



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT CHUKA

SUCCESSION CAUSE NO.758 OF 2015

(FORMERLY MERU SUCCESSION CAUSE NO. 456 OF 2009)

IN THE MATTER OF THE ESTATE OF M'KENYA NJAGI Alias M'AKENYA NJAGE - (DECEASED)

JOHN NJAGI DAN.....PETITIONER

VERSUS

JUSTUS NYAGA DAN M'KENYA.....1ST OBJECTOR

FRANCIS J. NJAGI M'KENYA.....2ND OBJECTOR

MUTEGI DAN.....PROTESTOR

J U D G M E N T

1. This cause relates to the estate of the late M'Kenya Njagi (deceased) who died at Embu Hospital on 24th December, 1990. According to the petition for letters of administration presented to this court (P&A5) the deceased died intestate leaving behind the following dependants surviving him namely:-

- (i) Ciambaka Dan
- (ii) Mbaka Dan
- (iii) Munene Dan
- (iv) Nyaga Dan
- (v) Kariga Dan
- (vi) Mutegi Dan
- (vii) Gitari Dan
- (viii) Kaari Dan
- (ix) Kanyua Dan
- (x) Kagendo Dan
- (xi) John Dan

2. The deceased died leaving the following assets comprising the estate namely:-

- (i) Karingani/Muiru/194
- (ii) Karingani/Ndagani/91

(iii) Karingani/Muiru/534

3. John Njagi Dan, the petitioner herein was appointed the administrator of the estate of the deceased on 4th July, 2011 and vide Summons for Confirmation of Grant dated 3rd March, 2014 he together with Justus Nyaga Dan and Francis J. Njagi M'Kenya for confirmation of grant and proposed to have the estate distributed as follows:-

(i) **L.R. No. Karingani/Ndagani/91 (measuring approximately 42.2 acres).**

- a) Francis J. Njagi M'Kenya - 4.5 acres
- b) Justus Nyaga Dan M'Kenya - 4.5 acres
- c) Julius E. Munene Dan - 4.5 acres
- d) Augustine Karuga M'Kenya - 4.5 acres
- e) Mutegi Dan - 4.5 acres
- f) Gitari Dan Elosy Mukwanjeru -to share 4.5 acres jointly Nesbit Kirimi Gitari
- g) John Njagi Dan - 4.5 acres
- h) Alban Micheni Dan - 3.5 acres
- i) Mary Kaari M'Kenya - 0.5 acre
- j) Benson Musila Njagi - 1 acre
- k) Samuel Gitonga Njagi - 1 acre
- l) Kalen Kagendo Jebio - 0.5 acre
- m) Ciamati Nthuci - 2.5 acres
- n) John Njagi Dan Justus Nyaga M'Kenya to hold 2 acres jointly Francis J. Njagi M'Kenya

(ii) **L.R. No. Karingani/Muiru/534 (approximately 19 acres)**

- a) Francis J. Njagi M'Kenya - 2.5 acres
- b) Julius Munene Dan - 2.5 acres
- c) Justus Nyaga Dan M'Kenya - 2.5 acres
- d) Augustine Karuga M'Kenya - 2.5 acres
- e) Mutegi Dan - 2.5 acres
- f) Elosy Mukwanjeru Daniel - 2.5 equally Nesbit Kirim Gitari
- g) John Njagi Dan - 2.5 acres

(iii) **L.R. Karingani/Muiru/194 (approximately 19.5 acres)**

- a) Francis J. Ngai M'Kenya - 1.4 acres
- b) Julius E. Munene Dan - 1.4 acres
- c) Justus Nyaga Dan M'Kenya - 1.4 acres
- d) Augustine Karuga M'Kenya - 1.4 acres
- e) Mutegi Dan - 1.4 acres

f) Elosy Mukwanjeru Daniel 1.4 acres jointly Nesbit Kirimi Gitari

g) John Njagi Dan - 1.4 acres

4. Mutegi Dan, the 1st protestor and one of the beneficiaries in this cause felt aggrieved by the proposed mode of distribution and filed affidavit of protest sworn on 21st May 2014 claiming that there had been no consensus on the mode of distribution proposed as other beneficiaries had not been consulted. He also claimed that Samuel Gitonga Njagi and Ciamwati Nthuci were strangers. He further alleged that Justus Nyaga Dan M'Kenya was not acting in good faith and could not be trusted in the administration of the estate of the deceased.

5. Mary Kaari M'Kenya the 2nd protestor and another beneficiary is protested against the Petitioner's proposed mode of distribution. She has vide an affidavit of protest filed on 13th September 2016 deposed that a beneficiary known as Alban Micheni a son of Asenath Dan was unfairly left out in the proposed distribution. She also suggested that Mukwanjeru Gitari wife to Gitari Dan deceased's son who is also deceased should be given a share and so to Muchira Mbaka Dan grandson of the deceased and son to the late Janet Kanyua (daughter of the deceased).

6. According to the 2nd protestor (Mary Kaari) the known properties that comprise the estate are as follows namely:-

- a) Karingani/Ndagani/91
- b) Karingani/Ndagani/534
- c) Karingani/Ndagani/194
- d) Karingani/Ndagani/412
- e) Karingani/Ndagani/349
- f) Karingani/Ndagani/1096
- g) Karingani/Ndagani/431
- h) Karingani/Muiru/433
- i) Karingani/Muiru/434
- j) Karingani/Ndagani/227

7. The 2nd protestor has proposed to have the estate distributed as follows:-

(i) **Karingani/Ndagani/91**

- a) John Njagi Dan
- b) Mutegi Dan to share equally
- c) Mbaka Dan
- d) Mukwanjeru Dan
- e) Mary Kaari Callen Kagendo to share 1 acre

(ii) **Karingani/Muiru/534**

- a) ohn Njagi Dan
- b) Mutegi Dan equal share
- c) Mbaka Dan
- d) Mukwanjeru Dan
- e) Mary Kaari Allen Kagendo jointly

(iii) **Karingani/Ndagani/194**

- a) Alban Micheni - 2 acres
- b) Muchira Mbaka - 2 acres
- c) John Njagi Dan - 1.3465 acres
- d) Mutegi Dan - 1.3465 acres
- e) Mbaka Dan - 1.3465 acres
- f) Mukwanjeru Dan - 1.3465 acres

8. The 2nd protestor has deposed that Justus Nyaga Dan benefited from a parcel given to him by the deceased in his lifetime and that he got Karingani/Muiru/1096 and Karingani/Muiru/434 while Julius Munene M'Kenya got Karingani/Ndagani/227. She has further alleged that parcel No. Karingani/Muiru/1096 was held by the late M'Thirika Kirinya in trust of the deceased and that it is on the basis that Justus Nyaga Dan eventually ended up getting a share. According to the 2nd protestor the dependants of the deceased who did not get any share are as follows namely:-

- (i) John Njagi Dan
- (ii) Assenath Njagi Dan
- (iii) Mutegi Dan
- (iv) Callen Kagendo Dan
- (v) Gitari Dan
- (vi) Janet Kanyua Dan
- (vii) Mary Kaari M'Kenya

9. The protest lodged herein was canvassed through oral evidence and it turned out that the petitioner John Njagi Dan was on one side with Justus Nyaga Dan M'Kenya and Francis Njagi M'Kenya (the 1st and 2nd objectors) being on the other side.

10. Peter Mutegi Dan testifying as (PW1) in support of petitioner whom he said is his young brother told this court that the children of the deceased are as follows:-

- (i) Asenath Dan (deceased)
- (ii) Francis Joseph Njagi
- (iii) Ephraim Alias Julius Munene Dan
- (iv) Justus Nyaga Dan
- (v) Augustino Karika
- (vi) Peter Mutegi Dan
- (vii) Gitari Dan (deceased)
- (viii) Mary Kaari Dan (deceased)
- (ix) Caren Kagendo Dan
- (x) Janet Kanyua Dad (deceased) &
- (xi) John Njagi Dan.

He told this court that the properties forming the estate are as follows:

- (i) Karingani/Ndagani/91 - 17 ha
- (ii) Karingani/Muiru/534 - 8 ha
- (iii) Karingani/Muiru/194 - 3.8 ha

11. He testified that the deceased gifted land parcel No. Karingani/Ndagani/227 measuring 7.2 ha to one of his sons namely Julius E. Munene. It was also his evidence that M'Riria M'Irambu, a brother to deceased was given Karingani/Ndagani/349 while Ngeretha Nyaga, (a cousin to PW1) was given Karingani/Ndagani/412 which share was handed to Augustino M'Kenya. According to him the deceased directed Augustino to go and live in that parcel and that Augustino lives there to date. He further added that Karingani/Ndagani/431 was held by the late M'Thirika Kuhihia in trust of the deceased and that in view of that arrangement Justus Nyaga Dan was given 4.3 ha vide a succession in Meru H.C Succession Cause No. 260/2008.

12. The witness (PW) further added that Samwel Gitonga Njagi should not benefit from the estate as he is not a bonafide beneficiary. He supported the proposition that Nelmit Kirimi a child of the late Gitari Dan, and her mother Elosy Mukwanjeru should be provided for in the distribution of the estate herein.

He added that Justus Nyaga Dan benefited also from Karingani/Muiru/434 as he got 0.9 ha from M'Thirika on account of the deceased herein. He stood by his position that those beneficiaries who had benefited from a share courtesy of his late father (deceased) should not get any extra share in the distribution of the estate notwithstanding that the cited properties were never previously registered in the name of the deceased. He conceded that Alphan Micheni a son to his late sister Asenath Dan (deceased) stays on parcel No. Karingani/Ndagani/91 but he was of the view that he should go and stay in his father's land who according to him is John Murungi and that John Murungi has other 7 children who are staying with him. He however conceded that Alphan Micheni was born before to her late sister Asenath got married to John Murungi.

He further conceded that Benson Muchira, a son of the late Janet Kanyua should get a share from Karingani/Muiru/194. He however declined a suggestion put to him that Ciamati Nthuci should get a share though he conceded that she is in occupation of a portion within Karingani/Ndagani/91.

13. Mary Kaari M'Kenya testifying as PW3 justified her proposed mode of distribution in her affidavit I have cited above. She told this court that though she is married she wants to be given a share in parcel No. Karingani/Ndagani/91 and that if she get 1/2 acre she will be comfortable and that she does not want any other share. She justified her proposal to have Alphan Micheni (son to the late Asenath Dan) get a share from Karingani/Muiru/194 saying that he was born out of wedlock and was left behind to the stay with the deceased when her late sister (Asenath) got married. According to PW3 those living in parcel No. Karingani/Ndagani/91 should get a share in that parcel and named the following as living in parcel No.91 namely:-

- (i) Alphan
- (ii) Francis Mbaka
- (iii) Gitari Dan
- (iv) Mutegi Dan
- (v) Nyaga
- (vi) Kaaria
- (vii) Kagendo Dan

14. Another witness who testified on behalf of the petitioner was M'Mugera M'Ithara (PW4). He told this court that he was 80 years old and knew the deceased well and his children. He testified that he was from the same clan with the deceased and that the clan had sat in a meeting after Mutegi Dan complained that his other brothers were locking him out of the estate. According to him the deceased had settled Justus Nyaga Dan and Julius Munene in their respective parcels outside the estate shown to them by the deceased herein and that they decided as a clan that both of them should remain where they are currently settled. According to him Justus Nyaga was given 13 acres of land by the deceased in his lifetime and that the parcel was held by Karugu Kireinya a brother to the deceased in trust for him (deceased). He further added that Julius Munene was given 17 acres which is not part of the estate herein.

According to PW4 the family of the deceased's quarrels centred over parcel No.91 because Justus Nyaga became overbearing on his siblings and that that is the reason why the clan came in to try and resolve the differences.

15. Humprey Gitari (PW2), another clan member told this court that the deceased was his uncle. He further testified that he was in support of Mutegi Dan's position on the distribution of the estate. He justified his support by stating that Justus Nyaga got a share from Karingani/Ndagani/431, Augustino Kariga got Karingani/Ndagani/412 while Munene got Karingani/Ndagani/227. He further added that Justus Nyaga was sworn traditionally by the clan in accordance with Meru customs and that he agreed that he had benefitted from a share of land parcel No.431 from the deceased. He further added that he was a secretary of the clan and tendered minutes of the meeting as P. Exhibit 1 to back up his claims. He added that Justus and Munene should not get another share from the estate. He testified that during adjudication exercise a person could not get more than 3 parcels of land and that some people who had sons who had reached adulthood registered them and that is how Justus Munene was registered in parcel No. 227. He further added that Justus Nyaga Dan got a bigger share

of land from the deceased during his lifetime than his other siblings. He conceded under cross-examination that Alphan (Alban) Micheni a grandson to the deceased and Benson another grandson should get a share from the estate adding that the clan had reserved 2 acres out of the estate for the daughters of the deceased and their children. He suggested that the two acres be given to the said grandchildren.

16. John Njagi Dan (PW5) testified and justified his proposal in the affidavit in support of the Summons for Confirmation of Grant. He however made some adjustment as per his affidavit sworn on 31st October, 2016 and proposed as follows:-

(A) Karingani/Ndagani/91

- (i) John Njagi Dan
- (ii) Mutegi Dan
- (iii) Mbaka Dan equal share
- (iv) Mukwanjeru Dan
- (v) Mary Kaari to share 1 acre jointly Kallen Kagendo

(B) Karingani/Muiru/534

- (i) John Njagi Dan
- (ii) Mutegi Dan equal share
- (iii) Mbaka Dan
- (iv) Mukwanjeru Dan
- (v) Mary Kaari Dan Kallen Kagendo jointly

(C) Karingani/Ndagani/194

- (i) Alban Micheni - 2 acres
- (ii) Muchira Mbaka - 2 acres
- (iii) John Njagi Dan - 1.3465 acres
- (iv) Mutegi Dan - 1.3465 acres
- (v) Mukwanjeru Dan - 1.3465 acres

17. The petitioner told this court that Augustino Kariga benefitted from a parcel No. Karingani/Ndagani/412 given to him by the deceased during his life time. He stated that Justus Nyaga resides on parcel No. 431 which parcel according to him was held in trust by Ngeretha Nyaga for the deceased and that Justus Nyaga benefitted as such and that he had moved into that parcel even during the lifetime of the deceased.

18. Ngeretha Nyaga (DW1) testified and told this court that he was 80 years of age. He added that the deceased took care of him as a child and even paid his fees. He added that as a token of appreciation he gave Augustino- (son of the deceased 4 acres) of land and stays with him just like the deceased had taken care of him when he was young.

19. Justus Nyaga Dan (DW2) on his part testified that parcel No. Karingani/Ndagani/431 belonged to his uncle the late M'Thirika and that he got a share from him in that parcel as well as parcel No. Karingani/Muiru/434. He however denied that he got the parcel courtesy of the deceased herein though he conceded that the land originally belonged to their grandfather and it was a family land.

20. DW2 or the 1st objector in this cause further added that Ciamati Nthuci was a child of Nthanga Ruguru who was a sister to his late father (deceased herein). He further added that though Nthuci is married it was their father's wish that she gets a share in the estate as she had stayed with him for over 20 years. He also denied the contention the Julius Munene benefitted from a gift of land from the deceased. He contended that Julius Munene bought his parcel from one Kiiru.

21. Ciamati Nthuci (DW3) also testified and justified her claim of a share in the estate on the grounds that the deceased settled her in a portion within Karingani/Ndagani/91 and that according to Chuka customs she referred to him (deceased) as her father. She further testified that he has been living in the estate since 1974 where she has planted tea and coffee and that the portion she has been occupying measure about 2 acres.

22. Alban Micheni (DW4) on his part testified that he is a grandson to the deceased and has been living in the estate since 1957 when he was born. He further added that he is also ploughing some portion in Muiru and that the deceased brought him up and took care of him. He stated that parcel No.91 measures around 42 acres and that each beneficiary should get 4 acres and that as a son of Asenath Ciambaka (daughter to deceased) he should also get a share.

23. Japhet Njoka (DW5) testified and confirmed that he was a son of M'Ithirika (deceased) who was a brother to the deceased herein. He also stated that before his father (M'Ithirika) passed on, he had expressed his desire that Justus Nyaga Dan should be given a share of his estate and that when he died, he respected his wishes and gave 4 ha out of land parcel No.431 to Justus Nyaga. He however added that Justus Nyaga should also get a share from his own father's estate. He further conceded that he also gave a share to Justus Nyaga in parcel No. Karingani/Ndagani/434 in addition to the parcel in Karingani/Ndagani/431.

24. This court has considered the evidence tendered by the petitioner and the protestors on one hand and the objectors and their witnesses on the other.

The deceased in this cause as observed above died intestate on 24th December, 1990. The record shows that the petitioner John Njagi Dan was appointed sole administrator on 4th July 2011 and moved this court for the confirmation of that grant and though he states that the grant was made to him together with Justus Nyaga Dan M'Kenya and Francis J. Nyaga M'Kenya, a fact also advanced by the objectors (Justus Nyaga Dan M'Kenya and Francis J. Njagi M'Kenya) . But the grant issued on 4th July, 2011 as per the court file was only issued to John Njagi Dan and this court shall proceed as such. That however is not a contested issue. What is contested herein are as follows:-

- (i) Who are dependants to the deceased.
- (ii) Who among the dependants should benefit from a share in the estate.
- (iii) What share should each beneficiary get.

25. Before I delve into which dependants survived the deceased when he passed on, it is important to lay down the law applicable in the administration of the estate of the deceased herein. The provisions of **Section 2(1)** of the **Law of Succession Act** clearly indicate that the **Law of Succession Act (Cap 160)** applies in this case because the deceased died after commencement of the **Law of Succession Act** which was 1st July 1981. There is also no dispute that he died intestate leaving behind no surviving spouse. There is no dispute that the deceased left behind the following children namely:-

- (i) Assenath Dan - (now deceased)
- (ii) Francis Joseph Njagi
- (iii) Julius Munene Dan
- (iv) Justus Nyaga Dan
- (v) Augustino Karika
- (vi) Mutegi Dan
- (viii) Kallen Kagendo Dan
- (ix) Mary Kaari M'Kenya
- (x) Gitari Dan (deceased)
- (xi) Janet Kanyua (deceased)
- (xii) John Njagi Dan

Apart from the above children evidence was tendered that the deceased also had other dependants within the meaning of **Section 29(b)** of **Law of Succession Act**. Under **Section 29(a)** of **Law of Succession Act** children, wife of wives whether maintained or by deceased immediately prior to his death are automatic heirs of his estate.

The provisions of **Section 29(b)** **Law of Succession Act** covers other dependants like deceased's parents, step parents, grand children, step children or other close relatives so long as they can establish that they were being maintained by the deceased immediately prior to his death.

26. This court has considered the evidence by the petitioner and protestors and objectors in regard to the other dependants namely:-

- (i) Alban Micheni - a grandson to the deceased and son of Assenath Dan - who is a deceased daughter of the deceased.
- (ii) Ciamati Nthuci - a daughter of a sister of the deceased.

(iii) Mukwanjeru Dan- wife to the late Gitari a deceased son of the deceased in this cause.

(iv) Benson Muchira Njagi.

Based on the evidence tendered by the petitioner, protestor and the objectors it is abundantly clear that the above named persons fit into the description of dependants ascribed under **Section 29 (b)** of the **Law of Succession Act**. To begin with Ciamati Nthuci, her evidence was that she used to stay with the deceased in parcel No. Karingani/Ndagani/91 from 1974 when she got married to one Nthuci who was a son of nephew of the deceased (His mother was a sister to the deceased.) She told this court that she was given a 2 acre portion where she has since been living with her five children. By all accounts given in this court, I am satisfied that Ciamati Nthuci has established to the required standard that she is a dependant with the meaning of the law cited above. She is treated as a dependant and the law recognises her interests in the intestate which though not equal to the children of the deceased are interests all the same.

27. All the parties in this cause agreed that Alaban Micheni a grandson to the deceased a son of Assenath Ciambaka Dan (deceased) was born and brought up by the deceased in the estate after her late mother was married to one John Murungi. The evidence tendered shows that the said John Murungi is not a biological father of Alban Micheni and has never assumed any parental responsibility over him and that is why the said Alban was brought up by the deceased as his grandfather and has been living in the estate since he was born. I find that he is entitled to a share of the estate as dependant within the meaning of **Section 29(b)** of the **Law of Succession Act**. In the same breadth I also find from the evidence tendered that Benson Muchira Njagi a son of the late Janet Kanyua who was a daughter of the deceased also qualifies to be a dependant having been born and brought up by the deceased in his estate.

28. Mukwanjeru Dan, a daughter in law to the deceased and wife to the late Gitari Dan (deceased's late son) is also a dependant as the parties in this cause have all agreed to that fact and therefore her claim to a share of the estate is uncontested.

29. This court therefore finds that the other dependants to the estate of the deceased apart from her biological children named above are as follows:

(i) Alban Micheni

(ii) Ciamati Nthuci

(iii) Mukwanjeru Dan and her children inclusive of Nelbit Kirimi Gitari and

(iv) Benson Muchira Dan

30. The surviving children of the deceased named are:

(i) Francis J. Njagi M'Kenya

(ii) Mutegi Dan

(iii) Kallen Kagendo Dan

(iv) Julius Munene

(v) Justus Nyaga Dan

(vi) Augustino Kariga M'Kenya

(vii) John Njagi Dan and

(viii) Mary Kaari M'Kenya

The eight children named above besides the named 4 other dependants above are entitled to a share of the deceased estate.

31. However this court has considered the protests filed in respect to the following dependants:-

(i) Justus Nyaga Dan

(ii) Julius E. Munene

(iii) Augustino Kariga and

(iv) Francis J. Njagi M'Kenya.

The protestors have stated that the four sons benefitted from a previous gift in form of parcels of land during the lifetime of deceased. Under the provisions of **Section 42** of **Law of Succession Act** a dependant who benefits from a gift inter vivos from deceased person will have that

gift taken into consideration when the estate is being distributed like in this cause pursuant to the provisions of **Section 38** of the **Law of Succession Act**.

This court has considered the evidence presented by petitioner (John Njagi Dan) and the protestor Mary Kaari M'Kenya. In regard to Justus Nyaga Dan, evidence tendered show that he benefitted from a share of parcel No. Karingani/Ndagani/431 which the petitioner and protestors claim were given to him from the estate of the late M'Thirika M'Kurenya a late brother of the deceased who the petitioner and protestors claim was holding the said parcel in trust of their deceased father. This court was shown the proceedings of Succession Cause No.260 of 2008 at Meru High Court which supports the petitioner and protestor's claims. In that cause annexed to the affidavit (sworn on 21st May 2014) of Mutegi Dan (one of the protestors herein and PW1 in this cause), Justus Nyaga Dan M'Kenya is named as a son of the late M'Thirika M'Rukenya and in the distribution of his estate he was given 4.3 ha in Karingani/Ndagani/431 and the whole Karingani/Muiru/434 measuring 0.9 ha.

32. Justus Nyaga Dan (DW3) concedes that he received the above parcels but denies that the above parcels were ever held in trust for the deceased. He has contended that he got the parcels a gift from M'Thirika Kurehia and has submitted that the petitioner and protestors did not prove that the share he got were a gift from his late father, the deceased herein.

33. This court has considered the evidence of M'Mugera M'Thara (PW4) and the affidavit sworn on 25th May 2016. He told this court that he was a clan member of the deceased and knew the deceased well. He stated clearly that Justus Nyaga Dan got a share of land from Kareiya (deceased) who was a brother to the deceased herein and that the Karenya held the parcel of land in trust for deceased herein. Given his age (80 years old) this court finds that the petitioners as well as protestors' claim that Justus Nyaga Dan benefitted from the deceased's estate is well grounded. I have also considered the evidence of Humprey Gitari (PW2) who told this court that Justus Nyaga Dan had conceded during a clan meeting after administration of a traditional oath according to Meru customs that he had benefitted from a share of land from where he is currently staying which is a piece of land he got vide the cited succession cause in Meru. This court finds that the petitioner and the protestors (Mary Kaari and Peter Mutegi Dan) have proved on a balance of probability that Justus Nyaga Dan M'Kenya benefitted from a previous gift from the deceased. The evidence tendered before this court shows that Justus Nyaga Dan moved and stayed with the late M'Thirika M'Kareiya in his lifetime. I have looked at the proceedings in **Meru High Court Succession Cause No.260/2008** and find that Justus Nyaga Dan M'Kenya was listed as one of the sons of the late M'Thirika M'Kurehia. He benefitted from a share in that estate on account of being a son to the deceased therein. The deceased herein had apparently handed him over to his brother M'Thirika M'Kareiya (deceased) because of the arrangements the two had, made prior to their demise. The claims by Justus Nyaga Dan that he got a gift from his uncle in his own right is not supported by evidence tendered in this court. This court finds that he benefitted and got 4.3 ha from Karingani/Ndagani/431 which translates to 10.75 acres and Karingani/Muiru/434 which is 0.9 ha or 2.25 acres. In total he got approximately 13 acres of land.

34. The evidence tendered also show that Julius Munene benefitted from Karingani/Ndagani/227 measuring 7.2 ha which is approximately 18 acres. The documentary evidence tendered by protestors show that Julius Munene was the 1st registered owner but they have claimed that it is the deceased who caused him to be registered and therefore conferred him a benefit on him. M'Mugera M'Thara (PW4) and Humprey Gitari (PW2) two elderly clan members testified and supported this view. Though Julius Munene swore an affidavit denying that he got parcel of land No. Karingani/Ndagani/227 as a gift from his father, he did not turn up in court to buttress his claims. This court therefore finds that on a balance of probability given the evidence tendered by the petitioner, protestors and the witnesses I have cited above, parcel No. Karingani/Ndagani/227 was obtained by Julius Munene Dan courtesy of his late father the deceased herein. The provisions of **Section 42** of **Law of Succession Act** therefore applies to him.

35. The petitioners and protestors' claim that Augustino Kariga got parcel No. Karingani/Ndagani/412 as a gift from his father is not contested by the said Augustino. Ngeretha Nyaga (DW1) testified in this court and told this court that the deceased took care of him and educated him when he was young and that he decided to reward the efforts of the deceased by rewarding one of his sons as a token of appreciation to the deceased herein. According to him took Augustino Kariga and gave him 4 acres of his land where he is currently living. He however added that he had no problem if the said Augustino was to get an extra share from his father's estate. This court therefore finds that the said Augustino Kariga having benefitted from 4 acres because of the good will of this late father, the same shall be taken into account in distribution of the estate in accordance with the provisions of **Section 42** of **Law of Succession Act**.

36. This court finds that the petitioner and protestors' claim that Francis J. Njagi M'Kenya benefitted from a previous benefit from the deceased, are benefit of evidence as no evidence was tendered to establish the same. There was no evidence laid before me showing that Francis J. Njagi M'Kenya benefitted from any previous benefit. All the affidavits of the petitioner, Peter Mutegi Dan and Mary Kaari are silent on this fact. It is a cardinal rule of evidence that whoever alleges must prove and since no prove has been laid before me, this court finds that Francis J. Njagi M'Kenya did not benefit from any share from the deceased during his lifetime and should be considered in the distribution of the estate like all the other children in this cause.

37. Having determined who the dependants of the late M'Kenya Njagi are, the only question remaining for determination is the question of distribution. The estate as observed above comprises the following properties:-

- (i) Karingani/Ndagani/91 which measures 17 ha or 42.5 acres
- (ii) Karingani/Ndagani/534- 8 ha or 20 acres
- (iii) Karingani/Muiru/194- 3.8 ha or 9.5 acres

38. The children of the deceased are all entitled to an equal share of the estate as per the provisions of **Section 38** of the **Law of Succession Act** which provides that an estate of a deceased person dying intestate should be distributed equally among all the children of the deceased. However provisions of **Section 42** as I have observed above provide as follows:

"Where an intestate has during his lifetime or by will, paid, given or settled any property to or for the benefit of a child..... the property shall be taken into account in determining the share of the net intestate finally accruing to the child, grand child or house."

The above provisions as I have found above apply to the shares or properties given to Justus Nyaga Dan M'Kenya, Julius Munene and Augustino Kariga. Of course each of the above beneficially benefitted from different portions of land in varying sizes and the same shall be considered accordingly.

39. This court has considered the evidence tendered by the witnesses regarding the parcels comprising the estate and noted that most of the dependants are in occupation of parcel Karingani/Ndagani/91 and in order to ensure that each beneficiary stays where they have put up their houses each beneficiary shall get a share which shall reflect as much as possible where developments have been carried out. Alban Micheni Ciamati Nthuci and Benson Muchira Dan being other dependants of the deceased are each entitled to 2 acres of land which they are claiming from the estate. They will get their respective shares from where they are occupying within parcel No. Karingani/Ndagani/91. That will leave a balance of approximately 36.5 acres. One of the protestors herein Mary Kaari told this court that she is only interested of 1/2 acre out of parcel No. Karingani/Ndagani/91. She is of course entitled to more than that given the size of the estate and the provisions of the law. Since there is no consent on the mode of distribution from the beneficiaries to justify her getting only 1/2 acre, there is no other option other than to apply the law since in probate matters either an estate is distributed as per the consent of family members or the provisions of the law apply.

The remaining acreage in parcel No. Karingani/Ndagani/91 is approximately 36 acres and the dependants who did not get any share are:

- (i) John Njagi Dan - 7 acres
- (ii) Peter Mutegi Dan - 7 acres
- (iii) Francis J. Njagi M'Kenya - - 7 acres
- (iv) Mukwanjeru Dan - 7 acres (to hold in trust for her children)
- (v) Callen Kagendo Dan Mary Kaari 8 acres jointly

(1) In parcel No. Karingani/Muiru/534 the distribution shall be as follows:-

- (i) Augustino Kiragi - 7 acres
- (ii) John Njagi Dan - 4 acres
- (iii) Peter Mutegi Dan - 4 acres
- (iv) Mary Kaari Callen Kagendo 5 acres jointly

The remaining parcel No. Karingani/Muiru/194 measuring 9.5 acres;

- (i) Mukwanjeru Dan - 4 acres (to hold in trust for her children)
- (ii) Francis J. Njagi M'Kenya - 4 acres
- (iii) Mary Kaari Callen Kagendo Dan to share the balance jointly.

The above distribution shows each child of the deceased has gotten approximately 11 acres each which is far less than what Justus Nyaga Dan M'Kenya got from a previous benefit which is approximately 12.25 acres in total and 18 acres of Julius Munene.

40. In summary, the grant issued to John Njagi Dan on 4th July, 2011 is hereby confirmed as per the following distribution:-

(A) **Karingani/Ndagani/91**

- (i) John Njagi Dan - 7 acres
 - (ii) Peter Mutegi Dan - 7 acres
 - (iii) Francis J. Njagi M'Kenya - 7 acres
 - (iv) Elosy Mukwanjeru Dan - 7 acres
- (to hold for herself and in trust of her children inclusive of Nesbit Kiriimi)

(v) Callen Kagendo Dan

Mary Kaari 8 acres jointly

(vi) Alban Micheni - 2 acres

(vii) Ciamati Nthuci - 2 acres

(viii) Benson Muchira Njagi - 2 acres

(B) **Karingani/Ndagani/534**

(i) Augustino Kiragi - 7 acres

(ii) John Njagi Dan - 4 acres

(iii) Peter Mutegi Dan - 4 acres

(iv) Mary Kaari - 5 acres jointly

Callen Kagendo Dan

(C) **Karingani/Muiru/194**

(i) Elosy Mukwanjeru Dan - 4 acres

(For herself and in trust of her children inclusive of Nesbit Kirimi.

(ii) Francis J. Njagi M'Kenya - 4 acres

(iii) Mary Kaari Callen Kagendo Dan 1.5 acres jointly

This being a family matter I shall make no order as to costs so each party to bear own costs.

Dated, signed and delivered at Chuka this 14th day of November, 2018.

R.K. LIMO

JUDGE

14/11/2018

Judgment, signed dated and delivered in open court in the presence of all the parties and Kirimi for protestor.

R.K. LIMO

JUDGE

14/11/2018