

**THE REPUBLIC OF UGANDA  
IN THE HIGH COURT OF UGANDA SITTING AT GULU  
CIVIL APPEAL No. 0028 OF 2016**

**(Arising from Kitgum Chief Magistrate's Court Civil Suit No. 052 of 2013)**

- 5 1. KOMAKECH SAM }  
2. ORYEMA ALEX }  
3. OLWOCH JULIUS }  
4. AKENA PATRICK } ..... APPELLANTS  
5. AKELLO ROSALBA }  
10 6. LABONGO INNOCENT }  
7. OYET MARTIN MAT-OGIK }  
8. OYET RICHARD }

**VERSUS**

- 15  
1. AYAA CORINA }  
2. OKELLO VINCENT ENOSI } ..... RESPONDENTS

**Before: Hon Justice Stephen Mubiru.**

20 **JUDGMENT**

The respondents, who are husband and wife, jointly and severally sued the appellants jointly and severally for general and special damages for trespass to goods and conversion, arising from a wrongful eviction. Their claim was that at all material time they operated business as a bar and  
25 dealers in general merchandise at Apollo Ground in Kitgum Town. On or around 17<sup>th</sup> June, 2012, the L.C.1 Court delivered a judgment by which it directed the respondents to vacate the premises within a period of two weeks. The respondents contested that period as being too short for them to secure alternative accommodation for their business. On 5<sup>th</sup> July, 2012, the appellants went to the respondents' business premises and forcefully evicted them from, by throwing their  
30 merchandise outside. Consequently, a significant part of their merchandise worth shs. 24,150,000/= was stolen or damaged, hence the suit.

In their joint written statement of defence, the first to the fourth appellants contended that before intervention, the office of the Resident District Commissioner had requested the District Police Commander, Kitgum to sort out the property wrangles involving the commercial building on which the respondents were conducting business. The 5<sup>th</sup> and 6<sup>th</sup> appellants were the Landlords and had entered into a tenancy agreement with the respondents. The respondents had complained to the L.C.1 Executive Committee that the 5<sup>th</sup> and 6<sup>th</sup> appellants planned to terminate the tenancy agreement wrongfully. When the committee investigated the complaint, it discovered that the respondents were at fault since they had defaulted on their rental payments for the previous seventeen months. The 5<sup>th</sup> and 6<sup>th</sup> appellants had issued a three months' notice of termination of tenancy expiring on 4<sup>th</sup> June, 2012 but the respondents requested for a two week's extension which was granted to them. they instead complained to the Resident District Commissioner alleging a planned wrongful eviction. When the respondents failed to turn up on the appointed date for resolving the conflict, it was referred to the GISO Kitgum and the DPC Kitgum to handle. In their capacity as members of the L.C.1 Executive Committee, and acting on the directives of the Kitgum District Police Commander, and in conjunction with the 5<sup>th</sup> and 6<sup>th</sup> appellants, they caused the eviction of the respondents from the premises.

In their joint written statement of defence, the 5<sup>th</sup> and 6<sup>th</sup> appellants contended that they are the proprietors of a commercial building at Apollo Ground in Kitgum Town in respect of which they executed a tenancy agreement with the respondents. The respondents used the premises as dealers in locally made wine. The respondents had by March, 2012 defaulted on rent for the previous twenty one months, at the rate of shs. 350,000/= per month. By reason of that default, the 5<sup>th</sup> and 6<sup>th</sup> appellants, on 4<sup>th</sup> March, 2012 gave the respondents three months' notice to vacate the premises, which notice expired on 4<sup>th</sup> June, 2012. The second respondent instead lodged complaint to his clan leader claiming to be the owner of the building. He continued to falsely accuse them before the Resident District Commissioner alleging a planned wrongful eviction. When the respondents failed to turn up on the appointed date for resolving the conflict, it was referred to the GISO Kitgum and the DPC Kitgum to handle. In conjunction with the 1<sup>st</sup> and 4<sup>th</sup> appellants, they caused the eviction of the respondents from the premises and the 5<sup>th</sup> and 6<sup>th</sup> appellants regained possession. The respondents contributed to any losses they may have

incurred by their failure to find alternative premises within the period of notice given to them and the further two weeks they requested for. They prayed that the suit against them be dismissed with costs. They counterclaimed for a sum of shs. 7,350,000/= in outstanding rent under the tenancy agreement, general damages for the damage they occasioned to the building by undertaking unauthorised modifications, interest and costs. The 7<sup>th</sup> and 8<sup>th</sup> appellants did not file their respective defences and an interlocutory judgment was entered against each of them. They did not appear at the hearing of the appeal either.

P.W.1, Korina Okello, the first respondent, testified that her husband and the landlord had agreed that she conducts business of a bar and shop on the premises for five years, to enable her husband recoup money he had spent on the construction of the building. The building belonged to the late Erick, a brother to the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> Labongo Innocent. She occupied the room at the back while the brother of the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> Labongo Innocent, occupied the front, a room whose size is bigger than the courtroom. On or around 17<sup>th</sup> March, 2012 she was involved in a quarrel with a neighbour, a one Akoko Susan. The second appellant reacted by delivering to her on 17<sup>th</sup> June, 2012 a two weeks' written notice to vacate the premises. Later the 1<sup>st</sup> appellant, Komakech Sam, the 2<sup>nd</sup> Oryema Alex, the 3<sup>rd</sup> Julius Olwoch and the 6<sup>th</sup> Labongo Innocent sealed off the premises but she sought the intervention of the police who came and opened the door. One week later, on 5<sup>th</sup> July, 2012, the 1<sup>st</sup> appellant, Komakech Sam and his men; the 3<sup>rd</sup> appellant Julius Olwoch, the 2<sup>nd</sup> Oryema Alex, the 4<sup>th</sup> Akena Patrick, the 6<sup>th</sup> Labongo Innocent, the 5<sup>th</sup> Akello Rosalba and others, evicted her in the presence of policemen, by throwing out her property from the premises. She mentioned all items of her merchandise she could remember were thrown out, including cash, shs. 2,000,000/= Some items got damaged, including music and video recording equipment, plastic chairs and crates of beer. She was earning shs. 100,000/= daily from her business. She had occupied the premises for more than ten years paying shs. 15,000/= per month.

P.W.2, Okello Vincent Enosi, the second respondent, testified that with the consent of a one Mohammed Amadi, the 5<sup>th</sup> appellant Akello Rosalba and the 1<sup>st</sup> appellant, Komakech Sam, he had since 1999 made a substantial financial contribution to the construction of the premises which belonged to their deceased brother. On 19<sup>th</sup> March, 2012 he demanded for refund of shs.

25,000,000/= but Mohammed Amadi verbally agreed to refund only shs. 10,000,000/= As a result, on 26<sup>th</sup> May, 2012 an agreement was made allowing him to occupy the premises for five years, rent free, in order to recoup his money. On 17<sup>th</sup> June, 2012 he received a call from his wife, the first respondent. She told him the appellants had given her a fourteen days' notice to vacate following her quarrel with a one Akoko Susan. Later she told him the premises had been sealed off but that she had sought intervention of the police and re-opened them. On 5<sup>th</sup> July, 2012 he went to the premises at around 11.00 am and found all the business merchandise strewn by the roadside. Shs. 2,200,000/= cash that was earned from the sale of speakers was missing alongside business stock such as crates of beer and sachets of liquor. Some property had been damaged such as plastic chairs, a woofer, DVD player and sound proofing material for the music recording studio. Other items like a hired microphone condenser, a computer and woollen carpet were missing.

P.W.3, Otim Geoffrey, a son of both respondents, testified that the appellants had evicted his parents from the commercial premises in issue on 5<sup>th</sup> July, 2012, yet they had no power to do so. This followed a quarrel between the first respondent and a one Akoko Susan on 16<sup>th</sup> June 2012 and the following day the L.C.1 Executive resolved that the respondents had to leave the premises. The landlord was Andrew Mohammed Okidi who had permitted the respondents to occupy the premises for five years effective from the year 2012. The respondents were tenants paying shs. 100,000/= in rent per month. During the eviction, his mother collapsed and he took her to hospital as a result of which some of the property went missing.

P.W.4, Opio Komakech, testified that the business premises belonged to the late Okot Eric, a brother to the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> Labongo Innocent. The administrator of the estate was D.W.4 Okidi Angelo. On 17<sup>th</sup> June, 2012, the 1<sup>st</sup> appellant, Komakech Sam and the 2<sup>nd</sup> Oryema Alex, in their capacity as members of the L.C.1 Executive convened a meeting to resolve the dispute between the first respondent and a one Atto. They resolved that the respondents should vacate the premises. On 5<sup>th</sup> July, 2012, the two L.C.1 Executive members, the police and others purporting to be the landlords, evicted the respondents from the premises. The 6<sup>th</sup> appellant Labongo Innocent physically pulled down the walls of the recording studio. All business items of the respondents were cast outside. That was the close of the respondents' case.

D.W.1 the 1<sup>st</sup> respondent, Komakech Sam testified that the respondents had during the month of February, 2012 complained to him that they had been given three months' notice to vacate the business premises they were occupying for defaulting on rent for the previous twenty one  
5 months, a total of shs. 7,350,000/= He and other members of the L.C.1 Executive Committee intervened and with the consent of the 5<sup>th</sup> appellant Akello Rosalba, the 2<sup>nd</sup> Oryema Alex, and the 3<sup>rd</sup> Julius Olwoch, the respondents were given an extension of two weeks. The first respondent instead went to the office of the RDC to complain against the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> Labongo Innocent. The complaint was dismissed. The first respondent began quarrelling  
10 with neighbours thereby posing a security threat causing the 4<sup>th</sup> appellant Akena Patrick and the 5<sup>th</sup> appellant Akello Rosalba to seek help from the RDC. The RDC delegated the issue to the police which upon verifying the respondents' claim oversaw the eviction. Some youths helped in carrying property out of the room and placed it on the veranda and the premises were thereafter locked. No item was lost or damaged. The property was left under the care of the first  
15 respondent.

D.W.2 Olwoch Julius, the 3<sup>rd</sup> appellant and Secretary for Defence on the L.C.1 Executive, testified that pursuant to the complaint by the respondents registered with the first appellant, he attended the meeting at which it was resolved that the respondents be given two weeks to vacate  
20 the premises. He more or less re-stated the rest of what was stated by the first appellant. D.W.3 the 5<sup>th</sup> appellant Akello Rosalba testified that she and the 6<sup>th</sup> appellant Labongo Innocent, own the premises in issue and have receipts of payment of ground rent as proof. In January 2010 when the respondents began defaulting on rent, a family meeting was convened at which it was resolved that if the default continued, the respondents were to be evicted. She was delegated by  
25 the meeting to follow up the matter with the L.C.1 Executive. The respondents having failed to pay rent at the rate of shs. 350,000/= per month since September, 2011, making a total of shs. 7,350,000/= she issued a notice of termination of tenancy. The respondents instead complained to the L.C.1 Executive and later to the R.D.C who referred the issue to the police and the L.C.1 Executive. They went to the premises and the first respondent having refused to remove her  
30 property, the police summoned some youth who peacefully carried the property out and placed it

on the veranda. After verifying that no property was missing, the police handed over all the items to the first respondent and locked the premises.

5 D.W.4 Angelo Okidi testified that the late Andrew Okot helped the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> appellant Labongo Innocent to construct a commercial building, but it belongs to the former. The 5<sup>th</sup> appellant Akello Rosalba let out the building to the respondents. The 6<sup>th</sup> appellant Labongo Innocent testified as D.W.5 and stated that he and the 5<sup>th</sup> appellant Akello Rosalba are joint owners of the commercial building. They applied for and were granted a lease offer over that plot on 4<sup>th</sup> May, 2012 and have since then been paying ground rent for the premises. They  
10 let out the premises to the respondents in 1998 but they defaulted on rent to a total of shs. 7,350,000/= for the period starting September 2009 up to July, 2012. They were given ample time after a notice to vacate which they failed to heed and instead complained to the L.C.1 Executive and later to the R.D.C who referred the issue to the police and the L.C.1 Executive. They went to the premises and the first respondent having refused to remove her property, the  
15 police summoned some youth who peacefully carried the property out and placed it on the veranda. After verifying that no property was missing, the police handed over all the items to the first respondent and locked the premises and handed the building back to them. None of the respondents' property was lost damaged or vandalised. The eviction was done by the police. That was the close of the defence case.

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In his judgment, the trial magistrate found that the persons named as parties to the tenancy agreement tendered in court were not the parties before court. In their respective written statements of defence, the appellants admitted having evicted the respondents from the premises, yet the premises belonged to a family not individuals. During mediation, a one Okidi had  
25 disclosed that the second respondent had demanded for a refund of shs. 25,000,000/= being the sum of money he had invested in construction of the building and had committed himself to refunding shs. 10,000,000/= He had already commenced payment of monthly instalments with a sum of shs. 500,000/= The 1<sup>st</sup> and 4<sup>th</sup> appellants had not acted as members of the L.C. Executive but had only helped the 5<sup>th</sup> and 6<sup>th</sup> do commit a wrong. He therefore dismissed the counterclaim  
30 with costs to the respondent, entered judgment in favour of the respondents directing them jointly and severally to compensate the respondents in the sum of shs. 10,355,600/=, the 5<sup>th</sup> and

6<sup>th</sup> to pay a sum of shs. 9,570,000/= each paying shs. 165,000/= per month for 58 months with effect from July, 2012 until 26<sup>th</sup> May, 2017, general damages of shs. 5,000,000/= against the 5<sup>th</sup> appellant, and costs.

5 Being dissatisfied with the decision, the appellants appealed to this court on the following grounds, namely;

1. The learned trial Chief Magistrate erred in law and fact when he awarded the respondents special damages of shs. 10,355,600/= for loss of property without proof hence occasioning a miscarriage of justice.
- 10 2. The learned trial Chief Magistrate erred in law and fact when he ordered the 5<sup>th</sup> and 6<sup>th</sup> appellants to pay the respondents shs. 9570,000/= as loss of rent for 58 months without any evidence thus occasioning a miscarriage of justice.
3. The learned trial Chief Magistrate erred in law and fact when he awarded general damages of shs. 5,000,000/= to the respondents without proving the same thus arriving at  
15 a wrong decision.
4. The learned trial Chief Magistrate erred in law and fact when he dismissed the 5<sup>th</sup> and 6<sup>th</sup> appellants' counterclaim based on a mediation report that was never tendered in court thus arriving at a wrong decision.
5. The learned trial Chief Magistrate erred in law and fact when he failed to order the  
20 respondents to pay the 5<sup>th</sup> and 6<sup>th</sup> appellants' unpaid rent thereby arriving at a wrong decision.
6. The learned trial Chief Magistrate erred in law and fact when he held that the eviction of the respondents from the 5<sup>th</sup> and 6<sup>th</sup> appellants' premises was illegal, thus arriving at a  
25 wrong decision.

Both counsel for the appellants Mr. Louis Odong and counsel for the respondents Mr. Jude Ogik, were in court on 27<sup>th</sup> September, 2018 when the appeal came up for hearing. They were directed to file their written submissions by 11<sup>th</sup> October, 2018, the date fixed for delivery of the judgment. At the time of writing this judgment, none of them had filed their submissions. That  
30 notwithstanding, this being a first appeal, this court is under an obligation to re-hear the case by subjecting the evidence presented to the trial court to a fresh and exhaustive scrutiny and re-

appraisal before coming to its own conclusion (see in *Father Nanensio Begumisa and three Others v. Eric Tiberaga SCCA 17of 2000; [2004] KALR 236*). In a case of conflicting evidence the appeal court has to make due allowance for the fact that it has neither seen nor heard the witnesses, it must weigh the conflicting evidence and draw its own inference and conclusions.

5 Ground six challenges the trial court's finding as to the legality of the respondents' eviction. Determination of this ground requires the court first to determine whose property the commercial building in issue is. According to P.W.1, Korina Okello, the first respondent, the building belonged to the late Okot Eric. P.W.4, Opio Komakech, too testified that the business premises belonged to the late Okot Eric. On the other hand, P.W.3, Otim Geoffrey, testified that the  
10 landlord was Andrew Mohammed Okidi. I find that the respondents' evidence as a whole was contradictory on this point. In contrast, the 5<sup>th</sup> and 6<sup>th</sup> appellants testified they own the building jointly and relied on lease offer from the District Land Board, in their joint names as corroborative of their claim. Their claim was further corroborated by D.W.4 Angelo Okidi who testified that the late Andrew Okot only helped the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup>  
15 appellant Labongo Innocent to construct the commercial building in issue. The second respondent's claim that he contributed to the construction of that building was not proved. In any event, that would not confer upon him any proprietary interests therein. I therefore find that on the balance of probabilities, the building belongs to the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> appellant Labongo Innocent, and not to the estate of the late Okot Eric.

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It was then necessary to determine whether or not there existed a tenancy agreement between the respondents as tenants on the one hand and the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> appellant Labongo Innocent, on the other hand as landlords. Firstly, I observe that whereas the respondent's case was based on oral examination in chief, that of the appellants was based on  
25 witness statements. According to Order 18 rule 4 of *The Civil Procedure Rules*, "the evidence of the witnesses in attendance shall be taken orally in open court in the presence of and under the personal direction and superintendence of the judge." This is not only meant to guarantee that evidence is received subject to the rules of evidence meant to ensure that witness testimony is probative, credible, and fairly and efficiently presented, but it also enables the Judicial officer to  
30 evaluate the witness as the evidence unfolds; to assess the extent of the witness' actual



recollection and knowledge. Although oral testimony during an examination in chief is time intensive, it therefore has significant adjudicative advantages.

That notwithstanding, witness statements have become pervasive because Court time is increasingly precious, and more efficiency is required. When witness statements are used in the place of oral examination in chief, Court time is concentrated on cross-examination rather than examination-in-chief. Although they have become pervasive, they are undesirable where there are significant factual disputes and credibility issues. This is because witness statements are prone to containing inadmissible content, may not be reflective of the witness' statement of fact but rather eloquent and compelling advocacy of counsel, and thus incapable of withstand test of cross-examination, and so on.

Time and again during cross-examination it has emerged that the true recollection and words of the witness were contaminated by the reconstruction, language and advocacy of the lawyer who prepared the statement. The words of the advocate are too often substituted for the words and recollection of the witness, obscuring the evidence in the process. When preparing witness statements, advocates should avoid any suggestion of coaching or collusion. Court should therefore ensure before relying on such a statement that it contains statements of fact that are relevant (to the disputed issues); that are admissible (should not include statements of opinion and submission); and authentic (expressed in the witness' own words not the advocate's words).

Before a witness statement is adopted in place of an examination in chief, the witness should be given opportunity to;- (a) correct any mistakes in the statement, (b) clarify points made already in the statement and (c) update evidence since the statement was made. It is the duty of opposite counsel at that point to object to inadmissible content in the opposing party's witness statement before it is adopted by court as the examination in chief of a particular witness. Where the statement has annexures to it, their admissibility as exhibits has to be addressed before the witness statement is adopted in place of an examination in chief.

This is more importantly so considering that evidence not objected to or challenged by cross-examination is deemed uncontroverted. It is trite that an omission or neglect to challenge the

evidence in chief on a material or essential point by cross examination would lead to an inference that the evidence is accepted, subject to it being assailed as inherently incredible or possibly untrue (see *James Sawoabiri and another v. Uganda, S. C. Criminal Appeal No. 5 of 1990* and *Pioneer Construction Co. Ltd v. British American Tobacco HCCS. No. 209 of 2008*). It turns out  
5 that the annexures to the appellants' witness statements, as part of their evidence in chief, were not objected to or challenged by cross-examination and are deemed uncontroverted, subject to it being assailed as inherently incredible.

Under section 10 (2) *The Contracts Act, 7 of 2010*, a contract may be oral or written or partly  
10 oral and partly written or may be implied from the conduct of the parties. Section 10 (5) though requires that a contract the subject matter of which exceeds twenty five currency points (500,000/=), shall be in writing. In the instant case, considering the size of the premises rented as described by the second respondent in her testimonies, the activities she was undertaking therein which included a bar and a music recording studio and her claimed daily income of shs.  
15 100,000/= I find the amount of shs. 350,000/= stated by the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup> appellant Labongo Innocent as the agreed monthly rent, as proved. The parties had an oral tenancy agreement.

That being the case, the law is that where a party alleges that it paid the other and the other  
20 denies receipt of the payment, the burden is on the party who alleges payment to prove it (see *Global Forwarders & Clearing Ltd v. Henry Mugenyi t/a Kifaru High Court Bailiffs and Auctioneers, H.C. Civil Suit No. 188 of 2002*). The burden of proving up to-date payment was on the respondents, and it was not discharged. For recovery of the outstanding rent, section 2 of *The Distress for Rent (Bailiffs) Act, Cap 76*, authorised the 5<sup>th</sup> appellant Akello Rosalba and the 6<sup>th</sup>  
25 appellant Labongo Innocent in their capacity as landlords in person, or their attorney to act as bailiff to levy distress for rent without a certificate in writing under the hand of a certifying officer. They did not chose to do this but instead chose to evict the respondents.

The eviction of tenants in breach of tenancy agreements is regulated by *The Rent Restriction Act*,  
30 Cap 231 which under section 6 thereof, provides that court may grant an order of ejection where;- any rent lawfully due from the tenant has not been paid; any other obligation of the

tenancy has been broken or not performed; the tenant, or any person residing with him or her or using the premises, has been guilty of conduct which is a nuisance or annoyance to adjoining occupiers; the tenant has assigned his or her interest in the premises or sublet the whole or part of the property without the consent of the landlord. In the instant case, the respondents violated  
5 almost all the above in a manner that would have justified issuance of an order of eviction.

This court is aware of the decision in *Joy Tumushabe and another v. Anglo African Ltd and another*, S. C. Civil Appeal No. 7 of 1999 where it was held that when tenants defy the landlord's terms and conditions of tenancy agreed between the parties and the landlord prefers to repossess or effect a lawful act which the tenants continue to disregard, they become trespassers on the  
10 property concerned. In that event, the owner may resort to any legal means to achieve the desired objective, namely of evicting the defiant trespassers well as removing their property from the premises so as to leave the premises vacant.

Whereas it true that at common law if a trespasser peacefully enters or is on a land, the person  
15 who is in, or entitled to, possession may request him to leave, and if he or she refuses to leave, that person may remove him or her from the land, using no more force than is reasonably necessary, I find myself unable, with utmost respect, to follow the decision in *Tumushabe and another v. Anglo African Ltd and another* for reasons that it was decided *per incuriam* since their Lordships did not take into account the provisions and purpose of *The Rent Restriction Act, Cap*  
20 *231* which provides in strict terms, the manner in which a landlord may recover his or her premises. Lord Godard, C.J. in *Huddersfield Police Authority v. Watson* [1947] 2 All ER 193 observed that where a case or statute had not been brought to the court's attention and the court gave the decision in ignorance or forgetfulness of the existence of the case or statute, it would be a decision rendered in *per incuriam*. Thus the rule of *per incuriam* can be applied where a court  
25 omits to consider a relevant statute while deciding an issue. A decision of a superior court is not a binding precedent if given *per incuriam*, that is, "quotable in law." It is avoided and ignored if it is rendered in ignorance or forgetfulness of a statute.

Furthermore, their lordships in *Tumushabe and another v. Anglo African Ltd and another*, cited  
30 *Halsbury's Laws of England*, Third Edition, vol.38, at p.741, paragraph 1207 in which the learned authors observe;

If a tenancy determines by effluxion of time or otherwise, and former tenant remains in possession against the will of the rightful owner the former tenant is, apart from statutory protection, a trespasser from the date of the determination of the tenancy (emphasis added).

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Although their Lordships cited that extract, they never expressed themselves as regards the proviso "apart from statutory protection." It is my considered view that section 6 (1) (f) (ii) of *The Rent Restriction Act*, Cap 231, affords such protection. Under that provision, although court is empowered to grant an order of ejectment for any of the violations listed in section 6 of the Act, the subsection stipulates that no order for the recovery of possession of any premises, or for the ejectment of a tenant from a premises, may be made by any court unless the premises are reasonably required by the landlord for business, trade, or professional purposes or for the public service, and alternative accommodation reasonably equivalent as regards rent and suitability in all respects is available or was available at the time the premises were so required.

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The Act seeks to provide security of occupancy to tenants who come into lawful occupation at the commencement of their period of tenancy, but remain in possession at the expiration of the contractual term, from ejectment by their landlords unless the landlord complies strictly with the procedure laid down by the Act. The rationale behind this Act is to preserve the reasonable expectation of a person's possessory interest in a property and prevent the tenant from the heartlessness of the landlord who relying upon the strict principles of contractual relationships, would not scruple at throwing the tenant, possibly together with his or her family, out of lodging or business premises, for them to face the adverse circumstances on the street.

25 In *African Petroleum v. Owodunni* (1991) 8 NWLR (pt.210) p.391, the Supreme Court of Nigeria, interpreting *The Rent Control and Recovery of Residential Premises Law, No. 9, 1976* and relying on its earlier decisions, held that, once a contractual tenancy comes to an end by effluxion of time or otherwise and the tenant holds over, it is more correct to describe him or her as a statutory tenant and once there is an incidence of statutory tenancy, the tenant becomes a weekly, monthly or yearly tenant depending upon the term of the original grant. The Court further held that;

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the definition of tenant is very wide and includes all persons who occupy premises lawfully. Whether a person pays regular rent subsidized rent or indeed no rent is immaterial. The qualification of becoming a tenant under law is lawful occupation. Hence, when the initial occupation is lawful the occupier even if holding over  
5 becomes a protected tenant qua the landlord... Sometimes a statute gives security of tenure to a tenant after his contractual tenancy has expired where such a statute exists, such a tenant then holds the premises no longer as a contractual tenant because there no longer exists a contract between him and the landlord but he retains possession by virtue of the provisions of the statute and is entitled to all the benefits  
10 and is subject to all terms and conditions of the original tenancy. Such a tenant is called a statutory tenant.

From the above definition, a statutory tenant is one who when his or her contractual tenancy expires holds over, continues in possession by virtue of special statutory provisions and holds the  
15 premises of another contrary to the will of the other person who strongly desires to turn him or her out. The principle that an owner of a property has the right to evict a trespasser who has refused to vacate the property (see *Harvey v. Brudges 14M & W437*) and that where such eviction is effected, the owner may also remove the property and goods of the person evicted to leave the premises empty, does not apply to periodical tenants holding over under a tenancy  
20 agreement. The common law classification of tenants holding over at the expiration of the contractual term into tenancy at will and tenancy at sufferance does not apply to a tenant protected by *The Rent Restriction Act, Cap 231*.

*The Rent Restriction Act, Cap 231* applies the terms of the former tenancy (which is contractual)  
25 to create a statutory tenancy, until an order of eviction is granted by a court of law. A statutory tenancy does not involve any transfer or convey an estate in the property, it is an expression under the law to describe the right of a tenant of protected premises to remain in possession of those premises, notwithstanding the determination of his or her contractual interest, until such a time as either he or she voluntarily gives up possession, or the court, on cause shown, makes an  
30 order against him or her to deliver up possession. A periodical tenant holding over after termination of the tenancy become a statutory tenant not a trespasser, and the landlord has no

right to forcibly evict him or her except in accordance with due process of the law. Acts such as threats, intimidation, utility shutoffs, changing the locks, throwing the tenant's property out in the street or attempts to physically remove a tenant in default without an order of court, are therefore outright illegal. Although the eviction process established by *The Rent Restriction Act* may entail  
5 considerable expense and delay, it must be followed. Ground six accordingly fails.

Grounds 1, 2 and 3 of the appeal will be considered concurrently in so far as they relate to proof of loss and the award of special and general damages. Special damages must be claimed specifically and strictly proved but need not to be supported by documentary evidence in all  
10 cases (see *Kyambadde v. Mpigi District Administration [1983] HCB 44* and *Senyakazana v. Attorney General [1984] HCB 48*). Nevertheless, a "plaintiff must understand that if they bring an action for damages, it is for them to prove their damages. It is not enough to write down the particulars and so to speak throw them at the head of the court saying this is what I have lost, I ask you to give these damages, they have to prove it" (see *Shell Uganda Limited v. Achilles*  
15 *Mukiibi, C. A. Civil Appeal No. 69 of 2004*).

In the instant case, in paragraphs 8 and 9 of the plaint, the respondents claimed to have sustained loss and damage to property worth shs. 24,150,000/= as property lost and damaged. Awarding damages in respect of damaged property in most instances is guided by the amount of money it  
20 would take to fix the damaged item. There should therefore be evidence of the value of the items and as to the extent of damage occasioned to the item. However, when the cost of fixing the item exceeds its total value, the plaintiff is not entitled to a new or better object than the one that was damaged, the plaintiff is only entitled to have his or her loss made good. Evidence of extent of damage and proof of the cost of repair was lacking and this deprived the trial court of a basis for  
25 assessment of this category of damages.

On the other hand, the respondents claimed that they lost several items of property during the eviction but there is no evidence to show that it is the appellants who took any of the items. There is practically no evidence attributing that loss, whether directly or vicariously, to any of  
30 the appellants. The respondents hinged their claim on the assertion that by reason of the unlawful eviction, their property was stolen by unknown third parties. In the law of torts, the test of

causation not only requires that the defendant was the cause in fact, but also requires that the loss or damage sustained by the plaintiff was not too remote. Not every loss will be recoverable, the damage claimed must be of a foreseeable type.

5 To establish a duty of care, there must be a relationship of proximity in which the failure to take reasonable care might foreseeably cause loss or harm to the plaintiff (see *Overseas Tankship (UK) Ltd v. Morts Dock and Engineering Co Ltd (The Wagon Mound (No 1))* [1961] AC 388). Once foreseeability and proximity are made out, a prima facie duty of care is established. Whether or not something is “reasonably foreseeable” is an objective test. The question is  
10 properly focussed on whether foreseeability was present prior to the incident occurring and not with the aid of hindsight. The loss had to be shown to be the natural and probable result or consequence of the alleged act of eviction. In general, eviction from premises does not automatically include the risk of theft of the tenant's property by third parties. Some evidentiary basis was required before the court could conclude that on the facts of this case, eviction  
15 included the risk of theft by third parties. There was no evidence to suggest that third parties frequent premises during evictions, or habitually get involved in theft in such processes. Thus, the evidence did not provide specific circumstances to make it reasonably foreseeable that an eviction of this nature would result in theft of some of the property of the tenant. The burden of establishing a *prima facie* duty of care owed to the respondents was not met.

20

A negligent tortfeasor is not always liable for the consequences of a plaintiff's subsequent injury, even if the subsequent injury is tortiously or criminally inflicted. It depends on whether or not the subsequent tort and its consequences are themselves properly to be regarded as foreseeable consequences of the first tortfeasor's negligence. "A line marking the boundary of the damage  
25 for which a tortfeasor is liable in negligence may be drawn either because the relevant injury is not reasonably foreseeable or because the chain of causation is broken by a *novus actus interveniens*. But it must be possible to draw such a line clear before a liability for damage that would not have occurred but for the wrongful act or omission of a tortfeasor and that is reasonably foreseeable by him is treated as the result of a second tortfeasor's negligence alone"  
30 (see *Mahony v. Kruschich* [1985] HCA 37; (1985) 156 CLR 522 and *Chapman v. Hearse* [1961] HCA 46; (1961) 106 CLR 112, at pp 124-125.). In the instant case, loss of property at the hand

of thieves was not only unforeseeable, but also constituted a *novus actus interveniens* for which none of the appellants would be held responsible. The trial court's award of special damages was wrong on those grounds.

5 The only award to which the respondents were entitled was that of general damages for wrongful eviction. In assessing general damages for wrongful eviction, courts have ordinarily been guided by the rent payable for the premises and the appropriate period of notice. For example in *Smith v. Khan [2018] EWCA Cave 1173, 17 May 2018*, the defendant had granted a twelve-month fixed tenancy to the plaintiff's husband in June 2014. In March 2015 the husband left the property and  
10 disappeared. On 1<sup>st</sup> April, 2015 the defendant handed Mrs. Smith a letter purporting to terminate her tenancy. The defendant was notified that the notice was unenforceable because Mrs. Smith had a legal right to occupy the property under s. 30 of *The Family Law Act 1996*. On 15<sup>th</sup> April 2015 the defendant entered her property and changed the lock. Mrs. Smith ended up sleeping on the floor of a friend's house for many months. Mrs. Smith managed to retrieve her belongings,  
15 much damaged, at the end of June 2015. Her claim against the defendant proceeded as a damages claim as an order of re-entry could not be enforced. At first instance, the judge awarded Mrs. Smith general damages for trespass at £130 per day by reference to the rent payable, £9,280 for interference with her belongings, aggravated damages of £1,500 for injury to feelings; exemplary damages of £1,200; damages for harassment of £500 and for loss of the property at £1,000. The  
20 award of damages for trespass covered the period from the eviction to the date for the hearing.

The defendant appealed against the award of general damages, arguing that general damages should have been calculated at £200 per day. On appeal, it was held that the respondent was entitled to damages until 30<sup>th</sup> June 2015 (the end of the contractual term) because on that date  
25 neither her husband nor Mrs. Smith was in physical occupation of the property. Further, the court held that in unlawful eviction cases damages must compensate the tenant not only for the letting value of the property, but also for anxiety, inconvenience and mental stress. The trial court had been correct to award £130 per day, making a total of £9,880 for general damages in addition to the other unchallenged heads of damages.

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Similarly, in *Choudhury v. Garcia* [2013] EWHC 3283 (QB) (June 2013), the landlord wanted to evict the tenant, mainly because the tenant had a ground floor room and the landlord wanted this for his wife who had become ill, but also because the tenant had allowed waste to accumulate in the garden, neighbours would bring rubbish and junk and garden debris into the garden including bits of cars, cushions, blanket, old bits of metal, old bits of chairs, cardboard, bird muck-splattered chairs, making it look unsightly. Deciding that he wanted the tenement back, the landlord undertook a series of acts intended to harass the tenant out of the premises such as removing panels of the back garden fence, and in particular blocking the light from his windows into his room, and at one stage a whole wardrobe was put in front of the glass window. The landlord did nothing to stop it or help clear it. He plainly wanted the tenant to leave. The landlord obtained a possession order but then evicted the tenant during a stay of execution which had been granted, which the tenant claimed was unlawful.

In assessment of damages, the court was guided by previous cases which tended to give a range of values, by the week, for general inconvenience, as somewhere between £150 and £250 per day. But because the tenant had inordinately prolonged the process of his eviction for two and a half years, the court considered that to an extent, he had brought this a little bit on his own shoulders. In those circumstances, the judge considered that a figure of £100 per day would be the right figure for 70 days, which came to £7,000 for general damages. As for exemplary damages, the court noted that the landlord had at one point during the proceedings ignored an order of stay. He has not provided a justification for doing so. In those circumstances, the judge awarded exemplary damages in the sum of £5,000. For harassment up to eviction, the tenant had to live for the best part of two and a half years, about 120 weeks, with rubbish in his garden. Adopting, “a pretty broad approach,” the judge asked himself: “What rent should have been paid or would have been paid by somebody taking a property with a garden in that sort of state? Or, to put it another way, what reduction in rent should I allow because of these defects?” The judge concluded that a £15 reduction would be an appropriate award for that harassment of 120 weeks, which made £1,800. These awards were upheld on appeal.

From the above decisions, it would appear that the level of damages is heavily fact dependent and will always be assessed depending on the security of tenure enjoyed by the tenant, by

reference to the rent payable, and the degree of inconvenience occasioned to the tenant. With that in mind, I have found that the rent payable for the premises was shs. 350,000/= per month. I have multiplied this by a factor of three, on a scale of five, to reflect the degree of fault attributed to the appellants in flouting the law to yield a sum of shs. 1,050,000/= I have added an amount of  
5 30% of that value (i.e. shs. 315,000/=) as reflective of the inconvenience occasioned to the respondents. On top of this I have added shs. 3,585,000/= as damages for injury to feelings to arrive at a total award of shs. 4,950,000/= as general damages for the wrongful eviction. The trial court otherwise rightly awarded the respondents the costs of the suit. Grounds 1, 2 and 3 therefore succeed only in part.

10 Grounds 4 and 5 of the appeal will be considered concurrently in so far as they relate to proof of the counterclaim. It is trite that there is no particular format required in the evaluation of evidence. The task may be carried out in different ways depending on the circumstances of each case since judgment writing is a matter of style by individual judicial officers. A Judgment will be valid once it is the court's final determination of the rights and obligations of the parties based  
15 on the evidence adduced and gives reasons or grounds for the decision (see *British American Tobacco (U) Ltd v. Mwijakubi and four others*, S.C. Civil Appeal No. 1 of 2012; *Bahemuka Patrick and another v. Uganda* S.C. Criminal Appeal No. 1 of 1999 and *Tumwine Enock v. Uganda* S.C. Criminal Appeal No. 11 of 2004).

20 The question as to whether the appellants discharged the burden of proof on a balance of probabilities depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and / or inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable. The enquiry is two-fold: there has to be a finding on credibility of the witnesses;  
25 and there has to be balancing of the probabilities. When the law requires proof of any fact, the court must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality (see *Wigmore on Evidence* (2<sup>nd</sup> ed. 1923) v, s. 2498). The probabilities must be high enough to warrant a definite inference that the allegations are true.

30

The law of evidence allocates the burden of proof. The party who bears the burden must produce evidence to satisfy it, or his or her case is lost. In a civil suit, when the evidence establishes conflicting versions of equal degrees of probability, where the probabilities are equal so that the choice between them is a mere matter of conjecture, the burden of proof is not discharged (see  
5 *Richard Evans and Co. Ltd v. Astley*, [19U] A.C. 674 at 687). The facts proved must form a reasonable basis for a definite conclusion affirmatively drawn of the truth of which the trier of fact may reasonably be satisfied (see *Bradshaw v. McEwans Pty Ltd*, (1959) 101 C.L.R. 298 at 305). The law does not authorise court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others.

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The law is that where a party alleges that it paid the other and the other denies receipt of the payment, the burden is on the party who alleges payment to prove it (see *Global Forwarders & Clearing Ltd v. Henry Mugenyi t/a Kifaru High Court Bailiffs and Auctioneers*, H.C. Civil Suit No. 188 of 2002). The burden of proving up to-date payment was on the respondents, and it was  
15 not discharged. The respondents neither adduced evidence of payment of rent nor undermined by cross-examination, the 5<sup>th</sup> and 6<sup>th</sup> appellants' testimony as regards the amount outstanding and due from the respondents as arrears of rent for twenty one months. I therefore find that it was proved on the balance of probabilities that the respondents owed the 5<sup>th</sup> and 6<sup>th</sup> appellants shs. 7,350,000/=

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The normal measure of damages in cases of belated payments of money is by way of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). I have therefore applied a rate of interest of 15% per annum, as the measure of profit which the  
25 money would have attracted during the period of breach, i.e. from for the period starting September 2009 up to July, 2012 (nearly three years), as general damages to be awarded to the plaintiff. This translates into shs. 1,102,500/= per annum and when multiplied by the three years of default, the result is shs. 3,307,500/= Onto this is added shs. 2,842,500/= to take into account the period of this litigation hence a total of shs. 6,150,000/= which is hereby awarded as general  
30 damages.

Having re-evaluated the evidence as a whole, I find that had the trial court properly directed itself, it would not have come to the conclusion it did. The judgment and orders of the court below are consequently set aside. In their place, a finding is made in favour of the respondents on the suit with an award of shs. 4,950,000/= as general damages for wrongful eviction and the costs of the suit. A finding is made in favour for the 5<sup>th</sup> and 6<sup>th</sup> appellants on the counterclaim against the respondents for a) shs. 7,350,000/= arrears of rent, and b) General damages of shs. 6,615,000/= total of shs. 13,965,000/= The award of shs. 4,950,000/= in favour of the respondents is then offset against that in favour of the 5<sup>th</sup> and 6<sup>th</sup> appellants, shs. 13,500,000/= leaving a balance of shs. 8,550,000/= in favour of the 5<sup>th</sup> and 6<sup>th</sup> appellants.

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The net balance being in favour of the 5<sup>th</sup> and 6<sup>th</sup> appellants, Judgment on appeal is accordingly entered in their favour against the respondents in the following terms;

- a) shs. 7,350,000/= arrears of rent.
- b) shs. shs. 6,150,000/= as general damages.
- 15 c) Interest on (a) above and (b) above at the rate of 8% per annum from the date of this judgment until payment in full.
- d) The costs of the appeal and of the counterclaim.

Dated at Gulu this 11<sup>th</sup> day of October, 2018

20 Stephen Mubiru  
Judge,