



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2427 OF 2023

MARY GATHONI MWAURA.....COMPLAINANT

-VERSUS-

**KENYA BANKERS SAVINGS & CREDIT
CO-OPERATIVE SOCIETY LIMITED.....1ST RESPONDENT**

**MUGA AUCTIONEERS & GENERAL
MERCHANTS.....2ND RESPONDENT**

DETERMINATION

(Pursuant to Section 8 (1) (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 complaint lodged against Kenya Bankers Savings & Credit Co-operative Society Limited (hereinafter as 'the 1st Respondent') and Muga Auctioneers & General Merchants (hereinafter as 'the 2nd Respondent') relates to the alleged phone calls and text messages directed at Mary Gathoni Mwaura (hereinafter as 'the Complainant') by the Respondents and/or their agent regarding a loan that she was not a party to.

B. LEGAL BASIS

2. 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.
3. The Office of the Data Protection Commissioner (hereinafter as 'this Office' 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.

4. Section 8 (1) (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.
5. This determination is premised on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as '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

6. The Office received a complaint from Mary Gathoni Mwaura dated 22nd November, 2023 against Kenya Bankers Savings & Credit Co-operative Society Limited and Muga Auctioneers & General Merchants.
7. The 1st Respondent is a Savings and Credit Co-operative Society (SACCO), regulated by the Sacco Societies Regulatory Authority (SASRA), which offers credit facilities to its members.
8. The 2nd Respondent is an auctioneer within the definition provided under Section 2 of the Auctioneers Act Cap 526.
9. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against them *vide* two letters both dated 19th December, 2023 and referenced ODPC/CONF/1/5 VOL 1 (644) and ODPC/CONF/1/5 VOL 1 (648). The Respondents were required to respond within 14 days of receipt of the letters. In the Notification of the Complaint filed against the Respondents, the Respondents were to provide: -
 - 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 mitigation measures adopted or being adopted to address the complaint;
 - d. The Standard Contract that they have between themselves and the Complainant, if any;

PK

- e. Details of how they obtained, stored and processed the Complainant's personal data and whether the Complainant consented to processing of her personal data.
 - f. The legal basis relied upon to engage with the Complainant and whether they fulfilled the duty to notify under Section 29 of the Act;
 - g. Any other relevant information regarding the complaint.
10. The 1st Respondent responded to the Notification of Complaint letter *via* email on 27th December, 2023.
11. The 2nd Respondent responded to the Notification of Complaint letter *vide* a letter dated 22nd December, 2023.
12. This determination is therefore as a result of analysis of the complaint as received and the responses from the Respondents.

D. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S CASE

13. The Complainant alleged that she received calls and text messages from one Simon Nyongesa of mobile phone number 0733****20 and 0722****80 regarding an alleged loan taken by her husband. She produced screenshots of her call log and messages as proof of the allegations made.
14. The Complainant averred that she was not a member of the 1st Respondent's SACCO and that the aforementioned Simon Nyongesa, who contacted her, purported to act on the instructions of the 1st Respondent given through the 2nd Respondent.
15. The Complainant further alleged that the said Simon Nyongesa threatened to auction her house and car which were not related to the alleged loan and that he also stated that he obtained her mobile phone number from the 1st Respondent as she was listed as a next of kin in the personal details of her husband.
16. Additionally, the Complainant stated that she was aggrieved by incessant calls and issuance of threats involving a loan that she is not party to. Further the said agent also threatened to auction her family property which was not attached to the alleged loan.
17. Further, the Complainant stated that she suffered stress from the calls directed at her as she was in hospital and that the calls made her condition worse as the level of threats and drastic action threatened to be taken against her family

were grave and that she was being threatened over information that she was not privy to.

18. The Complainant prayed for "reasonable remedies" for the stress suffered as a result of the Respondents' actions.

II. THE 1ST RESPONDENT'S RESPONSE

19. The 1st Respondent, via an email dated 27th December 2023, responded to the Notification of Complaint letter.

20. In its response, the 1st Respondent stated that the Complainant is the spouse to its SACCO member namely, G****e W****e, who had earlier on raised similar issues with the Sacco Societies Regulatory Authority (SASRA).

21. The 1st Respondent confirmed that its engagement with the said G****e W****e had previously resulted into a resolution of all the matters as he had made a proposal to repay his outstanding loan.

22. The 1st Respondent mentioned that the conduct of the debt collector was per its set Service level Agreement with no unethical behaviour since the debt collector is one of its most outstanding service providers. Moreover, that said the agent only contacted the wife of the loanee, being the next of kin in its records with a view of reaching the loanee. However, the next of kin who is the complainant appears to have taken it as a privacy invasion.

23. The 1st Respondent stated that the Complainant is not its member but a next of kin with no contractual obligation with the SACCO. Additionally, it used the information provided for the best interest of the member rather than compromise the complainant contact information.

24. In addition to the above, the 1st Respondent stated that it is its assumption that its member, G****e, must have constructively informed the Complainant (his wife) that her contact information had been shared with the SACCO in case of need, as next of kin.

25. The 1st Respondent averred that the nature of usage of the Complainant's contact is purely within the confines of the reason for the data held and it does not therefore find that its actions were an invasion of privacy.

26. The 1st Respondent attached correspondences between itself and SASRA, a letter from itself to G****e W****e, dated 23rd November 2023, and a copy of

a handwritten payment proposal letter from the said G****e to itself as proof of the above statements.

III. THE 2ND RESPONDENT'S RESPONSE

27. The 2nd Respondent, via a letter dated 27nd December 2023, responded to the Notification of Complaint letter.

28. In its response, the 2nd Respondent stated that the said Simon Nyongesa who allegedly contacted the Complainant purporting to have instructions from the 2nd Respondent, is a total stranger to them as he is not their employee, agent, broker and/or representative of their firm in any capacity.

29. The 2nd Respondent further stated that it has never been in the panel of service providers for the 1st Respondent for the entire period it has been in business and therefore it has never been engaged by the 1st Respondent at all.

30. Finally, the 2nd Respondent stated that it was going to file an official complaint with the police against Simon Nyongesa for defamation and impersonation against its firm for the necessary legal redress.

E. ISSUES FOR DETERMINATION

31. It is not in contention that the Complainant was contacted regarding a loan that she was not a party to. The issues that therefore fall for determination by this Office are:

- i. Whether next of kin details may be used when a loanee defaults on payments;
- ii. Whether the 2nd Respondent contacted the Complainant on instructions of the 1st Respondent;
- iii. Whether there was a violation of the Complainant's rights under the Act; and
- iv. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER NEXT OF KIN DETAILS MAY BE USED WHEN A LOANEE DEFAULTS ON PAYMENTS

32. The Barron's Dictionary defines the "next of kin" as:

"The term is used generally with two meanings: (1) nearest blood relations according to the law of consanguinity, and (2) those entitled to take under

statutory distributions of intestates estates. In the latter case, the term is not necessarily confined to relatives by blood, but may include a relationship existing by reason of marriage and may well embrace person who in the natural sense of the word, bear no relation of kinship at all."

33. The main purpose of collection of next of kin details by a SACCO is for management of accounts of the account holder in the event of incapacity or death of the account holder.
34. The Complainant's husband is a member of the 1st Respondent's SACCO and listed the Complainant as his next of kin according to Form A3 of the Kenya Bankers Savings and Credit Co-operative Society Limited, which was provided by the 1st Respondent.
35. The 1st Respondent admitted to using the next of kin details provided by G****e W***e, who is the husband to the Complainant, to engage the Complainant regarding a loan taken by the said G****e W***e.
36. The Complainant on the other hand stated that she was not a member of Kenya Bankers SACCO and that she had received threatening calls and messages regarding a loan that she was not party to.
37. It is not in dispute that the Complainant was not a party to the loan as no evidence was adduced by the 1st Respondent indicating that the Complainant had consented to be a guarantor or referee of the loan taken by the husband.
38. Section 25 of the Act provides for the principles of data protection.

Section 25 (c) states that, "every data controller or data processor shall ensure that personal data is collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes."

39. From the above principle of purpose limitation, it is clear that next of kin details should only be used for the purpose which they are collected, which is for management of accounts of the account holder in the event of incapacity or death of the account holder.
40. In this particular complaint, the next of kin details provided were used to contact the Complainant regarding a loan she was not party to and therefore the 1st Respondent violated the principle of purpose limitation by further

WJ

processing the details in a manner incompatible with the purpose for which they were collected.

41. The Complainant had no contractual obligation with the 1st Respondent and therefore should not have been contacted regarding the loan despite the fact that the loanee was the Complainant's husband. The 1st Respondent should have contacted the guarantors/referees of the loanee if it was unable to reach the loanee and not his next of kin.

42. This Office therefore finds that next of kin details cannot be used to contact a next of kin when a loanee defaults on payments as this will be a violation of the purpose limitation principle of data protection.

II. WHETHER THE 2ND RESPONDENT CONTACTED THE COMPLAINANT ON INSTRUCTIONS OF THE 1ST RESPONDENT

43. The 2nd Respondent in its response denied that it contacted the Complainant. It further stated that it has never been in the panel of service providers for the 1st Respondent for the entire period that it has been in business and therefore has never been engaged by the 1st Respondent at all.

44. The 1st Respondent, in its response, confirmed to having engaged a debt collector to contact the Complainant regarding a loan taken by the Complainant's husband.

45. No evidence was adduced to prove that the 1st Respondent engaged the services of the 2nd Respondent as a debt collector. In a letter dated 23rd November 2023, addressed to the loanee, G****e W****e, the 1st Respondent indicated that it had engaged the services of M/S Trackfinders Debt Collectors to recover the amounts owed.

46. From the foregoing, it is evident that the 2nd Respondent did not contact the Complainant and had no instructions to recover the subject loan.

III. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

47. 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. The 1st Respondent by not informing the Complainant that her personal data was to be used in the event that G****e W****e defaulted on his loan, violated the Complainant's right to be informed.

48. This right was not upheld by the 1st Respondent as it further processed the next of kin details provided in a manner incompatible with the purpose for which they were collected, and used the same to contact the Complainant without obtaining prior consent from her.

IV. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS.

49. The Complainant sought 'reasonable remedies' from the stress suffered as a result of the threatening calls and messages directed at her.

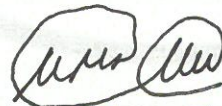
50. Having found that the 1st Respondent violated the Complainant's rights under the Act as well as the principle of purpose limitation, an Enforcement Notice shall be issued against the 1st Respondent pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

F. FINAL DETERMINATION

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

- i. The 1st Respondent is hereby found liable;
- ii. The complaint against the 2nd Respondent is hereby dismissed;
- iii. An Enforcement Notice to issue to the 1st Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 16th day of February 2024.



Immaculate Kassait, MBS
DATA COMMISSIONER