

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-000656-MR

ORVILLE DEWAYNE BROCK AND
HIS WIFE, KATHY BROCK

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE RON JOHNSON, JUDGE
ACTION NO. 00-CI-00685

HAROLD K. SELLERS AND
HIS WIFE, PATRICIA SELLERS;
TERRY WAYNE SELLERS AND
HIS WIFE, ANGELA SELLERS

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND McANULTY, JUDGES.

McANULTY, JUDGE: Appellants, Orville Dewayne Brock and his wife Kathy Brock, appeal from a judgment of the Harlan Circuit Court quieting title in favor of Appellees. Concluding the trial court did not abuse its discretion in finding that the Appellants did not prove the requisite elements of adverse possession, we affirm.

The tract of land at issue is referred to as "Lot 25" in the Mary Alice Mining Camp in Harlan County, Kentucky. A portion of Lot 25 adjoins two parcels of property (Lots 20 and 21) from the rear that the Brock family has owned since March 15, 1976. The Brock family purchased their properties from the Buttermore heirs. Appellant's mother, Beulah Brock, and her late husband initially purchased one parcel (Lot 20) at the same time Appellant, Orville Dewayne Brock ("Wayne Brock"), purchased the second, adjoining parcel (Lot 21). In 1996, Beulah Brock sold her property to Wayne Brock and his wife, Kathy Brock.

In 1977, J.A.D. Coal Company purchased the remaining Buttermore interests in the Mary Alice Mining Camp. Among those interests was Lot 25. In 1987, J.A.D. Coal Company sold some of those interests to Harold Sellers; however, J.A.D. Coal Company did not sell Lot 25 at that time. Ultimately, J.A.D. Coal Company did sell Lot 25 to Harold Sellers, Harold's son, Terry Sellers, and their wives in April of 2000. On August 21, 2000, Wayne and Kathy Brock filed a complaint alleging they had acquired title to Lot 25 by adverse possession.

The trial court conducted a bench trial on February 14 and 15, 2001. The testimony at trial was highly conflicting on the issue of whether the Brocks' use of the property was with the permission of Harold Sellers. At the conclusion of the trial, the court issued findings of fact and conclusions of law

in favor of the Sellers because the Brocks had not met their burden of proof in establishing two elements of adverse possession -- (1) hostile and (2) open and notorious.

Specifically, the trial court found and concluded as follows:

(2) The Plaintiffs do not claim title to Lot 25 by deed. Rather, the Plaintiffs claim title by adverse possession. They assert that their possession began in 1976 when they erected a fence around the perimeter of Lot 25;

(3) At trial, the Defendants did not dispute that since 1976 the Plaintiffs have engaged in certain family purpose activities upon Lot 25 such as the erection of fences, the erection of a gate, the erection of a carport, the erection of two storage buildings, and parking cars upon the property, and that such activity has occurred continuously for a period of time greater than fifteen (15) years. However, the Defendants defended the action by asserting that any use of the property by the Plaintiffs was done so with the express permission of the Defendants. Specifically, the Defendants claim that Beulah Brock, mother of the Plaintiff, Orville Dewayne Brock, and Defendant, Harold Sellers, first acting as agent for J.A.D. Coal Company and later in his own behalf, had a bargained-for agreement whereby Beulah Brock was to collect rent from the various renters in the Mary Alice community, in exchange for which Harold Sellers paid her the sum of \$70.00 per month, agreed to give her and her family free water and sewer, and agreed to give her and her family use of Lot 25 for any reasonable family purpose.

(4) The Defendants further claimed that this agreement was known to both Orville Dewayne Brock and his wife, Kathy Brock, and that such knowledge was demonstrated when, on several occasions since 1977, Orville Dewayne Brock has requested of both Harold

Sellers and Terry Sellers that he be permitted to purchase Lot 25 from J.A.D. Coal Company and later, from the Sellers individually.

(5) The Plaintiff, Orville Dewayne Brock, and his mother, Beulah Brock, deny that any such agreement ever existed and, further, deny that either of them has ever made a request of J.A.D. Coal Company or the Sellers to purchase Lot 25.

(6) The Court is faced with the dilemma that the Plaintiffs and Defendants disagree completely that (a) any such arrangement ever existed; and, (b) a request for purchase of Lot 25 was ever made by Orville Dewayne Brock.

(7) As the Trier and Finder of Fact in this case, the Court is persuaded by the testimony of Harold Sellers and Terry Sellers that there existed an agreement with Beulah Brock for her to collect rent in exchange for use of Lot 25 by her and her family, and that over the years Orville Dewayne Brock offered to purchase Lot 25 from them.

(8) Specifically, the Court finds that from 1977, when Harold Sellers became the land agent for J.A.D. Coal Company, the Brocks used Lot 25 with the express permission of Harold Sellers. Moreover, the Court finds that Harold Sellers acted as an intermediary between the Brocks and J.A.D. Coal Company such that he prevented the Brocks from being ejected from Lot 25 by J.A.D. Coal Company. The Court was especially persuaded by the testimony of Harold Sellers as to he and his wife's kinship with Beulah Brock, and the Court noted genuine emotion on the part of Harold Sellers when testifying as to the present dispute with Beulah Brock and her family such as to make the Court believe that the agreement between Beulah Brock and Harold Sellers in fact existed.

(9) The Court also specifically finds that on several occasions, beginning in 1977 and continuing until July 2000, Orville Dewayne Brock requested of Harold Sellers and/or

Terry Sellers that he be permitted to purchase Lot 25.

(10) Both this agreement and the requests to purchase defeat the Plaintiffs' claim of adverse possession because neither the "hostile" nor "notorious" elements of adverse possession, which the Plaintiffs had the burden of proving, ever existed.

(11) The Court specifically finds that at no time did the Brock's use of Lot 25 exceed that use for reasonable family purposes and, as such, did not exceed the scope of the permission originally granted for its use by Harold Sellers.

(12) That title in and to the subject premises is quieted in favor of the Defendants pursuant to KRS 411.120.

On appeal, the Brocks argue that they established the requisite elements of adverse possession. Moreover, the weight and credibility afforded the testimony of Harold Sellers and Terry Sellers constitutes an abuse of discretion by the trial court resulting in the erroneous award of Lot 25 to the Sellers.

The Brocks correctly state that the appropriate standard of review in this case is whether the trial court abused its discretion. See Boggs v. Burton, Ky. App., 547 S.W.2d 786, 787 (1977). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair or unsupported by sound legal principles." Goodyear Tire & Rubber Co. v. Thompson, Ky., 11 S.W.3d 575, 581 (2000). Moreover, in cases tried upon the facts without a jury, "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of

the trial court to judge the credibility of the witnesses." CR 52.01.

In this case, the trial court observed and heard the various witnesses testify, he viewed their demeanor on the witness stand, and he was of the opinion that there was an agreement between Beulah Brock and Harold Sellers granting the Brock family permission to use Lot 25. Standing alone, this finding defeats a claim of adverse possession because, "[w]hile occupancy of realty represents actual possession, it must be adverse or hostile to the rights of the title owner, and possession by permission cannot ripen into title no matter how long it continues." Phillips v. Akers, Ky. App., 103 S.W.3d 705, 708 (2002) (citing United Hebrew Congregation of Newport v. Bolser, 244 Ky. 102, 50 S.W.2d 45 (1932) and Mills' Adm'x v. Mills, Ky., 265 S.W.2d 458 (1954)). However, the Sellers' defense was further buttressed by the facts that Beulah Brock knew she did not own Lot 25 when she began utilizing it and Wayne Brock offered to purchase Lot 25 on at least a couple of occasions. Such admissions and actions belie an adverse possession claim.

Contrary to the Brocks' assertion in this appeal that the trial court's decision was arrived at as a result of passion and prejudice, we believe the trial court carefully heard the evidence and properly considered the matter before quieting

title in favor of the Sellers. In short, we cannot conclude that the trial court clearly erred or made an error of law, therefore we affirm the judgment of the Harlan Circuit Court. See City of Louisville v. Allen, Ky., 385 S.W.2d 179, 184 (1964), overruled on other grounds by Nolan v. Spears, Ky., 432 S.W.2d 425 (1968).

ALL CONCUR.

BRIEF FOR APPELLANT:

Otis Doan
Harlan, Kentucky

BRIEF FOR APPELLEE:

Mark David Goss
Goss & Goss Attorneys
Harlan, Kentucky