



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1996 OF 2024

EVELYN NASHIPAE SAKAJA.....COMPLAINANT

-VERSUS-

PREMIER CREDIT 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 her personal data for marketing purposes without her express consent and/or any other 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 4th December, 2024. 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 20th December, 2024 referenced ODPC/CONF/1/5 VOL II (388). 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:
 - i. A response to the allegations made against them by the Complainant;
 - ii. Any relevant materials or evidence in support of their response;
 - iii. The lawful basis for further processing of the Complainant's personal data
 - iv. Any evidence as to whether the Complainant was notified that her personal data would be processed for marketing and promotional purposes.

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- v. Descriptive evidence of how data subjects can exercise their rights as envisaged under Section 26 of the Act
 - vi. Mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant, if any;
 - vii. Any other information they wished the Office to consider.
8. The Respondent responded to the Notification letter on 9th January 2025.

D. NATURE OF THE COMPLAINTS

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

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

10. The Complainant alleges that the Respondent, either directly or through its agents, repeatedly solicited her with marketing communications for its brand and services without her consent.
11. The Complainant states that she previously obtained and fully repaid a loan from the Respondent, after which her personal information was unlawfully shared with its staff.
12. The Complainant pleads that this unauthorized dissemination of her details has resulted in continuous and unsolicited marketing communications, constituting an invasion of her privacy.
13. Despite the Complainant's efforts to block multiple numbers, the Respondent's agents have continued to harass her with persistent solicitations. Additionally, even after the Respondent submitted that the Complainant's account was restricted with regard to the marketing and the issue resolved amicably, she still continued to receive the marketing messages.
14. The Complainant asserts that the Respondent's actions amount to a violation of her right to privacy and protection from unsolicited direct marketing, warranting legal redress.

15. The Complainant has attached the following documents to support her complaint:

- i) Screenshots showing the multiple messages and calls received from the Respondent's agents.
- ii) Screenshots of her mobile block list.
- iii) Screenshot of the received messages

iv) THE RESPONDENT'S RESPONSE

16. The Respondent, responded to the Notification of complaint *via* a letter dated 9th January, 2025.
17. The Respondent confirmed that it collected and processed the Complainant's personal data directly from her when they were issuing her with a facility which she promptly repaid.
18. The Respondent admitted that its sales and marketing team had indeed contacted the Complainant for the purpose of promoting its products. It further asserted that it engages independent sales agents who are contractually obligated to conduct marketing activities in strict compliance with data protection laws.
19. The Respondent pleaded that all marketing communications were conducted with the Complainant's explicit consent and that an opt-out mechanism was available. However, it failed to provide any evidence demonstrating that such explicit consent had been obtained.
20. The Respondent alleged and maintained that the Complainant had never previously lodged an official complaint through its designated grievance resolution channels.
21. The Respondent further contended that, upon receiving the complaint, it took immediate remedial action by restricting access to the Complainant's personal data and instructing its sales agents to cease all further contact with her.

22. The Respondent stated that, in addition to restricting access to the Complainant's data, it directly contacted her to provide assurance that she would no longer receive any marketing or promotional communications from its representatives.
23. The Respondent pleaded that it remains committed to full compliance with data protection laws and regulations. Furthermore, and in support of its position, the Respondent submitted the loan application form executed by the Complainant, asserting that it constituted a valid and lawful basis for processing her personal data in accordance with applicable data protection laws.

F. INVESTIGATIONS UNDERTAKEN

24. After careful analysis of the adduced evidence on record and the law, the Office established that the Complainant continuously received marketing phone calls from different agents who identified themselves as agents of the Respondent.
25. The Respondent collected the Complainant's personal data pursuant to a loan agreement executed between the parties on 24th October 2019.
26. A review of the loan agreement's terms does not indicate any provision expressly permitting the sharing of the Complainant's personal data with third parties for marketing purposes.
27. While the Respondent contends that the loan agreement was executed prior to the enactment of the Data Protection Act, it is noted that the alleged violation occurred after the Act had come into force.
28. Furthermore, in its response dated 9th January 2025, the Respondent asserted that it had restricted the Complainant's personal data from marketing use and communicated this directive to all its agents. However, the Complainant, in an email dated 18th February 2025, reported that she continued to receive marketing messages from the Respondent's agents and provided a screenshot of a text message received on the same day as evidence.

29. This raises concerns regarding the adequacy and effectiveness of the Respondent's mitigation measures, as the Complainant's assertions suggest that unsolicited marketing communications persisted despite the Respondent's claimed interventions.

G. ISSUES FOR DETERMINATION

30. 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

31. In considering this issue, the Office will examine the following questions –

- a. Was there a valid data controller and data processor contract?
- b. Did the Complainant consent to the use of his personal data for direct marketing purposes?

Was there a valid data controller and data processor contract?

32. The Respondent states that it engages independent sales agents to market its products to potential customers. Furthermore, that the Respondent mandates these contracted independent agents to obtain explicit consent before marketing its products to individuals.

33. The Respondent states that the telephone numbers used to call the Complainant have been identified to belong to its independently contracted sales agents and disciplinary process was initiated against such agents.

34. Section 2 of the Act defines a data controller as a person or entity who, either alone or jointly with others, determines the purpose and means of processing personal data.

A data processor is defined as a person or entity that processes personal data on behalf of the data controller.

35. Section 25 of the Act imposes specific obligations on the data controller, including ensuring that personal data is processed lawfully, fairly, and transparently. The data controller must also ensure that personal data is collected for specified, explicit, and legitimate purposes, and is not further processed in a manner incompatible with those purposes.
36. Section 42 of the Act requires that where a data controller contracts a data processor to process data on its behalf, there must be a written contract in place that governs the relationship. The contract should outline the data processor's obligations, including the scope and purpose of the processing, and ensure that the data processor complies with the data protection principles under the Act.
37. Importantly, Section 42 of the Act emphasizes that the data controller retains full responsibility for ensuring the lawful processing of data, even when a processor is involved. Section 42(2) of the Act provides; that where a data controller is using the services of a data processor the data controller shall opt for a data processor who provides sufficient guarantees in respect of organizational measures for the purpose of complying with Section 41 (1). This provision clarifies that contracting a data processor does not absolve the data controller of liability for any violations of the Act. The data controller is still accountable for ensuring that the data processor complies with the required standards.
38. Regulation 24 of data protection (general) regulations, 2021 provides, that subject to Section 42(2)(b) of the Act, a data controller shall engage a data processor, through a written contract and the contract shall include the following particulars –
- a) *processing details including –*
- i) *the subject matter of the processing;*
 - ii) *the duration of the processing;*
 - iii) *the nature and purpose of the processing;*

- iv) the type of personal data being processed;*
 - v) the categories of data subjects; and*
 - vi) the obligations and rights of the data controller*
- b) instructions of the data controller;*
 - c) duty on the data processors to obtain a commitment of confidentiality from any person or entity that the data processors allow to process the personal data;*
 - d) security measures subjecting the data processor to appropriate technical and organizational measures in relation to keeping personal data secure;*
 - e) provision stipulating that all personal data must be permanently deleted or returned on termination or lapse of the agreement, as decided by the data controller; and*
 - f) auditing and inspection provisions by the data controller.*

39. The Independent Sales Agent Agreement submitted to this Office by the Respondent is fundamentally deficient. It categorically fails to specify the essential elements required under the Data Protection Act, including but not limited to: the subject matter of the processing, the duration of the processing, the nature and purpose of the processing, the type of personal data being processed, the categories of data subjects, and the obligations and rights of the data controller concerning the processing of personal data. These omissions represent a significant failure to comply with the statutory requirements, rendering the agreement non-compliant and legally inadequate.

40. Consequently, the Independent Sales Agent Agreement cannot, under any reasonable interpretation, be deemed a valid data processing contract between a data controller and a data processor. It falls markedly short of the legal threshold required for such agreements, as established under Regulation 24 of the Data Protection (General) Regulations, 2021. The failure to meet these critical legal requirements renders the agreement incapable of being recognized as a lawful processing contract, thus precluding it from conferring any of the rights or obligations typical of a compliant

data controller-processor relationship. Moreover, the said Independent Sales Agreement provided by the Respondent has not been executed by the sales agents.

41. It is on this foregoing that the Office finds the Independent Sales Agent Agreement the Respondent is relying upon as a data processing contract between itself and its independent agent therefore to be in violation of the requirements under Regulation 24 of the Data Protection (General) regulations, 2021.

Did the Complainant consent to the use of her personal data for marketing purposes?

42. The Respondent in support of its response, submitted that the Complainant was a former customer who had previously obtained and fully repaid a loan facility. The Complainant, however, asserted that since repaying the loan, she has had no further contact with the Respondent. She further maintained that she never provided consent to receive marketing or promotional messages and that she is no longer a client or customer of the Respondent. Her complaint is therefore based solely on the receipt of unsolicited marketing communications.

43. Having found that the independent sales agents were acting on behalf of the Respondent, the Respondent had an obligation to establish a lawful basis for the processing of the Complainant's personal data for commercial purposes.

44. 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."

45. 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.

46. By constantly calling the Complainant's phone number to market their products to him, the Respondent through its agents were processing the Complainant's personal data for commercial purposes as defined above.

47. 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."*

48. It was upon the Respondent to demonstrate that it had explicitly notified the data subject that direct marketing is one of the purposes for which the personal data is collected, obtained express consent from the Complainant before calling her to market its services and provided a simplified opt out mechanism. This burden was not discharged by the Respondent as it failed to prove that it obtained express consent from the Complainant.

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

49. 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 her personal data was to be put, prior to further processing of her personal data, violated her right to be informed.

50. On 18th February 2025, nearly two months after lodging her complaint, the Complainant submitted additional evidence to the Office demonstrating the Respondent's continued processing of her personal data. This was despite the Respondent's prior statement asserting that such processing for marketing and promotional purposes had ceased. Notably, the Respondent failed to address the process for erasure or deletion of the Complainant's personal data, nor did it provide details of any concrete steps taken to ensure the cessation of the alleged unlawful processing.

51. From the above, this Office finds that the Complainant's rights under Sections 26(a) of the Act were violated by the Respondent.

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

52. 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.

53. As a remedy, the Complainant sought the Respondent to cease and desist from contacting him, delete his personal data from the Respondent's systems, databases and any other record.

54. Furthermore, 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.

55. Having found that the Respondent did not fulfill its obligations provided for under the Act, the Office hereby orders for an enforcement notice to be issued against the Respondent.

56. 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.

H. FINAL DETERMINATION

57. 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. An Enforcement Notice is hereby issued to the Respondent herein.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 3rd day of March .----- 2025.



Immaculate Kassait, MBS
DATA COMMISSIONER