



**OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 0815 OF 2023**

BRIAN WAINAINA 1ST COMPLAINANT

GATHONI MAITAI 2ND COMPLAINANT

-VERSUS-

**DELTECH CAPITAL KENYA LIMITED T/A
MYKES. RESPONDENT**

DETERMINATION

(Pursuant to Section 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 Constitution of Kenya 2010, under Article 31 recognizes the right to privacy. Consequently, in an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter as "the Act") was enacted. Section 8 (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) 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.
2. The Office of the Data Protection Commissioner (hereinafter as "the Office") is a regulatory Office, established pursuant to the Data Protection Act, 2019. The

Office 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.

3. The Office received two (2) complaints by 2 Complainants; Brian Wainaina and Gathon Maitai, dated from 18th May, 2023 and 23rd May, 2023, respectively, against Deltech Capital Kenya Limited (hereinafter as "the Respondent") and pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as "the Regulations") has conducted investigations into the complaints.
4. In exercise of its mandate as envisaged under the Act and in the promotion of justice, the Office notified the Respondent of the said complaints through physical and by mail vide letters dated 2nd June, 2023 Ref: **ODPC/CONF/1/5/Vol 1(279)**. The same was in accordance with the provisions of Article 260(q) and Article 31 (c) and (d) of the Constitution of Kenya, Section 8(1) (a) (f) (k), Section 9 (1) (a) (c) (d) (e) (f) (g) (h) and Section 56 of the Data Protection Act, 2019, Regulation 4 (1), 13(1)(2)(3) and 14 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021. Attached to the notification were redacted copies of both complaints for the Respondent's reference.
5. In the said notification of the complaint filed against the Respondent, the Respondent was to provide:
 - a) A response to the allegations made against it by the Complainants;
 - b) The standard contract between the Respondent and the digital borrowers (the Complainants), if any;

- c) Details of how it obtained the contacts in the Complainants' phonebooks and whether the Complainants' consented to their phonebook contacts being accessed;
 - d) Details of how it fulfils the Data Subjects' right of rectification and erasure as per Section 40 of the Data Protection Act;
 - e) The legal basis under which it contacts third party contacts obtained from the digital borrowers' phone books without the third parties' consent;
 - f) The legal basis which it relied on to disclose the Complainants' personal private information to third parties obtained in their (Complainants') phone book contacts;
 - g) Proof of registration with this Office as data controllers and data processors;
 - h) Details of: -
 - i. The mitigation measures adopted or being adopted to address the complaints;
 - ii. The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaint do not occur again; and
 - iii. Its data protection policy outlining the complaints handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the Regulations, and any alleged contravention directed to their attention by data subjects.
 - i) Demonstration (by way of written statement) of its level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subject can exercise their rights in relation to data protection.
6. On 20th June 2023, the Office received the Respondent's response to the complaints.

7. Upon receipt of the aforementioned letters and documents, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.
8. This determination is anchored on the provisions of Regulation 14 which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

B. NATURE OF THE COMPLAINTS

9. The Complainants allege that the Respondent, and its products to wit: Mykes and Flytech mobile applications (hereinafter as "the apps") have been:
 - i) Making unwarranted calls and sending unwarranted text messages to the Complainants;
 - ii) Requesting the Complainants to make payments for loans not borrowed or for loans already settled, via text messages; and
 - iii) Requesting third parties to make loan payments on behalf of loanees, when their consent was not obtained to be a guarantor/referee and they were not party to, or aware of the loan.

C. THE RESPONDENT'S RESPONSE

10. Through a letter received on 20th June 2023, the Respondent stated that:
 - a) They own **MyKes**, one of the digital lending products that forms the crux of the present complaint;
 - b) Denied liability to the Flytech's mobile loan application, despite acknowledging its (company) ownership;
 - c) They do not access their clients' information, apart from those enlisted as emergency contacts and referees and/or guarantors;
 - d) The 1st Complainant was not among the referees in their system, and that their system could have captured his number wrongly;
 - e) They indeed called the 2nd Complainant who was both a borrower's spouse and referee;

- f) It does not disclose its clients' contacts obtained during the application process to any third party; and
- g) The clients' data is collected purely for the loan advance.

11. The Respondent further furnished the Office with screenshots of their loan application data flow diagram, standard contracts, a data protection impact assessment report together with flow charts of the calls made between the company and clients.

D. ISSUES FOR DETERMINATION

- i. Whether the Respondent collects, stores, and processes contacts data in accordance with section 25 of the Act;
- ii. Whether the Respondent fulfilled the duty to notify under section 29 of the Act; and
- iii. Whether there was any infringement of the Complainants' Rights as data subjects as provided for in the Data Protection Act, 2019.

E. ANALYSIS AND DETERMINATION

I. WHETHER THE RESPONDENT OBTAINED PRIOR CONSENT FROM COMPLAINANTS BEFORE OBTAINING THEIR PERSONAL DATA

12. The Complainants adduced screenshots of messages sent to them by the Respondent requesting them to make payments on behalf of loanees who had defaulted or were late in making payments. The Respondent in its response admitted to having obtained the Complainants contacts, and subsequently contacting them regarding loans they had not only not consented to, but also ones they were not party and had no idea of their existence.

13. In addition to the above, the Respondent is a registered data controller, that principally collects, stores and processes personal data of its clients and/or customers. A cursory perusal of the Respondent's response connotes that the Respondent admits to be the registered owner of the digital lending product,

MyKes. The Office further postulates that although the Respondent conveniently denies Flytech's ownership to the extent that it has never advanced any mobile loan, the evidence adduced by the Complainants portray the contrary; as it depicts a direct link and correlation between MyKes, and Flytech.

14. Section 32 provides for conditions of consent and provides that 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.

15. The Office finds that the Respondent did not obtain prior consent from the Complainants before enlisting them as referees/guarantors and did not have a mechanism whereby the proposed referee/guarantor(s) can have the liberty to decide whether or not they will guarantee a loanee, how much they are going to guarantee and whom they are guaranteeing. The Complainants did not have an option to decline to guarantee a loanee and were only informed about the loan when the loanee had defaulted or failed to pay in time.

16. The Office therefore posits that the Respondent collected the mobile phone contacts of the Complainants from third parties without their consent contrary to section 28 (1) of the Act which states that, "*a data controller or data processor shall collect personal data directly from the data subject.*"

II. WHETHER THE RESPONDENT FULFILLED THE DUTY TO NOTIFY UNDER SECTION 29 OF THE ACT

17. The Respondent indeed admits that the 1st Complainant was not among the listed referees. In a sudden turn of events, the Respondent advertently feigns mistake, by alleging that they captured the 1st Complainant's number wrongfully due to system failure. Both Complainants have equally provided screenshots of the incessant call logs and unwarranted messages to buttress

their allegations, which allegations remain uncontroverted as the Respondent did not respond to this allegation.

18. The 1st Complainant is apprehensive that the Respondent could get him enlisted in the Credit Reference Bureau, thus tarnishing his credit history and score. The 2nd Complainant on the other hand avers that the Respondent should be stopped if at all the information is untrue as her mental health is at stake
19. The Office is equally alive to and the Respondent's acknowledgment and/or admission of contacting third parties, who are referees provided by its borrowers when their customers and/or clients default. The Office further takes exception with the latter action which is bereft of any illustration or proof of legal basis for contacting the third parties (complainants herein) without their consent.
20. It is not lost to Office that the Respondent violated the Complainants' right to be informed by not informing them of the use to which their personal data was to be put, at the point of collection of the personal data, violated their right to be informed. The Respondent collected their contacts from its' clients, without informing the Complainants that their personal data was being collected and what it was going to be used for. Moreover, it did not inform the Complainants that it was collecting their mobile phone numbers and that it was going to process that information for the purpose of debt recovery from its defaulting clients.
21. Needless to state, Section 29 of the Act frowns upon the Respondent's failure to notify the Complainants the above before collecting their personal data.
22. As a result, the Office notes that the Respondent failed to notify and/or inform the complainants:

- a) Their specified data subject rights as espoused under Section 26 of the Data Protection Act;
- b) The facts that their personal data is being collected;
- c) The purpose for collection of their personal data; and
- d) The third parties whose personal data has been or will be transferred to, including details of the safeguards adopted.

III. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANTS' RIGHTS AS DATA SUBJECTS AS PROVIDED FOR IN THE DATA PROTECTION ACT, 2019

23. Section 26 of the Data Protection Act provides for the rights of a data subject which are: -

- a) to be informed of the use to which their personal data is to be put;
- b) to access their personal data in custody of data controller or data processor;
- c) to object to the processing of all or part of their personal data
- d) to correction of false or misleading data; and
- e) to deletion of false or misleading data about them.

24. In light of the above, the Respondent and its products are alleged to have processed personal data for the said complainants without their consent hence infringing on their rights as provided in Section 26 of the Data Protection Act, 2019. The Respondent neither collected personal data directly from the complainants as data subjects, nor notified them of their rights, nature of their personal data collected and the purpose of the collection beforehand.

F. FINAL DETERMINATION

25. In consideration of all the facts of the complaint and evidence tendered, the Data Commissioner makes the following final determination:

- i. The Respondent is hereby found liable.

- ii. An Enforcement Notice to hereby be issued to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at MAIROBI this 11th day of August 2023



**Immaculate Kassait, MBS
DATA COMMISSIONER**



