



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1042 OF 2025

RICHARD MALELU.....COMPLAINANT

-VERSUS-

FAIRDEAL FURNITURE LIMITED.....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 alleges that the Respondent processed and/or continues to process his personal data for marketing 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 22nd July, 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 Respondent of the complaint filed against it vide a letter dated 28th July, 2025 referenced ODPC/CIE/CON/2/1(508). In the notification of the complaint, the Respondent was informed that if the Complainant's allegations were true, they would be in violation of various sections of the Act. Additionally, the Respondent was 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 can provide further details as regards to this complaint;
 - c) Provide any relevant materials or evidence in support of your response above, including but not limited to proof of consent to receive marketing communications, records of communication with the individual, and evidence of action taken upon receipt of the objection;

- d) An explanation as to why the Complainant's contact information was obtained and subsequently used for promotional messaging; Any relevant material and/or evidence in support of the statement of response
- e) Details of your internal policies and procedures for obtaining valid consent prior to sending marketing or promotional communications;
- f) The lawful basis under which the Complainant's personal data was processed for direct marketing purposes, including after the objection was raised;
- g) Any mitigation measures adopted or being adopted to address the matter, including cessation of the promotional messages, formal communication with the affected party, and internal safeguards to prevent recurrence, if any;
- h) Any other information they wished the Office to consider.

8. The Respondent responded to the allegations made against it vide a letter dated 26th September, 2025.

D. NATURE OF THE COMPLAINTS

9. The Complainant alleges that the Respondent unlawfully processed his personal data by sending unsolicited promotional messages without his consent. He further contends that, despite attempting to opt out of such communications, the opt-out mechanism was ineffective, thereby preventing him from exercising his right to object. Consequently, he continued to receive the said marketing messages.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

10. The Complainant claims that he visited one of the Respondent's showrooms in 2024. That shortly thereafter, he began receiving unsolicited promotional messages from the Respondent on his mobile number, +254726****28.

11. He asserts that on several occasions, he attempted to unsubscribe using the opt-out mechanism as outlined in the promotional messages, but the messages continued. He subsequently lodged a formal objection to the processing of his personal data by the

Respondent through email and demand letters; however, despite these efforts, the promotional messages persisted.

12. The Complainant contends that the continued use of his personal data for direct marketing, despite his objection, was unlawful and in violation of his rights. He further states that the Respondent's conduct was intrusive, exploitative, and demonstrated disregard for the principles of consent and purpose limitation in the processing of personal data.
13. Additionally, he contends that he never executed or signed any customer feedback form authorizing the Respondent to collect and process his personal data for direct marketing purposes. He asserts that the Respondent has failed to provide any documentary proof of consent as required.
14. The Complainant maintains that the promotional messages sent by the Respondent were unsolicited and, therefore, constituted unlawful processing of personal data. He reiterates that he made several attempts to opt out of receiving promotional messages through the mechanism provided by the Respondent but was unsuccessful, as the mechanism was ineffective, complicated, and non-functional.
15. He further disputes the Respondent's claim that a bounce-back email was received a [REDACTED] noting that he uses a Yahoo email account and could not have received such a notification. He avers that the Respondent's assertions regarding a non-functional email address are an afterthought and unsupported by evidence such as server or audit logs, thereby maintaining that the Respondent unlawfully processed his personal data for direct marketing without valid consent and failed to facilitate an effective opt-out mechanism, infringing upon his rights.

ii. THE RESPONDENT'S RESPONSE

16. In its statement of response, the Respondent alleges that the Complainant voluntarily visited its showroom and provided his personal data, including his mobile phone number, through a Customer Feedback Form which expressly indicated that the information would be used for promotional and marketing communications.

17. The Respondent claims that the Complainant duly filled and signed the Feedback Form, thereby providing free, specific, informed, and unambiguous consent for the collection and use of his personal data for the stated purpose.
18. It further states that the processing of the Complainant's personal data was conducted strictly within the scope of the consent provided and in accordance with the Act.
19. The Respondent avers that all promotional messages sent to the Complainant included an opt-out mechanism consistent with Regulation 16 of the Data Protection (General) Regulations, 2021, which enabled recipients to object to further processing of their personal data.
20. The Respondent asserts that the Complainant failed to effectively exercise his right to object or opt out using the provided mechanism, and that no valid request for deletion or objection to processing was received by the Respondent.
21. The Respondent admits that an administrative error resulted in a non-functional customer service email address appearing on its website at the material time but maintains that this did not affect the opt-out process, as the USSD mechanism remained active and functional.
22. The Respondent states that upon discovering the error, the email address was promptly corrected, and that no intentional or negligent act led to the continued processing of the Complainant's personal data.
23. The Respondent contends that the continued sending of promotional messages was based on the Complainant's valid consent and the absence of a properly communicated objection, and therefore, no violation of Sections 26, 29, 30, or 37 of the Data Protection Act occurred.
24. The Respondent concludes that it acted in good faith, within the parameters of the law, and that the complaint arises from a misunderstanding of the consent and opt-out procedures rather than any unlawful processing of personal data.

F. INVESTIGATIONS UNDERTAKEN

25. After a thorough analysis of the evidence on record and the applicable law, the Office established that the Complainant continued to receive marketing and promotional messages from the Respondent.
26. The Complainant provided evidence confirming that he opted out of receiving promotional and marketing messages. Despite this, he demonstrated that the channel was ineffective and continued to receive such promotional messages from the Respondent.
27. The Respondent did not provide the Office with any evidence of having obtained the Complainant's express consent to process his personal data for commercial purposes. While the Respondent claimed that the continued messaging was due to a technical lapse that had since been resolved, it failed to furnish any supporting evidence to substantiate this assertion.
28. The Respondent also failed to demonstrate that it provided the Complainant with any follow-up communication or confirmation regarding the request for erasure and deletion of his personal data from its systems.

G. ISSUES FOR DETERMINATION

29. In light of the above, the complaint, the Respondent's responses and evidence adduced together with the investigations conducted, the following issues fall for determination by this Office:
- i. Whether the Respondent fulfilled its obligations under the Act;
 - 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 RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT;

30. In determining this issue, the Office will consider whether the Complainant consented to the use of his personal data for direct marketing purposes.

31. Section 25(c) of the Data Protection Act, 2019, provides that every data controller or data processor shall ensure that personal data is collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes.

32. The Respondent submitted that it collects contact details directly from data subjects through customer feedback forms completed at its showrooms. However, personal data collected under a customer feedback form is ordinarily provided solely for purposes of customer service and experience. Any subsequent processing of such data for promotional or marketing purposes, without obtaining additional, specific, and informed consent, contravenes Section 25(c) of the Act. This provision anchors the principle of purpose limitation, which requires that personal data be processed strictly within the purpose for which it was collected and not repurposed for incompatible objectives.

33. Section 25(g) of the Act further requires that personal data be retained in a form that identifies the data subject for no longer than is necessary for the purpose for which it was collected. Retaining a data subject's contact details after completion of a transaction and subsequently processing such data for marketing or promotional purposes, without renewed or specific consent, constitutes a breach of both the purpose limitation and storage limitation principles under the Act.

34. Section 37(1) of the Act expressly prohibits the use of personal data for commercial purposes unless the data controller-

- a) has sought and obtained the express consent of the data subject; or*
- b) is authorized to do so under written law and has informed the data subject of such use at the point of collection.*

35. Regulation 14(1) of the Data Protection (General) Regulations, 2021, defines the use of personal data for commercial purposes to include any activity aimed at advancing commercial or economic interests, such as inducing a person to purchase, subscribe to, or otherwise engage in commercial transactions.
36. The onus was on the Respondent to demonstrate that it duly informed the Complainant at the point of data collection that his personal data would be used for, among other purposes, direct marketing of its products.
37. Additionally, the Respondent was further required to demonstrate compliance with Section 29 of the Act by showing that it had informed the Complainant that his personal data was being collected and of his rights as a data subject.
38. By persistently sending promotional messages to the Complainant's mobile number for the purpose of marketing its products, the Respondent was processing the Complainant's personal data for commercial purposes as defined under Regulation 14(1) of the General Regulations.
39. Regulation 15 of the General Regulations provides that a data controller or data processor may use personal data for direct marketing only where—
- a) the personal data has been collected from the data subject;*
 - b) the data subject has been notified that direct marketing is among the purposes for which the data is collected;*
 - c) the data subject has consented to such use or disclosure;*
 - d) a simplified opt-out mechanism has been provided; and*
 - e) the data subject has not made an opt-out request.*
40. It was therefore incumbent upon the Respondent to demonstrate that it –
- i) collected the Complainant's personal data lawfully and directly from him;
 - ii) notified him that direct marketing was one of the intended purposes of collection;
 - iii) obtained his express consent prior to using the data for marketing; and
 - iv) provided a functional and simplified opt-out mechanism.

41. The Respondent failed to discharge this evidentiary burden. It neither produced a signed consent form nor provided credible proof of notification or a functional opt-out process. Consequently, the Office finds that the Respondent processed the Complainant's personal data for direct marketing without consent, thereby contravening Sections 25(c), 25(g), and 37(1) of the Act, as well as Regulations 14 and 15 of the Data Protection (General) Regulations, 2021.

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

42. 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.

43. In addition, the Complainant submitted evidence demonstrating that he exercised his right to object to the processing of his personal data for commercial purposes, as provided under Section 26(c) of the Act, as read together with Section 40(1)(b) of the Act. This was done by unsubscribing and/or opting out of receipt of promotional and marketing messages from the Respondent, which the Respondent acknowledged. The exercise of this right imposed a legal obligation on the Respondent to cease further processing of the Complainant's personal data for marketing purposes, and to act on the erasure request without undue delay.

44. Despite the Complainant exercising his right to object he continued to receive marketing and promotional messages from the Respondent. The Respondent attributed this to possible technical anomalies but failed to provide any evidence to substantiate this claim.

45. From the above, this Office finds that the Complainant's rights under Sections 26(a) & (c) and 40(1) of the Act were violated by the Respondent.

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

46. 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.
47. As a remedy, the Complainant requested that the Office grant an order for monetary compensation for the violation of his right as a data subject.
48. Section 65(1) of the Act provides, that a person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor. Section 65(2) provides, a data controller involved in processing of personal data is liable for any damage caused by the processing.
49. Section 65(4) of the Act provides that "damage" includes financial loss and damage not involving financial loss, including distress.
50. Having found that the Respondent failed to uphold the rights of the Complainant as a data subject as envisaged under Sections 26 (a) & (c), and 40(1) and that the Respondent continued to process the Complainant's personal data for commercial purposes without the requisite consent, it then follows that the Complainant is entitled to compensation. The Respondent is hereby directed to compensate the Complainant **KES 250,000 (Two Hundred Thousand Kenya Shillings)**.
51. 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 and the conduct of the Respondent.
52. Having found that the respondent failed to fulfil its obligations under the Act and attendant regulations, an Enforcement Notice shall against the Respondent pursuant to Section 58 of the Act and the Regulation 16 of Enforcement Regulations.

H. FINAL DETERMINATION

53. In consideration of all the facts of the complaints, the evidence tendered and the investigations conducted, the Data Commissioner makes the following determination:

- i. The Respondent is hereby found liable.
- ii. The Respondent is ordered to compensate the Complainant **KES 250,000 (Two Hundred and Fifty Thousand Kenya Shillings)**.
- iii. Enforcement Notice is hereby issued to the Respondent.
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 20th day of October 2025.



Immaculate Kassait, MBS
DATA COMMISSIONER

