**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA**

**CIVIL DIVISION**

**CIVIL APPEAL NO.61 OF 2018**

**(ARISING FROM CIVIL SUIT NO. 577 OF 2016**

**KYOMUKAMA SALOME :::::::::::::::::::::::::::::::::::::: APPELLANT**

**VERSUS**

**KATUSHABE JULIET :::::::::::::::::::::::::::::::::::::: RESPONDENT**

***BEFORE: HON. DR. JUSTICE BASHAIJA K. ANDREW***

***JUDGMENT.***

Kyomukama Salome *(hereinafter referred to as the "Appellant")* brought this appeal against Katushabe Juliet *(hereinafter referred to as the "Respondent")* challenging the judgment and orders of His Worship Jameson Karemani, Chief Magistrate of the Nakawa Chief Magistrate's Court *(hereinafter referred to as the "trial court")* delivered on 17/5/2016, in Civil Suit No. 577 of 2016.

***Background:***

The Appellant was the 1st defendant in trial court. She was sued jointly with Perez Kashekyebwa who was the 2nd defendant, by the Respondent now, Katushabe Juliet, who was plaintiff in the trial

court. The case before the trial court was that the plaintiff rented the 1st defendant's premises as a result of an agreement between the plaintiff on the one hand, and the 1st defendant and 2nd defendant on the other hand. After two months of occupying the premises, the 1st defendant (now the Appellant) came and closed the plaintiff's business premises. At the trial, the plaintiff contended that the closure was done without a court order and in the absence of local authorities or the plaintiff herself. The plaintiff further contended that the closure locked her properties inside some of which were perishable goods. That she later learnt that the 1st defendant gave out some of the locked properties to the 2nd defendant while the others were lost by the 1st defendant. The plaintiff thus claimed special and general damages arising from the tort of trespass, detinue and conversion of her goods, an order of compensation for trespass, detinue and conversion, the release of her properties, loss of earnings, exemplary damages and costs of the suit. The trial court gave judgment in favour of the plaintiff against the 1st defendant. Dissatisfied with the judgment and orders, the 1st defendant filed this appeal and advanced the following grounds of appeal;

1. ***The Learned Trial Magistrate erred in fact and law when he failed to properly evaluate the evidence on record and came to a wrong conclusion.***
2. ***The Learned Trial Magistrate erred in fact and law when he failed to properly evaluate the evidence and came to a wrong decision that the plaintiff had entered into an oral agreement with the appellant and there existed a tenancy agreement between the appellant and the respondent.***
3. ***The Learned Trial Magistrate erred in fact and law when he entered judgment in the suit on an alleged oral contract which was not proved to exist and which is not enforceable in law.***
4. ***The Learned Trial Magistrate erred in fact and law when he held that the appellant had closed her premises and that the properties in the premises belonged to the Respondent whereas the Respondent was not the Appellant's tenant and did not even have a right to occupy and use the appellant's premises and did not even have locus to institute the suit against the Appellant.***

5. ***The Learned Trial Magistrate erred in fact and law when he held that the appellant issued receipts to the respondent and that the receipts meant that the appellant had accepted the respondent as a tenant.***
6. ***The Learned Trial Magistrate erred in fact and law when, after holding that the appellant was not in breach of the tenancy agreement, condemned the Appellant to pay damages and costs of the suit.***
7. ***The Learned Trial Magistrate erred in fact and law when, after holding that the appellant was not in breach of the tenancy agreement, held that the appellant had closed her premises unlawfully.***
8. ***The Learned Trial Magistrate erred in fact and law when he awarded special damages which were not proved.***
9. ***The Learned Trial Magistrate erred in fact and law when she awarded general damages of Ug. Shs. 10,000,000/= (Ten million Shillings) basing on a wrong principle of law and which the respondent was not entitled to in the circumstances.***

***10. In the alternative but without prejudice to the aforesaid, the Learned Trial Magistrate erred in fact and law when he awarded general damages of UGX. 10,000,000/= (Ten million Shillings) which was excessive and exorbitantly high in the circumstances.***

***11. The Learned Trial Magistrate erred when he relied on admitted documents and evidence which are not admissible as evidence in Court.***

The Appellant prays that this court allows the appeal, sets aside the judgment and orders of the trial court with costs on appeal and in the court below. On appeal, Mr. Max Mutabingwa represented the Appellant while Mr. Edward Kakande represented the Respondent. Both counsel made oral submissions which court has evaluated along with the evidence in arriving at the decision.

The duty of this court, as a first appellate court, is to evaluate the evidence adduced before the trial court afresh and subject it to exhaustive scrutiny and draw its own conclusions and inferences. In so doing, however, the court must bear in mind that it did not see the witnesses as they testified and therefore, must make due

allowance for that fact. See: ***Barclays Bank of Uganda Ltd vs. Gamuli Tukahirwa C.A.C.A. No. 08 of 2016 [2018] UGCA 4***. With that duty in mind, this court will determine the grounds of appeal as follows; ground 1, 2, 3,4 and 5 and 7 will be resolved jointly, ground 6, 8,9 and 10 jointly, and ground 11 separately.

***Ground 1, 2, 3, 4, 5 and 7:***

The gist of the complaint which is cross – cutting in all these grounds is that the Appellant faults the trial court for having failed to properly evaluate the evidence and having erred in fact and law to hold that the Appellant issued receipts to the Respondent and that it meant the Appellant had accepted the Respondent as rent-paying tenant. Counsel for the Appellant submitted that there was no tenancy agreement between the Appellant and Respondent for the Respondent's premises. Further, that pursuant to Section 10 (5) of the Contract Act 2010, for such a contract to exist it had to be in writing since the amount involved exceeds 25 currency points. Counsel buttressed his argument with the case of ***Nabagala Anitah vs. Drake Lubega HCCS No. 383 of 2017,*** where court held, inter alia, that a suit filed claiming for rent where there is no

written agreement and terms of the agreement discloses no cause of action. Counsel argued that the only agreement existed as between one Perezi Kashekyebwa (2nd defendant) and the Appellant and not with the Respondent. That as such, the Appellant could not breach an agreement which was never there between herself and the Respondent.

In reply, counsel for the Respondent submitted that there was no written contract, but an oral tenancy agreement between the Appellant and the Respondent. That proof of the oral agreement was deduced from the receipts which were issued by the Appellant's son on behalf of her mother to the Respondent and that in that sense the son was the Appellant's agent and could sign off as such. That this fact of the son issuing receipts for and on behalf of her mother was never denied at the trial.

In rejoinder, counsel for the Appellant insisted that the only tenancy agreement was between the Appellant and 1st defendant. That the agreement between the 2nd defendant with the Respondent, if at all one existed, was illegal as it was made behind the back of the Appellant, and that the Respondent should not be permitted to benefit from her wrong.

Court observes that, at page 3 of its judgment, the trial court addressed the issue of the tenancy agreement. After evaluating the evidence on the issue, the trial court came to the conclusion that there was indeed a tenancy agreement between the Appellant and Respondent. Apparently, the written tenancy agreement which was tendered in evidence in court as *Exhibit P3* dated 31/7/2015, was between the Appellant and one Perezi Kashekyebwa, the latter of whom was the tenant and the former the landlord. The agreement spells out the terms of the tenancy among which is one that the reserved monthly rent was UGX. 450,000/=. In *Clause (i)* thereof, the agreement excluded the tenant from subletting the premises without the landlord's prior consent. The trial court, at page 4 (1st paragraph) relying on the case of ***Rolltex International Forex Bureau Ltd vs. Haba Group (U) Ltd HCCS No. 219 of 2012***, held that there was a tenancy agreement between the Appellant and the Respondent. The trial court stated further as follows;

> ***"In the instant case there was a tenancy agreement that had been entered between the 1st Defendant and second Defendant. Despite there being a clause prohibiting sub-renting, this was not sub-rent*** *(sic)* ***since the rent was***

***being paid directly to the landlord as per exhibit "P1" the receipts issued by the 1st Defendant directly to the Plaintiff. By receiving rent from the Plaintiff directly and issuing receipts in her name meant that the 1st Defendant had accepted her as her new tenant."***

After this court re-evaluating the evidence afresh and subjecting it to exhaustive scrutiny, it is quite evident that in coming to the conclusion that there was an agreement between the Appellant and Respondent, the trial court did not base itself on the written agreement between the Respondent and Perezi Kashekyebwa. The trial court based its conclusion on the receipts which the Respondent issued to the Appellant in lieu of rent payment for the premises. It is also the reason that the trial court labored to cite the case of ***Rolltex International Forex Bureau Ltd vs. Haba Group (U) Ltd*** (supra) to support its findings. This court agrees with the finding of the trial court that there was indeed an agreement between the Appellant and Respondent premised on the receipts issued.

There is also evidence showing that the Appellant was introduced to the Respondent by the 2nd defendant (Perezi Kasekyebwa) in

December 2015 as a new tenant. Upon being introduced, the Respondent accepted that the Appellant pays her UGX.2 Million for four months in advance, at UGX. 500,000/= per month. The Appellant expressed her inability to pay that much all at once, upon which the Respondent accepted UGX.1 Million for two months' rent, which the Appellant agreed to raise. She, however, only managed to raise UGX. 800,000/= and promised to pay the balance of UGX. 200,000/= later. The Appellant invited the Respondent to her home and the Respondent went with the Appellant's son called Derrick, to make the payment which would be used for clearing the utilities bills for the premises. Evidence was further adduced by the Appellant that they mutually orally agreed that from then onwards, the Appellant would start paying rent as a tenant independent of the 2nd defendant from 15/02/20216, after the 2nd defendant had ceased being a tenant on the premises. Evidence further shows that on 29/03/2016, the Appellant paid the Respondent the UGX.800,000/=, for two months from 15/02/2016 to 15/04/2016 leaving a balance of UGX.200,000/= to be paid later. The Respondent issued the Appellant with two receipts - *Exhibit "P1".* The first receipt *No. 013* is dated 29/03/2016 for UGX. 800,000/=

shows the money was received from the Appellant under the following description;

> "***In respect of rent for Room in Kataza front view of the main building for a period beginning with 15/2/2016 to 15/4/2016 a period of 2 months ending on 15th April 2016."***

The receipt shows that there was a balance of UGX.200,000/=. The second receipt *No. 015* is dated 25/04/2016, received again from the Appellant by the Respondent for UGX.1,000,000/=. It also shows; that the amount was for rent of the same premises for two months beginning 15/02/2016 to 15/04/2016 in respect of;

> "***Rent for Room in Kataza front shop (for) a period of 2 months ending on 15th April 2016."***

There was nil balance after payment of the last two months' rent. In both receipts the money was received under the authorized signature for the Appellant. There receipts are both headed *"SOLOME KYOMUKAMA S"* who happens to be the Appellant herein. The authenticity of the said receipts was never challenged at the trial. The amounts received were also not denied, or at all. What was denied by the Appellant at the trial was only that there was a

written tenancy agreement between herself and Respondent. It is the same argument being raised on appeal by the Appellant relying on Section 10 (5) of the Contract Act (supra). Counsel for the Appellant vehemently argued that the contract is illegal because it is not written yet it exceeds 25 currency points. Further, that the only agreement was between the Appellant and one Kashekyebwa (2nd defendant) which was also entered behind the back of the Respondent who should not benefit from her wrong. Section 10 (5) indeed provides that;

***"(5) A contract the subject matter of which exceeds twenty-five currency points shall be in writing."***

However, the provisions above cannot be construed as vitiating the provisions of Section10 (2) which also provide as follows;

***"A contract <u>may be oral or written or partly oral and partly written or may be implied from the conduct of the parties</u>."*** [underlining mine for emphasis].

Given the above latter position of the law, the trial court rightly came to the conclusion that there was an oral contract relying on the case of ***Rolltex International Forex Bureau Ltd vs. Haba Group (U) Ltd*** (supra) where the court took evidence of receipts as

proof of a tenancy agreement mutually agreed between the parties. In the instant case, the Appellant having acknowledged receipt of rent monies from the Respondent and issuing receipts, cannot hide behind the absence of a formal written agreement to deny that a landlord-tenant relationship existed between the parties.

It is also not true that the Respondent entered into a tenancy agreement with the 2nd defendant behind the Appellant's back, as contended by the Appellant's counsel. On the contrary, when the 2nd defendant could not continue with the tenancy, he called upon the Respondent to promptly pay the rent and introduced her to the Appellant who entered a separate arrangement with the Respondent after the 2nd defendant had ceased his tenancy. The agreement between the 2nd defendant and Respondent had nothing to do with the oral tenancy agreement or the landlord –tenant relationship that the subsequently ensued between the Appellant and the Respondent. The Respondent is thus not attempting to enforce any illegality or benefit from any wrong. There was nothing illegal or wrong.

The case of ***Nabagala Anitah vs. Drake Lubega*** (supra) cited by counsel for the Appellant, is distinguishable in principle and facts

from the instant case. The former case clearly stated that no suit can be founded on breach of a tenancy where the tenancy agreement is not reduced into writing. However, the court did not state that there are no legally binding oral or partially written and partially oral or even implied contracts/agreements from the conduct of the parties. Oral agreements/contracts are perfectly legal and provided for in the law under Section 10(2) (supra) and therefore enforceable. Like in the instant case, where the Appellant acknowledged under her authority rent monies from the Respondent, a tenancy agreement is easily implied by that conduct and the Appellant would be precluded from denying existence of such tenancy by the doctrine of estoppel, under Section 144 of the Evidence Act Cap 6, which provides as follows;

> ***"When one person has, by his or her declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon that belief, neither he or she nor his or her representative shall be allowed, in any suit or proceeding between himself or herself and that person or his or her representative, to deny the truth of that thing."***

Indeed, in the instant case the Appellant by her conduct of receiving money in lieu of rent and issuing receipts to that effect, caused or led the Respondent to believe that the tenancy truly existed as between them and the Respondent acted upon that belief. Therefore, the Appellant cannot be allowed to deny the fact of the tenancy.

It is also erroneous to premise the argument on Section 10 (5) (supra) that the agreement between the Appellant and Respondent is illegal for exceeding 25 currency points when it is not in writing. The provisions are not applicable to the instant case given that the rent reserved was UGX. 500,000/= per month. Whereas the rent amount could be paid in a lump sum in advance or upfront for several months, the monthly rent still remained UGX.500,000/= which does not exceed the 25 currency point. A currency point under the Schedule to the Contract Act (supra) pursuant to Section 2 (supra) is equivalent to twenty thousand shillings only. Therefore, the trial court arrived at the right decision that there was an agreement between the Appellant and Respondent basing on evidence of receipts, and the implied conduct of both parties, among other things. Accordingly, this court shall not disturb the judgement and orders of the trial court in that regard.

Special attention is drawn to ground 7 of the appeal. Though similar to the foregone grounds is slightly different in some subtle ways. It concerns the closure of the premises by the Appellant and the Respondent's properties therein. The Appellant argued that since the Respondent had no right to occupy and use premises, the Respondent did not even have the *locus standi* to institute the suit. As already found by this court, the Respondent was rightfully a tenant on the premises. Therefore, the argument that the Respondent had no cause of action cannot be not sustained. If the Appellant felt that the Respondent had defaulted on rent, in the absence of a written agreement spelling out the terms, the implied conditions by the law would apply or she would have sought to enforce payment through a court order or an eviction order. Simply locking up the premises with the properties of the Respondent, which have never been returned to her and some of which were perishables, was unlawful. The trial court was justified in finding so. The appeal therefore fails on those listed grounds.

***Ground 6, 8,9 and 10:***

These grounds concern the award of damages and costs by the trial court. Counsel for the Appellant submitted that no general

damages ought to have been awarded since the Respondent had not cause of action. The issue regarding cause of action has been put to rest and it is not necessary to repeat it except to emphasize that the Respondent had a cause of action. By definition of a cause of action, she had a right which was infringed by Appellant and as the responsible party for the violation the Appellant would be liable in damages under the law. Violation of a right attracts a remedy in damages paid by the party in breach.

Regarding the award of special damages, counsel for the Appellant argued that the trial court awarded special damages which were not proved. Without belaboring the point, the perusal of the trial court in its judgment, at page 5 shows that the court awarded UGX 1440,000/= as special damages based on the receipts presented by the Respondent. The trial court was alive to the law and principle that special damages must be pleaded and strictly proved but that they need not to be supported by documentary evidence. To that end the trial court even cited the case of ***Kyamabadde vs. Mpigi District Administration (1983) HCB 44.***

Also the perusal of the plaint, paragraph 5 (i) to (x) shows that the plaintiff pleaded and even particularized the special damages. It is

therefore, not true that the trial court awarded special damages which were not proved.

Counsel for the Appellant argued that UGX.10,000,000/= ought not to have been awarded as general damages by the trial court, and in the alternative, that the award of UGX.10,000,000/= as general damages was excessive in the circumstances and cited the case of ***Omunyokol vs. Attorney General [2012] HCB Vol. I 55 at p. 56.***

In reply counsel for the Respondent submitted that the trial court was justified in awarding the damages. That it took into account that the Appellant locked the Respondent's property which she has never recovered.

The settled position is that the award of general damages is in the discretion of court, and is always as the law will presume to be the natural consequence of the defendant's act or omission. See: ***James Fredrick Nsubuga v. Attorney General, H.C.C.S No. 13 of 1993.*** The discretion must, however, be exercised judicially taking into account all circumstances of the case. See: ***Uganda Commercial Band v. Kigozi [2002] 1 EA. 305***. A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been in had she or he not suffered the wrong**.**

See ***Charles Acire v. Myaana Engola, H.C.C.S No. 143 of 1993; Kibimba Rice Ltd. v. Umar Salim, S.C.C.A. No.17 of 1992.***

Also to note is that the appellate court will usually not interfere with the exercise of discretion by the trial court merely because it could have exercised it differently. However, as was held in ***Omunyokol vs. Attorney General*** (supra) (at page 56)

> ***"There are two circumstances where the appellate Court will interfere with the exercise of discretion namely; where the trial court acted on wrong principles and where the amount awarded is manifestly excessive or manifestly (too) law that a misapplication of a wrong principle is inferred."***

In the instant case, the trial court awarded the Respondent UGX. 10,000,000/= as general damages. At page 5 of its judgment, the trial court took into account the inconvenience suffered and loss experienced since 2016, by the Respondent. This court has not found the instance of where trial court applied any principle of the law wrongly or the amount awarded as general damages to be excessive in the circumstances. Given the value of money, the business that was lost since 2016 until May 2018 when judgment

was delivered. The trial court rightly exercised its discretion and this court is reluctant to interfere with the award of general damages. The grounds of appeal in that regard have no merit and are dismissed.

In ground 11, the Appellant faults the trial court for having relied on and admitted documents and evidence which are not admissible. On the appeal, however, this ground was not argued and it seems to have been abandoned altogether. That notwithstanding, this court has perused the entire record of appeal and has not come across the alleged inadmissible material or evidence which the trial court relied on to arrive at the decision. The next effect is that the appeal fails in its entirety. The judgment and orders of the trial Court are upheld. The appeal is dismissed with costs to the Respondent.

***BASHAIJA K. ANDREW***
***JUDGE***
***29/04/2020***