

RENDERED: February 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2754-MR

VIOLA BLANTON; ROGER BLANTON;
RHODA CONLEY; ILENE COUCH;
CHARLES COUCH; and J. EDDIE
CONLEY

APPELLANTS

V. APPEAL FROM LESLIE CIRCUIT COURT
HONORABLE R. CLETUS MARICLE, JUDGE
ACTION NO. 93-CI-98

JOHNNY ROBERTS; HOMER
ROBERTS; VYCIE ENGLE;
RUFUS ROBERTS; MAVIE
ROBERTS; and MOLLIE SHELL

APPELLEES

OPINION VACATING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; ABRAMSON and GUIDUGLI, Judges.
GUDGEL, CHIEF JUDGE: This is an appeal from a judgment
overruling exceptions to a commissioners' report and directing
the master commissioner to execute deeds in an action seeking to
partition jointly owned property. Appellants contend that the
court erred because the commissioners were not impartial and
their report failed to comply with statutory requirements. We
are constrained to agree with appellants' second contention.
Hence, we vacate and remand for further proceedings.

Appellees Homer Roberts and Johnny Roberts filed an action in Leslie Circuit Court seeking the appointment of three commissioners to partition property which they jointly owned with appellants and the remaining appellees. Appellees Rufus Roberts, Mavie Roberts, Vycie Engle and Mollie Shell filed an answer in which they alleged that the property was already divided to a certain extent and that improvements had been made with the acquiescence of the remaining parties. A warning order attorney for appellants filed a report in which she stated that each appellant had received actual notice of the action. Nevertheless, appellants failed to file an answer or otherwise participate in the action until after the commissioners were appointed and filed their report with the circuit court in September 1995.

Subsequent to the filing of the commissioners' report, appellants Rhoda Conley, Viola Blanton, and Ilene Couch sent letters to the Leslie Circuit Court. The court thereafter scheduled a status conference. Appellants then filed exceptions to the commissioners' report in February 1996 in which they alleged, *inter alia*, that the commissioners failed to provide for access to the cemeteries on the property; that they did not consent to the improvements made by appellee Rufus Roberts and that he should not be allotted more property because of his improvements; that no map was filed; and that inadequate descriptions were given for each parcel and that no corresponding acreage was provided. Appellants requested that the

commissioners' report be set aside or remanded, that a fair and equitable allotment and division be made, and that a sale be ordered if a fair division could not be made.

Appellees Homer Roberts and Johnny Roberts, plaintiffs in the action, also filed exceptions in which they alleged that the commissioners failed to make a fair and equitable division, that mineral and timber rights were not assigned, and that the descriptions were inadequate. Homer Roberts and Johnny Roberts requested that the commissioners' report be set aside or remanded; that the commissioners allot each party 27.63 acres, which represented one-ninth of the total property; and that a judicial sale be ordered if such a division would impair the value of the property.

The circuit court then conducted a hearing, at which two of the commissioners and appellant Viola Blanton testified. The court overruled all of the parties' exceptions. This appeal followed.

Appellants first contend that their exceptions were timely. While the commissioners' report was filed in the circuit court September 25, 1995, and amended in December 1995, the record fails to reflect upon whom or when the report was served. In view of the fact that the circuit court exercised its discretion and considered appellants' exceptions, we find no error in this respect. See Eiland v. Ferrell, Ky., 937 S.W.2d 713, 716 (1997).

Appellants next contend that the commissioners were not impartial. We disagree.

Appellants assert that the commissioners should not have taken into account the requests of the parties who lived on or near the property. The testimony does not support appellants' allegation. Although appellees concede that the commissioners took into consideration the fact that some of the parties lived on the property, there was no testimony that the requests by some of the parties controlled their partition of the property. Further, we note that the commissioners may take into account the circumstances of the parties so long as the division is equitable. See Howard v. Long, 238 Ky. 822, 38 S.W.2d 951, 952 (1931). More important, no objection was raised in the circuit court to the selection of the commissioners and appellants have failed to demonstrate that the commissioners were not impartial. Cf. Heard v. Cherry, 150 Ky. 318, 150 S.W. 361 (1912).

Next, appellants maintain that the partition cannot take place without an actual survey of the land and preparation of a map and descriptions by a registered land surveyor. We are constrained to agree.

KRS 381.135 requires the commissioners, after taking "an oath to discharge their duty impartially," KRS 381.135(4), to determine the allotment of the parties' respective interests in the land. The statute further provides that a registered land surveyor "shall perform the actual survey of the land in accordance with the determination made by the commissioners, and

prepare the descriptions of the land, including all related maps, plats, and documents, and he shall affix thereto his personal seal and signature" KRS 381.135(6) (emphasis added). Clearly, the statute mandates that a registered land surveyor shall conduct a survey after the commissioners have made their division and prepare descriptions of the property. It is only after the completion of this step that the statute provides for the commissioners to make a report to the circuit court.

Here, the commissioners filed a report in which they stated that the "property has been divided in equal value (as close as possible) into 9 lots," but the report fails to disclose the factors considered by the commissioners in making their division. "Equality of value as well as of quantity and quality is a criterion so that the relative vendible value assigned to each party shall be proportioned as near as may be to the extent of his interest." Whitefort v. Barron, 291 Ky. 712, 165 S.W.2d 545, 547 (1942). Further, the descriptions provided fail to provide the acreage contained in each of the parcels. Moreover, although one commissioner testified that the lots ranged in size from fifteen to forty acres they admittedly did not consider mineral rights. However, contrary to appellants' allegation, the commissioners did consider timber as both commissioners testified that little marketable timber was on the property.

Although the commissioners contracted for a survey of the exterior boundary of the property, they failed to cause a survey of the internal boundaries to be accomplished and no maps,

plats, or other documents required by KRS 381.135(6) were provided to the circuit court. In their exceptions appellants challenged the sufficiency of the descriptions, the lack of maps, and a failure to recite the acreage of the lots. While a party filing exceptions to a commissioners' report has the burden of proving the allegations in the exceptions, Long v. Howard, 260 Ky. 323, 75 S.W.2d 742, 743 (1934), here appellants have met their burden by demonstrating that the commissioners' report clearly fails to comply with the requirements of KRS 381.135(6).

Appellees concede that a survey has not been conducted, but contend that the appeal is premature until such a survey is completed. We disagree.

The appeal was timely since the judgment of the circuit court overruling the exceptions and directing the master commissioner to execute deeds is a final order. See Frazier v. Hughes, 306 Ky. 421, 208 S.W.2d 311, 313-14 (1948).

Appellants request that this cause on remand be referred to a new set of commissioners. However, appellants did not seek such relief from the circuit court and cannot raise this issue for the first time on appeal. Moreover, even though appellants demonstrated that the commissioners failed to have a registered land surveyor survey the property, they simply failed to establish that the commissioners are not impartial in any event.

The court's judgment is vacated and this cause is remanded to the circuit court for further proceedings consistent with the dictates of KRS 381.135(6).

ALL CONCUR.

BRIEF FOR APPELLANTS:

Thomas I. Eckert
Hazard, KY

BRIEF FOR APPELLEES:

Phillip Lewis
Hyden, KY