



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1048 OF 2023

KENNEDY OWUOR..... COMPLAINANT

-VERSUS-

AVENTUS GROUP..... 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 and the Judgment in Nairobi High Court Constitutional Petition No. E321 of 2021)

A. INTRODUCTION

1. The Constitution of Kenya 2010, under Article 31 (c) and (d) 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.
2. The Office of the Data Protection Commissioner (Hereinafter '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.
3. 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) 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.

4. The Office received a complaint by Kennedy Owuor (herein after 'the Complainant') on 20th June 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter 'the Enforcement Regulations') from the Complainant who is the aggrieved data subject.
5. Aventus Group/Aventus Technology Limited (hereinafter 'the Respondent') is a digital credit provider that operates Lendplus as its money-lending product.
6. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the complaint filed against it vide a letter dated 26th June, 2023 referenced ODPC/CONF/1/7/4 VOL 1 (313) and required their response within 21 days. In the notification of the complaint filed against the Respondent, the Respondent was to provide:-
 - (a) A response to the allegation made against them by the complainants;
 - (b) Any relevant materials or evidence in support of the response;
 - (c) The standard contract between themselves and the complainants.
 - (d) The legal basis relied upon to process and engage with the complainants, whether or how they fulfill the duty to notify under Section 29 of the Data Protection Act, 2019;
 - (e) Details of all the product names/mobile money lending apps that the Respondent runs;
 - (f) Proof of registration with the Office as data controllers and data processors;
 - (g) Details of:
 - (i) The mitigation measures adopted or being adopted to address matters arising from the complaints;
 - (ii) The technological and organizational safeguards that have been put in place to ensure that such occurrences mentioned in the complaints do not take place again; and

- (iii) Their 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.
- (h) Demonstration (by way of a written statement) of their level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how a data subject can exercise their rights in relation to data protection.
7. The Office received a response from the Respondent on 18th July 2023 *via* email. Upon receipt of the responses, the Office conducted investigations as required by Regulation 13 (1)(d) of the Enforcement Regulations.
8. This determination is premised on the provisions of Regulation 14 of 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.

B. NATURE OF THE COMPLAINT

9. The Complainant alleged that Lendplus, a product of the Respondent contacted him *via* their agent to inquire about the whereabouts of its client identified as [REDACTED]. He further states that the agent of the Respondent engaged his phone with persistent incoming calls that he could not use his phone and he had to switch it off. He further avers that when he tried to talk to the agent of the Respondent to explain that he is a third party and not a client of the Respondent, the Respondent's agent verbally abused him.

C. THE RESPONDENT'S RESPONSE

- 10 The Respondent provided a response to the allegations against them by the Complainant *via* email on 18th July 2023 and stated that the Complainant is listed as an alternative contact person by its client whom it identified as [REDACTED].

17. The Respondent also states that in its loan process, a client has the option of providing alternative phone numbers to be used in the event that the primary number provided is unreachable.

the clients internally blacklisted to ensure that these contacts are not contacted. The Respondent further states that this measure was necessitated by the fact that some of their clients as borrowers fill in data that does not belong to them or data of persons unrelated and unknown to them.

27. The Office acknowledges that the Respondent has provided a statement received in email and dated 18th July, 2023 as to the allegations by the Complainant. However, the Office also reverently notes that other than the response, the Respondent has failed to provide any other detail(s) verbal or written as requested herein above in support of its position on the allegations by the Complainant.

E. ISSUES FOR DETERMINATION

28. Having considered the nature of the complaint, the evidence adduced by all parties to the complaint and the investigations conducted by this Office, the issues for determination are therefore:

- I. Whether the Respondent fulfilled its duty to notify as per Section 29 of the Act;
- II. Whether the Respondent infringed the Complainant's right to privacy; and
- III. Whether the Complainant is entitled to the remedies sought for the alleged breach.

I. WHETHER THE RESPONDENT FULFILLED ITS DUTY TO NOTIFY AS PER SECTION 29 OF THE ACT

29. Section 28 of the Act provides that a data controller or data processor shall collect personal data directly from the data subject.

30. Section 29 of the Act provides for the *duty* of a data controller or data processor to, before collecting personal data, *inform* the data subject of their rights under

client, who provided the phone number as an alternative contact prior to being issued with a loan.

32. The Respondent states that according to its system of operations, its client has an option of giving their alternative phone number for such instances where their primary numbers are unreachable. The Respondent further states that it obtains consent from its clients prior to issuing them with loans. No evidence of this was adduced to this Office in support of this statement.
33. Section 28(1) of the Act provides that a data controller or data processor shall collect personal data directly from the data subject. Section 28(2) of the Act provides the exemptions for when a data controller or processor may indirectly collect and/or process personal data. The Respondent has not demonstrated to this office neither through its response, its actions, policies or any other means that its need to indirectly collect personal data from its clients fall under these exemptions addressed in Section 28(2) of the Act.
34. The Respondent states that phone numbers used by its agents to reach its clients do not appear as 'private numbers'. The Respondent has not demonstrated to this Office any support to how true or accurate this statement is. Also, the Respondent did not give any registered phone number its used or continues to use to contact its clients.
35. The Respondent also avers that all its calls to its clients are recorded and that its records do not show that the Complainant's number had been contacted by its agent. At the same time, the Respondent states in their response that the Claimant's number had been listed through a customer, [REDACTED], as an alternative phone number and that [REDACTED] defaulted on the facility hence leading them to reach out to the given alternative numbers. The Respondent is therefore reprobating and approbating on whether they indeed contacted the Complainant.
36. Notwithstanding the above, the Respondent, prior to collecting personal data, was obligated to inform the data subject from whom the data is being collected of their rights under Section 26 of the Act, and the purposes for which their personal data

is being collected among others, and further given the data subjects the option to either authorize or decline the collection and processing of the same.

37. In this regard, this Office finds that the Respondent has failed to demonstrate that the Complainant was duly informed that his phone number is listed as alternative contact and that the Respondent did not obtain prior consent from the Complainant. In addition, the Respondent did not have a mechanism whereby the proposed alternative contact(s) can:

- i) have the liberty to decide whether or not they can be used as an official contact of the borrower with regards to the repayment of the loan advanced by the borrower,
- ii) have the liberty to decide whether or not they will guarantee a borrower, how much they are going to guarantee and whom they are guaranteeing. The Complainants did not have an option to decline to guarantee a borrower and were only informed about the loan when the borrower had defaulted or failed to pay in time.

38. To this end, the Office finds the Respondent liable for breaches of Sections 28 and 29 of the Act.

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

39. 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.

40. By not informing the Complainant of its intention to collect his personal data, the method of collection and the use to which his personal data was to be put, at the

point of collection of the personal data, the Respondent violated the Complainant's right to be informed.

41. The Respondent collected the phone number of the Complainant from its client without:

a) prior authority from the data subject, in this case the Complainant, whom the data is being collected.

b) informing the Complainant that his personal data was being collected and the purpose that data was to be used for.

42. The Respondent failed to inform the Complainant that it was collecting his mobile phone number and that it was going to process that information for the purpose of debt recovery from a defaulting third party.

43. The Respondent should have informed the Complainant, before collecting their phone numbers, (regardless of the mode of collection) that it has their phone numbers and that they will be contacted in the event that the third-party borrower defaults in repayment of their loans.

44. Lastly, to reiterate on this fact, as a data controller and data processor, the Respondent should only collect personal data directly from the data subject as per Section 28(1) of the Act. A data controller and/or data processor can only indirectly collect and/or process personal data if they fulfil the requirements of legal exemptions provided under Section 23(2) of Act. The Respondent herein fails to demonstrate it qualifies for an exemption.

In view of the foregoing, the Office finds that the Respondent infringed on the rights of the Complainant as a data subject as provided for in the Act.

PK

III. WHETHER THE COMPLAINANT IS ENTITLED TO THE REMEDIES SOUGHT FOR THE ALLEGED BREACH.

45. The Complainant sought for compensation by the Respondent for the inconveniences occasioned to him.

46. However, the Complainant did not clearly demonstrate any loss; financial or otherwise caused by the Respondent to justify compensation.

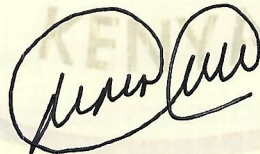
47. From the foregoing, the prayer for compensation against the Respondent is denied.

F. FINAL DETERMINATION

48. In consideration of all the facts of the complaint, the evidence tendered and the investigations conducted, the Data Commissioner therefore 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 NAIROBI this 18th day of September 2023



**IMMACULATE KASSATT, MBS
DATA COMMISSIONER**