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Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001516-MR

CHRIS LASHER, LIVINGSTON
COUNTY JUDGE EXECUTIVE,
BY AND THROUGH THE
LIVINGSTON COUNTY ATTORNEY — APPELLANT

APPEAL FROM LIVINGSTON CIRCUIT COURT
v. HONORABLE CLARENCE A. WOODALL, III, JUDGE
ACTION NO. 12-CI-00047

BURNA FIRE DISTRICT A/K/A
BURNA COMMUNITY FIRE DEPARTMENT — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Chris Lasher, Livingston County Judge Executive, (Judge Executive) by and through the Livingston County Attorney brings this appeal from

a July 29, 2013, Order and Writ of Mandamus of the Livingston Circuit Court. We reverse and remand.

Burna Fire District, a/k/a Burna Community Fire Department is a fire protection and taxing district organized under Kentucky Revised Statute (KRS) Chapter 75. Burna Fire District sought to annex additional territory into the fire district. In 2011, Burna Fire District, through its trustees, filed a petition in the Livingston County Clerk's Office describing the territory it sought to annex and the reasons thereof as required by KRS 75.020(1)(a). Thereafter, Burna Fire District published notice by describing the territory proposed to be annexed in the Livingston Ledger per KRS 75.020(1)(a). A petition to remonstrate was later filed opposing the annexation in the county clerk's office and was signed by 179 individuals. KRS 75.020(1)(a). The Judge Executive subsequently determined that more than 51 percent of freeholders[1] remonstrated against annexation and that failure to annex the territory would not materially affect the functioning of Burna Fire District. KRS 75.020. Consequently, the Judge Executive rejected the annexation petition by letter dated February 20, 2012.

On March 23, 2012, the Burna Fire District filed a Petition for Declaration of Rights and a Writ of Mandamus against the Judge Executive in the Livingston Circuit Court. Burna Fire District claimed that the Judge Executive erred by failing to approve the annexation in accordance with KRS 75.020(1)(a). The Burna Fire District argues that under KRS 75.020(1)(a), to successfully

[1] A freeholder is generally "one holding a title to real estate." *City of Northfield v. Holiday Manor, Inc.*, 508 S.W.2d 756, 758 (Ky. 1974).

oppose the annexation, at least 51 percent of freeholders in the proposed annexed territory must sign the petition opposition to the annexation, and, in this case, asserts that 51 percent of freeholders did not sign the remonstration petition. In the absence of 51 percent of the freeholders remonstrating, Burna Fire District claimed it was the statutory duty of the Judge Executive to approve the annexation. KRS 75.020(1)(a).

The Judge Executive filed a response. He claimed that Burna Fire District did not provide proper notice of the territory to be annexed and that 51 percent of the freeholders in the proposed annexed area signed the petition opposing annexation.

Subsequently, both parties filed motions for summary judgment. By order entered December 28, 2012, the circuit court determined that an evidentiary hearing was needed to resolve various issues and held the pending motions for summary judgment in "abeyance." An evidentiary hearing was later held, and Supplemental Findings of Fact, Conclusions of Law, and Declaratory Judgment was entered on February 25, 2013. Therein, the circuit court found that the notice of annexation published in the Livingston Ledger included the City of Carrsville in the description, but Burna Fire District did not intend to annex the City of Carrsville. The circuit court also found that 51 percent of freeholders in the territory sought to be annexed did not sign the petition of remonstrance. Thereupon, in its enumerated conclusions of law, the circuit court determined:

5. With the error in the description and with the miscalculation of the 51% of the freeholders, the Court believes that the most equitable resolution in this Declaratory Judgment matter is "**back to the drawing board" for a "redo"** rather than entry of a Writ of Mandamus. (Emphasis added.)

Following its conclusions of law, the circuit court rendered its nonfinal declaratory judgment as follows:

JUDGMENT

. . . .

1. [Burna Fire District] will revise and correct the description so as to exclude the city of Carrsville. The revised description will be used in any subsequent notification which would then only have to be run one time as was previously done in compliance with KRS 75.020(1)(a).

2. In the meantime, the parties can work together with the Property Valuation Administrator to compile a list of freeholders in the territory sought to be annexed, the best they can. With the knowledge now that freeholder has been defined "as one who has the actual possession of land for life or a greater estate" and that "owner and freeholder" are not synonymous in this statutory process, and that property held by a husband and wife means there are two separate freeholders because they each have an interest, and that there is no authority to exclude tax exempt organizations, trusts, or foreclosed upon freeholders, a more accurate list of the total number of freeholders can be determined.

3. Property ownership (and therefore freeholders) is a fluid situation, and in order to have a day certain for computation, the list of freeholders should be determined from the PVA's records of owners of property as of January 1, 2013.

> 4. Once the number of freeholders is determined, then 51% of that number can be determined so it will be known ahead of time what number of freeholders must sign the remonstrance.
>
> 5. Since this is a statutory process, strict compliance is required by the parties. This is not a final and appealable Order at this point so that if either party challenges any of the above or if another issue arises, this case can be a proper forum without re-filing.

The circuit court specifically determined that "[t]his is not a final and appealable Order."

The parties then followed the specific mandates of the circuit court's judgment entered February 25, 2013, that required a "redo" of the statutory process. Burna Fire District again published notice of its intent to annex the territory and correctly described the proposed annexed area, without including the City of Carrsville. The parties agreed that 520 freeholders were in the area sought to be annexed. A petition of remonstrance was again filed opposing the annexation. The petition contained 273 signatures. The Judge Executive determined that the petition of remonstrance was signed by more than 51 percent of the freeholders in the territory to be annexed and refused to render an order of annexation.

Burna Fire District then filed a writ of mandamus against the Judge Executive alleging that the remonstrance petition did not contain the signatures of 51 percent of the freeholders in the proposed annexed area. By order entered July 29, 2013, the circuit court agreed with Burna Fire District and concluded that the

remonstration petition did not contain the signatures of 51 percent of the freeholders in the proposed annexed area. Thereupon, the circuit court rendered a writ of mandamus ordering the Judge Executive to approve the "requested annexation of territory to the Burna Fire District." This appeal follows.

The Judge Executive contends that the circuit court erred by ordering him to approve the annexation petition of Burna Fire District. Specifically, the Judge Executive argues that the circuit court committed reversible error by allowing Burna Fire District to file two separate notices of its intent to annex the proposed territory. For the following reasons, we agree.

To begin, the interpretation and construction of a statute is an issue of law, and our review proceeds *de novo*. *City of Worthington Hills v. Worthington Fire Prot. Dist.*, 140 S.W.3d 584 (Ky. App. 2004). The statutory provision authorizing a voluntary fire department to annex territory is found in KRS 75.020(1)(a); it provides as follows:

> The territorial limits of an established fire protection district, or a volunteer fire department district, as established under KRS 75.010 to 75.080, may be enlarged or diminished in the following way: The trustees of the fire protection district or of the volunteer fire department district shall file a petition in the county clerk's office of the county in which that district and the territory to be annexed or stricken off, or the greater part thereof, is located, describing the territory to be annexed or stricken and setting out the reasons therefor. Notice of the filing of such petition shall be given by publication as provided for in KRS Chapter 424. On the day fixed in the notice, the county judge/executive shall, if the proper notice has been given, and the publication made, and no written objection or remonstrance is interposed enter an

> order annexing or striking off the territory described in the petition. Fifty-one percent (51%) or more of the freeholders of the territory sought to be annexed or stricken off may, at any time before the date fixed in the notice, remonstrate in writing, filed in the clerk's office, to the action proposed. If such written remonstrance is filed, the clerk shall promptly give notice to the trustees of the fire protection district, or of the volunteer fire department district, and the county judge/executive shall hear and determine the same. If upon such hearing, the county judge/executive finds from the evidence that a failure to annex or strike off such territory will materially retard the functioning of the fire protection district or the volunteer fire department district and materially affect adversely the owners and the inhabitants of the territory sought to be annexed or stricken off, he or she shall enter an order, granting the annexation or striking off the territory. In the latter event, no new petition to annex or strike off all or any part of the same territory shall be entertained for a period of two (2) years. Any aggrieved person may bring an action in Circuit Court to contest the decision of the county judge/executive.

Pursuant to KRS 75.020(1)(a), a fire district organized under KRS 75.010 – 080 may enlarge its territory by the filing of a petition to annex. KRS 75.020(1)(a) mandates the giving of proper notice of the filing of the annexation petition through publication as specified by KRS Chapter 424. KRS 75.020(1)(a) provides that the judge executive "shall" enter an order approving the annexation if "proper notice has been given" and "no written objection or remonstrance" signed by at least 51 percent of freeholders in the annexed area is filed in the clerk's office. KRS 75.020(1)(a). So, if "proper notice" of the annexation petition is given and no filed remonstration petition is signed by 51 percent of freeholders, the judge executive must render an order approving annexation. If, however, 51

percent of freeholders file a remonstration petition, the judge executive is directed then to hold a hearing and determine whether the "failure to annex . . . such territory will materially retard the functioning" of the fire district and "materially affect adversely the owners" of the proposed annex territory. KRS 75.020(1)(a). In the event the judge executive finds in the affirmative upon both issues, the judge executive "shall enter an order, granting the annexation[;]" conversely, in the event the judge executive finds in the negative upon one of the issues, "no new petition to annex . . . all or any part of the same territory shall be entertained for a period of two (2) years." And, it is incumbent upon a fire district to strictly follow the statutory mandates set forth in KRS 75.020 to annex territory.[2] *See City of Lebanon v. Goodin*, 436 S.W.3d 505 (Ky. 2014).

In this case, the first notice published by Burna Fire District incorrectly described the territory to be annexed by erroneously including the City of Carrsville. Burna Fire District was statutorily mandated to give proper notice of the proposed annexation by the terms of KRS 75.020(1)(a), and essential to such proper notice is that the territory annexed must be accurately and particularly described. An accurate description of the proposed annexed territory is essential, so the freeholders of such territory are put on notice of the annexation and may file a petition of remonstrance to oppose annexation. The statutory scheme of KRS 75.020(1)(a) hinges upon accurate notice to the freeholders of the proposed

[2] A fire protection or voluntary fire district established under Kentucky Revised Statutes (KRS) 75.010 is recognized as "a type of municipal corporation." *Kelley v. Dailey*, 366 S.W.2d 181, 183 (Ky. 1963).

annexed territory. By including territory (City of Carrsville) in the notice of publication that was not validly subject to annexation, Burna Fire District failed to strictly comply with KRS 75.020 (1)(a) and the publication notice given by Burna Fire District was statutorily defective. However, while the circuit court acknowledged that the Burna Fire District's initial notice was defective, it, nevertheless, allowed Burna Fire District to refile its petition and publish a second notice of filing of said petition to annex.

In its February 25, 2013, supplemental judgment, the circuit court concluded that Burna Fire District had to go "back to the drawing board" for a "redo." Therein, the circuit court instructed Burna Fire District to publish a second notice with the correct description of the territory to be annexed. The circuit court also directed the parties to "work together" with the county property valuation administrator to compile a list of freeholders in the annexed territory in order to correctly identify such freeholders for a remonstrance petition. We believe the circuit court clearly erred by instructing the parties to "redo" the proposed annexation, and we turn to the Kentucky Supreme Court's decision in *City of Okolona v. Lindsey*, 706 S.W.2d 835 (Ky. 1986) for authority.

In *Lindsey*, the City of Okolona (Okolona) sought to incorporate, and KRS 81.050(2) mandated that "[n]otice of filing the petition and of its object shall be given by publication pursuant to KRS Chapter 424." *Id.* at 835-36 (citation omitted). Okolona failed to give proper notice as required by KRS 81.050(2) and argued that the "deficient publication did not divest the trial court of jurisdiction

and that the case should be remanded for a new hearing after [a second] notice is published." *Id.* at 836. The Supreme Court rejected Okolona's argument. The Court held that there is no second chance to amend the notice when the first notice of publication is defective under the statute:

> There is nothing there to amend, and we are unwilling to supply language to the statutes allowing an amendment to permit a second attempt at proper publication of notice.

City of Okolona v. Lindsey, 706 S.W.2d 835, 837 (Ky. 1986). The Supreme Court held that the proper remedy is dismissal of the action.

Herein, we, likewise, do not believe that KRS 75.020(1)(a) may be interpreted as allowing a subsequent or amended notice of publication after the initial notice of publication was patently and statutorily defective.[3] Rather, as the initial notice to annex was patently defective, the Burna Fire District's attempted annexation must fail as violative of the notice provision of KRS 75.020(1)(a). This does not prohibit the fire district from filing another petition in accordance with applicable law.

In sum, we hold that the circuit court erred by ordering a "redo" of the annexation.[4] We additionally conclude that the initial notice of publication was materially flawed and failed to strictly comply with the KRS 75.020(1)(a) notice

[3] The circuit court did correctly state in its judgment entered February 25, 2013, that strict compliance is required by the parties under KRS 75.020(1)(a).

[4] We also note that the circuit court improperly rendered an advisory opinion in its February 25, 2013, judgment by instructing the parties upon how to proceed with the second petition/notice process. *See Associated Indus. of Ky. v. Com.*, 912 S.W.2d 947 (Ky. 1995).

requirement. Therefore, we believe the Judge Executive properly refused to order the annexation and that the circuit court erred by ordering otherwise.

For the foregoing reasons, the order of the Livingston Circuit Court is reversed and this case is remanded for proceedings consistent with this Opinion.

DIXON, JUDGE, CONCURS.

MAZE, JUDGE, DISSENTS WITH SEPARATE OPINION.

MAZE, JUDGE, DISSENTING: Respectfully, I must dissent from the reasoning and the result of the majority opinion. The majority concludes that the circuit court lacked the authority to remand the matter for filing of an amended petition after finding that the original petition was defective. As an initial matter, I must point out that the Judge Executive does not raise this issue on appeal. While this Court may affirm the circuit court's ruling on any ground which appears in the record, we are limited to reversing on those grounds which are properly raised on appeal. *Fischer v. Fischer*, 348 S.W.3d 582, 588-89 (Ky. 2011). If the issue is not raised on appeal, we may only reverse on a matter affecting the subject-matter jurisdiction of the court. *Hisle v. Lexington-Fayette Urban Cnty. Gov't*, 258 S.W.3d 422, 431 (Ky. App. 2008).

I fully agree with the majority that the original petition was defective because it incorrectly identified the territory to be annexed. In concluding that the circuit court lacked the authority to order the filing of an amended petition, the majority relies on *City of Okolona v. Lindsey*, 706 S.W.2d 835 (Ky. 1986). In that case, like in the current case, the petition seeking incorporation of a city was

statutorily defective. Based on this defect, the Kentucky Supreme Court held that the circuit court had no jurisdiction to enter a judgment incorporating the city or to remand the matter for filing of proper notice. *Id.* at 836.

However, the Court in *Lindsey* was specifically addressing a jurisdictional question involving the incorporation of a city. Under KRS 81.050 & 81.060, the petition for incorporation of a city is filed directly with the circuit court. The court makes the determination of whether the petition is sufficient and enters the judgment granting incorporation. An incorporation proceeding is strictly *in rem*, and if the statutory requirements for incorporation are not met, the circuit court lacks jurisdiction to enter a judgment granting incorporation. *Booth v. Copley*, 283 Ky. 23, 140 S.W.2d 662, 665-66 (1940). Since the publication notice was defective, the Court in *Lindsey* concluded that the court had no jurisdiction to further consider the matter. *Lindsey*, 706 S.W.2d at 836.

In contrast, an annexation petition under KRS 75.020 is addressed to the Judge Executive, who makes the determination concerning the sufficiency of the petition. The statute permits any aggrieved person to bring an action in circuit court to contest the decision. In the current case, the action was brought in circuit court as a petition for declaration of rights under KRS 418.040 and for a writ of mandamus. Thus, the circuit court's subject-matter jurisdiction was not dependent upon the sufficiency of the annexation petition itself. I agree with the majority that the circuit court should not have remanded of the matter for filing of an amended petition, as that went beyond the relief sought in the petition. However, that issue

is not raised on appeal, and I cannot agree that the circuit court lacked jurisdiction to do so.

Having reached this conclusion, I will briefly address the other argument by the Judge Executive concerning the order of remand. The Judge Executive argues that the circuit court lacked the authority to order the filing of an amended petition because KRS 75.020(1)(a) prohibits the filing of a new petition to annex or strike off the same territory within a period of two years. Although the statute is not entirely clear on this point, I would conclude that the time limitation does not apply under the specific facts of this case.

As the majority correctly notes, KRS 75.020(1)(a) sets out the procedure which allows a volunteer fire department or fire protection district to annex or strike off territory. The district must first file a petition which describes the territory to be annexed or stricken off, and notice of the filing of the petition must be given by publication as provided in KRS Chapter 424. If proper notice has been given and no written objection or remonstrance signed by at least 51% of the freeholders in the territory is filed in the clerk's office, then the Judge Executive must enter an order approving the annexation.

However, if 51% of the freeholders file a remonstration petition, the Judge Executive must conduct a hearing. The statute further provides:

> If upon such hearing, the county judge/executive finds from the evidence that a failure to annex or strike off such territory will materially retard the functioning of the fire protection district or the volunteer fire department district and materially affect adversely the owners and

> the inhabitants of the territory sought to be annexed or stricken off, he or she shall enter an order, granting the annexation or striking off the territory. *In the latter event*, no new petition to annex or strike off all or any part of the same territory shall be entertained for a period of two (2) years.

KRS 75.020(1)(a) (*Emphasis added*).

Based on the italicized language, the two-year time restriction applies when the Judge Executive grants a petition annexing or striking off territory after conducting a hearing and making the required findings. However, the limitation language does not expressly apply when, as in this case, the Judge Executive makes contrary findings and denies the petition. Although this result is not entirely logical, I would conclude that it is consistent with the language of the statute as written. Consequently, I would find that the circuit court had the authority to allow the filing of an amended petition under the facts as presented in this case. Finally, I would not disturb the circuit court's conclusions concerning the validity of the signatures on the remonstration petition. Therefore, I would affirm the circuit court's order in its entirety.

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BRIEF FOR APPELLEE:

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