



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 677 OF 2022

ALLEN WAIYAKI GICHUHI.....1ST COMPLAINANT

CHARLES WAMAE.....2ND COMPLAINANT

-VERSUS-

FLORENCE MATHENGE.....1ST RESPONDENT

AMBROSE WAIGWA.....2ND RESPONDENT

DETERMINATION

(Pursuant to Judgment delivered by Honourable Justice J. Chigiti (S.C.) given at Nairobi on 12th May, 2023 in the High Court Judicial Review. E028 of 2023)

A. INTRODUCTION

1. On 6th January, 2023 the . Office of the Data Protection Commissioner delivered a Determination in respect of a complaint lodged by the Applicants herein on 20th July, 2022. The Applicants were aggrieved by that Determination and filed a Judicial Review Application in the High Court vide High Court Judicial Review Application No E028 of 2023 Allen Waiyaki Gichuhi & 2 other Vs. Office of the Data Protection Commissioner & Others.
2. The Application before Court was heard and vide a Judgment delivered on 12th May, 2023, Hon. Justice Chigiti directed amongst others that "*An order of mandamus is hereby issued compelling the Respondent to readmit for fresh investigations the Applicants complaint dated 20th July, 2022.* This Determination is delivered following reinvestigations conducted by the Office of

the Data Protection Commissioner in compliance with the Court's order. A rendition of the facts and the detailed background of the matter and the issues in controversy is set out here below.

3. The Constitution of Kenya 2010, under Article 31 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.
4. Section 8 (f) of the Act guarantees that the Office of the Data Protection Commissioner (Hereinafter known as 'ODPC') 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.
5. ODPC is a regulatory Office, established pursuant to Section 5 of the Act. ODPC 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.
6. ODPC received a complaint dated 20th July 2022 on 21st July 2022 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 ('the Regulations') and has conducted investigations into the complaint based on the materials availed and timeline given by the Court. The 1st and 2nd Complainants (hereinafter referred to as 'the Complainants') are partners at the firm of Wamae & Allen Advocates (hereinafter referred to as 'the firm').
7. The 1st and 2nd Respondents (hereinafter referred to as 'the Respondents') are former employees of the firm. However, the basis of the complaint is that the 1st Respondent allegedly sent confidential information from the firm to her

personal email as well as to the 2nd Respondent while she was still an employee of the firm.

8. The complaint dated 20th July 2022, initially filed by the firm, was received by ODPC on 21st July 2022. The complaint was accompanied by a sworn Affidavit dated 20th July 2022 of Prestone Wawire (hereinafter referred to as the 'deponent'), a Partner in the firm. The affidavit contained the evidence that the Complainants relied on including the email correspondence between the 1st and 2nd Respondent.
9. In a letter dated 18th August 2022 and bearing the reference number MM/2022/LIT./A023/520, the Complainants instructed Muchemi & Co. Advocates to represent them in their capacity as data subjects. The letter also made it clear that the complaint has two levels: one level is made by the Complainants on behalf of the firm for disclosing its intellectual property to unauthorized parties, and the other level is made on behalf of the firm's clients, who may be either private individuals or corporations. A collection of documents that were allegedly shared by the first respondent with the second respondent were attached to the letter.
10. ODPC, as mandated under the Act and the Regulations, notified the Respondents of the complaint filed against them and required their response within 21 days, again as mandated under the Act and the Regulations. Upon receipt of the responses, ODPC conducted investigations as required by Regulation 13 (1)(d) of the Regulations.
11. The ODPC thereafter rendered a Determination dated 6th January, 2023 which was the cause of action in the High Court Judicial Review No. E028 of 2023 wherein the Honorable Court gave the following Orders:

a. An order of certiorari is hereby issued to remove to this Court for quashing the decision of the Office of the Data Protection Commission dated 6th January, 2023, in respect of the Reference No. ODPC/CONF/1/5/V01 1(112), ODPC COMPLAINT NO. 677 OF 2022

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b. Prayer D is allowed.

c. Prayer E, F and G are granted as prayed.

d. An order of mandamus is hereby issued compelling the Respondent to readmit for fresh investigations the Applicants complaint dated 20th July, 2022.

e. The Respondent shall complete the fresh investigations within 30 days from the date of readmission.

f. Costs to the Applicant.

12. The Complainants herein through their Advocates on record vide letter MM/2022/LIT/A023/520 dated 17th May, 2023 forwarded to the ODPC the Judgment of the court and requested for the complaint to be heard afresh as directed by the Court.

13. The ODPC acknowledged the submission of the Judgment on 24th May, 2023 and the accompanying request and informed the Complainants to submit evidence of the complaint within seven (7) days. Noting that time was of the essence, and in the interest of all parties, the ODPC undertook re-investigation of the documents submitted and appreciated the need to summon the parties to the complaint.

14. On 30th May, 2023, the ODPC pursuant to Regulation 13 (1) (a) of the Regulations issued summons to the parties herein to attend the ODPC for reinvestigation as follows:

a. The 1st Complainant was to appear on 8th June, 2023 at 10:00 a.m.

b. The 2nd Complainant was to appear on 8th June, 2023 at 2:00 p.m.

c. The 1st Respondent was to appear on 9th June, 2023 at 2:00 p.m.

d. The 2nd Respondent was to appear on 9th June, 2023 at 10:00 a.m.

15. The 1st and 2nd Complainants through their Advocates on record challenged the summons and opted to appear jointly on 8th June, 2023 at 2.00 p.m. Further, Advocates on record for the 1st and 2nd Respondents also challenged the severed appearances of the Respondents and further informed the ODPC vide letter CM/LIT/1783/1/2022 dated 30th May, 2023 that the 1st Respondent had been taken ill and could not attend the summons. They attached letters from the Hospital and the 1st Respondent's personal doctor confirming the 1st Respondent's ill-health. In view of the timeline provided by the Court, it was impossible for the ODPC to await the recovery of the 1st Respondent before concluding its investigations.

16. While the 2nd Respondent was accorded an opportunity to appear for the investigations, vide a letter dated 8th June, 2023 sent through their Advocates M/s CM Advocates LLP, they indicated their unwillingness to participate in the proceedings separately noting that *"it is unclear to us why the ODPC proceedings of 9th June, 2023 have been separated, whereas the subject Complaint is one i.e. ODPC 677 of 2022, and the matters in the impugned complaint level joint allegations not severed as against either Respondent."* The Respondents consequently did not participate in the fresh investigations and neither did they submit any written brief or further documents.

17. This Determination will therefore consider evidence collected in the investigations which was available to the ODPC as at the date of this Determination.

18. This Determination is pegged on the provisions of Regulation 14 which provides 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

19. The Complainants alleged that the 1st Respondent, shared and disclosed personal and sensitive data to a third-party, the 2nd Respondent herein, without

consent of the data subjects and the Complainants. Moreover, the firm, allegedly, discovered a series of communication between the Respondents which was ongoing for more than a year. The 2nd Respondent was a third party and not entitled to the communication as he was a former employee of the firm.

20. Similarly, the complaint contained a summary of documents allegedly shared as between the 1st and 2nd Respondent in the affidavit dated 20th July 2022 deponed by Preston Wawire specifically at paragraph 17. It was alleged that the documents shared included court documents such as pleadings and supporting documents, applications, affidavits, submissions and legal opinions. Other documents allegedly shared included bank statements, correspondences, invoices and subscription emails as shown below:

No.	EMAIL DATE	EMAIL SENT TO	FILE REF & DETAILS	TYPE OF DOCUMENT SHARED
1.	12 th April 2021	[REDACTED]	5702/54/2020 Osho chemicals	Notice of intention to sue
2.	7 th May 2021	[REDACTED]	5562/119/1 Consolidated Bank of Kenya-vs- Pine Crib Limited	Certificate of Urgency and Affidavit in Support of urgency
3.	26 th May 2021	[REDACTED]	Neils Bruels Vs Moses Wachira & Others	Submissions on review and certification to the Supreme Court and Applicant's List of Authorities
4.	3 rd June 2021	[REDACTED]	5703/127/19 I & M Limited vs Buzeki Enterprises Limited	Plaintiff's rejoinder submissions, Defendant submissions and Plaintiff's written submissions.

5.	15 th June 2021	[REDACTED]	Santowels vs Stanbic Bank	Certificate of urgency on Stay Application
6.	15 th June 2021	[REDACTED]	Tajdin Thanawalla, Jane Kameme & Veronica Musyimi	Certified Final Arbitration award dated 19 th April 2021
7.	15 th June 2021	[REDACTED]	5835/1/5 Mamtah Peyush Mahajan -vs- Yashwant Kumari Mahajan	Plaintiff's written submissions
8.	23rd June 2021	[REDACTED]	Mark Properties vs Coulson Harney Advocates	Replying Affidavit by Ino Ponangipalli Venkata Ramana Rao and Supporting Affidavit by Christopher Ndolo -Certificate of urgency by Chris Mutuku and chamber summons application dated 11 th June 2021.
9.	7 th July 2021	[REDACTED]	5696/1/13 Ryan Properties & Philip Jalango	Certificate of urgency and application for stay pending appeal dated 1 st March 2021
10.	28 th July 2021	[REDACTED]	Alpha Grain Millers & 7 others vs Ministry of Agriculture, Livestock and	Notice of Motion (Setting aside Arbitral Award), Chamber summons and Supporting Affidavit

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			Fisheries and the Attorney General	
11.	25 th August 2021	[REDACTED]	Simon Frase vs Timarflor	Notice of Motion, Legal opinion, Supporting Affidavit, Petition, Supplementary Affidavit and Petitioner's submissions
12.	25 th August 2021	[REDACTED]	Precedents	Wamae & Allen Appeal Checklist
13.	2 nd September 2021	[REDACTED]	Stanbic Bank & Ahono Greens 5988/1/19 Sidian Bank & Waveron Limited	Certificate of Urgency, Notice of Motion and Supporting Affidavit
14.	8 th December 2021	[REDACTED]	5904/1/17 Kirogani Investments vs Sigma & Sigma & 9 others Sidian Bank & Waveron Limited	Third Party Notice dated 17/11/17 and 19/12/17
15.	12 th December 2021	[REDACTED]	5703/203C/21 Mark Prime Properties	Draft Consent
16.	10 th December 2021	[REDACTED]	Prepare by Allen	Petition to Parliament on the in duplum rule 16/01/18
17.	12 th January 2022	[REDACTED]	5717/47/18	Plaint

			Bank of Africa vs Seven Seas	
18.	14 th January 2022	[REDACTED]	5703/220/2 I&M Bank & Dishon Kiman	Amended Complaint and Application for Inhibition Orders
19.	17 th February 2022	[REDACTED]	Saham Insurance vs Gas & Go Petroleum & Another	Chamber Summons dated 14/12/20 and 16/12/20
20.	11 th March 2022	[REDACTED]	5835/19/119 Shalimar Flowers & Mwangi Gathimba & Associates	Plaint Legal Opinion 23/5/19 Legal Opinion 29/4/19
21.	11 th March 2022	[REDACTED]		Complaint to Disciplinary Committee by Prestone Wawire
22.	12 th April 2022	[REDACTED]	5727/7/20 Prime Bank vs Porshe Kenya Limited	Injunction dated 15/1/21, 11/1/21 and 15/1/21
23.	10 th May 2022	[REDACTED]	Basil Criticos Vs NBK	Appellants Submissions
24.	10 th May 2022	[REDACTED]	E003 of 2022 Milliam Iyende Mayaka vs Rao & General Printiers	Ruling dated 6 th May 2022
25.	11 th May 2022	[REDACTED]	5703/255/202 I & M Bank	Administrators Consent, Affidavit of

		v [REDACTED]		statement of facts, Gazette Notice of Appointment of an Administrator & Statutory Declaration
26.	23 rd May 2022	[REDACTED]	5395/102/17 Remax vs Sichuan Huashi Limited	Submissions on Review
27.	6 th July 2022	[REDACTED]		Complaint to Disciplinary Committee dated 12/1/19
28.	5 th July 2022	[REDACTED]	5703/197/21 Emmanuel Kuria - vs- Invesco & 3 others	Original order dated 21/3/22, Notice of Motion dated 12/1/22, Record of Appeal and Memorandum of Appeal.
29.	6 th July 2022	[REDACTED]	146-Wamae & Allen	W & A Guide on Administration under Insolvency Act, 2015.
30.	4 th July 2022	[REDACTED]	Civil Application No. E036 of 2022 Mehul Patel & Another vs Champaklal Ramji & 2others	2 nd Respondent's Submissions dated 29/6/2022 and Replying Affidavit by Andrew Muchina dated 22/6/22

21. The Complainants through their advocates on record further produced documents they relied on to support their case vide their letter dated 18th August 2022 as detailed below:

- i. Amended Plaintiff dated 14.01.2022-Nai CMCC No. E1562 of 2021; I&M Bank Ltd vs Dishon Mutegi Kimani;

- ii. Garnishee Replying Affidavit sworn on 13.05.2022- Kilgoris PMCC No. 50 of 2017; Thomas Onyango Onchonga vs. AMACO;
- iii. Exhibit Marked CNM-2 of a third party sworn on 11th June 2021; and
- iv. Originating Summons-Nai HCCOMM No. of 2021; Prime Bank Limited vs. Porsche Center Nairobi Limited.

22. The Complainants further allege that the documents shared by the 1st Respondent to the 2nd Respondent are the firm's trade secrets and intellectual property which cannot be shared to an external party without authorization. The Complainants asserted that the Act was violated, particularly section 72 which prohibits data controllers from unlawfully disclosing personal data to third parties, which prohibition extends to data processors.

23. The Complainants also attached a certificate of electronic evidence dated 18th July 2022 signed by Ms. Maurine Sumba an employee of the firm as per section 78A, 106A and 177 of the Evidence Act, cap 80 of the Laws of Kenya in respect of the documents attached to the affidavit of the deponent.

24. The Complainants further submitted documents for investigation vide letter MM/2022/LIT./A023/520 dated 31st May, 2023 pursuant to the Court's order for reinvestigation.

C. THE RESPONDENTS' CASE

I. 1st RESPONDENT'S RESPONSE

25. The 1st Respondent averred in response to the complaint vide a letter dated 18th October 2022 that ODPC does not have jurisdiction to interrogate alleged breaches of intellectual property rights. The 1st Respondent similarly asserted that the documents in question were public documents that fell under section 79 of the Evidence Act on the definition of public documents.

26. Moreover, the 1st Respondent also alleged that the Complainants are forum shopping and hence the whole process is an abuse of the legal process in an

attempt to stop her from initiating legal proceedings against the managing partner for a totally unrelated issue. It is her assertion that the 1st Complainant authorised the issuance of the templates from the firm.

27. The 1st Respondent further averred that the firm had not been registered as a Data Controller or Data Processor as at the time she responded to the complaint and therefore, the Act cannot be applied retrospectively. The emails that the 1st Respondent allegedly sent to the 2nd Respondent were sent before the 14th of July 2022 which date marked the commencement of the registration of Data Controllers and Data Processors.
28. Additionally, the 1st Respondent avers that she was never furnished with any employment policies as required under the Employment Act. Similarly, she asserts that she is neither registered as a Data Controller or a Data Processor as she was only an employee at the Complainants' firm until her resignation as such.
29. The 1st Respondent also reiterated that the court documents sent to the 2nd Respondent are public documents by dint of section 79 of the Evidence Act. Consequently, the various documents were filed in court by the Complainants on behalf of their clients, some who are companies registered under the Companies Act, 2015 and are therefore not data subjects as per the definition in section 2 of the Data Protection Act.
30. The 1st Respondent also cited the case of ***Robert Ngande Kathathi v Francis Kiviva Kitonde (2020) eKLR*** where the Court held that submissions are generally parties' "marketing language". It was her argument that submissions are not personal data.
31. Accordingly, the 1st Respondent implies that legal opinions contain mere analysis of the law which are then replicated into pleadings and therefore do not constitute as personal data.

32. The 1st Respondent also alleges that documents shared to her personal email were not shared with a third party as she is the sole custodian of the said email address. The 1st Respondent indicated that some of the pleadings she sent to her personal email were for purposes of working from home during the COVID-19 pandemic and were not shared to a third party and stated that the Complainants' firm was well aware that she was sending these documents to her personal email for the purposes of working from home.

II. 2ND RESPONDENT'S RESPONSE

33. The 2nd Respondent vide a letter dated 19th October, 2022 responded to the complaint through his advocates on record, CM Advocates LLP. In the said letter, the 2nd Respondent drew ODPC's attention to a number of parallel proceedings that were commenced by the same Complainants. These ongoing legal proceedings were lodged and are currently pending before the High Court (HCCC No. E135 of 2022; Allen Gichuhi and 4 others -vs- Ambrose Ndung'u Waigwa), the LSK Disciplinary Tribunal and at the Directorate of Criminal Investigations.

34. Moreover, the 2nd Respondent stated that the multiplicity of the same complaints in the various institutions over similar issues will fetter his right to fair administrative action, and his right to a fair hearing. The 2nd Respondent also alleges that the complaints at the different fora will be a violation of the legal doctrine of *sub judice* and will jeopardise attempts at amicable settlement of the matter as formally initiated by the President of the Law Society of Kenya.

D. ISSUES FOR DETERMINATION

- i. Whether ODPC has jurisdiction to determine the issues raised in the Complaint.
- ii. Whether there was breach of the Act.
- iii. Whether the Complainants are entitled to any remedy under the Act.

E. ANALYSIS AND DETERMINATION

I. WHETHER ODPC HAS JURISDICTION TO DETERMINE ISSUES RAISED IN THE COMPLAINT

35. ODPC is a regulatory Office, established pursuant to the Act 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.

36. Section 2 of the Act sets out the meaning of **personal data** as *any information relating to an identified or identifiable natural person*; **personal data breach** as *breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*; and **sensitive personal data** as *data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject*.

37. Similarly, section 72 (3) and (4) of the Act on which the complaint is anchored provides that any person who obtains access to personal data without prior authority of the data controller and further discloses the said information to a third party commits an offence. Moreover, the said provisions do not apply to a person who is an employee or agent of the data controller or data processor acting within the scope of that mandate.

38. In the foregoing case and having carefully considered the complaint and the responses thereto, the nature of the complaint involves the disclosure of personal and sensitive data to a third party without consent of the data controller. Personal

and sensitive data falls under the confines of the Act thereby giving ODPC the jurisdiction to determine the complaint.

39. Similarly, it was noted that the 1st Respondent challenged the jurisdiction of ODPC on the basis that the firm had not been registered as a Data Controller or Data Processor as at the time the complaint was instituted and therefore, the Act cannot be applied retrospectively. ODPC notes that the Complainants and their firm, having not yet been registered as data controllers or data processors does not preclude them from being under the confines of the Act.
40. Moreover, ODPC is not persuaded by the 2nd Respondent that the cases filed before High Court that is HCCC No. E135 of 2022; Allen Gichuhi and 4 others -vs- Ambrose Ndung'u Waigwa, the Directorate of Criminal Investigations (DCI) and Advocates Disciplinary Tribunal prevents ODPC from handling the complaint. Indeed, the mandate of each of the stated forums differs from that of the ODPC.
41. The matter before the High Court is a defamation suit against the 2nd Respondent which relates to remarks purportedly posted on his twitter handle. Similarly, the matter before the Advocates Disciplinary Tribunal which is established under the Advocates Act, Cap 16 Laws of Kenya relates to matters of professional ethics and conduct of the 1st and 2nd Respondent. Lastly, the Directorate of Criminal Investigations, which is established under the National Police Service Act, 2014 has the mandate to conduct criminal investigations on matters within their mandate.
42. ODPC on the other hand operates within the limits of the Act and the Regulations thereof with its sole mandate being to protect personal data. It therefore has jurisdiction to determine this complaint. In response to matters relating to infringement of intellectual property rights as alleged by the Complainants, ODPC's jurisdiction does not extend to intellectual property rights hence cannot make a determination on the same. The decision of the ODPC will therefore be limited to the issues that fall within the Act.

II. WHETHER THERE WAS BREACH OF THE ACT

43. The Complainant alleged unlawful disclosure of personal and sensitive data contained in the documents allegedly shared between the 1st and 2nd Respondents. Each document is analysed below to establish whether there was breach of the Act.

44. To set the foundation in determining this issue, the preamble of the Data Protection Act is clear on the general purpose of the Act being, *'to make provision for the regulation of the processing of personal data; to provide for the rights of data subjects and obligations of data controllers and processors'* among others.

45. The High Court (*Hon. Justice Jairus Ngaah*) also weighed in on the purposive interpretation of the Act in ***Republic v Joe Mucheru, Cabinet Secretary Ministry of Information Communication and Technology & 2 others; Katiba Institute & another (Exparte); Immaculate Kassait, Data Commissioner (Interested Party) (Judicial Review Application E1138 of 2020) [2021] KEHC 122 (KLR) (Judicial Review) (14 October 2021) (Judgment)*** and stated as follows: -

'It is because of such likely impact that section 3 of the Data Protection Act states, in clear and unambiguous terms, that the Act is intended to regulate the processing of such personal data; that the processing of personal data of a data subject is guided by certain principles whose import is to protect an individual's right to privacy; that the Act is intended to protect the individual's personal data and, that the Act is also intended to provide data subjects with rights and remedies whenever their right to privacy is infringed.'

46. Section 2 of the Act defines **personal data** to mean *'any information relating to an identified or identifiable natural person'*. A **data subject** is also defined as, *'an identified or identifiable natural person who is the subject of personal data'*. Subsequently, an **identifiable natural person** under the Act is defined to mean *a person who can be identified directly or indirectly, by reference to an identifier such as a name, an identification number, location data, an online identifier or to*

one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social or social identity'.

47. As such, the Act defines **personal data breach** as *'a breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed'*. This basically refers to a security incident that results in interference with the confidentiality, integrity or availability of personal data. Section 56 (1) of the Act which provides for locus on who can lodge a complaint before the ODPC, reads as follows: -

(1) A data subject who is aggrieved by a decision of any person under this Act may lodge a complaint with the Data Commissioner in accordance with this Act.

48. Section 56 (2) of the Act further reads: -

(2) A person who intends to lodge a complaint under this Act shall do so orally or in writing.

49. In that regard, ODPC is guided on the nature of complaints it can admit and, who a 'proper' Complainant is or how they can exercise their rights. Conjunctively read, Section 56(1) and (2) of the Act concisely narrows the scope of the ODPC to a complaint that: -

- a) relates to breach of any information relating to an identified or identifiable natural person;
- b) regards a security incident that negatively affects the confidentiality, integrity or availability of personal data; and
- c) is lodged by a data subject (natural person) or their **authorized representative** under Section 27(c) of the Act.

50. Consequently, incorporated, unincorporated or other juristic persons cannot lodge a complaint for personal data breach under the Act since they are not regarded as data subjects. Subsequently, a cursory look at the filed Complaint reveals that it is

not only lodged on behalf of several juristic persons but it is also lodged on allegation of delegated authority to which no evidence has been led contrary to Section 27(c).

51. It is also important to note that a data subject cannot lodge a complaint for personal data breach relating to information that is already available in public domain either as government records or published information since the same cannot be constituted as a violation of the Act. Further, Section 79 of the Evidence Act, cap 80 Laws of Kenya and the Schedule of the Public Archives and Documentation Service Act defines records of the High Court of Kenya or of any other court or tribunal as public records that are therefore exempt from complaints for breach of personal data under the Act.

52. It therefore behoves a Complainant who lodges a complaint under the Act to adduce material to support their claim for breach of personal data as provided under Section 13(1)(d) of the Act. Instrumentally, the ODPC noted that the Complainants failed to adduce supporting documents to corroborate most of their claims even after being requested to do so vide the ODPC's letter dated 24th May, 2023.

53. For completeness, we have analysed each and every document and allegation raised in this Complaint and render several determinations below.

No. 1 - File Ref: 5702/54/2020 Osho Chemicals

54. The document allegedly shared was the Notice of intention to sue. It is noted that the Complaint has indicated that the email is dated 4th December, 2021 but this is inconsistent with the document attached as the said email is dated 12th April, 2021. The claim that the document discloses the addresses of the Complainants' clients cannot be substantiated because the said addressees are public entities particularly, Kenya Bureau of Standards, the Office of the Attorney General and the Directorate of Criminal Investigation thus not personal information.

55. Furthermore, section 2 of the Act defines a data subject as an identified or identifiable natural person who is the subject of personal data. It is our understanding that Osho chemicals is not a natural person and hence not a data

subject for the purposes of the Act. Without prejudice to the foregoing, there was no breach of the Act.

No. 2 - File ref: 5562/119/1- Consolidated Bank of Kenya vs Pine Crib Limited

56. The document relates to pleadings filed in Court, that is; a certificate of urgency an application and the affidavit in support of the same. These documents were not provided. Therefore, ODPC is unable to ascertain whether there was personal and sensitive data contained in those documents in order to make a determination on whether there was breach of the Act.

57. From ODPC's findings, it was noted that the said matter is a reported case available at Kenya Law Reports that is **Consolidated Bank of Kenya Limited v Pine Crib Apartments Co. Ltd & another; China Wu Yi Company Limited (Garnishee); Mashariki Investments Limited (Interested party) [2020] eKLR**. Moreover, the details available in the public domain include the property details, escrow account number amongst other information. Section 79 of the Evidence Act, Cap 80 of the Laws of Kenya provides that public records include documents forming the acts or records of judicial officers. Similarly, Section 2 of Public Archives and Documentation Service Act, cap 19, Laws of Kenya provides for the definition of a public record as records specified in the schedule. The Schedule thereto includes the records of the High Court and of any other court or tribunal as public records. The ODPC therefore holds that there was no breach of the Act in this regard.

No. 3 - Neils Bruels vs Moses Wachira & Others

58. The document relates to pleadings such as submissions on review and certification to the supreme court, application to review the judgment of the Court of Appeal and List of Authorities. ODPC, upon scrutiny of the documents provided by the Complainants, noted that the same was not provided hence the Office cannot make a determination on whether there was breach of the Act.

59. However, as alleged by the 1st Respondent, a quick search on <http://kenyalaw.org/caselaw/cases/view/110193/> as well as the AfricanLii Database <https://africanlii.org/> reveals that the Complainants made the said case to be available to the general public as it is reported. ODPC therefore finds that there was no breach of the Act as section 79 of the Evidence Act, Cap 80 of the Laws of Kenya and the Schedule of the Public Archives and Documentation Service Act, Cap 19 Laws of Kenya qualifies records of the High Court and of any other court or tribunal as public records.

No. 4 - File Ref: 5703/127/19 – I & M Vs Buzeki Enterprises Limited

60. The Complainants allege that the documents shared included Plaintiff and Defendant submissions and authorities. We note that the Complainant did not provide any of these documents in order to ascertain whether they contained personal or sensitive data hence ODPC cannot make a determination on whether there was breach of the Act.

61. Moreover, the said case has been reported at Kenya Law Reports Website as **I & M Bank Limited v Buzeki Enterprises Limited [2020] eKLR**. In this regard, the documents form part of public records and therefore, there was no breach of the Act.

No. 5 - Santowels vs Stanbic Bank

62. The documents allegedly shared by the 1st Respondent to the 2nd Respondent include certificate of urgency application, stay application and submissions by both parties. The said documents were not provided by the Complainants. The ODPC is therefore unable to ascertain which kind of data was contained in the said documents and therefore cannot make a determination as to whether there was breach of the Act.

63. From ODPC's findings, the said case is also a reported case on the Kenya Law Reports Website cited as **Santowels Limited v Stanbic Bank Kenya Ltd [2020] eKLR** constituting public records. We therefore find that since said case is already in public domain, there was no breach of the Act.

No. 6 - Tadjin Thanawalla, Jane Kamene & Veronica Musyimi

64. The Complainants alleged that the 1st Respondent shared a certified Arbitration Award with the 2nd Respondent. The ODPC read through the documents attached as evidence particularly the Arbitral Award dated 19th April, 2021 and verified that the Complainants personal information was not contained in the said Arbitral Award. There was therefore not personal data breach against the Complainants in this regard.

No. 7 - File ref: 5835/1/15 Mamta Peyush Mahajan vs Yashwant Kumari Mahajan

65. The information alleged to have been disclosed in this regard are the Plaintiff's written submissions. ODPC's findings revealed the said case is reported and can be found at the Kenya Law Reports website and is therefore part of public records. It has been cited as **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR**. In this regard, ODPC finds that that there was no breach of the Act.

No. 8 - Mark Properties vs Coulson Harney Advocates

66. The Complainants alleged that the 1st Respondent shared the following documents with the 2nd Respondent; Replying affidavit, supporting affidavit, certificate of urgency dated 11th June 2021 and Chamber Summons of even date. From the evidence attached, the Complainants produced exhibit "CNM-1" extract only.

67. The Complainants provided submissions, pleadings and lists of exhibits in reference to Milimani HCCOMM No. 287 of 2021. The ODPC noted that the documents contained information relating to persons who were not parties to this complaint. Moreover, the exhibits attached form part of the proceedings of a reported case which is public record.

68. The upshot of the foregoing is that the case at hand is also a reported case cited at the Kenya Law Report as **Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Limited & another (Applicants) [2021] eKLR** and therefore in the public domain and hence cannot be constituted as a violation of the Act. We reiterate that section 79 of the Evidence Act, cap 80 Laws of Kenya and Schedule of the Public Archives and Documentation Service Act includes the records of the High Court and of any other court or tribunal as public records.

No. 9 - File Ref: 5696/1/3 Ryan Properties & Philip Jalango

69. The Complainants alleged that the 1st Respondent shared pleadings such as stay pending appeal and a certificate of urgency dated 1st March 2021 with the 2nd Respondent. The said documents were not adduced despite the Complainants being given a further opportunity to do so. ODPC is therefore unable to ascertain what kind of personal or sensitive data was contained in the said documents and therefore cannot make a determination on the same.

70. However, the decision has been cited at the Kenya Law Reports website as **Philip Jalango v Ryan Properties Limited [2021] eKLR** and therefore, already in the public domain, hence there was no breach of the Act.

No. 10 - Alpha Grain Millers & 7others vs Ministry of Agriculture, Livestock and Fisheries and the Attorney General

71. The Complainants averred that the information shared between the Respondents included pleadings such as chamber summons and supporting affidavit. It is ODPC's finding that the said pleadings were not produced to ascertain whether it contained personal data. Therefore, this Office cannot make a determination on whether there was breach of the Act.

72. Furthermore, the said matter is a reported decision at the Kenya Law Report Website cited as **Alpha Grain Millers Limited & 7others v Ministry of Agriculture, Livestock and Fisheries & another [2021] eKLR** and therefore

in the public domain. In this regard, ODPC finds that there was no breach of the Act.

No. 11 - Simon Fraser vs Timarflor

73. The Complainants alleged that the documents shared between the Respondents were various pleadings. On second submission, the Complainants attached an incomplete and undated Joint Venture Agreement containing information of a juristic person. The ODPC did not find any personal information of the Complainants shared and could therefore not conclude that a personal data breach against the Complainants by the respondents had been occasioned.

74. The Complainants further adduced an email dated 25th August, 2021 claiming that the 1st Respondent shared to the 2nd Respondent a legal opinion containing personal information of third parties not party to this claim and juristic persons not protected under the Act. The ODPC therefore could not find a case of personal data breach against the Complainants by the Respondents nor a breach of the Act.

No. 12 - Precedents-Wamae & Allen Appeal Checklist

75. The Complainants did not provide the said checklist that was allegedly shared between the Respondents despite being given a further opportunity to do so. It is our finding that the ODPC cannot make a determination on whether there is personal data contained or even a breach under the Act.

No. 13 - Stanbic Bank & Ahono Gardens

76. In this case, it is alleged that the 1st Respondent shared pleadings such as certificate of urgency, notice of motion application and a supporting affidavit. The Complainants did not provide these documents in order for ODPC to ascertain whether there was personal and sensitive data contained in the documents. Therefore, a determination cannot be made with regards to breach of the Act.

No. 14 - 5988/1/19- Sidian Bank & Waveron Limited

77. The Complainants alleged that the 1st Respondent shared supporting affidavit for extension of registration of charge. However, these documents were not provided in order for ODPC to ascertain whether the said document contained personal data

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or sensitive data. Therefore, ODPC is unable to make a determination on whether there was breach of the Act.

No. 15 - File Ref: 5904/1/17- Kirogani Investments vs Sigma Limited & 9 others

78. The documents that were allegedly shared between the Respondents are pleadings such as third-party notice application, the third-party notice and the supporting affidavit. Again, these documents were not provided to ODPC to ascertain whether the said pleadings contained personal data. Therefore, a determination cannot be made on whether there was breach of the Act.

79. Additionally, the said decision is available at Kenya Law Reports website cited **Kingorani Investments Limited v Sigma Limited & 9 others [2018] eKLR** thereby being in the public domain hence there was no breach of the Act.

No. 16 - File ref: 5703/203C/21- Mark Prime Properties

80. The Complainants alleged that the documents shared between the Respondents in relation to this case is a draft consent order. These documents were not availed to ODPC to ascertain whether the said draft consent contained personal data and therefore a determination cannot be made regarding breach of the Act.

81. However, the decision regarding the said consent is cited at the Kenya Law reports as **Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Limited & another (Applicants) [2021] eKLR** and therefore within the public domain.

No. 17 - Petition to Parliament on the *In Duplum* rule

82. The Complainants alleged that the 1st Respondent shared a petition to the 2nd Respondent regarding the *In Duplum* rule. The Complainants did not provide a copy of the said petition in order for the ODPC to ascertain whether there was personal and sensitive data contained therein. Nevertheless, Section 6 of the Petitions to Parliament (Procedure) Act, 2012 makes a provision as to the Register of petitions as follows:

1. The Clerk of each House of Parliament shall keep and maintain a register in which shall be recorded all petitions and supporting documents, and the decisions of the House.
2. The register of petitions under subsection (1) shall be accessible to the public during working hours.

83. In light of the above, petitions to parliament are considered as public documents. Additionally, as per the Schedule of the Public Archives and Documentation Service Act, the records of Parliament are deemed to be public records. In this regard, ODPC finds that there was no breach of the Act.

No. 18 - File Ref: 5717/47/18- Bank of Africa vs Seven Seas

84. The document allegedly shared as between the Respondents is a pleading, specifically a plaint dated 10th June 2019. However, the said document was not availed to ODPC to ascertain whether it had personal and sensitive data. In the circumstances, ODPC cannot make a determination on the same.

No. 19 - File ref: 5703/220/2 – I&M Bank & Dishon Kimani

85. The Complainants alleged that the 1st Respondent shared pleadings such as an amended plaint and an application for inhibition orders. Similarly, the Complainants alleged that these documents contained property details such as Land References and Title Numbers as well as Bank Account details. We do note that the Complainants produced this document and also adduced evidence to demonstrate that the 1st Respondent shared the said document to the 2nd Respondent vide an email dated 14th January 2022.

86. Upon analysis of the document, ODPC noted that the Plaintiff and the 2nd Defendant in the case are not natural persons but legal persons hence are not data subjects as provided under the Act. ODPC further notes that the 1st Defendant is a natural person in line with the provisions of the Act. However, the said party is not a party to this Complaint. Equally, the Complainants have not demonstrated that they had authorization to act on behalf of the said third party. Moreover, the document presented is a Plaint which is attendant to a legal claim thus public record.



No. 20 - Saham Insurance vs Gas & Go Petroleum and another

87. The Complainants alleged that the document shared between the Respondents are pleadings including a Chamber Summons application dated 14th December 2020 and 16th December 2020. The said document has not been produced before the ODPC. The ODPC can therefore cannot ascertain whether the said documents contained personal data and sensitive data.

No. 21 - File ref: 5835/19/119- Shalimar Flowers & Mwangi Gathimba & Associates

88. The documents shared between the Respondents include pleadings such as plaint and legal opinions. The said documents were not availed to the ODPC in order to ascertain whether the same contained personal and sensitive data. ODPC can therefore not make a determination as to whether there was breach of the Act.

No. 22 - Complaint to disciplinary committee by Preston Wawire

89. The above complaint to disciplinary committee was not adduced. ODPC is therefore unable to ascertain what data was contained in the said documents. In that regard, the ODPC cannot make a determination on whether there was breach of the Act.

No. 23 - File ref: 5727/7/20- Prime Bank -vs- Porsche Kenya

90. The document relates to pleadings filed in court and specifically an application for an injunction. Upon scrutiny of the same, it is our finding that the said case is a reported case available at the Kenya Law Reports Website cited as **Prime Bank Limited v Porsche Center Nairobi Limited [2021] eKLR** and therefore a public record. We reiterate that section 79 of the Evidence Act as well as the Schedule of the Public Archives and Documentation Service Act includes the records of the High Court and of any other court or tribunal as public records. In that regard, we hold that the case herein is a matter that is in the public domain thereby not in violation of the Act.

No. 24 - Basil Criticos -vs- NBK

91. The document allegedly shared between the Respondents in this case was pleadings and specifically the appellants' submissions. Upon scrutiny of the various documents provided by the Complainants, the said document was not availed.

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Therefore, ODPC cannot ascertain whether the documents contained personal data. However, the decision regarding the said Appeal is cited at the Kenya Law reports as **Criticos v National Bank of Kenya Limited (as the successor in Business to Kenya National Capital Corporation Limited "KENYAC") & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment)** and was therefore in the public domain hence it cannot be said that the Act was breached in this instance.

92. Similarly, the Complainants publicized the said case in their firm website titled "A Commentary on the Basil Criticos v National Bank Judgment: Damages for wrongful sale of security" available at <https://wamaeallen.com/a-commentary-on-the-basil-criticos-v-national-bank-judgment-damages-for-wrongful-sale-of-a-security/>.

93. Additionally, the Business Daily published an article in the website on the 5th May 2022 titled, "Former MP gets 2Bn in a court fight with NBK" available at <https://www.businessdailyafrica.com/bd/economy/former-mp-gets-sh2bn-in-court-fight-with-nbk-3804692>. In this regard, we hold that the said case is within public domain and therefore no breach of the Act.

No. 25 - E003 of 2022 -Milliam Iyende Mayaka vs Rao & General Printers

94. The document allegedly shared between the Respondents is a ruling of the court. The said ruling was produced by the 1st Respondent in her bundle of documents. Moreover, the ruling was pronounced by Justice Mabeya in open court on the 6th May 2022. In this regard, we hold that a ruling is a public record within section 79 of the Evidence Act and the Schedule of the Public Archives and Documentation Service Act which includes the records of the High Court and of any other court or tribunal as public records.

No. 26 - 5703/255/2022 -I&M Bank templates for appointment of an Administrator under S.534

95. The document allegedly shared between the Respondents is a pleading and specifically a Complaint dated 10th June 2019. However, the said document was not available to us to ascertain whether it had personal data and therefore ODPC cannot determine whether there was breach of the Act.

No. 27 - 5395/102/17 Remax vs Sichuan Huashi

96. The documents that were allegedly shared between the Respondents are pleadings such as submissions on review. However, the said documents were not available. Accordingly, we cannot ascertain whether the said pleadings contain personal data and whether there was breach of the Act.

97. However, it is ODPC's finding that the said decision is available at Kenya Law Reports website cited **Sichuan Huashi Development Company Ltd v Remax Realtor Limited [2020] eKLR** thereby being in the public domain.

No. 28 - File Ref: 5703/197/21 Emmanuel Kuria vs Invesco & 3 Others

98. The Complainants allege that the 1st Respondent shared documents such as original order, notice of motion application, record of appeal and a filled memorandum of appeal to her personal email. However, these documents were not available for ODPC to ascertain whether the said documents contained personal data. Therefore, ODPC cannot make a determination on whether there was breach of the Act.

No. 29 - File Ref: 146-Wamae and Allen

99. The Complainants alleges that the 1st Respondent shared W & A Guide on Administration under the Insolvency Act 2015 to her personal email. However, this document was not available. Accordingly, we cannot ascertain whether the said documents contained personal data and cannot therefore make a determination on whether there was breach of the Act.



**No. 30 - Civil Application No. E036 of 2022 Mehul Patel & Another vs
Champaklal Ramji Raishi Shah & 2 others**

100. The Complainants allege that the 1st Respondent shared documents of the 2nd Respondent's submissions dated 29th June 2022 and a Replying affidavit dated 22nd June 2022 to her personal email. These documents were not availed for ODPC to ascertain whether the said documents contained personal data. Therefore, the Office cannot make a determination on whether there was breach of the Act.

No. 31 – Email dated 5th June, 2021

101. The Complainants refer to an email dated 5th June, 2021 as an application under Certificate of Urgency in HCCC No. 512/2014 shared by the 1st Respondent and that it discloses particulars of a dispute. The ODPC finds that the said email does not contain personal information relating to the Complainants hence not a breach of the Act.

No. 32 – Email dated 26th May, 2021

102. The Claimants make references to an email dated 26th May, 2021 from the 1st Respondent to the 2nd Respondent. The ODPC noted that the said email does not contain personal information of the Complainants herein. The ODPC further notes that the ruling on this application analysing the submissions and is available on Kenya Law Reports website hence public record.

No. 33 - Email dated 6th March, 2021

103. The Complainants aver that the 1st Respondent disclosed the nature of the dispute in HCCCOMM No. E375/2019 being submissions of various parties. The Claimants did not avail the same for analysis by the ODPC despite request to do so. Therefore, ODPC finds that there was no ascertainable breach of the Act.

No. 34 – Email dated 15th June, 2021

104. Regarding the Certificate of Urgency and Notice of Motion in HCOMM No. 648/2004 and submissions in HCOMM 571 of 2015 the Complainants claim that the

1st Respondent disclosed particulars of the dispute. The same was not provided for investigation despite request to do so and therefore the ODPC cannot ascertain the veracity of the claim or breach of the Act.

No. 35 – Email dated 11th March, 2022

105. The Complainants state that the 1st Respondent shared a legal opinion disclosing a dispute between parties. The email print out shared did not contain any personal information of the Complainants herein and the legal opinions shared were not provided for investigation by the Complainants. The ODPC can therefore not ascertain breach of the Act.

No. 36 - Email dated 23rd June, 2022

106. The documents under investigation herein were pleadings in Kilgoris CMCC No. 50 of 2017 and, ODPC noted that one of the documents attached **Garnishee Replying Affidavit sworn on 13th May 2022; Kilgoris PMCC No. 50 of 2017 Thomas Onyango Onchonga -vs- AMACO**. The Complainants alleged that the document contained personal and sensitive information particularly bank account details including account statements and 3rd party account numbers. The ODPC notes that this matter is before a court of law thus forming public record. In light of the above, ODPC finds that there was no breach of the Act in the circumstances.

III. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDY UNDER THE DATA PROTECTION ACT, 2019.

107. The Complainants have not demonstrated in any of the cases above that their own personal or even sensitive data has been infringed in their capacity as data subjects. Instead, the cases that form part of the complaint belong to their clients, whom are mostly legal persons and not data subjects within the confines the Act. Furthermore, the cases have been reported making them available in the public domain as public records which cannot be regarded as personal data within the meaning of the Act.

108. Section 45 of the Act provides for instances where sensitive personal data may be processed. Likewise, section 45(b) provides that sensitive personal data of a data subject may be processed where the processing relates to personal data which is manifestly made public by the data subject or where processing is necessary for the establishment, exercise or defence of a legal claim.

109. As demonstrated from an analysis of all the documents provided by the Complainants, most of the documents are reported cases available on the Kenya Law Reports Website and other sites, some of which are hosted by the Complainants in their capacity as partners of their firm. Since the Complainants have not demonstrated breach of the Act, ODPC finds that a remedy cannot ensue in the circumstances.

110. Lastly, ODPC notes that the Complainants are Partners in a law Firm. The documents which were purportedly shared belonged to the Firm to which the Respondents were its erstwhile employees. The ODPC notes that the Firm as a Data Controller did not report the alleged breach to the ODPC as required by Section 43 of the Act. The Section provides as follows:

"Where personal data has been accessed or acquired by an unauthorized person, and there is a real risk of harm to the data subject whose personal data has been subjected to the unauthorized access, a data controller shall-

- a) Notify the Data Commissioner without delay, within 72 hours of becoming aware of such breach; and*
- b)communicate to the data subject in writing within a reasonably practical period, unless the identity of the data subject cannot be established."*

111. ODPC notes that the firm has neither notified ODPC nor has it informed the data subjects whose personal data was purportedly breached of the incident of breach. ODPC takes the view that the firm was either nonchalant about the purported


breach or did not consider that there was a real risk of harm as required under the Act.

F. FINAL DETERMINATION

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

- i. The complaint is dismissed.
- ii. The Complainants have the right to appeal this Determination.

DATED at **NAIROBI** this **17th** day of **June** 2023.



Immaculate Kassait, MBS

DATA COMMISSIONER