

# Commonwealth of Kentucky

## Court of Appeals

NO. 2007-CA-000600-MR

JERRY KEENE

APPELLANT

v. APPEAL FROM PIKE CIRCUIT COURT  
HONORABLE EDDY COLEMAN, JUDGE  
ACTION NO. 05-CI-01231

RAYMOND ANDERSON;  
MELISSA ANDERSON

APELLEES

OPINION  
AFFIRMING

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BEFORE: ACREE AND STUMBO; JUDGES; GRAVES,<sup>1</sup> SENIOR JUDGE.

GRAVES, SENIOR JUDGE: Jerry Keene appeals from a judgment of the Pike Circuit Court adjudging appellees Raymond Anderson and Melissa Anderson the owners of a disputed section of property by both record title and adverse possession. For the reasons stated below, we affirm.

Keene and the Andersons own adjoining property located in Grapevine, Pike County, Kentucky. The Andersons acquired

<sup>1</sup> Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

their tract of property in January 2003 from Raymond's parents and have resided there since that time. Keene obtained his property from his mother in 1983.

Shortly after the Andersons purchased their property, they erected a chain-link fence where they believed the boundary line between the Keene and Anderson properties to be. On September 1, 2005, Keene cut through the Anderson's chain-link fence and erected his own make-shift fence where he thought the property line to be. The disputed property consists of approximately a 40-foot by 100-foot area.

Unable to resolve the dispute, on September 9, 2005, the Andersons filed a Complaint in Pike Circuit Court alleging trespass by Keene and seeking to quiet title to the disputed property in their favor. Keene filed an Answer and Counterclaim wherein he denied the Anderson's claim to the disputed property and sought the quieting of title to the property in his favor.

In connection with the litigation the Andersons filed a survey prepared by Professional Land Surveyor Luke Hatfield which determined that the disputed property belonged to them, and Keene filed a survey prepared by Professional Land Surveyor Philip Potter, whose survey determined that the disputed property belonged to the appellant.

A bench trial was held on December 6, 2006. On March 14, 2007, the trial court entered a judgment accepting the survey of the Anderson's over that produced by Keene and adjudicating the Anderson's as having fee simple record title to

the disputed property. The judgment further found that the Anderson's met the requirements to have obtained ownership of the property by adverse possession. Keene appeals from the trial court's judgment in favor of the Andersons.

Before us, Keene contends that the trial court erred by accepting the Anderson's survey over his survey. More specifically, he alleges that the trial court erred by failing to accept the lost-marker testimony of his witnesses; failed to apply the straight-line rule applicable to calls between markers; and failed to apply the rule that course and distance calls are to give way to natural objects.

We begin by noting that this is a case of the trial judge sitting without a jury. In such cases 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. CR<sup>2</sup> 52.01; *Lawson v. Loid*, 896 S.W.2d 1, 3 (Ky. 1995). Findings of fact are not clearly erroneous if supported by substantial evidence. *Black Motor Company v. Greene*, 385 S.W.2d 954 (Ky. 1964). The test for substantiality of evidence is whether the evidence, when taken alone, or in the light of all the evidence, has sufficient probative value to induce conviction in the minds of reasonable persons. *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). Moreover, "[i]t is the rule that,

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<sup>2</sup> Kentucky Rules of Civil Procedure.

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." *Croley v. Alsip*, 602 S.W.2d 418, 419 (Ky. 1980) (quoting *Rowe v. Blackburn*, Ky., 253 S.W.2d 25, 27 (Ky. 1952)).

In its March 14, 2007, judgment that trial court made the following findings of fact relevant to our review:

FINDINGS OF FACT

. . . .

4. The court finds [the]common boundary line of the plaintiffs' and defendant's respective tracts is that depicted by Lucas Hatfield, L.P.E. as identified in the record as Plaintiff's Exhibit "34."

5. The court finds the expert testimony of Lucas Hatfield, L.P.E. to be credible, and the boundary line set forth by him to be most consistent with the metes and bounds of the parties' respective deed descriptions, as well as with the descriptions contained in underlying mineral deeds.

6. Notwithstanding the court's findings herein with regard to record title, the court further finds the plaintiffs and their predecessors-in-title have maintained actual, open, notorious and hostile possess[ion] of the premises described in the aforementioned deed of conveyance for more than thirty (30) years prior to the commencement of this action.

Lucas Hatfield's testimony and his survey map comprise substantial evidence in support of the trial court's findings of fact concerning the boundary line between the Anderson property and the Keene property. Using a previous survey of the "Bennet

Reynolds Subdivision" prepared in 1959,<sup>3</sup> as his starting point, Hatfield testified that he located the disputed common boundary between the properties by taking line calls from both parties' chains of title, attempting to locate the calls by performing a physical inspection of the tracts, and then plotting the boundaries onto a map prepared in accordance with the deed descriptions and located landmarks. Moreover, Hatfield cross-checked his work against the mineral deeds underlying the subjects tracts and determined that the mineral deeds resulted in confirmation of his plotting of the surface boundaries. As such, the evidence in the record in this case is clearly sufficient to sustain the judgment of the trial court.

Keene argues, however, that the trial court should have accepted Philip Potter's survey as establishing the proper boundary. A key underpinning of the Potter survey was reputation testimony as to the location of nonexistent markers allegedly at one time located near a drainpipe adjacent to the properties. Thus the credibility of the reputation testimony was an issue in the trial. We emphasize that it was the trial court's function, not the function of this Court, to resolve the credibility of that testimony. CR 52.01. In summary, it was the trial court's prerogative to believe Hatfield's testimony and survey map over the survey prepared by Potter, which, again, depended in large part upon reputation testimony of lost markers.

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<sup>3</sup> The Anderson property consisted of eight lots as originally plotted on the Bennett Reynolds Subdivision plat.

Finally, as Keene has not challenged in his appellate brief the trial court's finding that the Anderson's had met the requirements to acquire ownership of the disputed property by adverse possession, we deem any such challenge to be waived or abandoned. *Grange Mutual Insurance Co. v. Trude*, 151 S.W.3d 803, 815 (Ky. 2004).

For the foregoing reasons the judgment of the Pike Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James Pruitt  
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Darrell E. Sammons  
Pikeville, Kentucky