

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001271-MR

JEAN ACTON

APPELLANT

v. APPEAL FROM PULASKI CIRCUIT COURT
HONORABLE DAVID A. TAPP, JUDGE
ACTION NO. 01-CI-00128

J.D. ACTON AND LOWELL ACTON

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, STUMBO, AND WINE, JUDGES.

WINE, JUDGE: Jean Acton appeals *pro se* from the final order of the Pulaski Circuit Court. After careful review of the record, we affirm.

In 2001, Lowell and J.D. Acton filed the underlying lawsuit to compel the sale of their seventy-seven acre family farm, which had passed to them and Jean upon their parents' deaths, and for equal division of the sale proceeds. In response,

Jean sought partition of the farm rather than a sale. The trial court ruled that the property could not be divided evenly and ordered that it be sold. The court further ordered that costs incurred in selling the property be divided evenly among the parties.

Jean appealed and this court held, in part, that the farm was divisible and should be partitioned into equal parts. *Acton v. Acton*, 283 S.W.3d 744 (Ky. App. 2008). The case was remanded for the trial court to divide the property; its division on remand is not presently challenged on appeal. Instead, Jean, who was represented by counsel during at least part of the proceedings in the court below and who, as a licensed attorney, represents herself on appeal, raises numerous claims of error which we address in turn.

To note the underlying litigation before the trial court was contentious would be an understatement. The job before this Court, to sort through litigation below, is complicated by the failure of both Appellant and Appellees to adequately cite to the record. In their brief, the Appellees suggest this Court sort through the extensive record to gain an understanding of the case. The Appellant repeatedly interjects her personal feelings and understanding of the facts without citing to the record, making it impossible to determine what information the trial judge relied upon. CR 76.12(4)(c)(iv) clearly requires parties cite to the record to support their arguments before this Court. Failure to do so would allow us to strike briefs or accept as concession any issues not addressed. CR 76.12(8)(a). *See also Hallis v.*

Hallis, 328 S.W.3d 694 (Ky. App. 2010). However, this Court will accept the task of reviewing this complete file and addressing those issues raised by Appellant.

Jean first complains that the trial court abused its discretion by not awarding her costs incurred in this litigation, which included the cost of rental cars, gasoline, appellate filing fees, independent appraisers, video tapes, postage, and photocopies. In support, she cites Kentucky Revised Statutes (KRS) 381.135(11), which provides:

The costs of the action shall be apportioned among the parties in the ratio of their interests, except that the costs arising from a contest of fact or law shall be adjudged against the unsuccessful party.

Jean argues that since this court previously determined that the property was divisible, she should be awarded costs as the successful party. However, KRS 453.040(2) provides that “[i]n actions between parceners, tenants in common or joint tenants, and in actions for settling the distribution and division of deceased persons’ estates, to settle partnerships and to settle or enforce trusts, the court shall exercise judicial discretion in regard to costs.” Indeed, in *Mead v. Mead*, 31 Ky.L.Rptr. 70, 101 S.W. 330, 331 (1907), the Court held that with respect to the division of land, judicial discretion is limited only by the notion that costs of an action shall be apportioned among the parties in the ratio of their interest. Here, the trial court determined that no party was entirely successful and ordered that the costs of the action be apportioned among the parties in the ratio of their interest,

one-third each. Under Kentucky law, the trial court's refusal to award Jean expended costs was not an abuse of its discretion.

Next, Jean disputes the reasonableness of the work performed and expenses claimed by the commissioners, timber cruiser, and land surveyor. In the final order, the trial court overruled Jean's exceptions and objections to the commissioners' plan for partition, finding, in part, that the commissioners' partition was an equitable division. The trial court further cited KRS 381.135(13), which provides that "[t]he commissioners and the land surveyor shall be paid a reasonable compensation, to be taxed as costs." Jean failed to introduce any expert testimony to refute the necessity of the work performed or the reasonableness of the expenses. Therefore, the trial court found that the expenses were reasonable and the work performed was necessary. We agree.

Next, Jean asserts that the trial court abused its discretion by awarding additional fees to the commissioners after entry of the final order. Following entry of the final order, but before Jean filed the notice of appeal, the trial court entered an order awarding the commissioners additional fees for appearing in court at the court's direction and ordered that the fees be borne equally by the parties. Jean argues that the trial court was without authority to amend the final order, but fails to cite any appropriate authority to support her claim. Jean also fails to persuade us that the award of additional fees to the commissioners was unreasonable.

Next, Jean contends that the trial court erred by assessing a \$100 fee against her as a sanction for violating Kentucky Rules of Civil Procedure (CR) 11 which provides, in part, that

[e]very pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record[.] . . . The signature of an attorney or party constitutes a certification by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact . . . and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

While CR 11 does not prescribe an appellate standard for reviewing rulings made under it, if sanctions have been imposed, a multi-standard approach is required; a clearly erroneous standard should be applied to the court's finding in support of sanctions, a *de novo* review should be made of the legal conclusion that a violation occurred, and an abuse of discretion standard should be applied to the type and amount of sanctions assessed. *Clark Equipment Co., Inc. v. Bowman*, 762 S.W.2d 417, 420-421 (Ky. App. 1988). If sanctions have been denied, we review the trial court's decision for an abuse of discretion. *Id.* at 420.

Jean asserted in her objection to the trial court's order appointing commissioners that she has reason to believe that "the selection of persons to be appointed as commissioners was substantially influenced by the wishes made on behalf of the plaintiffs." In its final order, the trial court noted its exclusive role in selecting the commissioners and that Jean was afforded an opportunity to provide evidence regarding her allegation of impropriety on the part of the court at a hearing on the matter. However, at that time, Jean conceded that she had no evidence to believe that the court's selection of the commissioners was influenced by the wishes of Lowell and J.D.

As a result, the court found that Jean's allegation of impropriety on behalf of the court was without any factual basis or effort to confirm its truth. Though the court noted that Jean apologized for her statement, it also observed that on several occasions throughout the course of this litigation, Jean had accused the court of other acts of impropriety. The court found Jean's statement to be objectionable, in violation of CR 11, and assessed a \$100 sanction against her. Our review of the record discloses that the trial court's findings were not in error and that Jean's allegation was in violation of CR 11. Further, the \$100 sanction assessed against her was appropriate and reasonable in these circumstances.

Similarly, Jean argues that the trial court abused its discretion by denying her motion requesting that the court impose CR 11 sanctions against Lowell and J.D. for costs she incurred in litigating this action, which she maintains was abusive and devoid of intelligence. At a hearing addressing her motion for

sanctions, Jean stated that during informal settlement negotiations prior to the filing of this lawsuit, division of the property was considered by the parties as a viable option, which demonstrates that Lowell's and J.D.'s subsequent challenge to the property's divisibility was unreasonable.

The court pointed out that regardless of whether Lowell and J.D. were willing to divide the property in pre-litigation settlement discussions, they ultimately filed the underlying action to compel a sale of the property. The court found no reason to award CR 11 sanctions based on the notion that this case should never have been filed in the first place and summarily denied Jean's motion. Upon review of the record, we are unable to say that the trial court abused its discretion by declining to assess CR 11 sanctions against Lowell and J.D.

Finally, Jean maintains that the trial court abused its discretion by issuing a "criminal" summons for her to appear in court. The record shows that Jean was to appear at a hearing on June 28, 2010, to explain why she should not be held in contempt of court for her failure to timely pay CR 11 sanctions as directed. Jean failed to appear and the court noted on the record that Jean had telephoned the court and stated that she was unable to appear due to a physical injury she sustained. During that phone conversation, the court advised Jean to file an appropriate motion by fax with the court so that the court could have grounds upon which to enter an order. Jean represented to the court that she would do so, yet the record shows she did not. Moreover, counsel for Lowell and J.D. represented to the court that Jean had failed to notify them, either by fax or telephone, of her

inability to appear. Ultimately, the court directed the clerk to issue a summons for Jean to appear in court on July 16, 2010, to show cause as to why she should not be held in contempt for her failure to appear at the June 28th hearing and her failure to timely pay the CR 11 sanctions.

At the July 16, 2010, hearing, the court noted that before issuing the summons, it had taken great pains to white-out the word “criminal” appearing before the word “summons” on the standard summons form issued by the clerk’s office. Thus, Jean’s argument that the trial court abused its discretion by issuing a “criminal” summons is without merit since the summons at issue was not “criminal.”

The final order of the Pulaski Circuit Court is affirmed.

ALL CONCUR.

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