RENDERED: AUGUST 21, 2009; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002161-MR

MICHAEL LIVELY AND
CYNTHIA LIVELY — APPELLANTS

v.

APPEAL FROM HOPKINS CIRCUIT COURT
HONORABLE JAMES C. BRANTLEY, JUDGE
ACTION NO. 00-CI-00056

MOLLIE DINWIDDIE MCGAW; BARRY MCGAW; JAMES FREDERICK DINWIDDIE; JOAN DINWIDDIE; ROBERT DUNCAN DINWIDDIE; NANCY JOANNE DEAVER; MOLLIE DINWIDDIE MCGAW, EXECUTRIX FOR THE ESTATE OF ANNA DINWIDDIE; AND WILLIAM JOSEPH DINWIDDIE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; WINE, JUDGE; GRAVES,[1] SENIOR JUDGE.

[1] Senior Judge John W. Graves sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

COMBS, CHIEF JUDGE: This case is the culmination of nearly a decade of litigation involving multiple parties. The record is extensive. The Appellants (the Livelys) appeal from an order of the Hopkins Circuit Court clarifying a deed pertaining to property that they previously purchased in a judicial sale. The order was issued in response to a motion of the Appellees (the Dinwiddies).

The Dinwiddies' family has farmed in Grayson County for several generations spanning approximately 150 years. At issue are 1500 acres that were owned by Joseph Dinwiddie. During his lifetime, Joseph and his wife made several conveyances dividing the entire acreage among their three children. In the process, they severed the mineral rights in 1949, retaining a life estate for themselves with their children as remaindermen. The severance was recorded in a Lease Book in Grayson County. The record indicates that throughout the years, the three siblings observed the surface boundaries but utilized a common pipe gathering system to connect gas wells; each claimed an undivided one-third interest.

Joseph's son William died intestate in 1989. William's one-third interest in the mineral rights was divided among his wife, Anna,[2] and their four children. Anna received an undivided one-sixth interest, and each child inherited an undivided one-twenty-fourth interest.

Anna later moved to Hopkins County before she died testate in 1998. Her heirs filed the underlying lawsuit in Hopkins County in order to settle her

[2] The record refers to her both as "Anne" and "Anna." The brief that is written by her son consistently uses "Anna."

estate. In February 2001, the trial court ordered a sale of certain property. The commissioner issued a notice of sale that separately listed and described two parcels of real estate as well as Anna Dinwiddie's undivided one-sixth interest in the mineral estate of 1500 acres. At the sale by special commissioner on May 19, 2001, James Dinwiddie (one of the Appellees[3]) purchased the mineral rights, and Michael Lively (one of the Appellants[4]) purchased a parcel of real estate containing 320 acres. On May 29, 2001, James Dinwiddie filed a motion with court to have a reservation of the mineral rights included in the deed for the 320-acre farm. The court granted the motion on June 5, 2001, ordering the special commissioner to include a provision in the deed "providing that the minerals and mineral rights have previously been reserved and are excepted from the conveyance."

At this point, the record contains some gaps. Though both parties quote deed language, the record does not contain it.[5] The next reference in the record to the property at issue is a motion made by the Dinwiddies in March 2007, again asking the court to correct the language in the deed. The record indicates that the Livelys were served with the motion and appeared at a hearing in May 2007. At that hearing, the trial court gave the Livelys time to brief their arguments for objection and the Dinwiddies time to respond.

[3] The Appellees are Anna's estate, the four children, and their spouses.

[4] Since purchasing the land, Michael Lively deeded a portion of it to his parents with a remainder in his son. The Appellants are Michael Lively, his wife, his parents, and his son.

[5] Nonetheless, this defect does not affect our analysis.

The Livelys never filed a brief or any other pleading. They also did not appear at the next hearing in September 2007. The trial court then granted the Dinwiddies' motion to amend the deed in order to except the mineral rights from the conveyance of the 320 acres. The Livelys subsequently filed this appeal. Upon examination of the record, we affirm.

The Livelys' first argument is that the Hopkins Circuit Court improperly exercised jurisdiction over them because they were not joined as parties to the underlying action and because they did not receive proper service.

In Kentucky, the purchaser at a judicial sale *becomes a party* to any subsequent proceedings resulting from the sale and affecting property rights. *Aurora Loan Services v. Ramey*, 144 S.W.3d 295, 299 (Ky. App. 2004). The Livelys purchased the property in a judicial sale ordered by the Hopkins Circuit Court. Therefore, that court properly exercised jurisdiction over them in the subsequent proceedings.

With regard to their argument as to notice, the Livelys argue that their notice was defective because it did not include a summons. The record shows that they received copies of the motion to correct the deed. It included the place, date, and time that the motion would be heard. Contrary to what they claim in their brief, the video record shows that the Livelys were present for that hearing. Because they initially appeared *pro se*, the court gave them more time to allow their attorney to present their objections in a brief.

Though Kentucky Rules of Civil Procedure (CR) 4.01 and 4.04 require a summons to be included with the initiating document,

> the purpose of service . . . is to make [a] person aware of the proceedings. . . . [T]he purpose for the rule disappears or has been satisfied when the party appears . . . and participates or is given an opportunity to participate, does not even give the trial court the opportunity to correct any defect in the notice[,] and only complains after . . . the case is on appeal.

Messer v. Commonwealth, 754 S.W.2d 872, 874 (Ky. App. 1988). Since the Livelys participated in the proceedings without complaining to the trial court about how they were served with notice, they are barred from arguing improper service at this juncture.

At the trial court hearing in May 2007, the Livelys primarily argued that they were *bona fide* purchasers for value without notice of any reservation of a mineral estate. They admit in their brief that James Dinwiddie purchased a one-sixth undivided interest in the mineral rights of 1500 acres that included the land they purchased.[6] Nevertheless, they claim that they did not have any notice of this transaction in their deed.

The General Assembly has instructed that "[t]he deed of the commissioner shall refer to the judgment, orders and proceedings, authorizing the conveyance, *so that the same may be readily found*." Kentucky Revised Statutes (KRS) 426.572. (emphasis added). This statute has been cited once by our state's highest court when a deed was contrary to the commissioner's report. *Dotson v.*

[6] Mr. Dinwiddie's purchase occurred at the *very same auction* as the Livelys' purchase.

Merritt, 132 S.W. 181 (Ky. 1910). In *Dotson*, the court concluded that the purchaser had received notice of the discrepancy by virtue of the reference to the case record and could not claim to be an innocent purchaser.

Similarly, our record contains a draft copy of a Commissioner's Deed. In the second paragraph, it describes the underlying action, including the names of the parties and the case number assigned by the Hopkins Circuit Court. Additionally, the introduction of the description of the property includes the recitation that the special commissioner conveyed the property "as he is authorized to by the Judgment, Orders and proceedings in said case to make."

In the case record, we have readily found the court order from June 2001 clarifying the separation between the surface and mineral rights. There is also an agreed order from January 2002, which reiterates that "[a]s to the ownership interest which the various parties have in Kentucky mineral rights and Tennessee mineral rights, it is hereby ordered that said property shall continue to be owned jointly by the beneficiaries of the estate."

We conclude that the Livelys received sufficient notice that they do not own the mineral rights. Additionally, we note that their main contention before the trial court was that they did not know whether the 1500 acres referred to in James Dinwiddie's deed included their 320 acres. On appeal, they have argued to the contrary and contend that the 320 acres are indeed included. Their contradictory positions render moot their case on appeal. A party may not make

one argument to the trial court and another to the appellate court. *Kennedy v. Commonwealth*, 544 S.W.2d 219 (Ky. 1976).

As the Livelys did not preserve their remaining arguments, we will not address them. *Howard v. Hamilton*, 612 S.W.2d 345 (Ky. App. 1981). We affirm the order of the Hopkins Circuit Court clarifying the deed in this case.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Gary A. Tabler
Jonathan Farmer

BRIEF FOR APPELLEES:

James F. Dinwiddie, *pro se*
Leitchfield, Kentucky