

COSMAS KADZIMA
and
KIZITO KADZIMA
versus
JOSEPH MAGASO
and
THE DISTRICT ADMINISTRATOR, NYANGA
and
MINISTER OF LOCAL GOVERNMENT, PUBLIC
WORKS & NATIONAL HOUSING
and
THE PRESIDENT OF THE REPUBLIC OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAWADZE J

HARARE, 20, 28, 30 September 2010 and 1& 18 October 2010 and 19 October 2011

Civil Trial

J. Mandizha, for first and second plaintiffs

L. Mundirwa, for first defendant

T.O. Dodo, for second, third and fourth defendants

MAWADZE J: The plaintiffs issued summons out of this court on 2 October 2009 seeking the following relief:

- “1. That the first defendant is according to the law and prevailing principles of succession of the chieftainship in the Wanyama (Hata) clan hereby declared unfit, illegitimate and unsuitable to preside over the Wanyama (Hata) community as chief.
2. Additionally or alternatively the process leading to the second defendant’s submission of the first defendant’s name to third and fourth defendants for appointment be and is hereby declared to be contrary to law and the prevailing principles of succession of the Wanyama (Hata) clan.
3. The appointment and installation of the first defendant a substantial Chief Hata be and is hereby declared null and void and is hereby set aside.
4. The second defendant be and is hereby directed to follow the law and the prevailing customary principles of succession in the appointment of the future substantive Chief Hata.
5. That the first, second and third defendant be and are hereby ordered to pay costs of suit jointly and severally, with the one paying the other (s) to be absolved.”

The first and second plaintiffs are both resident in Kadzima Village, Chief Hata in Nyanga. They both trace their lineage to Chief Kadzima Hata (Wanyama) chieftainship. They have instituted these proceedings both in their personal and representative capacities. The first and second plaintiff base their *locus standi* on their personal and individual eligibility to the chieftainship in issue as well as being concerned descendants of Chief Kadzima (Hata) chieftaincy.

The first defendant is the current chief Hata. His appointment as such on 26 April 2006 is being challenged by the first and second plaintiffs.

The second and third defendants, the District Administrator for Nyanga and the Minister of Local Government Public Works and Urban Planning are cited in their official capacities in relation to the role they play in terms of the law in the appointment of chiefs.

The fourth defendant the President of the Republic of Zimbabwe is cited in his official capacity in compliance with the law as it is his legal right to appoint chiefs.

The dispute between plaintiffs and the defendants has been raging on for a long time. This matter was first brought as a court application in case number HC 2689/06. The litigants *in casu* are substantially the same as in case number HC 2689/06. At some point a default judgment was granted but was later rescinded. The court then directed that the matter be referred to trial.

At the pre-trial conference stage the following issues were referred for resolution;

- “1. Which families are eligible for the Hata Chieftainship?
2. Whether the first defendant is a descendant of and derives his lineage from Samuwozi and Hata and whether he is in consequence entitled to the Hata (Wanyama) Chieftaincy.
3. What are the prevailing customary principles of succession of the Hata (Wanyama) people.
4. Whether first defendant’s appointment as Chief Hata is consistent with the Hata customary principles of succession as well as applicable law.
5. What is the authentic family tree for the Hata (Wanyama) people and for how long has it subsisted in its current form.
6. Whether recommendation for the first defendant for appointment as chief Hata by the second and third defendants is consistent with the prevailing customary principles of succession of the Hata people.

7. Whether the voting was held before or in arriving at the installation of the first defendant as chief Hata, and if so, whether such principle is consistent with the prevailing customary principles of succession of the Hata people.
8. Whether the first defendant's appointment as chief Hata should be set aside.
9. Cost of suit."

THE PLEADINGS

According to the plaintiffs the Hata (Wanyama) chieftaincy traces its origin from the 18th century. The first chief was Mudziwepasi who was succeeded by Hata. Hata was succeeded by Nyazema who in turn was succeeded by Samuwozi. This history is not disputed by the defendants.

According to the plaintiffs Samuwozi was succeeded by his son Kadzima. It is the plaintiffs' contention that the basis for the ascendancy of Kadzima to the chieftainship was a result of the extreme bravery he exhibited during Samuwozi's rein when the Hata clan waged a bitter war against the Guvheya tribe defending Samuwozi's territory. It is said although not the eldest son of Samuwozi Kadzima excelled during the war and rose to become the commander in chief much to the pleasure of his father Samuwozi. After the war, it is said Samuwozi rewarded Kadzima by appointing him as his successor on the basis of the valour and exploits Kadzima had shown. It is said Kadzima was given by Samuwozi a large piece of land which land became the central kingdom containing the ancestral sacred place of burial of the Hata Chiefs/Kings. According to the plaintiffs Samuwozi called his other ten (10) sons and parcelled to them small pieces of land (tsungu) from the central kingdom which they ruled over separate from the central kingdom.

The plaintiffs further allege in their declaration that Kadzima at one time was barred and tricked out of the chieftainship by the colonialists hence he had to ask his blood brothers Bonde, Dzapasi and Mwarura to rotate the chieftaincy as care taker chiefs since Kadzima's own sons were too young. It is however said that at the appropriate time Kadzima's son, Bayisai Bonde Kadzima became the next succeeding chief.

According to the plaintiffs the prevailing customary principles of succession of the Hata people has been based on the following important factors;

- (a) That the chieftainship would rotate among those children born to chief Kadzima's three official wives which is the basis of the three houses which now rotate in the

succession of the Hata chieftaincy: The three wives and the respective eligible houses can be graphically illustrated as follows:

<u>Name of wife</u>	<u>Resultant House</u>
i) Mai Bayisai Bonde Kadzima	- Zviseko
ii) Mai Musasikwa Kadzima	- Hakunemutsa
iii) Mai Boriri Kadzima	- Makoko House

It is the plaintiff's case that only those who trace their lineage to Samuwozi Hata and the predecessor chiefs could succeed him and the subsequent chiefs. According to the plaintiffs the first defendant who is from the Magaso house is therefore illegible to ascend to the chieftaincy of the Hata clan.

- (b) That the spirit medium known as mboringa plays a crucial and central role in the identity of the actual chief to take over the chieftainship and such person should in terms of the prevailing customary principles of succession of the Hata clan be approved by the spirit medium (mboringa). According to the plaintiffs the first defendant was neither identified nor approved by the spirit medium.
- (c) That the eligible person should be circumcised.
- (d) That the eligible person's fore fathers should have been buried in the clan's sacred burial place called "chitsanza" and would be buried at the same place upon death. The plaintiffs allege that none of first defendant's fore fathers was buried in the "chitsanza" and that first defendant is not eligible to be buried at that place.
- (e) That the eligible person's fore fathers should have been brave and proved themselves in the war fought and not deemed as cowards. The plaintiffs contend that the first defendant's fore fathers have no such proud history which seems to be the preserve of Kadzima.
- (f) That the eligible person should be able as his fore bears to conduct the Hata clan rites and ceremonies which include *inter alia* the rituals done in the sacred hut called "zami", and to handle and be bestowed with the traditional regalia which include such paraphernalia, like clay pot, sacred walking stick (tsvimbo), sword, shroud and gun. According to plaintiffs the first defendant's forebears did not perform such rites and ceremonies and were not custodians of such traditional paraphernalia.

- (g) That the eligible person's fore bears should not have been given the small pieces of land "tsungo" by Samuwozi. According to plaintiffs the first defendant's forebears were not even entitled to "tsungo" let alone the Hata chieftainship.
- (h) That the eligible person should be resident in the Hata central kingdom not the "tsungo" and should not have a criminal record.
- (i) That the eligible person should not be a twin and should not have a big or long navel and meet the approval of the father (bambo) who would have the honour to dress up the chief designate.

It is the plaintiffs' case that the first defendant does not meet the above stated criteria which relates to the prevailing customary principles of succession of the Hata people. According to the plaintiffs the first defendant is not a true and legitimate son of Samuwozi Hata let alone Kadzima. It is alleged that the first defendant was never approved by the "bambo" and his fore bears never participated in the Guvheya wars. According to plaintiffs the first defendant traces his lineage from an adulterous relationship involving one of chief Samuwozi's wives (mubvandıripo). The first defendant according to the plaintiffs is not within the prescribed lineage nor is he from the legitimate eligible family or house hence he is totally disentitled to lay any claim to the Hata chieftaincy. Lastly the plaintiffs allege that first defendant was improperly appointed through a voting system conducted by the second defendant at Sedze Business Centre in Nyanga which voting system is alien to the prevailing customary principles of succession of the Hata people. It is on that basis therefore that the appointment of the first defendant by the second to fourth defendants is not only irregular but inconsistent with the prevailing customary principles of succession of the Hata clan.

The first defendant in his plea disputed that he is unsuitable, unfit and illegitimate to assume the Hata chieftaincy. He further puts into issue the alleged prevailing principles of succession, tradition, history and cultural values of the Hata clan as claimed by the plaintiffs. According to the first defendant all the 12 families shown on the "family tree" kept at the second defendant's offices are eligible to ascend the Hata chieftaincy. These are;

- Magaso
- Dzepasi
- Gwidibira
- Bonde
- Kadzima
- Mwarura

- Hakunemutsa
- Mautsi / Chisvo / Mapeta
- Nyakayi
- Samudzi
- Nyagomo
- Mhiripiri

According to the first defendant Samuwozi is the father of all the families (houses) which now appear on the family tree. It is the first defendant's contention that Samuwozi gave all his sons the opportunity to ascend to the Hata chieftaincy through the process of succession by rotation. According to the first defendant this is the correct and prevailing principle of succession of the Hata people introduced by the grandfathers since time immemorial. While the first defendant confirmed the Guvheya wars referred to by the plaintiffs and that Kadzima was a commander, he disputed that Kadzima emerged as a hero from that war but that Nyatondo was the hero. In fact the first defendant said Kadzima was captured and made a slave during that war and only escaped later after which he assumed chieftainship through force. However the first defendant said Kadzima was disgraced after he snatched someone's wife and wedded her which caused the colonial government to remove him from chieftainship and was replaced by Mwarura. According to the first defendant Samuwozi had 3 cities each with 10 wives and that out of all the children born only eleven (11) were eligible to assume chieftaincy of the Hata clan.

According to the first defendant the prevailing customary principles of succession of the Hata clan include the following;

- (a) All the houses which appear on the family tree are eligible to ascend to the Hata chieftainship and they are all sons of Samuwozi.
- (b) That the spirit medium plays a role in the process but would not identify the eligible person. According to the first defendant Chiruvhi and not Mboringa is the current spirit medium of the Hata people.
- (c) That circumcision is not a pre-condition for one to be eligible.
- (d) That all Samuwozi's children are buried at the sacred burial place (chitsanza) including the first defendant's fore-fathers and that his fore-fathers also participated in all the wars alleged.
- (e) That the Zami (sacred hut) is only entered by the spirit medium and not the incumbent chief Hata.

- (f) That all the traditional regalia referred to by the plaintiffs was destroyed by Ignatius Kadzima.
- (g) That the principle of the small piece of land (tsungo or dunhu) is alien to the Hata clan and is unknown.
- (h) That the practice in relation to twins was long abandoned by the Hata people and is no longer a bar to one's eligibility for the Hata chieftaincy.

According to the defendant he is eligible to ascend to the Hata chieftaincy as he has no criminal record and reside in the central kingdom. In fact the first defendant said that the father (Bambo) one Nyamaropa approved first defendant's appointment. The first defendant denied that a voting system was used to elect him as chief but that he was chosen through the stated process of rotation as the Magaso house was next in line and this was supported by the majority of the houses.

The first defendant said it is incorrect to state that only those who trace the lineage to Kadzima or the so called 3 houses are entitled to the Hata chieftainship.

The second, third and fourth defendants in their joint plea indicated that the second to fourth defendants complied with the relevant provisions of the Traditional Leaders Act [Cap 29:17] and the relevant traditions and customs of the Hata people in appointing the first defendant as chief Hata. They all denied that a voting system was used or done but that people were called to meetings where they debated and finally selected the first defendant as the eligible person to assume the Hata chieftainship. The second and third defendants indicated that the plaintiffs should prove their eligibility to the Hata chieftainship.

During the trial the following exhibits were produced;

Exhibit 1 – Bundle of documents produced by plaintiffs - 22 pages. I shall hereafter refer to the various documents in exh I as and when appropriate.

Exhibit 2 - Is the Hata chieftainship family tree. According to the second defendant the District Administrator, the family tree exh 2 was authored by an Administration Officer in the District Administrator's Office (Nyanga) in 1982. The family tree shows the sons of Samuwozi as follows;

- Magaso
- Gwidibira
- Bonde
- Mwarura
- Kadzima

- Mhiripiri
- Nyakayi
- Hakunamutsa
- Mautsi
- Chamaya
- Masiyanyenda
- Dzapasi
- Zviseko
- Makoko
- Chisvo / Mapeta

(there are fifteen houses and I have not stated them in any order as neither is indicated)

Exhibit 3 – Is the second set of minutes of the meeting held in connection with the Hata chieftainship at Sedze Business centre on 27 January 2005 between 1030 – 1615 hours. The first set of the same minutes is in exh 1 pages 19 – 21. There are material differences between the two sets of minutes recorded by the officials from the second defendant’s office on the same day. The notable differences are as follows;

- i) In exh 1 at p 20 the concept of “tsungo” and its importance is discussed but in the second set of same minutes exh 3 it is inexplicably omitted.
- ii) In exh 1 the minutes cover just 2 ½ pages whereas in exhi 3 the minutes cover 4 pages.
- iii) The contents of minutes are materially different in a number of ways and in respect of what various persons present said.

The second defendant was at pains to explain these disparities and could only say that exh I minutes were in brief format and exh 3 in detailed format (whatever that means). What is important to note is that the second defendant conceded that the minutes for the same meeting are not the same and that other persons are misrepresented in what they said (for example Kenneth Hakunamutsa.)

Plaintiff’s case

The following witness gave evidence in support of the plaintiff’s case;

1. Cosmas Kadzima
2. Kenneth Kadzima

3. Alois Mhande
4. Elizabeth Mapeta
5. Rangai Nyagomo
6. Erica Kadzima

Cosmas Kadzima

Cosmas Kadzima is one of the plaintiffs in this matter. He was an aide to the last substantive chief Hata Shadreck Boriri who was in power from 1982 – 2001. After the death of chief Shadreck Boriri Cosmas Kadzima became the acting chief from 2002 to July 2004. His evidence is that he is from Zviseko House which traces its lineage to Kadzima. He testified that he took part to the meetings which were held in selecting Shadreck Boriri as Chief Hata.

According to Cosmas Kadzima the family tree exh 2 simply shows the descendants of Samuwozi which are 15 in number and that it would be impracticable for each one of them to be eligible to the Hata Chieftaincy. He testified that the family tree is not a reflection of the Houses entitled to chieftainship but simply shows descendants of Samuwozi and include houses entitled to the chieftainship, to tsungo and some entitled to nothing. He described exh 2 the family tree as a mix bag (musanganiswa). He gave an outline of what each of the sons of Samuwozi is entitled to (which are the houses) as per exh 2 as follows:

<u>House</u>	<u>Entitlement</u>
Gwidibira	Headmanship
Mwarura	Nothing
*Kadzima	chieftainship
Mhiripiri	Headmanship
Nyakayi	Headmanship
*Hakunemutsa	Chieftainship
Mautsi	Headmanship
Chamaya	Headmanship
Dzapasi	Headmanship
Masiyanyanda	Headmanship
*Zviseko	Chieftainship
*Makoko	Chieftainship

Chisveta / Mapeta	Headmanship
Magaso	Nothing

Cosmas Kadzima indicated that he is not aware as to how, by who and when was the family tree the exh 2 compiled. He however agreed that it shows all of Samuwozi's sons including Magaso relevant to first defendant although he is deemed to be Samuwozi's illegitimate son.

In his evidence Cosmas Kadzima stated that the prevailing customary principles of succession of the Hata clan are clear and went on to explain as follows: He stated that only three (3) houses from the family tree exh 2 are eligible to the Hata chieftainship and they all trace their lineage to Kadzima in the manner already explained in the pleadings. His testimony is that the Hata chieftainship rotate among the Zviseko, Makoko and Hakunamutsa houses only and the other houses Bonde and Dzapasi were only caretaker chiefs. He testified that after identifying the eligible house from the three houses the eldest surviving member of the eligible house is then selected as the substantive chief.

According to Cosmas Kadzima there are other requirements the eligible person should meet. He listed them as follows:

- The person eligible to assume the Hata throne has to be approved by the spirit medium called mboringa.
- The eligible person should be entitled to be buried among other former chiefs at the sacred burial place "chitsanza" not below the mountain where other descendants of Samuwozi are buried.
- The eligible person should be able to perform all the rites at the sacred hut "zami" where some traditional paraphernalia like clay pot are kept.
- That once chosen the eligible person is given the traditional regalia by the eldest father of the Hata clan (Bambo) which regalia include shima (ngoma or drum) axe (ganho) hoe and a gun (which was however lost during the liberation war). The three eligible houses are said to be the custodians of the zami and the traditional regalia.
- There are other factors which include that the eligible person should be circumcised, should not trace his lineage to Samuwozi's illegitimate son (mubvandıripo), has not been given a tsungo (headmanship), is not a twin and should not have a long navel.

- According to Cosmas Kadzima the above stated requirements and factors captures the prevailing customary principles of succession of the Hata clan and that the first defendant does not meet any of the requirements.
- According to Cosmas Kadzima the procedure to choose the eligible House and person to be appointed chief Hata is also clearly spelt out. His evidence is that a gathering of elders (Dare) is called and that it comprises of the eligible houses and some which are not eligible and they agree on the next house to take over. Such minutes are recorded by officials from the second defendant's office and are kept as part of the family history so as to guide future deliberations.
- It is Cosmas Kadzima's evidence that the house which the first defendant belongs to the Magaso house is at ineligible to assume the Hata chieftainship primarily because first defendant's grandfather Magaso was not the legitimate son of Samuwozi. In fact according to Cosmas Kadzima it is a well known fact that when Magaso's mother married Samuwozi she was already 5 months pregnant and gave birth to a child Magaso which child was disowned and disherited by Samuwozi and was not entitled to anything, village headmanship, headmanship or chieftainship. According to Cosmas Kadzima this is the reason why the first defendant's father was given the name Tserayi or Manditsera which meant murambiwa, mutumbwa or the cursed one which name reflects the lineage history of the first defendant. It is Cosmas Kadzima's evidence that this explains why first defendant's forefathers are not buried in the chitsanza (from Magaso house). To compound matters Cosmas Madzima said that first defendant is a twin which further complicates his already difficult position.

According to Cosmas Kadzima the recorded family history relevant to the Hata chieftainship is kept by the second defendant and it shows that from 1967 to date no one from Magaso house was appointed chief Hata until the disputed appointment of the first defendant. In fact Cosmas Kadzima made reference to specific records to buttress his evidence. I shall briefly refer to the minutes which form part of exh 1.

According to a letter dated 17 November 1967 written by the District Commissioner as at that time there were 6 Houses eligible to the Hata chieftainship, that is Kadzima, Nyakayi, Bonde, Dzapasi, Mapeta, Gwidibira. The letter shows that first defendant's father

Tserayi was present but not under Magaso house but Gwidibira House and that he was offered to be appointed chief under Gwidibira house and he declined for reasons not stated. The letter shows that the 6 eligible houses rotated according to seniority i.e Gwidibira, Kadzima, Mapeta, Nyakayi, Bonde, then Dzapasi and starts all over again. As per the minutes the title of the chieftaincy was changed from Saunyama Bonde to Chief Bonde.

The records in exh 1 show that after Gwidibira died the District Administrator wrote a letter to the Provincial Commissioner dated 22 January 1968 indicating that Bayisai Kadzima was to be appointed the next chief and that the spirit medium had not played any role or influence in this particular appointment. The traditional regalia given to the new chief was the ganho (axe).

In a letter dated 31 May 1982 contained in exh 1 the District Administrator wrote to the Ministry of Local Government on the appointment of Musasikwa Elias Kadzima as new chief taking over from Bayisai Kadzima who was killed on 26 June 1978 and the traditional regalia destroyed. The title of the chieftainship was changed from Bonde to Kadzima. As per that letter there were now 7 houses eligible from 6 previously with the addition of the Hakunemutsa House. The succession custom followed was that the appointed chief was approved by the spirit medium Mboringa and was crowned by the eldest father identified as Sekuru Nyagura. There was no traditional regalia as it had been destroyed during the liberation war.

The records in exh 1 show that another meeting was held with the District Administrator on 3 February 1983 as per the recorded minutes. All the eligible houses were present except Bonde house. A decision was made at this meeting to change title of the chieftainship from Bonde to Hata. At this meeting reservations were raised on the existing succession system which was deemed out-dated. A decision was also taken that although Hakunamutsa had died without children his wife was inherited by Kadzima and had children who retained the name Hakunamutsa.

Reference was also made to the minutes recorded relevant to the appointment of Boriri Kadzima in 1997. The first record relates to minutes of meetings held at Sedzi Business Centre on 22 January 1997. It was agreed that the eligible houses for the Hata chieftainship were now four (4) down from seven (7). They were identified as Kadzima, Dzapasi, Gwidibira and Hakunamutsa. It was recorded at that meeting that the houses of Mapeta, Nyakayi and Bonde were dropped from the list of eligible houses as they had been elevated to headmen or “tsungo”. A letter dated 23 September 1987 was written by the

District administrator on the appointment of Boriri Kadzima. The letter reiterated the eligibility of only four houses as stated already. It noted that the spirit medium mboringa was deceased and there was need for replacement. Again it is sekuru Nyagura (Bambo) who crowned or announced the approved chief. Lastly the traditional regalia handed over to chief Boriri Kadzima were the shima (drum) hoe and the gun had still not been replaced. A new family tree dated 19 March 1997 was drawn.

The last part of Cosmas Kadzima's evidence relates to his version of events as regards the appointment of first defendant as chief Hata. Cosmas Kadzima was the acting chief at material time and he said the meeting culminating in first defendant's appointment was called for by the second defendant through letters given to the first defendant to distribute to the descendants of Samuwozi. This culminated in the meeting held at Sedze Business Centre on 27 January 2005. I have already alluded to the two different versions in the minutes of that meeting recorded by the officials in second defendant's office. I shall therefore proceed to deal with Cosmas Kadzima's own version of events of that meeting.

According to Cosmas Kadzima the second defendant had invited 14 houses but only 10 houses turned up for the meeting. His evidence was the contrary to the prevailing principles of succession of the Hata people the second defendant proceeded to ask those present to simply chose the eligible house between the Kadzima and Magaso houses. He said a voting system was used and 7 houses chose Magaso house and 3 houses chose Kadzima house. Cosmas Kadzima said he immediately protested indicating that the Magaso house has never been eligible to assume the Hata chieftainship as Magaso house has always appeared under Gwidibira house for reasons already explained. He said he implored second defendant to refer to records available dating back to 1967 and that a voting system was never used to appoint a chief for the Hata people. He said the second defendant promised to look into the matter and the Kadzima house later approached second defendant to raise the same objections to no avail as second defendant insisted on the first defendant's appointment. This then led to the decision by the plaintiffs to seek a court order to stop the installation ceremony of the first defendant as substantive chief Hata which order was granted preventing the installation ceremony on 30 June 2006.

Cosmas Kadzima was extensively cross examined by counsel for the first and second to fourth defendants but this did not change the complexion of his evidence. In fact no serious adverse in roads were made into his evidence which remained largely unchallenged.

I find Cosmas Kadzima to have been a very articulate and focussed witness. He gave his evidence with evident passion although at times in a very emotional way. I have no doubt that he has very sound knowledge of the prevailing principles succession of the Hata people considering that he was a chief's aide for 10 years and was an acting chief for two years. The eligibility of the house to which he traces his lineage to the Hata chieftainship is not in issue. In my view his evidence is very clear on the interpretation of the family tree and how this should be distinguished from the houses which are entitled to chieftaincy. He was able to explain the succession custom of the Hata people and to a great extent his evidence is corroborated by independent records kept by the second defendant which are part of exh 1. What emerges from his evidence is that one does not become eligible or qualify to be appointed chief of the Hata people simply on the basis that he traces his lineage to the house in the family tree. It is highly improbable, in my view that the Hata chieftainship would rotate among 17 houses. His evidence is clear that the voting system is not part of the succession custom of the Hata people. Under cross examination Cosmas Kadzima admitted that the first defendant's father Tserayi was offered chieftaincy in 1967 but declined. I find his explanation probable in that the said Tserayi did not appear under the banner of his House the Magaso house but under Gwidibira House. This is clear from the records. At the material time Gwidibira house was one of the eligible houses hence the offer to Tserayi. Cosmas explained that Tserayi could not have accepted that appointment to chieftainship even under the banner of Gwidibira house because he knew that as a person who traces his lineage to Magaso he was not eligible. All in all Cosmas Kadzima's evidence was underpinned by reference to documented history.

The only blemish aspect of his evidence is that nowhere in the records he referred to is it stated that the three houses of Zviseko, Hakunamutsa and Makoko are the three houses eligible to the Hata chieftaincy. What is clear is that all these three houses trace their lineage to Kadzima. It is also evident that from 1967 to 1997 all the appointed chiefs traced their lineage to Kadzima and not from other houses. These are;

- i) Bayisai Bonde Kadzima from the Zviseko Zvenyika (Kadzima) house 1966 to 1982.
- ii) Elias Musasikwa Kadzima from Hakunemutsa (Kadzima) house – 1982 to 1987.
- iii) Shadreck Boriri Kadzima from Makoko (Kadzima) house 1987 to 2001.

The other aspect of his evidence which remained unclear is the reasons as to why the eligible house in 1967 were 6 and were then changed to 7 and now to only 3 as he alleges. What remains clear from his evidence is what he explained as the prevailing principles of succession of the Hata people and the fact that first defendant is not eligible to ascend to the Hata chieftaincy for reasons he gave. Cosmas Kadzima's evidence overall reads very well.

Kenneth Kadzima

Kenneth Kadzima is the son of the late chief Elias Musasikwa Kadzima. His evidence was to the effect that currently only three houses which trace their lineage to Kadzima are eligible to contest for the Hata chieftaincy and that this process as per the succession custom is guided by the spirit medium and that the appointed person is crowned by the elder father (Bambo) who are Nyagura or Midzi after which the said chosen person is handed over the traditional regalia or Fuko which include drum (ngoma), gano (axe) and that person would be entitled to perform rituals at the sacred hut "zami".

Kenneth Kadzima testified that the family tree is a mixture of houses eligible for chieftainship and those not eligible. He said he learnt from his elders that the Magaso house is ineligible on account of the fact that they trace their lineage to an illegitimate son of Samuwozi (deemed to be mubvandiripo)

Kenneth Kadzima corroborated Cosmas Kadzima's evidence as to how the second defendant conducted the meeting at Sedze Business Centre on 22 January 2005 which resulted in the appointment of the first defendant as chief Hata. He confirmed that 10 houses were present and that the second defendant limited the choice to 2 houses that is Magaso and Kadzima. He also confirmed that second defendant asked the 10 houses to vote per house and the result was 7 to 3 in favour of Magaso. Kenneth Kadzima pointed out that a number of people vehemently protested against the second defendant's handling of the meeting, the succession custom used and the voting system and that second defendant promised to reconvene another meeting which never happened. Kenneth Kadzima specifically disowned his so called version recorded in the second set of the minutes of this meeting exhi 3 in which he is quoted to have supported first defendant's appointment. Under cross examination he said he does not support the plaintiffs to be appointed substantive chief Hata but is concerned about the need to follow the correct succession custom of the Hata people so as not to appoint ineligible persons like the first defendant whose fore fathers are not entitled to and have not

been buried in the chitsanza. Although Kenneth Kadzima is 43 years old he gave his evidence well and there is no objective basis not to accept his evidence.

Alois Mhande

Alois Mhande is 60 years old and from Mhiripiri House. He told the court that the 3 houses eligible to the Hata chieftaincy are Zviseko, Hakunamutsa and Makoko who rotates chieftaincy among themselves. He said in terms of the succession custom the eligible house out of the three is first identified after which the eldest person in that house is chosen as chief and that this process should be guided by the spirit medium mboringa. His evidence is on all fours with other witnesses on the value placed on the “zami”, “chitsanza” and the nature of the traditional regalia. He also pointed out that the first defendant is not eligible to be appointed as chief Hata as he traces his lineage to an illegitimate son of Samuwozi hence all his fore fathers from Magaso are not buried in the chitsanza. He also explained that not all the houses on the family tree are eligible to the Hata chieftaincy and explained the entitlement of each house on the family tree. I assess Alois Mhande to be a credible witness and I can not do more than referring to his cross examination on the pertinent issues.

“Q: Did you ask the District Administrator why he wanted the voting system rather than the rotation system?”

A: We asked and we opposed the voting system hence the commotion which ensued.

Q: How did the District Administrator react?

A: He gave people ballot papers to vote and ignored our pleas. We argued vehemently talking to him as regards our procedure as per our custom and the role of mboringa.”

On being asked why the first defendant is not eligible he had this to say:-

“Q: Why is Magaso family not eligible for chieftainship?”

A: When mai Magaso was married by Samuwozi she came pregnant and gave birth after five months. The baby was not pre-term so the chief disowned the child, denied paternity. The mother tried to kill child but the chief heard about it and he sent people to restrain her as he did not want a curse in the family, so the child was spared but the chief called all his family members and advised that the child in question (Magaso) was not his child but would be brought up in the Samuwozi family but would not be entitled to any post or inheritance even village headship.

Q: How are the chiefs chosen?

A: The eligible house gather and choose one due on the basis of rotation and the choice is put to mboringa and if approved the chosen person is then given the fuko (traditional regalia). This procedure was not followed.”

Alois Mhande testified that the district Administrator may be called to guide or assist in such discussion or deliberations and would be told who the chosen person is. He said some of the houses not eligible to chieftainship participates in the deliberations to oversee the process and give guidance. My overall view is that his evidence reads well.

Enika Kadzima

Enika kadzima is widow of the late chief Shadreck Boriri Kadzima. She testified that she married into the Hata Clan, specifically the Kadzima family and that on that basis she got to know the prevailing principles of the succession custom of the Hata clan. According to her the eligible houses are the Zviseko, Hakunamutsa and Makoko houses who all trace their lineage to Kadzima. She said it is a well-known secret in the Hata clan that first defendant traces his lineage to an illegitimate son of Samuwozi and is disqualified to assume chieftaincy of the Hata clan and that his fore fathers has long navels. She also dismissed the notion that that all houses on family tree are entitled to chieftainship. As the widow of the late chief Hata she is very conversant with the traditional regalia given to the chief which included a cloth worn by the chief, ganho (axe) and that the chief is anointed by the Bambo (eldest family member) who is Nyagura. She pointed out that she still has her late husband's traditional regalia as first defendant was not properly appointed to allow a proper hand over and takeover of the traditional regalia. She also stated that the voting system was not used to appoint a person to assume chieftainship as per the succession custom of the Hata clan. No useful questions were put to her in cross examination and her evidence remained largely unchallenged.

Elizabeth Mapeta

Elizabeth Mapeta is 48 years and is from the Mapeta / Chisvo house which she said is only entitled headmanship as it was given tsungo. She said all she knows is that the 3 houses of Zviseko, Hakunamutsa and Makoko are eligible for the Hata chieftaincy and is not privy to the reasons thereof. She also said the Magaso house to which the first defendant belongs is not eligible as all traces its lineage to an illegitimate son (mubvandıripo) of Samuwozi.

Elizabeth Mapeta's evidence was largely unchallenged and is in tandem with the other witnesses as already explained.

Ranga Nyagomo

I am not able to place any probative value on Ranga Nyagomo's evidence. He told the court that he is 78 years old although he looks much older than that as he seemed to be hard of hearing and unable to talk coherently. In my view he is so advanced in age that he was virtually unable to follow let alone appreciate the nature of these proceedings.

I now turn to the defendant's case.

The following witnesses gave evidence in support of the first defendant's case;

1. Joseph Magaso
2. Tengeranyi Kadzima
3. Simon Nyatondo
4. Lazarus Kadzima
5. Mike Bonde

Joseph Magaso

In his evidence the first defendant Joseph Magaso indicated that in terms of the prevailing principles of succession of the Hata people the following 7 houses from the family tree are entitled or eligible to the Hata chieftainship.

- Magaso
- Kadzima
- Gwidibira
- Dzapasi
- Hakunamutsa
- Mwarura
- Bonde

The first defendant said that there are other houses in the family tree which are not eligible to the Hata chieftainship like Mautsi and Chamanja. He also said that other houses which appear on the family tree like Masiyanyanda, Makoko and Zviseko are unknown.

It is important to note that the first defendant was unable to explain why in his plea he had said 12 houses inclusive of Mhiripiri, Nyagomo, Samudzi, Nyakayi, Mautsi and Chisvo / Mapeta are eligible or entitled to the Hata chieftainship. The common thread running

through the plaintiff's case was that only 3 houses, Hakunamutsa, Zviseko and Makoko are eligible. It was never suggested to the first plaintiff and his witnesses that the Makoko and Zviseko houses are unknown. The existence of these two houses was never put in issue. Again the first defendant could not explain why this crucial fact was not put to first plaintiff and his witnesses to comment as it was very critical to the plaintiff's case. The impression created by the first defendant in his plea was that all Samuwozi's sons were entitled to chieftainship as per family tree and this is materially different from his evidence in chief.

As regards the succession custom of the Hata people the first defendant testified that the system was rotational amongst the eligible 7 houses. He said the eligible houses would hold a round table discussion and agree as regards the house that assumes chieftainship and also on the next house due. From such chosen house the eldest surviving person is then appointed as the chief. The first defendant said the spirit medium only played a role prior to 1945 and since then the spirit medium has no role to play in the appointment of the chief for the Hata clan.

It is clear that both the plaintiffs and first defendant agree that the succession custom of the Hata clan is rotational among the eligible houses and as regards the process leading to such an appointment which is a family gathering for consultations. They differ as regards the exact number of the eligible houses. They also agree that the spirit medium played a role in the appointment of the chief but differ in that first defendant said this was only prior to 1945 and plaintiffs allege that it is relevant even as at now. It cannot be true that the spirit medium ceased to play any role in 1945 because the records kept at the District Administrator's Office which I have already alluded to as part of exh 1 covering the period of 1967 to 1982 refer to the role of the spirit medium well after 1945. In fact in a letter dated 23 September 1997 dealing with the appointment of Boriri Kadzima as chief Hata the District Administrator wrote that the spirit medium (svikiro) called mboringa was now deceased and was to be replaced. The first defendant's evidence in this regard cannot possibly be true.

The first defendant gave a detailed account of how he was chosen to be the next substantive chief Hata in January 2005. The first defendant gave evidence on how the meeting held at Sedze Business Centre on 27 January 2005 was conducted culminating in his appointment. He said the District Administrator called a meeting of all houses but only 10 houses were able to attend the meeting. According to first defendant the District Administrator then asked for the name of the next house eligible to take over the Hata chieftainship. He said all the 10 houses present suggested only two names – Magaso House

and Kadzima House. This is contrary to the evidence of the first plaintiff and his witnesses who said the District Administrator is the one who told the gathering that only the Magaso and Kadzima house should be chosen to take up the Hata chieftainship. At that point the first defendant said people from Kadzima house protested the eligibility of Magaso house threatening to abandon the meeting. He said this conduct was consistent with other previous meetings which had not yielded anything. He said other houses decided to proceed with the meeting and 7 houses out of the 10 present chose Magaso house and 3 chose Kadzima house. The first defendant said this infuriated the first plaintiff who started to quarrel with the District Administrator insisting that the chieftainship should be retained in the Kadzima house. The first defendant said the District Administrator stood firm and asked the Magaso house to nominate a person to be appointed as the next substantive chief Hata. Later the Magaso house gathered, that is elder sisters, uncles including Shigirayi and Gwidibira where the first defendant was chosen. According to the first defendant his appointment was above board.

The evidence of the first defendant is clear that the District Administrator led the discussions of the meeting held at Sedze Business Centre in January 2005. He confirmed that the eligibility of Magaso House was challenged immediately by the first plaintiff and others and that the first plaintiff's argument was that only the houses tracing their lineage to Kadzima were eligible. The first defendant could not explicitly explain how the 7 houses chose his house and 3 houses Kadzima house – whether it was by show of hands, affirmation or writing on pieces of paper as the first plaintiff said. The first defendant also confirms that the result of choosing Magaso house was not accepted by the first plaintiff and others and this confirms that there was no consensus amongst the 10 houses. What carried the day was therefore the majority voice. Whereas the first defendant said the District Administrator brooked no protests and stood firm in the choice made, the first plaintiff said the District Administrator on that day promised to re-look into the matter. It remained unclear from the first defendant's evidence as to the basis or criteria used to choose the 2 houses Magaso and Kadzima out of the 10 houses in relation to the prevailing principles of succession of the Hata people. Further it would appear that at this decisive meeting there was no reference to the previous minutes or records kept by the District Administrator.

The first defendant testified on his knowledge of the prevailing principles of succession of the Hata people. He indicated that the spirit medium called Mboringa is not

known to him as this was just the name of the first plaintiff's grandfather. As I said the records are clear on this and the first plaintiff and his witnesses were not cross examined on this issue.

The first defendant said there was no special procedure to be followed when one was chosen as chief Hata. He said traditionally as per custom and practice he advised his late grandfather Magaso about his appointment and proceeded to send a pipe with snuff tobacco (mutete) to all family members as a way of announcing his appointment. This new procedure was only raised by the first defendant at this stage and had not been stated as part of the succession custom of the Hata Chieftainship.

In relation to the "Zami" the first defendant said its relevance was only to the rain making ceremony not the appointment of the Chiefs. He said the items kept in the 'zami' (the two clay pots – big and small) were used for rain making purposes not any other rituals and that it is Nyatondo who is allowed into the zami not the chief. What is important to note however is that the version of the relevance of the zami given by the first plaintiff and his witnesses was not challenged as the first plaintiff insisted that only the eligible houses had access to "zami".

According to the first defendant "chitsanza" is a mountain where all those from the Hata clan are buried whether circumcised or not, whether twins or not. He said that his grandfather Magaso was buried at this place contrary to the allegations by the plaintiffs. The first plaintiff and other witnesses insisted that the "chitsanza" was no ordinary burial place but a sacred one where not everyone who traces lineage to the Hata clan was buried but reserved for only those eligible to be chiefs and had been chiefs. The first plaintiff and his witnesses said neither the first defendant's grandfather Magaso nor his father Tserayi were buried in the Chitsanza.

The first defendant dismissed as false the allegation made that he traces his lineage to Samuwozi's illegitimate son one Magaso (or "mubvandiripo"). Instead he said his grandfather Magaso was not a mubvandiripo or illegitimate son of Samuwozi but a biological son of Samuwozi like one other sons reflected in the family tree. In my view this allegation raised by the first plaintiff and his witnesses is problematic as no records to that effect are available. The court is therefore limited to the conflicting evidence of the opposing sides. What is notable however is the non-involvement of the Magaso house on its own in the

succession matrix of the Hata Chieftainship. The records indicate that the first defendant's father Tserayi would be represented under the banner of Gwidibira house and that Magaso house is not reflected in the records. The first defendant in his evidence gives no explanation for this position.

The first defendant admitted that he is a twin but stated that this fact is no longer a relevant consideration in their succession custom just like the long or big navel. First defendant was not clear as to when this practice was abandoned. The available records are not useful in this regard.

According to the first defendant the "tsungo" concept or headmanship was important in the succession custom of the Hata clan and that those given tsungo were not even part of the family tree and therefore not eligible to chieftainship. I am unable to accept this explanation on the simple basis that the family tree in issue shows Samuwozi's sons. The first defendant could not state Samuwozi's sons who are not in the family tree who were given "tsungo" and this aspect was not put to first plaintiff and witnesses.

In relation to the chief's traditional regalia the first defendant said there was no such regalia or "fuko" and that all that he knows about is a "ndoro" which is a small leopard skin worn by the chief on the forehead and that the rest of the regalia is supplied by the State or government. Again the records available which I have referred to clearly state what constitute the traditional regalia. The issue of "ndoro" was only raised for the first time by the defendant in his evidence. In my view the first defendant is either genuinely ignorant about the traditional regalia associated with the Hata Chieftainship or is simply being dishonest. The same goes for the first defendant's insistence that the Mhiripiri house is entitled to chieftainship when Rangarirai Mhiripiri disputes this fact.

The first defendant stated that the reason why the plaintiffs protested and brought this claim was not because of his alleged ineligibility but that he was simply younger to them in terms of age and they would not countenance to be ruled by a younger person. He said it is known that after the Magaso house the next house is the Mapeta/Chisvo house, a fact disputed by Elizabeth Mapeta who said her house of Chisvo/Mapeta was entitled to Headmanship.

According to the first defendant the voting system was never used to choose the Magaso house but each house was simply asked to choose its preferred eligible house.

I was clear to the court that the first defendant was not able to abide by his evidence in chief when he was cross examined. I shall proceed to highlight few examples.

Under cross examination this first defendant said that the succession custom is rotational and that all the eligible houses are ranked in terms of age and follow that format. The issue of “ranking” the houses is a new issue not part of the first defendant’s plea nor his evidence in chief. The plaintiffs’ case has been clear and consistent that the Hata Chieftainship is based on Kadzima’s 3 wives and their progeny which forms the basis of the 3 houses and not the “ranking” of the houses. In fact the first defendant admitted that he was raising a new issue and had no explanation for omitting such vital information about the succession custom. When the first defendant was pressed to outline the succession custom of the Hata clan he then dismissed the existence of any succession custom and had this to say:-

“A. Nowadays we can’t sit down and choose a chief because there are now benefits of cars, tractors, electricity so we now need the District Administrator’s assistance”.

I find that statement to be misleading because such benefits only accrue to a properly chosen person in terms of the law and cannot be the basis to depart from prevailing principles of succession in choosing eligible persons to be chiefs.

Under cross examination the first defendant seemed to accept that an election or voting system was used. This flows from the answer the first defendant gave;

“Q. Was the 7 vs 3 in keeping with the traditional custom of succession?

A. Yes, it was our election”.

The first defendant was asked to explain why the so called election was restricted to the two houses only. The first defendant shifted ground and said the District Administrator did not restrict the election to the two houses of Magaso and Kadzima but solely relied on the records available from 1967 to 1982. The first defendant was not able to identify such records.

Under cross examination the first defendant admitted that when Kadzima relinquished Chieftainship his blood brothers Bonde, Dzapasi and Mwarura took over and

that thereafter the chief reverted to the Kadzima house, that is Baysisai Bonde Kadzima 1966 to 1982, Elias Musasikwa Kadzima 1982 to 1997 and Shareck Boriri Kadzima 1997 to 2001. The defendant was asked to give an explanation for this and the following exchange took place.

“Q. If your version is correct how do you explain that 3 children from the same house Kadzima house ruled one after the other from 1966 to date if the houses were using the rotation system.

A. It was improper. Bayisai Kadzima fraudulently got chieftainship from Bonde house.

Q. So between 1966 to 2007 money or force was used to retain chieftainship in the same Kadzima house.

A. Some were there properly like Elias Musasikwa Kadzima only. Shadreck Kadzima was not properly chosen and installed as we never sat down and Bayisai Kadzima fraudulently masqueraded as from Bonde House”.

All these issues now raised by the first defendant are new evidence as this is not part of the first defendant’s plea and was never put to the first plaintiff and his witnesses in cross examination. I find it to be incredible that the traditional custom of succession would not be followed for 45 years and the available records would not capture all that. It is even more incredible when the first defendant fails to raise such issues in his plea and in cross examination of the first plaintiff and his witnesses.

The first defendant was asked how Kadzima assumed chieftainship after his release from captivity when he was not the eldest son of Samuwozi. In reply the first defendant said again Kadzima was not properly chosen but imposed himself and was never anointed by Samuwozi. If this is true it would then mean that the succession custom was not followed even at this stage!

It is clear to me that as the cross examination progressed and more contradictions emerging from his evidence the first defendant was prepared to rubbish all what was said by the first plaintiff and his witnesses even if this resulted in the damage to the first defendant’s case. An example is when under cross examination the first defendant said the Hata Chieftainship has never had any traditional regalia like a ganho or axe or anything called ‘fuko’. In fact he said this was all fabrication by the first plaintiff and his witnesses. This flies in the face of the first plaintiff’s clear evidence well corroborated by his witnesses and

available records. In fact the evidence Erika Kadzima the widow of the late chief Shadreck Boriri Kadzima 1997 - 2001 is clear that there is such traditional regalia as she still has the regalia which was being used by her late husband. Again my view is that the first defendant is being untruthful or he simply does not know the very basic aspects of the traditional customs of the Hata chieftainship.

My assessment of the first defendant is that he totally discredited himself when he said that the first plaintiff was corrupt and greedy because he had offered the first defendant 5 beasts in order to induce the first defendant to relinquish claim chieftainship. This seemingly important issue which discredits the first plaintiff was only raised belatedly in my view as an after thought. It is not part of the first defendant's plea. It was not put to the first plaintiff in cross examination. No such report was made to either the Police or the District Administrator by the first defendant. This is incredible.

It would appear that when the first defendant was cross examined he abandoned his evidence in chief and sought to lead new evidence. An attempt by the court to seek clarification from the first defendant even yielded more confusion. Few examples suffice.

- (a) Initially the first defendant had said there were 7 houses entitled to the Hata chieftainship but when asked by the court he changed and said the eligible houses were 12 to 14 houses and that he was unsure of the exact number.
- (b) First defendant was not able to explain why he was saying the Zviseko and Makoko houses were unknown when they appear on the very family tree the first defendant said is authentic,
- (c) First defendant was not able to give the historical background and evidence on how the 12 or 14 houses rotated or how his house fits in this system of rotation leading to his appointment. He was unable to give the family history in support of his assertions.
- (d) First defendant was unable to explain how the other 12 or 10 houses were eliminated in this rotation system to leave only the Kadzima and Magaso houses to compete for chieftainship.
- (e) First defendant was even heard to tell the court that he is not aware of the "tsungu" concept and that no house on the family tree was given "tsungu".

- (f) First defendant admitted that the allegation that he traces his lineage to an illegitimate son of Samuwozi (mubvandiripo) one Magaso is not a new allegation but had been raised in the past though it is false. He accepted that up to his appointment no-one from the Magaso house had been appointed chief and that he is not aware of the reasons why his father Tserai declined to be chief.
- (g) His explanation as to why chieftainship remained in Kadzima house from 1967 up to his appointment is that the Hata chieftainship was never properly handled until only at the time of his appointment.
- (h) First defendant was now heard to say the majority vote of 7 to 3 houses was irrelevant to his appointment as he was not chosen on that basis but on the basis of rotation.
- (i) Lastly the first defendant finally admitted that his forebears from Magaso were not buried in the 'Chitsanza'.

All I can say is that the first defendant was a very poor and incredible witness. He was unable to tell a coherent and consistent story on most issues discussed.

I now proceed to assess the evidence of the witnesses called by the first defendant.

Tengerai Kadzima

Tengerayi Kadzima told the court that he is the eldest surviving person who traces his lineage to Kadzima and that both the plaintiffs and the first defendant are younger to him. He is 86 years old. He however did not participate in the meeting held to choose the next subsequent chief Hata and was not at the meeting held at Sedze Business Centre on 27 January 2005.

According to Tengerai Kadzima the prevailing succession custom of the Hata chieftainship is that there are 6 eligible houses, which are Kadzima, Hakunamutsa, Bonde Dzapasi, Magaso and Madora. Suffice to note that this list differs from the list of eligible houses given by the first defendant and also is contrary to the recorded history already alluded to.

Tengerai Kadzima testified that the 6 eligible houses rotates amongst themselves. Contrary to the first defendant's evidence he said the Makoko and Zviseko houses are known

but that both Makoko and Zviseko died without children. He told the court that Kadzima was a very brave warrior and a hero and that this was the reason why he assumed the Hata chieftainship even though he was not the eldest son of Samuwozi. This is at variance with the first defendant's evidence that Kadzima fraudulently took over chieftainship improperly and that he was not a brave warrior. Tengerai Kadzima indicated that whilst Bonde, Mwarura and Dzapasi took over at some stage the Hata chieftainship they did so as caretaker chiefs when Kadzima was in exile.

According to Tengerai Kadzima it is incorrect to allege that all the houses which appear on the family tree exh 1 are eligible or entitled to the Hata chieftainship. He agreed that the first plaintiff and other witnesses that the family tree is a "mixed bag" as it were (musanganiswa) as it contains those houses entitled to chieftainship (6 houses), and those entitled to headmanship who were given 'tsungo' like Mhiripiri, Mautsi, Nyakayi and Chamaya. This confirms that the tsungo concept is part of the succession custom of the Hata people contrary to the first defendant's evidence.

He said all what the family tree shows are Samuwozi's sons and that it is false and misleading to say that all the Samuwozi's children as reflected in the family tree are entitled to chieftainship. He insisted that only 6 houses are eligible and that the other non eligible 6 houses are only allowed to participate as assistants in choosing the chief.

According to Tengerai Kadzima the spirit medium or svikiro played a role in the choice of the chief and the house eligible but that as at now the svikiro is no longer used. He said the same applies to the custom relating to twins which in the past prohibited twins from being appointed chiefs but is no longer the case. He conceded that the first defendant is the first to be so chosen when he is a twin. He however said circumcision is still a mandatory requirement for one to be chief.

Tengerai Kadzima testified that none of the first defendant's forebears from Magaso were buried at the sacred place reserved for chiefs called "chitsanza". He however was unable to explain the reasons thereof. Likewise he was also unable to explain why from 1966 to 2001 all the chiefs appointed traced their lineage to Kadzima and that the chieftainship was not rotating among the 6 houses as he had said. It was difficult to accept that he genuinely did not know the reasons thereof on account of his age. He also contradicted the first defendant when he told the court that he had never heard the rumours or allegation that the first

defendant traces his lineage to Samuwozi's son Magaso who is deemed not to have been Samuwozi's biological son but an illegitimate son (mubvandıripo). Again in view of his age, the evidence of the first plaintiff and his witnesses on the point and the concession by the first defendant that this allegation was a notorious fact amongst the Hata clan it is unlikely that Tengerai Kadzima at his age would not have heard about it, whether it is true or false.

Tengerai Kadzima testified that he was not part of the people who gathered at Sedze Business Centre on 25 January 2005. In fact he seemed not to have taken part in any such meetings relevant to appointment of the first defendant. He however said the eligible house according to their succession custom is chosen by consensus and that if the meeting at Sedze Business Centre and did not reach a consensus the first defendant's house should not have been deemed duly appointed as consensus was part and parcel of their succession custom.

My assessment is that Tengerayi Kadzima on account of his age has a very rich knowledge of the Hata Chieftainship, the prevailing principles of succession and tradition of the Hata people. His evidence is more in tandem with the plaintiff's case rather than the first defendant's case. Other than his evidence that Magaso house is entitled to chieftainship he seemed to disagree with the first defendant on almost all the issues.

Simon Nyatondo

Simon Nyatondo regards himself as the eldest son in law of the Hata clan (mukwasha mukuru). It however became clear to the court when he testified that he was not useful to the first defendant's case and that his evidence was irrelevant. He told the court that he was not privy as to the prevailing principles of the succession custom of the Hata people/chieftainship as he was an outsider as it were. His only role in the Hata clan as the eldest son in law is not related to appointment of the chief but is in relation to the sacred hut-'zami' which is used for rain making rituals. He said he is the person allowed to enter the zami and not the incumbent chief. Lastly he was clear that the chief's traditional regalia is not kept in the zami.

In my view Simon Nyatondo was an irrelevant witness who added no value to the first defendant's case.

Lazarus Kadzima

According to Lazarus Kadzima he took part in the meeting held at Sedze Business Centre on 25 January 2005 which culminated in the appointment of Magaso house as the eligible house.

According to Lazarus Kadzima none of the first defendant's forebears, that is Magaso and Tserayi are buried in the sacred place "chitsanza" reserved for chiefs. He had no much knowledge about the prevailing principles of succession of the Hata Chieftainship. He however said all the houses in the family tree exh 2 are entitled to the Hata chieftainship except Masiyanyanda, Zviseko and Makoko. He was unable to explain why only these three houses are ineligible.

Lazarus Kadzima said the Magaso house was entitled to chieftainship and that it was properly chosen on basis of the wish of one of the last chief Boriri Kadzima who left word to the Hata clan that Magaso house should be chosen as the next eligible house just before he died. According to him this is the basis upon which Magaso house was chosen. This issue is only being raised by Lazarus Kadzima and is not part of evidence given by any of the witnesses including the first defendant or the old man Tengera Kadzima, None of the witnesses ever said that it was part of the succession custom of the Hata chieftainship for the last incumbent chief to anoint the successor house before he dies. I find this aspect of Lazarus Kadzima's evidence to be highly improbable.

As regards the deliberations of Sedze Business Centre meeting Lazarus Kadzima said the meeting went on very well and that there was no disagreement at all. He said the meeting was held in a friendly environment, there were no quarrels or disagreements and that the consensus was reached by all houses on the choice of Magaso house as the next eligible house. Lazarus Kadzima said no voting system or election was carried out at the Sedze Business Centre meeting neither were ballot papers or show preference by the houses present was asked for. He said the allegation that there was a figure of 7 houses in favour of Magaso and 3 houses in favour of Kadzima house is all false, a fabrication and never happened.

My assessment of Lazarus Kadzima is that he is clearly not being truthful to the court. This explains why when he was told that the first plaintiff, the first defendant and all other witnesses present at Sedze business centre meeting were in agreement of the seven to three figure he was dumbfounded and could only say that this must have happened at the time he had gone to relieve himself at the toilets! This is clearly false because if he was at this

meeting he could not have missed completely on what happened at this meeting which is largely common cause, more so the crucial part on how the meeting was concluded.

To my mind Lazarus Kadzima was another untruthful and irrelevant witness. He was unable to explain the prevailing principles of succession custom of the Hata chieftainship saying he was too young to know that and had spent most of his life in Harare. This explains why Lazarus Kadzima for some reason thought he could gain relevance by being untruthful. It is quite clear he was not at the Sedze business centre meeting in January 2005 because his version of events is at variance with the evidence of all those that were present including the first defendant even on mundane issues. For example he said the meeting reached a peaceful consensus on the choice of Magaso house when everyone agreed that Magaso house prevailed on a majority choice of seven to three. He is the only one who says Magaso house was chosen on the basis of the last wish of Chief Boriri Kadzima. Finally, Lazarus Kadzima even blatantly lied that he witnessed the Deputy Minister installing the first defendant as chief Hata at the ceremony held at a local school, a fact even denied by everyone including the first defendant. Need I say more?

Mike Bonde

According to Mike Bonde not all the houses on the family tree are entitled to chieftainship. He listed the ineligible houses as Mwarura, Mhiripiri, Mautsi, Zviseko, Makoko, Chamaya and Masiyanyenda. He was however unable to explain the basis upon which why some houses were eligible and other ineligible. He was also unable in his evidence to explain how the rotational system of succession which he said operated among the eligible houses was implemented and the sequence of the eligible houses. All he could say is that the plaintiffs were just greedy and wanted to monopolise chieftainship. I find his evidence to be unhelpful as it did not corroborate the first defendant's evidence in all material respects.

In conclusion therefore the first defendant's evidence was not materially corroborated by the evidence of the witnesses he called. The first defendant himself was a very poor and incredible witness. All his witnesses were largely unhelpful to his case and added no value to the first defendant's cause. Their evidence could therefore not be accepted by the court.

Lastly I turn to the second to the fourth defendants' case.

SECOND TO FOURTH DEFENDANTS' CASE

The second to the fourth defendants only called one witness, the then District Administrator for Nyanga one NOEL MUNDETA at the material time (hereinafter referred as the "District Administrator – DA").

The DA told the court that when he assumed the post at Nyanga his predecessor had not resolved the Hata chieftainship issue hence he called the meeting at Sedze business centre on 27 January 2005 to deal with that issue. His evidence is that ten houses were represented at the meeting and he proceeded to inquire how the next eligible house was to be chosen. He was advised that the system was rotational amongst the ten houses and he gave each house the opportunity to air their views. The DA said from the views expressed the Kadzima, Hakunamutsa and Mhiripiri house said the Kadzima house was eligible and all the other seven remaining houses said Magaso house was eligible. He denied that people were given pieces of paper to write their preferred house and insisted that he simply verbally asked each house to say out its preference or choice.

The DA confirmed that the first plaintiff expressed his displeasure with the proceedings and the outcome but he remained unmoved and never promised to convene another meeting or to reconsider the outcome. The DA said after some time the Kadzima family visited him at his work place raising their objection to the choice of Magaso house as the eligible house. Again he did not accede to their demands and proceeded to recommend Magaso house as the one eligible.

The DA told the court that the family tree exh 2 was authored by an Administration Officer in the D A's office in 1982. The records in the D A's office which I have alluded to in exh 1 show that the last family tree was drawn up in 1997 not 1982.

On what was the source of dispute raised by the Kadzima house the DA said in his view three issues were raised, that is;

- (i) That only the Kadzima house had the right to "chitsanza" or "zami";
- (ii) That the chieftainship was rotational among six to seven houses; and
- (iii) That Magaso house was ineligible because it was given tsungo or headmanship and that they have big or long navels.

Judging from the above issues raised by the DA it is clear to me that the DA completely missed the issues raised by the Kadzima house or if he understood them he chose to misrepresent them.

Under cross examination the DA said in his view all the houses on the family tree are eligible to chieftainship and was not aware that some are not. I find this to be surprising especially coming from the DA when all witnesses inclusive of the first defendant agree that not all the houses on the family tree are eligible to the Hata chieftainship.

The DA was probed to explain how he arrived at the recommendation that the Magaso house was eligible. In response he said he was guided by the discussions he held at Sedze business centre on 27 January 2005, the views expressed at that meeting, inconclusive minutes of the 2004 meeting, government circulars, available records in his office and the enabling Act. Indeed I agree that these would be useful reference points to be used by the DA to arrive at an informed decision. The issue which then arises is whether he indeed walked the talk, that is made reference to all these sources?

Under cross examination the DA admitted that the records in his office as per exh 1 p 1 dated 17 November 1967 in para 6 indicate the eligible houses to the Hata chieftainship as follows:

- Kadzima
- Gwidibira
- Nyakayi
- Bonde
- Mapeta
- Dzapasi

The DA admitted that as per the document dated 17 November 1967 only the six listed houses were eligible and most importantly that the Magaso house is not among them.

The DA admitted under cross examination that as per exh 1 on p 5 in a document in his office dated 31 May 1982 in para e (ii) there are seven houses listed as being eligible to the Hata chieftainship and that the Magaso house is not one of them.

The DA admitted that as per exh 1 at p 7 in a document dated 7 February 1983 listing this eligible houses, the Magaso house is not listed.

Lastly the DA conceded under cross examination that as per the document in his office exh 1 at p 11 dated 23 September 1997 the eligible houses were collapsed to four

houses from seven houses and that still the Magaso house is not part of them. In fact the DA admitted that as per records in his office and for thirty years Magaso house had not been one of the houses eligible to the Hata chieftainship. In fact there are no records to show that the Magaso house is eligible.

The DA admitted in his evidence that in making his decision leading to the recommendation made to the third and fourth defendants he ignored all precedent and recorded history. Instead he said his decision was anchored on the family tree, views of the people and the inconclusive 2004 minutes. I find this to be baffling if not a serious misdirection. It has been shown that the family tree is not useful guidance in determining the eligible houses as not all houses on the family tree are eligible. The minutes of December 2004 by his predecessor by his own admission were inconclusive and reached no useful conclusion. The views of the people he gathered at one meeting at Sedze business centre on 27 January 2005 were clearly not unanimous as serious dispute arose as regards the prevailing principles of succession custom of the Hata clan and the eligibility of Magaso house. In fact the DA conceded that it was only the Magaso house which said all the houses on the family tree are eligible. It is therefore clear that the basis of the DA's decision and recommendation is incorrect. The sources of information used by the DA were not only unreliable but at times incorrect. The DA ignored recorded and compelling sources of information in his office. I am therefore not surprised that at the end of the day he produced two different sets of minutes for the same meeting held at Sedze business centre on 27 January 2005, one in exh 1 and the other exh 3. He even conceded that some of what is recorded in exh 3 alluded to **Kenneth Hakunamutsa** is incorrect. His explanation for having two different set of minutes for one meeting is totally unconvincing.

The answers given by the DA under cross examination clearly shows that his decision and recommendation were flawed. I refer to the questions and answers.

Q Are you versed with their (Hata clan) customary principles of succession?

A I am not well versed.

Q Why did you depart from documented evidence or records from 1967?

A That was overlooked

Q Did you find out why Magaso house has been excluded all along?

A I have not looked into that.

Q Why not?

A I agree it may be necessary.

Q Did you find out why all the previous chiefs (Hata chieftainship) were from Kadzima house?

A No.

Q Was this not important?

A It was.

Q Did you find out the role of the “svikiro” spirit medium?

A I was told there was none, if one was there I would have allowed it.

This exchange cited above clearly shows that the DA did not take on board the prevailing principles of succession custom of the Hata chieftainship in arriving at the decision or recommendation made. In fact the DA never sought to understand the prevailing principles of succession and the traditional customs. He failed to seek explanations and answers on obvious issues like why the Magaso house had never assumed chieftainship and why as per records it was never listed as eligible to the chieftainship. In fact the DA admits to have disregarded useful information available in his office. In my view he virtually admitted that he did not do a good and sound job. He was not privy to the customary mores of the Hata clan.

THE LAW

In terms of our law the appointment of the chiefs is done in terms of s 3 of the Traditional Leaders Act [*Cap 29:17*] which provides as follows:

“3. Appointment of Chiefs

(1) Subject to subs 2, the President shall appoint chiefs to preside over communities inhabiting in communal land and resettlement area.

(2) In appointing a chief in terms of subs (i), 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 interest 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 subpara (i) of para (a); Provided that, if the appropriate persons concerned fail to nominate a candidate for appointment as chief within two years after the office of the chief became vacant, the Minister in consultation with the appropriate persons, shall nominate a person for appointment as chief.”

It is therefore clear that in appointing the chief the prevailing customary principles of succession of the Hata clan should be considered. I am not persuaded by the argument by counsel for the second to fourth defendants that the first defendant was appointed in terms of the proviso in s 3 (2)(b) which relates to failure to nominate a candidate for appointment as chief within two years after the office of the chief became vacant. I am surprised that the second to fourth respondents would raise this argument in final written submissions when they did not place such evidence before the court. The first defendant himself does not even allege he was appointed on that basis. The second to fourth defendant’s case throughout the trial had been that the first defendant was appointed in accordance with the prevailing customary principles of succession of the Hata clan.

The provisions of s 31 k of the Constitution of Zimbabwe – are inapplicable in this case. This court is not making an inquiry as envisaged in s 31 k (1) or (2) of the Constitution. It is my firm view that this court has power to investigate whether the second and third defendants in formulating their advice to the President they acted on sound principle. See *Muskwe v Nyajina & Ors* HH 92-2007 at p 28 of the cycostyled judgment and in *Chagaresango v Chagaresango* 2000 (1) ZLR 99 (S) at 106 C wherein MUCHECHETERE JA had this to say:

“The appellant in this court is not asking the court to investigate how the President exercised his discretion but whether the Minister and his officials in formulating their advice to the President acted on sound principle. He argues they deliberately ignored or disregarded the customary principles of succession of Nenguwo clan. It is therefore to be an examination as to whether the advice admittedly given to the President was properly formulated ...”

The LEARNED JUDGE OF APPEAL continued at p 106 G – H:

“In our case there should be “due consideration” that is “proper”, consideration, of the law and custom of succession of the Nenguwo clan. The issue being raised by the appellant is that there was no “no proper” consideration because the wrong customs

and laws were taken into consideration and that there was collusion in the appointment ...”

In my view the prevailing customary principles of succession of the Hata (Wanyama) clan can be summarised as follows:

1. The suitable candidate must trace lineage to a true and legitimate son of Samuwozi Hata;
2. The suitable candidate must belong to identifiable eligible houses for the Hata chieftainship and supported by documented evidence;
3. The suitable candidate must be circumcised;
4. The fore fathers of the suitable candidate must have been buried at the clan’s sacred place called “chitsanza”.
5. The suitable candidate’s forefathers must have proved themselves in a war;
6. The suitable candidate must not have a criminal record;
7. The suitable candidate must be resident in the central kingdom (Dzimbabwe);
8. The suitable candidate must not belong to the houses who were given headmanship or “tsungo”;
9. The appointment of the suitable candidate should be approved by the spirit medium if available; and
10. The suitable candidate must be able to lawfully conduct traditional ceremonies and rites of the Hata clan including being custodian of “zami” and be able to handle the traditional paraphernalia and regalia which include sacred walking stick (tsvimbo dzeumambo), the ganho (axe), the drum (ngoma), shroud and the gun (which is currently not available.)

I have some doubt in my mind as to whether some practices like the ineligibility of twins or those with long or big navels are still being considered a requirement. While it is accepted that traditional customs evolve with time, I still share the firm view that the plaintiffs have shown that the prevailing customary principles of succession of the Hata clan are still applicable and no just cause was given as to why they were not considered. In fact the DA did not apply his mind as to which families or houses are eligible for the Hata chieftainship. This is a crucial issue. The DA did not find out why the first defendant’s Magaso house has never been eligible to the Hata chieftainship. This would have led to an

inquiry as to whether the first defendant is a descendant of and derives his lineage from Samuwozi Hata and whether his grandfather Magaso is Samuwozi's legitimate son and whether in consequence he is entitled to the chieftainship. The DA did not even seek to appreciate the value of the family tree *vis-à-vis* the eligible houses. To my mind the voting or majority system used by the DA is not consistent with the prevailing customary principles of succession of the Hata people. All in all there was no due consideration of the prevailing customary principles of succession of the Hata clan by the second and third defendants before they made their recommendation to the President. The plaintiff's case must therefore succeed.

In the result I make the following order:

1. That it is hereby declared that the customary principles of succession of the Hata (Wanyama) chieftainship were not given due consideration in the appointment of the first defendant as substantive chief Hata.
2. That the second and third defendants shall forthwith make a recommendation to the President of the Republic of Zimbabwe for the removal of the first defendant from the chieftainship of the Hata (Wanyama) clan.
3. That the first, second and third defendants shall pay costs of the suit jointly and severally, the one paying the other(s) absolved.

Mandizha & Company, plaintiffs' legal practitioners
Sinyoro & Partners, 1st defendant's legal practitioners
Civil Division of the Attorney General's Office 2nd, 3rd and 4th defendants' legal practitioners