



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT KISUMU

CIVIL APPEAL 308 OF 2006

JONE BROOKS CONSULTANTS LTD.....APPELLANT

AND

CO-OPERATIVE BANK OF KENYA.....RESPONDENT

**(An appeal from the judgment of the High Court of Kenya at Kisumu (Warsame, J) dated 9th
November, 2006**

in

H.C.MISC. C. APPL. NO. 263 OF 2005)

ORDER OF THE COURT

This appeal (Civil Appeal No. 308 of 2006) came up for hearing before this Court differently constituted on 21st March, 2007. The Court *suo moto* raised a question as to whether the appellant, Jone Brooks Consultants Limited, being a limited liability company can legally carry out the business of a licensed auctioneer under the Auctioneers Act, Act No. 5 of 1996. Mr Ragot the learned counsel for the appellant indicated at that time that he needed time to consider the matter. He thus applied for adjournment on that ground. As Mr Owiti, the learned counsel for the respondent, did not oppose the application for adjournment, the hearing of the appeal was stood over to this session, but it was only to be fixed for mention to enable Mr Ragot inform the Court whether the appeal would still proceed to hearing or not despite that concern raised by the Court.

The appeal came up for mention on Wednesday 20th June, 2007. Mr Ragot, having considered the matter, applied to withdraw the appeal. He however submitted that the appellant should not be condemned to pay costs for the appeal on grounds first, that it was the fault of the licensing officer that licensed the appellant to carry out the work of an auctioneer. Secondly, Mr Ragot argued that the issue that has resulted into the appellant withdrawing his appeal was raised by the Court *suo moto* and so the respondent does not deserve costs as he did not take action resulting into appeal being withdrawn. Thirdly, the matter had been raised by the respondent in the superior court but was rejected and the respondent did not appeal against that rejection by the superior court. Thus, Mr Ragot concluded that the respondent did not deserve the costs and the appellant should not be punished for the fault of licensing officer.

Mr Owiti on the other hand while not opposing the application to withdraw the appeal, and while accepting that the respondent raised the point resulting into application for withdrawal of the appeal in the superior court but without success and it did not appeal against the superior court's decision on the same, contended however, that this was a matter of law and was thus rightly raised by the Court *suo moto*. He submitted that costs should follow the events.

We have considered the application to withdraw the appeal filed on 24th March 2006. As it is not opposed, and as it is based on proper grounds, we allow it as prayed. Thus, Civil Appeal No. 308 of 2006 filed in the Court on 24th November, 2006 is hereby marked as withdrawn.

As to costs, the entire record was served upon the respondent, and it had to take instructions on it to prepare for the appeal. That included preparation on both matters of facts as well as matters of law. Whether the appeal fails on points of facts or of law or of both facts and law and whether such points of law are raised by Court *suo moto* or by any party, is in our view, neither here nor there. The Court, however, has the discretion in the award of costs. The time honoured principle that costs follow the event is a guideline on the exercise of that discretion. We have considered the matter before us anxiously. We see no reason to deviate from that principle. The appellant shall pay the costs of the appeal to the respondent

Orders accordingly.

Dated and delivered at Kisumu this 22nd day of June, 2007.

P.K. TUNOI

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JUDGE OF APPEAL

E.M. GITHINJI

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR