



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 371 OF 2024

VICTORY OWINO.....COMPLAINANT

-VERSUS-

MHASIBU HOUSING COMPANY LIMITED.....1ST RESPONDENT

MHASIBU NWDT SACCO SOCIETY LIMITED.....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 Complainant filed a complaint on 4th March 2024 alleging that the Respondents used her personal data for marketing purposes without obtaining consent or having a lawful basis for processing of her personal data.

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 4th March, 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 1st Respondent of the complaint filed against it *vide* a letter dated 28th March 2024 and referenced ODPC/CONF/1/5 VOL 1(903). The Office notified the 2nd Respondent of the Complaint filed against it *vide* a letter dated 3rd April 2024 and referenced ODPC/CONF/1/5 VOL 1(910). 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 allegations made against them by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to store, process and engage with the Complainant's personal data;
 - d. Proof of consent from the Complainant to send her marketing messages;



- e. A detailed description of how they fulfill the rights of a data subject;
 - f. 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
 - g. Any other relevant information regarding the complaint.
8. The 1st Respondent responded to the Notification of Complaint letter via a memorandum of response dated 17th April 2024.
9. The 2nd Respondent responded to the Notification of Complaint letter via a memorandum of response dated 24th April 2024.
10. On 30th April 2024, the Office forwarded the Respondents' response to the Complainant and invited her to file a rejoinder to the same. The Complainant opted not to file a rejoinder to the Respondents' response.
11. This determination is therefore as a result of analysis of the complaint as received, the response from the Respondents and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

12. The Complainant alleged that the Respondents used her contact details for marketing purposes without obtaining her consent or having a lawful basis for the processing of her personal data.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

13. The Complainant averred that she joined the 2nd Respondent's SACCO sometime in 2019 and exited in October 2022. Her father, Mr. C**** O**** (Deceased) was also a member of the SACCO. The Deceased bought some property through the 1st Respondent, which is an investment arm of the 2nd Respondent.
14. The Complainant stated that the transactions for property were not completed in the Deceased's lifetime and she took over as the beneficiary of one such transaction and was therefore a client of the 1st Respondent.

15. The Complainant stated that her complaints are as follows:

i) Adequacy/Absence of Data Privacy Policies

- a) The 1st Respondent does not have a published data protection policy on its website as of the date of lodging this complaint.
- b) The 2nd Respondent has a 2 paged data privacy policy that hardly functions as a data privacy policy. This policy was also not in place at the time she became a member of the SACCO.

ii) Collection of Data by the 1st Respondent and/or the 2nd Respondent

The Complainant alleges that there are two possible ways in which the 1st Respondent received her information:

- a) It got it from the 2nd Respondent. She states that a membership to the 2nd Respondent should not arise in automatic membership in its sister company, and that detail was not included in the registration forms as she was joining the SACCO (the 2nd Respondent).
- b) Her father bought land from the 1st Respondent and when he died, she took over that transaction. However, she did not consent to receive marketing communication.

iii) Failure to Register as a Data Controller/Processor Contrary to Section 18 of the Act

- a) The Complainant stated that the 2nd Respondent is only registered as a data controller and not a processor according to this Office's online register.
- b) The 1st Respondent is not on the Office's online register of data controllers and processors.
- c) The 1st Respondent used a third-party marketing service provider "SendGrid" to send out mass emails and that this company is not on the Office's online register of data processors and controllers.

iv) Contravention of Principles of Data Protection

- a) The 1st Respondent did not process data in accordance with the right to privacy. The 1st Respondent sent an email in which recipients were put in carbon copy (cc) and everyone could see everyone else's email

addresses. This wide distribution of contact details is not in accordance with privacy rights.

- b) Data was collected by the 1st Respondent for purposes other than processing the land transaction she had originally entered into with them. Her data was used for marketing purposes.
- c) There was no adherence to the purpose limitation principle.
- d) The Complainant stated that even after they completed the sale of land process, the 1st Respondent has continued to hold her information and send marketing emails.

v) Rights of a Data Subject

- a) The 1st Respondent did not inform the Complainant that her data would be used for any other reason other than the land sale transaction they were involved in.
- b) The 2nd Respondent did not inform her of what use and to who they would distribute her data, and her rights as a data subject when she was registering as a member, and throughout the continuity of her membership.

vi) Collection of Personal Data

- a) The Complainant averred that she was a member of the 2nd Respondent's SACCO before the land transaction with it. She is concerned that the 2nd Respondent could be sharing the personal data it holds with the 1st Respondent even if she has no proof that this is actually the case.

vii) Duty to Notify

- a) While the Complainant provided her data to the 2nd Respondent for the purpose of completing a conveyancing transaction, she was not notified that it would be utilized for purposes outside that transaction. She alleges that she has since been bombarded with marketing emails, calls and texts.
- b) Further, the Complainant is concerned that her data could have been collected from the 2nd Respondent in contravention of the requirement to notify data subjects of the contacts of the data

processor and on whether any other entity may receive the collected personal data.

- c) The Complainant states that she was not given notice with a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

viii) Lawful Basis of Processing

- a) The Complainant alleges that an institution cannot have a lawful basis of processing data when they are not registered as data processors.
- b) The Complainant further states that she highly suspects that the 1st Respondent cannot pinpoint what basis it has applied for processing of her data for commercial use and marketing.
- c) In addition, the Complainant highly suspects that the 1st Respondent did not assess the impact of sharing her data and that of other data subjects with *SendGrid* or any other third parties.

ix) Commercial Use of Data

- a) The Complainant alleged that her contact details were used for marketing purposes on different platforms without consent or lawful basis contrary to Section 37 of the Act.

x) Retention of Data

- a) The Complainant alleged that she ceased being a member of the 2nd Respondent's SACCO in 2022 and yet the SACCO still retains her data and applies it for commercial purposes.
- b) The Complainant alleged that she only had one conveyancing transaction with the 1st Respondent, which has been completed, and yet her data is still retained.

xi) Transfer of Data Outside Kenya

- a) The Complainant stated that the 1st Respondent used a third-party service provider to send marketing communications. She further stated that from a prima facie perspective, the company is international and it is quite possible that the personal data used for marketing was transferred outside Kenya.

16. In conclusion, the Complainant sought the following remedies:

1. That this Office investigates the data protection practices of the 2nd Respondent.
2. That this Office issues enforcement notices against the 1st and 2nd Respondent as it shall find suitable.
3. Damages in lieu of the distress occasioned to her by the actions of the Respondents as shall be determined:
 - a) Complaint 1 – damages of Kshs. 50,000 from the 1st Respondent and Kshs.30,000 from the 2nd Respondent.
 - b) Complaint 2 – damages of Kshs. 100,000 against the 1st Respondent for improper collection of data and Kshs. 200,000 against the 2nd Respondent for illegal distribution/disbursement of data to an unregistered data processor.
 - c) Complaint 3 – damages of Kshs. 100,000 against the 2nd Respondent for processing data without having registered as a data processor, damages of Kshs. 300,000 against the 1st Respondent for operating as a data processor and controller without either registration and damages of Kshs. 500,000 against the 1st Respondent for engaging third party providers without proper safeguards and reviews in place.
 - d) Complaint 4 - damages of Kshs. 200,000 against the 1st Respondent for handling of her data in contravention of data protection principles.
 - e) Complaint 5 – damages of Kshs. 200,000 against the 1st Respondent for not informing her of her rights when handling her data and damages of Kshs. 200,000 against the 2nd Respondent for not informing her of her rights when handling her data.
 - f) Complaint 6 – damages as shall be determined by this Office.
 - g) Complaint 7 – damages of Kshs. 200,000 against the 1st Respondent, and damages of Kshs. 200,000 against the 2nd Respondent.
 - h) Complaint 8 – damages of Kshs. 1 million against the 1st Respondent and Kshs. 1 million against the 2nd Respondent as neither had a lawful basis for processing the data since neither are registered data processors.

- i) Complaint 9 – Damages of Kshs. 5 million against the 1st Respondent.
- j) Complaint 10 and 11 – damages as shall be determined by this office.

The Complainant provided copies of WhatsApp messages sent by the 1st Respondent as well as emails sent by the 2nd Respondent as proof of the allegations made against the Respondents.

ii. THE 1ST RESPONDENT'S RESPONSE

17. The Respondent in its response stated that the 1st and the 2nd Respondent are two organizations which operate as separate legal entities and ought to be treated as such for purposes of this complaint. It further stated that its response shall only be limited to the allegations levelled against it in the complaint. The 1st Respondent responded to the complaints made against it as follows:

18. On Complaint 1: Adequacy/Absence of Data Privacy Policies

The 1st Respondent stated that it is in the process of procuring a data privacy specialist to assist the organization in the formulation of a data privacy policy.

19. On Complaint 2: Collection of Data by the 1st Respondent and/or the 2nd Respondent

- a) The 1st Respondent averred that the Complainant is no stranger to it as she is the daughter of Mr. C**** O****(Deceased) who was a member of the 2nd Respondent.
- b) That the prior to the above-mentioned Deceased's demise, he had purchased land in Juja – Kiambu county from the 1st Respondent and that the Complainant being one of the beneficiaries of the Deceased, the above-mentioned property was distributed in her favour.
- c) That upon the culmination of the succession proceedings in the Estate of the Deceased, the Complainant supplied to the 1st Respondent, a certificate of Confirmation of Grant which proved that the Complainant was entitled to inherit the property which the Deceased had purchased from the 1st Respondent. The 1st Respondent provided a certified copy of the Certificate of Confirmation of Grant dated 22nd July 2021 as proof.
- d) That the Complainant has since been in communication with the 1st Respondent's officials and even attended the Juja 2 plots selection event

at the site where she willingly provided her phone contacts for purposes of receiving communication from the 1st Respondent. The 1st Respondent provided an excerpt of the Register of Client Contacts at the event as proof.

- e) The 1st Respondent stated that it lawfully obtained the Complainant's contact details and did not in any way infringe on the Complainant's data privacy rights. Further, it stated that it had fully discharged its burden of proof that it obtained the data by consent from the Complainant.

20. On Complaint 3: Failure to Register as a Data Controller/Processor

- a) The 1st Respondent stated that it is in the process of completing registration as a data controller or processor.
- b) The 1st Respondent stated that it has in place a contractual agreement with JAYNNOVATION whose servers are hosted by "SENDGRID". JAYNNOVATION is duly registered as a data controller/processor and is compliant with the Act in terms of processing of data provided by its clients which include the 1st Respondent.

21. On Complaint 4: Contravention of Principles of Data Protection

- a) The 1st Respondent reiterated that the Complainant's phone contact details were supplied to it by consent. By virtue of the Complainant's attendance at the Juja 2 plots selection event and her acquiescence in supplying her phone contacts at the event, the Complainant had acceded to receiving marketing information on plots for sale by the 1st Respondent.
- b) The 1st Respondent stated that none of the emails were sent out by it or its agents. Its staff only sent out marketing WhatsApp messages to the Complainant without copying any other third party. The Complainant's contact data and information was kept within the 1st Respondent Company and solely utilized to disseminate information on the 1st Respondent's products to the Complainant. There was no apparent breach on data protection and the Complainant has not demonstrated as such. The 1st Respondent fully complied with the requirements of Section 28(3) of the Act by ensuring that the data collected was lawfully

utilized for communication purposes to the Complainant as its client and not for dissemination to any other third parties other than the 1st Respondent's staff who are authorized individuals handling the data in the course of performance of their employment duties.

22. On Complaint 5: Rights of a Data Subject

- a) The 1st Respondent stated that the Complainant in attending its plot selection event on site and providing her contact details was explicitly aware that the 1st Respondent would disseminate information on its products via her contact details.
- b) Further, the Complainant has not provided any proof to the extent that she explicitly wrote to the 1st Respondent requesting an immediate cease to receiving information on the 1st Respondent's products via her supplied contact details.

23. On Complaint 6: Collection of Personal Data

The 1st Respondent averred that the Complainant's apprehension that the 2nd Respondent is sharing the personal data it holds in respect to its clients with the 1st Respondent is unfounded and unsubstantiated as there is nothing on record to suggest that the Complainant's data was provided to the 1st Respondent by the 2nd Respondent.

24. On Complaint 7: Duty to Notify

The Respondent stated that the Complainant was well aware that in providing her contact details at a marketing event organized by the 1st Respondent in respect to plots selection on site, she had acquiesced to receive further information on the 1st Respondent's products.

25. On Complaint 8: Lawful Basis for Processing

The 1st Respondent stated that even though it is not registered as a data controller or processor, it has at all material times relevant to this complaint managed its client's data including the Complainant for the sole purpose of marketing its market products. The Complainant has not adduced any evidence to the effect that her personal contact has been shared with third parties by the 1st Respondent other than authorized individuals or entities.

26. On Complaint 9: Commercial Use of Data

The 1st Respondent reiterated that the Complainant's data was supplied by consent for dissemination of information on the 1st Respondent's products other than the conveyance land transaction. The said data has not been utilized for any commercial purposes other than for purposes of disseminating information to already existing clients which includes the Complainant.

27. On Complaint 10: Retention of Data

The 1st Respondent stated that it is allowed to retain the Complainant's data for historical, statistical, journalistic, literature, art or research purposes pursuant to Section 39(1)(d) of the Act. That in keeping with the above provision, the 1st Respondent can retain information supplied by its clients for historical or statistical purposes to enable the organization study the market trends. The Complainant has not provided any evidence to the effect that her retained data was utilized or disseminated to unauthorized third parties in a manner infringing on her privacy.

28. On Complaint 11: Transfer of Data outside Kenya

The 1st Respondent reiterated that the third-party marketing service provider that was contracted is compliant with General Data Protection Regulations at an international level and all data supplied to it by its clients is lawfully held and processed for the benefit of the 1st Respondent and not supplied to any other unauthorized third-party entities.

29. On the Prayer for damages in lieu of distress occasioned to the Complainant

The 1st Respondent stated that:

- a) The said damages as outlined by the Complainant are manifestly excessive and untenable in law.
- b) The damages sought are merely intended to enrich the Complainant and not restore the loss she allegedly suffered on account of alleged infringement of her data privacy.
- c) The Complainant despite making allegations that she has suffered psychological distress on account of the alleged breach has not produced any medical report to corroborate her claims.

d) The figures proposed to be the quantum of damages in the complaint are not backed by any comparable awards made by this office under similar circumstances hence without any representations being made on the basis of the quantum of damages, the prayer ought to fail in its entirety.

30. In conclusion, the 1st Respondent stated that it prayed for the dismissal of the complaint in its entirety for lack of merit.

iii. THE 2ND RESPONDENT'S RESPONSE

The 2nd Respondent responded to each of the complaints as follows:

31. **Complaint 1: Adequacy/Absence of Data Privacy Policies**

The 2nd Respondent stated that it has developed a Data Privacy Policy and published on its website as admitted by the Complainant. The 2nd Respondent produced a copy of the said policy. Further, at the time of developing and publishing the policy, the Complainant had ceased being a member of the 2nd Respondent.

32. **Complaint 2: Collection of Data by the 1st Respondent and/or the 2nd Respondent**

- a) The 2nd Respondent stated that the Complainant admitted to having joined the membership of the 2nd Respondent on 29/08/2019 by filling the Membership Account Opening Form. The 2nd Respondent produced a copy of the aforementioned form dated 28th August 2019.
- b) The 2nd Respondent stated that it is a separate and distinct legal entity from the 1st Respondent and that membership in the 2nd Respondent does not in any way, manner or form result in membership in the 1st Respondent.
- c) The 2nd Respondent averred that it does not share any data with the 1st Respondent and that the Complainant has failed to provide any evidence to substantiate the allegation.

- d) The 2nd Respondent stated that it always seeks consent from a data subject before sharing any of their information with a third party. It provided a copy of its consent form.
- e) The 2nd Respondent stated that the Complainant admitted that she took over as the beneficiary of one of the transactions that had been initiated by C**** O**** (Deceased) with the 1st Respondent therefore she willingly gave her information to the 1st Respondent.

33. Complaint 3: Failure to Register as a Data Controller/Processor

The 2nd Respondent stated that it is registered as a Data Controller and provided a copy of its Certificate of Registration dated 18th February 2023 as proof.

34. Complaint 5: Rights of a Data Subject

- a) The 2nd Respondent stated that it has developed various data processing consent forms for its members and data subjects and has undertaken various training for both its members and staff on Data Protection. The 2nd Respondent produced a copy of its Data Processing Consent and Consent Withdrawal Forms.
- b) The 2nd Respondent stated that the Data Privacy Policy referred to by the Complainant clearly outlines the rights of a data subject including the right to have the information held by the 2nd Respondent deleted. This is further augmented by the emails sent to her which under the caution part requires anyone who has received the email in error to contact the sender by telephone or email.
- c) In addition to the above, the 2nd Respondent stated that the first cause of action by the Complainant ought to have been a request to the 2nd Respondent to stop sending her any emails and delete her email address from its contact list.

35. Complaint 6: Collection of Personal Data

- a) The 2nd Respondent stated that the Complainant was its member thereby forming the legal basis for the collection of her personal data.
- b) The Complainant contradicts herself by claiming that the 2nd Respondent shared her personal data with the 1st Respondent while claiming that

she provided her data to the 1st Respondent for purposes of completing a conveyancing transaction.

36. Complaint 7: Duty to Notify

The 2nd Respondent stated that its Data privacy Policy together with the Information Technology and Information Security Policy provides a description of the technical and organizational measures taken by the 2nd Respondent to ensure the integrity and confidentiality of the data it collects.

37. Complaint 8: Lawful Basis for Processing

The 2nd Respondent reiterated that it is duly registered as a Data Controller as required by Section 18 and it processes personal data in line with Section 30 of the Act.

38. Complaint 9: Commercial Use of data

The 2nd Respondent stated that it sent the Complainant three emails as follows:

- On 4th October 2023 to wish her a Happy Customer Service Week.
- On 6th November 2023 inviting her to give feedback to improve its services.
- On 4th December 2023 to invite her to the Family Fun-day.

None of the emails sent amounts to commercial use of the data as provided for under the Act.

39. Complaint 10: Retention of Data

The 2nd Respondent stated that Section 39 of the Act provides for the limitation of retention of personal data for various purposes. Further the Data Privacy Policy provides that the 2nd Respondent shall retain Personal Data for as long as is necessary for the purposes of complying with any legal provisions.

40. Damages claimed by the Complainant

The 2nd Respondent stated that:

- a) The Complainant has failed to provide evidence to warrant the damages sort.
- b) The demand for damages is pre-emptive as the Complainant failed to first seek a way to resolve the matter before approaching this Office.

- c) The Complainant has failed to provide the rationale for the damages demanded against the 2nd Respondent.
- d) Awarding such damages is likely to set a bad precedent.
- e) The damages sought are manifestly excessive in the circumstances.

41. In conclusion, the 2nd Respondent prayed for the complaint to be dismissed in its entirety for lack of merit.

F. INVESTIGATIONS UNDERTAKEN

42. The Office reviewed the complaint, the Respondents' response, and all the supporting documents provided by both parties.

G. ISSUES FOR DETERMINATION

43. The Complainant complained about, *inter alia*, the absence of data privacy policies, failure to register as a data controller and/or processor, retention of data and transfer of data outside Kenya. The above are compliance issues and may be addressed using various enforcement measures under the Act, including by the issuance of an enforcement notice to the Respondent(s), in the event the Office is satisfied that they have failed to comply with relevant provisions of the Act.

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

- i. Whether the 2nd Respondent shared the Complainant's personal data with the 1st Respondent;
- ii. Whether the Respondents used the Complainant's personal data for commercial purposes without obtaining consent;
- iii. Whether the 1st Respondent shared the Complainant's personal data with third parties;
- iv. Whether there was an infringement of the Complainant's rights under the Act; and
- v. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE 2ND RESPONDENT SHARED THE COMPLAINANT'S PERSONAL DATA WITH THE 1ST RESPONDENT

45. The Complainant alleged that the 2nd Respondent shared her personal data with the 1st Respondent without consent. She stated that membership to the 2nd Respondent should not arise in automatic membership in the 1st Respondent company. The Complainant stated that she didn't have proof of the said allegations.

46. In response to the above allegation, the 1st Respondent provided evidence that it lawfully obtained the Complainant's personal data from the Complainant as she supplied to it a certificate of Confirmation of Grant which proved that the Complainant was entitled to inherit the property of her late father, who had purchased it from the 1st Respondent.

47. Further, the Complainant attended the Juja 2 plots selection event at the site where she willingly provided her phone contacts.

48. The 2nd Respondent denied sharing any data with the 1st Respondent and stated that the Complainant did not provide any evidence to substantiate the allegation. In addition, the 2nd Respondent stated that the Complainant admitted that she took over as the beneficiary of one of the transactions that had been initiated by her late father with the 1st Respondent and therefore gave her information willingly to the 1st Respondent.

49. From the above, this Office finds that the 2nd Respondent did not share the Complainant's personal data with the 1st Respondent as the Complainant willingly provided her personal data to the 1st Respondent for the purposes of completing a transaction that had been initiated by her late father.

II. WHETHER THE RESPONDENTS USED THE COMPLAINANT'S PERSONAL DATA FOR COMMERCIAL PURPOSES WITHOUT OBTAINING CONSENT

50. The Complainant alleged that her contact details were used for marketing purposes without consent or lawful basis. Further, the 1st Respondent has continued to hold her information and send marketing emails even after they

completed the sale of land process. The Complainant provided screenshots of WhatsApp messages sent by the 1st Respondent and emails sent by the 2nd Respondent as proof.

51. The 1st Respondent admitted to having sent out marketing messages to the Complainant via WhatsApp and stated that by virtue of the Complainant's attendance at the Juja 2 plots selection event and her acquiescence in supplying her phone contacts at the event, the Complainant had acceded to receiving marketing information on plots for sale by the 1st Respondent.
52. Section 37 of the Act provides for commercial use of data and states, "*a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained **express consent** from the data subject or is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject.*"
53. The 1st Respondent did not provide any evidence to prove that it obtained **express consent** from the Complainant to send her marketing messages. The 1st Respondent did not demonstrate that it informed the Complainant the purpose of collection of her personal data, which in this case, was for marketing purposes. Further, the 1st Respondent did not provide any evidence to prove that it was authorised under any written law and that the Complainant was informed of such use when her data was collected.
54. A perusal of the screenshots of the WhatsApp messages sent to the Complainant reveal that no opt out mechanism was provided for the Complainant to request not to receive the marketing messages contrary to Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021. However, it is worth noting that the Complainant did not exercise her right to object to further processing of her data by writing to the 1st Respondent to stop sending her marketing messages via the same channel that she received the messages or through a different channel.

55. The 2nd Respondent stated that it sent three emails to the Complainant and none of the emails sent amount to commercial use of data as provided for under the Act.

56. Regulation 14(1) of the Data Protection (General) Regulations, 2021 provides for the interpretation of use of personal data for commercial purposes and states, "...a data controller or data processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting, directly or indirectly, a commercial transaction."

57. A perusal of the emails sent by the 2nd Respondent indicates that the 2nd Respondent did not use the Complainant's personal data for commercial purposes as the emails sent did not contain the ingredients contained in Regulation 14(1) above.

58. On the other hand, this Office finds that the 1st Respondent used the Complainant's personal data for commercial purposes without obtaining her express consent contrary to Section 37 of the Act; and that the 2nd Respondent did not use the Complainant's personal data for commercial purposes.

III. WHETHER THE 1ST RESPONDENT SHARED THE COMPLAINANT'S PERSONAL DATA WITH THIRD PARTIES

59. The Complainant alleged that the 1st Respondent widely distributed her contact details in an email in which all recipients were put in carbon copy (cc) and everyone could see everyone else's email address. The subject email sent by the 1st Respondent was not provided by the Complainant.

60. In response to the above allegation, the 1st Respondent averred that none of the emails were sent out by itself or its agents. Its staff only sent out marketing WhatsApp messages to the Complainant without copying any other third party.

61. In the absence of any evidence to prove that the 1st Respondent shared the Complainant's personal data with third parties through email, this Office finds that the 1st Respondent did not share the personal data of the Complainant with third parties without a lawful basis, as alleged.

IV. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT;

62. 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.

63. The Complainant alleged that the 1st Respondent sent her marketing messages and did not inform her that her data would be used for any other reason other than the land sale transaction.

64. On the other hand, the 1st Respondent stated that the Complainant by attending its plot selection event on site and providing her contact details was explicitly aware that it would disseminate information on its products via her contact details.

65. The 1st Respondent did not adduce any evidence to prove that it informed the Complainant that her contact details were being collected for purposes of sending her marketing messages. The 1st Respondent by collecting the mobile phone number of the Complainant and not informing her that it would use it to send marketing messages to her violated her right to be informed.

66. The Complainant alleged that the 2nd Respondent did not inform her of the use and to whom it would distribute her data, and her rights as a data subject when she was registering as a member, and throughout the continuity of her membership.

67. The 2nd Respondent in response to the above allegation stated that it has a Data Privacy Policy which clearly outlines the right of a data subject. The Complainant also mentioned that the 2nd Respondent has a 2 paged data privacy policy thereby acknowledging its existence. A perusal of the said data privacy policy indicates that it outlines the rights of a data subject.

68. Having already found that the 2nd Respondent did not share the Complainant's personal data with third parties, the allegation that she was not informed about who her data would be shared with is invalid.

69. From the foregoing, the Office finds that the 1st Respondent violated the Complainant's right to be informed under Section 26(a) of the Act and that the 2nd Respondent did not violate her rights as alleged.

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

70. 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.

71. The Complainant sought for the issuance of an enforcement notice against the Respondents.

72. The Office having found that the 1st Respondent violated the Complainant's right to be informed and used her personal data for commercial purposes, hereby orders for an enforcement notice to be issued against the 1st Respondent.

73. The Complainant also prayed for compensation from the Respondents.

74. 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.*"

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

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

77. Having found the 1st Respondent liable for violating the Complainant's right to be informed of the use to which her personal data is to be put and for using the Complainant's personal data for commercial purposes the 1st Respondent

is hereby **ordered to pay the Complainant Kenya Shillings six hundred and fifty thousand (KES 650,000) as compensation.**

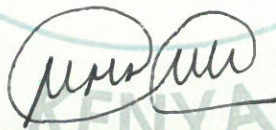
78. Having found that the 2nd Respondent did not violate the Complainant's rights and that it did not use her personal data for commercial purposes, the complaint against it is hereby dismissed.

H. FINAL DETERMINATION

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

- i. The 1st Respondent is found liable for violating the Complainant's right to be informed of the use to which her personal data is to be put and for using her personal data for commercial purposes without express consent;
- ii. The Complaint against the 2nd Respondent is hereby dismissed;
- iii. An enforcement notice be hereby issued to the 1st Respondent;
- iv. The 1st Respondent is hereby ordered **to compensate the Complainant Kenya Shillings Six Hundred and Fifty Thousand (KES 650,000);** and
- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 31st day of may 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

