

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002487-MR

JOYCE BROWN

APPELLANT

v. APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE SHEILA R. ISAAC, JUDGE
ACTION NO. 99-CI-03574

WISEMAN AND ANDERSON
DEVELOPERS, LLC

APPELLEE

OPINION
AFFIRMING

** ** * * * ** **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Joyce Brown (Brown), pro se, appeals from an October 4, 2000 summary judgment of the Fayette Circuit Court granted in favor of Wiseman and Anderson Developers, LLC (Developers). The Fayette Circuit Court granted summary judgment in Developers's favor, established the boundary of a 150-square-foot-gravesite easement on Developers's property, and gave Developers permission to remove and relocate graves that were on its property but outside of the 150-square-foot gravesite. We affirm.

The property, known as 3059 Todds Road, Lexington, Kentucky, that is the subject of this appeal was originally part of the estate of James Harris. On January 28, 1993, the administrator of Harris's estate filed suit, styled Case No. 93-CI-0353, in the Fayette Circuit Court to settle Harris's estate. The circuit court appointed a master commissioner to handle the estate. The master commissioner determined that it was necessary to sell the property at auction. Prior to the auction, the master commissioner determined that a gravesite was on the property. He set aside approximately 150 square feet for the gravesite, determined its boundary and, to preserve it, placed an easement upon the property in favor of Harris's relatives.

In October 1995, the master commissioner auctioned off the property. Joyce Brown, Della Brown, and Jewell D. Mitchell, officers of the Shield of Faith Ministries, Inc. (Shield of Faith) and relatives of the deceased, successfully bid \$80,100.00 for the property. However, they failed to file a required surety bond with the master commissioner, and the master commissioner rescinded the sale. On January 8, 1996, the master commissioner auctioned off the property again. Again, Joyce Brown, Della Brown, and Jewell D. Mitchell attended the auction. Dennis R. Anderson (Anderson), a real estate developer, also attended the auction. Once again, Brown, on behalf of Shield of Faith, successfully bid \$54,500.00 for the property. On that same day, Joyce Brown paid the master commissioner ten percent of the purchase price with a check drawn upon Shield of Faith's account but signed by her.

On January 9, 1996, the master commissioner filed a report of sale with the circuit court and in his report, the master commissioner listed Brown as both the highest bidder and the purchaser of the property. Brown paid the balance of the purchase price by check drawn upon Shield of Faith's account and, once more, signed by her. On March 13, 1996, the Fayette Circuit Court entered an order that confirmed Brown as the buyer of the property and referred to her, not Shield of Faith, as the purchaser of the property. On March 14, 1996, Brown, through counsel, filed a motion for issuance of deed upon full payment of purchase price and requested the circuit court order the master commissioner to prepare and deliver a deed for the property to Brown, personally, not Shield of Faith. On April 8, 1996, Brown recorded a deed from the circuit court that conveyed the property to her, which failed to mention Shield of Faith.

On June 18, 1996 in Fayette County, the Internal Revenue Service (IRS) recorded a federal tax lien against Brown for a tax deficiency. Brown deeded, by quitclaim, all her property rights in said property to Shield of Faith and Della Brown and recorded the deed in Fayette County on July 8, 1996. Due to the prior recorded federal tax lien, Shield of Faith and Della Brown took the property subject to the IRS's tax lien. The IRS seized the property and sold it at public auction to Anderson for \$80,000.00. On March 3, 1997, the IRS deeded, by quitclaim, the property to Anderson after Brown failed to redeem the property within 180 days of the sale.

On February 19, 1997, Brown and Shield of Faith filed suit in United States District Court for the Eastern District of

Kentucky, against Anderson, the IRS and IRS agent Lynn Tucker. Brown contested the IRS' seizure and sale of the property and requested a temporary injunction to prevent Anderson from conveying the property, building on it or disturbing any graves on it. On November 6, 1997, the United States District Court dismissed Anderson from Brown's action. Brown appealed Anderson's dismissal to the United States Court of Appeals which affirmed the trial court. On January 3, 2000, the United States District Court dismissed IRS agent Tucker from Brown's action and, on January 12, 2000, dismissed the IRS as well. Brown filed a motion to reconsider which was denied. On March 11, 1998, Anderson deeded the property to Developers.

Developers filed suit in the Fayette Circuit Court and requested the circuit court to quiet title in its favor, set the boundary of the gravesite and authorize Developers to move any graves outside of the gravesite's boundary. On April 24, 2000, Developers filed a motion for summary judgment and, on June 12, 2000, the Fayette Circuit Court entered a partial summary judgment that quieted the title of the property in Developers' favor, subject only to an unrelated prior judgment lien. Later on October 4, 2000, the circuit court entered another summary judgment in Developers' favor, set the boundary of the 150-square-foot gravesite in accordance with the master commissioner's original determination and authorized Developers to move any graves that were outside of the gravesite's boundary. Brown's appeal followed.

When considering a motion for summary judgment on appeal, we must review the record in a light most favorable to

the party that opposes the motion and resolve all doubts in his favor, and the movant must have shown that the party opposing the motion could not have prevailed under any circumstances.¹

It appears to this Court that Brown presents one assignment of error -- that the Fayette Circuit Court erred by failing to preserve the property at 3059 Todds Road as a gravesite. Brown contends that the circuit court failed to comply with the Fourteenth Amendment to the United States Constitution and the following Kentucky statutes: KRS² 164.705, KRS 171.313, KRS 381.710, KRS 381.715, and KRS 381.720. We will address each in turn.

First, Brown contends that her rights to due process and equal protection were violated by the Fayette Circuit Court. However in her brief, Brown fails to state how the circuit court violated her constitutional rights; she merely states a conclusion that her rights were violated. We have reviewed the record in its entirety, and it contains no evidence that supports Brown's allegation that her Fourteenth Amendment rights were violated. Therefore, we adjudge that Brown's constitutional rights were not violated by the Fayette Circuit Court.

Second, Brown cites KRS 164.705 and implies that the circuit court failed to comply with it. In KRS 164.705, the General Assembly promulgated a public policy, "to preserve archaeological sites and objects of antiquity for the public benefit. . . ." Brown did not preserve this issue for appeal and

¹ Scifres v. Kraft, Ky. App. 916 S.W.2d 779, 781 (1996).

² Kentucky Revised Statutes.

even if it were preserved, KRS 164.705 is inapplicable to the case sub judice. The record fails to support the contention that the gravesite in question is an archaeological site nor does Brown argue that it is. Therefore, the circuit court did not violate KRS 164.705.

Third, Brown cites KRS 171.313 and implies the circuit court violated it. KRS 171.313 places upon the Kentucky Historical Society the following responsibilities:

(1) Collect, maintain, preserve, categorize, and cause to be published necessary information concerning Kentucky family cemeteries; (2) undertake a systematic program which will restore and maintain the gravesites of any of the following historically significant people who are buried within this Commonwealth: (a) Past Governors of the Commonwealth and their spouses; (b) The three (3) former Vice Presidents of the United States from the Commonwealth: Richard M. Johnson; John C. Breckinridge; and Alben W. Barkley; and (c) The "First Pioneers," who were the original members at either Boonesboro, Harrodsburg, or Stanford in 1774-1775 . . .

KRS 171.313 places affirmative duties upon the Kentucky Historical Society not the Fayette Circuit Court. The Kentucky Historical Society is not a party to this appeal nor was it a party to the underlying action. Brown does not argue that the Kentucky Historical Society has failed to comply with subsection (1) of this statute nor does Brown argue that any of the graves belong to historically significant people as defined by subsection (2). Since KRS 171.313 does not apply, the circuit court could not have violated it.

Fourth, Brown cites KRS 381.710 which states in its entirety:

The fact that any tract of land has been set apart for burial purposes and that a part or all of the grounds has been used for burial purposes shall be evidence that such grounds were set aside and used for burial purposes. The fact that graves are not visible on any part of the grounds shall not be construed as evidence that such grounds were not set aside and used for burial purposes.

In Case No. 93-CI-0353, the master commissioner found that a certain portion of the property at 3059 Todds Road was used for burial purposes. The master commissioner expressly set aside 150-square feet as a gravesite and created an easement for the benefit of James Harris's family. The circuit court reaffirmed the master commissioner's actions and reaffirmed the boundary set forth by him. Developers took the property subject to said easement. Brown impliedly argues on appeal that the entire property should have been preserved as a cemetery; however, such an issue was not preserved for appeal nor is it factually substantiated by the record. In fact, in 1993, Brown's mother, Della Brown, approached the Lexington-Fayette Urban County Planning Commission (Commission) and petitioned the Commission to change 3059 Todds Road from single family residential zone to a townhouse zone.³ Della Brown failed to mention in her petition to the Commission that a gravesite was located upon the property. Della Brown's actions in front of the Commission are inconsistent with Brown's implied claim that the entire property should have been preserved as a gravesite.

Lastly, Brown cites KRS 381.715 and KRS 381.720. KRS 381.715 addresses the abandonment of burial rights and the resale

³ T.R. 189.

of cemeteries after abandonment. This statute is inapplicable. Developers have not argued that Brown or any other member of the Harris family have abandoned their rights to use the gravesite. In fact, the circuit court expressly reaffirmed the Harris family's right to access and to use the 150 square foot gravesite located on the property. KRS 381.720 addresses the vesting of titles of certain abandoned cemeteries in cities of the first, second, third, fourth or fifth class. As above, this statute is inapplicable since the gravesite has not been abandoned. Therefore, the circuit court could not have possibly violated either KRS 381.715 or KRS 381.720.

Brown presented no facts, circumstances or arguments that would justify reversal of the circuit court, and after reviewing the record in a light most favorable to the her and resolving all doubts in her favor, we could see no circumstances where she could have prevailed at trial. Therefore, the judgment of the Fayette Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Joyce Brown, pro se
Lexington, Kentucky

BRIEF FOR APPELLEE:

Richard V. Murphy
Cheryl H. Anderson
Lexington, Kentucky