



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 2506 OF 2023

DANIEL NDAMBUKI.....COMPLAINANT

-VERSUS-

AVENTUS TECHNOLOGY LIMITED.....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 Complainant lodged a complaint against the Respondent alleging that through its customer support agents, the Respondent was calling him endlessly over someone else who borrowed a loan using their Lendplus loan application.

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 '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.

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 (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. This Office received a complaint from the Complainant on 5th December 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.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 16th January 2024 referenced ODPC/CONF/1/5 VOL 1 (721). In the notification of the complaint, the Respondent was informed that if the allegations by the Complainant were true, they were in violation of various Sections of the Act. Further, the Respondent was 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. Details of how they obtained the Complainant's personal details;
 - d. The legal basis relied upon to process the Complainant's personal details and whether and how they fulfilled the duty to notify data subjects prior to collection of their personal data pursuant to Section 29 of the Act;

- e. Whether the Complainant consented to the processing of his personal data; and
 - f. 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.
8. The Respondents responded to the allegations *vide* a letters dated 8th and 15th February 2024.

D. NATURE OF THE COMPLAINT

9. The Complainant alleged that he was receiving numerous calls from certain phone numbers 0709****00 and 0111*****44 over someone else who borrowed a loan from Lendplus, a product of the Respondent.
10. The Complainant stated that the caller could not disclose how they obtained his contact and that they should have called the borrower instead of pestering him with calls and verbal abuses.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANTS' CASE

11. The Complainant reported receiving harassing calls from multiple phone numbers regarding a loan he was unaware of. He added that all of the representatives said they were phoning from Lendplus.

ii. THE RESPONDENT'S RESPONSE

12. The Respondent filed an initial response to the notification of complaint on 8th February 2024 and stated that the borrower of the loan was well known by the Complainant and that during the loan application process, the borrower gave out the Complainant's phone number to be used as the contact person when he was not available or reachable.
13. The Respondent stated that a pop-up message was sent to the Complainant to either Accept or Reject to be the borrower's contact person. In this case, the Respondent alleged that the Complainant clicked "Accept" when he received

the pop-up message and therefore was to be contacted whenever the borrower was not reachable.

14. The Respondent provided several call recordings as part of its evidence. On one telephone conversation between its agent and the Complainant on 5th December 2023, the Complainant acknowledged to know the borrower and that his details were provided by the borrower for purposes of being a contact person.

15. During another call recording provided by the Respondent, the Complainant stated that the borrower also owed him money and that he was not picking his calls as well.

16. The Respondent stated that in their Terms and Conditions, any customer who applies for a loan must provide a contact person that is well known to them and the contact person is always contacted in form of a "pop-up message" on their phone to give their consent by either accepting or rejecting to the borrower's contact person.

17. The Respondent stated that this process only happens to customers who have qualified for a loan from them after proper KYC is conducted.

F. INVESTIGATIONS UNDERTAKEN

18. Pursuant to Regulation 13 (3) of the Enforcement Regulations, the Data Commissioner, in conducting investigations, is to be guided by the provisions of the Fair Administrative Action Act, 2015. Based on the Respondent's response, it was prudent to get additional information from the Respondent.

19. Vide an email dated 12th February 2024, the Office directed that the Respondent provides the following:

- a) Details on the date that the Pop-Up message was sent to the Complainant.
- b) Proof that the complainant accepted to be a contact person after receiving the pop-up message.
- c) Any other relevant information to assist in resolving the complaint to the satisfaction of the Complainant.

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20. The Respondent provided a second response dated 15th February 2024 and provided a screengrab showing an event log ID 35352 containing a message which was alleged to have been sent to the Complainant's phone number (+254 711****20). The event log, however, did not show the date the message was sent to the Complainant, as requested by this Office.
21. The Respondent also provided another screengrab showing a prompt that the Complainant received, requiring him to confirm his contact and "receive guaranteed promocode". The screengrab also showed a tab stating "Agree & Continue". The Respondent indicated that that was the receipt the contact person received before the borrower gets the approval of the loan. If the contact person does not agree, the process is halted until the borrower gets the right contact person.
22. The Respondent also called this Office to consider the fact that the Complainant did indeed consent to having a relationship with the borrower in the first call and offered to help to trace the borrower.
23. The Respondent attached the borrower's profile in their system and highlighted where the Complainant's details, being the emergency contact person's details, are captured. The details included the Complainant's name and phone number and the relationship to the borrower indicated as "friend".
24. This Office then wrote to the Complainant *via* an email dated 16th February 2024 to confirm whether he received the pop-up message as alleged by the Respondent. The Complainant in his response on 18th February 2024, stated that he did not receive the pop-up message and therefore did not consent to be added as an emergency contact.
25. It was on this basis that this Office conducted a site visit on 27th February 2024 at the Respondent's premises to conduct an investigation on the emergency contact onboarding system.
26. From the site visit, it was confirmed that the screengrab evidence log ID 38895352 cited by the Respondent in its 2nd Response was dated 15th February 2024. It was also noted that there was no log indicating that the system sent

out a pop-up message to the Complainant on or about 21st November 2023, being the date that the borrower's loan was approved.

27. On 28th February 2024, the Respondent provided another response to this Office where they provided another screengrab showing log ID 29675555 indicating that it was sent on 21st November 2023 to the Complainant requesting for his consent to be added as a third party.
28. The Respondent also stated that whenever a data subject consents to be added as a contact person his mobile phone number turns green in their system. However, from the Respondent's 2nd response the Office notes that the Complainant's phone number in their system had not changed colour as alleged.
29. This Office's investigations established that there was a discrepancy between the evidence submitted by the Respondent on 28th February 2024 and that initially presented on 15th February 2024. Specifically, the discrepancies were on the log IDs which were expected to be identical as they pertain the same event.
30. Secondly, in its 2nd response to this Office, the Respondent omitted critical details regarding the date which the pop-up message was sent to the Complainant. The date was categorically requested by this Office in its quest to find out when exactly the Complainant was listed as an emergency contact by the borrower.
31. It is upon further inquiry that this Office found that log ID 29675555 was dated 15th February 2024 and it was not the subject to the complaint. The Respondent therefore misrepresented facts and attempted to mislead this Office.
32. With regards to the onboarding process of emergency contact persons by the Respondent, investigations revealed that the emergency contact is not contacted and does not receive the pop-up prompt in order to consent to be added as an emergency contact until the borrower's loan application is reviewed and approved.

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33. Additionally, as at the time the loan is approved, a prompt with a web link is sent *via* text message to the emergency contact's phone number requiring them to agree or disagree to be added as an emergency contact. Upon clicking on the link, the person is redirected to a webpage where they can accept or decline to be added as an emergency contact.

34. During the site visit investigations, this Office noted various concerns with regards to the onboarding process of emergency contacts including;

- i. Emergency contacts do not get an acknowledgement after they have agreed or declined to be added as emergency contacts persons.
- ii. The Disagree button was not as conspicuous as the Agree button. This is indicative of a 'dark pattern', that is, a deceptive design patterns on the online interface that impairs the ability of the data subject to make autonomous, informed choices and/or decisions.
- iii. In their response, the Respondent indicated that incase the contact person does not agree to be added as a contact person the loan application process is halted till the loan applicant provides the right contact person. However, the Respondent's Director confirmed that they proceed to disburse the loan despite the emergency contact not giving consent.
- iv. The Respondent stores personal data belonging to emergency contacts who have not given consent for a period of two years.
- v. The content of the message is enticing as it offers a promocode and coupons as opposed to having the contact person to easily consent to be added as a contact person.

G. ISSUES FOR DETERMINATION

35. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act;

- ii. Whether the Respondent fulfilled its 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 AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

36. The Complainant is a data subject as per the definition under the Act and has rights as stipulated under the Act. Specifically, under Section 26 (a) the Complainant had the right to be informed of the use to which his personal data was to be put.

37. From the Respondent's response, the evidence adduced and investigations conducted by this Office, the Complainant was not informed that he was onboarded as the borrower's emergency contact. There was no evidence from the Respondent to demonstrate that they informed him that the borrower listed him as an emergency contact.

38. Therefore, the Complainant's right under Section 26 (a) was infringed by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

39. The Respondent is a data controller as the parent company of all the products that operate under it and is therefore mandated to fulfil its obligations as such under the Act.

40. Section 28 (1) provides that a data controller **shall** collect personal data **directly** from the data subject. Section 28 (2) gives instances where a data controller can collect personal data indirectly, however, the Respondent did not prove that it had any basis for indirect collection of the Complainant's personal data, specifically under Section 28 (2) (c) where a data controller can collect personal data indirectly where the data subject has consented to the collection from another source.

41. In view of the above, the Respondent's defence is that it collected the Complainant's phone number from the borrower of its loan products. However, the Respondent failed to prove that the Complainant consented to the collection of his phone number from the borrower of the loan. Their system did not show that the Complainant was sent the alleged pop-up message in order to consent being listed as the borrower's emergency contact person.

In as much as the Complainant seemed like he knew the borrower from the call recordings provided by the Respondent, that did not amount to consent to have his personal details in the Respondent's system and justifying the calls made to him with regards to the borrower's whereabouts.

42. Section 29 mandates a data controller to, **before** collecting personal data, in so far as practicable, inform the data subject of, among others,

- a) the rights of data subject specified under section 26;*
- b) the **fact that personal data is being collected**;*
- c) the **purpose for which the personal data is being collected**;*
- d) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted;*
- e) the contacts of the data controller or data processor and on whether any other entity may receive the collected personal data; and*
- f) a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.*

43. In the notification of complaint to the Respondent, this Office directed that they prove that they fulfilled the above obligation. The Respondent did not respond to this particular question and according to the evidence that they provided, they did not notify the Complainant of any of the above requirements. The Complainant was not aware that his personal data was collected by the Respondent and the purpose for collection up until the time he was called regarding the whereabouts of the borrower.

44. The Act under Section 30 provides for the lawful processing of personal data and states that a data controller **shall not** process personal data, unless the

data subject **consents** to the processing for one or more specified purposes or the processing is necessary for the provisions indicated under Section 30 (1) (b). The Respondent did not demonstrate that the Complainant consented to the processing of his personal data nor did they prove that the processing was necessary for any of the provisions under Section 30 (1) (b).

45. Further, the conditions of consent are set out under Section 32 of the Act which provides that the data controller shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose. From the analysis of the evidence adduced and investigations conducted by this Office, the Respondent failed to discharge the burden imposed upon them by Section 32 of the Act.

46. In light of the above, this Office finds that the Respondent did not fulfil its obligations under the Act.

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

47. 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.

48. The Complainant's right under Section 26 (a) was infringed upon by the Respondent. However, there was no apparent financial loss upon the Complainant. That notwithstanding, Section 65 of the Act provides that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. The Section indicates that damage included financial loss and damage not involving financial loss including distress.

49. The Complainant was constantly receiving calls from agents of the Respondent. This Office therefore makes an order that the Respondent compensates the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** as damages for violation of the Complainant's rights under Section 26 (a) of the Act.

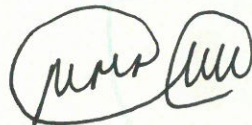
50. The Respondent is also in violation of several obligations under the Act as analyzed above and therefore, pursuant to Section 58 of the Act, an Enforcement Notice shall be issued against the Respondent.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for infringement of the Complainant's rights and non-compliance of its obligations under the Act;
- ii. The Respondent to pay the Complainant a sum of **Kenya Shillings Two Hundred and Fifty Thousand (Kshs. 250,000)** as damages;
- iii. An Enforcement Notice to issue against the 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 4th day of March 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

