**East African Community v Railway African Union (Kenya) and others (No. 2)**

**Division:** Court of Appeal at Nairobi

**Date of judgment:** 7 October 1974

**Case Number:** 41/1974 (115/74)

**Before:** Spry Ag P, Mustafa and Musoke JTA

**Sourced by:** LawAfrica

**Appeal from:** High Court of Kenya – Sir James Wicks, C.J. and Chanan Singh,

J

*[1] Master and Servant – Trade dispute – Employees of Community – Industrial Court must apply laws*

*of partner states.*

*[2] Master and servant – Trade dispute – Railways Corporation – Major alterations of terms of*

*employment may only be made by Communications Council – Council a proper party to proceedings*

*before Industrial Court – East African Railways Corporation Act* (*Cap.* 18), *s.* 13.

*[3] Prerogative Orders – Certiorari – Necessity for order must be shown.*

**JUDGMENT**

The following considered judgments were read.

**Spry Ag P:** This is an appeal from a decision of the

High Court of Kenya refusing an order of certiorari to remove into that court and quash a decision of the

East African Industrial Court.

The proceedings in the Industrial Court were between the Railway African Union (Kenya), the

Railway African Union (Uganda) and the National Union of Tanganyika Workers, on the one hand, and the East African Railways Corporation, on the other. The East African Community, the applicant in the High Court and the present appellant, was not a party to the proceedings in the Industrial Court: Mr. Khaminwa, representing the Community, attended those proceedings but as amicus curiae only. The Community has, in Kenya, the capacity of a body corporate by virtue of s. 3 (1) of the Treaty for East African Co-operation Act (Cap. 4). The issue before the Industrial Court was expressed as follows: “Failure and/or delay by the Corporation to implement in full a voluntarily negotiated Agreement signed on 21 July 1972 on the Omari Salaries and Terms of Service Report.” The facts are not in dispute and can be stated briefly. A commission, commonly known as the Omari Commission, was appointed to review the wages and salaries paid to the employees of the Corporation. In due course it made its recommendations. It is not seriously disputed that these, if implemented, would make major alterations. The report of the Omari Commission was considered at a series of meetings of the Central Joint Council of the Railways. This is a body set up under an agreement, known as the Industrial Relations Machinery, 1970, made between the Director-General of the Corporation and representatives of the Unions, one of the functions of which is the negotiation of wages and salaries. The Central Joint Council agreed, subject to certain modifications, with the recommendations of the Omari Commission, and chose 1 January 1972, as the date from which they thought the recommendations should be implemented. This agreement was recorded in a memorandum which is undated but which was apparently signed by all parties on 21 July 1972. It was of this memorandum that the Industrial Court was asked to order implementation. Under s. 13 (*c*) of the East African Railways Corporation Act (Cap. 18) (to which I shall for brevity refer as the Railways Act), major alterations of wages or salaries require to be approved by the Communications Council, an institution established by Articles 53 and 54 of the Treaty for East African Co-operation. Accordingly, the memorandum of agreement of the Central Joint Council was, on 3 August 1972, sent by the Director-General to the Communications Council. On 28 August 1972, the Secretary-General of the Railway African Union (Kenya) wrote to the Kenya Minister of Labour formally reporting, under the Trade Disputes Act, the existence of a trade dispute. The subject of the dispute was said to be: “Failure and refusal by the Management to implement a voluntarily negotiated agreement signed on 21 July 1972 on the Omari Salaries and Terms of Service Report.” This letter purported to be signed “For and on behalf of East African Railways Trade Unions”. A conciliation meeting was held on 24 October 1972, at which the submission on behalf of the Corporation was that it was not at fault, since no decision had yet been taken by the Communications Council. The conciliator recorded a deadlock. The following day, 25 October, the Minister issued a certificate under r. 7 of the East African Industrial Court (Procedure) Rules 1970, that the parties had exhausted the disputes machinery provided by the law of Kenya. It should be noted that this showed the parties to the dispute as the Corporation on the one hand and the three Unions on the other. In the meanwhile, that is to say, after the existence of a dispute had been reported and before the Minister issued his certificate, the Communications Council had considered the Omari Report and the memorandum of the Central Joint Council and had approved the proposed salaries for the lower paid workers, but only with effect from 1 July 1972. At some later stage, the Corporation appears to have implemented the proposals to some further extent, without the authority of the Communications Council. The Industrial Court heard the parties on 16 and 17 January 1973, and gave a fully reasoned award on 8 February 1973. The main findings of the Industrial Court were that the Corporation and the Unions had concluded an agreement, that it had not been ratified by the Communications Council and that the Industrial Court had power to order its implementation in spite of it not having been ratified. Accordingly, the Industrial Court directed that the Corporation should implement the “Agreement” in full, with effect from 1 January 1972. The Community applied to the High Court for an order of certiorari to bring up and quash the award. The application was heard by two judges. They agreed that the application should be dismissed but for different reasons: the Chief Justice held that there was no error on the face of the record, while Chanan Singh, J., held that there were errors but that practical considerations made it undesirable for the High Court to exercise its discretionary power in favour of the Community. Before us, Mr. Sebalu appeared for the Community, Mr. Wako for the Railway African Union (Kenya) and the Railway African Union (Uganda) and Mr. Ouma for the Corporation. The National Union of Tanganyika Workers was unrepresented. Mr. Kwach appeared for the Industrial Court but he did not require to be heard and when we indicated that we did not consider his presence necessary, he withdrew. In support of the application to the High Court, it was submitted that there were seven errors of law apparent on the face of the Industrial Court’s award. Some of these were not pursued in the appeal and others were of minor importance. Perhaps the most important of the alleged errors went to jurisdiction. This was expressed in the statement supporting the application in a rather curious way. It was alleged that the Industrial Court had acted unlawfully in entertaining a purported dispute involving the three Unions and the Corporation, when the Railway African Union (Uganda) and the National Union of Tanganyika Workers “were not party to the said dispute”. As I have already remarked, the original report of a trade dispute purported to be made on behalf of the three Unions and the Minister’s certificate showed all three as parties. When it came to argument, the issue intended to be raised was expressed as two questions; whether it was proper for the Uganda and Tanganyika Unions to be parties to the dispute and whether the Industrial Court, in a trade dispute raised under Kenya law, could properly make an award affecting Railway employees residing and working in Uganda and Tanganyika. As regards the first part of the argument, the Chief Justice said: “It must be accepted that the Court [that is, the Industrial Court] has no jurisdiction over employees of the Community and the Corporations who are Kenya Citizens and members of the Railway African Union (Kenya) when those members are outside Kenya, that is when they are in Uganda or Tanzania. What is the position of Uganda and Tanzania Citizens, members of their respective Unions, who are within Kenya? They are employees of the Community and the Corporations within Kenya. Are not the Uganda and Tanzania Unions entitled to be parties to the proceedings in respect of their members within Kenya? I consider that the answer to both these questions is, ‘Yes’ and that all three Unions were properly made parties.” With respect, I do not think citizenship enters into the matter: I think the governing consideration is where the employees reside and work. At first sight, the proposition that a Uganda or Tanganyika union should be able to represent one of its members stationed in Kenya in a dispute concerning wages and terms of service in Kenya appears an attractive one, but Mr. Sebalu suggested that as the Uganda and Tanganyika unions are not registered in Kenya under the Trade Unions Act (Cap. 233), they are not entitled to operate as unions in Kenya. This would seem to preclude their being parties, on behalf of their members, to Kenya disputes even though as corporate bodies they might be able to sue or be sued on their own behalf. However, this is a matter of misjoinder and not of jurisdiction. It was not fully argued and I prefer to express no firm opinion on it. On the second part of the argument, the Chief Justice remarked that in the operating of the railways, every single employee of the Corporation might at some time or another be within Kenya and he held, for this reason, that the Industrial Court was entitled to order the implementation in full of the Omari Report. There, with respect, I am unable to agree. Although the Industrial Court is a single, East African, court, it has to apply the separate laws of the three Partner States and its jurisdiction to hear any application is based on the law of the State in which that application is made. In dealing with an application made under Kenya law, supported by a certificate of the Kenya Minister of Labour that the parties to the dispute have exhausted the disputes machinery provided in the Kenya Trade Disputes Act, the Industrial Court has, in my view, no jurisdiction to make an award affecting employees residing and working in Uganda or Tanganyika. On the question of jurisdiction, Chanan Singh, J., remarked that it appeared from reports of decided cases that the Industrial Court has “all along ignored the law which restricts its jurisdiction”. He held that this was not a serious matter, first, because of acquiescence and, secondly, because he thought the law unworkable. With great respect, I cannot agree. In the first place, acquiescence cannot create jurisdiction. Secondly, I am not persuaded that the law is unworkable, although it may be inconvenient. Even if the law were unworkable, it would not justify a tribunal assuming a jurisdiction it did not possess. What I have said on this subject does not mean that a matter such as the report of the Omari Commission could not be dealt with by the Industrial Court in relation to all three countries. If proceedings had been instituted in all three countries in accordance with the laws of those countries and the machinery of conciliation had been exhausted in all of them, I see no reason why the three disputes should not be consolidated for hearing, as a matter of convenience and with the consent of all parties. The Industrial Court would, of course, have to keep in mind the separate laws of those countries and might have to qualify its award in respect of one or more or even make three separate awards, because what is proper and reasonable in one country might be unlawful in another. In the present case, however, there is no suggestion that trade disputes had been initiated in Uganda or Tanganyika and no allegation that the machinery of conciliation had been exhausted in either. I do not think, however, that this excess of jurisdiction concerned the High Court of Kenya, since the Industrial Court undoubtedly had jurisdiction as regards Kenya, and I do not think the Kenya court was under any duty to quash the award merely because it was, or may have been, a nullity in Uganda and Tanganyika for lack of jurisdiction. The position would have been very different had the application been made to the High Court of Uganda or that of Tanzania, where it would have been more likely to have been allowed. This aspect of the matter was not argued before us, but it is one that I think we may, and indeed must, take into consideration. The position is a rather curious one. On an application for certiorari, a court may quash or refuse to quash a decision, but it may not vary it or substitute its own decision. In *East African Community v. Railway African Union* (*Kenya*), [1973] E.A. 529, this court held that the High Court of Kenya has jurisdiction to quash an award of the Industrial Court but such an order would not, of course, run in Uganda or Tanganyika. An award might, therefore, stand quashed in one or two of the partner states while remaining operative in the others or other. The second major issue was expressed, again not strictly accurately, in the statement supporting the application, as a complaint against the Industrial Court purporting to make an award “embodying the Omari Report” before the Report was approved by the Communications Council. I say “not strictly” because the award did not purport to embody the Report but to enforce an agreement embodying the Report, and that again, as the Chief Justice pointed out, was not accurate, because the so-called agreement modified the Report. I think, with respect, that not enough attention was given to the nature of this so-called agreement. For reasons that I shall give, I think it was neither more nor less than a memorandum of agreed recommendations to the Communications Council. In this connection, it is necessary to look at the powers conferred by the Railways Act. S. 11 provides that, subject to the directions of the Board of Directors, the Director-General may: “(*d*) approve any alteration in salaries, wages or other terms and conditions of service of employees of the Corporation not involving expenditure in excess of the limits determined by the Board”. S. 12 provides that, subject to any directions of a general nature which may be given to it by the Communications Council, the Board may: “(*b*) approve any minor alteration in salaries, wages or other terms and conditions of service of employees of the Corporation.” S. 13 provides that the Communications Council may: “(*c*) approve any major alterations in salaries, wages or other terms and conditions of service of employees of the Corporation.” I have quoted these three paragraphs because some consideration was given both in the Industrial Court and more particularly in the High Court, to the meaning of the word “approve” as used in s. 13 (*c*). The Chief Justice considered it in relation to the question whether the Communications Council could amend any proposed alterations of salary and concluded that it could not. He considered the meanings given to the word “approve” in the Oxford Dictionary and interpreted it in the context of the wide general powers of the Communications Council. With respect, I see the matter differently. When it is borne in mind that the word “approve” is used for the powers of the Director-General and of the Board, within their limited authority, in relation to alterations of wages and salaries, just as it is for the Communications Council, I think the word must signify the taking of the effective or operative decision. I think it is synonymous with “authorise”. It cannot mean the mere confirmation or ratification of an agreement arrived at by others. I am confirmed in this opinion by the terms of s. 14 (3) of the Railways Act, which indicates that the normal procedure in relation to paras. (*b*), (*c*), and (*d*) of s. 13 is for the Board to make proposals and for the Communications Council to make decisions. In my opinion, it would have been ultra vires the Director-General or the Board to enter into any agreement of a binding nature regarding major alterations of wages or salaries. Therefore there was, in my opinion, no agreement capable of being enforced. In this connection, Mr. Wako drew our attention to the definition of “collective agreement” in the Trade Disputes Act, and particularly to the words “whether or not enforceable in law”. With respect, I am not persuaded that this is of any relevance. The expression “collective agreement” appears to be used almost exclusively in relation to the requirement of registration and it may not be without significance that there has never been any suggestion in these proceedings that the so-called agreement sought to be enforced was either registered or registrable. In any case, I think the words “whether or not enforceable in law” must relate to such matters as lack of consideration: I do not think they can possibly render enforceable a purported agreement made by a person having no authority to make it. One has only to magine an “agreement” of this kind entered into by a junior official to see how absurd this would be. If I am right in thinking that the so-called agreement was a memorandum of agreed recommendations, I do not see how the Industrial Court could order its implementation. The Industrial Court itself appears to have accepted without question that there was a valid agreement and treated the proceedings as analogous to an action for specific performance of a contract. In the High Court, the judges approached the issue differently. Chanan Singh, J., held that it was beyond the power or authority of the Corporation or its Director-General to “agree” to any major alterations and therefore that the Industrial Court had no power to implement the “agreement”. With that view, I respectfully agree. The Chief Justice avoided this issue. He said: “In any case the Court was not implementing the Omari Report. It was resolving a dispute by making its own award. The fact that it took into account evidence properly in front of it in the form of the Report and framed its award so as to include a reference to that report, cannot possibly amount to an error of law. Indeed, in my view the Court was doing exactly that for which it was constituted.” With the greatest respect, I cannot agree. The contents of the Report were not in issue and were not argued. The Industrial Court only looked at them, as far as I can see, to satisfy itself that its award would not offend against the principles laid down for it by the Authority. All that it was asked to do was to implement an “agreement” and that is all that it purported to do. Where, with respect, the Industrial Court went wrong, was in concentrating its attention on the Industrial Relations Machinery 1970, which is nothing more than an agreement inter parts regulating the procedure of negotiation, and losing sight of the Railways Act, which is law in all three partner states and must prevail over any agreements. This led it to look for the ratification of an agreement, the wording of the Industrial Relations Machinery 1970, instead of the approval of alterations, the wording of the Railways Act. It the Industrial Court had begun with the provisions of the Act, it would have been apparent that the Board had no power to make any binding and enforceable agreement for a major alteration of salaries and wages. If the Board purported to make any such agreement, I think it was ultra vires, but I am by no means persuaded that there was any such intention. I think the Board was at all times conscious of the need for the approval of the Communications Council and that the so-called agreement was in fact agreed proposals to be put to the Communications Council for its decision. Here, again, I think there was a clear error of law on the face of the award. Having found errors of law on these two major questions, I do not think it necessary to consider the other, minor, errors of law alleged. I must, however, mention another matter. There runs through all these proceedings the suggestion of a basic conflict between the Communications Council and the Industrial Court. I think this is entirely misconceived. Their functions are different: the one is executive, the other quasi-judicial. Where there is no dispute and, where a dispute arises, until the machinery of conciliation has been exhausted, the Communications Council is the only body capable of authorising major alterations in wages and salaries. Where there is a dispute, and the machinery of reconciliation has been exhausted, and the dispute has been referred to the Industrial Court, that court has exclusive jurisdiction. I do not consider, however, that the Industrial Court can properly consider a dispute involving major alterations without giving the Communications Council an opportunity of being heard. Mr. Wako argued that a dispute is between employer and employees, and that the Corporation is the employer: he submitted that the Industrial Court is not concerned with the relationship between the Communications Council and the Corporation. With respect, I reject that argument. The position of the Communications Council is a statutory one and the Industrial Court cannot ignore it. Here again, there was an error of law on the face of the award, although it was not specifically argued as such before us. The Industrial Court took the stand that, once it had jurisdiction, it could disregard the Communications Council. I think this was wrong, and that in purporting to enforce an agreement which required, but had not received, the approval of the Council, the Industrial Court was usurping the function of the Council. If the Industrial Court was proceeding on the basis of an agreement, I think the approval of the Council was essential. If the proceedings were not based on agreement, I think the Council was entitled to be a party. I turn now to what is, perhaps, the more difficult problem. All prerogative orders are matters of discretion. It is therefore necessary to consider how far the judges of the High Court were exercising a judicial discretion in refusing the application, because this Court will only interfere with the exercise of a judicial discretion where the court below has misdirected itself, or taken into account matters which should not have been taken into account, or failed to consider matters which should have been taken into account, and has, as a result, arrived at a wrong decision. Moreover, even if this Court were to decide that the High Court had been at fault in the exercise of its discretion, we should still have to exercise our own discretion, after considering all the circumstances, whether we should direct that an order of certiorari be issued. As I have said, the Chief Justice based his decision on his finding that there was no error of law on the face of the record. He did, however, make two findings that are relevant to the exercise of discretion. First, he held, relying on *R. v. Lord Newborough* (1869), L.R. 4 Q.B. 585, that to order certiorari would be “a mischievous act” because it would mean that part of the wages paid to employees would have to be repaid. With respect, a demand for repayment would have been a possible but not a necessary result; indeed, Mr. Sebalu, without giving any undertaking, indicated that if an order were made now, repayment might not be demanded. Also, the *Lord Newborough* case can be distinguished, because it related to payments that had been made, whereas in the present case, the award relates to future as well as past payments. Secondly, the Chief Justice said that he would have refused the application on the ground that other remedies were available to the Communications Council. He referred to s. 14 (3) of the Railways Act and para. 9 of Part B of Annex XIII to the Treaty. I do not, with respect, think that either could be invoked, because the former is only available to the Board, while the latter relates only to disputes on the question whether an alteration is major or minor. Mr. Wako suggested that paras. 7 and 8 of Part B might provide a remedy, but, with respect, I do not think they would enable the Authority to reverse a decision of the Industrial Court, certainly not immediately or directly. Chanan Singh, J., while of the opinion that the Industrial Court had acted outside its jurisdiction, thought that the High Court should exercise its discretion and reject the application for four reasons. Three of these, with respect, I would reject. The judge thought that the alterations, which had been recommended by a Commission after thorough investigation, were not unmerited; but there had been no argument on the merits of the proposed alterations. He thought it was only a matter of time before the Communications Council concurred in them: that was supposition, and has not been justified in the event. He thought that the excess of jurisdiction was not serious: I have already commented on that. The main factor that influenced the judge was the possibility that the quashing of the award would lead to a major disruption of the railway system in East Africa. This argument was developed before us by Mr. Wako and even more strongly by Mr. Ouma, who suggested that the whole economy of East Africa might be imperilled. This is obviously a serious consideration but I must say that I think the danger was exaggerated. If the award were quashed, it would still be for the Communications Council and ultimately for the Authority to decide whether and to what extent to implement the Omari Report. This is a matter of executive action and not of law: there would, so far as I can see, be nothing illegal or improper in the Communications Council approving all or any of the proposed alterations with retroactive effect. If a decision were taken quickly, there might be no disruption. In these circumstances, I think it would be open to us to reverse the decision of the High Court. For my part, I am not disposed to do so, for the following reason. The onus is on a person seeking one of the prerogative orders to show that it is necessary: these are not orders that are lightly made. The onus becomes particularly heavy when an appellate court is asked to make such an order after it has been refused by the court of first instance. When dealing with the suggestion that the quashing of the award would lead to disruption and chaos, Mr. Sebula indicated that the authorities concerned might not demand any repayments and might not reduce any wages or salaries. This is a most reasonable attitude but it does not seem to me to justify the quashing of the award. It is now eighteen months since the award was made and it seems strange that no final decision has yet been taken by the Communications Council. Be that as it may, it appears that it is at least possible that the decision may be such that the quashing of the award would have no practical consequences. If that is so, I do not think an order of certiorari should issue. Mr. Sebalu said that the Community wanted the award quashed and then to be free to take advantage of it or not: that is not showing that the order is necessary, and unless it is necessary, it should not, in my opinion, be granted. I would therefore dismiss the appeal. No application was made for costs in the High Court, but all parties asked for costs of the appeal. On my view of the appeal, the Community has been wholly successful on the issues of law but it has failed to obtain the order it sought. The respondents have succeeded in the event, but not for the reasons they advanced. I would order that each party do bear its own costs. As the other members of the Court agree, it is so ordered.

**Mustafa JA:** The facts in this appeal have been fully set out in the judgment of Spry, Ag. P., which I have had the advantage of reading in draft. I will be very brief. The East African Community applied to the High Court of Kenya comprised of two judges, Wicks, C.J. and Chanan Singh, J., for an order of certiorari to bring up and quash an award made by the East African Industrial Court. The dispute was between the three Unions, (1) the Railway African Union (Kenya), (2) the Railway African Union (Uganda), (3) the National Union of Tanganyika Workers on the one hand, and the East African Railways Corporation on the other, and the Industrial Court heard the dispute and made an award on 8 February 1973. Prior to this hearing by the Industrial Court, a commission, known as the Omari Commission, had submitted a report in respect of wages and salaries payable to the employees of the Corporation. The representatives of the Unions and the Corporation met as the Central Joint Council of the Railways and agreed with the main recommendations of the Omari Report. However, it is common ground that the recommendations of the Omari Commission constituted major alterations in the wages and salaries structure and would require approval by the Communications Council, a body established by the Treaty for East African Co-operation. The Director-General of the Corporation duly forwarded the memorandum of agreement of the Central Joint Council to the Communications Council for its approval on 3 August 1972. Before the Communications Council had dealt with the matter the Kenya Railway Union had reported a trade dispute, under the Kenya Trades Dispute Act, on 28 August 1972. On 25 October 1972 the Minister of Labour of Kenya issued a certificate certifying that the three Unions and the Corporation had exhausted the machinery for settling disputes and the Industrial Court was seized of the matter. The subject of the dispute reported to the Kenya Minister of Labour and referred to the Industrial Court was stated to be: “failure and refusal by the Management to implement a voluntarily negotiated agreement signed on 21 July 1972 on the Omari’s Salaries and Terms of Service Report”. The Industrial Court in effect found that the Unions and the Corporation had entered into an agreement which however had not been ratified by the Communications Council but that in its stead the Industrial Court could do so, once it was seized of the matter, and thereupon ordered the parties to implement the agreement as from 1 January 1972. Mr. Sebalu for the Community has submitted that there were errors apparent on the face of the award. I will deal with the main ones. (1) The Industrial Court purported to “enforce” or “implement” an “agreement” embodying the Omari report. As stated earlier the Corporation had to obtain “approval” from the Communications Council in respect of major alterations to the salaries and wages structure. No such approval had been obtained. The Corporation could not enter into any binding contract until it had obtained such approval. What it had agreed at the Central Joint Council was only a conditional agreement, conditional on approval from the Communications Council being obtained. Here “approval” does not merely mean “ratification”, which is the word used in a document known as the Industrial Relations Machinery 1970. This document is not a statutory instrument, and cannot modify the statutory provisions of the East African Railways Corporation Act (Cap. 18). The word “approve” is used in ss. 11 (*d*), 12 (*b*) and 13 (*c*) of the Act and the word in these sections is used in an active sense, and would connote “sanction”, or “authorise”; not merely in a passive sense to “ratify” something which has been done. In my view there existed no concluded agreement which was capable of being enforced or implemented; that purported “agreement” merely contained agreed recommendations submitted to the Communications Council for it to “approve”. I do not think that the definition of “collective agreement” in the Trades Dispute Act of Kenya is of help. That must presuppose a concluded agreement, where both the parties have finally agreed. It cannot refer to an incomplete agreement which has not been finalised. The Industrial Court did not make its own award, nor did it, after full and due enquiry into its merits, adopt the Omari report as its award, but purported to implement an “agreement”. still in the process of being negotiated as a “free and voluntarily negotiated agreement”. In my view this was an error on the face of the award. (2) Mr. Sebalu also submitted that the Industrial Court purported to make an award concerning a trade dispute referred to it by a Kenya Minister in accordance with Kenya laws and affecting union outside Kenya, i.e. unions in Uganda and Tanzania. I would in this connection refer to a previous decision of this Court, *East African Community v. Railway African Union* (*Kenya*) [1973] E.A. 529, where it was decided that when the East African Industrial Court sits in Kenya and deals with a trade dispute under Kenya law it acts as and has the powers of a Kenya Industrial Court, but its jurisdiction is restricted to employees of the Community or Corporations residing and working within the confines of Kenya. It has no jurisdiction to deal with such employees outside Kenya; those have to be dealt with according to the laws of the partner states in which they reside and work. In this case the Industrial Court exceeded its jurisdiction when it purported to deal with the unions in Uganda and Tanzania, and is another error, and this error goes to jurisdiction. I do not propose to deal with the other grounds of complaint since the appellant has made out a case for the making of the order asked for. With great respect I am unable to agree with the Chief Justice when he held that there was no error on the face of the proceedings. Chanan Singh, J. held that there were errors, but he exercised his discretion in refusing to grant the application. He gave several reasons for the refusal. With respect I think only one of his reasons is good, the one which concerns “administrative chaos and public inconvenience”. Although the Chief Justice found that there was no error, he also referred to a “mischievous act”; thus both the judges in the High Court were concerned about the serious consequences flowing from the grant of the order. The order of certiorari is a discretionary order. Although in effect only one of the two judges had exercised his discretion in refusing the order, any action to interfere with the exercise of that discretion is not lightly taken. Counsel for the respondents have submitted that very grave consequences and industrial unrest and disruption would result from granting the order. I myself am not greatly impressed by this argument. It seems that more than 80 per cent of the staff, especially the lower paid staff, have been paid in accordance with the recommendations, which the Communications Council had approved, and it is not very probable that a refund would be demanded from these employees after the lapse of such a long time. In any event there would be nothing to prevent the Communications Council form approving all the recommendations contained in the “agreement”, should that be necessary to avoid industrial disruption. I would have thought that the Communications Council, in its role as a branch of the executive, would be more qualified, informed and equipped than a Court to assess and ward off any potential labour unrest and disruption. I would not accept that as a compelling reason to refuse the order. During the appeal Mr. Sebalu seemed to suggest that although he could not personally give any undertaking, it is not impossible that the Communications Council might not enforce repayment from the Corporation’s employees. There was also a statement from the Bar that further increases in salaries and wages are being formulated and submitted for negotiation and settlement. It seems to me that the appellant would be more concerned with the clarification of the issues involved than with its determination to recover money from the Corporation’s employees. The appellant would appear to want the application granted and the award of the Industrial Court quashed, and then the appellant would decide what steps to take. That does not appear to me to indicate any urgency or necessity for the quashing of the order. The onus lies with an applicant seeking the grant of a prerogative order to establish that it is essential for it to issue. In my view the appellant has not discharged the onus in this case and I do not think that we should exercise our discretion in favour of the appellant. I concur in the order of the Acting President.

**Musoke JA:** I agree.

*Appeal dismissed.*

For the appellant:

*P Sebalu* (Counsel to the Community) and *DM Wekesa* (Principal Assistant Counsel)

For the first and second respondents:

*SA Wako* (instructed by *Kaplan & Stratton*, Nairobi)

For the fourth respondent:

*AO Ouma*