



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MERU**

**Civil Appeal 63 of 2008**

**SORA ADI ABDI ..... APPELLANT**

**VERSUS**

**KUMPA HASSAN DIBA ..... 1<sup>ST</sup> RESPONDENT**

**THE ELECTORAL COMMISSION OF KENYA ..... 2<sup>ND</sup>  
RESPONDENT**

**THE RETURNING OFFICER**

**ISIOLO CONSTITUENCY ..... 3<sup>RD</sup> RESPONDENT**

*(An appeal against the ruling of the Hon. S.M. Kibunja SPM dated 27th July 2008 vide Meru Local Government inquiry No. 2 of 2008)*

**JUDGMENT**

The first respondent on the 15<sup>th</sup> January 2008 filed an inquiry of the local authority elections of Yamicha Ward of Isiolo North Constituency of Isiolo District held on 27<sup>th</sup> December 2007. the inquiry was filed before the Chief Magistrate Court in Meru. The inquiry alleged that the elections of that ward were flawed. The appellant in the lower court filed a Preliminary Objection containing 5 objections. However, when he argued the same before the magistrate he only seem to have emphasized one of them. The one he emphasized was that the statement of facts which were in support of the application were filed long before the gazettelement of the results of the elections. The appellant provided a copy of the gazette notice which was annexed to his replying affidavit dated 22<sup>nd</sup> April 2008. The appellant’s argument was that the first respondent should have waited for the results of the elections to be gazetted in the Kenya gazette before filing the inquiry. The learned magistrate in his considered ruling after setting out the provisions of Section 61 of the Local Government Act Cap 265 stated:-

**“..... The context of Section 61 of Cap 265 of L.O.K. can only mean the act of the authorized officer of communicating the outcome of the election in the ward to the people of that ward. This must therefore refer to the act of the returning officer declaring the winner and preparing and issuing such a winner with the necessary certificate to proof (sic) the same. Clearly, this occurred on 28<sup>th</sup> December 2007 when the 3<sup>rd</sup> respondent (appellant) was declared the winner and was issued with a certificate dated 28<sup>th</sup>**

*December 2007. publication does not mean the time results and election of 3<sup>rd</sup> respondent was gazetted in the Kenya Gazette on 25<sup>th</sup> January 2008 as counsel for 3<sup>rd</sup> respondent appeared to submit and on that ground the preliminary objection fails.”*

The appellant was aggrieved by that ruling and has filed this appeal presenting the following grounds of appeal.

- 1. That the learned senior principal magistrate erred in law and in fact by failing to strike out the Local Government Inquiry.*
- 2. That the learned senior principal magistrate erred in law and in fact by not finding that the Election Inquiry was totally incompetent for the same was filed long before gazettelement of Local Government Election results was done.*
- 3. That the learned senior principal magistrate erred in law and in fact by misinterpreting the word publication of Election results to mean when the Returning Officer announced the results, hence misinterpreting the provisions of section 61 Local Government Act.*
- 4. That the learned senior principal magistrate’s ruling and orders are bad in law and facts.*

This appeal is mainly predicated on the interpretation of Section 61 (1). That Section provides as follows:-

*“61 (1) If the validity of an election to a local authority under this Act is brought into question by any person qualified either to be elected or to vote at the election or by the returning officer on any ground or for any cause whatsoever, that person or the returning officer, as the case may be, may at any time within fifteen days after the publication of the result of the election, apply to a resident magistrate’s court within or nearest to the area of the local authority to set the election aside.”* (Underlining mine).

The appellant in support of his appeal relied on 2 high court decisions. Firstly, is the case **Electoral Commission Vs. Bernard Adeya Ongwa** Civil Appeal No. 66 of 2000. In this case, the learned judge on finding that Section 61 of Cap 265 does not define publication, proceeded to state as follows:-

*“The word “Publication” is defined under Sections 3 (1) of the Interpretation and General provisions Act Cap 2 Laws of Kenya as:-*

*“Publication” includes all written and printed matter and any record, tape, wire, perforated roll, cinematograph film or other contrivance by means of which any words or ideas may be mechanically or eclectically produced, reproduced, resented or conveyed, and everything, whether of a nature similar to the foregoing or not, containing any visible representation, or by its form shape or in any manner capable of producing, reproducing, representing or conveying words or ideas and every copy and reproduction of a publication.”*

*It is clear that the format or mode of publication is not defined. The meaning of the word “publication” is given in detail. The inquiry does not state when the results were published. It does not also state the mode in which the returning officer used to announce the results.*

*I hold the view that though the mode of publication is not specifically prescribed in the Local Government Act, the publication should be by*

*Kenya Gazette. The basis of my view is that this is the most reliable and convenient means in which all the parties concerned can receive official results from the Electoral Commission of Kenya. It is not just enough to verbally announce. Not all people concerned will know when the results are declared and who was declared the winner. At the time of announcing the results not every one is present at the counting hall. It is in my considered opinion that time will begin to run when the results are published in the Kenya Gazette. The reliance on the Kenya Gazette notice sets consistency. It defeats logic for the returning officer to verbally announce the results and then follow it by publishing in the gazette. The publication through the gazette is to make official the results and to notify those concerned that time has begun to run.”*

Secondly, the appellant relied on the case **James Mwangi Wanjau & Ano. Vs. Joseph Macharia Kairu** Civil Appeal No. 436 of 1998. In that case, the Judge in considering the provisions of Section 61 had this to say:-

*“I would hold that the word publication accompanied in the subject matter of elections means the official publication in the Kenya Gazette. This being the legal communication which the electoral commission has in officially announcing its results and in which a party has a basis in challenging those results.”*

My take, is that Section 61 (1) requires anyone who desires to file an inquiry into the elections of a Local Authority to do so within 15 days of publication of those results. Publication is the act of communicating of something to the public either in printed form or orally. It is the act of making information available to the public. The Black’s Law Dictionary 8<sup>th</sup> Edition defines publication as

*“Generally, the act of declaring or announcing to the public.....”*

In considering that definition, I respectively do not agree with the finding in the two cases quoted above, that Section 61 must be taken to mean publication can only be by gazettement in the Kenya gazette. Indeed as argued by the first respondent, if parliament had intended that section 61 meant that publication was by means of gazettement parliament would have clearly put it so in that section. Publication as in that section in my view is not restricted to gazettement. Accordingly, I find no merit in the present appeal. This appeal is hereby dismissed with costs being awarded to all the respondents.

Dated and delivered at Meru this 7<sup>th</sup> day of May 2010.

**MARY KASANGO**  
**JUDGE**