discussed. The court concluded that modern life was a dominant part of Dr. Mengi.

It was the submission of the appellant's advocate that the late Rogatus Anthony Shayo embraced the modern life and that was a dominant part, though he could be said that he lived a hybrid life style.

The learned advocate consolidated the second and third ground of appeal and submitted to the effect that the 1st appellate court failed to evaluate evidence on record especially after discovering that the appellant was the wife of the deceased. That, after failing to evaluate evidence on the record, the first appellate court dismissed the prayer of the appellant of being added as an administratrix of the estate of the deceased.

It was the opinion of Mr. Mahuna that this court cannot re-evaluate evidence on record having in mind the concurrent findings of the two courts below. However, he opined that this court can re-evaluate evidence as a second appellate court where there is misdirection, misapprehension of evidence, violation of some principles of law or procedures or occasioned miscarriage of justice. In support of his contention, the appellant's advocate referred to the case of **Martin Kikombe vs Emmanuel Kunyumba, Civil Appeal No. 201 of 2017,** CAT at Iringa at page 6.

The learned counsel pointed out the following circumstances in this case which occasioned miscarriage of justice. First, the court at page 9 of the appellate judgment admitted that the appellant was the wife of the deceased and that she was eligible to be appointed as an administratrix of the estate of the deceased. Thereafter, the court proceeded to state that the appellant did not know the properties of the deceased. That was a clear misdirection.

Mr. Mahuna went on to state that, thereafter, they occasioned misapprehension of evidence. The 1st respondent (PW3) at the trial stated that the appellant phoned him claiming properties of the deceased. Mr. Mahuna questioned how could one claim something which she does not know? He continued to state that at page 8 of the judgment of the primary court, DW2 Asnat Gerson Abraham corroborates what was stated by the 1st respondent that when the 1st respondent went at Kijichi discovered that some of her properties were missing. At the same page DW1 the bearer of Power of Attorney stated that Margret knew her properties.

Mr. Mahuna noted that it should not escape the attention of this court that the appellant is a legal wife of the deceased. That the properties which are subject of this probate are matrimonial properties. It was his argument that if the wife dies before the husband no one disturbs the husband, but when the husband dies the wife is interfered in respect of her matrimonial properties. He urged this court to condemn such kind of behaviour.

The learned advocate referred to the case of **Sekunda Mbwambo vs Rose Ramadhani [2004] TLR 439** at page 443-444 the High Court quoted with approval the decision of the district court and stated the criteria of appointing an administrator of the estate of the deceased that,

he should be a faithful person, impartial, close to the deceased and who can identify the properties. In that case the court stated further that an administrator may be a widow, child, parent or any close relative. That, where all of them are unfit then, another person may be appointed. In the instant matter, the learned advocate argued that no plausible reason was advanced to disqualify the appellant as an administratrix of the estate of the deceased. The only reason which was advanced is that the appellant resides in the USA. He said that at this age of technology when the court conducts its proceedings even by video conference.

Countering the reason that the appellant never nursed her deceased husband and never participated in his burial ceremony, it was argued that from 2019 there was travel restriction due to COVID-19. That the deceased died on April 2020, so it was difficult for the appellant to travel to Tanzania to attend the burial ceremony of her late husband. That, surprisingly the appellant was waited to attend the clan meeting which Mr. Mahuna said that is a filter mechanism since probate matters can be instituted even without clan meeting minutes as stated by the first appellate court at page 10 of its judgment where the case of Malisa was cited, but to his surprise the same point was used to disqualify the appellant.

In the circumstances, Mr. Mahuna implored this court to set aside the decision of the 1st appellate court and the trial court in its entirety together with the proceedings for want of jurisdiction. In the alternative, he prayed that the court deem fit, to add the appellant as one of the administratrix of the deceased together with the respondents for interests of the justice. He also prayed costs of this appeal, first appeal and the original matter be borne by the estate of the deceased.

Before replying to the above submissions, the learned counsel for the respondents appreciated the submission by Mr. Mahuna and admitted that he had learnt something from it though the same is irrelevant to this appeal.

Responding the 1st ground of appeal in respect of jurisdiction, it was stated that the trial court had jurisdiction to entertain this matter. On the the argument that the deceased had no fixed place of abode within the local limits of the said court, and that the deceased had fixed place of abode at Kijichi – Dar es Salaam, which was based on the death certificate of the deceased and one of the properties of the deceased; Mr. Julius argued that the learned counsel for the appellant did not consider the place where the deceased was buried, the place of his birth and where he was residing before going to Dar es Salaam for treatment. That, the death certificate indicates the last residence of the deceased. Thus, the learned counsel has misdirected himself since after retirement the deceased went back to Rombo where he stayed until when he felt sick and went to Dar es Salaam for treatment. He continued to state that the appellant and all witnesses did not dispute the fixed place of abode of the deceased. All of them knew that the deceased was buried within the local limits of Mengwe primary court and that's why before his demise he was residing at Muhimbili where he had gone for treatment. It was the opinion of Mr. Julius that since the issue before trial court was appointment of the administrator of the estate of the deceased and not to determine mode of life of the deceased and it is obvious that the deceased was a resident of Rombo and he was buried at Rombo. Thus, the learned counsel for the appellant cannot state mode of life of the deceased and fixed place of abode contrary to the life of the deceased.

Concerning the cited **Rule 1 (1) of the 5th schedule**, pursuant to that law and the submission of the learned counsel of the appellant, what is in dispute is the fixed place of abode. That, the respondents are not disputing the fact that the deceased had a residence at Kijichi – Dar es Salaam except the fact that the deceased was residing at Rombo.

In respect of mode of life of the deceased that the deceased embraced hybrid mode of life pursuant to the evidence adduced before the trial court. It was stated that the aim of this argument is to out the jurisdiction of the trial court and has been raised too late. Mr. Julius was of the view that if the said issue will be discussed in this appeal, it will attract new evidence. That, what can be derived from trial court judgment is that the deceased contracted a Christian marriage, he was a Christian but who also practiced Chaga rituals, a good example being slaughtering a goat when the deceased reconciled with his wife.

Regarding the issue of clan meeting which was also attended by the appellant, Mr. Julius submitted that the issue of jurisdiction has been raised lately because the same was not an issue before the trial court. The issue before the trial court was an application of the appellant to be added as a co-administratrix with the respondents.

The learned advocate referred to the case of **National Bank of Commerce versus Lisase Ndama [1997] TLR 282** which held that objections to the jurisdiction of the court had to be taken at the first instance. Thus, he was of the view that, since the issue of jurisdiction was raised at the appellate level and the fact that there was no dispute in respect of fixed place of abode of the deceased, the appellant did not find the said issue to have merit.

Regarding the cited High Court cases it was the contention of Mr. Julius that despite the fact that the said cases are persuasive, the same do not support what was submitted. That, the facts of the cited cases and the facts of the instant case are distinguishable. He opined that the appellant's counsel should have concentrated on who is fit to administer the estate of the deceased as the beneficiary of the estate of the deceased has right to sue the administrator of the estate of the deceased where it is found that he is misappropriating the estate. He called upon this court to be guided by the case of **Pelesi Moshi Masoud vs Yusta Kinuda Lukanga, Pc Probate Appeal No. 4 of 2020** which discussed the issue of mode of life of the deceased. (Hon. Matuma, J)

Mr. Julius also submitted that in the instance matter it is obvious that when the deceased slaughtered a goat for the sake of re-union with the appellant it was known by those who participated and it is known by Chaga rites that a slaughtered goat for celebrating re-union of spouses, is not a customary issue compared to the goats slaughtered for business purposes.

He argued that in the cited case above, Hon. Matuma, J went further by stating that beneficiaries of the deceased cannot deny the life which the deceased embraced. That, if they wanted the deceased to embrace a certain lifestyle (Christianity) they should have advised him while alive so that he could be a good Christian. Thus, in this appeal, the appellant cannot prescribe the lifestyle of the deceased, rather it is how the deceased lived that will determine his lifestyle.

Moreover, Mr. Julius noted one ignored fact which was stated by the appellant that the said marriage between the deceased and the appellant

was not consummated as the deceased was impotent. That, that's why the appellant contracted another marriage. The same is stated at page 7 and 8 of the trial court judgment. That, apart from that, relatives of the deceased acknowledge the appellant as the wife of the deceased and beneficiary.

Therefore, on the issue of jurisdiction it was Mr. Julius's conclusion that the deceased owning properties at various places does not make him a resident of the place where the property is located. Otherwise, it would have been impossible to administer estates of the deceased who have properties at various places which cannot determine fixed place of abode. He continued to state that, what can be gathered from the available facts in this case, is that the deceased had two residents and was buried at Rombo. Therefore, Mengwe Primary court had jurisdiction to entertain this matter because the deceased had fixed place of abode within its local limits where he was buried.

In reply to the 2nd and 3rd grounds of appeal that this court cannot re-evaluate the concurrent findings of the two lower courts except in exceptional circumstances which the learned counsel for the appellant mentioned; Mr. Julius agreed on that contention.

On the issue that the first appellate court findings were that the appellant was eligible to be appointed as administratrix of the estate of the deceased and misdirected itself by stating that the appellant did not know the properties of the deceased, Mr. Julius submitted that the first appellate court did not misdirect itself because first, the appellant does not object the respondents as administrators and she does not want to administer the estate alone. Rather the appellant wants to be joined as co-

administratrix which shows weakness on part of the appellant. Thus, the issue of misdirection of the first appellate court has no merit.

Mr. Julius also argued that the appellant's advocate mentioned PW3 instead of PW2, thus he prayed the court to put the records clear. He informed the court that the appellant disturbs the administrators to the extent that they fail to fulfil their duties as administrators. He urged the appellant not to disturb the administrators as she has legal remedies in case the administrators will misappropriate the estate of the deceased.

On the issue that clan meeting are filter mechanisms, it was the reply of Mr. Julius that as a matter of practice the courts use the clan meeting minutes to appoint or know the eligible administrator. That, in this case, the appellant participated to appoint the respondents to administer the estate of her deceased husband and signed the minutes. Otherwise, if the respondents are unfit to administer the estate of the deceased, the appellant should have applied for their revocation.

On the issue that there was miscarriage of justice, it was submitted that such argument is misleading since up to this stage the appellant prays to be joined with the respondent as co-administratrix. Also, the respondent acknowledges the appellant as the beneficiary of the estate of the deceased. Mr. Julius formed an opinion that proceeding with this matter, will render the estate of the deceased unadministered which they do not think that is the aim of this court.

Finalizing his submission, Mr. Julius stated that all the grounds of appeal have no merit and there is no miscarriage of justice occasioned as the same has not been stated. He argued that if the court will entertain this

kind of matters, it will lead to chaos in matters which have many beneficiaries.

The learned counsel prayed this court to find this appeal to have no merit and dismiss it and uphold the decisions of the two lower courts. He also stated that despite the fact that this is a probate matter, he prayed to be granted costs.

I have keenly examined the grounds of appeal, submissions of both parties and lower courts records. The appellant has raised three grounds of appeal.

On the first ground of appeal which concerns jurisdiction, the learned advocate for the appellant questioned the trial court jurisdiction in two aspects, ***FIRST***, the two courts below never considered the fixed place of abode of the deceased thus, Kijichi Dar es Salaam as seen in the death certificate. It was his opinion that the fixed place of abode of the deceased was Kijichi Dar es Salaam where there is immovable property of the deceased. In opposition, the respondents' advocate argued that the appellant's advocate never considered the place where the deceased was buried, the place of his birth which is within the local limit of the trial court. He was of the view that the death certificate only indicates the last residence of the deceased.

The jurisdiction of a primary court in probate matters is provided for under **Rule 1(1) of the 5th Schedule to the MCA** (supra) which reads:

> *"1.-(1) The jurisdiction of a primary court in the administration of deceased's estates, where the law applicable to the administration or distribution or the succession to the estate is customary law or Islamic law,*

may be exercised in cases where the deceased at the time of his death, had a fixed place of abode within the local limits of the court's jurisdiction..."

According to the above provision of the law, jurisdiction of a primary court is determined under two aspects, first where the law applicable to the administration and distribution of the deceased's estate is customary law and Islamic law. Second, whether the deceased had a fixed place of abode within the jurisdiction of the primary court.

On the issue as whether the deceased had a fixed place of abode within the jurisdiction of the court; according to the prescribed Form No. 1 in the trial court, the deceased had a fixed place of abode within Mamsera Rombo and Kijichi Dar es Salaam. In the circumstance of this nature, I am of considered view that either Dar es Salaam or Rombo courts had jurisdiction to entertain the matter considering that the deceased had properties in both places. I am persuaded by the decision of this court which was also cited by the appellant's counsel in the case of **Fabian Robinson** (supra) in which my learned brother **Hon. Amour, J** stated that the fixed place of abode is not limited to the actual residence of the deceased but also ownership of the immovable property within the jurisdiction of the trial primary court. Therefore, in the instant matter, since the deceased had immovable property at Mamsera Rombo which is within the jurisdiction of Mengwe trial court, then the contention by Mr. Mahuna lacks merit.

SECOND, the learned advocate for the appellant challenged the jurisdiction of the trial court in aspect of mode of life. His submission is

coupled with authorities to persuade this court to hold that the mode of life of the deceased was not customary and so the trial court had no jurisdiction to entertain the matter.

I am aware that the issue of jurisdiction is a point of law which can be raised even on appellate stage. However, it is my considered view that this principle is not applicable in the circumstances of this case on the reason that before the trial court, the issue of jurisdiction especially on the mode of life was not raised by the parties. The disputed issue before the trial court was whether the appellant deserved to be appointed as co-administratrix or not. The issue of mode of life is subject to the available evidence on record. The trial court was in a good position to access the mode of life through the available evidence presented to it.

As rightly submitted by the learned counsel for the respondent, the issue of mode of life was raised at appellate stage, no evidence was presented to that effect, rather than submissions of the learned counsels which is not evidence. I am of considered view that the trial court is in a better position to receive evidence especially on the mode of life of the deceased since the parties will present their evidence on that aspect. Determining the issue of mode of life simply by relying on the parties' submission which is not evidence is like ousting the jurisdiction of the trial court. Thus, I rest the issue of mode of life of the deceased as such.

On the 2nd and 3rd grounds of appeal on evaluation of evidence, it was stated that the first appellate court erred for dismissing the prayer of the appellant of being added as an administratrix. That, there is misdirection of evidence in which the first appellate court misdirected itself by stating that the appellant did not know the deceased's properties. Mr. Mahuna

argued that no plausible reason was given to disqualify the appellant from being co-administratrix.

I have gone through the trial court's records as well as 1st appellate records, I find that there are concurrent findings in respect of this issue. That, the courts did not allow the appellant to be co-administratrix on the reason that the appellant was among the members who attended the clan meeting which appointed the respondents to be administrators. The trial court also found that the appellant is residing in the USA thus, she will not administer the estate on time. Also, it was the findings of the trial court that since the appellant separated with the deceased for a long time, the respondents are the one who are in a better position to know the properties of the deceased. The first appellate court upheld the above reasons and dismissed the appeal.

Looking at the above findings, it is the opinion of this court that the lower courts had concurrent findings in disqualifying the appellant from being co-administratrix. In both courts, the learned magistrates did not cite any provisions of the law in disqualifying the appellant. Thus, this being the second appellate court, I am duty bound to visit the law to see what it provides.

The appointment of the administrator is governed by **Rule 2 (a) of the 5th Schedule to the MCA** which provides that:

> *"A primary court upon which jurisdiction in the administration of deceased's estates has been conferred may-*
>
> *(a) either of its own motion or* ***on application by any person interested in the administration of the***

> ***estate appoint one or more persons interested in the estate of the deceased*** *to be administrator or administrators thereof, and, in selecting any such administrator, shall, unless for any reason it considers in expedient so to do, have regard to any wishes which may have been expressed by the deceased;* [emphasis added.]

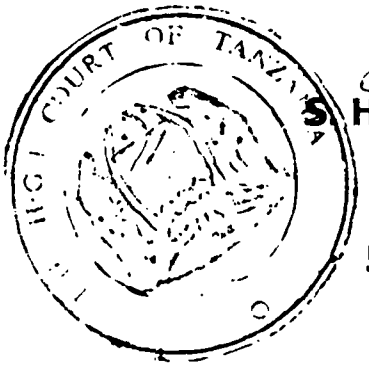
According to the above provision, the primary court had jurisdiction to appoint any person interested in the estate of the deceased. In the instant matter, the appellant had shown her interest in respect of administration of the estate of her deceased husband. It is undisputed fact that the appellant was the only wife of the deceased though they sometimes separated. Also, it is not disputed that the deceased had no child. By saying this I should not be quoted to conclude that the appellant is the only beneficiary, what I am trying to establish is that the appellant herein considering that she was the wife of the deceased she might have interest in the estates of the deceased and deserve to be appointed as co-administratrix. The fact that she is residing in the USA and that she will cause delay in the administration of the estate has been prematurely raised since there are procedures to be taken in case the co- administrator is found to delay the administration. The same will not prejudice the respondents.

Having said that and done, I allow the appeal to the extent explained herein above. I hereby appoint the appellant Magreth Msangi in her capacity as a co-administratrix of the deceased's estates.

Considering the fact that this is the probate matter, I make no order as to costs

It is so ordered.

Dated and delivered at Moshi this 5th day of August, 2022.



S. H. SIMFUKWE

JUDGE

5/8/2022