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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000630-MR

WILLIAM KENNETH SPURLOCK — APPELLANT

v.

APPEAL FROM LAWRENCE CIRCUIT COURT
HONORABLE JOHN DAVID PRESTON, JUDGE
ACTION NO. 04-CI-00287

ALLEN HORN AND
DOROTHY HORN — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON AND NICKELL, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

BUCKINGHAM, SENIOR JUDGE: William Kenneth Spurlock appeals from a judgment of the Lawrence Circuit Court following a bench trial wherein the court

[1] Senior Judge David C. Buckingham 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.

decided that Spurlock had no ownership interest in a tract of real property upon which his home of 18 years once stood. We reverse and remand.

Spurlock is the son of the late Fred and Dorothy Spurlock. There are eleven other siblings. Fred and Dorothy owned real property in Lawrence County, Kentucky, located on Rockcastle Creek. On March 17, 1986, Fred and Dorothy deeded a portion of the property consisting of one acre to Spurlock. The parcel deeded to Spurlock had been acquired by Dorothy in 1962.

Spurlock did not review the deed that had been prepared at his father's direction, and he subsequently placed it in his safe deposit box. Spurlock later constructed a home on what he believed was the property described in the deed. Fred supervised some of the construction work for his son's home. Spurlock also mortgaged the property several times and constructed a greenhouse, barn, small outbuildings, workshop, and a gravel drive near the home. Further, he raised crops and built furniture on the property.

Fred died in 1990 and left his entire estate to Dorothy. Dorothy died in 1999, and her estate passed by will equally to her 12 children. In 2001 a civil action was filed in the circuit court to force the sale of the indivisible real property. The Horns purchased the property for $30,000 at judicial sale and received a master commissioner's deed in February 2003. Spurlock was present at the sale, bid on the property, but made no mention of a possible mistake in the property description as read by the commissioner.

Several weeks later, Horn discovered that Spurlock's home was included within the boundaries of the property he had purchased at the judicial sale. Horn then advised Spurlock that he would either have to move from the property or pay a monthly rental. Spurlock refused, and Horn filed a forcible detainer action in the district court, which was dismissed for want of subject matter jurisdiction. The Spurlock home was totally destroyed by fire in the spring of 2004.

In August 2004, the Horns filed a declaratory judgment action in the circuit court seeking a judgment declaring them to be the owners of the property claimed by Spurlock. Surveys of the property revealed that the property was, in fact, owned by the Horns under the commissioner's deed. The deed to a one-acre parcel to Spurlock in 1986 was for a parcel located 300-500 feet from where Spurlock had built his home and resided with his wife and children for a number of years. The one-acre tract actually owned by Spurlock was on a hillside that apparently was not very desirable as a home site.

Spurlock contended that the description in his deed was erroneous due to a mutual mistake. He asserted that he was therefore entitled to a reformation of the deed to correct the property description. Alternatively, he alleged that he had acquired title to over nine acres of the Fred and Dorothy Spurlock property by adverse possession.

The court conducted a bench trial and thereafter entered a judgment in favor of the Horns. The court stated that it was unable to find that there was any

mistake on the part of the grantor in preparing the description in the deed. The court stated that it was "obvious that there was some sort of survey work done to prepare the description for the property" and that this was not a situation "where the Defendant's parents picked up the wrong deed, and took it to the lawyer for drafting." The court thus concluded that Spurlock had built his home and used the property from the time of his deed in 1986 until his parents died because of their permissive use rather than due to any mutual mistake in the deed. The court further concluded that due to Spurlock's occupancy by permissive use, any adverse possession could not have begun until 1999 or 2000, which was after Fred and Dorothy had died. Spurlock's appeal herein followed.

In *Abney v. Nationwide Mut. Ins. Co*., 215 S.W.3d 699 (Ky. 2006), the Kentucky Supreme Court stated as follows:

> To vary the terms of a writing on the ground of mistake, the proof must establish three elements. First, it must show that the mistake was mutual, not unilateral. Second, "[t]he mutual mistake must be proven beyond a reasonable controversy by *clear and convincing evidence*." Third, "it must be shown that the parties had actually agreed upon terms different from those expressed in the written instrument."

Id. at 704. (Citations omitted, emphasis in original).

Spurlock contends that "[i]t flies in the face of logic to believe that Fred and Dorothy Spurlock conveyed a piece of worthless hillside to their son at the same time he was preparing to build a house on another piece of their property." He asserts that to believe this to be true, one would have to believe that

he built the home, drilled a well, installed fencing, constructed outbuildings, obtained fraudulent mortgages, engaged in commercial activities, raised a family, and entertained guests for 18 years on property that he knew would eventually fall into heirship of the twelve children of Fred and Dorothy. Further, Spurlock notes that his building of the home was with the total acquiescence and even participation of his parents. The Horns respond that it was entirely possible that Fred and Dorothy had told Spurlock at some point that they would convey the property to him at a later time but that they failed to do so prior to their deaths. Further, they contend that the trial court correctly determined that the property described in Spurlock's deed was the property intended to be deeded because it had been surveyed.

Pursuant to Kentucky Rules of Civil Procedure (CR) 52.01, "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Further, we understand that mutual mistake must be proven "beyond a reasonable controversy by *clear and convincing evidence*." *Abney*, 25 S.W.3d at 704 (emphasis in original). "With respect to property title issues, . . . the appellate court should not substitute its opinion for that of the trial court absent clear error." *Phillips v. Akers*, 103 S.W.3d 705, 709 (Ky. App. 2002). "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." *Id*.

Nevertheless, we agree with Spurlock that "it defies logic" to believe that Spurlock would build a home and use the property as he and his family did for 18 years with the help and acquiescence of his parents when they all knew that Spurlock did not own this parcel but owned a parcel some 300-500 feet away. We conclude that the trial court findings in this regard were clearly erroneous and not supported by substantial evidence. There was clear and convincing evidence of mutual mistake in the deed.

We also accept Spurlock's argument that he adversely possessed the property and that the court erred in finding otherwise. The five elements necessary to prove adverse possession are: (1) possession must be hostile and under claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. *Tartar v. Tartar*, 280 S.W.2d 150, 152 (Ky. 1955). "Adverse possession, even when held by mistake, may ripen into a prescriptive right after 15 years of such possession." *Id*.

"The party claiming title through adverse possession bears the burden of proving each element by clear and convincing evidence." *Phillips*, 103 S.W.3d at 709. "Stronger evidence of hostile possession with a clear, positive assertion of an adverse right is required where there is a family relationship between the parties than where there is no such relationship." *Id*. at 710.

This is not a case where a party is asserting adverse possession of a small portion of property that he may have raised a garden on or may have mowed or even fenced in for a numbers of years. This is adverse possession by moving

onto property, building a house and small outbuildings, and occupying it as a homeplace for the requisite period of time. The trial court based its rejection of Spurlock's adverse possession claim on a finding that Spurlock occupied the property with the permission and consent of his parents, the owners of the property.

We conclude that the findings of the trial court in this regard were clearly erroneous and not supported by substantial evidence. Again, it defies logic to believe that Spurlock's parents would deed him an acre of property, immediately assist him in the building of a home, allow him to develop the property and even mortgage it eight times, yet know that the property he was occupying was not the one acre that they had deeded to him but was property that they continued to own. We conclude that the evidence was clear and convincing that Spurlock's parents and his siblings were obviously aware that Spurlock was occupying the property under a claim of an ownership right. All other elements of adverse possession were proven by clear and convincing evidence as well.

Finally, there is a remaining issue concerning the amount of property that Spurlock adversely possessed. He claimed adverse possession of over nine acres based on boundaries that he said were pointed out to him by his father when he was deeded the property. However, there was substantial evidence that the amount possessed was actually only one and one-half to two acres. The issue of the exact boundaries of the one to two acre tract actually possessed by Spurlock must be remanded to the trial court to be determined.

The judgment of the Lawrence Circuit Court is reversed and remanded for the entry of a judgment reforming the deed in accordance with boundaries to be determined by the trial court.

DIXON, JUDGE, CONCURS.

NICKELL, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

NICKELL, JUDGE, DISSENTING. Respectfully, I must dissent. I believe the majority is erroneously substituting its judgment for that of the trial court in holding the evidence supported Spurlock's claim of ownership to the disputed tract.

The majority correctly indicates that under CR 52.01 the trial court's findings of fact should be given deference so long as they are supported by substantial evidence and absent clear error. However, it then goes on to hold that "it defies logic" to believe reasonable people could or would act in an unreasonable way. The majority's opinion is based as much on speculation as was Spurlock's argument before the trial court. Although the majority declares "[t]here was clear and convincing evidence of mutual mistake in the deed[,]" it fails to elucidate this point with factual references from the record. Further, the majority has failed to indicate why it believes the trial court's decision was unsupported by substantial evidence. For the following reasons, I believe it was.

The description included in Spurlock's deed was obviously prepared following a survey or by one possessing the skills of a trained surveyor. The call

for the beginning point of the property is specific and could be located nowhere else but the southwest corner of the parent tract. In fact, the location of the one-acre tract described in Spurlock's deed was undisputed by either party. The remaining calls contain accurate bearings and distances. The subject property was carved out of a larger tract conveyed to Dorothy in 1962, thus eliminating the possibility of an incorrect deed being taken to an attorney for use in drafting the current deed. The technical nature of the description indicates this was not a "homemade" description given to an attorney for drafting. Testimony adduced at trial indicated several surveying pins were located on the boundary of the subject tract which appeared to have been placed there by at least two different surveyors at some time prior to the ripening of the instant controversy. Spurlock himself testified his father was well-familiar with his property and knew the locations of the Goble line and Rockcastle Creek. Thus, I respectfully believe it is illogical to conclude Fred and Dorothy intended to convey any property other than that referenced in the March 17, 1986, deed to Spurlock, and am convinced there is sparce evidence supporting Spurlock's contention exists in the record before us.

The only evidence before the trial court regarding a possible mistake was the testimony of Spurlock that his parents intended to convey to him the property where he ultimately constructed his house. He contended he and his father walked and discussed the proposed boundary lines of the property and that within those boundaries lay the foundation of an old house which would later serve as the foundation for Spurlock's home. Further, Spurlock stated the intention of

the parties was to convey him a location upon which to build his home, his father assisted and supervised much of the landscaping and construction of the home, and that the described land was a hillside unsuitable for construction. Based on these allegations, he contended reformation was mandated.

However, Spurlock was in the difficult position of proving that conversations and agreements occurred between himself and his deceased parents regarding the location of the property to be conveyed. If the conversations occurred, no one else besides Spurlock testified as to the content of the agreements reached therein, and no other witnesses testified they were present for any such conversations. I am unable to conclude Spurlock's uncorroborated and self-serving testimony is sufficient to overcome the high burden of proof required to reform a deed. Although building and maintaining a home may be an indication Spurlock believed he owned the subject property, no plausible evidence in the record indicates this was other than a unilateral mistake which is insufficient to support reformation of his deed. As the trial court's ruling was based on substantial evidence and was not clearly erroneous nor manifestly against the weight of the evidence, I believe it should not be disturbed on appeal. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442 (Ky. 1986); *Harry Harris, Inc. v. Quality Const. Co. of Benton, Ky., Inc.*, 593 S.W.2d 872 (Ky. App. 1979).

Next, I believe the majority is erroneous in its determination that the trial court incorrectly found Spurlock's use of the disputed property was permissive rather than adverse. Again, I believe the trial court's decision was

supported by substantial evidence and the majority's position is unsupported by the record.

My review of the record reveals Fred and Dorothy were generous people, especially toward their children, and would have allowed any of the children to use a portion of their lands. In fact, one of Spurlock's brothers testified he had raised cattle on a portion of the farm, including part of the property claimed by Spurlock as his own, with his parents' permission and consent. Spurlock himself actually testified he used the property with his parents' permission. There was no evidence presented that Spurlock excluded or attempted to exclude any of his siblings or other family members from the subject property. Contrary to the majority's conclusion, I find it illogical to conclude Spurlock's possession of the land was "adverse" to his parents when they assisted and allowed his development of the property. Such a conclusion is a *non sequitur*. Although there was some conflicting testimony, the trial court is in a better position to determine the credibility to be given to the testimony of live witnesses. CR 52.01. Thus, I am again unable to conclude the trial court's factual finding was clearly erroneous as it was supported by substantial evidence. *Id.*; *Reichle*.

Finally, because I believe Spurlock failed to prove his occupation of the disputed land was hostile and under a claim of right, I believe the trial court was correct in its determination that Spurlock did not prove the elements of adverse possession by clear and convincing evidence. The majority's conclusion to the contrary is again unsupported by factual references from the record or legal

authority. All of the elements of adverse possession must be proven for a party to gain title to disputed lands. *Phillips*, 103 S.W.3d at 710. As I believe Spurlock's possession of the subject property was permissive, I must conclude he has failed to affirmatively show he is entitled to the property by adverse possession especially since "possession by permission cannot ripen into title no matter how long it continues." *Id*. at 708 (citations omitted). I believe the trial court correctly denied Spurlock's claim.

Although the majority disagrees with the trial court's decision, I believe there was sufficient testimony adduced at trial to support the findings that there was no mutual mistake in the deed and that Spurlock occupied the property by permission. Even when, as here, there is conflicting testimony and differences of opinion between the parties, an appellate court should not substitute its view of the evidence for that of a trial court. *Wells v. Wells*, 412 S.W.2d 568, 571 (Ky. 1967). Due regard should be given to the trial court's opportunity to judge the credibility of the witnesses and the weight of the evidence presented. CR 52.01. Therefore, as I believe the evidence adduced was sufficient to support the trial court's findings, I believe there was no clear error and I would not disturb the judgment on appeal. *Id*.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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