MILTON MADYAUTA
versus
MAZVIONA MADZIVA

HIGH COURT OF ZIMBABWE
UCHENA AND MWAYERA JJ
HARARE, 20 December 2014 and 21 January 2015

Civil Appeal

Miss R. Bwanali, for the appellant
T. Nyakunika, for the respondent

UCHENA J: The appellant and the respondent had a dispute over land which they took to Headman Ganje for determination. Headman Ganje presided over the same dispute twice giving two different judgments. He initially found in favour of the appellant, but subsequently found in favour of the respondent. The respondent was aggrieved by Headman Ganje's second judgment, and appealed against it to Chief Saunyama's Court. Chief Saunyama found in favour of the appellant. The respondent then appealed to the Magistrate's court, which set aside Chief Saunyama's decision. The appellant then appealed to this court.

The appellant raised several grounds of appeal, which will be considered if the point of law raised on appeal does not resolve the appeal. The appellant's counsel raised the issue of *functus officio* in her heads of Argument. It is trite that a point of law can be raised at any stage even on appeal. See the cases of *Trustees, Leonard Cheshire Homes Zimbabwe Central Trust* v *Chite & ors* 2010 (1) ZLR 631, *Muchakata* v *Nertherburn Mine* 1996 (1) ZLR 153 (S) at 157, *Nissan Zimbabwe (Pvt) Ltd* v *Hopitt (Pvt) Ltd* 1997 (1) ZLR 569 (S), *Zesa* v *Bopoto* 1997 (1) ZLR 126 (S). It has therefore been properly raised and should be determined before the other grounds of appeal can be considered. If it succeeds it has the effect of resolving the appeal without considering the other grounds of appeal

Miss *Bwanali* for the appellant submitted that, the first judgment of Headman Ganje remains extant, so the Headman was *functus officio* when he presided over the same dispute for the second time. It is common cause that the Headman presided over the same dispute

twice. The law does not ordinarily allow a judicial officer to preside over the same case more than once. The *functus officio* principle simply means after hearing a case for the first time the judicial officer will have completed his functions over that case, and cannot hear it again. This rule is of universal application and ensures that justice is seen to be done. Allowing a judicial officer, to preside over the same case more than once opens, him, to giving, conflicting decisions, as happened in this case.

Mr *Nyakunika* for the respondent, submitted that s 20 (1) of the Customary Law and Local courts Act [*Cap 7.05*], provides against applying common law principles in customary law cases. It provides as follows;

> "**20** (1) Subject to this Act, the procedure and law of evidence in local courts shall be regulated by customary law and not by the general law of Zimbabwe, and the proceedings in such courts shall be conducted in as simple and informal a manner as is reasonably possible and as, in the opinion of the person presiding over the court, seems best fitted to do substantial justice."

The intention of the legislature is clearly to bar the application of general law principles of procedure and evidence from customary law proceedings. Miss *Bwanali* for the appellant while not disputing the clear meaning of s 20 took the court back into the provisions of the Customary Law and Local Courts Act in s 23 (1) and 24 (1) which she submitted introduced the principle of *functus officio* into customary law proceedings. Sections 23 (1)and 24 (1) provides as follows;

> "**23** (1) Any person who is dissatisfied with any decision of a primary court may, in the time and manner prescribed, appeal against such decision to the community court within whose area of jurisdiction the primary court is situated.
> **24** (1) Any person who is dissatisfied with any decision of a community court may, in the time and manner prescribed, appeal against such decision to a magistrate for the province within which the community court is situated."

Sections 23 (1) and 24 (1) clearly provides for an appeal to the next higher court if a party is dissatisfied by a decision of the trial court, at primary court and community court levels. This means these courts are not allowed to hear the same case again after determining it for the first time. They to use the general law principle become *functus officio* after determining a customary law case.

The facts of this case establish that the appeal against the primary court's second decision has scaled the hierarchy of the courts right up to this court without being shot down

for being a nullity. Each court laboured in vain on this nullity on which nothing can depend. It remains a nullity and must now be correctly defined. It should never have been given a status while the real judgment of the primary court remained unnoticed. A nullity does not gain status because it has erroneously been worked on by esteemed courts. It has never been and will never be a valid decision of the primary court. If any party is aggrieved by the first and valid decision of the primary court it must start from there and not this nullity.

In view of the above I find that the appellant's appeal is against a nullity and must therefore be up held. The respondent shall pay the appellants costs of suit.

Mwayera J agrees----------

Messers Mahuni & Matatu, appellant's legal practitioners
Messers Chibaya & Partners, respondent's legal practitioners.