



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1679 OF 2024

BRIAN GITHAIGA.....COMPLAINANT

-VERSUS-

NCBA BANK KENYA LTD.....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 Complaint filed on 22nd October, 2024 relates to the allegation that the Respondent failed to rectify and update the Complainant's accurate email address which constitutes his personal data.

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 22nd October, 2024. The complaint was lodged pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations by the advocates for the Complainant on behalf of 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 25th October, 2024 and referenced ODPC/CONF/1/5 VOL II (275). 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. Provide any relevant evidence in support of the response;
 - d. A detailed procedure on how data subjects can exercise their rights;
 - e. The data protection policy addressing issues on data accuracy, rectification and erasure;

- 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 it wishes the Office to consider.
8. The Respondent submitted its response to the Notification of Complaint *vide* a letter dated 13th November, 2024.
9. This determination is therefore as a result of analysis of the complaint as received, the response submitted by the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

10. The Complainant lodged his complaint against the Respondent alleging that the Respondent failed to rectify and update his correct personal data (i.e email address which is b*****.g@gmail.com and continued to share his business transactions details to b*****@gmail.com which doesn't belong to him.

E. SUMMARY OF RELEVANT FACTS AND EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

11. The Complainant stated that on or about 29th May 2019, he opened a Business account under Versilia Enterprises with the Respondent's Lavington Branch and was issued with A/C No. 8*****8 and filled all the correct details for the bank opening forms with the Respondent.
12. The Complainant further states that the Respondent captured the wrong email address b*****@gmail.com instead of the email address provided b*****.g@gmail.com, which is the same email captured for his personal accounts maintained with the same Respondent.
13. On 15th June 2023, the Complainant initiated a transaction with the Respondent's Westlands Branch with a Japanese Company where the Respondent's agents emailed/notified the wrong account holder of the transaction details through b*****@gmail.com.

14. The Complainant stated that the said third party one B*** G***** owner of email address b*****@gmail.com wrote back to the Respondent enquiring why she was receiving emails and details of various transactions yet she does not maintain any accounts with the Respondent.
15. The Complainant also avers that on 7th July 2023 he visited the Respondent's Westlands Branch to complete the earlier transaction and further requested for change of the email address from b*****@gmail.com to b*****.g@gmail.com (which he had originally shared during the account opening) to avoid any breach of personal information relating to the Business. The Respondent through their agent later confirmed during same day that the change of email address had been effected.
16. The Complainant also states that on 7th February 2024, while remitting storage payment for the Business, he noticed that the Respondent did not effect the change of email and was still sending the business transaction details to b*****@gmail.com which belongs to the third party.
17. The Complainant further avers that that the Respondent negligently declined to update the correct email address for the Business and continues to share the business transaction details to the said third party.
18. The Complainant sought the following redress;
- i. The Respondent to immediately amend his business details since the breach of personal data continues to occur;
 - ii. The Respondent to compensate him for general damages;
 - iii. Restitution for loss of business; and
 - iv. Penalty for breach of privacy.
19. The Complainant provided the following documents as evidence: -
- i) A certificate of registration of Versilia Enterprises.
 - ii) A copy of the email thread dated 15th June 2023 for the Complainant to the Respondent.
 - iii) A copy of the email from the third party dated 15th June 2023.

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- iv) A copy of the email correspondence between the Complainant and the Respondent dated 7th July 2023.
- v) A copy of the email correspondence between the Complainant and the Respondent dated 18th July 2023.
- vi) Email correspondence between the Respondent and the Complainant dated 7th February 2024.

ii. THE RESPONDENT'S RESPONSE

- 20. The Respondent in its response dated 25th October 2024 confirmed that indeed the Complainant opened a business account at NCBA Lavington on 29th May 2019 under the name Versilia Enterprises.
- 21. The Respondent further states that it refutes capturing the Complainant's wrong email address. Further, the Respondent avers that it is the Complainant who provided two different email addresses on the application form being b*****@gmail.com under the section detailing the business information and b*****.g@gmail.com in all subsequent sections.
- 22. The Respondent avers that the Bank lawfully obtained and recorded the contact information provided by the Complainant during the account opening process to meet contractual obligations.
- 23. The Respondent states that on 3rd July 2023, the Complainant issued written instructions at the Westlands branch to delete the email address b*****@gmail.com from the business account. Prior to the aforementioned instructions, the Respondent stated that the Complainant had never communicated to the Bank his desire to have his account details updated to exclude the email address b*****@gmail.com
- 24. The Respondent further states that the Complainant's instructions were executed and the Complainant was informed of the change on 7th July 2023.
- 25. The Respondent states that it received a demand letter dated 17th July 2024 from the Complainant's advocates alleging that the Respondent had erroneously captured an incorrect email address and negligently sent emails the wrong recipient.

26. The Respondent observes that it conducted investigations to address the Complainant's concerns. A result of the investigations was that the said email address that the Complainant alleged was erroneously captured had been deleted on the 3rd July 2023. The Respondent further made a response to the Complainant's Advocates on the 1st August 2024.

27. The Respondent provided the following documents as evidence: -

- i) A screenshot of the account opening form with two different email addresses.
- ii) A screenshot of the notification to both emails.
- iii) Screenshots of the instruction and the change made to the system.
- iv) Correspondence on the asset acquired by the Complainant through a banking facility.
- v) Demand letter dated 17th July 2024.
- vi) Response to the demand dated 1st August 2024.
- vii) The data subject's rights policy guideline.
- viii) The Account maintenance procedure.
- ix) Excerpt of the data quality standards guideline
- x) Screenshot of awareness email sent to staff.

F. INVESTIGATIONS UNDERTAKEN

28. The Office analysed the complaint as lodged, the Respondent's response and the documents submitted by both parties as evidence.

29. The Office established that indeed the Complainant filled in two different email addresses in different sections in the account opening form with the Respondent namely b*****@gmail.com and b*****.g@gmail.com.

30. The Office further established from the evidence adduced that one of the email addresses b*****@gmail.com belongs to a third party one B*** G*****. The said third party notified the Respondent on 15th June 2023 that she was receiving emails from the Respondent yet she didn't have an account with them.

31. The Offices also finds that the Complainant indeed issued written instructions to the Respondent on the 3rd July 2023 at the Westlands branch for the deletion

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the email address b*****@gmail.com from the business account. Prior to the aforementioned instructions, the Office notes that the Complainant provide evidence of communicating to the Bank his desire to have his account details updated to exclude the email address b*****@gmail.com

32. The Offices finds that despite the allegations by the Respondent that the Complainant's instructions for deletion of the email address was executed on 7th July 2023, the Complainant provided evidence to the contrary that the Respondent sent his personal information to the third party's email address b*****@gmail.com on the 7th February 2024.

33. This email dated 7th February, 2024 was communicated to the Respondent as an attachment to the Notification Letter 25th October, 2024. The Respondent did not refute the email and therefore the same remains uncontroverted.

G. ISSUES FOR DETERMINATION

34. It is not in dispute that the Complainant provided two email addresses on his account opening form which is the foundation to the lodging of this complaint. However, upon discovery of the said error the complainant requested for deletion of the erroneous email address b*****@gmail.com on 3rd July 2023 which the Respondent confirmed to have executed on the 7th July 2023.

35. However, on the 7th of February 2024 the Respondent sent personal information to the said third party's email address from the evidence adduced to this Office.

36. In light of the above, the following issues fall for determination by this Office:

- i. Whether there was an infringement of the Complainant's rights under the Act; and
- ii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THERE WAS AN INFRINGEMENT OF THE COMPLAINANT'S RIGHTS UNDER THE ACT

37. The Complainant is a data subject as per the definition under the Act and has rights as provided for under the Act.
38. Section 40(1)(b) of the Act provides for the right of rectification and erasure and states that a data subject may request a data controller or processor to erase or destroy without undue delay personal data that the data controller or data processor is no longer authorized to retain, irrelevant, excessive or obtained unlawfully.
39. The Complainant exercised this right by issuing written instructions to the Respondent on the 3rd July 2023 at the Westlands branch for the deletion the email address b*****@gmail.com from the business account.
40. Further the said third party one B*** G*****a, also wrote an email to the Respondent on 15th June 2023 notifying the Respondent that she was receiving emails from the Respondent yet she didn't have an account with them, thus need for rectification as soon as possible.
41. Regulation 12(3) of the Data Protection (General) Regulations, 2021 states that ***"a data controller or a data processor shall respond to a request for erasure within fourteen days of the request."***
42. The Office finds that despite the allegations by the Respondent that the Complainant's instructions for erasure of the email address were executed on 7th July 2023, the Complainant provided evidence to the contrary that the Respondent sent his personal information to the third party's email address b*****@gmail.com on the 7th February 2024 which constitutes an infringement of his rights under the Act.
43. From the foregoing, this Office finds that the Complainant's right of erasure was violated by the Respondent.

II. 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's sought for an order that Respondent to immediately amend his business details since the breach of personal data continues to occur. **The Respondent is hereby ordered to erase the third party's email b*****@gmail.com from the Complainant's business account within fourteen (14) days.**
46. The Complainant sought for compensation from the Respondent. 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."*
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 of erasure of his personal data by failing to correct the email address in its database even after instructions had been issued by the Complainant.
50. This Office therefore awards the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES 250,000)** as compensation for the violation of his right of erasure as provided for under the Act.

H. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainant's right to erasure under Section 40(1)(b) of the Act.
- ii. The Respondent is hereby ordered to erase the third party's email address b*****@gmail.com from the Complainant's business account within the next fourteen (14) days.
- iii. The Respondent is hereby ordered to compensate the Complainant **Kenya Shillings Two Hundred and Fifty Thousand (KES. 250,000).**
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 19th day of January 2025.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

KENYA