



Case Number:	Civil Case 2 of 1970
Date Delivered:	10 Aug 1970
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Ruling
Judge:	Chunilal Bhagwandas Madan
Citation:	Parklands Properties Ltd v Patel [1970] eKLR
Advocates:	-
Case Summary:	<p>Parklands Properties Ltd v Patel</p> <p>High Court, at Nairobi August 10, 1970</p> <p>Madan J</p> <p>Civil Case No 2 of 1970</p> <p><i>Civil practice and procedure - pleadings - striking out pleadings for failure to comply with the rules of pleading - party may be given an opportunity to file an amended pleading – defence failing to comply with the rules of pleading, but on the face of it answering the claim - such defence may not be struck out.</i></p> <p><i>Landlord and tenant - leases and tenancies - determination of leases and tenancies - tenancies at will and statutory leases from year to year or month to month - Limitation of Actions Act (Cap 22), Section 12(2), contrasted with Transfer of Property Act, 1882, of India (Orders in Council and Applied Acts, Group 8), Section 106.</i></p> <p><i>Adverse possession - proof of - adverse possession as a matter of evidence - particulars of adverse possession.</i></p>

The plaintiff filed an action against the defendant for specific performance of an oral agreement for sale of a house, and other reliefs. The defendant filed a defence denying that there was any agreement to purchase, and pleaded that he was in adverse possession of the house. But the defence was evasive and vague and lacked particularity, whereupon the plaintiff applied to have certain parts of the defence connected with the claim to adverse possession struck out on the ground that the defence failed to comply with the rules of pleading and that material facts to support the claim of adverse possession were not pleaded. Leave was given to amend the defence, and an amended defence was filed setting out further and better particulars. The plaintiff contended that the amended defence still failed to disclose an answer to his claim.

Held :

1. Where a pleading has failed to comply with the rules of pleading (such as where the pleading is evasive, vague and lacking particularity) and the material facts are not pleaded, on an application to have the pleading or parts of it struck out on that ground, the hearing of the application may, in the discretion of the court, be adjourned and the party given leave to file an amended pleading within a time allowed for that purpose in order that a party may not be deprived of any possible claim or defence.
2. Instead of striking out a pleading which offends the rules of pleading it may, in the discretion of the court, be amended in certain circumstances.
3. The issue whether a party's possession of a piece of land is adverse is a matter for evidence, and a decision thereon depends upon whether the party alleging adverse possession successfully establishes the particulars of adverse possession pleaded.
4. The party who justifiably made the application for striking is entitled to the costs of the application if the particulars subsequently pleaded in the amended pleading could and should have been included in the original pleading.

	<p>5. Section 12(2) of the Limitation of Actions Act makes provision for the accrual of the right of action in the case of an expired tenancy at will, and it is unrelated to Section 106 of the Transfer of Property Act, 1882 which deals with the duration and termination of periodical leases from year to year or month to month in the absence of a contract, local law or usage to the contrary. The two provisions in the respective Acts are designed to serve separate purposes under Section 106 of the 1882 Act a tenancy is brought or sought to be brought to an end by an act of the landlord or tenant, but under Section 12(2) of the statute of limitations the tenancy is determined by operation of law in a certain event which the parties cannot prevent upon the event taking place.</p> <p>6. That the amended defence, on the face of it, provided an answer to the plaintiff's claim, and that the defence of adverse possession was a matter for evidence, and the application to strike out the amended defence was rejected, but the costs of the application was granted to the applicant in any event.</p> <p><i>The application was dismissed.</i></p> <p>Cases</p> <p>No case referred to.</p> <p>Statutes</p> <p>1. The Limitation of Actions Act (Cap 22) Sections 12(2), 13(1) & 7</p> <p>2. The Transfer of Property Act, 1882, of India (Group 8, Orders in Council and Applied Acts) Section 106</p>
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Application Dismissed.
History County:	-

Representation By Advocates:	-
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-
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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 2 OF 1970

PARKLANDS PROPERTIES LIMITED.....PLAINTIFF

VERSUS

PATEL.....D

DEFENDANT

RULING

The averments in the plaint state that on September 1, 1957, the plaintiff verbally agreed to sell, and the defendant to buy, a house and plot on which it stood (to be sub-divided) at the purchase price, and upon the further terms, set out in paragraph one; that the defendant went into possession in pursuance of the said agreement on September 1, 1957, and receipt of rents and profits of the said house and has so remained in possession ever since; also that the defendant from time to time made part payments by way of deposit against the purchase price, other dues and interest, the last of such payments being on January 29, 1959.

The plaint continues that on March 31, 1961, the defendant as purchaser signed a letter addressed to the plaintiff as vendor authorizing and requesting the plaintiff to carry out the work therein described to the suit plot which he thereby acknowledged as having purchased from the plaintiff; that the defendant further agreed to pay to the plaintiff the full cost of such work the same to be added to the balance of the purchase price of the plot to be paid upon grant of the title to it to the defendant.

The plaint also claims that a revised agreement concerning the aforesaid transaction was made in writing between the parties on August 12, 1966, relating to the value of the property and other dues which the defendant would pay the plaintiff.

Another averment in the plaint states that on July 21, 1969, the plaintiff's advocates offered the deed plans of the suit plot to the defendant requiring him to draw and proffer an assignment thereof for execution by the plaintiff, and that the defendant has refused to complete the sale as against the plaintiff who is and has always been ready and willing to perform its part of the bargain; that a notice sent on November 14, 1969, requiring the defendant to complete the contract also failed to produce any result, as also the threat by another notice dated December 17, 1969, that the plaintiff regarded the contract sued upon as having been broken by the defendant, and that the plaintiff would take such steps as it may be advised in the matter.

The plaintiff claims it is entitled to specific performance, and/or rescission, and/or possession of the house, and in either event damages for delay and/or loss of rent and/or loss of bargain; in the alternative to possession of the house and mesne profits and/ or an account of rents and profits. The prayers are framed accordingly.

The defendant filed a written statement of defence denying, save as expressly admitted therein, all allegations in the plaint. He also pleaded the defence of adverse possession in paragraphs 2 and 6 as follows:

Now the rule is that the court will not strike out a defence which on the face of it appears to provide, as in this case, an answer to the plaintiff's claim, and, when the merit of the defence, in this instance the defence of adverse possession, is a matter of evidence. In addition, the argument on behalf of the plaintiff that adverse possession does not commence because a right of action does not accrue unless, in this case, the tenancy is first determined in accordance with the provisions of Section 106 of the Transfer of Property Act, is in my opinion defeated by the Limitation of Actions Act, (Cap 22) which reads as follows:

12.(2) A tenancy from year to year or other period, without a lease in writing, is taken to be determined at the end of the first year or other period, and accordingly the right of action of the person entitled to the land subject to the tenancy accrues at the date of such determination:

Provided that, where any rent has subsequently been received in respect of the tenancy, the right of action accrues on the date of the last receipt of rent.

It seems to me this particular provision is unrelated to Section 106 of the Transfer of Property Act because, it also seems to me, these two provisions are designed to serve separate purposes. Under Section 106 a tenancy is brought or is sought to be brought to an end by an act of the landlord or tenant: under sub-section (2), Section 12, the tenancy is determined by operation of law in a certain event which the parties cannot prevent upon the event taking place.

Section 13.(1) of the same Act reads as follows: 13.(1) A right of action to recover land does not accrue unless the land is in the possession of some person in whose favour the period of limitation can run (which possession is in this Act referred to as adverse possession), and, where under Sections 9, 10, 11 and 12 of this Act a right of action to recover land accrues on a certain date and no person is in adverse possession on that date, a right of action does not accrue unless and until some person takes adverse possession of the land.

The plaintiff's learned counsel conceded that in this case the land is in the physical possession of the defendant, and that he is a person in the terms of Section 13 in whose favour, the period of limitation could run. The remaining issue requiring a decision therefore is whether the defendant's possession is adverse which I have already stated is a matter for evidence. If the defendant could successfully establish the particulars pleaded by him, the plaintiff's action must fail by virtue of the provisions of Section 7, for at the expiration of the therein prescribed period of limitation the plaintiff's title to the land could be extinguished.

For these reasons I think it would be wrong to accede to the plaintiff's application. I dismiss it.

As regards the costs of the application the original defence was an open invitation for a striking out application. It was filed by an advocate of considerable experience on behalf of the defendant. I think it was deliberately drawn in a non-committal fashion to leave the field free for maneuvering. It was wrong tactics. The further and better particulars now pleaded could easily and should have been included in the defence originally. The plaintiff was justified in making the application; therefore, the costs of the application shall be to the plaintiff in any event, to be paid within twenty one days of taxation.

Dated and Delivered at Nairobi this 10th day of August 1970

C.B.MADAN

JUDGE



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