

RENDERED: JANUARY 23, 2009; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002529-MR

LLOYD SIMPSON;
JACQUELINE SANFORD SIMPSON;
BUD SIMPSON; BUDDY T. SIMPSON;
KAREN SIMPSON; GEORGETTA SIMPSON;
CHARSLEE SIMPSON; CHARICE SIMPSON;
CHESIREE SIMPSON; JIMMIE SIMPSON; AND
FLOYD SIMPSON

APPELLANTS

v. APPEAL FROM HARLAN CIRCUIT COURT
HONORABLE D. JEFFREY CHOATE, SPECIAL JUDGE
ACTION NOS. 96-CI-00300 & 96-CI-00583

ERIC SCOTT BOWLING and VERNA LOU BOWLING;
JENNY HELTON SMITH; JOANNE HELTON LAINHART;
BARBARA SUE HELTON OWENS; RALPH OWENS;
CORRINE HELTON TAYLOR; LARRY TAYLOR;
DAVID HELTON MILLER; JUNE MILLER;
CLYDE DANIEL MILLER; NORMA ANN MILLER;
JAMES TERRY MILLER; BOBBIE MARCELLA MILLER;
JOHN FREDERICK MILLER; JANICE HARLENE MILLER;
NORMA JEAN HELTON; HENRIETTA MCMULLEN;
BONNIE HELTON PIERSON; JESSIE MCCULLIN HELTON;
NADENE HELTON; DOROTHY BOWLING;
MARY RUIONS; DONNA CALDWELL;
GLADYS HELTON; CINDA SAYLOR;
REBECCA HELTON; LINDA KROLCZK;
ROSIE BRAVENDER; BILLIE JEAN TIDWELL;
RONALD TIDWELL; EDNA BLANTON SIMMONS HOWARD;
VERA HELTON; JESSIE SUE SMITH;
SHIRLEY ANN BOWMAN;
MADISON VAN BUREN BLANTON and wife SANDY BLANTON;
ELSIE BLAYLOCK, a widow
WILLIAM BLANTON, now deceased;
JANIE BLANTON, a widow;
MARY BOWLING, single;
SUE BOWLING SMITH and husband ROBERT C. SMITH;
WILLIAM BOWLING and wife CHARLENE BOWLING;
RALPH HELTON, now deceased;
NADENE HELTON, a widow;
JULIE A HAMILTON and husband MARVIN HAMILTON;
BONNIE HAHN and husband ALBERT HAHN;
NORMAN HELTON and wife PHYLLIS HELTON;
MITCHELL HELTON, AND HIS UNKNOWN SPOUSE, IF ANY;
CARLO HELTON and wife JESSIE HELTON;
DORIS ANN RHODES and husband JAMES RHODES;
FRANKLIN HELTON and wife FLORA HELTON;
JIMMY HELTON and wife MISSY HELTON;
CHUCK HELTON and wife LINDA HELTON;
GILLIS HELTON and wife CHERYLE HELTON;
DONNIE HELTON, AND HIS UNKNOWN SPOUSE, IF ANY;
DORCELL HELTON wife of DONALD HELTON, deceased;
REBA HELTON and husband WOODROW HELTON;
VERNON HELTON, now deceased;
VERA HELTON a widow;
CHINA LOU HELTON MILLER, a widow;

ANN HELTON, wife of JOHN HELTON, deceased;
HENRIETTA HELTON, AND UNKNOWN SPOUSE, IF ANY;
MELVIN HELTON;
SUE HELTON SAYLOR and husband WILLIARD SAYLOR;
ALL HEIRS OF JOHN HELTON;
RUTH RHINEHART, A/K/A LILLIAN RUTH RHINEHEART and
husband CECIL RHINEHART;
JIMMY BRYAN, A/K/A JAMES BRYAN, divorced;
JUDY FELKNER and husband GEORGE FELKNER;
DIANA OWENS DIXON and husband TOM DIXON;
SHARON MOSS and husband TOM MOSS;
WILLIAM GREER, husband of MARY LEE GREER, deceased;
NANCY HORN daughter of deceased MARY LEE GREER, AND UNKNOWN
SPOUSE, IF ANY;
HEIRS of MARY LEE GREER, deceased;
BILLY K. HOWARD and wife EDNA HOWARD;
EVA HOWARD and husband WALTER HOWARD, deceased;
JUANITA ELDRIDGE, daughter of deceased WALTER HOWARD,
and husband HOWARD ELDRIDGE;
HEIRS OF WALTER HOWARD deceased;
JAMES SUITS and wife WILMA SUITS;
LOUISE HOWARD, wife of CLYDE HOWARD, deceased;
PAUL ELDRIDGE, AND HIS UNKNOWN SPOUSE, IF ANY;
JENNY CASELLO, A/K/A VIRGINIA CASELLO AND HER UNKNOWN
SPOUSE, IF ANY;
LOIS KING CAMPBELL and husband DEWEY CAMPBELL;
BOBBIE KING STONE and husband CLYDE STONE;
JIMMY KING A/K/A JAMES KING, widower;
BRADFORD HOWARD and wife FRANCIS HOWARD;
MARTHA WHITE, widow;
ELIZABETH LEACH, single;
GEORGE R. LEACH, single;
PAUL R. LEACH and wife PATRICIA LEACH;
RACHEL H. THOMAS and husband WILLIAM THOMAS;
WILLIAM LEACH and wife MARIAN LEACH;
SALLY FISKE, single;
JANIE HISLOP and husband A.S. HISLOP;
SHIRLEY HOUSE, single;
MARGARET BINGHAM and husband WILLIAM BINGHAM;
JAMES C. CREECH and wife RUTH SMITH CREECH;
THOMAS SOUTHWOOD, widower;
WILLIAM D. JOHNSON and wife CONNIE JOHNSON;
SARA QUILICI and husband JOHN QUILICI;

OPINION
AFFIRMING

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BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,¹ SENIOR JUDGE.

KELLER, JUDGE: This appeal arises from two separate real property disputes, which were ultimately consolidated. The first dispute involved the ownership of two tracts of real property containing several parcels (the property). One tract is located north of the Cumberland River on Pine Mountain, and the other is south of the Cumberland River on Happy Top. We will hereinafter refer to this dispute as the Bowman claim. The second involved a dispute between adjoining property owners regarding ownership of a portion of the property at issue in the Bowman claim. We will hereinafter refer to this dispute as the Bowling claim. The issues raised on appeal are as follows: (1) whether the trial court abused its discretion when it denied Floyd Simpson's (Floyd) motion to intervene; (2) whether the trial court erred in denying the Appellants' motion to vacate and set aside the court's judgment and sale of the property; and (3) whether the trial court erred in the method of sale and distribution of the proceeds from the sale of the real property.

FACTS

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On May 9, 1996, Shirley Bowman (Bowman) filed suit in Harlan Circuit Court. In her suit, Bowman asked the court to order the sale of the property, which had belonged to her great-grandmother, China Blanton. Bowman alleged she and all of the named defendants are heirs of China Blanton and that, because of the amount of the property and the number of heirs, division of the property was not feasible. Additionally, Bowman alleged Buddy Simpson and his wife were obstructing access to and removing timber from some of the property to the detriment of all the heirs. Therefore, Bowman requested injunctive relief in the form of an order forbidding any of the parties from doing anything to diminish the value of the property.

On September 16, 1996, Eric Bowling (Bowling) and his wife filed a complaint against Lloyd Simpson (Lloyd). The complaint alleged that Lloyd blocked the Bowlings' driveway, thereby keeping the Bowlings from accessing their residence. During the course of litigation in the Bowling claim, the parties discovered that at least a portion of the property involved in that claim was also involved in the Bowman claim. Therefore, the circuit court consolidated the Bowling and Bowman claims.

Throughout the next ten years,² the parties filed various pleadings, deeds, plat maps, etc., and the court scheduled, cancelled, and rescheduled a number of hearing and trial dates. Parties were added, parties died, and parties

² We note the protracted nature of this litigation should not be laid at the feet of the circuit court. Based on our review of the record, it appears the court did all that it could to expeditiously bring this matter to a conclusion.

substituted for the deceased. With the pertinent exception of Jacqueline, Bud, Karen, Buddy T., Georgetta, Charslee, Charice, and Chesiree Simpson (the Simpsons) the parties generally agreed that the property should be sold and the funds distributed to the heirs.³ The Simpsons claimed they had an interest in some of the property that traced to China Blanton and that they had acquired some of the property by adverse possession.

On March 3, 2006, the court entered findings of fact, conclusions of law, *in rem* judgment, and order of sale. The court found that the Simpsons did not establish ownership by adverse possession of any of the property because they had not claimed the property for the required 15 years. Furthermore, the court held the Simpsons had acquired only that interest attributable to their inheritance from China Blanton. As to disposition of the property, the court found the number of heirs made any disposition other than sale unfeasible; therefore, the court ordered the master commissioner to sell the property. The court did not rule on the Bowling claim as the parties settled their differences. The court then entered judgment consistent with the preceding on March 7, 2006.⁴

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We note that it appears that a group of persons referred to by the parties variously as the Arrington defendants or the Blanton-Dolan heirs claimed a portion of the real property through adverse possession. Because there is no issue on appeal with regard to the Arrington/Blanton-Dolan defendants, we will not address their claims.

⁴ On March 9, 2006, the court entered amended findings of fact, conclusions of law, *in rem* judgment, and order of sale. This appears to have corrected typographical errors in the March 3, 2006, order and removed a portion of the order addressing the Bowling claim that had been crossed out by the judge in the March 3, 2006, order. It does not appear to have substantively altered the March 3, 2006, order.

The Simpsons appealed from the circuit court's order on April 6, 2006. However, the Simpsons did not seek to stay the sale of the property by the master commissioner. Following a number of procedural motions, a panel of this Court dismissed that appeal on March 9, 2007.⁵ This Court held that the Simpsons' appeal was fatally flawed because they failed to name the purchasers of the property as parties to the appeal. This Court also noted the Simpsons had failed to file any exceptions to the master commissioner's report of sale and had failed to file an appeal from the order confirming the master commissioner's report.

While the appeal was pending, the court began distributing funds from the sale. The first such distribution took place pursuant to the court's order allowing attorney fees, which was entered on June 22, 2006.

On October 1, 2007, Floyd and the Simpsons filed motions to set aside the judgment and Floyd filed a motion to intervene. In support of their motion, the Simpsons argued, for the first time, that they had acquired a portion of the real property that had been sold by the master commissioner through a line tracing to John P. Saylor, father of the wife of China Blanton's son, Calvin. According to the Simpsons, that property did not trace back to China Blanton and should not have been subject to the order of sale. In his motion, Floyd stated that Jimmie Simpson (Jimmie) had deeded a portion of the property to him on December 31, 2003, and that said property was part of the property sold by the

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master commissioner. Floyd argued the judgment should be set aside because he had not been made a party and had not been served with any pleadings. On November 8, 2007, in summary fashion, the court denied those motions. It is from the court's order denying their motions that the Simpsons appeal.

STANDARD OF REVIEW

An attempted intervention clearly must be undertaken in a timely fashion. The timeliness of a motion for intervention is a question of fact, the determination of which ordinarily falls to the presiding judge. An applicant who moves for intervention after judgment carries a special burden of justifying the apparent lack of timeliness. (Internal citations omitted).

Rosenbalm v. Commercial Bank of Middlesboro, 838 S.W.2d 423, 427 (Ky. App. 1992). See also *Arnold v. Com. ex. rel. Chandler*, 62 S.W.3d 366 (Ky. 2001).

[T]he determination to grant relief from a judgment or order pursuant to CR 60.02 is one that is generally left to the sound discretion of the trial court with one of the chief factors guiding it being the moving party's ability to present his claim prior to the entry of the order sought to be set aside.

Schott v. Citizens Fidelity Bank and Trust Co., 692 S.W.2d 810, 814 (Ky. App. 1985). With the preceding standards in mind, we will address the issues raised by Floyd and the Simpsons in the order set forth above.

ANALYSIS

1. Motion to Intervene

Kentucky Rules of Civil Procedure (CR) 24.01 provides that:

[u]pon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an

interest relating to the property or transaction which is the subject of the action and is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless that interest is adequately represented by existing parties.

As noted above, a motion to intervene must be timely and establish that such intervention is necessary to protect the movant's interest. Having reviewed the record, we hold that Floyd's motion fails on both counts.

As to timeliness, a movant may intervene after judgment; however, he bears a special burden of proving why he did not move to intervene sooner. Floyd received a portion of the disputed real property on or about December 31, 2003. The court did not enter a judgment until March 7, 2006, more than two years later. Floyd has not offered any excuse for the delay in seeking to join the law suit. Furthermore, we note that the deed transferring the real property from Jimmie to Floyd was prepared by one of the Simpsons' attorneys and Jimmie was a party to the lawsuit. It seems unlikely that Floyd had no knowledge of the lawsuit, and he has not shown how he might have been prejudiced by his failure to receive any pleadings. Therefore, Floyd has failed to establish why the circuit court should have excused his delay in seeking to intervene.

As to the necessity of protecting his interest, Floyd has not put forth any evidence to show how his presence as a party to the lawsuit would have changed the outcome. Furthermore, the person from whom he obtained the real property, Jimmie, was a party to the lawsuit from its onset. Floyd has not put forth

any evidence as to how his interests differ from those of Jimmie's. Nor has he put forth any evidence showing how Jimmie's protection of her interest did not inure to his benefit. Therefore, Floyd has failed to establish how his interest was not adequately represented by the other parties.

Finally, we note that Floyd argues that he filed his motion to intervene prior to the distribution of any of the funds from the master commissioner's sale. However, based on our review of the record, the court began ordering distribution of the funds, at least as related to attorney fees and costs, on June 22, 2006, more than one year before Floyd filed his motion to intervene. Therefore, this argument by Floyd is without merit.

Based on the above, we hold that the circuit court did not abuse its discretion in denying Floyd's motion to intervene.

2. Motions to Set Aside

As noted above, one of the primary factors a court must consider when addressing a motion to set aside is whether the movant could have presented his argument prior to judgment. Floyd has offered no reason why he could not have presented any arguments he may have had prior to judgment. Therefore, we discern no error on the part of the trial court in denying Floyd's motion to set aside.

As to the Simpsons' motion to set aside, CR 60.02 provides that:

a court may, upon such terms as are just, relieve a party or his legal representative from its final judgment, order, or proceeding upon the following grounds: (a) mistake, inadvertence, surprise or excusable neglect; (b) newly discovered evidence which by due diligence could not

have been discovered in time to move for a new trial under Rule 59.02; (c) perjury or falsified evidence; (d) fraud affecting the proceedings, other than perjury or falsified evidence; (e) the judgment is void, or has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (f) any other reason of an extraordinary nature justifying relief. The motion shall be made within a reasonable time, and on grounds (a), (b), and (c) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this rule does not affect the finality of a judgment or suspend its operation.

Relief under CR 60.02 is an extraordinary remedy and the denial of such a motion will only be reversed where clear abuse of discretion is shown. *Barrett v.*

Commonwealth, 979 S.W.2d 98, 102 (Ky. 1998). The purpose of CR 60.02 is to provide relief which is not available by direct appeal. *Gross v. Commonwealth*, 648 S.W.2d 853 (Ky. 1983).

In their motion to set aside, the Simpsons failed to delineate which of the grounds, set forth above, they were relying on in support of their motion. The motion to set aside was filed more than one year after the judgment. Therefore, the Simpsons did not timely seek review of any arguments they may have had under CR 60.02 (a), (b), or (c). As to (d) and (e), the Simpsons have not alleged any fraud, that anyone falsified evidence, or that the judgment was void or otherwise discharged or satisfied. Based on the process of elimination, the Simpsons' motion must have been based on a "reason of an extraordinary nature." The Simpsons argue in their motion that the court did not recognize their argument that their title

to the real property traced to someone other than China Blanton. This is not a reason of an extraordinary nature and is one the Simpsons could have raised on direct appeal. Furthermore, we note the Simpsons have not set forth any reason for the delay in seeking to set aside the judgment. Finally, we note that the Simpsons have not set forth any reason why they did not present their argument regarding the chain of title before entry of the judgment. Therefore, we discern no error in the trial court's denial of the Simpsons' motion to set aside.

3. Method of Sale of Property

The Simpsons argue the court should have sold the property as separate parcels and distributed the proceeds "so that each party received a fair and just amount for his/her own property." We note that the master commissioner, when conducting the sale, accepted bids on each individual parcel, and only then a bid on the entire amount of the property. The amount bid for the entirety of the property exceeded the amount for the separate parcels. Furthermore, the Simpsons did not offer by motion or otherwise request an alternative method of sale or distribution. Finally, it is clear that this issue should have been raised on direct appeal, not by way of a CR 60.02 motion to set aside. Based upon the preceding, we hold that the circuit court did not err in determining the method of sale or distribution of the proceeds of sale.

CONCLUSION

For the foregoing reasons, we hold that the circuit court did not err when it denied Floyd Simpson's motion to intervene and to set aside. Furthermore, it did not err when it denied the Simpson's motion to set aside. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANTS:

Karen S. Davenport
Harlan, Kentucky

BRIEF FOR APPELLEE SHIRLEY
ANN BOWMAN:

Hugh M. Richards
London, Kentucky

BRIEF FOR APPELLEE SHIRLEY
ANN BOWMAN ADOPTED BY:

Mary Blanton Howard Heirs
China Helton Miller Tye Heirs
Elisha Helton Heirs
Norman Helton Heir
Pete Pointer

NO OTHER BRIEFS SUBMITTED.