



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 849 OF 2024

DERRICK KIAMBA.....COMPLAINANT

-VERSUS-

CERES TECH LIMITED T/A ROCKETPESA.....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 14th June, 2024 alleging that the Respondent has constantly been sending him unsolicited promotional messages without obtaining consent.

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 14th June 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 18th June 2024 and referenced ODPC/CONF/1/5 VOL II(12). In the Notification of the Complaint, the Respondent was informed that if the allegations by the Complainant were true, it was in violation of various provisions 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. Proof of consent from the Complainant to call and send him text messages regarding its loan product;
 - e. Confirmation that mobile numbers 0794****88, 0703****09 and 0741****37 belong to the Respondent or any of its agents;

- f. A detailed description of how it fulfills the rights of a data subject;
 - 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 *via* a letter dated 18th June, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant alleged that he has been receiving unsolicited promotional messages from the Respondent without obtaining his consent.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant stated that his complaint was on the unlawful processing of his personal data by the Respondent. He alleged that the Respondent's agents have been calling and messaging him incessantly trying to shove their loan products down his throat. He provided screenshots of the messages sent to him as proof.
12. The Complainant stated that he informed the Respondent that he is not interested in its products and even threatened to report them to this Office for processing his personal data without obtaining consent and sending him marketing messages and offers about its products.
13. Further, the Complainant stated that he has had to block so many of the Respondent's contacts from calling and texting him but they have even migrated to WhatsApp texting.
14. The Complainant stated that the actions of the Respondent have caused him so much distress and anxiety given that he has never downloaded their app

before and never consented to any processing of his data. He also does not know where the Respondent got his number.

15. The Complainant averred that in his profession as an Advocate of the High Court of Kenya and a Legal Counsel for one of Africa's top companies, he needs to communicate frequently with both domestic and international clients. However, this has been a challenge as every new call he receives, he immediately panics, as he is not sure if it is a client or the Respondent's agents calling.

16. The Complainant averred that he had no loan facility with the Respondent.

17. The Complainant prayed for the following remedies/reliefs; regulatory sanctions against the Respondent, and continuous monitoring of the Respondent to ensure that it operates in the realm of privacy rights in Kenya.

ii. THE RESPONDENT'S RESPONSE

18. The Respondent denied the allegations that unsolicited messages were disseminated by its marketers. It stated that its internal investigations revealed that its marketing team strictly adheres to established protocols, including the implementation of measures to prevent the transmission of unsolicited messages. Further, the Respondent stated that its marketing is conducted solely through authorized agents whose contact numbers are attached. The Respondent did not attach the said contact numbers of its authorized agents.

19. The Respondent stated that marketing messages are only sent to individuals who sign up with its app and ultimately sign the marketing consent form during onboarding. This ensures that only those who have expressly consented to receive such communications are targeted. The Complainant provided a copy of the marketing consent form as proof.

20. The Respondent averred that it ensures that all its marketing messages clearly convey to data subjects the option to opt out of receiving further communications. This information is conspicuously indicated within its marketing messages, serving as an explicit notification to data subjects regarding their right to cease such communications.

21. Further, the Respondent stated that it places great emphasis on verbal communication with data subjects regarding the option to opt out of marketing messages. Its customer service representatives routinely convey this information during interactions with users, ensuring that data subjects are aware of and empowered to exercise their right to opt out.
22. The Respondent stated that its opt-out procedures are designed to be user-friendly and are included in all its marketing messages, the simplest method requiring individuals to SMS STOP TO 0795671130, which is clearly indicated in each of its marketing messages. The Respondent attached a sample marketing message as proof. Additionally, the Respondent stated that the consent forms signed during onboarding detail a comprehensive opt-out procedure.
23. The Respondent stated that a review of the Complainant's list of documents indicated that the messages had been sent numerous times from various numbers which are not linked to the Respondent. Such behaviour, if conducted by the Respondent, would be self-sabotaging and would not make sense as it exposes it to significant legal repercussions. The Respondent stated that the alleged conduct was by malicious individuals purporting to be its agents in an effort to sabotage its business and that these individuals should be investigated.

F. INVESTIGATIONS UNDERTAKEN

24. The Office analysed the complaint as lodged, reviewed the response submitted by the Respondent and analysed all documents submitted by the parties as evidence.
25. The Office conducted a site visit at the Respondent's premises on 9th August 2024 to carry out further investigations into the matter.
26. The Respondent despite having been notified of the site visit *via* a letter dated 1st August 2024, derailed and hindered the investigations by claiming that the marketing team was not available to facilitate an examination of the system/application used to send out the promotional messages, and to respond to the questions posed by Officers from this Office. This act amounts to obstruction of the Data Commissioner contrary to Section 61 of the Act.

G. ISSUES FOR DETERMINATION

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

- i. Whether the mobile phone numbers that contacted the Complainant belong to the Respondent; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE MOBILE PHONE NUMBERS THAT CONTACTED THE COMPLAINANT BELONG TO THE RESPONDENT

28. The Complainant alleged that he has been receiving unsolicited promotional messages from the Respondent without obtaining his consent. He produced screenshots of the messages sent from the following mobile phone numbers; 0799****98, 0794****88, 0703****09 and 0741****37.

29. The Respondent denied the allegations and averred that the messages were sent from various mobile numbers which are not linked to the Respondent.

30. This Office visited the Respondent's premises but was denied an opportunity to interview the marketing team and examine the system/application used to send out the promotional messages. This act amounts to obstruction of the Data Commissioner contrary to Section 61 of the Act.

31. In the absence of any evidence implicating the Respondent, this Office is unable to establish whether the mobile phone numbers that contacted the Complainant did indeed belong to the Respondent.

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

32. 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.

33. Section 61(a) & (b) of the Act provides for the offence of obstruction of the Data Commissioner and states that,

"a person who, in relation to the exercise of a power conferred by Section 9 – obstructs or impedes the Data Commissioner in the exercise of her powers; fails to provide assistance or information requested by the Data Commissioner; commits an offence and is liable on conviction to a fine not exceeding five million shillings or to imprisonment for a term not exceeding two years, or to both."

34. The Respondent by **intentionally** not availing a representative from its marketing team to answer questions relating to the complaint, during investigations despite being notified of the a site visit by this Office, and by not allowing investigation Officers an opportunity to examine the system/application used to send out the promotional messages obstructed the Data Commissioner in the exercise of her powers.

35. From the above, a recommendation for prosecution is hereby made to the Director(s) of the Respondent's Company, for obstruction of the Data Commissioner contrary to Section 61 of the Act.

36. In conclusion and having found that that the mobile phone numbers that contacted the Complainant did not belong to the Respondent, the Office hereby dismisses the Complaint.

H. FINAL DETERMINATION

37. The Data Commissioner therefore makes the following final determination: -

- i. The Complaint is hereby dismissed.
- ii. A recommendation for prosecution is hereby made against the Director(s) of the Respondent's Company for obstruction of the Data Commissioner contrary to Section 61 of the Act.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of September 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

