

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 1145 of 2000

FINA BANK LIMITED

PLAINTIFF

VERSUS

MARIRI ENTERPRISES LTD. DEFENDANT

RULING

The defendant/applicant has brought this application under O. IXA Rules 10 and 11, O. XXI Rule 25 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act for orders:-

- (a) that the ex parte judgment entered in this matter on 7.2.2001 be set aside; and
- (b) that there be a stay of execution of the orders issued pursuant to the order of 7.2.2001.

The application is supported by an affidavit sworn on 1.3.2001 by Mr. Amos Kathuri Mugambi, the applicant's advocate who claims that he was unable to file a defence because the court file was missing.

There is however no evidence to show that the file ever went missing. In that respect, I note that no complaint was ever made to the Deputy Registrar of this court about the matter prior to the filing of this application and to me the allegation appears to be an afterthought. If indeed it is true that the court file could not be traced, there is a procedure, which Mr. Mugambi should be aware of, of opening a skeleton file so that no party is prejudiced by the failure to trace a particular file. There being no evidence that any report was made about the matter or that any attempt was made to open a skeleton file, which in itself is a very rare occurrence in this court, there is in my view sufficient ground for believing that what Mr. Mugambi states is not true. The application is therefore based on false premises and must therefore fail. It is dismissed with costs.

Dated at Nairobi this 26th day of March, 2001.

T. MBALUTO

JUDGE