

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000439-MR

CITY OF PIKEVILLE

APPELLANT

V. APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 95-CI-01269

OSCAR W. THOMPSON, JR.;
and JOE RAMSEY

APPELLEES

AND NO. 1999-CA-000572-MR

WHITE WATER TRADING CO.,
INC., d/b/a FINISH LINE
LIQUOR AND BEER

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OSCAR W. THOMPSON, JR.;
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OF PIKEVILLE

APPELLEES

OPINION REVERSING AND REMANDING AS TO
APPEAL NO. 1999-CA-000439-MR, AND VACATING AND REMANDING
AS TO APPEAL NO. 1999-CA-000572-MR

* * * * *

BEFORE: GUDGEL, Chief Judge; KNOFF and McANULTY, Judges.

GUDGEL, CHIEF JUDGE: These are appeals from a summary judgment granted by the Pike Circuit Court declaring an annexation ordinance null and void. Appellant City of Pikeville (Pikeville) contends in Appeal No. 1999-CA-000439-MR that the trial court erred by granting summary judgment, by making certain findings, and by prohibiting the taking of certain depositions. Appellant White Water Trading Co., Inc., d/b/a Finish Line Liquor and Beer (White Water), contends in Appeal No. 1999-CA-000572-MR that the court erred by refusing to permit it to intervene in Pikeville's action. For the reasons stated hereafter, we reverse and remand as to Pikeville's appeal, and we vacate and remand as to White Water's appeal.

Pikeville enacted an ordinance in May 1990 indicating its intent to annex an adjacent unincorporated area. As a petition was filed in opposition to the annexation, the proposal was placed on the next regular election ballot. The single vote which was cast opposed the annexation. However, because the circuit court adjudged that the voter was not qualified to vote in the annexed precincts, no qualified vote was recorded in opposition to the annexation. On appeal, the circuit court's judgment was affirmed, and the annexation was effected.

Meanwhile, appellees Oscar W. Thompson, Jr. and Joe Ramsey, nonresident owners of property within the annexed territory, filed a complaint in the circuit court alleging that the annexation was void as the boundaries were

arbitrary, capricious and unreasonable and designed with no purpose other than the gathering of revenue with no provision of services in mind or with no other lawful reason for those boundaries. The boundaries

were in fact designed to attempt to create a territory in which there were no registered voters to vote against the annexation ordinance.

Ramsey also filed an affidavit in January 1998, claiming that although the annexation map generally followed the highway right-of-way, it jutted out at a particular point so as to include a business building and a private driveway but not the adjacent residence. Moreover, he claimed that elsewhere, a voting resident was excluded from the annexed territory because the highway right-of-way boundary was not followed, and that "the Ordinance was designed to exclude registered voters opposing the annexation from the coverage of the territory while taking in revenue producing businesses."

In response, Pikeville filed an affidavit of its former city manager, John Johnson, describing the factors involved in drawing the annexation boundaries. Those factors included the fostering of economic development, the inclusion within city limits of a newly-constructed and city-maintained bridge, the improved routing of city emergency and law enforcement vehicles, and the upgrading of water utility lines. Johnson indicated that the annexed area included only one residence, which was occupied by at least two adults who were eligible to vote, that very few residences were located nearby, and that the adjacent residential property owned or occupied by Thompson's daughter was not annexed because it was "not suitable for urban development" and because it was situated in an isolated and elevated location which was not accessible for purposes of receiving city services.

Next, the attorney for Thompson and Ramsey, Lawrence R. Webster, filed his own affidavit stating that he had examined the county clerk's records, and that the occupants of the single residence in the annexed area were Lloyd Charles and Patty Charles, neither of whom was registered to vote in the annexed area. He further alleged that

[i]t is believed that Walter May, Mayor of the City of Pikeville took voter registration cards from Lloyd Charles and Patty Charles but, in violation of the Kentucky Revised Statutes, failed to turn those cards in to the Pike County Court Clerk's Office, and did so deliberately, realizing that if no registered voters were in the precinct the annexation would have to carry no matter how the Charles voted.

The trial court eventually granted a summary judgment in favor of Thompson and Ramsey, and Pikeville filed a motion to vacate the judgment. While that motion was pending, two additional affidavits were filed, including an August 1998 affidavit of Lloyd Charles and Patty Charles, who denied any knowledge of having signed, having been requested to sign, or having given anyone else voter registration cards which would have enabled them to vote on the annexation issue. They stated that they had no desire to vote on the issue. Further, in September 1998, former mayor Walter May filed an affidavit stating that the annexation was needed for urban development reasons, that the annexation's boundaries were not intended to exclude potential voters, and that the property of Thompson's daughter was excluded from annexation because it was "not subject to immediate urban development," rather than because of any potential opposition to the annexation. May stated that he had not given voter

registration cards to Mr. or Mrs. Charles, and that neither he nor anyone else to his knowledge had received such cards from them for filing.

Finally, while the motion to vacate was still pending, White Water sought to file an intervening complaint as an indispensable party. It asserted that the annexation's revocation would irreparably harm its retail package liquor store business by causing it to be located in the "dry" territory outside of the "wet" city limits. The court denied the motion but stayed enforcement of its decision, pending the outcome of any appeal. These appeals followed.

First, in Appeal No. 1999-CA-000439-MR, Pikeville contends that the trial court erred by finding that Thompson and Ramsey were entitled to a summary judgment as a matter of law. We agree.

It is settled in Kentucky that "[a]nnexation is purely and simply a political act within the exclusive control of the legislature," and that "a party has no constitutional right to resist annexation." Louisville Shopping Center, Inc. v. City of St. Matthews, Ky., 635 S.W.2d 307, 310 (1982). Moreover, a city's

legislative body may extend the city's boundaries to include any area:

- (a) Which is adjacent or contiguous to the city's boundaries at the time the annexation proceeding is begun; and
- (b) Which by reason of population density, commercial, industrial, institutional or governmental use of land, or subdivision of land, is urban in character or

suitable for development for urban purposes without unreasonable delay.

KRS 81A.410. However, prior to any such annexation, the city's legislative body must enact an ordinance stating its intent and accurately describing the annexation boundaries. KRS 81A.420(1). If at least half of the resident voters or real property owners within the annexation boundaries file a petition opposing the proposed annexation, an election must be conducted. KRS 81A.420(2). If less than fifty-five percent of those voting in such election oppose the annexation, the annexation shall become effective. KRS 81A.420(2)(b).

Here, the trial court's summary judgment specifically addressed "only . . . the gerrymandering issue." However, we cannot agree with the court's conclusion that no genuine issues of material fact exist as to that issue. The entire record on appeal consists of the circuit clerk's 126-page record. Although that record contains little in the way of probative evidence other than the above-summarized and conflicting affidavits and a map showing the area in controversy, and although no direct evidence was adduced to show how registered voters in adjacent areas would have voted if included in the annexed area, the summary judgment order included the following statements and conclusions:

In one particular area, the annexed area takes in a business but stops halfway up the driveway of Dr. Thompson's daughter, who would have opposed annexation had her house been annexed. At the mouth of Buckleys Creek

is an area drawn so as to avoid one or more houses situated at road level.

As a result of the annexation, revenue can be gathered from that area's businesses, but no registered voters could have voted against the annexation because none were within the annexed area.

. . . .

In this case, the City annexed an area along U.S. 23. The area was drawn to include commercial property but exclude residents who might have opposed annexation but could not challenge it because they were not included in the annexed area.

Absolute and arbitrary power over peoples' lives, liberty, and property exists nowhere in a republic, not even in the largest majority. Ky. Const. §2. The annexation violates this section because of its irregular shape and its failure to encompass potential opposition voters, like Dr. Thompson's daughter.

Further, we cannot agree with the court's reliance on City of Birmingham v. Community Fire District, 336 So.2d 502, 503 (Ala. 1976), and Township of Owosso v. City of Owosso, 25 Mich. App. 460, 467, 181 N.W.2d 541, 545 (1970), affirmed by 181 N.W.2d 541 (1970), as support for the finding that gerrymandering was involved in the annexation process herein. Unlike the instant action, the annexation plan in Birmingham excluded numerous areas, "as islands or enclaves either completely or primarily surrounded by the annexed territory," in order to eliminate the votes of those persons who were predetermined to be in opposition to the annexation. 336 So.2d at 503. Noting that "[t]he divisions between those allowed to vote and those excluded were sometimes a street, and sometimes merely lot lines in the same block," id. at 504, and concluding that such gerrymandering was

unconstitutional and unreasonable, the appellate court affirmed the trial court's order setting aside the annexation election.

Similarly, Owosso involved an annexation of property which was connected to the city only by a strip of land, measuring 1,326 feet long by 280 feet wide, which was purchased especially to secure the connection. The strip was populated only by two voters who favored the annexation, while the areas between the bulk of the annexed land and the city contained some 140 qualified voters. The court held that the requirement of contiguity, involving "reasonable compactness and regularity of boundary so as to insure that the annexed and annexing territories become an unbroken mass which can function effectively as a single unit rather than as an armed monster with only minimally-connected appendages," had not been met. 25 Mich. App. at 467, 181 N.W.2d at 545.

Here, Thompson and Ramsey contend that, as in Birmingham and Owosso, the annexation boundaries were drawn to exclude potential opponents of the annexation process, including Thompson's daughter. However, as noted above, the affidavit of the former city manager specifically lists numerous city-related reasons for the location of the annexation boundaries, and two affidavits clearly controvert Webster's statements regarding the registration of potential voters within the annexed area. Moreover, the map included in the record shows that, unlike Birmingham and Owosso, here the boundaries were "roughly rectangular" in shape, as described in Thompson's and Ramsey's appellate brief. Indeed, a review of that map shows that including the daughter's residence within the annexed area would

have required the annexation boundary to deviate from that rectangular shape and to incorporate, at the annexed area's widest point, an additional oval extension into the county which apparently would have further doubled the width of the annexed territory in that limited area.

Based upon our review of the record, we cannot say that it is clear, as a matter of law, that it would be impossible for Pikeville to produce evidence at a trial which would warrant a judgment in its favor and against Thompson and Ramsey.

Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476, 483 (1991). Instead, when viewed in the light most favorable to Pikeville, the record clearly shows that genuine issues of material fact exist as to whether the annexation boundaries were, as alleged by Thompson and Ramsey, arbitrary, capricious, unreasonable, and unlawfully designed with the intent of creating a territory unpopulated by registered voters who could oppose the annexation ordinance. We conclude, therefore, that the trial court erred by granting a summary judgment to Thompson and Ramsey.

Next, Pikeville contends that the trial court erroneously held that Kentucky law "prohibits municipalities from arranging the boundaries of annexation territory to include residents who may favor annexation." However, the court's summary judgment order in fact focused on the specific annexation boundaries herein, and determined that the boundaries involved gerrymandering such as that described in Birmingham and Owosso. Thus, the broader issue was not addressed in the summary

judgment, and it is not properly before us on appeal. Hence, we decline to address it.

Next, Pikeville contends that the trial court erred by granting Thompson and Ramsey's postjudgment motion seeking a protective order prohibiting the taking of depositions. The record shows that the court specifically granted the motion on the ground that "this case has been decided and . . . those depositions are now improper." Given the fact that we are reversing the summary judgment, it follows that the court's protective order should be set aside on the ground that the underlying basis for it no longer exists.

Finally, White Water contends in Appeal No. 1999-CA-000572-MR that the trial court erred by denying its motion for leave to intervene as an indispensable party, which was filed on the same date as Pikeville's motion to vacate the order granting summary judgment. The court denied both motions without specifying the reasons for its actions.

The right to intervene in a pending action is addressed by CR 24.01(1), which states:

Upon timely application anyone shall be permitted to intervene in an action (a) when a statute confers an unconditional right to intervene, or (b) when the applicant claims an interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

Here, the requirements of the rule are satisfied because White Water's ability to continue the operation of its liquor store in

the annexed territory is dependent on whether that territory is annexed to the "wet" city, or reverts to being part of the "dry" territory outside of the city limits. Clearly, White Water "claims an interest relating to" the annexation, and it is "so situated that the disposition of the action may as a practical matter impair or impede" its "ability to protect that interest." CR 24.01(1). Further, the record contains nothing to suggest that White Water's interest is "adequately represented by existing parties." Id. Thus, we must assume for purposes of this appeal that White Water's motion was denied by the court on the ground that it was untimely.

Although it is arguable that the motion to intervene was untimely because it was filed on the same date as the unsuccessful motion to vacate the summary judgment, again it follows from our reversal of the summary judgment that the underlying basis for the court's determination no longer exists. Hence, the court's order denying White Water's intervention motion as untimely must be set aside, and the motion should be reconsidered upon remand.

The court's summary judgment is reversed, its denial of White Water's motion to intervene is vacated, and this matter is remanded to the trial court for further proceedings consistent with our views.

ALL CONCUR.

BRIEFS FOR CITY OF PIKEVILLE:

Russell H. Davis, Jr.
Pikeville, KY

BRIEF FOR OSCAR W. THOMPSON,
JR.; and JOE RAMSEY:

Lawrence R. Webster
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BRIEF FOR WHITE WATER TRADING
CO., INC., d/b/a FINISH LINE
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Miller Kent Carter
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