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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001360-MR

BEATRICE B. JUSTICE

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 00-CI-00972

HOWARD JAMES; AND ALMA LAND
COMPANY

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

VANMETER, JUDGE: This is an appeal from an order entered by the Pike Circuit Court adjudging appellee Howard James to be the true owner of a certain piece of property in Pike County, Kentucky by adverse possession. Appellant, Beatrice B. Justice, contends on appeal that the evidence is insufficient to support the trial court's finding that James acquired ownership of the property by adverse possession. For the reasons stated hereafter, we affirm.

Justice owns three lots on or near the Sulphur Springs Hollow of Chloe Creek in Pike County. The ownership of two of those lots is not in dispute. Justice obtained the third, disputed lot in 1981 from the Annie E. Young Heirs. In 1983, James obtained from the same heirs an interest in property adjoining Justice's third lot. A dispute subsequently arose as to the location of the boundary between the two properties. Justice filed a complaint in July 2000 seeking to eject James from the disputed area and to recover damages for his prior possession. James counterclaimed, seeking to quiet title to the disputed area by reason of record title or adverse possession.

James testified that at the time he acquired an interest in his property, there was located in the now-disputed area a small pond which was created during a mining operation in the 1970s. James stated that he immediately began using his property to graze livestock and that he also mowed the property. James testified that the property was fenced, and he replaced the fence after it was damaged during mining operations in the 1990s. At that time, James also placed a second fence around the pond after it and the surrounding flat area were enlarged due to the mining operations.

After a bench trial the circuit court characterized the "ultimate question" before it as being the location of the boundary between the parties' properties. The court found that

the property description in Justice's deed was ambiguous, and relied upon the language in James' deed in locating the property line. The court noted that James urged it to locate the property line with a sharply skewed angle, with the result that Justice would own property other than that located directly behind her two undisputed lots. However, the court rejected this argument and instead located the property line at some distance directly behind Justice's two undisputed lots, consistent with Justice's stated intention to purchase the property located in that area.

The court further rejected James' claim that he had adversely possessed a portion of the property including the pond for more than fifteen years. The court found

that there was no continuous use of Ms. Justice's property for fifteen years by Mr. James himself, or through Alma Land Company. The fence claimed by Mr. James is a newer fence and has not been on the property for fifteen years. Further, the Court finds that over the years the landscape was changed, and the pond claimed by Mr. James has simply been enlarged over time. Not all of the pond as it exists today (part of the pond extends over to Ms. Justice's land) has been there for fifteen years. Defendants failed to introduce any proof that compares and contrasts the topography of the property when Mr. James obtained his deed and the topography of the property now. Further, the Court finds that Mr. James has not held Ms. Justice's property to a well-marked boundary for fifteen years. Likewise, Alma Land Company did not have possession or use of Ms. Justice's property for fifteen years.

The court noted that a "party claiming by adverse possession must have open, notorious, continuous, exclusive, hostile possession of the property to a well-marked boundary. A party cannot move the boundary out year after year and claim to that boundary in the fifteenth year."

James timely requested the court to alter, amend or vacate its judgment¹ or to make additional findings of fact, raising issues as to both the location of the boundary line and the finding that he had not adversely possessed the pond and surrounding land. On June 9, 2004, the trial court entered an order addressing its earlier judgment and the location of the boundary line. While the trial court did not relocate the boundary line, it discussed its earlier characterization of James' argument, noting that it

was wrong to write that the "Defendant claims that 'top of hill' means the toe of an excavated pond on a flat area created by mining sometime in the 1990's." This Court was attempting to describe the place where the fence was located. This Court believed that James had claimed possession to the fence for more than 15 years.

Further, the court adjudged that James had adversely possessed the property which encompassed the pond and the surrounding area, noting that it

¹ See CR 59.05.

must consider the use made by the Defendants of property belonging to the Plaintiff. There is no doubt that James had used the pond and the nearly flat property surrounding it for more than 15 years, but it has been hard for the Court to determine the boundary for his adverse use. Part of the problem is that the pond had been enlarged during the early 1990's and the Court suspects that now flat area around the pond had also been expanded at the same time. James testified that the fence present in that area today replaced one that had always been in that location. Because actual testimony is probably better than the Court's mere suspicion, the Defendants' Motion will be granted as to this issue. The Judgment is Amended so as to exclude from Justice's land, the entire pond and the nearly flat property adjacent to it. The line between Justice and James will be the point to the fence and following the fence to the Shelby Fuel line.

This appeal followed.

Justice contends on appeal that the trial court erred by finding that James owned the pond and surrounding area by virtue of adverse possession. In support thereof, Justice argues that the circuit court's amended judgment is not supported by the record and that James did not prove by clear and convincing evidence that he adversely possessed the property. We disagree.

It is clear that "[t]he party setting up and relying on adverse possession has the burden of proving it, and to succeed he must prove all the elements necessary to establish

it."² Thus, such a party must prove that his possession of the disputed area was actual, open, notorious, exclusive, and continuous for the full statutory period.³ Each of these elements must be proven by clear and convincing evidence.⁴ On appeal, however, "the appropriate standard of review is whether or not the trial court was clearly erroneous or abused its discretion, and the appellate court should not substitute its opinion for that of the trial court absent clear error."⁵ Finally, "in an action tried without a jury, the factual findings of the trial court shall not be set aside unless they are clearly erroneous, that is not supported by substantial evidence."⁶

First, Justice argues that the trial court's amended judgment is not supported by the record. In support thereof, she claims that the circuit court erred by finding, in its amended judgment, that James' "testimony is probably better than the Court's mere suspicion," and that James' new fence was in the same location as a previous fence. On appeal, we must give due regard to the circuit court's assessment of James'

² *Vorhes v. Dennison*, 300 Ky. 427, 431, 189 S.W.2d 269, 271 (Ky. 1945).

³ *Sackett v. Miniard*, 219 Ky. 765, 767, 294 S.W. 487, 488 (Ky. 1927). See also *Phillips v. Akers*, 103 S.W.3d 705, 708 (Ky.App. 2002).

⁴ *Phillips v. Akers*, 103 S.W.3d at 709.

⁵ *Id.*

⁶ *Id.*

credibility.⁷ That the circuit court abandoned its initial finding that the fence was completely new, and ultimately found that the new fence replaced a previous fence, does not affect the weight of the trial court's amended judgment. After all, "a trial court has unlimited power to amend and alter its own judgments."⁸

Further, we are not persuaded by Justice's argument that even if the trial court believed there was an old fence, James did not establish when, where, and by whom that fence was built. Certainly, the trial court could infer from James' testimony that he built the old fence himself. In any event, a finding that James did not build the old fence would not have been fatal to his claim since the trial court believed his testimony that he built the new fence in the same location as the old fence.

Moreover, evidence was adduced to support the trial court's finding that James adversely possessed the property for at least 15 years. One witness testified that he lived near the Sulphur Springs Hollow from 1979 through the 1980s and that he was aware that James continuously grazed cattle in the disputed area starting in the early 1980s. This witness also recalled the existence of both a fence around the pond and a second

⁷ See CR 52.01.

⁸ *Gullion v. Gullion*, 163 S.W.3d 888, 891-92 (Ky. 2005) (internal citation omitted).

fence. Another witness testified that he recalled James' cattle grazing in the disputed area starting shortly after the witness moved to the area in 1979. A third witness, who conducted daily mining operations in the area in the early 1980s, also testified that he saw James grazing cattle in the disputed area.

Finally, we are not persuaded by Justice's argument that the trial court erred by finding that James proved by clear and convincing evidence that he adversely possessed the property. Decisions regarding adverse possession are extremely fact sensitive. In *Kentucky Women's Christian Temperance Union v. Thomas*⁹, for instance, the court held that Thomas' seeding, fertilizing, and bulldozing a tract were insufficient to constitute adverse possession even though Thomas also had cut hay off the land every other year, raised corn on the land at one point, dug a pond, placed the land in a soil bank for four years, and cut the bushes every year. The court in *Gray v. Taylor*¹⁰, however, held that adverse possession was established where the defendant built and maintained a fence, farmed the land for several years, cut and sold timber, pastured the land, and paid taxes on the land for many years. The *Gray* court reasoned that "[a]lthough these acts of adverse possession when considered individually perhaps would not be sufficient to

⁹ 412 S.W.2d 869, 870 (Ky. 1967).

¹⁰ 271 S.W.2d 30, 31 (Ky. 1954).

establish title by adverse possession, nevertheless their cumulative effect, when considered with other elements, was such as to establish a continuous course of adverse possession for the required period."¹¹

In the matter now before us, James certainly maintained one fence and built a second fence around the pond. If James did not also build the first fence, he could claim the area to the boundary marked by another only if he showed "an intent to claim to the line marked."¹² Contrary to Justice's contention, the trial court's determination that James made such a showing is not clearly erroneous. James produced evidence to show that he sowed grass on the area, continuously ran livestock there, and mowed the area with a tractor. Moreover, James testified that the pond in the area was enlarged due to mining operations for which he was compensated. Finally, James asserts that after the mining operations were complete, he rebuilt the previously-existing fence and built a second fence around the pond to keep out his cattle. As in *Gray*, while these acts individually might not have amounted to adverse possession, together they were sufficient to support the trial court's finding that James was entitled to the disputed area by adverse possession.

¹¹ *Id.*

¹² *Caudill v. Bates*, 286 S.W.2d 922, 924 (Ky. 1955).

The judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joseph W. Justice
Pikeville, Kentucky

BRIEF FOR APPELLEES:

Reed D. Anderson
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