



REPUBLIC OF KENYA



**Rapemo & another v Oyugi & another (Civil Appeal E071 of 2021)
[2022] KEHC 11716 (KLR) (22 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 11716 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
CIVIL APPEAL E071 OF 2021**

KW KIARIE, J

JUNE 22, 2022

BETWEEN

RICHARD ODOYO RAPEMO 1ST APPELLANT

GODWIN OTIENO ODOYO 2ND APPELLANT

AND

CHRISTINE AKOTH OYUGI 1ST RESPONDENT

CHRISPINE JAGERO ODONGO 2ND RESPONDENT

*((Being an Appeal from the judgment in Oyugis Senior Principal Magistrate's
SPMCC No. 27 of 2020 by Hon. B. Omwansa–Senior Principal Magistrate).)*

JUDGMENT

1. Richard Odoyo Rapemo and Godwin Otieno Odoyo, the appellants herein, were the defendants in Oyugis Senior Principal Magistrate's SPMCC No 27 of 2020. This was a claim that arose from a contract of sale of land that did not materialize. The respondents were therefore claiming the refund of the entire sum paid in furtherance of the contract. The learned trial magistrate delivered judgment dated July 21, 2021 in favour of the respondents.
2. The appellants were aggrieved by the said judgment and filed this appeal. They were represented by the firm of Quinter Adoyo & Company Advocates. They raised grounds of appeal as follows:
 - a) The trial court erred in law and fact in purporting to re-write the contract for the parties.
 - b) The trial court erred in law and fact by failing to appreciate the express and glaring terms of the contract.
 - c) The trial court erred in law and fact by failing to appreciate the fact that the 1st defendant was the rightful owner of the subject property.



- d) The trial court erred in law and fact by ignoring the fact of the plaintiffs/respondents continued to default despite receiving a notice for completion.
- e) The trial court erred in law and fact by upholding the plaintiff's/respondent's unsubstantiated claims.
3. The appeal was opposed by the respondent through the firm of Onyango Owaka & Associates Advocates. It was argued that the appeal lacks merit.
4. This court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of *Selle v Associated Motor Boat Co Ltd [1965] EA 123*, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.
5. On July 30, 2019 the respondents entered into a sale agreement with the 2nd appellant in respect Kanyaluo/Kobila/Komwoyo/1425 but it later turned out that this parcel of land belonged to his father, the 1st respondent. The appellants alleged that this was a genuine mistake. The learned trial magistrate made a finding that this act was not only meant to hoodwink the purchasers but was illegal. This finding cannot be faulted. One cannot confuse the parcel of land just because they shared a common boundary.
6. The respondents testified that when they went to take possession, the appellants chased them away. The trial court believed their contention. I have no reason to arrive at a different conclusion on this issue. The appellants cannot turn and claim that the respondents were in breach of contract. They frustrated the same.
7. In contractual matters, courts are careful so that they may not appear to re-write the contract for the parties. The Court of Appeal in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd [2017] eKLR* after reviewing case law on the subject reiterated as follows:
- We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.
- In the instant case, the learned trial magistrate observed that to allow the appellants to capitalize on the default clause would be immoral and outright theft from unsuspecting purchasers. I agree with these sentiments. He cannot be accused of re-writing the contract for the parties.
8. I therefore find that the appeal has no merits. I dismiss it with costs.

DELIVERED AND SIGNED AT HOMA BAY THIS 22ND DAY OF JUNE, 2022

KIARIE WAWERU KIARIE

JUDGE

