



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 169 OF 2024

DR. BERNARD SHIAUNDA AETE.....COMPLAINANT

-VERSUS-

NCBA BANK KENYA PLC.....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 filed a complaint on 26th January 2024 alleging that he received false and misleading information regarding his loan statements from the Respondent, and the said information was simultaneously sent to a third party despite numerous requests to have the third party's contact removed as an alternate contact from his account.

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' 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 (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. This Office received a complaint from the Complainant on 26th January, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the Complainant, who was an 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 2nd February 2024 and referenced ODPC/CONF/1/5 VOL 1(774). 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 allegations made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to process and engage with the Complainant's personal data;
 - d. Details of how it obtains, stores and processes personal data;



- e. A detailed description of how data subjects can exercise their rights under the Act;
 - f. Whether the third party, Ms. J***** N***** consented to the processing of her personal data;
 - g. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant and to ensure that such occurrence mentioned in the complaint does not take place again; and
 - h. Any other relevant information it wishes the Office to consider.
8. The Respondent responded to the Notification of Complaint letter *vide* a letter dated 19th February, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent, the Complainant's rejoinder, and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that he received false and misleading information regarding his loan statements from the Respondent, and the said information was simultaneously sent to a third party despite numerous requests to have the third party removed as an alternate contact from his account.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant stated that he has loan facilities taken on 21st December 2022 for KES 9,043,407/= and on 13th June 2023 for KES 579,235/= with the Respondent institution which he opened at the Moi Avenue Mombasa Branch.
12. On opening the said facilities, the Complainant was required to furnish the Respondent with his telephone number as well as an alternate telephone number.
13. The Complainant stated that he gave a number of his former wife – Ms. J***** N*****. Later on, he went to the Respondent's institution and

changed the alternate number to that of one of his son's and asked the Respondent to effect the changes immediately.

14. The Complainant stated that on 20th November 2023, the Respondent wrote to confirm that the loan accounts were well serviced. The Complainant produced a letter dated 20th November 2023 as proof.

15. The Complainant stated that on diverse dates from February 2023, he received false and misleading information from the Respondent on his telephone line and the messages simultaneously sent to the alternate number as below;

- a) On 28th February 2023, there was a credit (positive balance) on the loan account for KES 1,686,000/= which the Respondent read as a debit. The Complainant produced loan statements as well as a screenshot of a message received from the Respondent as proof.
- b) On or around 28th February 2023, the Complainant called the Respondent and asked them not to send notifications to the alternate number of Ms. N*****. The Complainant also informed the owner of the alternate number that he had communicated with the Respondent to stop sending to her notifications about his bank loan balances.
- c) On 28th March 2023, the Respondent wrote to the Complainant asking for KES 218,172.80/= which amount did not reflect on the loan bank statement around that date. He produced loan statements as well as a screenshot of a message received from the Respondent as proof.
- d) On 30th March 2023, the Respondent sent out a message claiming that the sum of KES 218,531.40 was overdue by 3 days. However, that amount did not reflect on the statement. The statement did not reflect a debit by the same amount on the said date. The Complainant produced loan statements as well as a screenshot of a message received from the Respondent as proof.
- e) On 1st April 2023, the Respondent sent out a message alleging that the amount of KES 219,248.70/= was overdue by 5 days. The statement does not show a negative balance on the said date. The Complainant

produced loan statements as well as a screenshot of a message received from the Respondent as proof.

- f) On 3rd April 2023, the Respondent sent out a message alleging that an amount of KES 219,248.70/= was overdue by 7 days. However, the statement shows that there were no outstanding payments. The Complainant produced a screenshot of a message received from the Respondent as proof.
- g) This early April, messages to the alternate number continued and the Complainant again asked the Respondent to stop sending such notifications to the alternate number. The Complainant alleged that Respondent told him to put it in writing.
- h) On 4th April 2023, the Complainant wrote to the Respondent asking for a change of the alternate telephone number to that of his son. The Complainant produced a letter received by the Respondent on 4th April 2024 as proof.
 - i) In the above letter, the Complainant asked that all notifications be sent to the primary number alone.
 - j) In spite of such clear and unequivocal instructions, the Respondent continued sending notifications (containing false information) to a third party (previous alternate number).
- k) Ms. N***** kept receiving notifications from the Respondent.
- l) The Complainant alleged that on 24th May, Ms. N***** sent a letter to the Respondent complaining about being given information she does not need.
- m) On 24th May 2023, the Complainant sent a WhatsApp Message to the Respondent complaining about Ms. N*****'s letter and wondering why the Respondent was still sending notifications to her.
- n) Subsequently on 24th May 2023, the Respondent confirmed that the problem had been sorted out.
- o) On 30th May 2023, Ms. N***** received another notification from the Respondent concerning the same account.

- p) On 30th May at 1657 hours, the Respondent confirmed that the messages will not go out again to Ms. N*****.
- q) On 31st August 2023, another notification was sent to both the Complainant and to Ms. N*****.
- r) On 11th and 12th September, the Respondent sent out messages alleging that the account was in arrears by KES 10,226.25 and KES 10,234.6 respectively. This information was not supported by the statement produced by the Respondent which shows a positive balance. The Complainant produced loan statements as well as a screenshot of a message received from the Respondent as proof.
- s) On 12th September 2023, the Complainant sent a message received by Ms. N***** to the Respondent's Relationship Manager (Mr. D***** T*****). Mr. T***** said that the 'impugned' alternate number had been deleted from the system and promised to confirm this information the following day.
- t) On 14th September 2023 at 1630 hours the Respondent (Mr. T*****) wrote to say that the problem had been rectified.
- u) On 7th November 2023 at 2029 hours, the Respondent sent another notification to Ms. N*****. Ms. N***** wrote to the Respondent asking them to stop sending her such notifications. The Complainant produced a screenshot of an email sent to the Respondent as proof.
- v) On 16th November 2023, the Respondent sent another notification to Ms. Nkatha advising about the change of interest rates on the Complainant's loan account. The Complainant attached a screenshot of the said message as proof.
- w) The Complainant wrote to the Respondent (Mr. T*****) informing him of the notifications to Ms. N***** and Mr. T***** wrote to apologize and said that he had escalated the matter.

16. The Complainant averred that the Respondent divulged confidential data to third parties contrary to express and written instructions for a period of about eight months.

17. Further, the information so divulged was false, malicious and deliberately calculated to injure the image of the Complainant before the third party and any other persons to whom the information could be further conveyed.
18. A perusal of the bank statement dated 20th November 2023, which covers the entire loan period does not show that the Complainant owed the Respondent money at any time. The statement confirmed that the account had been conducted satisfactorily. The Complainant produced a letter dated 20th November 2023 from the Respondent as proof.
19. The Complainant stated that the actions of the Respondent have violated his right to dignity, right to privacy, right to fair administrative action and the right to access to information.
20. The Complainant prayed for the following orders;
- a) That the Respondent be compelled to effect the changes contained in the letter of 4th April 2023.
 - b) That the Respondent be ordered to stop harassing Ms. N***** through sending her unsolicited notifications regarding the Complainant's loan bank account.
 - c) That the Respondent be ordered to stop sending out false and misleading information about bank balances on the Complainant's account.
 - d) That the Respondent be ordered to pay the Complainant the sum of KES fifty million (50,000,000/=) as compensation for continuous and present violation of the Complainant's various rights.
 - e) Costs
 - f) Any other reliefs the Office may consider just to award.

ii. THE RESPONDENT'S RESPONSE

21. The Respondent in its response confirmed that the Complainant applied for two loan facilities with it and provided his telephone number as well as his former wife's telephone number as the alternative contact.
22. The Respondent stated that on 15th January 2024, the Complainant visited the Bank's legal department and raised concerns about gross violation of his

11/1

personal data. The Complainant indicated that he had made a request to the Bank on 4th April 2023 to remove his former wife's telephone number from his account. However, the former wife continued to receive his personal loan notifications and statements as of November 2023.

23. The Respondent stated that the Complainant indicated that he had filed a formal complaint with this Office, but expressed a willingness to consider a compromise if the Bank was open to engaging in discussions to address the issues raised.

24. On the same 15th January 2024, the Respondent initiated investigations into the matter. The investigations revealed that on 5th April 2023, a day after the Bank received the Complainant's deletion request, the former wife's telephone number was removed as the alternative contact in the Complainant's account. No evidence was adduced to prove the above assertions.

25. Investigations also revealed that, at the loan application stage, the Complainant had not just provided the former wife's telephone number as his alternative contact, but also his employer's contact. Therefore, while the former wife's number had been deleted as the alternative contact in April 2023 in response to the Complainant's deletion request, it was still maintained in the system under the employer's contact field. No evidence was adduced to prove that the Complainant had added his former wife as an employer while applying for the facilities with the Respondent.

26. The Respondent stated that it uses a reporting solution called NQUEST to generate reports of customers with loan arrears, for subsequent follow up. NQUEST obtains these customer's contact information from the core banking system (T24) through a sync job between the two systems. The Respondent identified that, in the Complainant's case, the sync job erroneously updated the employer's contact from his customer record on T24- being the former wife's telephone number- as his primary contact in NQUEST. This led to the former wife receiving notifications on the Complainant's account. Consequently, no notifications or alerts in relation to the Complainant's account have been sent to the former wife's telephone number.

27. The Respondent stated that on 17th January 2024, it notified the Complainant of the effected change via SMS, phone and email. The Respondent provided a copy of the email sent as proof.
28. Further, the Respondent contacted the system vendor to provide a fix for the sync update that occurs between NQUEST and T24 to ensure that the sync job only picks the primary contact on the customer record in T24 for updating on NQUEST. This will prevent recurrence of a similar issue and on other customer records in the system.
29. The Respondent avers that the Complainant's disputes pertaining to his loan administration, including information sent out on his bank balances, are matters of contract and are to be determined by the courts if the Complainant elects to pursue that option. Nevertheless, the Bank has initiated discussions with the Complainant to address the concerns raised, noting his willingness to engage in discussions as indicated in the foregoing paragraphs, and it is reasonably expected that the impasse will be resolved amicably

F. INVESTIGATIONS UNDERTAKEN

30. The Office analysed the complaint, the response to the complaint as well as documents submitted as evidence by both parties.
31. 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 Actions Act, 2015. Based on the Respondent's response, it was prudent to get a rejoinder response from the Complainant on certain issues relevant to the investigation of this complaint.
32. This Office sought a response from the Complainant regarding the issues raised by the Respondent in its response.
33. The Complainant stated that Respondent admitted the fact that the Complainant requested the Respondent in writing certain information in April 2023.

rk

34. The Complainant stated that there is no compromise or negotiations going on between the Complainant and the Respondent as stated by the Respondent in its response and that all its averments and prayers in the complaint so remain.

G. ISSUES FOR DETERMINATION

35. In light of the above, 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. Section 26(c) of the Act provides that a data subject has a right to object to the processing of all or part of their personal data. The Complainant objected to the disclosure of his loan statements and loan notifications by informing the Respondent of the objection via a letter received on 4th April 2023. In the said letter, he requested for the immediate removal of his former wife's number as an alternate contact so that his loan statements and notifications are no longer sent to Ms. N*****.

37. The Respondent did not effect the instructions given by the Complainant and his former wife Ms. N***** continued receiving his loan related notifications for a period of **eight months**. The instructions were implemented on 16th January 2024, a period of more than eight months since the Complainant formally objected to the processing of his personal data.

38. The Respondent did not demonstrate compelling legitimate interest for the processing which overrides the data subject's interests and therefore by its action or inaction, violated the Complainant's right to object to the processing of his personal data.

rk

39. Section 40(1)(b) of the Act provides for the right of erasure and states that, "a data subject may request a data controller or data processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully."

40. In addition, Regulation 12(1)(b) of the Data Protection (General) Regulations, 2021 provides that a data subject may request a data controller or data processor to erase or destroy personal data held by the data controller or data processor where the data subject withdraws their consent that was the lawful basis for retaining the personal data.

41. The Complainant exercised the above right by informing the Respondent to remove the alternate number from his account and to ensure that all notifications are sent to his mobile number.

42. The Respondent did not prove that it had any overriding legitimate interest to continue disclosing the Complainant's personal data to a third party.

43. Regulation 12(3) of the Enforcement regulations states that, "a data controller or data processor shall respond to a request for erasure within fourteen days of the request. The Respondent took eight months to implement the instructions contrary to the above Regulations which required it to have erased the data within fourteen days.

44. From the foregoing, this Office finds that the Complainant's right to object to the processing of his personal data and the right of erasure were violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

45. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.

46. Section 30 of the Act gives instances where a data controller or data processor can lawfully process personal data. It states that a data controller or processor shall not process personal data unless the data subject consents to the

10

processing for one or more specified purposes or the process is necessary for the reasons given in subsection (b).

47. The Complainant withdrew consent when he requested the Respondent to remove the alternate number of his former wife and ensure all notifications are sent to his primary number. The Respondent still continued to divulge the Complainant's personal data to a third party despite the withdrawal of consent and did not prove that it had any lawful basis provided for under Section 30(1)(b) of the Act to continue processing the Complainant's personal data.

48. Section 25(f) of the Act provides that, "every data controller or data processor shall ensure that personal data is accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay. The Respondent did not uphold this principle by not erasing the alternate mobile number as requested in a timely manner.

49. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act.

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

50. 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.

51. The Complainant prayed for the following-

- a) That the Respondent be compelled to effect the changes contained in the letter of 4th April 2023.** The Respondent effected the said changes on 16th January 2024 as indicated in their response.
- b) That the Respondent be ordered to stop harassing Ms. N***** through sending her unsolicited notifications regarding the Complainant's loan bank account.** The Respondent effected this on 16th January 2024 when it manually deleted Ms. N*****'s contact from its systems.

HK

c) That the Respondent be ordered to stop sending out false and misleading information about bank balances on the Complainant's account. The Respondent is hereby ordered to ensure that the information it sends out to the Complainant regarding his bank balances is accurate and kept up to date.

d) That the Respondent be and is hereby ordered to pay the Complainant the sum of KES Fifty Million (50,000,000/=) as compensation for continuous and persistent violation of the Complainant's rights.

i) Section 65 of the Act provides for compensation to data subjects and states, "*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.*"

ii) Section 65(4) of the Act states that, "*damage includes financial loss and damage not involving financial loss, including distress.*"

iii) Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

iv) The Respondent is liable for violating the Complainant's right to object to the processing of his personal data and his right of erasure. While the Office finds that the Complainant's rights were violated, it declines to award the Complainant Kenya Shillings fifty million as prayed for, as the amount is so inordinately high and an erroneous estimate of the damage. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Seven Hundred Thousand (KES. 700,000/=)** as compensation as follows:

-Kenya Shillings Two Hundred Thousand (KES 200,000) for unlawful processing of the Complainant's personal data.

-Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000) for the infringement of the right to object under section 26(c) of the Act.

-Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000) for the infringement of the right to erasure under section 40 of the Act as read with Regulation 12 of The Data Protection (General) Regulations, 2021.

e) Costs. The Office makes no orders as to costs.

H. FINAL DETERMINATION

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

- i. The Respondent is found liable for violating the Complainant's right to object and the right of erasure under section 26(c) of the Act and section 40 of the Act respectively.
- ii. The Respondent is hereby ordered to ensure that the information it sends out to the Complainant regarding his bank balances is accurate and kept up to date.
- iii. The Respondent is hereby ordered to compensate the Complainant **Kenya Shillings Seven Hundred Thousand (KES. 700,000/=)**.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 24th day of April, 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**