



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1280 OF 2024

ERIC MUNENE MBOGO.....COMPLAINANT

-VERSUS-

PLATINUM CREDIT 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 filed a complaint on 27th August, 2024 alleging that the Respondent used his personal data, which was in its custody, for marketing purposes and subsequently shared his personal data with a third party.

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 27th August 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 24th September, 2024 and referenced ODPC/CONF/1/5 VOL II(199). 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 contractual agreement with the Complainant, if any;
 - d. Details of all its interactions with the Complainant;
 - e. Details of how it collected, stored and processed the Complainant's personal data, and whether he consented to the processing of his personal data;

- f. The lawful basis for denying the Complainant his right to object to the processing of his personal data, if any;
 - g. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant; and
 - h. Any other relevant information it wishes the Office to consider.
8. The Respondent submitted a response to the Notification of Complaint letter *via* two letters dated 30th September, 2024 and 23rd October 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 Complaint is regarding the alleged use of the Complainant's personal data for marketing purposes without obtaining consent as well as the sharing of the Complainant's personal data with third parties without notifying the Complainant.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant alleged that on or around 26th July 2024 and 30th July 2024, the Respondent's staff called him regarding loan facilities that he had not requested for.
12. The Complainant stated that he received calls from mobile phone numbers +254714****68 and +254726****24, claiming to be the Respondent's Credit Officer and Manager respectively.
13. The Complainant alleged that the Credit Officer and Manager called to market a car loan facility and even went ahead to book a car valuation without him having ever visited their office or being known to them. They called him by his name and claimed that they got his number from their Organisation's database over a facility he had initially acquired with them but cleared. The Complainant provided a voice note between himself and the Manager, screenshots from his personal WhatsApp number and a screenshot of a text message from a valuer

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indicating that he was to visit him for car valuation as proof of the above allegations.

14. The Complainant averred that this incident has caused him emotional distress and reputational damage as his call was on loudspeaker when the insensitive caller made a call insisting that he had borrowed a loan with them.

15. Further, the Complainant stated that the actions of the Respondent amounted to a breach of data privacy as the callers were not known to him despite his details appearing on their database.

16. The Complainant sought the following remedies: -

- a) Compensation for emotional distress and reputational damages; and
- b) An order compelling the Respondent to be data protection compliant.

ii. THE RESPONDENT'S RESPONSE

17. The Respondent stated following its internal investigations, it established that that the Complainant's contact details were in its database as a dormant client.

18. The Respondent averred that through its sales team, it was noted that the Complainant had expressed interest in taking a subsequent loan with the Company. As part of its standard loan process, the Complainant was informed of the requirements for the loan facility, including the valuation of the motor vehicle to be used as security. Specific details about the valuation process, including the location, were communicated, and a booking was made for the assessment. The Respondent provided a screenshot of WhatsApp correspondence between the Complainant and the it's Agent as proof.

19. Additionally, the Respondent stated that it conducts valuation through third party providers to ensure that it obtains an independent assessment for a motor vehicle. This was the basis upon which it's agents and the contracted valuers contacted the Complainant.

20. The Respondent asserted that as per Clause 9 of the Loan Agreement between the Complainant and the Company, the Complainant had provided explicit consent for the continued holding and processing of his data even after the settlement of the initial loan which he had with the Company. This consent

covered a variety of purposes, including but not limited to marketing and offering further financial services. The Respondent provided the executed loan agreement between the Complainant and the Company dated 11th April 2022 as proof.

21. The Respondent stated that upon receiving the complaint on 6th August, 2024 from the Complainant, they promptly contacted the Complainant to address his concerns. The Respondent attached email correspondences to the Complainant as proof.

22. Further, the Respondent stated that it also took immediate action to remove the Complainant's personal data from its systems, and he is no longer being contacted.

23. In its response to the Complainant's rejoinder, the Respondent disputed the Complainant's claim that he continues to be contacted by its agents. The Respondent asserts that the Complainant's details do not appear on its database and that he has not provided evidence to confirm that any communication received was from its representative.

24. In conclusion, the Respondent stated that it is committed to ensuring compliance with the Data Protection Act, 2019 and it is continuously training sales agents on data protection principles, appropriate marketing methods and the importance of obtaining explicit consent from customers.

F. INVESTIGATIONS UNDERTAKEN

25. The Office analysed the complaint as lodged, reviewed the response submitted by the Respondent and analysed all documents submitted by the parties as evidence.

26. After careful analysis of the evidence adduced, the Office established the following: -

- a) The Respondent collected the Complainant's personal data via a loan agreement between both parties dated 11th April 2022.
- b) The Complainant cleared the loan and his account became dormant in the Respondent's database.

- c) The Respondent claimed that the Complainant had expressed interest in taking a subsequent loan with the Company and attached a WhatsApp correspondence between the Complainant and the Company's Agent to corroborate its claim.
- d) A review of the screenshot indicates communication between the Complainant and the Respondent's Agent on 29th and 30th July 2024. However, it is not clear from the conversation whether the Complainant had expressed interest in applying for a subsequent loan as claimed by the Respondent.
- e) On 30th July 2024, the Complainant received a text from one P***** M***** from Eezy Valuers informing him that he was on his way to Laare regarding the valuation of motor vehicle registration number K**9**S, to which the Complainant responded that he was unable to understand the text.
- f) The Complainant raised the issue with the Respondent on 6th August 2024, narrating the whole ordeal on the happenings from 26th to 30th July 2024. The Complainant requested the Respondent not to market anything to him whether in writing or through calls.
- g) On 20th August 2024, the Respondent responded to the Complainant where it clarified the issue and confirmed it had deleted his personal data from their systems and assured him that he would not receive further marketing communication from the Company.
- h) The Complainant, having not been satisfied with the Respondent's response, proceeded to file a Complaint with this Office on 27th August 2024.
- i) On 5th September 2024, the Complainant stated that he was still contacted by the Respondent. He stated that on 30th August 2024, one B***** M***** of mobile number 0748*****04 contacted him despite the earlier confirmation from the Respondent that his details had been purged from their system.
- j) The Complainant provided a call recording where the caller can be heard marketing payslip loans and logbook loans on behalf of the Respondent from their Meru Branch.

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G. ISSUES FOR DETERMINATION

27. 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 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.

28. Section 26(c) of the Act provides for the right to object to the processing of personal data. The Complainant exercised this right via email on 6th August 2024 and requested the Respondent not to market anything to him whether in writing or through phone calls.

29. On 30th August 2024, the Respondent and/or its Agent called the Complainant via mobile number 0748****04 and marketed payslip loans and logbook loans to him.

30. The Respondent in its response stated that the Complainant had provided explicit consent for the continued holding and processing of his data even after the settlement of the initial loan which he had with the Company. The consent covered a variety of purposes, including but not limited to marketing and offering further financial services.

31. It is worth noting that the right to object to processing applies as an **absolute right** where the processing is for direct marketing purposes as provided for under Regulation 8(4) of the Data Protection (General) Regulations, 2021.

32. The Respondent ought to have complied with the Complainant's objection request within fourteen days of the request as provided for under Regulation 8(3) of the Data Protection (General) Regulations, 2021 and stopped processing his personal data. The Respondent intentionally and/or negligently ignored the Complainant's objection and continued contacting him even after the 14-day period provided under the above Regulation had lapsed.

33. From the foregoing, this Office finds that the Respondent violated the Complainant's right to object to the processing of his personal data.

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

34. The Complainant alleged that the Respondent shared his personal data with third parties without his consent or signing of a fresh contract between him and the Respondent.

35. On the other hand, the Respondent stated that Complainant had expressed interest in taking a subsequent loan with the Company and as part of its standard loan process, the Complainant was informed of the requirements for the loan facility, including the valuation of the motor vehicle to be used as security. Specific details about the valuation process, including the location, were communicated, and a booking was made for the assessment. This was the basis upon which the Company's agents and the contracted valuers contacted the Complainant.

36. A review of the WhatsApp correspondences between the Complainant and the Respondent's agent does not clearly indicate that the Complainant had expressed interest in applying for a subsequent loan as claimed by the Respondent.

37. Further, the Respondent did not provide proof of having informed the Complainant of the requirements of the new loan facility such as the specific details about the valuation process.

38. Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject of the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted.

39. The Respondent had a duty to notify the Complainant of the third parties that it had shared his personal data to. The Respondent by not informing the Complainant that it will share his personal data to its contracted external valuer failed to fulfil this obligation under Section 29 of the Act.

40. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data and states that, "a data controller or processor shall not process 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)."

41. It was upon the Respondent to demonstrate that it had a lawful basis to share the Complainant's personal data with third parties for purposes of advancing a further loan.

42. This Office therefore finds that, by sharing the Complainant's personal data with third parties, that is, the valuer, the Respondent processed the Complainant's personal data without a lawful basis.

43. From the foregoing, this Office finds that the Respondent failed to fulfil its obligations under the Act.

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

44. 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.

45. The Complainant exercised his right to object and requested the Respondent not to market anything to him whether in writing or through phone calls. The Respondent is hereby **ordered to stop marketing its products to the Complainant whether in writing or via phone calls.**

46. The Complainant also prayed for compensation for emotional distress suffered.

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

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

49. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondent either intentionally or negligently violated the Complainant's right to object to the processing of his personal data.

The Office also considers the fact that the Respondent did not notify the Complainant of the third parties that it had shared his personal data to. Additionally, the Office takes into account the fact that the Respondent processed the Complainant's personal data without a lawful basis.

50. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Five Hundred Thousand (KES. 500,000/=) as compensation.**

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violation of the Complainant's right to object to the processing of his personal data and for failing to fulfil its obligations under the Act.
- ii. The Respondent is hereby ordered to pay the Complainant **Kenya Shillings Five Hundred Thousand (KES 500,000/=)** as compensation.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 22nd day of November 2024.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

KENYA