



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1059 OF 2024 AS CONSOLIDATED WITH ODPC
COMPLAINT NO. 1106 OF 2024

ADELINE MUNEE MUNGUTI.....1ST COMPLAINANT

LARRY OBINDI SISEI.....2ND COMPLAINANT

-VERSUS-

MINT VILLAS LIMITED T/A MINT VILLA HOUSING.....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 Office received two complaints from the Complainants alleging that the Respondent used their personal data to register a company without their consent.

B. LEGAL BASIS

2. Article 31(c) and (d) of the Constitution of Kenya 2010 provides for the right to privacy. Consequently, as an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter as 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' 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 (Complaint 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 two complaints from the 1st and 2nd Complainants dated 15th July 2024 and 23rd July 2024 respectively. The complaints were lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainants who were aggrieved data subjects.
7. Pursuant to Regulation 11 of the Enforcement Regulations, this Office notified the Respondent of the complaints filed against it *vide* two letters both dated 9th August 2024 and referenced ODPC/CONF/1/5 VOL II(88) and ODPC/CONF/1/5 VOL II(89). In the Notification of the Complaints letters, the Respondent was informed that if the allegations by the Complainants 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 Complainants;
 - b. Any relevant materials or evidence in support of the response;
 - c. The legal basis relied upon to process and engage with the Complainants' personal data;

- d. Proof of consent from the Complainants to use their personal data to register TwinFalls City Management Public Limited Company;
 - e. A duly written and signed agreement between themselves and the Complainants to use their personal data in registering the alleged company;
 - f. A detailed description of how it fulfils the rights of a data subject;
 - g. The mitigation measures adopted or being adopted to address the complaints to the satisfaction of the Complainants and to ensure that such occurrence mentioned in the complaints 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 Complaints 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 use of the Complainants' personal data to register a company known as Twinfalls City Management Public Limited Company without the Complainants' authorization, knowledge or consent.

E. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANTS' CASE

11. The Complainants stated that Mint Hub Limited and the Respondent are the developers and owners of a development known as Twin falls City.
12. The Complainants stated that sometime around 22nd March 2022, they received an offer to purchase Houses erected on L.R. No. 2358/195 which offer they accepted.

13. Upon purchasing the units, the Respondent acquired personal data that can easily identify them, including the following: ID card and ID number, KRA number, passport photo, signature (on the sale agreement), postal and physical address, phone number, bank account details, and email address.
14. The Complainants assert that the purpose of obtaining this personal data was solely for the sale and purchase of the homes, and any other use required their express consent.
15. Subsequently, the Complainants were elected by the neighbours of Twinfalls City as estate officials alongside others vide meetings dated 1st and 30th July, 2023. Subsequent to the appointments, the elected officials were to meet with the Respondent to chart the way forward. The Complainants provided minutes of the meeting as proof.
16. The Complainants stated that the Respondent sent an email dated 24th November 2023 and required the elected officials to register an email address for an intended company.
17. The Respondent further sent an email dated 27th November 2023 and attached a CR1, CR2, CR8, statement of nominal capital and beneficial owner forms for their execution. The Complainants provided a copy of the email and documents referred to above as proof.
18. The Complainants averred that they did not sign the above documents as required by law, and no one ever sent them a reminder or contacted them to follow up.
19. Shockingly, on 14th December 2023, Twin Falls City Management Public Limited Company was incorporated by Mint Hub and the Respondent, with the Complainants and the estate officials listed as the registered directors and shareholders. The Complainants produced a copy of the CR12 as proof.
20. The Complainants assert that they neither signed any document nor provided consent for any of their personal data to be used by the Respondent to

register a public company. Additionally, they failed to adequately consult them beforehand.

21. The Complainants aver that they diligently sought explanations from the Respondent through numerous correspondences but received no satisfactory response regarding how their signatures, IDs, KRA PINs, passport photos, phone numbers, email/postal/physical addresses and consent were obtained before registering the public company. The Complainants provided copies of the emails as proof.
22. The Complainants stated that before a company is registered, the following personal details are required; ID number, KRA PIN, Passport Photo, Phone Number, Email address, Postal address and signature. The same were captured in the Form CR-1 and processed without the requisite consent. The Complainants produced a copy of the CR-1 and CR-2 forms as proof.
23. The Complainants averred that their personal and sensitive data were not processed as per the principles of Section 25, 26 and 30 of the Data Protection Act.
24. The Complainants alleged that, no sooner had the Respondent sought their signatures *vide* email than they proceeded before they could even respond and be informed accordingly, to use their personal data for purposes that they never consented to.
25. Additionally, the Respondent did not bother to notify the Complainants as per Section 29 of the Act so that they could exercise their right to object as per Section 36 of the Data Protection Act.
26. The Complainants alleged that after they raised the issue, the Respondent instead of seeking an amicable resolution, abandoned the company registered in breach of their personal data and proceeded to register another company known as "Twinfalls Home Owners Company Public Limited Company". The Complainants produced a copy of the CR-12 as proof.

27. The Complainants stated that the Respondent despite registering a company in their names using their personal data without consent, have gone silent, leaving them to wonder what will happen next.

28. In conclusion, the Complainants prayed for the following remedies: -

- a) an immediate investigation into the actions of the Respondent;
- b) retrieval of their personal data and measures taken to prevent further unauthorized use;
- c) legal action against the Respondent for breach of data protection laws;
- d) that the Respondent be ordered to implement mechanisms to ensure that they are promptly notified and consent obtained for any future use of their personal data; and
- e) compensation for the emotional distress, reputational damage and use of their personal data without consent.

II. THE RESPONDENT'S RESPONSE

29. 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

30. This Office analysed the complaint as received and reviewed the documents submitted by the Complainant as evidence.

G. ISSUES FOR DETERMINATION

31. the following issues fall for determination by this Office:

- i. Whether there was a violation of the Complainants' rights under the Act;
- ii. Whether the Respondent fulfilled its obligations under the Act; and
- iii. Whether the Complainants are entitled to the remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANTS' RIGHTS UNDER THE ACT

32. Section 26(a) of the Act provides for the right of a data subject to be informed of the use to which their personal data is to be put. The Respondent did not inform the Complainants that their personal data (names, ID numbers, KRA PINs, passport photos, phone numbers, email addresses, postal addresses and signatures) were going to be used to register a company. This was a violation of the Complainants' right to be informed as their personal data was initially collected for the purpose of purchasing a house and not for purposes of registering a company.
33. The Respondent did not provide any evidence to indicate that it informed the Complainants of the use to which their personal data was to be put. No evidence was also provided to prove that the Complainants lawfully signed the company registration forms.
34. From the above, this Office finds that the Complainants' right to be informed of the use to which their personal data is to be put was violated by the Respondent.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT;

35. The Respondent is a data controller within the definition of the Act and therefore has obligations pursuant to the Act.
36. The Respondent had an obligation under Section 25(c) of the Act to ensure that personal data is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.
37. The Respondent collected the Complainants' personal data for purposes of sale and purchase of a house erected on L.R. No. 2358/195. The Complainants' personal data was further processed without obtaining their consent and used in the registration of a company, contrary to the purpose limitation principle of data protection. The Respondent ought to have sought fresh consent from the Complainant before using their personal data to register a company.

38. 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. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

The Respondent had a duty to notify the Complainants of their rights under the Act, the fact that it intended to use their personal data to register a company, and the measures it had in place to ensure safety of their personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

39. 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 data processor 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 reasons given in subsection (b).*" The Respondent failed to provide proof of having obtained consent to process the Complainants' personal data for purposes of registering a company. Further, the Respondent did not prove that it satisfied the reasons outlined in Section 30(1)(b) that allow for the processing of personal data without obtaining consent from the data subject.

40. From the foregoing, this Office finds that the Respondent did not fulfil the above obligations as set out under the Act.

III. WHETHER THE COMPLAINANTS ARE ENTITLED TO THE REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS

41. Pursuant to Regulation 14(2) of the Enforcement Regulations, a determination shall state the remedy to which a complainant is entitled. Further, the remedies are provided for in Regulation 14(3) of the Enforcement Regulations.

42. Having found that the Respondent violated the Complainants' rights provided for under the Act and did not fulfil its obligations provided for under the Act, an enforcement notice shall be issued to the Respondent.
43. The Complainants sought for the retrieval of their personal data and measures to be taken to prevent further unauthorized use. The Complainant also prayed that the Respondent be ordered to implement mechanisms to ensure that they are promptly notified and consent obtained for any future use of their personal data. The said remedies shall be addressed in the enforcement notice to be issued against the Respondent.
44. The Complainants also prayed for an order of compensation for emotional distress, reputational damage and use of personal data without consent.
45. Section 65 of the Act provides for compensation to data subjects and states 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."*
46. Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*
47. Further, Regulation 14(3)(e) of the Enforcement Regulations provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
48. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent processed the Complainants' personal data unlawfully.
49. Further, the Office considers the fact that the Respondent either intentionally or negligently violated the Complainants' right to be informed of the use to which their personal data was to be put.
50. As compensation for the violation of the Complainants' rights under the Act, failure to comply with the principle of purpose limitation and for the use of their personal data without obtaining consent, the Office hereby makes an order for compensation as follows -

- **The 1st Complainant – KES 550,000**
- **The 2nd Complainant – KES 550,000**

H. FINAL DETERMINATION

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

- The Respondent is hereby found liable.
- An enforcement notice to hereby issue against the Respondent.
- An order for compensation to the Complainants by the Respondent as follows –
 - **The 1st Complainant – Kenya Shillings five hundred and fifty thousand (KES 550,000).**
 - **The 2nd Complainant – Kenya Shillings five hundred and fifty thousand (KES 550,000).**
- Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 12th day of October 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER