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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000478-MR

JANA JONES APPELLANT

v.

APPEAL FROM JOHNSON CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 99-CI-00365

KENNETH HAUT and
LOUANN HAUT APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; VANMETER, JUDGE; GUIDUGLI,[1] SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Jana Jones ("Jones") appeals the January 29, 2007, order of the Johnson Circuit Court. That order denied Jones any right to a disputed parcel of property and ordered that she remove any obstructions from the property within thirty days. We affirm.

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[1] Senior Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

On September 1, 1999, Jones filed a complaint with the Johnson Circuit Court against Kenneth and Louann Haut ("the Hauts"), alleging injury to her property by the installation of drainage pipes on the Hauts' property. On November 4, 1999, the court entered an order allowing Jones access to the Hauts' property in order to tie into the drainage pipes. The case remained open, but no additional action was taken, and on March 19, 2002, Jones' complaint was dismissed with prejudice for failure to prosecute. On February 13, 2003, the Hauts filed a counterclaim in the action, alleging damage to their property by Jones' construction of "a wall and other barriers." The Hauts sought compensatory damages and removal of the wall and barriers, claiming they were built on property that was actually a street.[2]

The matter was referred to the Master Commissioner ("MC") and heard on October 19, 2005. Jones filed a memorandum in support of her defense. The Hauts did not file a memorandum. On August 31, 2006, the MC entered his recommendations, which included dismissing Jones' claim to the disputed piece of property; declaring it a roadway; and ordering any obstructions placed on the disputed property to be removed. The MC also recommended dismissing the Hauts' claims for monetary damages. Jones filed her exceptions to the MC's recommendations on September 7, 2006. On January 29, 2007, the Johnson Circuit Court entered an order sustaining the recommendations of the MC in their entirety and giving Jones 30 days to remove any obstructions from the disputed property. In its opinion, the court found that a formal action by the fiscal court

[2] It is unclear from the record what the actual damage to Appellee's property is alleged to be. However, this issue is not raised by Appellant and is thereby waived.

was required before the property could be abandoned and that Jones had failed to notice the county of her intentions to adversely possess the land, pursuant to KRS 413.050(2). Jones filed a motion to alter, amend or vacate. That motion was denied. This appeal followed.

> With respect to property title issues, 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. Furthermore, 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.

Phillips v. Akers, 103 S.W.3d 705, 709 (Ky.App. 2002) (citations omitted).

In her appeal, Jones argues: 1) the trial court's judgment is contrary to controlling case law and statutory authority and 2) she was not required to comply with KRS 413.050(2).

It is undisputed that a 25-foot roadway was depicted on the Blanton Subdivision plat map, recorded in Johnson County Clerk's Office Records File A, Map 12. It is also stipulated between the parties that the road has not been used by the public in approximately 30 years. Jones argues that the road has effectively been abandoned, making her use of it permissible. We do not agree.

In support of her argument, Jones cites to the case of *Sarver v. County of Allen*, 582 S.W.2d 40 (Ky. 1979). In *Sarver*, the Kentucky Supreme Court distinguished county roads from public roads that were not county roads, and found that county roads could not be abandoned without a formal action of the fiscal court. *Id.* at 42 (citations

omitted). Jones maintains that the road in question is not a county road and thus does not require formal action to be deemed abandoned. We agree with this general statement. The adoption of a county road requires more than the mere inclusion of the roadway on a map. The road must be accepted as part of the county road system by the fiscal court according to KRS 178.010. *Id.* at 41. While the road was dedicated in the subdivision plat and filed with the county, there is no proof that the road was ever formally accepted into the county road system. Therefore, the road is not a county road and does not require a formal action to be abandoned.

Although it can be found that the street has been abandoned, this status does not give Jones a right to it without a showing of adverse possession or other similar legal theory. In her brief, Jones argues that the theories of abandonment and adverse possession are separate legal theories. We agree. However, the fact that the road is abandoned does not give Jones an automatic right to it. In *Salyers v. Tackett*, the Kentucky Supreme Court was faced with the similar circumstance of a street that had been dedicated but never accepted into the county road system. 322 S.W.2d 707 (Ky. 1959). The court found in *Salyers* that "the dedication inured to the benefit of the public, and the public, particularly contiguous property owners, had a right to use it. . . . This right cannot be destroyed by mere encroachment by the owner of abutting property." *Id.* at 709 (citations omitted).

KRS 413.050(2) states:

> Limitation shall not begin to run in favor of *any* person in the possession of *any* part of *any* public road until written

> notice is given to the county court of the county in which the road is situated that the possession is adverse to the right of the public to the use of the road.

(emphasis added). Jones argues that KRS 413.050(2) fails to differentiate between public roads and public roads accepted into the county road system as specifically defined in the later amended KRS 178.010. She further argues that there is no reason to require notice to the county for the possession of a road not accepted into the county road system. We disagree. The statute clearly requires notice of *any* public road. We believe the legislature's intention to be clear from their use of the word *any.* Furthermore, the notice requirement of KRS 413.050(2) is clearly supported by case law. The *Salyers* opinion, which has an almost identical fact pattern as the case at hand, states “the right to obstruct a public way or road cannot be acquired by prescription, although the obstructions have been long maintained, unless this statute has been complied with.” 322 S.W.2d at 709. Therefore, we find that although the road in question has been abandoned, Jones has failed to prove her right to it.

For the foregoing reasons, the January 29, 2007, order of the Johnson Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

B.D. Nunnery
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

Wesley W. Duke
Lowmansville, Kentucky