Civil Application No.105 of 2006 – Court of Appeal of Tanzania at Dar es Salaam – Kaji, J.A	VIP Engineering and marketing Ltd VS SGS Society General Defureveildance SA & SGS Tanzania superintendence Company (Application for striking out the notice of Appeal from the decision of the High court of Tanzania – Commercial Division at Dar es Salaam Commercial Case No 16 of 2000 – Kimaro J)	1. Affidavity (which is evidence on Oath/affirmation) can not be amended except by lodging another affidavity which is correct (No need to right on title (Amendment Affidavit). See the Registered Trustees of Joy in the Harvest VS. Hamza Sungura, Civil Appeal No.3 of 2003 (Unreported) 2. Non disclosure of source of information (which makes information to be hearsay) renders an affidavit defective see Salima Vuai Foumu VS. Registrar of Co-operative societies and others (1995) TLR 75. 3. The wrong date made the purposed affidavit to becomes in effectual based on section 8 of notaries Public and Commissioner for Oath Act Cap 12 R.E 2002. 4. Non mentioning of the date in an affidavit its not fatal but the audacity to mention a wrong date its fatal

IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

IN THE MATTER OF CIVIL APPEAL NO. 65 OF 2006

CIVIL APPLICATION NO. 105 OF 2006

VIP ENGINEERING AND MARKETING LTD.................................APPLICANT

VERSUS

1. **SGS SOCIETE GENERALE DE SURVEILLANCE SA..........1ST RESPONDENT**
2. **SGS TANZANIA SUPERINTENDENCE COMPANY LTD.... 2ND RESPONDENT**

(Application for striking out the Notice of Appeal from the decision of the High Court of Tanzania – Commercial Division at Dar es Salaam)

(Kimalo, J.)

Delivered on the 22nd day of December, 2005 in Commercial Case No. 16 of 2000

RULING

13th & 21st December, 2006

KAJI, J. A.

By a notice of motion filed under Rules 45 (1) and 82 of the Court of Appeal Rules, 1979, the applicant, V.I.P. Engineering and Marketing LTD, is moving the Court for an order to strike out the notice of appeal lodged on 27/12/2005 by the respondents, 1. SGS Societe Generale De Surveillance SA, and 2. SGS Tanzania Superintendence Company LTD, on the following grounds:-

1. An essential step in the proceedings has not been taken by the respondents within the prescribed time.
2. The respondents have deliberately avoided applying for leave and /or extention of time from the Court before lodging the record of appeal out of time on 1st August, 2006 thereby rendering their notice of appeal to be incompetent for hanging on nothing.
3. The certificate of delay issued by the Registrar of the Commercial Court erroneously included time which went beyond the time used by the Court in the preparation of the necessary record of appeal.
4. The respondents are in the continuing abuse of Court process to the irreparable unfair prejudice of the applicant.

On 22/9/2006 when the application was called on for hearing before a Single Judge of the Court, Munuo, J. A, it was discovered that the affidavit accompanying the notice of motion was defective. The defect was that, it was erroneously deponed that the affidavit was in support of the Chamber Application instead of "notice of motion." The learned Single Judge directed the applicant to correct the error, and further directed as follows:-

> "Rectification of the affidavit in support of the application by the 28/8/2006.
>
> Hearing on 12/10/2006"

Pursuant to that direction, on 25/9/2006 the applicant filed a document titled "Amended Affidavit of the Applicant in support of the Notice of motion" with the following words in brackets:-
"(Pursuant to the order of the Court (Munuo, J. A.) dated 22nd Septermber,2006)" Unfortunately the jurat read that the affidavit was made, sworn and attested at Dar es Salaam on 22nd August, 2006. The record is silent as to why it was not heard on 12/10/2006 as previously fixed.

On 17/11/2006 it came before me on assignment.

When it was called on for hearing the respondents' counsel, Malimi and Chandoo, raised preliminary objection, notice of which had been lodged earlier under Rule 3 (2) (a) of the Court of Appeal Rules, 1979. The preliminary objection consists of the following points of objection:-

1. That the notice of motion lodged on 9th day of August, 2006 is incompetent and untenable as it violates the provisions of Rule 46 (1) of the Court of Appeal Rules, Cap 141 R. E. 2002.
2. That the purported Amended affidavit is defective for non compliance with the order of the Honourable Court dated 22nd September, 2006 requiring the applicant to lodge an amended affidavit in support of the Notice of motion.

3. That the purported amended affidavit is defective as it contains hearsay evidence because the deponent did not have the conduct of the proceedings in the High Court as is averred in paragraph 1 of the so called amended affidavit.

Arguing the first point of objection, Mr. Malimi contended that, under Rule 46 (1) of the Court of Appeal Rules, 1979, every formal application to the Court must be supported by one or more affidavits of the applicant or some other person or persons having knowledge of the facts. In the instant application the application is not supported by any affidavit and that the purported affidavit is defective as will be demonstrated in the 2nd and 3rd points of objection, contended the learned counsel.

In elaboration of the second ground of objection the learned counsel pointed out that the purported affidavit is defective in the sense that it does not comply with the direction of the Court given on

22/9/2006, as the purported amended affidavit was made on 22/8/2006, a month before the Court's direction. It is the learned counsel's submission that the purported amended affidavit referred to something else and not in compliance of the Court's direction. Mr. Malimi further pointed out that the purported affidavit is titled "Amended Affidavit" which is unknown in law. The learned counsel remarked that an affidavit, which is evidence on oath/ affirmation, cannot be amended by filing an amended affidavit but by filing a supplementary affidavit. He cited the case of D. B. Shapriya & CO. LTD. Versus Bish International BV – Civil Application No.53 of 2002 (unreported), and the Registered Trustees of Joy in the Harvest Versus Hamza Sungura – Civil Application No.3 of 2003 (unreported). The learned counsel cited also Bakshi, P. M (1997). Mula on the Civil Procedure, 15th Edition, N. M. Tripath Private Limited, Bombay, page 1508, item

2 (c), second paragraph which provides:-

> "A defective affidavit cannot be amended but a fresh affidavit setting out the facts correctly can be filed".

The learned counsel pointed out that, since the applicant filed an amended affidavit which is unknown in law, the applicant cannot be taken to have complied with the direction of the Court given on 22/9/2006, and that that document should be struck out leaving the notice of motion naked.

Arguing the third ground of objection the learned counsel contended that, the purported amended affidavit is also defective in the sense that it contains hearsay evidence. The learned counsel pointed out that, in that affidavit, the deponent, James Burchard Rugemalira, deposed that he was conversant with the matters as he had conduct of the proceedings in the High Court. Mr. Malimi observed that the person who had conduct of the case in the High Court was the advocate and not the deponent who was the 4th witness in the case. In that respect, when PW1, PW2 and PW3 adduced their evidence, the deponent, as PW4, was not in Court and could not know what was going on there and might only have known by being told by those who were inside the court. In that respect he ought to have disclosed the source of information, observed the

learned counsel. The learned counsel pointed out the relevant paragraphs in the amended affidavit which the deponent ought to have disclosed the source of information. Non disclosure of source of information renders an affidavit defective, remarked the learned counsel. He cited the case of Salima Vuai Foumu Versus Registrar of Co- operative Societies and Others (1995) TLR 75. The learned counsel concluded by submitting that, since the purported amended affidavit is defective for the reasons stated, the notice of motion is not supported by an affidavit as required by Rule 46 (1), and the notice of motion should be struck out with costs.

Responding to these submissions, the applicant's learned counsel, Mr. C. Tenga, contended that, Rule 46 (1) deals with documents required to support a notice of motion and that, an objection against an affidavit should be based on Rule 45. In that respect, it is his view that, the respondents are challenging the amended affidavit basing on a wrong provision of the law, and their objection should be ignored. The learned counsel observed that, the learned Single Judge of the Court had on 22/9/2006 directed amendment of the affidavit. In that respect the learned counsel

found nothing wrong in giving the amended affidavit the title of "Amended Affidavit". The learned counsel pointed out that, in the Amended Affidavit the defect detected in the earlier affidavit of 9/8/2006 was corrected as directed by the Court, and that the Amended Affidavit is competent as it contains the correction ordered by the Court, notwithstanding its title. Mr. Tenga remarked that, amended affidavits have been filed in this Court in various occassions as a matter of practice as directed by the Court. He said, even the cases cited by Mr. Malimi do not say specifically that an amended affidavit should be rejected. The learned counsel observed that the principle in Mula cited by the respondents' counsel is applicable in India, and that practice in Tanzania has shown differently. Mr. Tenga further contended that there is nowhere in the jurisprudence of Tanzania that requires an amended affidavit to be rejected.

The learned counsel conceded that the jurat shows the affidavit to have been deponed on 22/8/2006. But he was quick to point out that, immediately below the title of the affidavit, there are words

suggesting that it was made pursuant to the order of the Court (Munuo, J. A.) dated 22/9/2006. Thus, in his view, the date of 22/8/2006 in the jurat was merely a clerical error which is curable by direction of the Court under Rules 47 (1) (2), 45 (3) (a) and 18 (1). The learned counsel observed that, what is important in the jurat is the truth of the attestation. The learned counsel remarked that, despite the error in date, there is no element of cheating, and that the contents are true. The learned counsel contended further that, a clerical error can be amended at any stage.

The learned counsel denied the amended affidavit to be based on hearsay evidence. He pointed out that, the application in this Court is not related to the proceedings in the High Court but that it relates to striking out the notice of appeal for failure to take essential steps after the delivery of judgment. Further that, the deponent is the Director of the applicant Company who annexed an annexture to the affidavit to support his deposition. At any rate, the learned counsel doubted whether the 3rd ground of objection could properly be a point of objection in view of what the Court said as to what is a prelimianary objection in the case of Citibank Tanzania LTD Versus

Tanzania Telecommunication LTD and 4 others – Civil Application No. 64 of 2003 (unreported).

The learned counsel concluded by calling upon the Court to dismiss the preliminary objection and order the date on the jurat to be amended from 22/8/2006 to read 22/9/2006.

In a rather lengthy rejoinder, Mr. Chandoo, learned counsel for the respondents, contended that, Mr. Tenga cannot properly ask for amendment of the jurat because he is not the author. It is only the Commissioner for oaths before whom the jurat was made who can lodge a formal application.

Responding to why their challenge is based on Rule 46 (1) instead of Rule 45, the learned counsel pointed out that Rule 45 deals with format of an affidavit, of which they have no quarrel, but Rule 46 (1) which deals with the validity of a notice of motion without an affidavit, and Rule 46 (2) which allows supplementary affidavits, but not amended affidavits. Mr. Chandoo insisted that the pointed out paragraphs were hearsay because the deponent did not depose that he knew them by virtue of being the Director of the applicant

company but by purportedly having conduct of the case which is not true. The learned counsel also observed that, the deponent did not depose anywhere in the amended affidavit that he is the Director of the applicant company. That was only mentioned by Tenga from the bar. Mr. Chandoo doubted whether the alleged annexture could support the deponent's knowledge. At any rate, the deponent did not depose that the source of his knowledge is the annexture, observed the learned counsel.

Like Mr. Malimi, he insisted that the amended affidavit is incurably defective for the reasons stated, and that the notice of motion is incompetent for want of a proper affidavit, and that the preliminary objection should be upheld and the notice of motion be struck out with costs for two advocates.

There is no doubt that under Rule 46 (1) of the Court of Appeal Rules, 1979, it is mandatory that every formal application to the Court must be supported by one or more affidavits of the applicant or of some other person or persons having knowledge of the facts. I am

not sure whether I am required to clarify that the affidavit contemplated by this Rule is the one which is proper in every respect.

There is no doubt that an affidavit, which is evidence on oath/ affirmation, cannot be amended except by lodging another affidavit which is correct. The case cited by the respondent's learned counsel and Mula's observation are self explanatory. In the instant case, although the document is titled "Amended Affidavit" yet there is everything suggesting that it is another affidavit altogether incorporating the correction ordered by the Court. The title appears to be a misnomer, perhaps for want of a more appropriate word. Had this been the only defect I would probably direct the word "Amended" to be deleted. But this is not so. There is another defect which, in my view, is fatal. It is in the jurat. It is the requirement of section 8 of the Notaries Public and Commissioners for Oaths Act Cap 12 R. E. 2002, that every notary public and commissioner for oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat of attestation at what place and on what date the oath or affidavit is taken or made. This provision is couched in mandatory terms. Therefore, in my view, when it is breached by

showing a wrong date, the purported affidavit becomes ineffectual. It cannot serve the purpose for which it was intended. In the instant case, the affidavit was intended to support the notice of motion. It cannot serve that purpose. I am aware of the first paragraph of item 2 C of Bakshi, P. M. (1997). Mula on the Civil Procedure, 15th Editiion,N. M. Tripath Private Limited, Bombay which provides:-

> "Every defect in an affidavit is not fatal.
> For example non mention of date and place is
> a mere irregularity".

That may be so where the date is not mentioned. But where the commissioner for oaths has the audacity to mention a wrong date that, in my view, is fatal.

Having held that the amended affidavit is fatally defective by mentioning a wrong date in the jurat, and that therefore the notice of motion is not supported by a valid affidavit as required by Rule 46 (1) of the Court Rules, 1979, I find it unnecessary to deal with other aspects of the matter raised.

In the end result, and for the reasons stated, I sustain the preliminary objection and dismiss the application with cost to be taxed for two counsel.

DATED at DAR ES SALAAM this 18th day of December, 2006.

S. N. KAJI

JUSTICE OF APPEAL

I certify that this is a true copy of the original.

S. M. RUMANYIKA

DEPUTY REGISTRAR