

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-001350-MR

SAMMIE BAILEY AND  
JUANITA BAILEY, HIS WIFE

APPELLANTS

v. APPEAL FROM MAGOFFIN CIRCUIT COURT  
HONORABLE KIM C. CHILDERS, JUDGE  
CIVIL ACTION NO. 04-CI-00136

MYRA SUE HOWARD

APPELLEE

OPINION AND ORDER  
DISMISSING APPEAL

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BEFORE: COMBS, CHIEF JUDGE; MINTON, JUDGE; HUDDLESTON, SENIOR JUDGE.<sup>1</sup>

MINTON, JUDGE: Sammie and Juanita Bailey appeal the circuit court's ruling that land that they owned jointly with Myra Sue Howard could be divided without materially impairing the value of the land. We cannot reach the merits of the Baileys' arguments, however, because this is an appeal of an interlocutory order and it must be dismissed.

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<sup>1</sup> Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Howard filed an action to partition approximately 88 acres of land in Magoffin County, claiming that she and the Baileys own the land jointly. The Baileys objected to partition, arguing that dividing the land would materially diminish its value. The trial court ordered that the issue of divisibility be submitted to the court on depositions. Accordingly, Howard and the Baileys each marshaled evidence for their respective positions; and the matter was submitted to the court for resolution.

The trial court issued findings of fact, conclusions of law, and a judgment deciding that the property could be divided without materially impairing its value. Furthermore, the trial court found that Howard should be awarded the portion of the property where her trailer and outbuildings are located on the north side of the highway that bisects the property. Finally, the trial court appointed three disinterested commissioners to recommend the division. The trial court denied the Baileys' motion to alter, amend, or vacate, except for changing a recitation of the acreage upon which Howard resides. Dissatisfied, the Baileys then filed this appeal.

Actions like this one are governed by KRS 389A.030. Subsection three of that statute sets forth a presumption that the land is indivisible but provides that "if the court is satisfied from the evidence that the property is divisible,

without materially impairing the value of any interest therein, division thereof pursuant to KRS 381.135 shall be ordered.” Since the trial court found that Howard had presented sufficient evidence to rebut the presumption in favor of indivisibility, the land was automatically subject to division under KRS 381.135. KRS 381.135(4) required the trial court to appoint three disinterested commissioners to determine the proper division of the property. But the trial court had no power to direct the commissioners as to how to divide the land.<sup>2</sup> Thus, it appears to us that the trial court may have erred to the extent that it instructed the commissioners from the outset to award Howard any certain section of the land to be divided. But we may not express our opinion definitively on that issue because the Baileys have appealed from a nonfinal order of the trial court.

We have jurisdiction only over appeals from final judgments or orders.<sup>3</sup> And we are obligated to determine if the order appealed from is final and appealable, regardless of whether the parties question the order’s appealability.<sup>4</sup> So it makes no difference in our deliberation that Howard has not raised the appealability issue.

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<sup>2</sup> See, e.g., Kirk v. Maynard, 298 Ky. 576, 183 S.W.2d 547 (1944).

<sup>3</sup> KRS 22A.020.

<sup>4</sup> Francis v. Crouse Corp., 98 S.W.3d 62, 64 (Ky.App. 2002).

In order to be final and appealable, an order must determine all of the rights of all of the parties in the proceeding.<sup>5</sup> The order from which the Baileys attempt to appeal clearly does not finally adjudicate all of the rights of either side because it is not yet known how the commissioners will divide the property. In other words, until the commissioners' report is filed and the trial court acts with finality upon the commissioners' report, we are unable to determine whether the property was fairly and equally divided, which is the ultimate issue in these proceedings. Further, it is well settled that an order denying relief under Kentucky Rules of Civil Procedure (CR) 59.05 is not final and appealable.<sup>6</sup>

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<sup>5</sup> See, e.g., Commonwealth v. Harrelson, 14 S.W.3d 541, 545 (Ky. 2000).

<sup>6</sup> See, e.g., Marshall v. City of Paducah, 618 S.W.2d 433 (Ky.App. 1981).

Appeals from nonfinal orders must be dismissed.<sup>7</sup> So we must order that this appeal is dismissed.

ALL CONCUR.

ENTERED: June 9, 2006 \_\_\_\_\_ /s/ John D. Minton \_\_\_\_\_  
JUDGE, COURT OF APPEALS

BRIEFS FOR APPELLANTS:

Lowell E. Spencer  
Paintsville, Kentucky

BRIEF FOR APPELLEE:

Gordon B. Long  
Salyersville, Kentucky

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<sup>7</sup> Frantz, Inc. v. Blue Grass Hams, Inc., 520 S.W.2d 313, 315 (Ky. 1974).