



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 0914 OF 2023**

**AGNES KIMANZI..... COMPLAINANT**

**-VERSUS-**

**GRASS INTERNATIONAL LIMITED.....1<sup>st</sup> RESPONDENT**

**SOLOMON MUTHUI.....2<sup>nd</sup> RESPONDENT**

**DETERMINATION**

*(Pursuant to Sections 8(f), 56 and 57 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 "the Act") was enacted. 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.
2. The Office of the Data Protection Commissioner (hereinafter "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.

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3. The Office received the complaint from the Complainant on 2<sup>nd</sup> June 2023.
4. On 23<sup>rd</sup> June 2023, the Office in the exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaint filed against it, *vide* a letter of even date, Ref: ODPC/CONF/1/5/Vol 1(312). The Respondent received the notification letter on the same day. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
  - a) A response to the allegations made against it by the complainant;
  - b) Any relevant materials or evidence in support of the Response in (a) above;
  - c) The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;
  - d) The standard contract that the Complainant has with the Respondent, if any;
  - e) Details of how the Respondent obtained the contacts of the Complainant, and whether the complainant consented to retention and processing of her personal data;
  - f) The legal basis relied upon by the Respondent to collect, store, process and engage with the Complainant's personal data and whether or how you fulfil the duty to notify under Section 29;
  - g) The measures that the Respondent has put in place to observe limitation to retention of personal data as provided for by Section 39;
  - h) A statement outlining an opt out mechanism for the Complainant as provided for by Regulation 16 of the Data Protection (General) Regulations 2021;
  - i) Proof of registration with the office of the Data Protection Commissioner as data controller and data processors;
  - j) Details (in writing) of:
    - (i) The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaint do not take place again; and
    - (ii) The Respondent's 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 your attention by data subjects;

- (iii) Demonstration (by way of written statement) of your level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subjects can exercise their rights concerning data protection.

5. On 29<sup>th</sup> June 2023, the Office received a response from the Respondent vide a letter dated 29<sup>th</sup> June 2023. On the 1<sup>st</sup> Respondent's response, they acknowledged receipt of the notification letter informing them of the complaint filed against them and the 2<sup>nd</sup> Respondent, one of its distributors. The 1<sup>st</sup> Respondent stated that it had tasked the 2<sup>nd</sup> Respondent to talk to the complainant and out of the communication they amicably agreed to settle the dispute that arose after receiving messages from their distributor. The Respondent further stated that the complainant and the 2<sup>nd</sup> Respondent went ahead and agreed to block each other to avoid future disputes. The 1<sup>st</sup> Respondent further responded that it is a law-abiding organization and it would like to apologize on behalf of the 2<sup>nd</sup> Respondent for the mistake that occurred and they promised to put measures.
6. On 3<sup>rd</sup> July 2023, this Office wrote to the Complainant requesting her to confirm that the concern has been settled as outlined by the 1<sup>st</sup> Respondent's response to the notification of the complaint letter. On 11<sup>th</sup> July 2023, the Complainant responded to the Office disputing the contents of the dispute resolution as stated by the Respondents.
7. On 1<sup>st</sup> August 2023, this office wrote to the Respondents to substantiate the claims they averred in their response to the Notification letter.
8. On 22<sup>nd</sup> August 2023, the Respondents responded to this Office's letter in the same manner they had responded to the Office's notification letter. They did not substantiate what they had averred to in their responses. They did not adduce any alternative dispute resolution agreement.
9. This Determination is pegged on the provisions of Regulation 14 of the *Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021* 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 COMPLAINT**

10. The complaint relates to direct marketing messages. The complainant alleges that the Respondent has been flooding her phone with promotional messages despite

her several warnings and objections over the same. She expressed that she is not interested in receiving the messages to no avail.

### **C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT**

8. The 1<sup>st</sup> Respondent stated that it had tasked the 2<sup>nd</sup> Respondent to talk to the complainant and out of the communication they amicably agreed to settle the dispute that arose after receiving messages from their distributor. The Respondent further stated that the complainant and the 2<sup>nd</sup> Respondent went ahead and agreed to block each other to avoid future disputes. The 1<sup>st</sup> Respondent further responded that it is a law-abiding organization and it would like to apologize on behalf of the 2<sup>nd</sup> Respondent for the mistake that occurred and they promise to put measures.
9. Notably, On 11<sup>th</sup> July 2023, the Complainant responded to the Office disputing the contents of the dispute resolution as stated by the Respondents.

### **D. ISSUES FOR DETERMINATION**

- i. Whether it is mandatory for direct marketing messages to have an opt-out option.
- ii. Whether the Complainant's rights were violated.
- iii. Whether it is mandatory for parties to adduce an alternative dispute resolution agreement or any form of written agreement in the event parties conclude and resolve the complaint through the alternative dispute resolution mechanisms.

### **E. ANALYSIS AND DETERMINATION**

#### **i. WHETHER THERE WAS LAWFUL USE OF PERSONAL DATA FOR COMMERCIAL PURPOSES.**

10. In relation to the promotional messages which form the crux of the complaint at hand, since the enactment of the Data Protection Act 2019, SMS marketing, a form of direct marketing, has been examined as a form of use of personal data for commercial purposes. While the Office appreciates that SMS marketing provides entities with a fast and direct communication channel, such marketing must be in compliance with the Act and the Regulations.
11. The Complainant alleges that the 2<sup>nd</sup> Respondent being the 1<sup>st</sup> Respondent's distributor has been sending promotional messages to the Complainant incessantly. The promotional messages relate to the 1<sup>st</sup> Respondent's products. The Complainant tried to contact the 2<sup>nd</sup> Respondent to have him stop sending the

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promotional messages. The direct marketing messages being sent to the Complainant read in part as follows:-

***"Hello, Grass International (NGO) that deals..... invites you for a seminar...an opportunity to work on part-time or full-time..... God bless you as you prepare to come. Regards, Solomon Mathui."***

12. Regulation 15 of the Data Protection (General) Regulations 2021 provides for the permitted commercial use of personal data. It provides:-

**15. Permitted Commercial use of personal data**

**(1) 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.**

13. Regulation 16 of the Data Protection (General) Regulations 2021 further provides for the features and contents of an opt-out message as follows-

**15(1) An opt out mechanism contemplated under regulation 15(1)(d) shall-**

- (a) Have a visible, clear, and easily understood explanation of how to opt out;**
- (b) Include a process for opting out that requires minimal time and effort;**
- (c) Provide a direct and accessible communication channel;**
- (d) Be free of charge or where necessary involve a nominal cost to a data subject; and**
- (e) Be accessible to persons with a disability.**

14. The contents of the direct marketing messages have been captured hereinbefore. Juxtaposing the above contents of the promotional direct marketing messages sent to the Complainant and the above regulations the Office notes as follows:-

- a) The Respondents' being the data controller did not provide any evidence that they collected the Complainant's personal data from the data subject as envisaged in the above statutory provisions;
- b) The Respondents did not notify the data subject that direct marketing is one of the purposes for which personal data is collected;
- c) From the evidence adduced to this office, it is evident that the data subject did not consent to the use or disclosure of the personal data for the purpose of direct marketing;
- d) The Respondents did not provide a simplified opt out mechanism for the Complainant to request not to receive direct marketing communications. In addition to there being no opt-out option in the promotional message, the opt-out process was not included in the message.
- e) Moreover, the Complainant outrightly objected to receiving the promotional messages. Also, noting that there was no opt out option in the promotional messages, the Complainant could not opt out of the messaging. The provisions of regulation 16 (1) of the Data Protection (General) Regulations 2021 have been violated in toto.

20. Further, the messaging did not comply with Regulation 17 of the Data Protection (General) Regulations 2021 which provides for mechanisms to comply with in the opt-out requirement.

#### **17. Mechanisms to comply with the opt-out requirement**

**(1) In communicating with a data subject on direct marketing, a data controller or data processor shall include a statement which is prominently displayed, or otherwise draws the attention of the data subject to the fact that the data subject to the fact the data subject may make an opt-out request.**

**(2) a data controller or data processor may, in complying with an opt out requirement:-**

- (a) clearly indicate, in each direct marketing message, that a data subject may opt-out of receiving future messages by replying with a single word instruction in the subject line;**
- (b) ensure that a link is prominently located in the email, which takes a data subject to a subscription control centre;**

(c) clearly indicate that a data subject may opt out of future direct marketing by replying to a direct marketing text message with a single-word instruction;

(d) inform the recipient of a direct marketing phone call that they can verbally opt-out from any future calls; and

(e) include instructions on how to opt out from future direct marketing, in each message.

(3) A data controller or a data processor may use an opt-out mechanism that provides a data subject with the opportunity to indicate their direct marketing communication preferences, including the extent to which they wish to opt out.

(4) Despite sub-regulation (3), a data controller or data processor shall provide a data subject with an option to opt out of all future direct marketing communications as one of the outlined preferences.

21. Having established that the Respondents did not abide by Regulations 15, 16, and 17 of the Data Protection (General) Regulations 2021 this Office would like to further emphasize that the opt-out management system and mechanism needs to be effective in all instances. If a data subject requests the controller to delete their personal data collected for purposes of direct marketing, then that request must be actioned promptly.

## ii. WHETHER THE COMPLAINANT'S RIGHTS WERE VIOLATED.

22. Section 26 (d) and (e) of the Act outlines the rights of a data subject, including the right to rectification and erasure. The Act states that:

*A data subject has a right—*

(a) *to be informed of the use to which their personal data is to be put;*

(b) *to access their personal data in the custody of the 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.*

23. Similarly, the Act goes to further emphasize the right of rectification and erasure of a data subject under Section 40 which states that:

(1) *A data subject may request a data controller or data processor—*

(a) *to rectify without undue delay personal data in its possession or under its control that is inaccurate, outdated, incomplete or misleading; or*

- (b) *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.*
- (2) *Where the data controller has shared the personal data with a third party for processing purposes, the data controller or data processor shall take all reasonable steps to inform third parties processing such data, that the data subject has requested—*
- (a) *the rectification of such personal data in their possession or under their control that is inaccurate, outdated, incomplete, or misleading; or*
- (b) *The erasure or destruction of such personal data that the data controller is no longer authorized to retain, irrelevant, excessive, or obtained unlawfully.*
- (3) *Where a data controller or data processor is required to rectify or erase personal data under sub-section (1), but the personal data is required for the purposes of evidence, the data controller or data processor shall, instead of erasing or rectifying, restrict its processing and inform the data subject within a reasonable time.*

24. From the above provisions of law it is evident that data controllers and data processors have an obligation to ensure the personal data of data subjects is accurate and kept up-to-date. Further, the data controller and data processors are obligated to promptly erase and rectify any inaccurate personal data.

25. In the course of investigations, the 1<sup>st</sup> Respondent's response to the Notification of the complaint involved the following response, "***the matter was solved after a thorough discussion between Solomon Muthui and Agnes Kimani dated 26<sup>th</sup> June 2023 around 11:00am, both agreed to block each other as a measure to avoid future communications.***"

26. From the evidence adduced before this office, it is evident that the 1<sup>st</sup> Respondent left the matter with the 2<sup>nd</sup> Respondent to rectify the complainant yet it was the responsibility of the 1<sup>st</sup> Respondent to rectify and address the complainant's information and or details.

27. Further since this case involves the issue direct marketing messages by the Respondents', it needs to have been resolved in accordance with regulations 15, 16 and 17 of the Data Protection (General) Regulations 2021 and not through ***blocking each other as stated by the 1<sup>st</sup> Respondent*** in both their response to the notification letter dated 11<sup>th</sup> July 2023 and their further



correspondence of 22<sup>nd</sup> August 2023. The data protection laws and regulations do not envisage blocking as one of the ways of solving disputes relating to direct marketing messages as is the case here. Moreover, the means and ways of the solving such direct marketing messages has been expressly stipulated by Regulation 17 of aforesaid regulations as stated before.

28. In view of the foregoing, it has been established that the complainant was not availed the option of opting out of the direct marketing messages by the Respondents. Similarly, this Office informed the 1<sup>st</sup> Respondent of the issue at hand. However, the Respondents did not take action at all as there is no evidence as to that. Lastly, the Act and the regulations provides the procedures to be followed in cases of complaints relating to direct marketing which was not adhered to.

29. It therefore follows that Complainant was denied a chance to exercise her rights as envisaged under Section 26 of the Act by the Respondents.

iii. **WHETHER IT WAS MANDATORY FOR THE PARTIES TO ADDUCE THE ALTERNATIVE DISPUTE RESOLUTION SETTLEMENT AGREEMENT IN THE EVENT PARTIES CONCLUDE AND RESOLVE THE COMPLAINT THROUGH THE ALTERNATIVE DISPUTE RESOLUTION MECHANISMS**

30. On this issue, this office would like to acknowledge the importance of alternative dispute resolution with respect to complaints. The Constitution of Kenya 2010, embeds the importance of alternative dispute resolution. Article 159(2)(c) of the Constitution provides for the use of alternative dispute resolution mechanisms and principles by decision making bodies in the making of decisions.

31. Section 9(1)(c) of the Act gives this Office the powers to promote and facilitate conciliation, mediation and negotiation on disputes all disputes arising from the Act. In addition, the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 goes further under Regulation 15 on the applicability of conciliation, mediation and negotiation in data related issues as envisaged under the Act.

32. The Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 under regulation 15(4) expressly provides that at the conclusion of the negotiations, mediation or conciliation process, the parties

shall sign a negotiation, mediation or conciliation agreement in the manner specified in Form DPC 5 set out in the schedule.

33. The 1<sup>st</sup> Respondent, in its response stated that it had tasked the 2<sup>nd</sup> Respondent to talk to the complainant and out of the communication they amicably agreed to settle the dispute that arose after receiving the direct marketing messages. This, by itself, is an indication that the parties had attempted to resolve the complaint using one of the alternative dispute resolution mechanisms envisaged under the data protection laws and regulations.

34. Considering the parties had attempted to use one of the alternative dispute resolution mechanisms, whichever it was, this Office wrote to the parties to aduce the alternative dispute resolution agreement that emanated from the alternative dispute resolution processes. On this request, this Office notes that to date the parties have never provided this Office with any form of evidence as to the same. As such there is no proof of the parties resolving the issues amicably using the alternative dispute resolution mechanisms.

35. On that note, it follows that it is mandatory upon the parties concluding the Alternative Dispute Resolution process and reaching an agreement thereto to furnish this office with the Alternative Dispute Resolution Settlement Agreement as envisaged under Regulation 15(4) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.

#### **F. DETERMINATION**

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

- i. The Respondents are hereby found liable.
- ii. Enforcement Notice to issue against the 1<sup>st</sup> Respondent.
- iii. Parties have the right to appeal this Determination.

DATED at NAIROBI this 30<sup>th</sup> day of August 2023.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**