

IN THE COURT OF APPEALS 02/11/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00635 COA

MILDRED EDWARDS AND ANNIE MAE FLEMINGS

APPELLANTS

v.

HARRY L. DUNNIGAN AND SANDRA DUNNIGAN

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN MCCLURE

COURT FROM WHICH APPEALED: PANOLA COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANTS:

ROBERT H. BROOME

ATTORNEY FOR APPELLEES:

JIMMY MCCLURE

NATURE OF THE CASE: ADVERSE POSSESSION

TRIAL COURT DISPOSITION: JUDGMENT IN FAVOR OF DUNNIGANS. EDWARDS AND FLEMINGS FAILED TO PROVE ADVERSE POSSESSION

BEFORE McMILLIN, P.J., KING AND PAYNE, JJ.

McMILLIN, P.J., FOR THE COURT:

Mildred Edwards and Annie Mae Flemings appeal the judgment of the chancery court of Panola County in which the chancellor held that they failed to establish their claim of adverse possession of a strip of land situated between their property and the property of their neighbors, Harry and Sandra Dunnigan.

I.

Facts

In 1976, Dora Walker deeded to her daughters, Mildred Edwards and Annie Mae Flemings, title to her house in Sardis and to the property on which the house was situated. In 1977, Edwards moved into this house with her family. Flemings remained a co-tenant but continued to reside at her home in Chicago, Illinois. At the time Edwards and Flemings received title to this land, Harry and Sandra Dunnigan were renting a house located next door. The Dunnigans purchased the house that they were renting sometime in 1977. Although Edwards and Flemings remain co-owners of their property, for purposes of simplicity, we will hereafter refer to that property as the "Edwards property."

The testimony at trial revealed that sometime between 1976 and 1977, Edwards's mother, Ms. Walker, erected a fence (hereafter the Walker fence) between her property and the Dunnigan's property. This fence was composed of some old posts and wire, and it ran in a direction from north to south. This fence ended between the back yards of the two houses. At the southern end of the Walker fence, there was a gap of several feet, and at the end of this gap there commenced another fence which had been in place since the 1940's. This fence (hereafter the 1940 fence) also ran from north to south. On the eastern side of the 1940 fence, Ms. Edwards's son built a dog pen, and on the western side of this fence Mr. Dunnigan planted a garden.

The Dunnigans and Edwards appeared to have been very neighborly toward one another until 1994, when the Dunnigan's began building a carport on the western side of their house adjacent to the Walker fence. During this time, the Dunnigans hired a surveyor to survey their land. The survey, made with the metes and bounds description of the Edwards's and Dunnigans' deeds, revealed that the Walker fence and the 1940 fence were located on the Dunnigans' property, and that the boundary of the Dunnigan property actually included a triangular strip of land on the Edwards's side of the fences. Acting upon their discovery, the Dunnigans commenced an action against Edwards's son to force him to remove the dog pen, and Dunnigan also tore down the fence that Ms. Walker had built. As a result, Edwards and Flemings filed this suit asserting that they had acquired title to this strip of land through adverse possession.

It is uncontroverted that from at least 1977 until 1994, Edwards claimed title to the property east of the line described by the two partial fences and actively maintained some portion of the disputed area. Dunnigan testified that Edwards and her family regularly maintained the front portion of the property to the east of the fence erected by Ms. Walker, and that he never actively disputed the location of the boundary line until 1994, after he had his property surveyed. According to Dunnigan, Edwards mowed the grass along the eastern side of the Walker fence, and he mowed the grass to the western side of the Walker fence.

With respect to the property in the rear, bordering the 1940 fence, Dunnigan, along with several witnesses, testified that he mowed the grass on both sides of the fence. Edwards testified that she claimed ownership to the property on the east side of the 1940 fence, and that this ownership was evidenced by the dog pen built by her son and the clothesline which were both located adjacent to this fence. In contradiction to Dunnigan's assertion that he maintained the property along both sides of the 1940 fence, Edwards testified that her son did all of the mowing on her side of the fence. According to Edwards, the Dunnigans never did anything to assert ownership to the property on the eastern side of either fence until 1994.

II.

Discussion

This Court is of the opinion that the chancellor in this case committed an abuse of discretion in making a determination that the case before him had to be decided on an "all-or-nothing" basis. This case involved a strip of land that, though narrow, was fairly long, extending from the front property lines of these litigants all the way to the rear property line some 203 feet in distance. The proof is quite convincing that there was a marked change in the character and use of the land from the front to the rear. The photographs introduced as exhibits demonstrate this fact, as does essentially all of the testimony.

Beginning at the front property line and running backwards to the rear point of the Walker fence, the disputed property has all of the attributes conventionally associated with a residential yard for a single-family residence. The photographs and other evidence show that the homes of the two neighbors have been continuously occupied by these parties since the mid 1970's as their primary residences. The disputed area is a grass-covered space that has every earmark of having been subjected to the normal and customary uses incidental to a family's enjoyment of the area constituting the front, side and rear yards of the family's home place. The proof is clear that this area of the disputed strip has been exclusively used by Edwards and her family since she moved into the house in 1977. It appears beyond dispute that the Walker fence, erected some time prior to 1977, has, as to this portion of the property, been continuously observed as the boundary line. The proof showed that the Dunnigans, between the period of 1977 until the matter of the carport arose, exercised no control over the property or made any claim of right to that property. The dominion and control exercised by Edwards and her family over the portion of the property defined by the Walker fence has been exclusive, continuous, open and notorious insofar as the Dunnigans were concerned. *See Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992). Living only a few feet away, the Dunnigans had every opportunity to observe this dominion on a daily basis. The Edwards possession was also hostile against the Dunnigans to the extent that the use was not thought to be based on permission from the Dunnigans, nor do the Dunnigans advance such a proposition. The proof is unequivocal that the possession was being exercised under the belief that Edwards's right of possession was superior to any other person in the world, including the Dunnigans. *See Rawls v. Parker*, 602 So. 2d 1164, 1169 (Miss. 1992).

The undeveloped and little-utilized property in the disputed strip beyond the back post of the Walker fence is, possibly, a different story. The chancellor himself observed that this property more closely resembled a wilderness than a residential lot. The photographs in the record bear out this conclusion.

It is evident that, with the changing nature of this property as one traverses from the front property line to the rear, the strength of the Edwards claim of adverse possession grows weaker. The rearmost property does not appear to have been maintained on a regular basis by Edwards, by which she could have demonstrated to the world her open and hostile claim. The gap between the Walker fence and the 1940 fence provided a ready avenue for the Dunnigans to gain access to this more primitive part of the property, and there was some evidence, apparently accepted by the chancellor as true, that Dunnigan had exercised control over this rear portion of the property from time to time, including going on it and clearing brush and undergrowth. Any claim that the 1940 fence constituted the observed or recognized boundary line as to this portion of the property seems weakened by this evidence. The chancellor could reasonably have concluded, and apparently did so, that Dunnigan's activities in this area were sufficient to interrupt any periods of adverse possession by Edwards. Proof of the Edwards family's continuous and exclusive use of this portion of the property was somewhat lacking beyond the evidence of the dogyard erected in the area by a family member. On this proof, we cannot determine that the chancellor was manifestly in error in determining that Edwards and Flemings failed in their burden to establish their adverse possession of this property by clear and convincing evidence. *Rice v. Pritchard*, 611 So. 2d 869, 871 (Miss. 1992).

However, we conclude that a finding, supportable by the evidence, that Edwards failed to demonstrate her claim by adverse possession to the rearmost portion of the property does not, as a matter of law, defeat her claim to that portion of the land where the proof was overwhelmingly in support of her claim. As we have already observed, by the nature of the property involved in this case, the chancellor was not faced with a "winner-take-all" case. It was within the chancellor's discretion to determine that Edwards had established her title by adverse possession to some portion of the disputed property while, at the same time, determining that her proof had failed as to the remaining portion. When he failed to do so on the proof presented in this case, we conclude that he committed an abuse of discretion.

Beginning at the front property line and extending at least as far back as the back post on the Walker fence, the proof is clear and convincing that Edwards has established her claim by adverse possession. As to the less utilized and overgrown area extending behind the area defined by the Walker fence, this Court cannot discover an abuse of discretion in the chancellor's findings that would permit us to disturb his holding.

Thus, it becomes necessary to reverse and remand this case for further proceedings in which the chancellor must determine exactly where the line may appropriately be drawn to set off to Edwards that portion of the disputed property over which she has maintained exclusive and continuous control by virtue of the existence of the Walker fence and her utilization of the property for those purposes traditionally associated with a residential yard. The chancellor, upon making such a determination, should enter a judgment vesting title to that portion of the property in the appellants.

As to the remaining portion of the property, the original judgment of the chancellor, vesting title thereto in the appellees, is affirmed.

THE JUDGMENT OF THE CHANCERY COURT OF PANOLA COUNTY IN FAVOR OF HARRY AND SANDRA DUNNIGAN IS AFFIRMED IN PART AND REVERSED IN PART. THIS CASE IS REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS

OPINION. COSTS ARE DIVIDED EQUALLY BETWEEN THE PARTIES.

BRIDGES, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. HERRING, J., NOT PARTICIPATING.