



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1844 OF 2024

AYUB ODANYA NABURI.....COMPLAINANT

-VERSUS-

GEOSKY SERVICE 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 lodged a complaint with the office on 15th November 2024 alleging that the Respondent without authorization processed his personal data to apply for Tender at the Central Bank of Kenya. The Complainant asserts that the Respondent misrepresented the Complainant as their employee and falsely included his professional membership details to enhance their bid's credibility.

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 15th November 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 Respondents of the complaint filed against them *vide* a letter dated 7th January 2024 and referenced ODPC/CONF/1/5 VOL II (384). In the Notification of the Complaint, the Respondents were informed that if the allegations by the Complainant were true, they were in violation of various provisions of the Act. Further, the Respondents were asked to provide this Office with the following:
 - a. A response to the allegations made against them by the Complainant;
 - b. Any relevant materials or evidence in support of your response above
 - c. Any relevant materials or evidence in support of the response
 - d. The lawful basis relied upon to process the Complainants personal data.

- e. Evidence as to whether the Complainant consented to the sharing of his personal data
 - f. 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
 - g. Any other relevant information they wish the Office to consider.
8. The Respondent was non-responsive and did not submit a response to the Notification of Complaint. Regulation 11(2) of the Data Protection (Complaints Handling and Enforcement Procedures) Regulations, 2021 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 unauthorized use of the Complainant's personal data by the Respondent to apply for a tender at the Central Bank of Kenya, for professional valuers for valuation of fixed assets. The Respondent misrepresented the Complainant as their employee and used his credentials without consent to enhance their bid's credibility.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant avers that he holds esteemed professional positions, including council membership of the Institution of Surveyors of Kenya, lecturer at a Nairobi University and board membership of the Estate Agents Registration Board. He further contends that these positions coupled with his aspirations for the Institution's presidency, place him in a position of significant professional responsibility and public trust.

12. The Complainant alleges that the Respondent, a registered company in Kenya, currently has three directors. The fourth director, was present during the period relevant to this complaint but has since departed the company, allegedly to evade responsibility. Documentation from the Central Bank of Kenya confirms his directorship during the pertinent period. Notably, the fourth director had professional connections with the Complainant potentially facilitating unauthorized access to the Complainant's personal information.
13. The Complainant avers that in May 2024, the Respondent company submitted a bid for tender to the Central Bank of Kenya for professional valuation services of fixed assets. In this submission, the Respondent fraudulently utilized the Complainant's personal and professional documentation, including his curriculum vitae, academic certificates, professional certificates, and professional membership number, falsely representing him as their employee.
14. The Complainant contends that the Respondent and its directors, lacking the requisite qualifications for the tender, misappropriated the Complainant's credentials without his knowledge or consent to enhance their bid's credibility. The Complainant had no prior relationship with the Respondent company and had never authorized the use of his personal information.
15. The Complainant further avers that the fraudulent use of the Complainant's data came to light when the Central Bank of Kenya contacted the Institution of Surveyors of Kenya for verification following concerns about the Respondent's professional qualifications. This revelation caused significant reputational damage as the information circulated within professional surveyor and valuer networks.
16. The Complainant averred that the incident has severely impacted the Complainant's professional reputation, creating a false impression of dishonesty and professional misconduct. This damage is particularly severe given his position as an advocate for maintaining high professional standards in the industry.
17. The Complainant stated that the Respondent's actions constitute multiple violations of data protection laws this includes:



- i. Unauthorized disclosure of personal and professional data to a third party (Central Bank of Kenya).
- ii. False representation of the Complainant's employment status.
- iii. Unlawful processing of personal data without consent.
- iv. Unauthorized use of personal information for commercial gain.

18. The Complainant further avers that the severity of these violations is heightened by the Complainant's prominent position in the industry and his active role in combating such unethical practices, making the Respondent's actions are unacceptable in their impact on his professional standing and reputation.

19. The Complainant sought the following remedies from this Office:

- i) A permanent injunction restraining the Respondents from unlawfully using the Complainant's personal and professional information.
- ii) An unconditional apology published in two of the widely circulated newspapers.
- iii) Damages amounting to Kshs. 5 million for the unlawful use of the Complainant's personal and professional information

20. The Complainant provided the following documents in support his complaint:

- i) Letter from the Institution of Surveyors dated 24th July 2024.
- ii) Demand Letter to the Respondent and copied to the third parties involved.
- iii) Letter from the Central Bank of Kenya dated 16th July 2024 to the Valuers Registration Board.
- iv) Copy of CR 12 of Geosky Services Limited.
- v) Screenshots of LinkedIn public page of the Respondent's director.
- vi) Screenshot of social media conversations touching on the subject matter.
- vii) Email correspondence between the Complainant and the Institution of surveyors dated 26th July 2024.

- viii) Previous valuation Tender Award Notification by Kenya Development Corporation (KDC) dated 14th June 2024 listing the Respondent as one of the participants.

ii. THE RESPONDENTS' RESPONSE

21. The Respondents were non-responsive and did not submit a response to the Notification of Complaint. Therefore, the allegations made in the Complaint remain uncontroverted.

F. ISSUES FOR DETERMINATION

22. It is not in contention that the Respondents unlawfully processed the Complainant's personal data and used it during the submission of a tender application to Central Bank of Kenya. This is evidenced by the verification exercise done by the Central Bank of Kenya which enabled the Complainant to be aware of use of his qualifications for the submission of tender by the Respondent to the said institution.

23. 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 and attendant regulations.
- ii. Whether the Respondent fulfilled its obligation under the Act.
- 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

24. 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 never informed the Complainant that his personal data was being collected and used for tender application. The Complainant only became aware when the Central Bank of Kenya wrote to the institution of Surveyors for verification purposes. The Respondent failed to comply with Section 26(a) which requires informing the data subject of the intended purpose of data processing.

25. 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.

26. From the foregoing, this Office finds that the Respondents violated the Complainant's right to be informed under Section 26(a) of the Act.

II. WHETHER THE RESPONDENT FULFILLED ITS OBLIGATIONS UNDER THE ACT

27. In addressing this issue, the Office will address the following questions –

- a. Did the Respondent establish a lawful basis for processing the Complainant's personal data?
- b. Did the Respondent's processing of the Complainant's personal data meet the threshold for indirect collection of personal data as required and the Act?
- c. Did the Respondent fulfil its duty to notify?

Did the Respondent establish a lawful basis for processing the Complainant's personal data?

28. The Respondents 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.

29. The Respondent violated key data protection principles under Section 25 by unlawfully processing the Complainant's personal data for an unauthorized purpose. The unauthorized use of the Complainant's personal data to apply for a

tender at the Central Bank of Kenya (CBK) without consent was neither lawful, fair, nor transparent.

30. 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 Respondents processed the Complainant's personal data without obtaining consent from the Complainant. The Respondent failed to obtain valid consent as required under Section 32 of the Act, rendering the processing of the Complainant's data illegal.

31. The Office therefore finds that the Respondent did not establish a lawful basis for processing the Complainant's personal data.

Did the Respondent's processing of the Complainant's personal data meet the threshold for indirect collection of personal data as required and the Act?

32. In collecting personal data, the Respondents are 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 –

- i) the data is contained in a public record.
- ii) the data subject has deliberately made the data public.
- iii) the data subject has consented to the collection from another source
- iv) the data subject has an incapacity, the guardian appointed has consented to the collection from another source
- v) the collection from another source would not prejudice the interests of the data subject.

33. The Respondent unlawfully collected and processed the Complainant's personal data in clear violation of Section 28 of the Data Protection Act in the following aspect:

- i. Failure to Collect Data Directly from the data subject. The Respondent acquired the Complainant's personal data without his knowledge or consent, rather than obtaining them directly from him.

- ii. The Respondent failed to demonstrate that the Complainant's personal data was publicly available or deliberately made public by the Complainant, making the collection unlawful.
- iii. The Complainant did not provide any consent for the Respondent to collect his data from any source.

34. In light of the above the Respondent did not meet the threshold for indirect collection and processing of the Complainant's personal data.

Did the Respondent fulfil the duty to notify?

35. 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.

36. The Respondent failed to fulfil its obligation under Section 29 to inform the Complainant of the intended use of his personal data and that the Complainant personal data would be used for tendering purposes.

37. From the above, this Office finds that the Respondents did not fulfil their obligations provided for under the Act.

NA

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

38. 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.
39. The Complainant prays for permanent injunction restraining the Respondents from unlawfully using the Complainant's personal and professional information, unconditional apology published in two of the widely circulated newspapers, damages amounting to Kshs. 5 million for the unlawful use of the Complainant's personal and professional information.
40. The Office finds that a permanent injunction and an apology are not remedies contemplated under Regulation 14(3) of the Enforcement Regulations.
41. With regards to the award of compensation, Section 65 of the Act provides for compensation to data subjects and states, *"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."*
42. Section 65(4) of the Act states that, *"damage includes financial loss and damage not involving financial loss, including distress."*
43. Further, Regulation 14(3)(e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
44. In considering whether to issue compensation, this Office takes into consideration the fact that the Respondents either intentionally or negligently violated the Complainant's right to be informed and the unlawful processing of his personal data.
45. The Respondent is hereby found liable for processing the Complainant's personal data for without a lawful basis and for denying him an opportunity to exercise his right to be informed before processing of his personal data. The Office hereby orders the Respondent to pay the Complainant **Kenya Shillings Four Hundred and Fifty Thousand (KES. 450,000/=)** as compensation.

46. Having found that the Respondent failed to fulfill its obligations under the Act and attendant regulations, **an Enforcement Notice shall issue against the Respondent** pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.
47. Section 72 (1) of the Act provides that where a data controller who, without lawful excuse, discloses personal data in any manner that is incompatible with the purpose for which such data has been collected commits an offence.
48. The Complainant avers that he became aware of the Respondent's use of his personal data only after the Central Bank, during due diligence, sought verification from the Institution of Surveyors of Kenya, following concerns raised about the Respondent's lack of requisite qualifications.
49. Consequently, the Respondent's unauthorized disclosure of the Complainant's personal data constitutes an offence under the Act.
50. From the above, a recommendation for prosecution is hereby made to the Director of the Respondent's Company, for the offence under Section 72(1) of the Act.

G. FINAL DETERMINATION

51. The Data Commissioner therefore makes the following final determination: -
- i. The Respondent is hereby found liable for using the Complainant's personal data without a lawful basis and for denying the Complainant an opportunity to exercise his right to be informed before processing of his personal data;
 - ii. The Respondent is hereby **ordered to pay the Complainant Kenya Shillings Four Hundred and Fifty thousand (KES. 450,000/=)** as compensation;
 - iii. An **enforcement notice** to hereby be issued to the Respondent.
 - iv. A recommendation for prosecution is hereby made against the Directors of the Respondent's Company.

- v. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 10th day of February 2025.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

