

**IN THE HIGH COURT OF TANZANIA**  
**(DAR ES SALAAM DISTRICT REGISTRY)**

**AT DAR ES SALAAM**

**LAND CASE NO. 18 OF 2017**

**BARNABAS JOEL RWEIKIZA.....PLAINTIFF**

**VERSUS**

**APPOLLO JOEL RWEIKIZA ..... 1<sup>ST</sup> DEFENDANT**

**ULIANETH JOEL RWEIKIZA .....2<sup>ND</sup> DEFENDANT**

**SALUM RASHID ABDULLAH.....3<sup>RD</sup> DEFENDANT**

*Date of last Order: 02/04/2020*

*Date of Ruling: 14/07/2020*

**R U L I N G**

**MGONYA, J.**

Before this **Court is Land Case No. 18/2017**. Both parties appeared represented whereas the Plaintiff is represented by Mr. Denis Mwesiga while the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondents are represented by Mr. Almando Swenya, while the 3<sup>rd</sup> Respondent is represented by George Shayo. In the course of hearing of the Plaintiff's case, the Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent raised an objection to the effect of:

***a) Objecting the production of the exhibit the copy of the will, for the reason that the original was lost.***

Submitting for the objection, it was submitted By Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that, basing on the reason that the will was lost, while there is no any evidence that effect, the reason cannot be accepted, the same was lost serve for production of a loss report from the Police. However, that was not the case.

Further, it was the contention of the 3<sup>rd</sup> Respondent's learned Advocate that he concur with objection by the learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents that there must be a loss report to support that the will is lost.

In reply to the objection Mr. Mwesiga learned Advocate maintained that, the witness had reported the loss at Bukoba Police station and that the copy of the will has stamp duty to show that the will is lost, and further the copy was also endorsed by the Plaintiff herein.

In rejoinder, Mr. Swenya Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents stated that it is not a Police duty to issue a stamp duty upon loss, but rather to give a receipt of filing loss report. On the matter that the same was endorsed by the Plaintiff himself, those are mere words from the Plaintiff that there was a loss. Together with the 3<sup>rd</sup> Defendant's Counsel, reiterated

and insisted the objection on the admissibility of the document.

Having carefully perused the records of the court, it is my firm opinion that, as a matter of practice that, when one loses an important document it has to be reported to the police. Then the loss of the document is registered and a loss report form is filled. A copy of the lost document is attached to the loss report for further use of the copy for purposes of proving that the original is lost. After the loss is reported and a loss report is provided, the same has to be published in the newspaper for public awareness.

However, coming to our case at hand, the Plaintiff before this Court seeks to tender copy of a will for the reasons that the original will is lost; and that the loss was reported by the Plaintiff at Bukoba Police Station and they stamped the same with the stamp duty to show that the matter was reported and paid for. It is my serious observation that this is not the procedure aligned to the reporting of a lost document. Further, the issue whether the document was paid for or not is not a fact at issue before this honourable court but issue here is on the loss of the original will.

I have the knowledge of the procedure where a Will has been Lost, Misplaced or Destroyed as enshrined in the law. In case where the written will has been lost, misplaced or

destroyed by a person other than the testator and a copy or draft of the will has been preserved. At the time of petitioning for probate, the copy of draft be granted, until the original will is properly authenticated copy of it is admitted to probate. The law under ***section 25 (1) (a) Probate and Administration of Estates Act Cap. 352 [R.E. 2002]*** states:

***"In case, no such copy or draft has been preserved, probate may be granted of the contents of the will, if they can be established by evidence".***

In the circumstances where an application of a copy or draft of the will is to be made, the petitioner is required to file his/her petition together with relevant documents. The documents are the same as those made by petition annexed with the Will, it requires to be supported by an affidavit or affidavits showing that the copy produced is an accurate copy of the original will and proving the existence of the will after the death of the testator.

In the circumstance at hand I am of the view that the will tendered is said to be a copy and that the original was lost. It would be proper for the Will to have been accompanied by a loss report form to prove that the original will was lost and has been reported; or the will ought to be accompanied by an affidavit sworn by a witness who is in knowledge of the contents of the original will. **The affidavit by requirement of**

**law needs to be an affidavit sworn by the witness of the will or one who had knowledge of the contents of the will.** This would have amounted to the will at hand to be competent to be tendered before this Court.

An Affidavit in its general sense is a written statement which contains matters which the deponent knows or believes to be true and which statement has been made on oath or affirmation.

It is my firm view that if the Will at hand was accompanied by such affidavit or a loss report form, it would have been competent to serve the purpose it is intended to serve in these proceedings before this court. The will being endorsed by one Barnabas Muaguzi s/o Joel Rwekiza who is a heir to the estate is not a legal way to deal with a copy of a lost document to legalise the use of its copy. Since an heir is not entitled to know contents of the will before the Testator dies.

Having said the above, **I find the objection of the Respondents to have merits and is therefore sustained.**


It is so ordered.



  
**L. E. MGONYA**  
**JUDGE**  
**14/07/2020**

**Court:** Ruling delivered in the presence of Mr. Denis Mwesiga, Advocate for the Plaintiff, Ms. Magreth Kisoka, Advocate for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, Ms. Magreth Kisoka, Advocate holding brief for Shayo, Advocate for the 3<sup>rd</sup> Defendant and Ms. Janet Bench Clarke in my chamber today 14<sup>th</sup> July, 2020.



  
**L. E. MGONYA**  
**JUDGE**  
**14/07/2020**