THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPLICATION NO.46/97

CORAM: HON. MR. JUSTICE C.M. KATO, J.A.
HON. MR. JUSTICE G.M. OKELLO, J.A.
HON. MR. JUSTICE S.G. ENGWAU, J.A.

YEKOYAKIMU MWIMA HYABENE ::: APPLICANT

- VERSUS -

THE ATTORNEY GENERAL ::: RESPONDENT

RULING OF THE COURT

This matter came before us on reference apparently under the provisions of section 13(2) of the Judicature Statute No.6 of 1996 and rule 54(1) (b) of the Rules of this court.

The history of the application is fairly long but the gist of it is as follows. The applicant, Yekoyakimu Mwima Hyabene aged about 78 years, was appearing before Tinyinondi, J. in a civil case. He was not satisfied with the manner the learned judge was conducting the case. He thus demanded that the judge disqualifies himself from continuing with the hearing of the case. The judge overruled him and decided to continue with the hearing of the matter before him. The applicant did not take the judge's ruling lightly, he appealed against it. When, he however, discovered that his appeal was not as cheap as he had imagined, he had to deposit some money

as security for costs in the event of his losing the appeal and being ordered to pay costs to the other side, he checked on the position of the law. He discovered possibly with some relief that the law could come to his assistance if the court declared him a pauper in which case he would not be required to deposit any money for costs. He filed an application before this court seeking for declaration that he was a pauper under provisions of Rule 112 of the Rules of this court. The application was heard by our brother Twinomujuni, J.A. He dismissed the application on 10/3/98 on the ground that although the applicant could be regarded as a pauper, his intended appeal had no chance of succeeding. Hyabene, the applicant, saw the dismissal of his application not as the end of the road. He resorted to the provisions of the law as indicated above and had this matter placed before the three of us for consideration.

The matter proceeded ex parte under Rule 55(2) of the Rules of this court, after the applicant had successfully applied to the court to hear his side of the case in the absence of the respondent who had been served but had not bothered to appear in court. The applicant who argued the application personally submitted that he was a poor man, a fact which he said had been appreciated by the court which was presided by a single judge. He also insisted that his intended appeal against the ruling of Tinyinondi, J. had a high chance of succeeding.

Rule 112(1) of the Court of Appeal Rules 1996 under which this application was lodged reads, in part, as follows:

> "112. (1) If in any appeal from the High Court in its original or appellate jurisdiction in any civil case the Court is satisfied on the application of an appellant, that he or she lacks the means to pay the required fees or to deposit the security for costs and that the appeal is not without reasonable possibility of success, the Court may, by order, direct that the appeal may be lodged…………."

This rule clearly gives the court discretionary power to permit an intended appellant to file his appeal without paying the necessary fees or depositing security for costs, on being satisfied that such person lacks the means to raise money for such fees or security. In exercising this power, however, the court must act judiciously being guided by established and accepted principles.

In the instant case, before the court can declare the applicant a pauper, it (the court) must be satisfied that the applicant lacks the means to pay the required fees or security for costs and that his intended appeal has reasonable possibility of success.

The issue as to whether a person is poor' and fit to be declared a pauper is a point of fact which must be decided according to the evidence as adduced by the applicant. On 5/11/97 the applicant swore an affidavit in which he stated that he was a pauper living at the mercy of God and that he is medically invalid, aged 77 years and therefore unable to mulch the soil for a living (see paragraphs 3 and 5 of his affidavit). As there was no reply to this affidavit we have no reason not to believe what the applicant stated in it (affidavit). On balance of probability we are inclined to accept the applicant's claim that he cannot raise the necessary funds as security for costs.

Regarding the question of whether his intended appeal is likely to succeed, the applicant was confident that he would win the appeal.

This point cannot be handled properly without the decision of the Supreme Court in Civil Appeal No.14 of 1994 Hyabene v Attorney General being examined first. The facts of that case are the same as in the present case. The applicant who was the appellant in that case appealed to the Supreme Court against Mr. Tinyinondi's refusal to disqualify himself from presiding over HCCS No.655 of 1988. The Supreme Court dismissed the appeal on the ground that the judge was justified in refusing to step down. The court ordered that the case be retried. In the instant application the applicant's intended appeal is against the decision of the same judge for refusing to step down again in the same case. Considering the fact that the intended appeal is founded on

almost the same facts as in Appeal No.14/94 and between the same parties, this Court will not depart from the earlier decision of the Supreme Court. In the premises, we are of a firm view that there are no chances of the intended appeal succeeding.

We find that the applicant has failed to satisfy the requirements of the second leg of Rule 112(1) of the Rules of this court. The application to grant the applicant a status of a pauper is dismissed. Since the respondent did not appear at the hearing of this application it would be unfair to award him costs of this application.
The applicant is however to bear his own costs.

Dated at Kampala this 12th day of November 1998.

C.M. KATO
JUSTICE OF APPEAL

G.M. OKELLO
JUSTICE OF APPEAL

S.G. ENWAU
JUSTICE OF APPEAL