

**The Mutimuri Family
(Represented By Bernard Bunu Garamukanwa)
Versus
Moses Nyamukanga
(Representing The Nyamukanga Family)
And
Stanely Nyamangara
(Representing The Nyamangara Family)
And
Ernest Chikambi
(Representing The Chimbamauro Family)
And
Matthew Matare Dununu
(Representing The Dununu Family)
And
Chipuriro Chimbamauro
(Representing The Chimbamauro Family)
And
John Matibiri
(Representing The Chidziva Family)
And
The Djakonda Family
(Whose Representative Is To The Plaintive Unknown)
And
The District Administrator Zvimba
And
The Provincial Administrator
Mashonaland West
And
The Minister Of Local Government
Rural And Urban Planning.**

HIGH COURT OF ZIMBABWE
UCHENA J
HARARE 9, 10, 11, 17 May and 8 August 2007

Civil Trial.

Mr *T. P. Kawonde*, for the plaintiff.
Mr *N. Zvidzaj*, for the first defendant.

UCHENA J. The plaintiff and the first to the seventh defendants are families claiming entitlement to ascend the Zvimba Chieftainship. They are all descendants of Neiteve Chihobvu the founder of the Zvimba chieftainship.

The eighth respondent is the District Administrator responsible for the administration of Zvimba District. He plays a role in the identification of a candidate for appointment to the Zvimba chieftainship and recommends the candidate to his superiors the ninth and tenth respondents.

The ninth and tenth respondents are the Provincial Administrator Mashonaland West and The Minister of Local Government Rural and Urban Planning. They play a role in the appointment of chiefs and are being sued in their official capacities.

The plaintiff, family seeks an order declaring it and the sixth and seventh defendant the only families entitled to contest and ascend the Zvimba chieftainship.

The Historical background.

According to exhibits 1 and 2 documents obtained from the National Archives and common cause evidence led by the plaintiff and the 1st defendant, the Zvimba chieftainship was founded by Neiteve Chihobvu who migrated from Guru Uswa. When he arrived in the area now known as Zvimba he complained that his legs were swollen, (Nda zvimba makumbo). He was thereafter called Zvimba. The land then belonged to the Rozvi tribe then headed by Tambare. Tambare allocated the land to Neiteve (Zvimba). Neiteve became the first chief Zvimba.

Neiteve had three sons, Nemaunga, Negondo and Pokoteke. He according to exhibit 1, (the Zvimba history), recorded in 1965 by District Officer Bruce-Brand allocated a tract of land to his eldest son Nemaunga. Nemaunga did not thereafter succeed his father's chieftainship. Neiteve was succeeded by Negondo who was succeeded by Pokoteke. It is from this practice the plaintiff family seeks to bar houses which were allocated pieces of land from ascending the Zvimba Chieftainship. It must however be noted that according to the genealogy of the Zvimba chieftainship Nemaunga was recorded as chief number 2, contradicting the allegation that he did not ascend the Zvimba chieftainship.

Negondo had two sons Chambara and Beperere born to him through his wife and his young brother Pokoteke as he himself could not father any children. Chambara according to exhibit 1 was given a tract of land (where the farm, Martinspur, is today) by Pokoteke, who retained control of the area between the Karoyi and Hunyani rivers. Pokoteke thereafter married and had two sons Kakomwe and Chidziva.

The current dispute started after the death of Pokoteke, when according to pages 2-3 of exhibit 1 a document on the history of the Zvimba Chieftainship prepared by the District Commissioner's office in 1965, and obtained from the National Archives by the plaintiff's representative;

"Beperere assumed the chieftainship on the grounds that his elder brother, Chambara, had his own inheritance (that is Martinspur farm). The news of the death was slow in reaching Chambara, but when he did hear of it and came to pay his respects, he created trouble. He wanted both areas, but many people backed Beperere, because Chambara had been away in his own area for many years, and was regarded as a virtual stranger.

Chambara had the support of Pokoteke's sons, Kakomwe and Chidziva, and he sought and obtained assistance from the Varozvi, who had spears which inspired great fear.

Beperere's people took refuge at a hill called Chakona, and were soon surrounded by Chambara's contingent. Beperere summoned his sons to him and gave to each a horn of a wild animal, as follows: Baranje (eland), Nyamangara (kudu), Gwewera (sable), Dununu (tsessebe), and Chimbamauro (bush-buck). He himself had a horn curved from bamboo.

They assembled in an unplastered hut on top of the hill and blew their horns in unison, giving off a terrifying din. A great wind arose and carried the hut (complete with occupants) to the bank of the nearby Hunyani, river.

Beperere seeing the fear of his brother, shouted across the river; "You have failed" (wa kona)-hence the hill is called Chakona to this day.

Chambara could not ford the river, but shouted back: "Young brother, let us fight now for the country".

But Beperere responded, "Do you know what we are fighting over? Are we not brothers of the same womb? Is it not proper that each son should receive his inheritance? You elder brother, have your country; this is mine"

These words annoyed Chambara, who shot an arrow across the river at Beperere. The arrow pegged into the sand near Beperere, who shouted; "So! It is you who have the determination for war- yet you have no aim!" He plucked the arrow from the sand, broke off the head, and spat on the shaft, saying; "Look brother, my aim is true, but do not touch this arrow when it reaches you for you will surely die!" He shot it back across the water; on its way the arrow turned into a cockerel and settled on Chambara's head, depositing its droppings in his hair.

The Varozvi laughed at him, and withdrew their support. Thus Beperere got the country.

Chambara became insane and died shortly afterwards, and Beperere shared out the country, amongst his sons. To Baranje he gave Bangasefu (Banket) and to each of the others he gave land, with the exception of Chimbamauro, who began to sulk and beat his drums loudly every night. Eventually Chimbamauro was given land near Darwendale.

Thus originated the present five subdivisions of the Zvimba area; the chief's own dunhu, and those of Dununu, Nyamangara, Chimbamauro and Nyamkanga (Chambara's son)".

According to page one of exhibit one this information was given to District Officer A.A. Bruce-Brand by informants; especially Chakabva, the elder brother of Headman Dununu.

Exhibit 1 also contains information on the various family trees of families which originated from Neiteve the original chief Zvimba. Exhibit 2 also produced by the plaintiff's

representative contains information on the five subdivisions of the Zvimba chieftainship. Each subdivision is headed by a Headman. Commenting on the subdivisions A.A. Bruce-Brand on page 5 of exhibit 1 said,

"In addition to Zvimba's own dunhu, there are four recognized* hereditary headmen: Nyamangara, Nyamkanga, Dununu and Chimbamauro. Separate reports are submitted in respect of each. Their areas fall under the ultimate jurisdiction of Chief Zvimba.

*Recognised by the people, but not by Government."

An analysis of exhibit 2 reveals that these headmen are appointed by chief Zvimba, see pages 11, 17, 20 and 25.

Issues of land allocation and disputes from all these headmen are referred to chief Zvimba. On page 6 of exhibit 1 Bruce-Brand said,

"Only the chief can allocate land and he generally does so, on the recommendations of his vachinda, who consult the kraalheads affected."

On page 12 of exhibit 2 Bruce-Brand referring to land allocation under the Nyamkanga headmanship said,

"All questions regarding land distribution are referred for final decision to the chief on the recommendation of Nyamkanga."

Similar comments were made in respect of the Nyamangara, Chimbamauro and Dununu headmanships on pages 17, 22 and 26 of exhibit 2.

On page 12 Bruce-Brand commenting on headman Nyamkanga's judicial jurisdiction said,

"Cases go on appeal to Chief Zvimba."

The same comments were made in respect of the Nyamangara, Chimbamauro and Dununu headmanship, on pages 17, 22 and 26 of exhibit 2.

On pages 9 and 10 of exhibit 2 Bruce-Brand gives the genealogy of the Zvimba Chieftainship starting from Neiteve going down to the family trees which had developed by 1965. He in that genealogy traces the various chiefs who ascended the Zvimba chieftainship from Neiteve down to the chief who was reigning in 1965. The genealogy identifies 16 chiefs from Neiteve's time to Patrick Guzha who was chief Zvimba at the time the report was prepared. It clearly reveals that chiefs number 7 to 16 were from the Beperere house which had developed into the following families Gwewera, Dununu, Chisora, Mutimuri and Djakonda though the Gwewera family seems to have become extinct after the fourth generation before ascending the Zvimba chieftainship. The genealogy also establishes that in 1965 the only other families entitled to the Zvimba

chieftainship were Chambara's and Chidziva's. The Chambara family had not ascended the Zvimba chieftainship since the mysterious defeat of Chambara by Beperere when they fought for it at Chakona hill. The Chidziva family had by 1965 had only one opportunity to ascend the chieftainship. Only Chidziva himself had ascended the chieftainship. This means up to 1965, after the death of Beperere the chieftainship only left the Beperere house once during the reign of Chidziva.

There is no evidence of what happened after 1965 but it is common cause that the Nyamkanga (Chambara) house which is the first defendant in this case never ascended the Zvimba chieftainship after Chambara was mysteriously defeated by Beperere.

The Evidential Perspective

Bernard Bunu Garamukanwa gave evidence for the plaintiff. He is of the Mutimuri family an off shoot of the Beperere family. He told the court that he attended a meeting at Maringove to discuss the appointment of the next chief Zvimba. The meeting was not orderly as every body from the 5 families wanted to inherit. He advised the District Administrator who was chairing the meeting to convene a meeting with fewer representatives of each illegible family. The District Administrator did not accede to his request. According to the witness she was a bit arrogant. He further asked her to give him access to the Zvimba chieftainship file but she refused to give him the file. He then drove to Chinhoyi to access it from the Provincial Administrator's office but to no avail. He then drove to Harare where he accessed the file at the National Archives.

After perusing the file he discovered that only three houses were eligible, the Chidziva family, Mutimuri family and the Djakonda family. He then wrote to the District Administrator advising her to convene a meeting of the four sub-chiefs and Earnest Chikambi who had shown interest to be considered for chieftainship. The eighth respondent refused to convene that meeting. He warned her that he would now take the legal route. She according to Garamukanwa showed an "I don't care" attitude. He then approached his legal Practitioner and subsequently issued summons leading to this litigation. He served the summons on the respondents when they were attending another meeting to choose the next Chief Zvimba. The Provincial Administrator the 9th respondent chaired that meeting. Of the 10 respondents cited only the 1st defendant entered appearance to defend and defended this action.

On the historical background of the Zvimba chieftainship Garamukanwa told the court that Chambara who was the first born child of chief Negondo was given a piece of land as his inheritance. This according to Garamukanwa was a way of weaning him off

from whatever benefits and inheritance the father had to offer thereafter. After the death of Pokoteke, Chambara wanted to inherit the Zvimba chieftainship but was defeated in the manner already described under the historical background of this case. He told the court that many people supported Beperere as Chambara had been away in his own territory for a long time and had become a stranger to the Zvimba people. He said Chambara's bid for the chieftainship was supported by Kakomwe and Chidziva. He also had the military assistance of the Varozvi whose spears inspired fear.

Garamukanwa produced exhibits 1, 2 and 3 with the consent of counsel for the first defendant. Exhibits 1 and 2 have already been discussed in this judgment. Exhibit 3 is a recent document originating from a meeting held for the purpose of identifying families and the family from which the next chief Zvimba should come. It confirms that the Chambara family is one of the families of the Zvimba chieftainship though it was decided by the majority at that meeting that they are not entitled to ascend the Zvimba chieftainship because they have their own area which should be elevated from headmanship to chieftainship. The meeting also decided that other houses which were given pieces of land to head are not entitled to ascend the Zvimba chieftainship.

In his evidence in chief Garamukanwa repeatedly referred to the Nyamkanga chieftainship. He however under cross-examination grudgingly conceded that the Nyamukangas do not enjoy a chieftainship but a mere headmanship which falls under the jurisdiction of chief Zvimba. He made the concession after being cross-examined on specific references of the correct status of headman Nyamukanga from exhibits 1 and 2. He also conceded that other houses which enjoy headmanship have repeatedly ascended the Zvimba chieftainship. He also conceded that the issue of succession is based on customary norms. He told the court that they follow the collateral system of appointing chiefs.

It is apparent from this witness's repeated reference to the Nyamukanga chieftainship that even though he is the one who obtained exhibits 1 and 2 from the National Archives he is not prepared to come to terms with it where it does not support his case. He wanted this court to believe that the Nyamkangas have their own land where they manage themselves as they please. That is clearly not true as they can not allocate each other land without the approval of chief Zvimba. Their cases go on appeal to chief Zvimba. Their headmen are appointed by chief Zvimba. It seems to me that there is a misconception of the correct status of the Nyamkanga headmanship, and that may have influenced the decision against their ascending the Zvimba chieftainship. I will therefore not accept Garamukanwa's evidence where it conflicts with exhibits 1, 2 and 3 or with any other credible evidence.

Kizito Mutimuri also gave evidence for the plaintiff. He told the court that the Nyamukanga family was, given, their, own headmanship, and are therefore not entitled to ascend the Zvimba chieftainship. He conceded that the Dununus who were also given headmanship ascended the Zvimba chieftainship a number of times. He said this happened a long time ago under the authority of whites who did not observe the traditional way of appointing chiefs. He said the seniority of families is considered in selecting the next chief. When he was asked why family's allocated headmanship should not ascend the chieftainship when they are appointed by the chief and their land is allocated by the chief, he said, "If a father gives you a piece of land you can not take another person's land. He agreed that disputes arise out of greediness and that they brought this case to court so that they can be given direction.

Mutimuri's evidence is in general similar to that of Garamukanwa's minus the sophistication and inclination to mislead which colours that of the later. He gives the impression that chieftainship should be reserved for families which do not have their own headmanship and that, that is the only reason for their disentanglement. I have no difficulties in accepting his evidence as he apart from the simplicity of his evidence seems to have told the court what he believes to be the correct position. His position will be compared to that in documental evidence and that of other witness's to ascertain the correct customary position of the Zvimba chieftainship.

The plaintiff closed his case after Mutimuri's evidence. However counsel for the plaintiff applied to reopen plaintiff's case when he was asked to address the court at the end of the defendant's case. The defendant's counsel did not oppose the reopening of the plaintiff's case. The plaintiff wanted to produce minutes of a meeting held for purposes of selecting the next chief Zvimba. A postponement was sought and granted at the beginning of this trial to enable the plaintiff family's representative to obtain these minutes from the 8th respondent. They were not made available to him because they had not yet been approved at the next meeting which was to be held on 12 May 2006. When the minutes were not made available the plaintiff's case was opened without them. The minutes however became available before closing addresses hence this application. I am satisfied that the defendant's counsel properly consented to the re-opening of the plaintiff's case. Bernard Bhunu Garamukanwa was recalled to produce the minutes. He produced them as exhibit 3. In paragraph two of page 3 it was recorded that;

"The meeting agreed that the representatives of the Chambara, Chidziva and Beperere houses present were all legitimate off springs of Zvimba and were therefore entitled to be in that meeting."

On page 3 of exhibit 3 paragraphs 2-5 it was recorded;

"The Chambara house was singled out as having been weaned off by the father and given its own territory in the Chikanga area. Any claim for chieftainship should be for that particular area. The meeting recommended that this matter be looked into with a view to ensuring that the Chambara house had a fully fledged chieftainship and not a headmanship. This task was left to the Ministry of Local Government and it was on this basis that the Chambara house decided to let the other houses, proceed, with the issue at hand.

It also emerged that those houses which had been given headmanship were not eligible for the Zvimba chieftainship. The houses said it was a standing and well known norm for the Zvimba people. It was also highlighted that tradition dictated that a child who would have been weaned off by the father would no longer have any reason to go back to the father. The meeting agreed that there were certain traditional norms and values that were peculiar to the Zvimba Chieftainship and these had to be respected in the process.

Having agreed that the Chidziva and Chambara houses were not eligible this time around, the meeting resolved that the next Chief Zvimba should be provided by the Beperere house.

The meeting noted that in the past the Beperere house had taken more turns as chiefs than the Chidziva and Chambara houses. Be that as it may, the meeting said that in view of the fact that the previous substantive chief Titus Matibiri and the current Acting Chief John Masese Matibiri were all from the same house, the Chidziva house could therefore not provide a substantive chief this time around. The principle of rotation or collateral succession where one house has its turn after another would have been defeated."

Exhibit 3 establishes that the Nyamkanga (Chambara), house, is a legitimate off spring of Zvimba, and, were entitled to be in that meeting which was determining the house from which the next chief Zvimba should come. The meeting further decided that the Chambara house was not entitled to ascend the Zvimba chieftainship as they were given their own territory. The same meeting realized that what the Chambaras had was not a chieftainship but a headmanship, and recommended that the Chambara house be given its own chieftainship. The same meeting later resolved that the Chidziva and Chambara houses were not eligible this time around, suggesting that they would be eligible some other time. The meeting also observed that the Beperere house had taken more turns as chiefs than the Chidziva and Chambara houses, but resolved that the next chief should come from the Beperere house because the Chidziva house provided the last substantive chief and current acting chief. It seems the meeting remained conscious of the eligibility of the Chambara house but sought to side line it by what ever means. At first they said it is eligible to attend the meeting but not to ascend the chieftainship because they were given their own territory. The meeting conceded that what the Chambaras had was headmanship which can not be described as their own territory in relating it to

chieftainship, hence the suggestion that they be given their own chieftainship. The same meeting later acknowledged that the Beperere house had more chances as chief Zvimba than the Chidziva and the Chambara houses. It seems to me the meeting was finding it hard to completely disentitle the Chambara house.

When the court asked Garamukanwa how decisions are made at the meeting he said it is based on the majority's decision.

The first defendant led evidence from Masocha Wise Chagwedera and Obey Chagwedera. They are both from the Nyamkanga (Chambara) house. Masocha is Obey's father's young brother. Obey's father was the original representative of the first defendant's house. He died before the hearing of this case. He was headman Nyamukanga. Obey has been appointed acting headman Nyamukanga and has substituted his father as the representative of the Nyamkanga family in these proceedings.

Masocha Chagwedera told the court that Chambara was not given the Nyamukanga area by Pokoteke but was assigned the duty of guarding the whole Zvimba territory by staying in the Nyamukanga area so that when the Madzviti warriors came he would ward them off. He further told the court that the Nyamukanga headmanship was founded by Beperere who imposed it on Gungutsva one of Chambara's 5 sons after he captured him when he went to mourn his brother whose death he had caused when a spear turned into a cockerel and deposited its droppings on his head as they fought for the Zvimba chieftainship after Pokoteke's death. He disputed the evidence in exhibit 1 to the effect that the Nyamkanga headmanship was founded by Pokoteke pointing out that, that history was created by the Bepereres whose father had killed Chambara their forefather. He told the court that Beperere gave part of the land which was part of Chikanga to Chirau who had given him the magic he used against Chambara. He said the piece of land under the Nyamukanga headmanship is small and is not bigger than the area left under chief Zvimba as alleged in the plaintiff's evidence. He said all the 5 sons of Chambara passed down the history of what Beperere had done to their forefather Chambara, leading to Chambara's descendants fearing to ascend the Zvimba chieftainship. He narrated the early history of the Zvimba chieftainship from Neiteve to Chidziva. He said Neiteve was the first chief Zvimba followed by his first son Nemaunga who did not have any sons, hence the absence of his descendants. After Nemaunga the next chief Zvimba was Negondo followed by Pokoteke, after whose death Beperere snatched the chieftainship through his mysterious conquest of his elder brother Chambara. He stressed that the Chambaras never ascended the Zvimba chieftainship due to the fear inspired into them by what Beperere did to Chambara and there-after due to their being oppressed by the Bepereres who have ascended the chieftainship 13 times while the Chidzivas ascended it

3 times. He narrowed down the houses entitled to the Zvimba chieftainship to Pokoteke's three sons Chambara Beperere and Chidziva. He is aware that Beperere's house has sub-houses like the plaintiff's, Djakonda, Chimbamauro and Dununu. He denied the existence of a custom disentitling those with headmanship from the Zvimba chieftainship. He reinforced his denial by pointing out that the Dununu and Chimbamauro houses ascended the Zvimba chieftainship even though they enjoy a headmanship in their own areas. He said the decisions in exhibit 3 though made are a result of the Beperere house constituting seven eighths of the meeting and therefore being able to pass resolutions in their own favour.

Masocha Chagwedera's evidence finds corroboration in the plaintiff's evidence on the following aspects;

- 1) The origin of the history in the exhibits the plaintiff relied on. Bruce –Brand recorded that he obtained the information from "informants; especially Chakabva, the elder brother of headman Dununu." He therefore accurately pointed out that the Bepereres had a hand in the creation of the recorded history which he disputes on Nemaunga not having ascended the Zvimba chieftainship and how the Nyamkanga headmanship was created. The Dununu House originated from Dununu who was one of Beperere's sons.
- 2) That Chambara was not told of Pokoteke's death and that when he heard of it by rumor he came to mourn his father but found his young brother Beperere having snatched the chieftainship leading to the war which resulted in his death.
- 3) That Beperere used magic to defeat Chambara when he shot an arrow which turned into a cockerel which landed on Chambara's head.
- 4) That these events led to the Chambaras not ascending the Zvimba Chieftainship due to fear of Beperere's use of magic. There is no doubt that the events leading to Chambara's death are terrifying.
- 5) That the Bepereres constitute the majority in meetings leading to their views prevailing over those of other houses. This is confirmed by the genealogy of the Zvimba chieftainship on page 9 of exhibit 2 which proves that Chambara's house stands as one house while Beperere's house is represented by the Dununu, Chimbamauro, Mutimuri and Djakonda houses.
- 6) That the Nyamkanga house (the Chambaras) do not have a territory of their own. They simply enjoy a headmanship under chief Zvimba. See pages 11-12 of exhibit 2 which makes it clear that the Nyamkanga headmanship is subject to chief Zvimba. They can not distribute land without the approval of chief Zvimba. Their cases go on appeal to chief Zvimba. Their headmen are appointed by chief Zvimba. This is further acknowledged in exhibit 3 where the meeting agreed they were entitled to attend the meeting and that a chieftainship should be established for them.
- 7) That Chambara was merely sent to ward off the Madzviti warriors. The plaintiff's viva voce evidence and documental evidence clearly states that Pokoteke's sons Chidziva and Kakomwe supported Chambara in the fight for the chieftainship. Who, besides Pokoteke and his sons would have known the truth? Why would, Pokoteke's two sons support Chambara if he had been indeed weaned off and was not entitled to the chieftainship. This leaves three sons of the royal family against one. According to both Shona and Ndebele custom the disinheriting of an heir was supposed to be announced publicly. In his book "The History and Extent of Recognition of Tribal Law in Rhodesia" at page 85 Harold Child said;

“A man may disinherit his heir for proper cause and substitute another son. It is necessary in Ndebele law that the Kraal-head should make a public announcement at a meeting of adult men “inhlango yamadoda” to give effect to a wish of this nature. Shona and Fingo law is similar, and in the latter tribe, after the father’s death, the widow may likewise disinherit the eldest son. The descendants of a disinherited son are not affected in their rights of succession by the act by which their father was repudiated. The rule is that a declarant must have been in his sound mind, and not have been subject to undue influence when taking the exceptional step of putting aside his heir. A death-bed directive would consequently be suspect and of no effect if privately made”.

In view of this practice and custom the alleged disinheritance of Chambara by Pokoteke on the basis of his being given his own territory must have been common knowledge and have come to the knowledge of Kakomwe and Chidziva irrespective of their ages at the time the decision was made and announced. Kakomwe and Chidziva’s support for Chambara, therefore, strengthens Masocha’s evidence.

The events at Chakona hill before Beperere’s mysterious victory also supports Masocha’s evidence. The recorded history states that “Beperere and his people took refuge at the hill, but they were soon surrounded by Chambara’s contingent” The fact that Beperere and his people could be surrounded and all be on the hill and eventually in a hut in which they were mysteriously carried across the Hunyani river, does not suggest large numbers were on his side while the ability to surround suggests larger numbers were on Chambara’s side though this could have been due to the support he got from the Varozvi. According to Masocha’s evidence he must have managed to have a larger army because he and the warriors had been out there to ward off the Madziti warriors from the Zvimba territory. The support, Chambara got from his two brothers Kakomwe and Chidziva must also have brought to his side some of the subjects of the Zvimba territory. It is inconceivable that the two sons of the late Chief Zvimba (Pokoteke) would go to battle on Chambara’s side without being followed by some of the chieftainship’s subjects.

- 8) The support the Varozvi gave to Chambara also seems to indicate the correct position. They were the benefactors of the Zvimba chieftainship. They must have maintained a close relationship with chief Zvimba and known who was entitled to be the next chief. The custom of publicly disinheriting an heir must also have enabled them to know the truth about Chambara’s entitlement to ascend the chieftainship. The combination of Kakomwe, Chidziva and the Varozvi on Chambara’s side clearly indicates what should have been known by the royal family and its benefactors to be the correct position.
- 9) His evidence that Nemaunga become chief Zvimba after Neiteve seems to get support from Nemaunga being labeled Chief No 2 in the genealogy of the Zvimba chieftainship on page 9 of exhibit 2. I appreciate that Bruce-Brand recorded that he did not become chief as per the information he got from the descendants of Beperere, but if that was so why is he numbered among those who ascended the Zvimba chieftainship?
- 10) His denial that those who have headmanship are barred from chieftainship is corroborated by the ascendance of chiefs no 7, 10, 11, 12, 13, 14 and 16 to the Zvimba Chieftainship even though their houses, Dununu and Chimbamauro had

been given headmanship. See page 9 of exhibit 2. This confirms that being a headman does not disentitle one from ascending the Zvimba chieftainship. Naturally the position of headman is lower than that of a chief. There is no logical reason why a headman should not ascend the higher office, especially in view of there being 5 divisions of the Zvimba territory, the Chiefs own dunhu (which must be the domain of the houses which were not given their own headmanship), the Nyamkanga, Dununu, Chimbamauro, and Nyamangara headmanships. (See page 5 of Exhibit 1). On page 4 of exhibit 1 it is clearly stated that;

“Chief Zvimba has his own dunhu- that is, in addition to his functions as chief he is also a saduhu in respect of the area immediately surrounding his headquarters.”

This means if the other headmanships are barred from chieftainship the three houses claiming to be the only ones entitled to chieftainship would be entitled to the headmanship of the area which was not distributed plus the chieftainship. This in my view would not be consistent with those enjoying headmanship not being entitled to ascend the chieftainship. Masocha’s denial of the existence of the norm/custom is therefore vindicated.

11. His evidence that the Nyamukanga headmanship’s area is smaller than the land under chief Zvimba is confirmed by Bruce-Brand’s referring to the Nyamkanga area as what was then Martinspur farm. It is further collaborated by Obey’s evidence to the effect that only 15 villages, fall under the Nyamkanga headmaship.

I am satisfied that Masocha Chagwedera told the truth.

Obey Chagwedera was the next witness for the first defendant. He told the court that he is the fourth son of Moses Nyamkanga who is the late headman Nyamkanga and was the original representative of the Nyamkanga family in this case but died before the hearing of this case opened. He has been appointed acting headman until the appointment of another headman to succeed his father. He is now the 1st defendant’s representative in this case.

Obey’s evidence on the history of the Zvimba Chieftainship is identical to that of Masocha Chagwedera. He insisted that the Chambara house was entitled to ascend the Zvimba chieftainship. He agreed that they never ascended the chieftainship after Chambara lost the bid to ascend it when he was defeated by Beperere. He said Chambara’s descendants became afraid, and did not claim the chieftainship. His father was the first to claim the Zvimba chieftainship even though it was common knowledge that it was dangerous to claim it. He said the fear was due to Beperere’s use of magic. He said his father was courageous but has since lost his life. He however said that does not deter him from claiming the right to ascend the Zvimba chieftainship. He denied that the land under the Nyamkanga headmanship is bigger than that under the chief’s area. He said he only has 15 villages under him. On several other aspects his evidence is identical to that of Masocha Chagwedera.

My analysis of the evidence of Masocha applies to Obey's evidence. I am therefore satisfied that Obey told the court the truth.

Common Cause Evidence.

The following evidence is common cause between the plaintiff and the first defendant.

- 1) That the Chambara (Nyamkanga), Chimbamauro, Dununu, Nyamangara, Chidziva, Djakonda and Mutimuri families (houses) are all legitimate off springs of Neiteve who was the original chief Zvimba. They are therefore descendants of chief Zvimba and should in the absence of any, reason disentitling them, ascend the Zvimba chieftainship.
- 2) That the Dununu, Chimbamauro, and Nyamkanga (Chambara) houses enjoy headmanship of areas falling under the jurisdiction of chief Zvimba.
- 3) That according to Bruce-Brand's report there is an area for which Chief Zvimba is the headman.
- 4) That the (Nyamkanga's) first defendant's house did not ascend the Zvimba chieftainship since Chambara's failed bid to ascend it.
- 5) That the Chimbamauro and Dununu houses which enjoy headmanship of areas under chief Zvimba have ascended the chieftainship in spite of the alleged bar to such families.
- 6) That the Dununu and Chimbamauro families ascended the chieftainship through chiefs numbers 7, 10, 11, 12, 13, 14 and 16.
- 7) That these chieftainships span a period from just one chieftainship after Beperere's to chief Patrick Guzha who was in office in 1965 when Bruce-Brand recorded the genealogy appearing on pages 9 and 10 of exhibit 2.
- 8) That Beperere's descendants constitute the majority of houses entitled to ascend the Zvimba chieftainship and that whenever they vote for a solution they can easily impose their will on the other houses in particular the Chidziva and Chambara houses.
- 9) That Chambara could not ascend the chieftainship because he became insane and died, following Beperere's use of magic against him.
- 10) That his descendants the Nyamkanga's did not ascend due to fear of what had happened to Chambara.
- 11) That the Nyamkanga's now want to ascend and are seeking to enforce their rights to the chieftainship.
- 12) That the other houses concede that the Nyamkanga's do not have a chieftainship but a mere headmanship and seek for them an elevation to chieftainship so that

they do not contest the Zvimba chieftainship.

13) That the houses which were not given their own headmanship enjoy the headmanship of the area which was not distributed by Beperere.

14) That the Zvimba chieftainship is ascended through the collateral system, where according to Harold Child's *The History and Extent of Recognition of Tribal Law in Rhodesia* at page 85;

"-brother succeeds brother, the determining factor being the order of birth amongst the collateral sons and grandsons of the chief."

15) That the Beperere house has ascended the Zvimba chieftainship 13 times, while the Chidziva house has ascended it 3 times and the Nyamkanga house has not yet ascended the Zvimba chieftainship. It is therefore clear that the chieftainship is being monopolized by the Beperere house and the correct use of collateral succession is not being practiced as one house is continuously succeeding without allowing other houses their turn in the succession cycle.

The issues.

The only issue which was referred to trial is who is entitled to lay claim to the succession of the Zvimba chieftainship. The first defendant claims to be entitled to ascend the Zvimba chieftainship, while the plaintiff claims that only three houses are entitled namely Chidziva, Mutimuri and Djakonda houses.

Disputed evidence.

Most of the evidence in this case is common cause. The disputed evidence is on whether or not it is an accepted custom among the Zvimba people that a house which has a headmanship can not ascend the Zvimba chieftainship. The plaintiff sought to prove the existence of that custom by proving that it originated from Nemaunga, Neiteve's first son whom he said was given a piece of land by his father and was for that reason barred from ascending the Zvimba Chieftainship. The first defendant disputed that and said Neiteve never gave his son Nemaunga a piece of land and that Nemaunga in-fact became the second chief Zvimba as is confirmed by the genealogy of the Zvimba people on page 9 of exhibit 2. The plaintiff's witnesses also said that is why the Nyamkanga's never claimed the chieftainship since Chambara's defeat by Beperere. The first defendant's response was they became afraid of what had happened to their forefather Chambara to the extent that each of Chambara's five sons passed down that history to his descendants warning them of the dangers involved in contesting the chieftainship against the Beperere's. They however said they have now resolved to claim their inheritance even if they could ascend

the chieftainship for a few hours before they die for claiming it. Masocha and Obey who gave evidence for the first defendant said their resolve is demonstrated by their continuing to contest the chieftainship even though Moses Nyamukanga the original contestant is now late. When the plaintiff's representative and the witness who gave evidence for the plaintiff were confronted with the evidence that other houses which have headmanship over their own areas have ascended the chieftainship they said it was an error and that the error was caused by whitemen who did not know the correct procedure of appointing chiefs.

Resolution of the disputes.

An examination of common cause evidence and documentary evidence establishes that the probabilities favour the first defendant on whether or not the norm of barring houses which enjoy headmanship from the Zvimba chieftainship existed from Nemaunga's time and was repeated when Chambara was also weaned off. It was established during the cross-examination of the plaintiff's witness's that the numbering on page 9 of exhibit 2 indicates that any numbered person become chief Zvimba and the numbering started with Neiteve the founding chief down to the chief who was in office at the time Bruce-Brand recorded the history of the Zvimba chieftainship. I appreciate that there is a conflict in the recorded history as it records that Nemaunga was given a piece of land and as a result did not become Chief Zvimba. On the other hand he is recorded as the second chief Zvimba. It is accepted that oral history can be incorrectly passed down or recorded and can be affected by the bias of the persons who pass it down. In the case of *Ruzane v Paradzai & Anor* 1989 (1) ZLR 118 (HC) Mtambanengwe J at page 130F-G said;

"It should be remembered that oral history is notorious for its susceptibility to different interpretation and it is being passed down in different versions told by many people. Such discrepancies as there might have been are easily explained by this well known fallibility of human memory"

In this case I am convinced that the recorded history is not accurate as already demonstrated by the inconsistencies on Nemaunga's status as chief number 2, and what seems to be the biased position of Beperere's descendants.

I would therefore resolve the dispute in the first defendant's favour in view of the conflict and the contradictions the alleged custom suffered from what happened soon after the death of Chidziva, who took over from Beperere and was chief number 6. He was succeeded by Chisora whose house had a headmanship. While chiefs, number 8 and 9 came from the Mutimuri and Djakonda houses which have a headmanship, shared between the three houses which were not allocated their own headmanship, chiefs number 7, 10, 11, 12, 13, 14, and 16, came from the Dununu and Chisora

(Chimbamauro) houses which have their own headmanship. The question to be answered is what had happened to the alleged custom which must have been still fresh on the Zvimba people's minds, in view of the dispute it generated between Chambara and Beperere. This court was not told if the whiteman had a hand in the appointment of Chisora. The onus was on the plaintiff to prove that all such appointments were a result of the interference of the whiteman who did not appreciate their customs and norms. To do so the dates of appointment had to be proved to establish whether or not the whiteman was already involved as the appointment of chief number 7 seems to have been before the coming of the whiteman.

A custom is created by usage over a long period of time. It is not established through an incident which is thereafter not followed or is soon thereafter challenged. It should generally be followed and practiced by members of the tribe or community concerned. The definition of customary law can illustrate how a custom is established. The Interpretation Act [*Chapter 1:01*] describes customary law as follows;

"customary law," means the customary law of the people of Zimbabwe, or of any section or community of such people, before the 10th June 1891, as modified and developed since that date"

The same definition is repeated in the Customary Law And Local Courts Act [*Chapter 7.05*]. The use of the words modified and developed implies that a custom or customary law is established over a long period of time.

J.G. Story in his book Customary Law In Practice at page 1 defines it as follows;

"Customary law", in relation to a particular African tribe, means the legal principles and judicial practices of such tribe except in so far as such principles are repugnant to-

- a) natural justice or morality; or
- b) the provisions of any enactment: "—

The use of the words "judicial practices" again implies that a custom is established through a thing being done or practiced repeatedly. In this case the custom is alleged to have taken root when Nemaunga was disentitled from ascending the chieftainship. It was to be developed when Chambara was allegedly similarly disentitled, but, a serious dispute, arouse, and battle lines were drawn with the majority of the royal family opposing the alleged custom. It can not be said it ever became a settled custom. As if the dispute over the existence of the custom was not enough members of its proponent's house the Bepereres disregarded it and ascended the chieftainship in spite of their being headmen in their own areas. I am satisfied the alleged custom never became settled as its application to Nemaunga is in dispute and its enforcement by Beperere was openly challenged by the majority of the royal family. It was soon thereafter disregarded by Beperere's own

children who ascended the chieftainship when they could have been barred by the custom if it indeed existed.

I am also persuaded that Chambara had not been weaned off as alleged by the plaintiff, because of the support he got from Kakomwe and Chidziva who should have known the truth about his entitlement to the chieftainship. The support he got from the Varozvi who were the benefactors of the Zvimba chieftainship lends credence to the first defendant's denial of the existence of the custom. I have already dealt with the details and circumstances surrounding the Chambara Beperere battle which suggests that the plaintiff's claims about Chambara's weaning off are not truthful.

The ascendance of chiefs number 7, 10, 11, 12, 13, 14, and 16, who were appointed from houses which have their own headmanship and were from the Beperere house which is the proponent of this practice or custom, proves that the Bepereres simply want to use this alleged custom to bar the Nymkangas from ascending the chieftainship when they have been ignoring it in respect of the Dununus and Chimbamauros. They knew the custom and their father Beperere had fought and killed his brother Chambara to enforce it, why would his descendants who should have known better violate it.

The plaintiff who had the onus to establish the existence of the custom failed to lead evidence to prove that that custom was observed after independence when the whiteman could no-longer interfere with the customary appointment of chiefs. It is however common cause that the Beperere house has had 13 chances as chief Zvimba. This means 6 more chiefs from the Beperere house ascended the chieftainship after 1965. There is no evidence that these 6 appointments were confined to the Mutimuri and Djakonda houses. The probabilities are that the Dununu and Chimbamauro houses continued to ascend the chieftainship despite the alleged existence of the custom. The probability is strengthened by a reference in exhibit 3 and in Garamukanwa's evidence to the Dununus and Chimbamauros' concession at the meeting that they had ascended in error and will not contest the chieftainship in future. The first defendant alleged that many chiefs were appointed from the Dununu and Chimbamauro houses which have their own headmanship. This was conceded without indicating when it stopped. If it did not stop at independence when our customs could be observed can it be said that the custom exists. I am satisfied that the plaintiff did not establish the existence of the custom while the first defendant has on a balance of probabilities established that their house did not claim the chieftainship since Chambara's time due to fear.

In my view the right to inherit can not be waived by individuals on behalf of others. It is a right which flows through the original chief's blood, to his descendants. It is a birth right and can only be waived by each individual in respect of his own right. Mr Kaonde

seems to suggest that a custom was established through the first defendant's fear to claim the chieftainship. I have already said such rights can only be waived by individuals affecting their own rights to ascend the chieftainship and can not affect the rights of those from their house born or not yet born who are willing or may in future be willing to ascend the chieftainship.

In the result the plaintiff has not proved that the 1st defendant's house and the other houses which have their own headmanship are disentitled from ascending the Zvimba chieftainship.

The plaintiff's claim is dismissed with costs.

Kawonde and Company, plaintiff's legal practitioners

Attorney-General's Civil Division, first defendant's legal practitioners.