



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1088 OF 2024

MUSA WESUTSA.....COMPLAINANT

-VERSUS-

AZURA CREDIT LIMITED T/A TRUEPESA.....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 19th July, 2024 alleging that he has been receiving phone calls and emails regarding a loan that he did not apply for.

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 19th July 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 31st July 2024 and referenced ODPC/CONF/1/5 VOL II(70). 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 email address o*****7@gmail.com belongs 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 contact him *via* email and call;
 - f. A detailed description of how it fulfills the rights of a data subject;

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- 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 concerns the alleged contacting of the Complainant by the Respondent regarding a loan that he did not apply for.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that individuals purporting to be from the Respondent's Company have taken to harassing him and his senior managers as they try to recover some funds that one of his staff members borrowed. The Complainant provided screenshots of emails received as proof. No evidence was adduced to prove that he received phone calls from the Respondent as alleged.
12. Further, the Complainant stated that the Respondent is infringing on his privacy and collecting his personal identifiable information illegally in order to harass him as it seeks to recover its funds from his staff member. This includes phone calls, emails to the company and also to his personal Gmail account.
13. The Complainant stated that the Respondent should desist from involving him or his company in the affairs of an individual who borrowed money from them which they willingly issued.

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 lodged and reviewed the documents submitted by the Complainant as evidence.

16. The Office also conducted a site visit at the Respondent's premises on 30th August 2024 to carry out further investigations into the matter.

17. The Respondent despite having been notified of the impending site visit, derailed and hindered the investigations by claiming that the ICT personnel with access to the backend of its database was not available to facilitate an examination of the Respondent's loan application. This act amounts to obstruction of the Data Commissioner contrary to Section 61 of the Act.

G. ISSUES FOR DETERMINATION

18. In light of the above, 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 had obligations to fulfil 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

19. The Complainant alleged that he has been receiving calls and emails regarding a loan that he did not apply for.

20. 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.

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The Respondent collected the email address of the Complainant 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 email address was being collected for the purpose of being listed as a referee/emergency contact to its customer and did not give the Complainant an opportunity to consent to the listing.

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

II. WHETHER THE RESPONDENT HAD OBLIGATIONS TO FULFIL UNDER THE ACT

22. 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.

23. 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.

24. 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.

25. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that his email address was being collected for purposes of enlisting him as a referee/emergency contact 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.

26. 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.

27. 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.

28. 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.

29. As a remedy, the Complainant sought the Respondent to desist from involving him or his company in the affairs of an individual who borrowed money from them which they willingly issued.

30. Section 58 of the Act as read together with Regulations 14 and 16 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations,

2021 further contemplates, as a remedy, the issuance of enforcement notices against an entity that has failed or is failing to comply with any provisions of the Act and the attendant regulations thereto.

31. 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

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

- i. The Respondent is hereby found liable.
- ii. An enforcement notice to hereby be issued to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 14th day of October 2024.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

