

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001032-MR

KATHERINE HODGES and CLYDE
HODGES, wife and husband; JEAN
KARR, an unmarried adult; BEATRICE
MOORE, an unmarried adult; GLENN COBB
and JOYCE COBB, husband and wife;
LENA HELEN LEWIS, an unmarried adult;
SHIRLEY SWAFFORD and JOE SWAFFORD, wife
and husband; SANDE K. LEWIS, an
unmarried adult; TRUDY ANN MCKNIGHT
and JOE MCKNIGHT, wife and husband;
BILLIE COBB, an unmarried adult;
RAY COBB and wife, BILLIE COBB

APPELLANTS

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE LEWIS B. HOPPER, JUDGE
ACTION NO. 99-CI-00063

MICHAEL LOCKABY and
DIANA LOCKABY, husband and wife;
and EUGENE LOCKABY and HENRIETTA
LOCKABY, husband and wife

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HENRY, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: In order to prove ownership of a piece of property, a claimant must prove title and location. In the present case, the Laurel Circuit Court held that appellants

failed to prove the location of the tract which they claimed. We must decide whether that decision was supported by substantial evidence. We hold that it was, and we therefore affirm the circuit court's judgment.

In 1974, Eugene and Henrietta Lockaby conveyed a small triangular piece of property to Lucy Moore and Oakley B. Cobb, Exec. The property was described as follows:

A certain tract of land lying and being in Laurel County, Kentucky and being a part of the same land acquired by the parties of the first part from ROBERT LOCKABY, et al, by deed dated the 8th day of January, 1972, and recorded in Deed Book No. 210, page 222, Laurel County Court Clerk's office and which is more particularly described as follows:

Beginning at an oak tree at the road; thence a southwest direction 100 feet to a spruce pine; thence a Northwest direction 300 feet to a stone; thence east 250 feet to the point of beginning at the road.

At the time of this conveyance, the Lockabys owned a 40-acre tract which adjoined property owned by Moore and Cobb.¹ Portions of both properties were being actively strip-mined at that time, and the record indicates that the apparent purpose of this small conveyance was to provide access across the Lockabys'

¹In a nutshell, Willie Moore and Charlie Cobb purchased the 86-acre tract in 1947. As a result of numerous deaths and conveyances appellants, as alleged by their complaint, are the current owners in varying undivided interests. Appellants will hereinafter be referred to as "Moore and Cobb."

property so that coal could be hauled off the Moore and Cobb property.

Moore and Cobb brought this action to quiet title to the triangular tract of property and to establish the common boundary line.² The case was submitted to the master commissioner upon depositions. Initially, the master commissioner issued proposed findings of fact and conclusions of law which favored the position advocated by Moore and Cobb. Upon the filing of exceptions by the Lockabys, however, the trial judge rejected the master commissioner's proposed findings and entered findings of fact, conclusions of law and a judgment in favor of the Lockabys. Moore and Cobb appeal from that judgment.

Before reaching the merits of the appeal, we must address two procedural matters concerning the identities of the proper parties as appellants and as appellees.

With respect to the latter, the complaint names Diane Lockaby as a party defendant. Apparently, she has divorced Michael Lockaby, remarried, and moved to Ohio. She was never served with summons and did not enter an appearance. As such, the trial court never acquired personal jurisdiction over her,

² While the Lockabys argue that Moore and Cobb did not raise the issue of a boundary line dispute in their complaint, the complaint does set forth descriptions of both the 86-acre tract, and the small triangular tract, and it alleges that the Lockabys set out claims to the Moore and Cobb property and trespassed on the property.

and Moore and Cobb made no attempt to serve her by warning order attorney. The issuance and service of process is a fundamental prerequisite to a court's exercise of jurisdiction and, without personal jurisdiction over an individual, a court lacks authority to adjudicate that person's rights.³ As Diane Lockaby was never made a party to the trial court action, that court had no jurisdiction over her and she is therefore not a proper party to this appeal.⁴

The issue concerning the proper appellants is somewhat more substantial. Velma Cobb, who was one of the original plaintiffs, owned an undivided one-third interest in the Moore and Cobb tract. After she died on November 19, 2000, no revival of the action was filed.⁵ On April 3, 2003, the Lockabys filed a motion to dismiss for failure to revive. In response to this motion, the devisees under Velma Cobb's will, namely Glenn Cobb and his wife Joyce Cobb, Lena Helen Lewis, Shirley Swafford and her husband Joe Swafford, Sande K. Lewis, Trudy Ann McKnight and

³ See *Kulko v. Superior Court*, 436 U.S. 84, 91, 98 S.Ct. 1690, 56 L.Ed. 2d 132 (1978).

⁴ In addition, the record contains a copy of a deed from Diane Lockaby conveying to Michael Lockaby all her interest in a 4.5-acre lot which was an out-conveyance from the Lockaby 40-acre tract. This deed was recorded on June 26, 1989 in the lot Deed Book 367, page 239 in the Laurel County Clerk's office. Henrietta Lockaby and Elmer Lockaby joined in this deed to release a restriction which was contained in an earlier deed conveying the lot to Michael Lockaby and Diane Lockaby.

⁵ Under KRS 395.278, "[a]n application to revive an action in the name of the representative or successor of a plaintiff . . . shall be made within one (1) year after the death of a deceased party."

her husband Joe McKnight, filed a motion for permissive joinder under CR 19.01 and 20.01. On May 21, 2003, the trial court entered an order directing "[t]hat upon motion of Defendants and by agreement of the parties, the Plaintiff, Velma Cobb's Complaint is dismissed." Although the court explicitly reserved ruling on the motion for permissive joinder, it never again addressed the joinder issue.

The rules governing joinder of parties are set forth in CR 19 through 21. Under CR 19.01,

[a] person who is subject to service of process, either personal or constructive, shall be joined as a party in the action if (a) in his absence complete relief cannot be accorded among those already parties, or (b) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

In addition, under CR 21 "parties may be dropped or added by order of the court on motion of any party or of its own initiative **at any stage of the action.**" (Emphasis added.)

In the present case, no doubt exists but that Velma Cobb's executor failed to revive her complaint with respect to her cause of action. That said, upon her death Velma Cobb's interest in the Cobb and Moore property devolved to her children

under the terms of her will. At that point, they had an interest in the subject matter of the action, i.e. the establishment of the boundary line between the two tracts. And, their absence from the litigation might, as described in CR 19.01, "(i) as a practical matter impair or impede [their] ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of [their] claimed interest."

In the limited circumstances of this case, where CR 21 permits joinder at any stage of the proceeding, where the trial court apparently inadvertently failed to rule on the pending motion of Velma Cobb's devisees to join in the action, and where the subject matter of the litigation involves a boundary line dispute in which these devisees are undivided interest owners of one of the affected properties and all other interested owners are properly before the court and evidently do not object to their joinder as parties, we believe that in the interest of judicial economy those parties should be treated as having been properly joined as parties for purposes of this proceeding.⁶

⁶ We note that the same counsel who represented Velma Cobb also represents the other appellants as well as Velma Cobb's devisees, and that Velma Cobb's devisees raise no points of error any different from those already raised. So, Velma Cobb's devisees are hereinafter included with their co-owners under the designation of "Moore and Cobb."

As to the merits of the appeal, and as an initial matter, we note that this case was tried by the trial court sitting without a jury. In such a case, the findings of the trial judge may not be set aside unless clearly erroneous, with due regard being given to the opportunity of the trial judge to consider the credibility of the witnesses.⁷ Findings of fact are not clearly erroneous if supported by substantial evidence.⁸ The test for substantiality of evidence is whether the evidence, either when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons.⁹ This court has applied this rule in boundary disputes, stating that "where this Court cannot say on an appeal from the decree in an action involving a boundary dispute that the Chancellor's adjudication is against the weight of the evidence, the decree will not be disturbed".¹⁰

Moore and Cobb contend that the trial court erred in its findings of fact which disregarded the opinion of their expert, Charles Felts, that the small triangular tract was located along the southerly portion of the Lockaby tract along

⁷ CR 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995).

⁸ *Black Motor Company v. Greene*, 385 S.W.2d 954 (Ky. 1964).

⁹ *Kentucky State Racing Commission v. Fuller*, 481 S.W.2d 298, 308 (Ky. 1972); *Janakakis-Kostun v. Janakakis*, 6 S.W.3d 843, 852 (Ky.App. 1999).

¹⁰ *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980) (quoting *Rowe v. Blackburn*, 253 S.W.2d 25, 27 (Ky. 1952)); *Webb v. Compton*, 98 S.W.3d 513, 517 (Ky.App. 2002).

Campbell Branch Road. They also contend that the court erred in finding that no disturbance had occurred along the southerly end of the Lockaby property and therefore no coal had been hauled out at that point, and in failing to find that the common boundary line was in the location determined by Felts. As noted by the Lockabys, Felts proceeded under the assumption that the "road" described in the 1974 deed from Lockaby to Moore and Cobb was the Campbell Branch Road. However, countervailing testimony by the Lockabys' surveyor and by Henrietta Lockaby indicated that the "coal hauling road" was located in the middle of the Lockaby tract, that several roads ran through the Lockaby tract, and that Felts disregarded every directional call in the 1974 deed description in plotting and locating the small triangular parcel at the southerly end of the Lockerby tract. Further, a different result is not compelled by the fact that a wooden bridge located at the front of the property was used in the 1950s for hauling logs off the Lockaby tract. This earlier use of that bridge does not logically prove that the same egress was used by coal trucks in the 1970s, especially in light of the testimony that the area currently appears natural and undisturbed. Finally, the trial court also had the benefit of Peters' survey which established the existence of a common boundary point among several adjacent property owners at the confluence of Cox Branch and Little Laurel River. Thus, the

factual findings of the circuit court were not clearly erroneous.

The second argument of Moore and Cobb is that the Lockabys are estopped by deed to deny the title. The doctrine of estoppel by deed is that parties to a deed, or those in privity to the parties, are prohibited from denying the truth of the deed, from asserting any rights or title in derogation of the deed against any other parties to the deed, or from denying the truth of any material facts asserted in the deed.¹¹ This doctrine therefore bars the Lockabys' claim that the 1974 agreement was only an easement for the purpose of hauling coal, as the instrument is clearly a deed conveying a fee simple interest.

As found by the circuit court, however, the problem with the 1974 deed is that its description of the property is so vague that the physical location of the tract cannot be determined. In a quiet title action, "the burden is on the one asserting title to prove both title and possession."¹² However, a deed description must be made with reasonable certainty in order for the grantee, or one claiming under it, to establish

¹¹ *Kentucky River Coal Corp. v. Jones*, 441 S.W.2d 409, 411 (Ky. 1969); *Meyer v. Jefferson County*, 305 S.W.2d 536, 537 (Ky. 1957).

¹² *Hunt v. Cassity*, 297 Ky. 716, 721, 181 S.W.2d 248, 250 (1944).

possession of the tract in question.¹³ As Peters testified, the Lockaby tract contained several roads and many trees, and the deed description was so unclear that the small triangular tract could not be located from the face of the document using standard surveying practices. Thus, the finding and conclusion of the circuit court that Moore and Cobb "were not able to ascertain the actual location of the boundary lines of the triangular tract of land" was not clearly erroneous.

Moore and Cobb's final contention is that if they are unable to establish title by the 1974 deed to the small triangular tract, then they are entitled to damages for fraud and breach of title from the Lockabys. While the circuit court did not address this issue, we are mindful that even under Felt's survey, this tract comprises only 0.23 acre, which would comprise approximately 0.2% of Moore and Cobb's 86-acre tract, and the tract likely has no mineral value due to the previous strip mining. Further, the tract's current ownership is split among a number of owners, the stated consideration listed in the 1974 deed was only \$25, and the current owners' predecessors already received some benefit from the tract due to the

¹³ *Knott Coal Corp. v. Kelly*, 417 S.W.2d 253, 255 (Ky. 1967); see *Ken-Tex Exploration Co. v. Conner*, 251 S.W.2d 280, 281 (Ky. 1952) (court holding that description in a deed is sufficient to make a conveyance if a surveyor, with the deed before him, can with the aid of extrinsic evidence locate the land and establish its boundaries); *Justice v. Justice*, 239 Ky. 155, 158, 39 S.W.2d 250, 251 (1931) (court holding that a deed is void, where the description is so uncertain as to be meaningless and deed supplies nothing to enable the premises to be identified).

strip-mining of their larger 86-acre tract. Most importantly, since the tract cannot be located, any calculation of damages based on the tract itself would be speculative. Under these circumstances, Moore and Cobb would be entitled to nothing more than nominal damages for any failure of title. Hence, the failure of the circuit court to consider damages for breach of title was harmless error.¹⁴

The judgment of the Laurel Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Elmer Cunnagin, Jr.
London, Kentucky

BRIEF FOR APPELLEES:

Marilyn Benge McGhee
London, Kentucky

¹⁴ *De minimus non curat lex.*