



**Nathookhan v Chairman Mombasa Town Planning Authority (Civil Appeal 116 of 1930) [1930] KESC 1 (KLR) (1 January 1930) (Judgment)**

*Nathookhan v Chairman Mombasa Town Planning Authority [1930] eKLR*

Neutral citation: [1930] KESC 1 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL APPEAL 116 OF 1930**

**THOMAS, J**

**JANUARY 1, 1930**

**BETWEEN**

**NATHOOKHAN ..... APPELLANT**

**AND**

**CHAIRMAN MOMBASA TOWN PLANNING AUTHORITY ..... RESPONDENT**

**Compensation for property injuriously affected by acquisition under a town planning scheme.**

Reported by Diana Mutunga

***Compulsory acquisition of land** - town planning - private property - a house affected by town planning scheme - the Crown, as successor in title to the land, giving the plaintiff a notice to demolish - whether the Crown was liable to compensate the plaintiff - Town Planning Ordinance, 1919 section 13.*

***Compulsory acquisition of land** - compensation - property injuriously affected by acquisition scheme - Town Planning Ordinance (cap 85) section 13.*

**Brief facts**

The plaintiff was the owner of a house situated on the island of Mombasa as a monthly tenant subject to a month's notice. A town planning scheme had been prepared for Mombasa under whose provisions the land on which the plaintiff's house was built was included for road construction.

He was given notice to demolish his house and to remove the debris within six months. Consequently, he made a claim of compensation to the Mombasa Town Planning Authority. He therefore brought an action by way of case stated for determination by the court.

**Issues**

- i. Whether under the Town Planning Ordinance, the plaintiff was entitled to compensation.
- ii. Whether the Crown as successor in ownership of the land, was entitled to give the plaintiff notice to quit without paying him compensation.



## Held

1. The plaintiff was entitled according to the Mohammedan custom to one month's notice to quit.
2. The Crown as successors in ownership to the land, having given the plaintiff six months notice, was not liable to pay him any compensation.

*Application allowed.*

## Citations

### Statutes

None referred to

### Advocates

*Mr Morrison* for Plaintiff.

*Mr Atkinson* for Defendant.

## JUDGMENT

1. This matter comes before the Court by way of a case stated between the parties under o XXXII, r 1 of the Civil Procedure Rules 1927. The case sets out the following facts:
  1. The plaintiff is the owner of a house No 2186 situated on plot, formally known as No 67 section 11, on the island of Mombasa on land formally belonging to the late Liwali Saif Bin Salim, and the plaintiff occupied the land on which this house was built as a monthly tenant subject to a month's notice on either side.
  2. According to the custom among Mohammedans if before the scheme notice to quit had been given by his landlord, the plaintiff would have been entitled to remove his house but was not entitled to recover any compensation from his landlord, while the landlord had no right to the house unless he had paid full compensation.
  3. A town planning scheme has been prepared for Mombasa under the provisions of the Town Planning Ordinance, 1919 and has been duly approved by His Excellency the Governor-in-Council, and came into effect on the 21st day of May, 1926, in accordance with the Town Planning Procedure Regulations
  4. Under the provisions of the said scheme the land on which the plaintiff's house was built was included in area (a) referred to in section 18 of the Town Planning Ordinance, Chapter 85 of the Laws of Kenya, and is shown as a road on the approved plan of the said scheme and accordingly became Crown property on the 21st May, 1926.
  5. On the 16th April 1928, the authority gave notice to the plaintiff under section 17 of the scheme that he should demolish the said house and remove the debris thereof within six calendar months of the date of the said notice, viz, the 16th day of October, 1928.
  6. The plaintiff duly made a claim for compensation for injurious affection under the said Mombasa Town Planning Scheme to the Mombasa Town Planning Authority, and, subject to the question of law hereinafter raised by the defendant, it has been agreed between the parties hereto that the amount of compensation to which the plaintiff is entitled in respect of the said house, if the said question of law is decided in favour of the plaintiff, is the sum of Sh 3,000.



7. The owner of the land on which the plaintiff's house is situated, the late Liwali Seif Bin Salim, made no claim for compensation for injurious affection in respect of the said building house No 2186.
2. The question submitted for the consideration of the Court is as follows:-

Whether as alleged by the plaintiff the plaintiff is entitled under the Town Planning Ordinance to compensation from the defendant based on the full value of the said house No 2186 which has been agreed to be Sh 3,000, or whether as alleged by the defendant the Crown, as the successor of Liwali Seif Bin Salim in ownership of the land, is entitled as landlord to give plaintiff one month's notice to quit and remove the said building without paying compensation
3. Now section 18 of the Town Planning Ordinance, Chapter 85 referred to scheme shall be divided in to two areas.

Of these the area (a) required by the Town Planning Authority for the purposes of the scheme becomes the property of His Majesty.

The other area (b) having been replanned and readjusted goes to the original owners of the land. With regard to area (b) new documents of title are given to the new owners under the Town Planning Amendment Ordinance, Ordinance, No 14 of 1927. Such new documents of title are subject to such mortgages, charges, leases or other incumbrances, trusts and restrictions whereto the old documents of title was subject immediately prior to the extinguishments of the said title.

(See section 4 subsection 2.)

The area which becomes the property of His Majesty is free from all charges, liens, or any other claim whatsoever when the scheme is finally approved.
4. It is thus noticeable that whereas leases (which term would of course include tenancy agreements) are specially referred to in the Amending Ordinance no reference is made to them in the Principal Ordinance. I cannot regard the omission of the word leases as an unintentional omission especially in view of the insertion of the word in the Amending Ordinance. In my opinion the Principal Ordinance intentionally did not refer to leases and intended that the leases should continue, but that whilst the Crown would take the land subject to the leases the Crown would be freed from any claim in respect of any breach of covenant in respect of such leases such as the covenant for quiet enjoyment or any claim for specific performance. In lieu of such claims provision is made for claims for compensation. That is a recognized provision and I would refer to the case of the Manchester, Sheffield and Lincolnshire Railway v Anderson 1898 2 Ch, p 394, in which in the course of his judgment Chitty, LJ, said: "The covenant is not gone; but the remedy by action has been taken away," and to the case of Syers v Metropolitan Board of Works (1877) 36 LT (ns) 277, in which James, LJ, said: "Railway companies and other companies never do buy the interest of short tenants whom they can get rid of by legal notice, unless they want possession before the expiration of the notice, for which special provision is made by the Act of Parliament. The company deals with the freeholder. It acquires, either under compulsory powers or by contract with the freeholder (it may be by voluntary agreement) his interest, and with that the whole of his interest. They have bought the freehold; they are assignees of the freehold; they do give the tenant three month's notice, as any other assignee of the reversion might do; and at the end of the three months the tenant must give possession or be subject to be turned out by process of law—not under any statutory power, but under the right which is incidental to the property of the company".



5. If my reading of the Ordinance be correct then in view of the continuance of the tenancy agreement all that the plaintiff was entitled to was one month's notice, which is admittedly a compliance with the terms of a tenancy agreement, then he would not be entitled to claim any compensation. But assuming that my reading of the Ordinance is not correct and that on the approval of the scheme all leases were automatically extinguished, then the question would arise as to what compensation the tenant would be entitled to claim.
6. In my opinion, in such case, he might be entitled to claim for compensation in respect of what he has lost in consequence of the approval of the scheme. That would be one month's notice or if that notice were not given then for the loss that he suffered in consequence of not receiving the months notice. But in this case the notice has been given and in view thereof in my opinion he is not entitled to any other compensation. Another matter in connexion with this case has been mentioned to me. The tenancy agreement was made with the late Liwali Saif Bin Salim, and although the tenancy was monthly and the liability to remove the building on one month's notice being given existed, yet it has been urged that the Liwali would not have given that notice, since apart from the high moral grounds which would actuate such a course of conduct there would have been the material grounds that such a notice would have the effect of deterring other persons from entering into similar transactions. A somewhat similar claim was made in the case of *Syers v Metropolitan Board of Works* to which I have referred above. Jessel, MR, said:

“It was indeed suggested by counsel on behalf of the plaintiff that there is a duty binding upon the landlord to renew the lease or the tenancy if the tenant demands it. I have heard that such a notion prevailed in times past, but not in this country. In the country where such notions have prevailed they have not been sought to be enforced by the terror of the judiciary, but by other and more unpleasant means. But as I said before, I never knew that there was such an idea in this country, and I repudiate the assertion that a man ceases to be an honest man as a landlord even if he refuses in the extreme case which was put, to renew a lease to his tenant, although that tenant, and his ancestors before him, had held the property in question for sixty years under a term, at the expiration of that term. That being so, I consider there was no legal nor equitable interest in the person in question.”

There will therefore be judgment but in that this case is somewhat in the nature of a test case I order no costs to either side.

7. During the hearing of this case, I was advised that the Mombasa Town Planning Scheme was out of print. A copy was supplied to the Court by courtesy of counsel. Needless to say it would be of assistance to all interested in matters relating to the scheme if a reprint of the scheme could be made and it would be also an advantage if a copy of the plan could be attached.

**DATED 1930**

**THOMAS**

**JUDGE**

Advocates

Mr Morrison for the Plaintiff.

Mr Atkinson for the Defendant.

