RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-1044-MR

SAMUEL DOTSON; DENNIS DOTSON;
MARY DOTSON; TENNESSEE DOTSON;
SANDRA KAY SANDERS; and
BRADLEY SANDERS — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 94-CI-800

BOBBY DOTSON — APPELLEE

OPINION
AFFIRMING IN PART, VACATING IN PART
AND REMANDING

* * * * * * *

BEFORE: KNOPF, JOHNSON, AND MILLER Judges.

KNOPF, JUDGE: Samuel Dotson, Dennis Dotson, Mary Dotson, Tennessee Dotson, Sandra Kay Sanders, and Bradley Sanders (appellants) appeal from orders of the Pike Circuit Court granting default judgment and allowing the sale of property and disbursement of proceeds from the sale. After review of the record, we affirm in part, vacate in part, and remand for further factual findings.

On January 17, 1994, the appellee, Bobby Dotson, (Bobby) brought an action pursuant to KRS 389A.030 for sale or division of real property. Bobby claimed ownership of a 115/1200[1] undivided interest in a tract of real property, referenced as Parcel 1122, located on Rock Fork of Peter Creek in Pike County, Kentucky. He named as defendants his co-tenants in common: Dennis Dotson and Mary Margaret Dotson, Ransom Dotson, Sandra Kay Sanders and Bradley Sanders, Dallas Dotson and Betty Dotson, Garley Dotson and Janie Dotson, Ronald Dotson and Barbara Dotson, Donald Dotson, Alice Combs and James Combs, Sadie Hatfield, Julie May and Larry May, Billy Hunt and Margie Hunt, Ocie Abbot and Edward Abbott, Leroy Hunt and Geraldine Hunt, Luther Hunt and Cheree Hunt, Fayetta Hunt, Tennessee Dotson, Phyllis Muller and Eugene Muller, Floyd Dotson, Freelin Dotson, Samuel Dotson, Glenn Coleman, Thurman Coleman and Janie Coleman, Herman Coleman and Sharon Coleman, and Pansy Irene Dotson and Delouis Dotson. (Collectively, the Dotson heirs). Bobby alleged that the property was indivisible, and he sought sale of the property to recover his interest and the value of improvements which he alleged he made on Parcel 1122.

Bobby also named Kentucky Berwind Land Company as a party having an interest in the property. Kentucky Berwind answered and filed a counterclaim claiming ownership of the oil, gas, and coal estate underlying Parcel 1122. By amended

[1] Bobby's interest is approximately a 9.58% share.

counterclaim, Kentucky Berwind also claimed an interest in the surface and mineral estate of the adjacent Parcel 1116, also owned by the Dotson heirs. Kentucky Berwind also moved to name certain unknown heirs as additional defendants to the action,[2] and named other parties having recorded liens against the property.[3] Kentucky Berwind sought sale of both tracts.

Summons and complaints were issued to all of the Dotson heirs, including the appellants. The record reflects that signed certified mail receipts were returned by some of the Dotson heirs, including the appellants Sandra Kay Sanders, Bradley Sanders, and Tennessee Dotson. The summons sent to appellants Dennis Dotson, Mary Dotson and Samuel Dotson were returned unclaimed. However, these appellants were personally served with summons on Kentucky Berwind's counterclaim. The trial court appointed Richard Elswick as warning order attorney for the non-responding defendants. Mr. Elswick attempted to notify the named defendants of the pendency of the action, and filed his report notifying the court of his inability to locate the remaining defendants.

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[2] Specifically: the unknown heirs of Clarence Dotson, The unknown heirs of Dennis Dotson; the unknown heirs of Cally Hunt; the unknown heirs of Adda Wagnor Coleman; the unknown heirs of Chasy (Bud) Dotson, the unknown Heirs of Mandy Dotson; the unknown children/heirs of Ranson Dotson; the unknown heirs of Nellie Dotson; the unknown heirs of J.L. Dotson, Sr.; and the unknown heirs of Thomas Hunt.

[3] Those additional parties were: Gale Fausett; Ford Motor Credit Company; Bevins Boron; and Citizens Bank of Pikeville (now Trans Financial Bank).

The trial court set a non-jury trial date for June 20, 1995. However on June 13, 1995, the trial court entered an order setting aside the trial date. The trial court further found that no dispute regarding the indivisibility of the property had been raised by any party filing pleadings in the action. The court appointed commissioners to appraise the surface, mineral, oil, and gas interests in the property, as well as the value of the improvements. The court ordered the master commissioner to sell both tracts. On motion by Kentucky Berwind, the trial court entered default judgments against the Dotson heirs, and against the remaining non-responding parties.

The commissioners filed several reports appraising the values of the various interests in the tracts. On December 28, 1995, the trial court entered an order directing the sale of Parcels 1122 and 1116. On January 10, 1996, the master commissioner entered a notice of sale for January 31, 1996. The sale was advertised in the local newspaper of general distribution, and notices were posted on both parcels.

On January 26, 1996, the appellants filed motions to set aside the default judgments, to file late answers, and to set aside the commissioner's sale. The trial court conducted an emergency hearing on January 30, 1996. Following the hearing, the trial court denied the motions as follows:

> (A) The motion to set aside defalt [sic] judgment, the Motion to file late answer, and

> the Motion to set aside Master Commissioner's sale be and are **Overruled**, without prejudice.
>
> (B) The Movants may re-file their motion to file late answer at the " Distribution of Proceeds" part of the case following the Master Commissioner's sale and confirmation of same.

Record of Appeal (ROA) p. 188. **(Emphasis in original)**

The master commissioner's sale was conducted on January 31, 1996 as scheduled. Kentucky Berwind was the highest bidder for Parcel 1122, bidding $70,100.00 on the real estate and $2,550.00 for the oil and gas rights. Bobby was the highest bidder for Parcel 1116, bidding $55,500.00 on the real estate. Donald Dotson purchased the oil and gas rights for Parcel 1116.

The appellants filed exceptions to the master commissioner's report, and renewed their motion to set aside the default judgments and the sale. Steven D. Combs also filed a motion to intervene to set aside the sale, alleging that he had been willing to submit a higher bid for the oil and gas tracts, but he had been misled as to what interest was being sold. The trial court overruled the exceptions, and denied the motions to set aside the commissioner's sale or to file late answer. In its order confirming the commissioner's sale, dated March 13, 1996, the trial court ordered payment of $3,468.30 in commissioner's fees, advertising and sale expenses. The remaining proceeds were divided as follows:

Parcel 1122:

Kentucky Berwind	$11,992.16 (credited to bid)
Sandra and Bradley Sanders	$17,540.63

Bobby Dotson $35,709.54
Other parties $ 5,493.19
(paid to clerk pending further order of court)

Parcel 1116

Kentucky Berwind $29,259.56 (Distribute)
Bobby Dotson $ 869.92
(credit or distribute if full price has been paid).
Bobby Dotson or Samuel Dotson
for residence and barn $14,050.35
(Paid into court pending resolution of ownership issue)
Other parties $13,366.26
(paid to clerk pending further order of court)

The appellants then filed a notice of appeal from the trial court's order confirming the sale. The appellants named Bobby and Kentucky Berwind as parties to the appeal. During the pendency of this appeal, the appellants and Kentucky Berwind settled the issues between them. This court dismissed Kentucky Berwind as a party to the appeal. Consequently, the only issues in this appeal are those between the appellants and Bobby.

Bobby first argues that the appeal was not timely filed. He contends that the trial court's order of January 30, 1996, was the final order from which the appellants were required to appeal within thirty (30) days. We disagree. An order denying relief under CR 60.02 may be a final and appealable order, depending upon the circumstances. Commonwealth, Department of Highways v. Stahr, Ky., 351 S.W.2d 67, 68 (1961). However, the test of finality within the meaning of CR 54.01 is whether the order adjudicated the rights of the parties, required additional evidence to be taken or operated to divest any party of some right. Wagoner v. Mills, Ky. App., 566 S.W.2d 159 (1977). A final order or judgment from which an appeal lies

either terminates the action, or operates to divest some right in such manner as to put it out of the power of the court making the order to place the parties in their original condition. Green River Fuel Co. v. Sutton, 260 Ky. 288, 84 S.W.2d 79, 81 (1935).

An order of sale may be a final order where the order leaves nothing before the court except to perform a purely administrative act such as the entry of the report of sale and the disbursement of proceeds. Murty Brothers Sales, Inc. v. Preston, Ky., 716 S.W.2d 239, 241 (1986). In this case, the trial court specifically reserved the issues regarding how the proceeds were to be distributed. ROA, p. 155. Consequently, we conclude that the trial court's order of March 13, 1996, confirming the commissioner's sale and ordering distribution of the sale proceeds following payment of costs, was the final and appealable order in this action. Since the appellants filed their Notice of Appeal on April 10, 1996, within thirty (30) days from the trial court's final order, their appeal is timely.

The appellants primarily argue that the trial court erred in overruling their motions to set aside the default judgments, to file late answer, and to set aside the pending commissioner's sale. Default judgments are covered by CR 55.01, which provides, in pertinent part:

> When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defends as provided by these rules, the party entitled to a judgment by default shall apply to the court therefor. . . . The motion for judgment against a party

> in default for failure to appear shall be accompanied by a certificate of the attorney that no papers have been served on him by the party in default. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court, without a jury, shall conduct such hearings or order such references as it deems necessary and proper, unless a jury is demanded by a party entitled thereto or is mandatory by statute or by the constitution. A party in default for failure to appear shall be deemed to have waived his right of trial by jury.

The appellants first contend that the initial entry of default judgments against them was flawed. While we agree that the circumstances surrounding the entry of the default judgments are questionable, we are unable to find any reversible error. The appellants first note that there was no written motion for default judgment. However, a motion for default judgment need not be in writing. Pound Mill Coal Co. v. Pennington, Ky., 309 S.W.2d 772, 773 (1958). The appellants also point out that the motion was unaccompanied by a certificate of the attorney that no papers have been served on him by the party in default. Nonetheless, the failure of the attorney to submit such a certificate is a mere procedural irregularity and is not grounds to set aside the default judgment absent proof of prejudice. Ryan v. Collins, Ky., 481 S.W.2d 85, 88 (1972).

We are more troubled by the absence of any indication in the record that Bobby ever moved for default judgment.

However this error, standing alone, would not justify reversal of the trial court. As is the case with equity, the law likewise regards as done those things which ought to have been done. Sharps Adm'r v. Sharp's Adm'r, Ky., 284 S.W.2d 673, 675 (1955); quoting, Thomas' Adm'r v. Maysville Gas Co., 112 Ky. 569, 66 S.W. 398, 399 (1902). When the trial court entered its order granting default judgment on June 13, 1995, none of the Dotson heirs had filed a response to Bobby's complaint. The trial court properly noted that there were no disputed issues of fact. Furthermore, Kentucky Berwind had filed a motion for default judgment. Based upon the record, Bobby would have been entitled to default judgment against the appellants on that date had he moved for it.

Therefore, the primary questions on appeal are whether the trial court abused its discretion in denying the appellants' motions to set aside the default judgment, to file a late answer, and to set aside the commissioner's sale. A default judgment may be set aside for good cause shown in accordance with CR 60.02. CR 55.02. The law clearly disfavors default judgments. Moreover, the trial court has wide discretion to set aside a default judgment. The moving party, however, cannot have the judgment set aside and achieve his day in court if he cannot show good cause and a meritorious defense. Good cause is most commonly defined as a timely showing of the circumstances under which the default judgment was procured. Green Seed Co. v. Harrison Tobacco Storage Warehouse, Inc., Ky. App., 663 S.W.2d 755, 757

(1984). A liberal attitude should be observed toward a timely application to set aside a default judgment, although delay in pleading without reasonable excuse cannot always be overlooked. Childress v. Childress, Ky., 335 S.W.2d 351, 354 (1960). In the absence of a showing of a reasonable excuse or good cause, a default judgment will not be set aside. Howard v. Fountain, Ky. App., 749 S.W.2d 690, 692 (1988).

Bobby asserts that the trial court determined that the appellants arguments were meritless. Unfortunately, the order denying the motions to set aside the default judgment, to set aside the commissioner's sale, and to file a late answer, does not address these issues. We are particularly puzzled by the trial court's denial of these motions *without prejudice*. From this language, it appears that the trial court declined to make findings on the appellants' motions, and directed them to refile the motions after the commissioner's sale.

A motion to set aside a default judgment or a motion to set aside a pending commissioner's sale cannot be denied "without prejudice." The only reasonable explanation for the trial court's choice of words is that the trial court intended for its order of January 30, 1996, to be interlocutory. As previously discussed, the trial court's order of January 30, 1996 was not a final order because it did not completely adjudicate all of the issues before the court. See Murty Brothers Sales, Inc. v. Preston, supra. However, a motion denying a default judgment is

"with prejudice" in that it is conclusive as to the rights of the parties in default. Black's Law Dictionary, (6th ed., 1990), p. 1603. A party in default is deemed to have admitted all of the factual allegations of the complaint. Likewise, the order of sale was with prejudice, in that it operated to divest the appellants of their right to retain title to their property.

The second paragraph of the trial court's order supports the inference that the trial court intended for the order to be interlocutory, rather than without prejudice. The trial court then specifically permitted the appellants to refile their motion to a file late answer after confirmation of the commissioner's sale. Since a defaulting party does not admit unliquidated damages, the trial court's order allowing them to participate in the distribution of proceeds portion of the case was proper. Howard v. Fountain, Ky. App., 749 S.W.2d at 690, 693.

However, our interpretation of the trial court's order of January 30, 1996, as interlocutory does not explain the trial court's failure to state its grounds for denying the motions. The court made no written factual findings regarding the appellant's stated excuses for their failure to respond to the complaint. In an effort to resolve this matter, we directed the appellants to determine the existence of a video tape or stenographically recorded transcript of the emergency hearing conducted by the trial court on January 30, 1996. If such record

existed, we directed the appellants to file a copy with this court. We sought to determine if the trial judge made oral findings of fact at that proceeding. No such record was filed within the specified time. We can only take this to mean that no such record exists.

Normally, the absence of a record of the circuit court proceedings would compel us to conclude that the trial court's order was supported by substantial evidence. However, when a court denies a motion to set aside a default judgment, the court's order should be accompanied by some articulation of the factual, legal and discretionary issues presented. Greathouse v. American National Bank & Trust Co., Ky. App., 796 S.W.2d 868, 870 (1990). At best, the trial court's order is a qualified statement which denies the motion to set aside the default judgment, without any explanation of the trial court's reasoning. If the trial court found that the appellants' grounds for failure to file an answer were without merit, then the trial court should have so found and denied the motion to set aside the default judgment without qualification.

Nonetheless, a motion to set aside a default judgment addresses itself to the sound discretion of the court and the exercise of that discretion will not be disturbed on appeal except for abuse. Richardson v. Brunner, Ky., 327 S.W.2d 572, 574 (1959). We will not reverse the trial court's order unless the appellants' actually stated grounds for failing to respond

which constituted "good cause." In connection with their motions to set aside the default judgment, each of the appellants submitted affidavits stating their grounds for failing to respond. Samuel Dotson denied that he had been personally served. However, the record reflects that on September 24, 1994, Pike County Deputy Sheriff John Coleman served Samuel Dotson with a summons and complaint. ROA, p. 67. Mere inattention on the part of a defendant does not constitute good cause to set aside a default judgment. Perry v. Central Bank & Trust Co., Ky. App., 812 S.W.2d 166, 170 (1991). Samuel presented no good cause for his failure to respond.

Dennis and Mary Margaret Dotson stated that, after they received notice of the lawsuit, they took the matter to their attorney. However, that attorney failed to file an answer on their behalf. Again, mere inattention on the part of a defendant's attorney does not constitute good cause to set aside a default judgment. Howard v. Fountain, 749 S.W.2d at 692. Dennis and Mary Dotson cannot avoid the consequences of their attorney's alleged professional negligence.

Sandra Kay Sanders and Bradley Sanders have a better excuse. Sandra and Bradley live in a house located on Parcel 1122. They state that they are both deaf and mute and were unable to understand the legal papers served upon them. The fact that a party has a disability, by itself, does not constitute good cause for failure to respond. However, that disability may

be relevant to show overreaching by the party moving for default. Childress v. Childress, Ky., 335 S.W.2d 351, 354 (1960).

Furthermore, in an action for sale of property pursuant to KRS 389A.030, a defendant who is under a disability shall be represented in the action by a guardian ad litem. KRS 389A.030(2). The record does not indicate the extent of Sandra Kay's and Bradley's impairment. However, the trial court should have considered this factor in the motion to set aside the default judgment.[4] We conclude that the trial court abused its discretion in overruling their motion to set aside the default judgment without making any findings as to the sufficiency of their excuse.

Of all of the tendered defenses, Tennessee Dotson's is the most striking. Tennessee is a fifty-six (56) year old woman of limited education.[5] She states that she has lived in Samuel Dotson's house on Parcel 1116 since at least 1990. She alleged in her affidavit:

> That Tennessee Dotson was served by certified mail with a Complaint in this lawsuit. When Bobby Dotson asked her if she had received her papers she said "yes" and Bobby Dotson asked to see them. Bobby Dotson then took the papers from Tennessee Dotson and within a few days moved to Missouri. Tennessee Dotson

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[4] The trial court's failure to appoint a guardian ad litem is noteworthy because Kentucky Berwind had previously moved for a separate appraisal of the tracts because Sandra Kay and Bradley were "under a disability". ROA p. 141.

[5] According to the appellants' brief, Tennessee Dotson is also the natural mother of both Samuel Dotson and Bobby Dotson.

> never saw the papers again until Bobby Dotson returned some 3 or 4 months later. At that time Bobby Dotson informed Tennessee Dotson that his lawyer had gotten a default judgment against her concerning the heirship property.

ROA, p. 184.

We are disturbed by this allegation. First, a familial relationship existed between Bobby and Tennessee. Second, Tennessee alleges that Bobby took deliberate action to thwart her effort to respond to the complaint until after the default judgments were entered. And third, if the allegation is true, Bobby knew these facts when the trial court entered default judgment against Tennessee. These allegations, if true, would clearly constitute fraud pursuant to CR 60.02, and would justify setting aside the default judgment, at least as against Tennessee. A trial court has a duty and a right to determine that its judgments are correct and accurately reflect the truth. Potter v. Eli Lilly & Co., Ky., 926 S.W.2d 449, 453 (1996). The absence of any findings by the trial court, coupled with the ambiguous nature of the trial court's order, compels this court to vacate the default judgments against Tennessee Dotson, Sandra Kay Sanders and Bradley Sanders and remand for findings of fact.

Lastly, the appellants argue that the commissioner's sale should be set aside due to inadequacy of the sale price and the circumstances surrounding the sale. We disagree. It is well established that mere inadequacy of price is not in itself a ground for setting aside a judicial sale unless it is so great as

to create a presumption of fraud or to shock the conscience. Snawder v. Curry, 297 Ky. 360, 179 S.W.2d 665, 666 (1944). The appellants presented no evidence that the sale price was inadequate. Indeed, Parcel 1116 sold for more than the amount of the commissioners' appraisal. ROA, pp. 144-45. Furthermore, while the sale price of Parcel 1122 is substantially below the commissioners' appraisal of the property, the amount is not so grossly inadequate as to justify setting aside the sale.

The appellants also argue that when inadequacy of price is accompanied by any apparent unfairness or impropriety or oppression on the part of those connected with the sale, the sale will be set aside, though such circumstances are slight and by themselves do not furnish a sufficient reason for vacating the sale. Id. at 666-67. The appellants point to the motion to intervene by Steven Combs. In an affidavit, Combs' agent at the sale, Jesse Salyer, alleged that he was misled by Kentucky Berwind that the oil and gas interest was subject to a lease. Salyer asserted that he was "intimidated out of the bidding" by these representations. ROA, pp. 199-200.

We find no merit in this argument. Even accepting Mr. Salyer's allegations as true, there was no official mention of the lease during the commissioner's sale. Thus, Mr. Salyer had no reasonable basis to rely on the alleged representations by Kentucky Berwind's counsel. Therefore, the trial court correctly denied the motion to set aside the commissioner's sale.

However, we are remanding this case for further factual findings concerning the denial of the motion to set aside the default judgments against Tennessee Dotson, Sandra Kay Sanders and Bradley Sanders. If the trial court finds that the default judgments should be vacated, the court must then consider whether these parties can present an issue of fact challenging the indivisibility of these parcels. If they do, the trial court must set aside the commissioner's sale. Otherwise, the commissioner's sale should be upheld.

Accordingly, the judgment of the Pike Circuit Court is affirmed in part, vacated in part, and remanded for factual findings and further proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Carole Friend Conway
Pikeville, Ky.

BRIEF FOR APPELLEE:

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