



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 908 OF 2024

LAWRENCE KIRUTHI.....COMPLAINANT

-VERSUS-

MULLA PRIDE 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 on 21st June, 2024 alleging that the Respondent contacted him regarding a loan that he was not a party to, and had not consented to be listed as a guarantor.

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 21st 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 17th July 2024 and referenced ODPC/CONF/1/5 VOL II(37). 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. Confirmation whether the mobile phone numbers 0798****77 and 0703****72 belong to it or its agents;
 - d. The legal basis relied upon to process and engage with the Complainant's personal data;
 - e. Proof of consent from the Complainant to call and send him text messages;
 - 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 was non-responsive and did not respond to the Notification of Complaint filed against it. Regulation 11(2) of the Enforcement Regulations states that, *"where a respondent does not take any action as contemplated in the notification of complaint, the Data Commissioner shall proceed to determine the complaint in accordance with the Act and the Enforcement Regulations."*
9. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complaint relates to the alleged contacting of the Complainant regarding a loan that he was not a party to, and had not consented to be listed as a guarantor.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that he was being harassed by the Respondent through calls and messages regarding a loan taken by one of the Respondent's customers. Further, the customer placed him as one of his guarantors without his knowledge.
12. The Complainant stated that he has been receiving about 15 messages in one hour. He provided screenshots of the messages received as proof.
13. The Complainant requested this Office to investigate and stop the Respondent's employees from calling him or sending him messages.

ii. THE RESPONDENT'S RESPONSE

14. The Respondent was non-responsive and did not respond to the Notification of Complaint filed against it. Therefore, the allegations levelled against it remain uncontroverted.

F. INVESTIGATIONS UNDERTAKEN

15. The Office analysed the complaint as received and reviewed the screenshots submitted by the Complainant as evidence.

G. ISSUES FOR DETERMINATION

16. The following issues fall for determination by this Office: -

- i. Whether there was a violation 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 A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

17. The Complainant alleged that he has been receiving calls and messages from the Respondent regarding a loan that he is not party to and had not consented to be listed as a guarantor. He provided screenshots of the messages received as proof.

18. Section 26(a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent, by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed. The Respondent collected the mobile phone number of the Complainant indirectly, from a third party, and did not inform the Complainant that his personal data was being collected. The Respondent did not also inform the Complainant that his mobile phone number was being collected for the purpose of being listed as a guarantor to a loanee and did not give the Complainant an opportunity to consent to the listing.

19. From the above, this Office finds that the Complainant's right under Section 26(a) of the Act was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

20. The Respondent is a data controller as per the definitions of the Act and is therefore mandated to fulfil its obligations as provided for under the Act.

21. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, amongst others: -

- i. processed in accordance with their right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the data subjects;
- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

22. In collecting personal data, the Respondent is mandated by Section 28(1) of the Act to collect the data directly from the data subject. Section 28(2) sets out instances where personal data may be collected indirectly. The Respondent collected the Complainant's personal data from a third party and did not demonstrate that any of the conditions set out in Section 28(2) were relevant in this matter.

23. Further, Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, inter alia;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data;
- iv. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

24. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that his mobile phone number was being collected for purposes of

listing him as a guarantor to a loanee, and the measures it has in place to ensure the safety of his personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

25. Section 30 of the Act states that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes. The Respondent processed the Complainant's personal data without obtaining consent from the Complainant.

26. From the above, this Office finds that the Respondent did not fulfil its obligations provided for under the Act.

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

27. 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.

28. Having found that the Respondent violated the Complainant's right to be informed, and that it did not fulfill its obligations provided for under the Act, the **Office hereby orders for an enforcement notice to be issued against the Respondent.**

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's right to be informed of the use to which his personal data is to be put and for failure to fulfil its obligations under the Act;
- ii. An Enforcement Notice to hereby be issued against the Respondent; and
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 19th day of September 2024.


IMMACULATE KASSAIT, MBS
DATA COMMISSIONER