

REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

HCT-00-CC-MA-0010-2005

(Arising from HCT-00-CC-CS-0198-2001)

GABA BEACH HOTEL LTD

APPELLANT

VERSUS

CAIRO INTERNATIONAL BANK

RESPONDENT

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. This is an appeal against the decision of the taxing master in respect of the court bailiff's bill of costs filed in this court, in which he ordered the Judgement Debtor/Appellant to pay an unspecified sum of money to the court bailiff. The Court Bailiff's Bill itself was not taxed or signed by the Taxing Master. The appellant seeks that this ruling be set aside, and the respondent/judgment creditor be ordered to pay the Bailiff's Bill of Costs. The appellant further seeks that costs of this appeal be provided.
2. The appellant has set forth 8 grounds of appeal on which this appeal is based with an affidavit in support sworn by Peter Kiwanuka. The Respondent filed an affidavit in reply opposing this appeal, and asserting that it was the wrong party to the appeal, as this was a matter between the appellant and the Court Bailiff.
3. At the hearing the respondent was absent. So was Mr. Oine, who appeared for the court bailiff before the taxing master, though his firm had been served with court process. The same firm represented the respondent in the main suit. It would appear that the

respondent was not present at the hearing before the taxing master. The hearing before me proceeded in the absence of both the court bailiff and the respondent.

4. Before I deal with the grounds of appeal, I shall set out a brief history of this matter which is necessary for this decision. The Court Bailiffs, Festus Katerega, of Quickway Auctioneers and Court Bailiffs, were issued a warrant of attachment to sale the judgment debtors property situate in Luzira, which was the subject of mortgage in favour of the judgment creditor by the judgment debtor. After advertising the said property for sale, the applicant/judgment debtor made a series of applications to court, to halt the sale. These were HCT-00-CC-MA-444-2004 and HCT-00-CC-MA-453-2004.
5. A consent order was reached on 25th August 2004 in the following terms:
 - “1. That the Respondent/Judgment Creditor/Defendant signs a release of mortgage on Ggaba Beach Hotel Property comprised in LRV 1300 Folio 22, Plot 78 Block 251, Kyadondo at Ggaba.
 2. That the applicant/Judgment Debtor/Plaintiff shall pay all the debt due and owing to the Respondent/Judgment Creditor/Defendant within 45 days from today.
 3. That if after 45 days from today the Applicant/Judgment Debtor/Plaintiff shall not have paid all the debt and owing to the Respondent/Judgment Creditor/Defendant, the Respondent/Judgment Creditor/Defendant will proceed to execute the Warrant in respect of Luzira property, Plot No.207, Block 243, Luzira.
 4. That each party bears its own costs.”
6. On 12th October 2004, after the expiry of the 45 days, Festus Katerega of Quickway Auctioneers and Court Bailiffs, was issued with a new warrant of attachment and sale of immovable property, as the judgment debtor had not paid the decretal amount. They re-advertised the property for sale. Nevertheless in spite of the advertisement for sale the judgment debtor appears to have paid the decretal amount directly to the judgment creditor, at least going by the affidavit filed by the judgment creditor in this application. Paragraph 3 thereof states,
 - “That HCCS No. 198 of 2001 where the bank was the plaintiff/judgment creditor was concluded and its decretal sum and taxed costs duly paid by the judgment debtor herein the appellant/applicant after execution process.”
7. Following payment of the decretal amount the Court Bailiff then filed his bill of costs, and the same was fixed for a taxation hearing by the taxing master. The appellants herein objected to the bill of costs before the taxing master, at the hearing where both the appellants and the court bailiffs were represented, and argued their respective cases. The taxing master made his decision ordering that it must be paid by the appellant. It is from that decision of the taxing master that the appellant now appeals to this court.

8. Before the taxing master the appellant argued that as there was a stay of execution granted in this case it is the judgment creditor who should meet the bill of the court bailiff in accordance with rule 13 of The Court Bailiffs Rules. The Taxing Master found that the stay of execution granted was conditional, lasting only 45 days, within which time the appellant failed to pay the decretal amount. Fresh execution issued.
9. The Taxing Master further held that though the Court Bailiff had not actually sold the property, he had facilitated the sale of the property, by obtaining the best available price for it, upon which the judgment debtor, got a buyer, to pay for that value. In effect the Taxing Master held that the Court Bailiff had sold the property and was entitled to his fees for doing so, under Order 14 of Auctioneers Act, Cap 270, Laws of Uganda, 2000 Edition.
10. I now turn to the Grounds of Appeal. Grounds 1 and 2 will be taken together. Ground 1 is to the effect that the learned Taxing Master erred in law by allowing the Court Bailiff to apply on behalf of the Judgment Creditor when in fact he is an agent of Court. Ground 2 is that the Learned Taxing Master erred in law when he allowed to hear the application of the Bailiff for his Bill of Costs which brought in the names of the Judgment Creditor. In his bill of Costs filed in the Court the Bailiff, and in particular in the intitulement, set out the name of the court, and the parties to the head suit, and thereafter below, the heading or subheading "Bailiffs Bill of Costs". This did not amount to making the application in the names of the judgment creditor. The bill of costs merely regurgitated the parties in the usual intitulement of papers filed in a cause. Perhaps what was missing in the intitulement is the name of the Bailiff. Nevertheless I am satisfied that this oversight is not fatal to the bill. These two grounds have no merit whatsoever in my view.
11. Ground 3 is to the effect that the Learned Taxing Master erred in law by ordering the Bill of Costs to be taxed when the Bill itself was an illegality. The appellant did not argue this ground at all. I take it that it was abandoned. It is rejected accordingly.
12. Ground 4 was to the effect that the Learned Taxing Master erred in law when he entertained the matter and allowed the Respondent's Counsel to proceed with his submissions and yet he never put in a Reply to the affidavit in Opposition of Taxation of the Appellant/Applicant. The appellant appears not to have argued this ground. He pointed to no authority for the proposition that is espoused in this ground. In any case

from the record, it is clear that Mr. Oine who appeared, was on record for the Bailiff, and not the Respondent. It is also true that Mr. Oine is a member of the firm that acted for the Respondent in the main suit. This ground has no merit. It is rejected accordingly.

13. Ground 5 is to the effect that the Learned Taxing Master erred in law and in fact when he concluded that the Bailiff was entitled to the Costs in item 1 of his Bill of Costs dated 30th December 2004 amounting to UGS. 5,400,000.00 and yet those instructions had been stayed by Court.
14. The Taxing Master reviewed the order staying the execution that the appellant relied upon, and found that the stay was conditional for only 45 days, during which time the appellant, ought to have paid the decretal amount. He found as a fact that the 45 days elapsed without payment. I agree that this stay of execution was conditional, and it expired before the end of the second week of October 2004. The order staying the execution expressly provided that “the Respondent/Judgment Creditor/Defendant will proceed to execute the Warrant in respect of Luzira property, Plot No.207, Block 243, Luzira.” in event non-payment by the expiry of the 45 days. The stay of execution in this case had expired. I cannot fault the learned taxing master for finding so. Authority was available in this consent order for attachment to proceed in event of non-compliance.
15. In spite of the Taxing Master rejecting the appellant’s submission in this regard, he nevertheless, did not expressly tax and or allow the amount claimed under the head complained of. The taxing master ought to have indicated both in his ruling and subsequently on the bill if he was allowing the whole sum as claimed in that particular item. I will return to this matter later.
16. Ground No. 6 was to the effect that the Learned Taxing Master erred in law and in fact when he came to wrong conclusion that the bailiff sold the applicants property whereas not. I will set out the crucial finding and reasoning of the taxing master in his ruling.

“The conclusion is that the Auctioneer conducted the auction on schedule as advertised and still got a buyer but the Registrar advised the auctioneer to compare the offer of the buyer with the valuers report which the auctioneer did not have then. *Had the auctioneer had the valuer’s report, probably he would have sold off the property. The delay in getting the valuer, gave advantage to the Judgment Debtor, more so after realising the value of the house from the highest bidder to get another buyer because the Judgement Creditor simply wanted his money, accepted to the Judgment Debtor’s arrangement and the property was paid for by Judgment Debtor.* It cannot therefore be said that the Auctioneer did not sell the property. He did it or rather facilitated the sale of the property by getting the highest value of the property

for the buyers point of view, that “forced” the judgment debtor to pay for it. Whether the Judgment Debtor paid the property or not, it was still going to sell at Shs.180,000,000.00 which the debtor paid for it anyway, to me the Auctioneer sold the property he attached and he is entitled to the Auctioneers fees as is provided for in O.14 of the Auctioneers Act, Cap. 270, 2000 Edition. The Judgment Debtor has to pay.” (emphasis is mine)

17. It is clear from the foregoing passage that the Taxing Master found as a fact that the Auctioneer did not actually sell the property attached, but that the auctioneer’s actions including the publication of an offer he had received for the property had compelled the judgment debtor to pay off the judgment debt to the judgment creditor. The Taxing Master therefore concluded these actions of the Auctioneer entitled the auctioneer to fees including fees for conducting a sale under Order 14 of the Auctioneers Act, Cap 270, Laws of Uganda 2000 Edition.
18. I agree with the Appellant that this conclusion is erroneous. The auctioneer did not sell the property in question. Much as the auctioneer did take the actions that he undertook, those actions did not amount to a sale of the property in question. The auctioneer’s action fell short of conducting a sale. In any case the auctioneer did not have the certificate of title to the property. The auctioneer did not receive the purchase price for the property. He did not conduct an auction or sale of the property. The auctioneer cannot point to any person and say that is the person I sold the property in question to.
19. No doubt the auctioneer is entitled to remuneration and reimbursement of out of pocket expenses to be charged to the judgment debtor as is allowed by the applicable law. Such remuneration can not be for conducting a sale that he never conducted. It must be in respect of services rendered, which in this case is attachment.
20. I have perused the Auctioneers Act, and it appears to me, it does not deal with the issue of fees for auctioneers, save to authorise the Minister to prescribe the maximum rate of commission which an auctioneer shall be entitled to for his services under Section 18 (b) thereof. The Auctioneers Act has no reference to Orders. So I am not sure what the taxing master was calling Order 14! Remuneration of an Auctioneer acting as a court bailiff is governed by The Court Bailiffs Rules S I No. 64 of 1987 as amended by S I No. 15 of 1991, and in particular rules 15, 16 & 17.
21. Ground No. 7 was to the effect that the Learned Taxing Master erred in law when he failed to properly evaluate the evidence on record to reach a correct decision. This ground

was not specifically argued and I will take it as abandoned. In any case it is too vague and general. It is rejected accordingly.

22. Ground 8 is to the effect that the Learned Taxing Master erred in law to hold that fresh execution ensued after the 45 days granted by Court to the Judgment Debtor when in fact there was no execution because the judgment creditor still had the judgment debtor's certificate of title which it had refused to release to precipitate the sale. I do not agree that the possession of the certificate of title by the judgment creditor in itself is a basis for asserting that no execution could issue. Of course attachment of immovable property requires the giving up of the certificate of title to the court in accordance with Order 19 Rule 51 of the Civil Procedure Rules. On 12th October 2004 the Registrar issued a warrant of attachment and sale of immovable property for the Luzira Property to recover the sum of Shs.177,667,883.00 only. Execution was thus set in motion again. The delivery of the certificate of title by a person in possession of the same was to be a consequence of this order. This ground therefore fails.
23. I have perused the ruling of the learned taxing master, and no where does it deal directly with the sums of money set out in the court bailiff's bill of costs. He does not indicate whether the full amount claimed is allowed, or there is an amount or it is nil taxed off. I have looked at the Court Bailiff's bill of costs on the file. Similarly neither is it 'taxed'. There is no certificate of taxation indicating a final figure allowed by the taxing master. In effect, in spite of making a ruling on matters argued by the parties, the learned taxing master did not tax the bill of costs, as he ought to have done.
24. In the result I remit the court bailiff's bill of costs back to the taxing master for taxation, in accordance with the applicable law, and consistent with this decision.
25. I will make no order as regards costs of these proceedings. The appellant has failed on 7 grounds out of 8. At the oral hearing no effort was made to cite the relevant law on any of the grounds raised in this appeal, including on that ground where the appellant may be taken to have succeeded. The respondent did not attend the hearing of the appeal, though served, and as such deserves no costs.

Dated at Kampala this 14th day of July 2005

FMS Egonda-Ntende

Judge