

REPORTABLE (42)

PHARAOH B. MUSKWE
v
**(1) DOUGLAS NYAJINA (2) MUNHUWEI G. T. (3) MINISTER
OF LOCAL GOVERNMENT, NATIONAL HOUSING AND URBAN
DEVELOPMENT N.O.**

**SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA, & OMERJEE AJA
HARARE, JANUARY 21, 2013 AND AUGUST 14, 2014**

R Chingwena, for the appellant

M Kamudfwere, for the first respondent

No appearance for the second and third respondents

GARWE JA: In August 2005, the appellant, as plaintiff, issued summons in the High Court in which he sought an order setting aside the appointment of the first respondent as Chief Nyajina – designate and a further order directing the second and third respondents to take into account and abide by the values, traditions and customary principles of the VaZumba people in selecting the next Chief Nyajina. He also sought an order declaring the Mukonde House as the house eligible to select a candidate to become the next Chief Nyajina from its ranks. After hearing evidence the High Court dismissed the claim with costs. It is against that order that the appellant now appeals to this court.

The *pater genitor* i.e. founder of the VaZumba clan, was one Sororoziome. He passed the reins of power to his first son, Nyanhewe, who became the first chief of the clan. Nyanhewe in turn bore a son, one Nyahuma, who succeeded him after his death and burial at Marowe mountain. Nyahuma had four sons. These were Kanodzirasa (also known as Nyambudzi or Bambo of the Madzimbahwe), Mukonde, Kawoko and Chikuwe. There was some dispute as to who between Mukonde and Kanodzirasa was the eldest son. It was common cause during the trial that Kanodzirasa lost the right to accede to the chieftainship. The reason for this remains unclear. The appellant on the one hand says he had desecrated some of the traditions of the clan and in particular had taken the meat of the guardian spirit, the result of which was that he and his family were permanently barred from acceding to the chieftainship. The first respondent on the other hand says he murdered his younger brother Chikuwe and consequently was barred by the guardian spirit of the clan from acceding to the chieftainship. In addition he and members of his family were relegated to the position of ‘Mugovi wemarongo’ which, literally, meant “meat sharer”. The dispute remains whether in this capacity his role was to kill, skin and cook food whilst the other houses discussed issues of the chieftainship or whether members of the family were allowed to attend those meetings and participate, although they could not accede to the chieftainship.

After his death Nyanhewe became the guardian spirit or svikiro of the clan and was known interchangeably as Bvukura or Bvukupfuku. The guardian spirit, which manifested itself through a living human being, was intricately involved in the selection of a chief. The dispute during the trial was whether the guardian spirit merely vetted the candidate who was to assume the role of chief, as the appellant claims, or the spirit would, independently of the houses of the clan, announce the house and the name of the person who should succeed the deceased chief, as claimed by the first respondent.

The chieftainship of the VaZumba clan, which is not in dispute, is as follows-

<u>Name</u>	<u>House</u>
1. Nyanhewe	-
2. Nyahuma	-
3. Kawoko	Kawoko
4. Chikuwe	Chikuwe
5. Nyajina	Kawoko
6. Manyika	Chikuwe
7. Muskwe	Mukonde
8. Chikoso	Mukonde
9. Kanemadadu	Kawoko
10 Dyora	Kawoko
11 Kapita	Chikuwe
12 Bere	Mukonde

It is common cause that the last substantive chief, Bere, was from the Mukonde House, the same house under which the appellant falls. Bere died in 2000, having acceded to the chieftainship in 1971. Before him was Kapita from the Chikuwe House who had reigned from 1931 to 1968. Before Kapita, were Kanemadadu and Dyora both from the Kawoko house. Kanemadadu and Dyora were father and son respectively.

Following the death of Bere in 2000, a series of meetings took place between the houses and officials from the Ministry of Local Government, National Housing and Urban Development. Following those consultations the second and third respondents decided

in August 2005 to recommend for appointment the first respondent as Chief Nyajina - designate.

It is that decision that the appellant sought to have set aside before the court *a quo*. The basis for the order sought was that according to the tradition and customary principles of succession of the VaZumba people, succession was collateral, based on the seniority of the houses and that, since the Kawoko house had acceded to the chieftainship four (4) times, whilst Mukonde, the most senior house, and Chikuwe, the most junior house, had each acceded to the chieftainship only three (3) times, there had to be equal turns to the throne. Accordingly the appellant sought an order declaring his house as the rightful house to appoint a candidate to take the chieftainship. The first respondent, in his plea, disputed the suggestion that evenness of turns has always been part of the principles of succession of the VaZumba people. He claimed that there were two distinct periods in the history of the VaZumba; the first was the period when persons acceding to the chieftainship from the three eligible houses were chosen by Bvukura the guardian spirit of the VaZumba clan, without regard to seniority of the houses or evenness of turns; the second was the period after the guardian spirit ceased to manifest itself and the VaZumba acted on their own and chose chiefs based on collateral succession and seniority of the houses.

Having heard evidence and submissions from the appellant and the first respondent, the court *a quo* reached a number of findings of fact. These may be summarized as follows:-

- The appellant's version on the history of the VaZumba clan was more plausible than that of the first respondent.
- Seniority of the houses is part of the VaZumba tradition.

- Bvukura, the clan spirit medium, had a central role to play, which was not merely limited to vetting a candidate chosen by a particular house. It could, in its discretion, choose the house and candidate who was to succeed in the chieftainship or leave the selection of the candidate to the house it would have identified, subject to its approval of such candidate.
- Nyamukapa of the Mukonde house never become a chief and the attempt by the first respondent to show that he ascended to the chieftainship was against the evidence and intended to mislead.
- Collateral succession governs the appointment of chiefs in the VaZumba clan. Accession to the chieftainship was supposed to start with the most senior house, Mukonde, and thereafter laterally move to the houses of his brothers Kawoko and Chikuwe, before reverting to Mukonde.
- Collateral succession of the VaZumba after the advent of colonial rule followed this pattern. Dyora was succeeded by Kapita and Kapita by Bere, although there were attempts by Dyora's son David Nyajina and Kapita's son Joseph Manyika to seek progenitorial linear accession.
- Succession moved from Nyahuma to Kawoko, by-passing the Mukonde house because, in all probability, Mukonde, the eldest son, had died.
- It remains unclear why after Chikuwe it did not immediately devolve to Munzwere, son of Mukonde. It was probable that Munzwere predeceased his uncle Chikuwe as suggested by oral tradition, which resulted in the sub-house being given the name Muskwewebga, which means "lonely survivor".
- As between the Kawoko and Chikuwe houses, the guardian spirit followed the seniority of the houses.

- The suggestion by the appellant that Chikoso succeeded his elder brother Muskwe to even the turns was not contradicted. This was the first time that succession had moved from one brother to another in the same house. Although there was a more or less similar occurrence when Dyora took over from his father Kanemadadu, this appears to have happened at the advent of colonial rule when the white local government officials were tricked into appointing him as substantive chief.
- If evenness of turns was part of the VaZumba, it remains unclear why, after Chikoso died, Mundomera did not take over so that Mukonde, being the most senior house, would have had the first third turn to the chieftainship. Whilst Chikoso may have been appointed to even the turns, so that each house would have two turns, thereafter the succession was to revert to the house which first succeeded Nyahuma, that is, Kawoko.
- The colonial government accepted that succession amongst the VaZumba was collateral, and was to devolve around the three houses, without regard to the number of evenness of turns.
- The involvement of the guardian spirit was consensually dispensed with by all three houses.
- Provision of a 'doo' and designation of the burial spot are clearly part of the tradition and custom of the VaZumba.
- The 'doo' in which the late Chief Bere died was supplied by the Kawoko house and it is the same house that designated the spot where the late chief was buried.
- The Nyambudzi house, though forbidden from acceding to the chieftainship, could also take part in the deliberations of the clan.

The court *a quo* was satisfied that the Kawoko house, of which the first respondent is part, was properly nominated by the second respondent, taking into account the customary principles of the VaZumba clan, as the house from which the next chief should come. Consequently the court dismissed the appellant's claim with costs. The appellant, dissatisfied with this ruling, now appeals to this Court.

In his notice of appeal, the appellant seeks an order reversing the judgment of the court *a quo*. He attacks the decision of the court *a quo* on the broad basis that the decision of the court was "so outrageous in its defiance of logic that anyone who had properly applied his mind to it would have (*sic*) come to such a decision". More particularly it is the appellant's contention that the court *a quo* erred and misdirected itself:

1. In failing to find for the appellant when the respondent's witnesses were found to be unreliable on substantive issues of the matter.
2. In making a finding that the evenness of turns is not part of the VaZumba custom and tradition contrary to the evidence adduced before the court *a quo*.
3. In accepting the evidence of the respondents on the 'doo' contrary to the evidence that was adduced before the court *a quo* when Magadu who is alleged to have provided the 'mombe ye doo' was to all intents and purposes a complete stranger in VaZumba chieftainship issues.
4. In failing to make a finding that the 'tsika' is still in the possession of the plaintiff's 'house', and therefore the eligible house.
5. In failing to make a finding that, the mere presence and subsequent participation of strangers, such as, Acting Chief Chirinda, and Headman Magadu violated the VaZumba customs and tradition, more so when this material fact remained uncontroverted by the conspicuous absence of the 2nd and 3rd defendants (now 2nd and 3rd respondents) throughout the trial.
6. In failing to make a finding that the mere fact that the Kanodzirasa/Nyambudzi house was not being formally invited to the chieftainship meetings means that they were not supposed to deliberate on the VaZumba chieftainship matters.
7. In failing to make a finding that in light of the default of the 2nd and 3rd respondents, all that was alleged against them by applicant should have been accepted as proved by appellant (plaintiff in the court *a quo*)."

Although various issues are raised in the above grounds of appeal, the real issue is whether the finding by the court *a quo* that the appointment of the first respondent is in accordance with the values, traditions and customs of the VaZumba clan. Section 3 of the Traditional Leaders Act, [Chapter 29:17] gives the President powers to appoint chiefs to preside over communities living in communal and resettlement areas. In terms of s 2, in appointing a chief, the President:

- “(a) shall give due consideration to-
 - (i) The prevailing customary principles of succession, if any, applicable to the community over which the chief is to preside; and
 - (ii) The administrative needs of the communities in the area concerned in the interests of good governance;and
- (b) wherever practicable, shall appoint a person nominated by the appropriate persons in the community concerned in accordance with the principles referred to in subparagraph (i) of paragraph (a):
Provided that, ...”

In the court *a quo*, the onus was on the appellant to show, on balance, that the recommendation that the first respondent be appointed Chief Nyajina did not take into account the prevailing customary principles of succession of the VaZumba clan. In particular the question that required determination was whether evenness of turns is part of the VaZumba people.

Although there was an unsuccessful attempt by the first respondent to show that Nyamukapa of the Mukonde house had acceded to the throne, the parties are agreed that Nyamukapa never became chief. This means that from the house of Nyahuma, the Mukonde and Chikuwe houses have each acceded to the chieftainship three (3) times whilst the Kawoko house has acceded four (4) times. The last chief to reign was Bere, from the Mukonde house, which is the appellant’s house. It is the appellant’s contention that the

concept of 'ushe madzoro' namely, equality of turns, is part of the VaZumba people and that since Mukonde, being the most senior house, has had only three (3) turns, it must be given a fourth turn, notwithstanding the fact that the last Chief (Bere) was from that house.

A consideration of the genealogy of the VaZumba shows that although Mukonde was the most senior house, it only acceded to the chieftainship as seventh chief. Thereafter the same house nominated Chikoso who also acceded to the throne as the eighth chief. Thereafter the Kawoko house had two successive turns to the throne. The genealogy in my view raises more questions than it provides answers.

It is apparent that both Kawoko and Chikuwe each had two (2) turns to the throne before Mukonde, the most senior house. The explanation for this is, for want of a better word, unknown. The appellant's explanation was that for a period of approximately one hundred and thirty-six (136) years, there was no male issue from the Mukonde house to take the throne. Whilst possible, it is highly improbable, and begs the question: where did Muskwe, the seventh chief come from? As the court *a quo* noted, it remains unclear why, after Kawoko and Chikuwe had each taken a turn on the throne, the chieftainship did not revert to Munzwere, the son of Mukonde. Although the court *a quo* considered that Munzwere may have predeceased his uncle Chikuwe, as suggested by oral tradition, this was not backed by any evidence. Moreover it is not known for a fact why the Mukonde house acceded to the throne as the seventh and eighth chiefs. The trial court was of the view that this may have been an attempt to even the number of turns that each house had had to the throne. Whilst that is possible, it is by no means backed by any real evidence. At best it remains mere speculation. As submitted by the first respondent, if the intention was to even the turns, and, considering that Mukonde was the most senior house, the Mukonde house

would have retained the throne after Chikozo so that, as the most senior house, it would have had the first third turn on the throne. This did not happen. Instead, Kanemadadu and his son Dyora of the Kawoko house took the reign one after the other. It may be that Dyora had been acting at the time colonial settlers come to this country and was made substantive chief in error. Whilst this is possible, no-one can say so with certainty.

I now turn to the role of the guardian spirit. The position must be accepted as correct that, within the Shona culture, the guardian spirit can, in its discretion, select both the house and the candidate to accede to the chieftainship. Indeed the court *a quo* accepted this position. The court stated at page 20 of its judgment:

“The spirit medium could in its discretion select and appoint or it would ask the house to select a candidate and seek its approval. The spirit medium therefore had the crucial role in the selection process of a chief. The suggestion that it simply vetted is not borne out by the instruction given to Samuel Chirimuuta.”

In *African Law and Custom in Rhodesia*, by B. Goldin and M. Gelfand, the authors state at p. 48:

“... The medium (*svikiro*) becomes possessed and then announces which house is to have the privilege, and the name of the man who should succeed the dead chief. But it has happened that a person, not selected by the *svikiro*, becomes chief. Generally speaking, the *svikiro*, when possessed, has the prerogative of selecting the person who should succeed to this position.”

Notwithstanding its finding in this respect, the court *a quo* did not relate this to the circumstances of this case, and in particular, the role that Bvukura played in the selection of a chief in the VaZumba clan. It is common cause Bvukura was the clan’s guardian spirit until it disappeared in or about 1945 after the installation of Kapita as chief.

Once it is accepted that Bvukura had a role to play in the selection of chiefs of the clan, it must follow that for the period estimated by the appellant to be one hundred and thirty-six (136) years, there must have been a reason why no chief was appointed from the eldest house, the Mukonde house. The suggestion that for that length of time Mukonde and the other male issue that followed him predeceased their counterparts in the other two houses of Kawoko and Chikuwe, though possible, appears improbable. There must have been a reason why no candidate was selected from Mukonde. The difficulty is that no-one can say with certainty why this happened or whether the two turns taken in succession when Mukonde and Chikoso acceded to the throne as seventh and eighth chief respectively were intended to even the number of turns that each house had had to the throne. It is clear, as pointed by the first respondent in his heads, that the guardian spirit did not give any due regard to seniority or equality of turns before it ultimately disappeared with the appointment of Kapita.

It was on a consideration of the known facts and the probabilities, rather than the credibility of the witnesses, that the court *a quo* came to the view that evenness of turns was not part of the VaZumba clan.

In coming to this conclusion the court *a quo* remarked:

“There was no evidence from the plaintiff to explain why, if evenness was the primary objective, Mundomera did not take over from Chikoso so that the Mukonde house, as the most senior of the trilogy, would have the first third turn. It seems to me that the appointment of Chikoso was meant to even the turns to two apiece for each house and thereafter succession would and did revert to the house which first succeeded Nyahuma, that is Kawoko, hence the accession of Kanemadadu. Dyora was clearly an aberration. The effect of that aberration was that the appointment of all subsequent chiefs followed a hybrid procedure determined by the pre-independence legal provisions. That regime shared the tradition of the VaZumba. The pre-independence government functionaries accepted that the tradition was for collateral succession to devolve around the houses without regard to the evenness of turns. This

is apparent from the fact that neither after Dyora nor after Kapita did the Mukonde house ever suggest that the chieftainship should devolve to it.”

The court *a quo* further remarked;

“I am thus satisfied that evenness of turns is not a custom or tradition of the VaZumba. The *Chagaresango* case, *supra*, demonstrates that an eligible person from one house can be passed over for chieftainship by death or other suitable ground for disqualification. Once that happens his turn disappears for good to await the next turn after all other eligible houses and sub houses have had their turns. I hold that the equitable distribution of turns between the houses is not part of the VaZumba principles of succession to chieftainship.”

On the facts of this case, I am unable to find that the above conclusion is wrong.

The other issues raised by the appellant have no effect on the finding by the court on the evenness of turns. Whilst the court made certain adverse observations on the credibility of the first respondent, it found that, generally speaking, the appellant’s version on the genealogy of the VaZumba was preferable whilst the first respondent’s version on the customs and usages of the VaZumba was the more plausible. I do not find anything contradictory in these findings. It is also clear that the court *a quo*, on the common cause facts, found that evenness was not a custom of the VaZumba clan. The court went further and found that, consistent with the traditions of the VaZumba, the Kawoko house had not only provided the ‘doo’ in which Chief Bere had been buried, but had also designated the burial site. The court considered that these were further indications that the Kawoko house was next in line to the throne. The provision of the ‘doo’ and designation of the burial spot by the Kawoko house was not, on the evidence, seriously contested by the other two houses.

Further, although much was made of the presence of “strangers” such as Acting Chief Chirinda, and Headman Magadu, there is nothing to suggest that their presence

changed anything. In any event, it is quite possible, as the appellant seems to accept, that a person in the position of the second respondent may want to seek the opinion of persons considered to be experts on what constitutes the values, customs and traditions of a particular clan. The court *a quo* in any event found that the Mukonde house did not object to the presence of these strangers.

As regards the Nyambudzi subhouse, whilst the appellant says it is not involved in the deliberations of the three houses, the first respondent told the court *a quo* it was entitled to attend and participate in discussions although members of that house could not accede to the throne. The court *a quo* accepted the first respondent's claim and found that the conduct of Mukonde, the appellant's own house, appeared to confirm that the Nyambudzi house could attend, as the presence of the Nyambudzi family never attracted any objections from the appellant's house.

Finally, it must be mentioned that what the appellant sought to impugn are the findings of fact and credibility made by the court *a quo*. The approach of the court in matters such as these is now well settled. I cite three cases in this respect. The first is *Susan Rich v Jack Rich* SC 16/01 in which EBRAHIM JA cited with approval the remarks in Hoffman and Zeffert: *The South African Law of Evidence*, 4th ed, at p 489, that:

“There are no rules of law which define circumstances in which a finding of fact may be reversed, but as a matter of common sense the appellate court must recognize that the trial court was in some respects better situated to make such findings. In particular, the trial court was able to observe the demeanor of the witnesses, and courts of appeal are therefore very reluctant to disturb findings which depend upon credibility. The appeal court has rather more latitude in criticizing the reasons which the court *a quo* has given for its decision. The reasons given for accepting certain evidence may be unsatisfactory, e.g. they may involve a clear *non sequitur*. Alternatively, it may be plain from the record that the reasons are based upon a false premise, e.g. a mistake of fact, or that the trial judge has ignored some fact which is clearly relevant. Errors of this kind are generally referred to as misdirections of fact. Where there has been no misdirection of fact by the trial court, the appeal court will only reverse it when it is convinced that it is wrong.”

The second is *Hama vs National Railways of Zimbabwe* 1996 (1) ZLR 664 (S). At page 670, KORSAH JA remarked:

“The general rule of the law as regards irrationality, is that an appellate court will not interfere with a decision of a trial court based purely on a finding of fact unless it is satisfied that, having regard to the evidence placed before the trial court, the finding complained of is so outrageous in its defiance of logic that no sensible person who had applied his mind to the question to be decided could have arrived at such a conclusion. ...”

The third is *Charuma Blasting and Earth Moving Services (Private) Limited vs (1) Isaac Njainjai (2) Timothy John Walter Pres (3) The Registrar of Deeds* 2000 (2) ZLR 85. At p 91 D–F, SANDURA JA stated as follows:

“The circumstances in which this Court can interfere with the exercise of a judicial discretion were clearly set out by GUBBAY CJ in *Barros & Anor v Chimphonda* 1999 (1) ZLR 58)(S).

At p 62F-63A, the learned CHIEF JUSTICE said:

“The attack upon the determination of the learned judge that there were no special circumstances for preferring the second purchaser above the first – one which clearly involved the exercise of a judicial discretion, see *Farmers’ Co-operative Society (Reg.) v Berry* 1912 AD 343 at 350 – may only be interfered with on limited grounds. These grounds are firmly entrenched. It is not enough that the appellate court considers that if it had been in the position of the primary court, it would have taken a different course. It must appear that some error has been made in exercising the discretion. If the primary court acts upon a wrong principle, if it allows extraneous or irrelevant matters to guide or affect it, if it mistakes the facts, if it does not take into account some relevant consideration, then its determination should be reviewed and the appellate court may exercise its own discretion in substitution, provided always it has the materials for so doing.”

Whilst, as indicated elsewhere in this judgment, I do not agree entirely with all the findings made by the court *a quo*, I am not persuaded that the court *a quo* was wrong in arriving at the decision that although there may have been an attempt only once to ensure that the Mukonde house was given the opportunity to have an equal number of turns, equality of turns is not part of the VaZumba clan. It must be appreciated that the evidence adduced before the court *a quo* was not based on written testimony but rather oral history and tradition. Neither oral history nor tradition lend themselves to a proper and accurate record of

a clan's history. There are instances in the history of the clan where it is not clear exactly what transpired. The court *a quo* was dealing with a case where not all the facts were readily available or ascertainable. In my view the court *a quo* did the best it could in these circumstances and there can be no basis upon which its ultimate conclusion can be impugned.

In the result the appeal must fail.

The appeal is accordingly dismissed with costs.

GOWORA JA: I agree

OMERJEE AJA: [RETIRED]

Madanhi, Mugadza & Company Attorneys, first appellant's legal practitioners

Mvingi & Kamundefwere, first respondent's legal practitioners