RENDERED: OCTOBER 4, 2013; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-001227-MR

EMMETT LEE OGDEN, JR., and
VICTORIA ANN OGDEN — APPELLANTS

v.

APPEAL FROM HENRY CIRCUIT COURT
HONORABLE KAREN A. CONRAD, JUDGE
ACTION NO. 02-CI-00350

RUSSELL BEVERLY, NOW
DECEASED (NOW IDA BEVERLY);
ALMA BEVERLY CASEY;
WILMA BEVERY PARRISH;
ANNA CRAVENS;
BOULDER LLC;
LITER BROTHERS, LLC;
LITER'S QUARRY, INC.
(NOW LITER'S, INC.);
CEDARVILLE LUMBER, LLC;
HUBBERT C. SNIDER; and
ALL UNKNOWN PERSONS WHO
CLAIM ANY INTEREST IN THE
SUBJECT MATTER OF THIS ACTION,
TOGETHER WITH ANY UNKNOWN
SPOUSES OF THE ABOVE NAMED
DEFENDANTS AS WELL AS ANY
UNKNOWN SPOUSES OF ANY
UNKNOWN PERSONS WHO
CLAIM ANY INTEREST IN THE

OPINION AND ORDER
DISMISSING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; MOORE AND TAYLOR, JUDGES.

MOORE, JUDGE: Emmett Lee Ogden, Jr., and Victoria Ann Ogden appeal for the second time from an order of the Henry Circuit Court summarily dismissing their quiet title action against the above-named appellees. For the second time, we dismiss their appeal as interlocutory.

Our decision to dismiss this appeal as interlocutory is based upon two procedural issues regarding quiet title actions: 1) when a quiet title action should be dismissed with prejudice; and 2) when a defense in a quiet title action should be treated as a counterclaim. To address these issues and their relation to this appeal, it first becomes necessary to review what a quiet title action is. The authority for maintaining a quiet title action is codified at Kentucky Revised Statute (KRS) 411.120, entitled "Action to quiet title; court order if title proved." In total, that statute provides:

> Any person having both the legal title and possession of land may prosecute suit, by petition in equity, in the circuit court of the county where the land or some part of it lies, against any other person setting up a claim to it. If the plaintiff establishes his title to the land the court shall order the defendant to release his claim to it and to pay the plaintiff his costs, unless the defendant by his answer disclaims all title to the land and offers to give such

> release to the plaintiff, in which case the plaintiff shall pay the defendant's costs, unless for special reasons the court decrees otherwise respecting the costs.

In other words, a quiet title action is a special statutory proceeding for a declaration of rights with respect to land. One person who has claimed title to land is attempting to have a court silence another person's claim of title to the same land; this statute specifies that the affirmative relief sought by the person initiating a quiet title action, *i.e.*, the plaintiff, is a court order directing "any other person setting up a claim to [the land at issue] . . . to release his claim to it and to pay the plaintiff his costs[.]" *Id*. And, to receive a court order granting this affirmative relief, the plaintiff must as a threshold matter demonstrate two prerequisites: "both the legal title and possession of the land[.]" *Id*.

What KRS 411.120 does not state is equally important in this matter. KRS 411.120 does not state that the "other person setting up a claim to [the land]" has any obligation to prove legal title and possession of the land in order to qualify as a "defendant" in a quiet title action. This is because a plaintiff prosecuting a quiet title action "must recover on the strength of his title and not upon the weakness of his adversary's title, or the fact that his opponent has no title." *Gabbard v. Lunsford*, 308 Ky. 836, 215 S.W.2d 985, 986 (1948). Stated differently, proving legal title and possession are prerequisites to seeking affirmative relief (*i.e.*, the "court order" commanding "the defendant to release his claim to [the land] and to pay the plaintiff his costs," *Id*.). And, unless the defendant asserts a counterclaim to quiet title, the defendant is not seeking any

affirmative relief at all—the defendant is simply opposing the plaintiff's efforts to silence the defendant's unproven claim to the land.

Similarly, KRS 411.120 does not state that plaintiffs in quiet title actions *forfeit* their own claims to the land in question if they fail to establish both title and possession and are thus unsuccessful in prosecuting a quiet title action. Establishing title and possession are precedent conditions to maintaining a quiet title action and receiving affirmative relief. *Vogler v. Salem Primitive Baptist Church*, 415 S.W.2d 72, 75 (Ky. 1967). Absent a counterclaim from the defendant to quiet title to the land, the *only* question before the court in a quiet title action is whether the plaintiff has made the requisite showing of legal title and possession to establish a right to silence the *defendant's* claim. *See, e.g.*, *Whitaker v. Shepherd*, 280 Ky. 713, 134 S.W.2d 604, 606 (1939) ("if the plaintiff establishes his title to the land, the defendant shall be decreed to release his claim"); *Bentley v. Kentland Coal & Coke Co.*, 242 Ky. 511, 46 S.W.2d 1077, 1078 (1932) ("the judgment may be affirmed upon the ground that the plaintiff failed to establish his own title, which is a prerequisite to securing a judgment quieting title. . . . The plaintiff has, therefore, failed to establish his right to the relief sought."); *see also Davis v. Daniel*, 295 Ky. 717, 175 S.W.2d 501 (1943) (dismissing plaintiff's suit to quiet title, but undertaking no effort to place title to disputed tract in appellees who filed no counterclaim to quiet title).

Thus, returning to the first of the two procedural issues in this matter: if the only party requesting affirmative relief in a quiet title action is unsuccessful

in demonstrating both possession of and title to the land at issue, the proper disposition of a quiet title action is generally a dismissal *without prejudice*—in other words, a return to the status quo of two or more parties each maintaining unproven claims to the same land.

The reason for this is relatively straightforward: for a judgment to have any kind of *res judicata* effect it must be, among other things, on the merits. *Beverage Warehouse, Inc. v. Com., Dept. of Alcoholic Beverage Control*, 382 S.W.3d 34, 46 (Ky. App. 2011). Failing to sufficiently demonstrate the statutory prerequisites of title and possession effectively precludes the circuit court from reviewing the merits of a quiet title claim. *See, e.g., Cumberland Co. v. Kelly*, 156 Ky. 397, 160 S.W. 1077, 1078 (1913) ("Plaintiff's case not coming within any of the exceptions to the rule that to maintain an action to quiet title he must have both the legal title and actual possession, his failure to prove possession was fatal to a recovery. Judgment reversed, and cause remanded, with directions to dismiss the petition without prejudice to a future action."); *see also Rowe v. Kidd*, 259 F. 127, 129 (6th Cir. 1919):

> The dismissal of the bill upon the merits must, however, we think, be taken as an implied holding that the plaintiffs' possession had been sufficiently made out, since otherwise the bill should have been dismissed for want of such possession, without prejudice. It is well settled, as we formerly stated, that under the federal equity practice, as well as under the Kentucky Act of July 3, 1893 (Ky. St. Sec. 11), a bill in equity to remove cloud from plaintiffs' title, or, as it appears to be called in the Kentucky practice, a bill to quiet title, will not lie where the plaintiff is not in possession of the premises, and

> cannot be maintained without proof both of possession and legal title.

Moreover, in doing nothing more than dismissing a plaintiff's quiet title claim, a court has effectively refused to determine that *any* party's claim to the land at issue is superior to *anyone else's* claim. The court has, therefore, effectively exercised its authority under KRS 418.065[1] by declining to settle or declare any party's rights regarding the land at issue.

Indeed, even if a defendant asserts a quiet title counterclaim against the plaintiff and requests affirmative relief in its own right, doing so does not guarantee that either the defendant or the plaintiff will receive any affirmative relief from the court. That is, in the event that *neither* party is able to satisfy the prerequisites of KRS 411.120, the proper procedure is for the court to decline to take any action until the litigants file such pleadings and offer such proof as is necessary to a final and correct decision, or to propound questions to the parties and require pleading and proof thereon, or, failing that, to dismiss the plaintiff's

[1] Questions of law regarding title to real estate may be brought pursuant to either KRS 411.120 or the general declaratory action statute, KRS 418.040 *et seq*., subject to applicable limitations established by the legislature and the assorted rules and precedents of our Courts. *Whitley v. Robertson County*, 396 S.W.3d 890, 897-99 (Ky. 2013). Therefore, it would be improper to interpret KRS 411.120 inconsistently with KRS 418.065, which provides:

> The court may refuse to exercise the power to declare rights, duties or other legal relations in any case where a decision under it would not terminate the uncertainty or controversy which gave rise to the action, or in any case where the declaration or construction is not necessary or proper at the time under all the circumstances. The appellate court in its consideration of the case, shall not be confined to errors alleged or apparent in the record. When, in its opinion, further pleadings or proof is necessary to a final and correct decision of the matters involved, or that should be involved, it shall remand the case for that purpose; or if in its opinion the action is prematurely brought, or where a ruling in the appellate court is not considered necessary or proper at the time under all the circumstances, it may direct a dismissal *without prejudice* in the lower court. (Emphasis added.)

and defendant's respective quiet title claims. *See Ellis v. Chestnut*, 289 S.W.2d 740, 741 (Ky. 1956); *Peabody Coal Co. v. Rutter*, 283 S.W.2d 842 (Ky. 1955); *Duckwall v. Gregg's Adm'r*, 297 Ky. 730, 181 S.W.2d 263, 265 (Ky. 1944) ("ordinarily, when both the plaintiff and defendant fail to establish title in an action to quiet title both the petition and counterclaim should be dismissed" (citing *Nicholson v. Shear*, 225 Ky. 53, 7 S.W.2d 516 (1928)); *Strunks Lane & Jellico Mountain Coal & Coke Co. v. Anderson*, 276 Ky. 576, 124 S.W.2d 779 (1939).[2]

We now address the second procedural issue raised in this matter: when a defense in a quiet title action should instead be treated as a counterclaim. As noted, sometimes a defendant will simply deny the plaintiff's allegations of title and seek no affirmative relief. More often, a defendant will assert a quiet title counterclaim against a plaintiff in an effort to have the matter finally resolved; doing so obligates the court to consider all of the evidence as to both the plaintiff's and defendant's competing claims and to at least pass upon the question of superiority of title. *Whitaker*, 134 S.W.2d at 607; *see also Combs v. Combs*, 238 Ky. 362, 38 S.W.2d 243, 244 (1931).

[2] The following quote from *Strunks Lane*, 124 S.W.2d at 781, underscores this point:

> The record in this case does not contain sufficient evidence upon which the chancellor could with any degree of accuracy decide who had title to the lands in controversy. Plaintiff's evidence does not entitle it to a judgment nor does defendants' evidence entitle them to a judgment. While this is an equity action and we have authority to direct the entry of a final judgment, we find the evidence of both plaintiff and defendants too vague and uncertain to justify a final judgment, and due to the chaotic condition of the record we think the ends of justice require us to remand the case and that the parties on each side be given opportunity to take further proof.

But, it sometimes becomes necessary for the court to treat a defendant's "affirmative defense" in a quiet title action as a "counterclaim."

Consider, for example, the "affirmative defense of adverse possession." It is meaningless for a non-counterclaiming defendant to assert adverse possession as a "defense" to a quiet title action because the burden is already upon the plaintiff to establish a possessory right in order to maintain a quiet title action. *See* KRS 411.120; *Arnold v. Heffner*, 330 S.W.2d 943, 945 (Ky. 1960) ("We construe [Kentucky Rule of Civil Procedure (CR)] 8.03 as not requiring a defendant to plead adverse possession merely to refute by evidence an allegation of his wrongful possession."). Adverse possession is more than a defense; it would not only bar the remedy sought by the plaintiff in a quiet title dispute, but would also vest in the defendant an absolute title to the land. *See, e.g., Whitaker*, 134 S.W.2d at 607 ("if a suit to quiet title to land may be maintained upon a title acquired by fifteen years of adverse possession . . . the defendant may by answer and counterclaim, setting up title acquired by such required adverse holding of the land of the owner, also maintain a defense to the quia timet action brought against him" (citations omitted)); *Gabbard*, 215 S.W.2d at 986; *Noland v. Wise*, 259 S.W.2d 46, 48 (Ky. 1953) ("There are three ways in which the title to land may be shown: (1) paper title deductible from the Commonwealth; (2) *adverse possession for the statutory period*; and (3) title to a common source." (Citations omitted; emphasis added.))

For this reason, where a defendant's answer denies a plaintiff's claim, alleges title and possession of the land (by virtue of adverse possession, for example), and also includes a general prayer for relief, Kentucky courts have treated what a defendant styles as an "affirmative defense of adverse possession" as, in effect, a counterclaim for quieting title based upon a theory of adverse possession. This, in turn, triggers the court's duty to pass upon the issue of superiority of title as between the parties. *See Crawley v. Mackey*, 283 Ky. 717, 143 S.W.2d 171, 172 (1940); *Hunt v. Cassity*, 297 Ky. 716, 181 S.W.2d 248 (1944); *Hopkins v. Slusher*, 266 Ky. 300, 98 S.W.2d 932, 936 (1936).

With the above in mind, we now turn to the relevant facts and procedural history of this case.

On December 11, 2002, the Ogdens filed a quiet title action in Henry Circuit Court against the above-captioned appellees, claiming title to and possession of approximately 215 acres in Henry County near the Kentucky River by virtue of several recorded deeds. Relevant to this appeal, the Ogdens alleged that some of their neighbors (*i.e.*, Russell Beverly, Alma Beverly Casey, Wilma Beverly Parrish ("the Beverlys") and Anna Cravens) were wrongfully claiming title to part of that land. Specifically, the Ogdens asserted that 45 acres of their 215 acres had also been included in Cravens' and the Beverlys' deeds, and that the descriptions of their respective tracts overlapped as a result. The Ogdens asserted that the only reason Cravens' and the Beverlys' chains of title included the 45 acres in question was because, in the late 1800's, John Bates, Sr.—whom the

Ogdens alleged was a grantor in common between themselves, Cravens, and the Beverlys—had purported to convey to the Cravens' and Beverlys' predecessors land that had already been validly conveyed to the Ogdens' predecessors in title. The Ogdens argued that Cravens' and the Beverlys' deeds were therefore void to the extent that they purported to include the 45 acres at issue, and they asked the circuit court to order Cravens and the Beverlys to release any claim to that land.

Cravens and the Beverlys answered the Ogdens' action by denying the balance of the Ogdens' allegations of title to the 45 acres in question. Furthermore, in what they styled as an "affirmative defense" to the Ogdens' action, Cravens and the Beverlys asserted that even if the Ogdens' deeds did encompass those 45 acres, and even if the Ogdens' chain of title was superior to their own chains of title, Cravens and the Beverlys had adversely possessed the 45 acres for a period in excess of 15 years. Their respective answers also included general prayers for relief.[3]

As discovery progressed in this matter, Cravens and the Beverlys made no attempt to trace their titles back to the Commonwealth, nor did they assert that their own chains of title originated from a grantor in common with the Ogdens. Thus, to the extent that Cravens or the Beverlys asserted any claims of title to the 45 acres at issue, they were claims based solely upon theories of adverse possession.

[3] Cravens and the Beverlys asserted color of title to the 45 acres deriving from a common grantor, Charles Beverly. From the record, it is unclear whether Cravens and the Beverlys were asserting joint ownership of the entire 45 acres, or were merely asserting title to separate portions of that land based upon the same legal theory.

Throughout most of the proceedings below, it also appears that Cravens' and the Ogdens' theories of adverse possession were treated by all of the parties as quiet title counterclaims. For example, the Ogdens characterized these theories as "claims" of adverse possession, argued that Cravens and the Beverlys had failed to set forth any evidence in support of their claims, and moved the circuit court to dismiss their adverse possession claims by way of summary judgment. In Cravens' response to the Ogdens' motion (which the Beverlys largely adopted and repeated in their own response to the Ogdens' motion), Cravens outlined the specifics of what she and the Beverlys labeled as their "claims" of adverse possession, attached supporting affidavits, and further argued in relevant part:

> [E]ven if the [Ogdens] can establish that their deeds describe or overlap the same property as that owned by the [Beverlys and Cravens], the [Ogdens] must still defend the claim of the [Beverlys and Cravens] to said property by adverse possession.
>
> . . .
>
> [T]he [Ogdens] have failed to specifically state, and quite frankly failed to state at all how [Cravens and the Beverlys] have failed to meet their burden of proof or how the case law which they have cited would preclude [Cravens and the Beverlys] from prevailing on such a claim given the facts of this case. It is undisputed that the law of adverse possession in Kentucky requires that "the possession must be shown to be actual, open and notorious, exclusive, and continuous for a period of fifteen years." Phillips v. Akers, 103 S.W.3d 705 (Ky. 2003). It should also be undisputed that the Defendant, Anna Cravens, in her answers to the [Ogdens'] discovery request has pled facts that if proved, show that both she

> and her predecessors in interest have met the required elements for a claim for adverse possession in excess of one hundred years, thus undeniably meeting any burden of proof required to overcome a motion for summary judgment regarding her claim for adverse possession.

In addition, pursuant to an interlocutory order, the circuit court *itself* characterized Cravens' and the Beverlys' adverse possession theories as "claims." And, after reviewing what Cravens and the Beverlys had put forward to support their adverse possession theories, the circuit court entered partial summary judgment in favor of the Ogdens dismissing those claims.

However, after the circuit court dismissed their respective adverse possession theories, Cravens and the Beverlys readjusted their stances regarding whether they had actually asserted "claims" of adverse possession. Each moved the circuit court to alter, amend, or vacate its judgment pursuant to CR 59.05. Cravens argued:

> The motions pending before the court are on [the Ogdens'] motion for summary judgment. [The Ogdens] claimed that they were entitled to ownership of certain property by virtue of an assertion of senior deed status. The adverse possession claim of [Cravens and the Beverlys] were simply defensive to the position to the Plaintiff's position [sic]. Thus, it is not appropriate for the court to assume that the entirety of the evidence in regard to adverse possession is presented in affidavit form. It is possible that at trial other witnesses will be available to testify in regard to the elements of adverse possession. No motion was previously pending for a determination that the property had been adversely possessed. Because this was simply a defensive position, any order ruling that adverse possession has been , has not been or whether it can be established is premature and should be preserved for trial.

To the same effect, the Beverlys argued:

> The very reason for this case being brought is the "overlap" property. That "overlap" property is within the [Beverlys' and Cravens'] deed descriptions that they have proven to have possessed in an adverse manner since 1950. [The Ogdens'] complaint is to quiet title to them of this property described in [the Beverlys' and Cravens'] deed.
>
> The record is clear that we have alleged and set forth facts that the property in controversy (the "overlap") is the property we have used and possessed. [The Ogdens] have alleged and set forth facts that the property in controversy is property in our deeds.[4]
>
> To the extent the order states that such has not been proven it is not supported by any matters contained in the record and controverted by all. This portion of the order should be vacated.
>
> . . . Summary Judgment is not appropriate to deny a defense. RCP 56.01[5] set [sic] forth a Summary Judgment may be entered for a person; [sic] "seeking to recover upon a claim, counterclaim or crossclaim or to obtain a declaratory judgment" [sic] Here we are dealing with a defense to a claim. Movants have not asserted a claim, have not counterclaimed, or crossclaimed. We submit to the Court that entry of a Summary Judgment on a defense is not permitted by the rules.

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[4] Irrespective of any descriptions contained in Cravens' or the Beverlys' deeds, the Ogdens have never conceded that Cravens and the Beverlys have a valid chain of title, and the record does not indicate that Cravens and the Beverlys have ever sought to prove that they have a valid chain of title going back to the Commonwealth or to a grantor in common with the Ogdens (*i.e.*, the two avenues, aside from demonstrating adverse possession, for satisfying the prerequisites of a quiet title action).

[5] Kentucky Rule of Civil Procedure (CR) 56.01 provides:

> A party seeking to recover upon a claim, counterclaim, or cross claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

While their CR 59.05 motions were pending, Cravens and the Beverlys also filed their own motions for summary judgment against the Ogdens. The upshot of their motions was that their research had uncovered ancient records that appeared to indicate that a predecessor in the Ogdens' chain of title, through whom the Ogdens had been claiming ownership of the 45 acres at issue in this matter, had actually filed for bankruptcy in the 1870's and had been divested of title to the land as a result of those proceedings. For our purposes, it is unnecessary to discuss the specifics of these ancient documents, the validity of this theory, or the Ogdens' response to it; suffice it to say that the circuit court found this theory persuasive and cited it as its basis for dismissing the Ogdens' quiet title suit *with prejudice*.

In the same order that dismissed the Ogdens' quiet title action, the circuit court also addressed Cravens' and the Beverlys' pending CR 59.05 motions. In relevant part, the circuit court held:

> This Court, after extensive review of pleadings filed by the Parties upon the issue of summary judgment as to Defendants' claim of adverse possession, determined that Defendants had not come forward with evidence that would support a claim of adverse possession and entered judgment accordingly. The Court reverses itself as to this issue, and vacates its earlier Order of summary judgment, finding that the Defendants have presented enough evidence to create an issue of fact for the court or an advisory jury to consider.
>
> The Court, in reviewing the applicable and controlling law, feels Defendants have made a case for adverse possession based upon the nature of the use, the claim of

> right by prior conveyances in their record chain of title, and the fact the property boundaries were fenced, and occupied and used by them to the extent of their fenced boundaries. The court relies on Phillips v. Akers, Ky., 103 S.W.2d 705 (2003). The Court's Order granting judgment to Plaintiffs had relied upon case law not strictly applicable to this set of circumstances (dealing with occasional, non-daily, or partial use of property to maintain a claim of adverse possession).
>
> While the summary judgment entered above will complete this case, in the event the action is tried, the matter should be determined after presentation of evidence to the court and an Advisory Jury.

In short, the circuit court did not merely refuse to order Cravens and the Beverlys to release their claims to the 45 acres in controversy; in dismissing the Ogdens' quiet title action with prejudice, the circuit court went further and effectively ordered the Ogdens to release *their* claim to it.

The impropriety of the circuit court's judgment on this point is largely self-evident, in light of our previous discussion regarding quiet title actions. The circuit court did not adjudicate the merits of any quiet title counterclaim from Cravens or the Beverlys; Cravens and the Beverlys were, albeit equivocally, now insisting that they had never asserted any quiet title "claim" against the Ogdens; and yet, by dismissing the Ogdens' quiet title action with prejudice, the circuit court had granted Cravens and the Beverlys a form of affirmative relief that they would only have been entitled to receive if they had successfully asserted a quiet title counterclaim against the Ogdens.

This became a dispositive issue when the Ogdens thereafter filed their first appeal, designated *Emmett Lee Ogden, et al. v. Russell Beverly, et al.*, 2009-CA-000989-MR. During those proceedings, this Court ordered the parties to show cause as to why the appeal should not be dismissed as interlocutory, not only because the circuit court had neglected to indicate that its order was final and that there was no just reason for delay (*see* CR 54.02(1)), but also because:

> [I]n order to be final and appealable, a judgment must finally adjudicate one or more of the claims in litigation and conclusively determine the rights of the parties in regard to that particular phase of the proceeding. *Francis v. Crounse Corp.*, 98 S.W.3d 62, 65 (Ky. App. 2002). Without resolution of the adverse possession claim, it appears that the July 25, 2008, order fails to "conclusively determine" the parties' rights with respect to the property at issue in this appeal.

To summarize, this Court regarded Cravens' and the Beverlys' adverse possession theories as unresolved quiet title counterclaims. And, this Court recognized that if those counterclaims were successful and adequately supported, they would have mooted the issue of the validity of the Ogdens' chain of title or whether the 1875 bankruptcy proceeding cast a cloud upon it.

From their responses to our show cause order, it also became apparent that Cravens and the Beverlys had come to believe that they were the superior title holders of the 45 acres at issue and that it was unnecessary for them to counterclaim and prove their own title and possession of those 45 acres, simply because the circuit court had found that the Ogdens had not met the prerequisites for maintaining a quiet title action. The following portion of Cravens' response,

which the Beverlys essentially repeated in their own response, is particularly telling:

> Initially, this Court raised a concern regarding the finality of the Henry Circuit Court's Order because it failed to adjudicate any claims that the Appellees, Cravens and Beverly, had asserted for adverse possession. Appellee Cravens, does not believe that this issue should bar the Court of Appeals from deciding the case before it, as neither Cravens nor Beverly[s] made a counter-claim for adverse possession, but instead pled adverse possession as only a defense to the Ogden's Petition to Quiet Title. See Answers of Cravens and Beverly attached. *It was and remains the position of Cravens that she has superior title to the land described in her deed*. Cravens only intended to use adverse possession as a defense at trial *if she was unable to prevail on the underlying title dispute*.
>
> *As the Henry Circuit Court ruled in Cravens' favor on the issue of title, it was unnecessary to consider the defense of adverse possession*. Thus, Cravens does not believe the failure to rule on her defense affects the finality of the Judge's decision.

(Emphasis added.)

Contrary to their beliefs, when the circuit court dismissed the Ogdens' quiet title action, it did not rule that Cravens or the Beverlys held any title to the 45 acres at issue, let alone any title superior to that claimed by the Ogdens. The only issue the circuit court's order could have adjudicated was whether the Ogdens had made a showing of title and possession of the 45 acres sufficient to warrant silencing Cravens' and the Beverlys' *claims* to that property. Indeed, having insisted that they had asserted no quiet title counterclaim against the Ogdens

regarding the 45 acres, it was disingenuous for Cravens and the Beverlys to maintain that they had somehow acquired "superior title" to that land.

With that said—after reviewing their responses—this Court in the previous appeal determined that in spite of the style of their pleadings, Cravens and the Beverlys had indeed asserted quiet title counterclaims based upon theories of adverse possession. In dismissing the appeal as interlocutory, this Court also instructed that "Without resolution of the adverse possession claim[s], the order fails to conclusively determine the parties' rights with respect to the property at issues [sic] in this appeal."

After the Kentucky Supreme Court declined to review our decision to dismiss the appeal, this matter was then remanded to the circuit court. Rather than resolving the Beverlys' and Cravens' claims of adverse possession, however, the circuit court added the finality language of CR 54.02 and otherwise entirely re-adopted its previous interlocutory order without addressing the issue of adverse possession. This second appeal followed.

"Where an order is by its very nature interlocutory, even the inclusion of the recitals provided for in CR 54.02 will not make it appealable." *Hook v. Hook*, 563 S.W.2d 716, 717 (Ky. 1986) (citations omitted). Here, for the sake of judicial economy, we have again explained why the circuit court's order has remained interlocutory in spite of its added CR 54.02 recitals: The circuit court could only have rendered a final decision in this matter by treating Cravens' and the Beverlys' adverse possession theories as counterclaims and passing upon the

validity of those theories. Without resolving Cravens' and the Beverlys' adverse possession claims, the circuit court's order fails to conclusively determine the parties' rights with respect to the property at issue in this appeal.

Because the circuit court's order remains interlocutory, we continue to lack subject matter jurisdiction to review it and, as before, we are left with no option other than to DISMISS this appeal.[6] And, to the extent that the circuit court disagrees, "[t]he court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision. . ." *Buckley v. Wilson*, 177 S.W.3d 778, 781 (Ky. 2005) (quoting *Williamson v. Com.*, 767 S.W.2d 323 (Ky. 1989) (citing *City of Lexington v. Garner*, 329 S.W.2d 54 (Ky. 1959) and *E'Town Shopping Center, Inc., v. Holbert*, 452 S.W.2d 396 (Ky. 1970)).

ALL CONCUR.

ENTERED: _____ _____
JUDGE, COURT OF APPEALS

[6] Some of the parties to this appeal have passed away during its pendency, some of the attorneys of record have sought to withdraw as counsel, and consequently motions for substitution of parties and counsel have been filed with this Court. Because we have dismissed this appeal as interlocutory, it would be inappropriate to address these motions.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES, RUSSELL BEVERLY, NOW DECEASED (NOW IDA BEVERLY); ALMA BEVERLY CASEY; AND WILMA BEVERLY PARISH:

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BRIEF FOR APPELLEES, BOULDER, LLC; LITER BROTHERS, LLC; AND LITER'S QUARRY, INC. (NOW LITER'S INC.):

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BRIEF FOR APPELLEE, ANNA CRAVENS:

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