

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000066-MR

JUDY DONAHUE

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE SAMUEL C. LONG, JUDGE
ACTION NO. 98-CI-00277

EDWARD LAW

APPELLEE

OPINION AND ORDER DISMISSING

** ** *

BEFORE: JOHNSON, SCHRODER, AND TACKETT JUDGES.

SCHRODER, JUDGE. This is a pro se appeal from a judgment quieting title to real property. Appellant's sole argument is that as an indigent party, she is entitled to a free transcript of the trial proceedings to pursue her appeal on the merits. However, since appellant only appealed from the judgment on the merits and did not appeal from the subsequent order denying her motion for a free transcript, the appeal is not properly before us. Hence, we must dismiss the appeal.

On December 14, 1998, the appellee, Edward Law, filed a petition for declaration of rights to quiet title to certain property in Morgan County. Appellant, Judy Donahue, filed an answer denying Law's title and asserting as affirmative defenses adverse possession and champerty. On October 24, 2001, a bench trial was conducted on the matter. The trial court entered its findings of fact and conclusions of law in the case on December 12, 2001, adjudging that Law had superior title to the property in question and that Donahue failed to establish title by adverse possession.

On January 4, 2002, Donahue filed a pro se notice of appeal, specifically stating that it was from the judgment of December 12, 2001. On January 15, 2002, Donahue filed a pro se motion with the circuit court to proceed in forma pauperis which contained an affidavit of indigency. She requested that she be able to pursue the appeal without being required to pay fees, costs or give security therefor. On January 15, 2002, Donahue filed a "Motion To Prepare Record" asking that the court prepare the record on appeal to be transferred to the Court of Appeals and "also to order the minutes of the Trial transcribed." On January 28, 2002, the court sustained Donahue's motion to proceed in forma pauperis, but denied her motion to prepare record. On February 7, 2002, Donahue filed a motion specifically asking for a transcript of the trial at no cost to

her. The circuit court record before us does not contain the ruling on this motion, although apparently a copy of the order denying said motion on a docket sheet dated June 24, 2002, is contained in the appendix to appellant's brief. No subsequent notice of appeal was filed from either the January 28, 2002, order or the June 24, 2002, order.

Despite the fact that her appeal was from the December 12, 2001 judgment and her prehearing statement in this Court indicated that she was appealing the court's finding that title by adverse possession was not established, Donahue's sole argument in her appellate brief is that the court erred in denying her a transcript of the trial proceedings at no cost due to her indigent status.

CR 73.02(1)(a) requires that "[t]he notice of appeal shall be filed within 30 days after the date of notation of service of the judgment or order under Rule 77.04(2)." (emphasis added.) CR 73.02(2) sets forth a substantial compliance rule as to appeals except that "[t]he failure of a party to file timely a notice of appeal. . . shall result in a dismissal or denial."

It has been held that failure to timely file a notice of appeal is a jurisdictional defect that must result in automatic dismissal of the appeal. City of Devondale v. Stallings, Ky., 795 S.W.2d 954 (1990). Although the substantial

compliance rule was applied in Ready v. Jamison, Ky., 705 S.W.2d 479 (1986), where appellants failed to specify the proper judgment/order they were appealing from (all appellants indicated the appeal was from a subsequent post-judgment order), a timely appeal was filed from the judgment/order they were actually appealing. In the instant case, Donahue filed a timely notice of appeal from the December 12, 2001, order on the merits of the case, but did not file a notice of appeal from the later order which adjudicated the issue which is clearly the subject of her appeal herein. Since Donahue was actually appealing from the post-judgment order, she was required to file a separate appeal from that order, which could have then been consolidated with the appeal on the merits. Accordingly, we have no choice but to dismiss the appeal on jurisdictional grounds.

We would note, unfortunately, that had the appeal been properly perfected, it appears that Donahue, as an indigent party, would have been entitled to a transcript of the trial at no cost under KRS 453.190(1).

It is therefore ORDERED that this appeal be, and it is, DISMISSED.

ALL CONCUR.

ENTERED: August 29, 2003

/s/ Will Schroder
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT:

Judy Donahue
West Liberty, Kentucky

BRIEF FOR APPELLEE:

Earl Rogers, III
Morehead, Kentucky