

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-001496-MR

WANDA JONES

APPELLANT

v. APPEAL FROM CHRISTIAN CIRCUIT COURT
HONORABLE JOHN L. ATKINS, JUDGE
ACTION NO. 03-CI-00170

ROBERT BABBAGE

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * ** *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

WINE, JUDGE: Wanda Jones (“Wanda”) appeals from a summary judgment of the Christian Circuit Court dismissing her complaint against Robert Babbage (“Robert”). She argues that her action claiming title to real property under a prior, unrecorded deed is subject to the fifteen-year statute of limitations period contained in Kentucky Revised Statutes (“KRS”) 413.010, and not the five-year

period set out in KRS 413.120(12). We agree, as Wanda's claim is clearly an action to recover real property. Therefore, her complaint was not untimely and the trial court erred in granting summary judgment to Robert. Hence, we reverse and remand for additional proceedings.

The essential facts of this action are not in dispute. On June 8, 1984, Edward Babbage ("Edward"), as executor for the estate of Sallie G. Talbot, entered into an agreement to transfer a parcel of real property to Ralph and Wanda Jones. Pursuant to that agreement, Edward executed a deed conveying the property to Wanda alone. However, the deed was retained by the estate's attorney and was never recorded.

In January 1995, the estate's attorney notified Ralph and Wanda that they had defaulted on the purchase agreement and gave them thirty days to vacate the premises. Thereafter, on June 1, 1995, Edward, again as executor of Talbot's estate, executed a deed conveying the same property to his son, Robert. On the same date, Robert executed a deed conveying the property to himself and Edward in his individual capacity. Both deeds were recorded with the Christian County Clerk's Office.

On February 12, 2003, Wanda filed this action asserting that Robert had wrongfully taken title to and ousted her from the property. She sought an adjudication that she is the owner of the premises, temporary and permanent injunctive relief preventing Robert from interfering with her possession of the property, and an award of damages. Following a period of discovery, Robert

moved for summary judgment, arguing that the action was barred by the statute of limitations. The trial court agreed, concluding that the longest available limitation period for any of Wanda's causes of action was five years. Since Wanda failed to bring this action for nearly eight years after her cause of action accrued, the trial court found that it was untimely. This appeal followed.

There is no question that Wanda's cause of action accrued in June 1995, when Robert took possession of the property. The sole issue on appeal concerns the applicable statute of limitations for Wanda's action. Wanda maintains that her claim is essentially an action to recover real property, and thus subject to the fifteen-year limitations period contained in KRS 413.010. Robert, on the other hand, contends that Wanda's claim is grounded in fraud, and is subject to the five-year limitations period contained in KRS 413.120(12) and 413.130(3). As this is entirely a question of law, we review this matter *de novo*, without deference to the trial court's determination. *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998).

In support of the five-year limitations period, Robert relies on *Combs v. Grigsby*, 279 S.W.2d 249 (Ky. 1955), and *Combs v. Grigsby*, 200 Ky. 31, 252 S.W. 111 (1923). The 1955 *Combs v. Grigsby* case involved a suit to reform a deed to include only the surface estate. The former Court of Appeals found, among other things, that the grantors knew of the old mineral lease at the time the conveyance was made. Consequently, the cause of action accrued at that time and was subject to the five-year statute of limitations contained in KRS 413.120(12).

Combs, 279 S.W.2d at 250. Similarly, the 1923 *Combs v. Grigsby* case involved an action to cancel a deed executed by a common ancestor of the parties based upon that ancestor's lack of capacity. The former Court of Appeals found that the claim was not an action for recovery of real property under the predecessor to KRS 413.010, but was an action to set aside a deed based upon fraud or mistake under the predecessor to KRS 413.120(12). *Combs*, 252 S.W. at 113.

Unlike those cases, Wanda is asserting title based upon the strength of her own prior, unrecorded deed. She is not seeking to set aside the deed to Robert. But she does assert that Robert is not entitled to rely on his recorded deed because he had actual knowledge of the deed from Edward to her. *See* KRS 382.270. Furthermore, it is not necessary to prove fraud on the part of Robert, only that he had notice of such facts as would put a reasonable person on notice of the prior, unrecorded conveyance. *See Terry v. Ellsworth*, 236 Ky. 54, 32 S.W.2d 558, 560 (1930). Thus, Wanda's action is not one for fraud, but for recovery of real property.

We also disagree with Robert that the fifteen-year statute of limitations contained in KRS 413.010 applies only to claims based upon adverse possession. By its plain terms, KRS 413.010 applies to actions for recovery of real property. The statute applies to a person seeking to recover real property which is adversely possessed by another. But, it may also apply to actions to quiet title, *Justice v. Graham*, 246 S.W.2d 135 (Ky. 1952), and to recover real property from

trespass or ouster. *Wood v. Wingfield*, 816 S.W.2d 899, 903 (Ky. 1991).¹ While we express no opinion on the merits of Wanda's claims, we must conclude her action is not barred by the statute of limitations.

Accordingly, the summary judgment of the Christian Circuit Court is reversed, and this matter is remanded for additional proceedings on the merits of the claim.

ALL CONCUR.

BRIEF FOR APPELLANT:

William Clint Prow
Providence, Kentucky

BRIEF FOR APPELLEE:

W. E. Rogers, III
Hopkinsville, Kentucky

¹ We note, however, that actions for damages to real property caused by another's trespass are subject to the five-year statute of limitations contained in KRS 413.120(4). *Commonwealth, Department of Highways v. Ratliff*, 392 S.W.2d 913 (Ky. 1965).