

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000746-MR

ESTATE OF RUBY LEE,
MARY ELLIS, VENITA HARRIS,
ELAINE POOLE, Co-Administrators
and Individually;
ADRIAN LEE; DEBBIE DEVINE; and
REVENA BILBREY

APPELLANTS

v.

APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 98-CI-00339

LEON BRITT; LOIS BRITT;
TIM L. AULBACH; TERESA D. AULBACH;
BILLY HUDSON; JUDY HUDSON; and
LOGAN COUNTY, KENTUCKY

APPELLEES

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NO. 1999-CA-000838-MR

LEON BRITT; LOIS BRITT;
TIM L. AULBACH; TERESA D. AULBACH;
BILLY HUDSON; and JUDY HUDSON

CROSS-APPELLANTS

v.

CROSS-APPEAL FROM LOGAN CIRCUIT COURT
HONORABLE TYLER L. GILL, JUDGE
CIVIL ACTION NO. 98-CI-00339

ESTATE OF RUBY LEE,
MARY ELLIS, VENITA HARRIS,
ELAINE POOLE, Co-Administrators
and Individually;
ADRIAN LEE; DEBBIE DEVINE; and
REVENA BILBREY

CROSS-APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, JOHNSON and KNOFF, Judges.

HUDDLESTON, Judge: In No. 1999-CA-000746-MR, the Estate of Ruby Lee, Mary Ellis, Venita Harris, Elaine Poole, co-administrators and individually, and Adrian Lee, Debbie Devine and Revena Bilbrey appeal from Logan Circuit Court orders finding, inter alia, that Lee Road is a public road. In No. 1999-CA-00838-MR, the appellees in the first case – Leon Britt, Lois Britt, Tim L. Aulbach, Terea D. Aulbach, Billy Hudson, and Judy Hudson – have filed a cross-appeal against the appellants. The issues presented in these cases are: (1) whether the trial court erred in finding Lee Road is a public road, or in the alternative, that Lee Road is not a county road; (2) whether the trial court erred in placing the burden for proving that Lee Road is a private road on the appellants; (3) whether the trial court erred in applying Kentucky Revised Statute (KRS) 178.040, which requires right-of-ways of no less than thirty feet for county roads, because the trial court determined that Lee Road is a public road but not a county road; and (4) whether the trial court erred in determining the property line between the Aulbach/Hudson/Britt property and the Lee property.

I. FACTS AND PROCEDURAL HISTORY

These cases involve disputes between adjoining property owners in Logan County. Leon Britt, Lois Britt, Tim L. Aulbach, Teresa D. Aulbach, Billy Hudson and Judy Hudson filed a civil action against the Estate of Ruby Lee and her six children and Logan County. Some of the plaintiffs alleged that they had title to unspecified portions of property that contains the family residence formerly occupied by the Lee family near Lee Road, a 0.2-mile road that extends westerly from Kentucky Highway 1038. The plaintiffs also averred that Lee Road is a county road, a public road or a private passway, which they could use to access their property. The plaintiffs alleged that they had a right to construct an access road along a former logging road on their property to Lee Road.

In response, the defendants raised various defenses. The defendants alleged that Lee Road was neither a county road nor a public road extending beyond a gate located at Jimmy Bilbrey's corner, approximately five hundred feet from Highway 1038. The defendants claimed that the plaintiffs trespassed onto the defendants' property when the plaintiffs constructed a road between Lee Road and the plaintiffs' property. The defendants believed that this road, referred to as Mud Road, was not a public road or a private pass way.

A bench trial was conducted during which the judge visited the disputed roads and property with the parties. On January 4, 1999, the court found that Logan County had failed to comply with the statutory requirements of KRS 178.115 in accepting Lee Road as a county road in 1988. Specifically, the court found

that the County had neither posted a copy of the resolution adopting the road on the courthouse door nor posted a copy along Lee Road, as required by statute. The court also ruled on the boundary line dispute, finding for the defendants. The court determined the location of the boundary line by considering the evidence and testimony of registered land surveyor Gary Lee Dunning. It found that the plaintiffs could not have access across a parcel of ground at the old logging road where the plaintiffs installed drain tile and a new road. The court determined that the parcel is owned by the defendants. Thus, the court ordered the removal of the tile.

The trial court held further proceedings before deciding whether Lee Road is a public road or private passway and whether the defendants could be estopped from claiming otherwise. On February 18, 1999, the court found that Mud Road clearly connected with Lee Road and that both were public roads or passways which the residents of the area used to reach their homes. The owners of the Aulbach/Hudson property used both roads for access to the back portion of the land. Although Lee Road had been used less often as nearby residences were abandoned, the court found that the road has been used at least annually.

Despite the fact that Logan County failed to properly adopt Lee Road as a county road, the court found that the County maintained the road throughout the 1960s and most of the 1970s. The County may have discontinued regular maintenance in the 1980s, but around 1992, Adrian Lee requested that the County place gravel and grade the road surface. In 1993, someone placed a gate across

the road a few hundred feet from the main highway, just past the Bilbrey house. In December 1993, the County rejected Ruby Lee's request to remove Lee Road from the County's road system and ordered the removal of the gate.

The court found that attempts were made to block Lee Road beginning in the mid to late 1980s. However, the court determined that the road's obstruction did not occur for "a substantial continuous period of time." According to the court, Lee Road was never blocked for any continuous period exceeding a year. The County continued maintaining the road until 1996, when the plaintiffs filed this lawsuit. Thus, the court found that both Mud Road and Lee Road are public roads or passways.

The court considered whether the change in the use of the roads altered their status. The court concluded that the roads were not abandoned and that the Lee heirs were unable to establish title to the road by adverse possession because the elements had not been met. Applying its equitable power, the court determined that the defendants should be estopped from denying that Lee Road is a public road because the defendants encouraged the County to spend tax dollars to maintain the road. Using KRS 178.040 for guidance, the trial court concluded that Lee Road should have a thirty-foot right-of-way extending 0.2 miles from Highway 1038. The court also ruled that conveyance of land between Riley Yonts, grantor, and Tim L. Aulbach, Teresa D. Aulbach, Billy Hudson and Judy Hudson, grantees, was void.

Following the defendants' motion to alter, amend or vacate the final judgment and the plaintiffs' similar motion, the court denied the motions on March 17, 1999, but supplemented its findings of fact as follows:

The Court finds that the physical graveled or traveled surface of the Lee Road, is approximately 10 feet in width along the entire length of the disputed road. The Court is unable to determine from the evidence the precise width of a right of way, beyond the 10 foot graveled or traveled portion, which could be applied to the entire length of the disputed road. From this Court's observations, the width of the shoulder of the roadway and the distance from the center of the road to ditches, fences or other visible boundaries varies substantially along the length of the road and precise measurements of these distances are not in evidence.

This appeal and cross-appeal followed.

II. STATUS OF LEE ROAD

The appellants aver that the trial court erred in finding that Lee Road is a public road. They argue that Lee Road has been abandoned or that in the alternative, the appellants have acquired the property by adverse possession.

Under Kentucky law, a road can become a public road when it is acquired by prescription. However, the road can be acquired by prescription only if there has been both "(1) fifteen years public use and (2) a like number of years of control and

maintenance by the government.”¹ The trial court correctly determined that both requirements had been met for Lee Road.²

In a non-jury trial, the trial court serves as the fact finder, and its findings of fact will not be set aside unless clearly erroneous.³ Here, the trial court’s findings of fact are supported by substantial, although not undisputed, evidence.

In determining that Lee Road is a public road, the trial court found that Lee Road had been used as a public road for many years but not extensively since the 1960s. As area residents abandoned their homes, fewer people used the road. The owners of the Aulbach/Hudson tract of land used the roads to access the back portion of their land. The trial court found Paul Glenn Kincaid’s testimony credible when he stated that he used Lee Road approximately twenty times per year. Other people used the road less frequently, but the court concluded that the road has been continually used at least annually. The court also noted that

¹ Watson v. Crittendon County Fiscal Court, Ky. App., 771 S.W.2d 47, 48 (1989).

² The record is silent on the issue of whether Lee Road was formally dedicated as a public road. Because we have no indication that Lee Road was, our analysis focuses on acquiring a public road by prescription. If the road had been dedicated, KRS 178.025 would apply. That statute creates a presumption that a dedicated road that has been used by the general public without restrictions for five years is a public road. The evidence clearly establishes that the public has used Lee Road for more than fifteen years.

³ Ky. R. Civ. Proc. 52.01. See also Black Motor Co. v. Greene, Ky., 385 S.W.2d 954, 956 (1964) (“Th[e] Court cannot set aside a finding of fact unless it is clearly erroneous. If supported by substantial evidence, the court’s finding of fact is not clearly erroneous.”) (citations omitted); Whilden v. Compton, Ky. App., 555 S.W.2d 272, 274 (1977) (noting that the finding of that trial court – that a road was a public road – would not be set aside unless the finding was clearly erroneous).

Adrian and Ruby Lee lived on the Lee farm until about 1979. The homestead on the property burnt down in 1976, and someone placed a mobile home on the property, which was last used at some point between 1982 and 1985.

Logan County maintained Lee Road throughout the 1960s and most of the 1970s. The County applied gravel one time per year and graded the road surface. The court found that regular maintenance was probably discontinued in the 1980s. However, Adrian Lee requested that the County grade and place gravel on the road in 1992. Someone placed a gate across the road in 1993, but the County ordered its removal. The trial court concluded that Lee Road was never successfully obstructed for a substantial period of time – always less than one year. In fact, the trial court stated that the County maintained the road until 1996, when this litigation began.

According to the Supreme Court, “[a] public road that is not a ‘county road’ can be abandoned without formal action. When the public has acquired the free use of a roadway by user, . . . it may abandon that right by a long period of nonuser.”⁴ The trial court specifically found that Lee Road had not been abandoned for a significant period. There was evidence that the public has used Lee Road since at least the 1960s, thus more than fifteen years. Because the court’s findings of fact are supported by substantial evidence, the trial court did not err in finding Lee Road to be a public road that had not been abandoned.

⁴ Sarver v. Allen County, Ky., 582 S.W.2d 40, 42 (1979) (citations omitted).

If Lee Road has been used continually, the only way the appellants could have obtained title to the road was by adverse possession. In order to acquire property by adverse possession, five elements must be met: "1) possession must be hostile and under a claim of right, 2) it must be actual, 3) it must be exclusive, 4) it must be continuous, and 5) it must be open and notorious."⁵ The adverse possessor must be in possession of the real property for the appropriate statutory period of fifteen years.⁶

In order to adversely possess a public road, there is an additional requirement. KRS 413.050(2) provides:

[The statute of limitation] shall not begin to run in favor of any person in the possession of any part of any public road until written notice is given to the county judge/executive of the county in which the road is situated that the possession is adverse to the right of the public to the use of the road.

In Salvers v. Tackett,⁷ Kentucky's highest court interpreted the words "public road" in KRS 413.050. In addressing whether a platted street that had not been accepted by the County could be adversely possessed, the Court noted:

⁵ Appalachian Reg'l Healthcare, Inc. v. Royal Crown Bottling Co., Ky., 824 S.W.2d 878, 880 (1992) (citing Tartar v. Tucker, Ky., 280 S.W.2d 150, 152 (1955)).

⁶ Ky. Rev. Stat. (KRS) 413.010.

⁷ Ky., 322 S.W.2d 707 (1958).

A way dedicated in the manner in which the so-called street to which this case relates was dedicated to public use cannot be regarded as a 'public road' in the sense that it became part of the county's system of roads which must be maintained within the meaning of the statute, for the way was never legally accepted or established as such. But it was and is a public road in the sense that the dedication inured to the benefit of the public, and the public, particularly contiguous property owners, had a right to use it. This right cannot be destroyed by mere encroachment by the owner of abutting property.⁸

The statute does not distinguish between roads established by dedication and roads established by adverse possession. While the language of KRS 413.050(2) has changed slightly since Salvers, the intent of the statute is the same: a party must give the county notice prior to adversely possessing a public road. The appellants have not provided proof that they properly notified the Logan County Judge/Executive in accordance with KRS 413.050(2).⁹ Thus, we find that the appellants could not have acquired the property by adverse possession.

In response, the appellees argue that the trial court erred in not finding Lee Road to be a county road. However, we

⁸ Id. at 709 (citations omitted).

⁹ See id. at 710 ("[T]he right to obstruct a public way or road cannot be acquired by prescription, although the obstructions have been long maintained unless this statute has been complied with.") (citing Mack v. Leavill, 243 Ky. 275, 47 S.W.2d 1067 (1932)).

believe the trial court correctly concluded that Lee Road is not a county road.

KRS 178.115 requires a county to follow certain formalities to declare a road a county road. While Logan County did hold a hearing on April 12, 1988, as required by the statute, the County failed to post a certified copy of the resolution making Lee Road a county road at the courthouse door and along Lee Road. As the trial court noted:

The testimony of the County Judge Executive and the County Attorney at the time the road hearing was held, together with the testimony of the present County Judge Executive reveals that at no time was a certified copy of the resolution posted at the courthouse door within five (5) days after the adoption of a resolution, nor was a certified copy of the resolution posted by the county road engineer along the Lee Road within five (5) days after its adoption.

The court properly construed KRS 178.115 in concluding that Logan County failed to follow the statutory requirements to designate Lee Road as a county road.

III. BURDEN OF PROOF

Appellants insist that the trial court erred in shifting the burden of proof to them. However, the appellants misconstrue the court's order.

Appellants claimed that they acquired Lee Road by adverse possession, and by so claiming, they have the burden of proving

that they adversely possessed the land for the statutory period.¹⁰ In considering the evidence presented, the court concluded that the appellants failed to prove they had adversely possessed the property. Although this argument has no merit in view of the fact that the appellants did not adversely possess the property, we conclude that the court properly placed the burden of proof on the appellants.

IV. APPLICATION OF KRS 178.040

Finally, the appellants argue that the trial court erred in applying KRS 178.040 because Lee Road, while it might be a public road, is not a county road. KRS 178.010(1)(b), in part, defines county roads as "public roads which have been accepted by the fiscal court of the county as part of the county road system after July 1, 1914 or private roads, streets, or highways which have been acquired by the county pursuant to KRS 178.405 to 178.425." KRS 178.040(2), in part, provides that "[a]ll county roads hereafter established shall occupy a right of way not less than thirty (30) feet wide, but the fiscal court may order it to be a greater width."

The court found that Lee Road is a public road but not a county road. From the language of KRS 178.040 and the way that a county road is defined in KRS 178.010, it is clear that the road width requirements do not apply to Lee Road. However, in determining the width of the road and necessary right-of-way, the court drew an analogy by using the statute as a basis for

¹⁰ Vorhes v. Dennison, 300 Ky. 427, 189 S.W.2d 269 (1945); Melton v. Sparks, 263 Ky. 591, 92 S.W.2d 737 (1936).

determining that Lee Road is ten feet wide within a thirty-foot right-of-way. As the court acknowledged in its order denying the post-judgment motions, while it was extremely difficult to determine the right-of-way of Lee Road, the right-of-way necessarily included distance to ditches, fences, etc. We agree that the right-of-way for a road must include areas like the natural drainage ways, which are inherently part of the road. Thus, we find that the court did not err.

V. BOUNDARY LINE BETWEEN THE PARTIES

In their cross-appeal, the appellees claim that the trial court erred in determining the boundary line of the Aulbach/Hudson tract. They argue that their witnesses clearly established that the boundary line is different than the court concluded.

As fact finder, the trial court may accept some evidence and reject other evidence because it is the role of the trier of fact to determine the credibility and weight that is to be given to the evidence.¹¹ In this case, the court specifically relied on the testimony of Gary Lee Dunning, a registered land surveyor. The court noted that the appellees disputed Dunning's survey but found that the appellees had failed to "suggest any other definite line which could be established as a more correct boundary." The court chose to believe one witness over others. Because the court's decision on this issue is supported by substantial evidence, the court did not err.

¹¹ Calloway v. Calloway, Ky. App., 832 S.W.2d 890, 893 (1992) ("It is axiomatic that the findings of fact of the lower court 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 witnesses").

VI. CONCLUSION

The orders from which this appeal and cross-appeal are prosecuted are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS IN NO.
1999-CA-000746 AND CROSS-
APPELLEES IN 1999-CA-000838:

Jesse L. Riley
Russellville, Kentucky

BRIEF FOR APPELLEES IN NO.
1999-CA-000746 AND CROSS-
APPELLANTS IN 1999-CA-000838:

Charles R. Orange
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