



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0682 OF 2025

RUTH MURUGI NYAGA.....COMPLAINANT

-VERSUS-

MEGATANK SOLAR ENERGY LIMITED.....1ST RESPONDENT

XINDA ACCOUNTING FIRM.....2ND RESPONDENT

DETERMINATION

(Pursuant to Sections 8(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 alleged that the 1st and 2nd Respondents severally and/or jointly collected and processed her personal number for commercial purposes without a lawful basis.

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 '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 (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 13th May 2025. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations from the Complainant who was the aggrieved data subject.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondents of the complaint filed against them vide a letter dated 20th June 2025, referenced ODPC/CIE/CON/2/1 (399). In the notification of the complaint, the Respondents were informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondents were asked to provide this Office with the following:
 - a) A response to the allegations made against them by the Complainant;
 - b) A contact person who could provide further details;

- c) Any relevant materials or evidence in support the statement of response;
 - d) Evidence as to whether the Complainant consented to processing her phone number;
 - e) The lawful basis relied upon to process the complainant's personal data;
 - f) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - g) The mitigation measures adopted or being adopted to ensure that such occurrence mentioned in the complaint do not take place again, if any;
 - h) Any other information relevant to the complaint.
8. The 1st Respondent responded to the allegations against them vide a letter dated 11th July 2025.

D. NATURE OF THE COMPLAINTS

9. The Complainant alleged that the Respondent collected and processed her personal data for commercial purposes without her express consent and/or any other lawful basis thereof.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

10. The Complainant alleges that she was formerly employed by Megatank Solar Energy Limited as from April 2024 to April 2025. During the course of the employment, her number was used to register the company in the Kenya Revenue Authority (KRA) eTims portal.
11. The Complainant alleges that she made enquiries about the matter at the Respondent's Offices, but they did not provide any information on as to why her phone number was used without her consent.
12. The Complainant avers that the Respondent refused to offer any guidelines and therefore the Complainant was forced to follow up with a third-party accounting firm Xinda accounting firm.

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ii. THE 1ST RESPONDENT'S CASE

13. The 1st Respondent submits that the registration of the Complainant's personal line on the KRA eTims portal was orally agreed upon and undertaken with the implied consent of the Complainant.
14. That subsequent communication records demonstrate that the Complainant assented to and actively assisted with the registration, including, receiving the eTims username and password linked to her personal line; and sharing the verification code received from the KRA system which was indispensable for completing the registration.
15. That on 15th November 2024, the Complainant directly contacted staff of the 2nd Respondent to request for a change of the registered number.
16. That on 20th November 2024, the Complainant reiterated the request within the Company group forum, citing that she had acquired a new number for registration.
17. That on 21st November 2024, the Complainant provided the replacement number, being +254 75*****0, and the change was effected on the same day.
18. That upon her further request, the Complainant was furnished with a screenshot from the iTax system confirming that the replacement had been completed.
19. That the foregoing demonstrates that the Complainant was informed, involved, and actively participated in both the initial registration and the subsequent replacement of the phone number.
20. In support of its statement of response, the 1st Respondent attached:
 - a) screenshot evidence showing OTP/verification code sharing
 - b) Screenshot evidence of group communication
 - c) Screenshot evidence of replacement request

iii. THE 2ND RESPONDENT'S RESPONSE

21. The 2nd Respondent did not respond to the Notification letter dated 20th June 2025.

D. ISSUES FOR DETERMINATION

22. In light of the above, the complaint, the 1st Respondent's response and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:

- i. Whether the Complainant consented to the use of her personal data;
- ii. Whether there was a violation of the Complainant's rights under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act.

I. WHETHER THE COMPLAINANT CONSENTED TO THE USE OF HER PERSONAL DATA AS PER THE ACT

23. Section 2 of the Act defines consent as any manifestation of express, unequivocal, free, specific, and informed indication of the data subject's wishes by a statement or by a clear affirmative action, signifying agreement to the processing of personal data.

24. The definition of the Act details the minimum criteria of or for consent to be that it must be certain that the individual has consented, and what they have consented to. There must be a clear signal that they agree or have agreed to the processing. The unambiguity of the consent further links in with the requirement that consent must be verifiable to the extent that one must be able to demonstrate that the data subject consented to the processing.

25. From a combined reading of the above definitions, it is apparent that valid consent is a product of conscious decision-making and requires affirmative action. It should be demonstrable and capable of being proven.

26. Section 30 (1) (a) of the Act provides 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.

27. The Act goes further to state the conditions of consent. It states as follows concerning the conditions of consent: -

32. *Conditions of consent*

(1) *A data controller or data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.*

(2) *Unless otherwise provided under this Act, a data subject shall have the right to withdraw consent at any time.*

(3) *the withdrawal of consent under sub-section(2) shall not affect the lawfulness of processing based on prior consent before its withdrawal.*

(4) *In determining whether consent was freely given, account shall be taken of whether, among others, the performance of a contract, including the provision of a service, is conditional on the consent of the processing of personal data that is not necessary for the performance of that contract. (emphasis ours)*

28. Section 37(1) of the Act states that, "a person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person –

a) *Has sought and obtained express consent from a data subject; or*

b) *Is authorised to do so under any written law and the data subject has been informed of such use when collecting the data from the data subject."*

29. Regulation 14(1) of the General Regulations provides the interpretation of 'commercial purposes' and provides that for the purposes of Section 37(1) of the Act, *a data controller or data processor shall be considered to use personal data for commercial purposes where personal data of a data subject is used to advance commercial or economic interests, including inducing another person to buy, rent, lease, join, subscribe to, provide or exchange products, property, information or services, or enabling or effecting directly or indirectly, a commercial transaction.*

30. It's unchallenged that the 1st Respondent's as a data controller engaged the 2nd Respondent a third party to process its tax related data. The 2nd Respondent processed the Complainant's personal data under instructions of the 1st Respondent.

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31. The act of 1st Respondent retaining the Complainant's personal number on the company's ETR/e-tims, resulting in potential clients repeatedly contacting her to inquire about the Respondents' products and services, constitutes processing of the Complainant's personal data for commercial purposes. This aligns with the legal definition of data processing under the Act, thereby establishing the Respondents' liability for unauthorized use of personal data.

32. Regulation 15 of the General Regulations sets out the permitted commercial use of personal data and states that, *"a data controller or data processor may use personal data, other than sensitive personal data, concerning a data subject for the purpose of direct marketing where—*

- a) the data controller or data processor has collected the personal data from the data subject;*
- b) a data subject is notified that direct marketing is one of the purposes for which personal data is collected;*
- c) the data subject has consented to the use or disclosure of the personal data for the purpose of direct marketing;*
- d) the data controller or data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications; or*
- e) the data subject has not made an opt out request."*

33. The 1st Respondent bore the burden of demonstrating that it had lawfully collected the Complainant's personal data, including her telephone number, and that it had fulfilled its obligation to notify the Complainant that her number would be used as the company's formal ETR/E-tims contact. It was the 1st Respondent's responsibility to obtain the Complainant's express consent for such use.

34. From the above, it therefore follows that the 1st Respondent has not discharged the burden of proof to demonstrate that the Complainant expressly consented to the use

of her telephone number for commercial purposes, as envisaged under Section 32 (1) and 37 of the Act.

35. This Office therefore finds that as far as issue (i) is concerned, the 1st Respondent did not obtain the requisite consent required by the Act to use the Complainant's telephone number for commercial purposes.

II. WHETHER THERE WAS A VIOLATION OF THE COMPLAINANT'S RIGHTS UNDER THE ACT.

36. 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 1st Respondent, by not informing the Complainant of the use to which her personal data was to be put, at the point of collection of the personal data, violated her right to be informed.

37. The Complainant's mobile number was initially used in the registration of the Company's e-Tims account. While the 1st Respondent alleges implied consent through the sharing of OTP codes, consent under the Act must be informed, specific, and freely given. The fact that the Complainant later objected and requested replacement of her number demonstrates the exercise of her right to object to continued processing in line with Section 26(c) of the Act.

38. The Complainant demonstrated that in the month of January 2025, she discovered that her phone number was still being used in the ETR receipts and she made a complaint. Further the Complainant observed that she still receives phone calls and messages from the 1st Respondent's customers requesting for their tax certificates in order to claim refunds.

39. In light of the Office finds that that the Complainant's right to be informed under Section 26(a) and the right to object under Section 26(c) were violated by the Respondent.

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

40. According 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.
41. Having considered the merits of the complaint, the evidence adduced, and having found that the 1st Respondent processed the Complainant's personal data for commercial and tax regulatory purposes without the requisite consent as stipulated under the Act, it follows that there has been a violation of the Act by the 1st Respondent.
42. Section 65 (1) of the Act provides for compensation to a data subject 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. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.
43. Regulation 14 (3) (e) of the Enforcement Regulations further provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
44. Having found that the 1st Respondent failed to prove that they obtained express consent from the Complainant, the Respondent is hereby directed to compensate the Complainant the amount of **KES 400,000/= (Kenya Shillings Four Hundred Thousand Only)** for the unauthorized processing of the Complainant's personal telephone number for commercial and tax regulatory purposes without requisite express consent.
45. In so doing, this Office takes into account the nature and extent of violation with regard to unlawful processing of the Complainant's personal data.

I. FINAL DETERMINATION

46. In the ultimate, the Data Commissioner makes the following final determination;

- i. The 1st Respondent is hereby found liable.
- ii. The complaint against the 2nd Respondent is hereby dismissed.
- iii. The 1st Respondent is ordered to compensate the Complainant **Kenya Shillings Four Hundred Thousand Only (KES 400,000.)**
- iv. 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 August 2025



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**