

**BETWEEN:** UTIMAWA BELA FOR ISSUES  
OF TARERE BAINANA

**Appellant**

**AND:** TOTITENE KOOBA FOR ISSUES  
OF ETEI BAINANA

**Respondent**

**Before:** Salika JA  
Nelson JA  
Khan JA

**Counsel:** Ms Timeon Taaira for Appellant.  
Ms Kiata Kabure Ariera for Respondent.

**Date of Hearing:** 12 December 2024

**Date of Judgment:**

## **INTRODUCTION**

1. This appeal first arose from a decision of a single Magistrate sitting in its land jurisdiction in case number 452/18, and delivered a decision on 5th September, 2019. In that matter of CN 452/18, the appellant claimed that the decision of the Land Commission in CN 439/48 was tainted with fraud when the land title in Manoku 750 0/1 was transferred from Tarere Bainana to Etei Bainana, the respondent in this appeal.

2. On appeal in the High Court on 5 June 2023, the appellants called three witnesses in support of their fraud allegations. The respondent did not call any evidence.

3. The principle is that he who alleges must prove the allegations. See *Bukaineti v Tekimu* (2017) KIC 45. The appellant had the onus to prove fraud committed by the respondent in the matter. The single Magistrate sitting in the first instance considered all the evidence before him and found no fraud committed by the respondent. That was a finding of fact on the evidence before him.

4. The High Court in its decision on 22 June 2023 made the same finding of fact in that the learned Judge found no fraud had been established against the respondent. Again, that finding was of fact.

5. The appellants now appeal to the Court of Appeal. This Court notes the appeal is against the finding of the learned High Court Judge on a question of fact.

6. We raised the issue at the hearing of the appeal with counsel for the appellants that the findings by the High Court as to whether there was fraud was a question of fact, and as such this Court could not review the findings of the High Court as a matter of fact.

7. This Court requested Counsel from both sides to research the law on whether findings of the High Court were questions of fact or law. Counsel for the appellants made additional submissions on the issues but did not advance any argument that it was a question of law.

8. If this appeal lies on a question of law, the appeal can be considered and determined by this Court. If, however, the appeal lies only on a question of fact, this Court cannot interfere with the findings of the High Court in relation to whether fraud had been made out.

9. There was only ground of appeal. It reads:

***"The High Court was error in law in dismissing the appeal based on the reason that the allegation of fraud was not made out against the Respondent when the High Court failed to assess properly the evidence adduced before the Magistrate's Court that remained unchallenged throughout that Etei was not the father of Bainana and therefore it was not correct to inherit half of the share of Tarere's land over Manoku (issue-less owner) that was sufficient evidence to prove that fraud existed in case number 439/48."***

10. The sole ground questions the finding of the learned High Court Judge and that finding is based on the evidence before the High Court. There is no issue or question of law or mixed question of fact and law raised in the ground of appeal.

11. Counsel's additional submission filed with the Registry failed to address the issue of whether the single ground of appeal raised questions of law or mixed question of fact and law.

12. We are firmly of the view that this appeal ground raised a question of findings of fact only and as such it is not appropriate for this Court to review the findings of the learned Judge of the High Court on findings of fact.

13. This appeal is accordingly dismissed with costs to the respondent, to be agreed or taxed.

Order accordingly.



Sir Salika  
JA



Nelson  
JA



Khan  
JA