In the Matter of the Estate of Eric Gowa Nyasulu (Deceased) and In the Matter of an Application for the Determination of Parentage by Slyvia Gowa Nyasulu of (CGN, ULGN, JN and EAGN) Minors for Purposes of Succession and Inheritance

Judgment

Court:	High Court of Malawi
Registry:	Family and Probate Division
Bench:	Honourable Justice Madalitso Khoswe-Chimwaza
Cause Number:	Probate Cause No. 268 of 2024 (Miscellaneous Application Number 1 of 2025)
Date of Judgment:	July 09, 2025
Bar:	appellant unrepresented respondent unrepresented

INTRODUCTION

1. **SLYVIA GOWA NYASULU** is the mother of **ERIC GOWA NYASULU** (Deceased) who died intestate on 1st November,2025 at Partners in Hope

Hospital in Lilongwe. The late **ERIC GOWA NYASULU** is purportedly survived by four children, (one boy and three daughters) all born out of wedlock from four different mothers. The applicant commenced these proceedings challenging the paternity of some of the children of her late son who are represented by their litigation guardians (mothers) in these proceedings and receivership pending grant of letters of administration. The application is supported by sworn statements by Slyvia Gowa Nyasulu and Khumbo Nkhwazi.

BRIEF FACTS:

2. The applicant claimed that on 28th January, 2025 her lawyers wrote the lawyers representing the respondent requesting that the 1st to 3rd respondents should undergo a DNA test but this request was rejected. Exhibited letters **SN3** and **SN4**. She stated that the mother of the 4th respondent expressed her willingness to have her daughter undergo the requested DNA test. It is further stated that her son, Eric Gowa Nyasulu (deceased) had no doubts about the paternity of 1st respondent, however these two respondents (1st & 4th) have been included so that the two (2nd & 3rd) respondents do not feel discriminated against.

3. She has argued that it was important to ascertain whether the children were indeed of the deceased because **ERIC GOWA NYASULU (Deceased) was not married to the mothers of the children** and this scientific test will help determine the right individuals to benefit from the estate and this is in the best interest of the children and the estate.

4. It has been submitted that if the cited respondents were the biological children of ERIC GOWA NYASULU, their genetic make-up will match that of the applicant who is the mother of ERIC GOWA NYASULU and there she is ready to provide sample and the attendant costs should be charged on the estate.

5. The application is vehemently opposed by the 1st to 3rd respondents litigation guardians who filed sworn statements attached with birth certificates and photos showing the presence of the father in the lives of his children.

6. The three respondents submitted that the application was misconceived and a waste of time and resources of the Court and the parties. It must be dismissed for want of merit and the applicant should bear costs on an indemnity basis. There are four main grounds raised by the respondents in opposing the order to go for DNA test:

i. The respondents argue that the paternity of the 3 children (CGN, ULGN and JN) is not in doubt. There are birth certificates issued by the Government of Malawi which are evidence of the matters that are stated therein. It is therefore for the applicant to displace this presumption of paternity by leading evidence.

ii. The respondents further argue that the law has given the Court several tools for determining paternity apart from relying on birth certificate. The fact that the person who is alleged to be the father played the role of a father is one such tool. There is no legal requirement that paternity should only be proved using scientific evidence.

iii. Respondents argued that as a matter of common sense, logic and law, the applicant cannot question paternity of children when her son accepted the children, and embraced them by taking financial and moral responsibility as a father.

iv. The respondents wondered why the applicant herself having accepted the children as her grandchildren during her son's lifetime she is coming around seeking to a sail their paternity. The applicant cannot approbate and reprobate. Therefore, the respondents want the application dismissed on these grounds with costs on the applicant on indemnity basis.

ISSUES FOR DETERMINATION

1. Whether the Court should order deoxyribonucleic Acid-DNA test in view of other evidence available.

2. Whether the costs should be borne by applicant and not the estate.

REASONED ANALYSIS OF LAW AND FACTS

7. Before proceeding to determine the issues this court would like to establish of the applicant (mother of the deceased) has sufficient interest to commence the present these proceedings?

8. With regard to the issue of determining whether someone is a child of another or not, the **Sections 5 (1) and (3) of the Child Care, Protection and Justice Act (Act. No. 22 of 2010)** provides that any other interested person may apply.

(1) Where the Parents of a child are not known or where Parentage is dis-puted, the following Persons may apply to a child justice court for an order to

determine the Parentage of a child-

a) the child;

b) the Parent of the child;

c) the guardian of the child;

d) a Probation officer;

e) a social welfare officer; or

J) any other interested person as the child justice court may deem fit.

9. Before the court can delve into the distribution of deceased estate, there is a need to determine whether any person claiming a share of the deceased estate is a member of the immediate family or dependant.

10. Where there is a dispute in relation to a deceased person's estate, **section 73(1) (c) & (h) of the Deceased Estates (Wills, Inheritance and Protection) Act** provides that on the application by an interested person, court shall have jurisdiction:

(i) to decide if any Person is or is not entitled as a beneficiary of the estate;

(ii) to decide any other matter in dispute which the court considers to be competent for its jurisdiction.

11. In the present proceedings, the applicant (being the mother of the deceased) has applied as an interested person and potential beneficiary of the estate of the deceased as a dependant pursuant to **Sections 17 and 18 of the Deceased Estates (Wills, Inheritance and Protection) Act**. According to principles of fair distribution of intestate property, the persons entitled to inherit a fair share shall be members of the immediate family and dependants of the deceased. In the South African case of **M.S.N. vs C.Z.N, Thwane Attorneys, Department of Defence, Government Employees Fund and Master of the High Court, the High Court of South Africa (Gauteng Division, Cause Number 508880 of 2024**, the applicant , mother of the deceased was found to have had sufficient interest to bring an application for determination of the paternity of minors allegedly fathered by the deceased.

12. Has the applicant filed the application at the right time? The law has provided a specific period within which an application for determining paternity should be made for purposes of succession and inheritance. Section 6(3) has set the time limit as follows:

(3) For the purposes of succession and inheritance, the application for Parentage shall be made within three years after the death of the father or mother of a child.

13. In the present proceedings, the application has been filed within 12months after the death of the father since he passed on 1 st November, 2024.

14. Whether the test should be ordered or not in view of evidence provided through the birth certificates and evidence of presence of the deceased to take-up responsibility and to perform customary ceremonies towards the children as a father.

Section 6 (1) of the Child Care Protection and Justice Act provides what should be considered by the court as evidence of parentage:

a) the name of the parent entered in the register of births

b) Performance of a customary ceremony towards the child by the purported father of the child

c) refusal by the purported father to submit to medical test

d) Pubic knowledge of parentage; and

e) any other matter that the child justice court may consider relevant.

(2) The child justice court may order the Putative father to submit to a medical test.

15. Section 6 (7) gives unquestionable mandate to the child justice court, on the basis of the evidence under section 6 to determine whether or not the alleged parent is the Parent of the child.

16. The respondents have opposed the making of the order for scientific test to determine paternity on the basis that the birth certificates of all the three children is sufficient evidence to prove paternity as required by **section 6 of the CCPJA** above.

17. To demonstrate the significance of a birth certificate respondent cited **section 16 (4) of the Birth and Deaths Registration Act (now repealed)** which was the law applicable when the 1st respondent was born, and it provided the effect of registration in the following terms:

(4) The copy of any entry in any register or return certified under the hand of the Registrar to be a correct copy shall be Prima facie evidence in all courts of the dates and facts therein contained. (emphasis supplied).

18. In the **National Registration Act, section 39(4)** the effect of certificate of birth is considered as 'prima facie evidence' in the following terms:

(4) The copy of any entry in any register or return certificate under the hand of the Director to be a correct copy shall be Prima facie evidence in all courts of the dates and facts therein contained.

19. The *Sixth Edition of Black's Law Dictionary* defines 'prima facie evidence' as:

Evidence good and sufficient on its face. Such evidence as in the judgment of the law is sufficient to establish a given fact or the group or chain of facts constituting the Party's claim or defence and which if not rebutted or contradicted will remain sufficient. (emphasis supplied)

Evidence which is unexplained or uncontradicted, is sufficient to sustain a judgment a judgment in favour of the issue which it supports, but which may be contradicted by other evidence.

20. The fact that birth certificates were issued in the name of the late Eric Gowa Nyasulu as the father of all the four children has not been disputed. Indeed a birth certificate is one way of determining parentage and it is 'prima facie evidence' that a birth was registered and it is evidence of the dates and details stipulated therein. Meaning it is evidence which if unexplained or not contradicted, or if not rebutted, will remain sufficient. (emphasis supplied)

21. In the present case, this evidence is being challenged on the basis of the common law presumption of paternity where a man is presumed to be the father if he is married to the mother at the time of the child's birth or conception.

22. This common law presumption comes from the Latin maxim **'pater est quem nuptial demonstrant,'** meaning the marriage indicates who the father is. The presumption is based on the legal union of marriage and the assumption that sexual relations occurred within the marriage. The presumption applies to children born during a valid marriage, children conceived before the marriage

but born after the marriage and to children conceived during the marriage but born after dissolution of marriage. In such cases the presumption can only be rebutted by evidence showing that the husband is not the father of the children and that can be through Deoxyribonucleic Acid-DNA test.

23. The present case all the litigation guardians have confirmed that they were not married to the late Eric Gowa Nyasulu, but they gave birth to these children while in a relationship with him. Therefore, in the absence of a legal marriage this presumption cannot apply. Meaning the mere presence of a birth certificate is not enough evidence of proof of paternity in these circumstances.

24. It has been recognised world over that a person may be said to be the biological parent of a child while in marriage when in fact that is not the case. The DNA test is what cracks the nut and removes all doubts, uncertainty and speculations. The jurisprudence within the African region can testify to that. In the South African case of **Van der Walt v Engels 1959(2) SA 699(A)**, the High Court held that the presumption of paternity of a husband can be rebutted by evidence such as DNA testing. A local case which further testifies to the fact that the presumption of paternity can be rebutted through a DNA test is the case which was in the Magistrate Court. While acknowledging that it has no binding authority over this Court and while acknowledging that the issues before the Court was about property distribution after divorce, it is only relevant to confirm that not all fathers who are raising children born in wedlock are the biological fathers on the children. The father in this case had four children, two from previous two relationships and two were born while he was married to the mother of the children, but after DNA test it turned out that he was not the father

of all the four children and this led to the dissolution of the marriage. (Michael Ngwira vs Mirriam Nyirenda Ngwira, Civil Cause No. 528 of 2018 before Chief Resident Magistrate Court in Blantyre.)

25. In the case of **Mrs Triza Seyani on her own behalf and on behalf of P. a minor) vs Mrs Stella Seyani Civil Cause No. 373 of 2016** Honourable Justice Tembo observed that ordering a Deoxyribonucleic Acid-DNA test to determine parentage in a succession and inheritance case is a reasonable limitation of the rights to dignity and privacy.

26. In a more recent case **in the matter of the Estate of Omex Machakwani Probate Cause No. 103 of 2022**, where there was a dispute regarding paternity of some of the children. It was alleged the deceased had fathered 12 children with different women and only six of them had their birth certificates produced in court. Justice Kayira observed that the production of birth certificates was one step towards establishing paternity. The fact that the documents were tendered in court is not conclusive evidence of paternity. It was for that reason that the court proceeded to order for DNA test.

27. Therefore, even if there are birth certificates, the only way to rebut the presumption of paternity for married couples that the husband is not the father of the child is to go for DNA test. The same should apply even more importantly where the parties did not marry and there are issues of succession and inheritance. It is for the best interest of the child so that he/she is not unfairly excluded or disentitled. It is good for the estate to discard all uncertainty so that

only those who are entitled to benefit by law should be the ones to benefit.

28. Therefore, on the grounds that all the four litigation guardians were not married to the deceased, it is only fair, just and reasonable that all children should be subjected to the DNA test, regardless of the fact that the applicant had intended to exclude some. This Court is mindful that all the four litigation guardians did not object to submit their children to the DNA test in principle. The applicant too is ready to have her sample tested against the children.

ORDER

29. I therefore order that the Deoxyribonucleic Acid-DNA test should be conducted by extracting DNA samples from all the four children **(CGN, ULGN, JN AND EAGN)** and the applicant (mother to the deceased).

30. The parties will agree as to which facility they intend to patronise and how the chain of custody of the sample will be done in order to maintain the integrity of the samples. Should an agreement fail the parties will have to obtain quotations from 3 recognised DNA Laboratory Service providers and the Court will make an order.

31. The request to have the body of the late Eric Gowa Nyasulu exhumed for purposes of this scientific test is an extreme request which the Court views that it is not necessary since there are others who bear the same DNA with him- the

mother.**In the matter of Omex Chamakwana (deceased) Probate No. 103 of 2022**, the Court ordered the brother of the deceased to provide a sample that was to be compared and tested against the children of the deceased. Therefore, the prayer to exhume the body in this case is not granted, the mother of the deceased will provide the sample.

COSTS:

32. The respondent prayed that the attendant costs to this exercise should be borne by the applicant personally and not the estate because the prayer for DNA test was not necessary. This Court holds a contrary view for the reason that determining the persons entitled to benefit from a deceased estate is an essential and crucial stage in the proper administration of an estate and it is in the best interest of the estate. The applicant is also a beneficiary of the estate and going through this process is for the benefit of the estate, therefore any expense incurred to find the truth about the potential beneficiaries is a legitimate expenditure and well meant. Therefore, the Court orders that all the expenses for the DNA test will be borne by the estate.

33. Regarding costs for the present application, although the applicants have succeeded and were ordinarily entitled to costs, but looking at the nature of the proceeding, each party will bear own cost.

Either party aggrieved by this decision has the right to appeal.

Made in Chambers this 9th day of July, 2025, at High Court of Malawi, Lilongwe District Registry, Family and Probate Division.