



**OFFICE OF THE DATA PROTECTION COMMISSIONER  
ODPC COMPLAINT NO. 2380 OF 2023**

**MILLIE NAMASAKA.....COMPLAINANT**

**-VERSUS-**

**PLATINUM CREDIT.....1<sup>ST</sup> RESPONDENT**

**PREMIER CREDIT.....2<sup>ND</sup> RESPONDENT**

**DETERMINATION**

*(Pursuant to Section 8(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)*

**A. INTRODUCTION**

1. The Office received a complaint on 17<sup>th</sup> November 2023 from a customer alleging to have been receiving continuous calls from Respondents marketing their loan products, despite requesting that their number be removed from their database.

**B. LEGAL BASIS**

1. Article 31 (c) and (d) of the Constitution of Kenya provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter known as 'the Act') was enacted.
2. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/or 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals;

establishing the legal and institutional mechanism to protect personal data and providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

3. Section 8 (f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) of the Act provides that a data subject who is aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.
4. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Enforcement Regulations) which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

### **C. BACKGROUND OF THE COMPLAINT**

5. This Office received a complaint from the Complainant on 17<sup>th</sup> November 2023. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
6. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against them vide letters dated 6<sup>th</sup> December 2023 referenced ODPC/CONF/1/5 VOL 1 (616) and ODPC/CONF/1/5 VOL 1 (617). In the notification of the complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various Sections of the Act. Further, the Respondents were asked to provide this Office with the following:
  - a. A response to the allegation made against them by the Complainant;
  - b. Any relevant materials or evidence in support of the response;
  - c. The contractual agreement with the Complainant if any;

- d. Details of how they collected, stored and processed the Complainant's personal data, and whether she consented to the processing of her personal data; and
  - e. The mitigation adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint do not take place again.
7. Both Respondents responded to the allegations *vide* a letters dated 19<sup>th</sup> December 2023.
  8. This determination is pegged on the provisions of Regulation 14 of the Regulations which state that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

#### **D. NATURE OF THE COMPLAINT**

9. The Complainant alleged that she was not aware how the Respondents got her phone number. She claimed that was called by Respondents' agents and despite declining their offers regarding their loan products and visiting their offices to raise her complaint, she still received unending phone calls from the Respondents' agents.

#### **E. SUMMARY OF EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

10. The Complainant lodged her complaint through the complaint form and attached the messages she was receiving from different phone numbers who she alleged belonged to the Respondents' agents.
11. The messages she attached indicated were from different phone numbers and received at diverse dates between May 2023 and November 2023.

##### **ii. THE 1<sup>ST</sup> RESPONDENT'S RESPONSE**

12. The 1<sup>st</sup> Respondent stated that the Complainant's phone number did not exist in its database and that they did not store or process the Complainant's personal data.

13. Further, the 1<sup>st</sup> Respondent stated that they identified various phone numbers that were used to contact the Complainant as numbers registered to their independent sales agents and a team leader. However, there were some phone numbers that the 1<sup>st</sup> Respondent indicated did not exist in its database.
14. Subsequent to the notification of complaint, the 1<sup>st</sup> Respondent indicated that it has terminated the agents for breach of the terms of their independent sales agent agreements. This was demonstrated by attaching copies of the said agreements and the termination letters. The 1<sup>st</sup> Respondent also indicated that it has initiated a disciplinary process for the team leader in accordance with their internal Human Resources Procedures.
15. The 1<sup>st</sup> Respondent averred that all its staff attend regular and continuous data protection training to sensitize them of the data protection principles, rights and the obligations to ensure that they should only market to persons who have expressly consented to the same using the opt-in methods and that any marketing communication must include an opt-out mechanism for the data subject(s). However, the 1<sup>st</sup> Respondent did not provide proof of the said training.

### **iii. THE 2<sup>ND</sup> RESPONDENT'S RESPONSE**

16. The 2<sup>nd</sup> Respondent stated that the Complainant's phone number did not exist in its database and that they did not store or process the Complainant's personal data.
17. They stated that they identified various phone numbers that were used to contact the Complainant as numbered registered to their independent sales agents.
18. The 2<sup>nd</sup> Respondent confirmed that two (2) agents were terminated on 18<sup>th</sup> October 2023 pursuant to a previous complaint lodged with this Office and the other agents have since been terminated pursuant to the notification of this complaint. Further, the 2<sup>nd</sup> Respondent provided independent sales agent agreements, data protection training acknowledgment forms and termination letters as proof of the same.

19. The 2<sup>nd</sup> Respondent averred that all its agents attend regular and continuous data protection training to sensitize them of the data protection principles, rights and the obligations to ensure that they should only market to persons who have expressly consented to the same using the opt-in mechanisms that they have established.

20. Further, the 2<sup>nd</sup> Respondent indicated that to ensure compliance with the Act, they have amended their independent sales agent agreement to impose obligations on the agents to ensure that every marketing communication has an opt-out method for the data subjects. They attached the amended agreement as proof of the same.

#### **F. ISSUES FOR DETERMINATION**

21. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was a violation of Complainant's rights under the Act;
- ii. Whether the Respondents fulfilled their obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

#### **I. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT**

22. Section 26 (a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put.

23. The Respondents, through their agents, by not informing the Complainant of the use to which her personal data was to be put at the point of collection of the personal data, violated her right to be informed. The Respondents' agents collected the mobile phone number of the Complainant and did not inform her that it was to be used to send promotional messages to her and to make endless calls to her.

24. Section 26 (c) of the Act provides for the right of a data subject to object to the processing of all or part of their personal data. The Complainant objected

to the processing of her personal data by declining their offers and visiting the 1<sup>st</sup> Respondent's offices to raise her concern.

25. Despite having objected to the further processing of her personal data, the 1<sup>st</sup> Respondent ignored/failed to stop sending the promotional messages and therefore violated the Complainant's right to object to the processing of his personal data.

## II. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

26. The Respondents are data controllers within the definitions of the Act and therefore have obligations pursuant to the Act.

27. The Respondents had an obligation under Section 25 of the Act to ensure that the Complainants' personal data is, amongst others:

- i. processed in accordance with their right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the Complainant;
- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

28. In collecting personal data, the Respondents are mandated by Section 28 (1) of the Act to collect the data **directly** from the data subject. Section 28 (2) sets out instances where personal data may be collected indirectly. The Respondents did not demonstrate that any of the conditions set out in Section 28 (2) were relevant in this matter.

29. Further, Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;

- iii. the purpose of collection of their personal data;
- iv. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondents had a duty to notify the Complainant of her rights under the Act, the fact that her mobile phone number was collected to be used to send him promotional messages and call her regarding their services, and the measures in place to ensure safety of the Complainant's personal data. The Respondents failed to fulfil this obligation under Section 29 of the Act.

30. Section 30 of the Act states that a data controller or data processor shall not process personal data **unless the data subject consents** to the processing for one or more specified purposes. The Respondents failed to prove that it had obtained prior consent from the Complainant before processing her personal data.

31. Further, Section 32 of the Act places the burden of proof on the Respondents for establishing a data subject's consent to the processing of their personal data. This burden was not discharged by the Respondents as they did not prove that it had obtained Consent from the Complainant before processing her personal data.

32. Additionally, no evidence was tabled by the Respondents to prove that they obtained prior consent from the Complainant to use her personal data for commercial purposes in accordance with Section 37 (1) (a) of the Act. Further, no evidence was tabled to prove that the Respondent is authorised under any written law and that the Complainant was informed of such use when her data was collected contrary to Section 37 (1) (b) of the Act.

33. Section 42 (2), (3) & (4) of the Act provides as follows -

*(2) Where a data controller is using the services of a data processor—*

*(a) the data controller shall opt for a data processor who provides sufficient guarantees in respect of organisational measures for the purpose of complying with section 41(1); and*

*(b) the data controller and the data processor shall enter into a written contract which shall provide that the data processor shall act only on instructions received from the data controller and shall be bound by obligations of the data controller.*

*(3) Where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed to be a data controller in respect of that processing.*

*(4) A data controller or data processor shall take all reasonable steps to ensure that any person employed by or acting under the authority of the data controller or data processor, complies with the relevant security measures.*

34. The particulars of the contract envisaged between the Data Controller and the Processor are as espoused in Regulation 24(2) of the Data Protection (General) Regulations.

35. The 1<sup>st</sup> Respondent's independent sales agreement included a reasonable clause on data protection and the opt-out methods put in place for data subjects. However, a perusal of the termination letters as a measure undertaken by the 1<sup>st</sup> Respondent to resolve this complaint indicate that only one agent was terminated. The 1<sup>st</sup> Respondent did not provide proof of termination of the other agents that it indicated were registered as their independent sales agents.

36. As for the 2<sup>nd</sup> Respondent, they demonstrated that they took action against the responsible agents, by dismissing them. All the said agents signed the Agents Data Protection Basics Training Acknowledgment Form, confirming their understanding of data protection and the company's privacy statement. In that regard, this Office determines that the 2<sup>nd</sup> Respondent took prompt action to

remedy the conduct of their independent sales agents, and hence responsibility cannot be imposed on them.

37. The 1<sup>st</sup> Respondents is hereby found liable for violation of their obligations under the Act.

### **III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.**

38. Pursuant to Regulation 14 (2) of the Enforcement Regulations, a determination shall state the remedy to which the complainant is entitled. Further, the remedies are provided for in Regulation 14 (3) of the Enforcement Regulations.

39. The Complainant sought that the Respondents stop calling and texting her.

40. The 1<sup>st</sup> Respondent failed to prove to this Office that they terminated all the offending agents' contracts. They only provided proof of termination of one sales agent and therefore this Office has no evidence to prove that they dealt with all the offending agents with regards to this complaint. The 2<sup>nd</sup> Respondent on the other hand provided such proof.

41. This Office also notes that 1<sup>st</sup> Respondent's independent sale agents' agreements have an opt-out mechanisms but does not have provisions for the sales agents to stop calling data subjects who have not consented to their phone numbers being processed in such a manner. In this regard, an Enforcement Notice shall be issued against the 1<sup>st</sup> Respondent.

42. Pursuant to Regulation 14 (2) (e), this Office directs the 1<sup>st</sup> Respondent in this case to put in place clear consent mechanisms for processing data subject's phone numbers both in terms of sending promotional messages and calling them regarding their services.

## G. FINAL DETERMINATION

43. The Data Commissioner therefore makes the following final determination;

- i. The 1<sup>st</sup> Respondent is hereby found liable for infringement of the Complainant's rights and violation of its obligations under the Act;
- ii. An Enforcement Notice shall be issued against the 1<sup>st</sup> Respondent;
- iii. The complaint against the 2<sup>nd</sup> Respondent is hereby dismissed; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 14<sup>th</sup> day of February, 2024.



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**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**