



OFFICE OF THE DATA PROTECTION COMMISSIONER
ODPC COMPLAINT NO. 869 OF 2023

JOHN OTIENO.....COMPLAINANT

-VERSUS-

CERES TECH LIMITED T/A ROCKETPESA.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaint 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 (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) 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 a complaint on 26th May, 2023 by John Otieno (hereinafter as "the Complainant") against Ceres Tech Limited (hereinafter as "the Respondent") and pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as "the Regulations"), has conducted investigations into the complaint.
4. The Office in exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaint filed against it via a letter dated 2nd June, 2023 and required its response within 14 days.
5. On 16th June, 2023, the Office having not received a response to the aforementioned notification of complaints letter dated 2nd June, 2023, reminded the Respondent to provide its response via a letter dated 16th June, 2023. The Office gave the Respondent 7 days to respond to the notification of complaint.
6. The Respondent via a letter dated 16th June, 2023 responded to the Notification of Complaint letter.
7. Upon receipt of the aforementioned correspondences and documents, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaint Handling Procedure and Enforcement) Regulations, 2021.
8. 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.

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B. NATURE OF THE COMPLAINT

9. The Complainant alleged that the Respondent sent unsolicited promotional messages to his number regarding a loan product and that despite asking the Respondent to stop, he still receives the messages every day. He further alleged that he has never signed up for the Respondent's services.

C. THE RESPONDENT'S RESPONSE

10. In response to the allegation of sending unsolicited messages regarding loan products despite being asked to stop, the Respondent stated that it notifies its customers on collection of their personal data and its use in marketing. It further stated that clause 9 of its data protection policy states, *"We may occasionally send you push notifications through our mobile application to send you marketing messages and other service or transaction related notifications that may be of importance to you. You may at any time opt out from receiving these types of communications by turning them off at the device level through your settings or through the mobile application settings. Further, by using our services, you agree that we may, as necessary and appropriate for the purposes, transfer and disclose any customer information with your permissions or as may be required by relevant laws to the following recipients who may also process, transfer and disclose such Customer Information for the Purposes:*

Any Ceres Tech Staff (internal or external);

The bank;

Third-party service providers under contract with the Company that help us with our business operations, such as transaction processing, fraud prevention, and marketing. We share your personal information with these companies only as necessary to provide you with our service."

11. The Respondent stated that clause 19.1 of its Data Privacy Policy states, "Note that your express consent shall only be required when we need to share information to third parties for the purposes of marketing and for transferring such information outside Kenya.

We shall not require your consent where such information is necessary for national security or public interest purposes or the disclosure is required by an order of the court.

The consent shall be specific to the purpose of processing.

The consent shall be given electronically through ticking a box after electronically filling our consent form.

You have a right to withdraw the consent at any time. Noteworthy, the withdrawal of consent shall not affect the lawfulness of processing based on prior consent before its withdrawal."

12. The Respondent further stated that it had not engaged any third parties to market its products and that if it does, it shall require its customers to sign a consent form which is attached to its policy allowing it to share information to third party marketers.

13. Further, the Respondent advised its clients to read its policies before agreeing to its terms and conditions and signing up to use its loan services. Additionally, it stated that, where the client agrees to their use and sharing of their information for marketing purposes, they can only withdraw such consent as highlighted in clause 9 above of its data protection policy by opting out of receiving such communication by turning them off at the device level through their settings or through the mobile application settings.

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14. The Respondent also stated that its clients can communicate to it through the communication channels it has provided in its policies and that any request to stop receiving marketing messages sent to other numbers or emails not listed in its policies might not get to it, for instance in this case, the Complainant sent the requests to contacts different from the contacts they are advised to reach in such a situation and that the requests did not get to the company and as such it couldn't act.

D. ISSUES FOR DETERMINATION

- i. Whether the Complainant had signed up for the Respondent's services.
- ii. Whether prior consent was sought and obtained from the Complainant before collecting his personal data and using it to send promotional messages to him.
- iii. Whether the Respondent provided a simplified opt out mechanism to the Complainant to its promotional messages.
- iv. 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 COMPLAINANT HAD SIGNED UP FOR THE RESPONDENT'S SERVICES

15. The Complainant alleged that the Respondent sent him unsolicited messages regarding a loan product despite having never signed up for the Respondent's services. The Complainant produced screenshots of the messages sent to him as proof.

16. The Respondent did not provide any evidence of the Complainant subscribing to its loan products or opting in, to receive its promotional messages.

17. The upshot is that the allegation that the Respondent sent unsolicited messages regarding a loan product to the Complainant, despite him having never signed

up for it, remains uncontroverted and therefore this office finds that the Complainant did not sign up for the Respondent's services.

II. WHETHER PRIOR CONSENT WAS SOUGHT AND OBTAINED FROM THE COMPLAINANT BEFORE COLLECTING HIS PERSONAL DATA AND USING IT TO SEND PROMOTIONAL MESSAGES TO HIM

18. The Complainant alleged that the Respondent sent unsolicited messages about its loan product despite him having never signed up for its services.

19. The Respondent in response to the above allegation stated that it obtains consent electronically from its clients through ticking a box after electronically filling its consent form.

20. The Respondent did not adduce a copy of the filled consent form or evidence of the Complainant having electronically ticked a box to signify that he had consented to receive promotional messages from the Respondent.

21. Section 37 (1)(a) of the Act states that, "*A person shall not use, for commercial purposes, personal data obtained pursuant to the provisions of this Act unless the person has sought and obtained express consent from a data subject.*"

22. Section 32 (1) of the Act states that, "*A data controller or a data processor shall bear the burden of proof for establishing a data subject's consent to the processing of their personal data for a specified purpose.*"

23. With no evidence being tabled by the Respondent to prove that it obtained prior consent from the Complainant before sending him promotional messages, the upshot is that this office finds that the Respondent did not seek and obtain consent from the Complainant before processing his personal data. Further, the Respondent not discharge its burden of proof for establishing that consent was

obtained from the Complainant before using his personal data for commercial purposes contrary to Section 37 of the Act.

III. WHETHER THE RESPONDENT PROVIDED A SIMPLIFIED OPT OUT MECHANISM TO THE COMPLAINANT TO ITS PROMOTIONAL MESSAGES

24. The Complainant indicated that despite asking the Respondent to stop sending promotional messages to him, he still received them. He produced a screenshot of a message instructing the Respondent to stop sending him promotional messages as proof.
25. The Respondent on the other hand stated that one can only opt out of receiving promotional messages by turning them off at the device level through their settings or through the mobile application settings. In addition to that, they can communicate to it through the communication channels it has provided in its policies.
26. The Respondent further stated, "Unfortunately, any request to stop receiving marketing messages sent to other numbers or emails not listed in our policies might not get to us, for instance in this case, the clients sent the requests to contacts different from the contacts they are advised to reach in such a situation, these requests did not get to the company and as such we couldn't act."
27. Regulation 15 (1)(d) of the Data Protection (General) Regulations, 2021 provides that *a data controller or data processor may use personal data, concerning a data subject for the purpose of direct marketing where the data controller or the data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.* A perusal of the screenshots of the messages sent to the Complainant reveal that

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no opt out mechanism was provided for the Complainant to request not to receive the promotional messages.

28. Regulation 17 (1) of the Data Protection (General) Regulations, 2021 states that, "*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 may make an opt out request.*" No evidence was tabled by the Respondent to prove that it had complied with the above Regulation.

29. Regulation 17 (2) of the Data Protection (General) Regulations, 2021 states that, "*A data controller or a 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 the 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.*

The promotional messages sent to the Complainant did not comply with (a), (c) and (e) above.

30. The upshot is that this office finds that the Respondent did not provide a simplified opt out mechanism to its promotional messages contrary to

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Regulation 15(1)(d) of the Data Protection (General) Regulations, 2021 which oblige data controllers and data processors to provide a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.

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

31. 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.*

32. Section 40(1)(b) provides for the right of erasure of personal data that was obtained unlawfully. Further, Regulation 12(1)(d) of the Data protection (General) Regulations, 2021 states that, "... a data subject may request a data controller or data processor to erase or destroy personal data held by the data controller or data processor where the processing of personal data is for direct marketing purposes and the individual objects to that processing."

33. The Respondent by not informing the Complainant of the use to which his personal data was to be put, at the point of collection of the personal data, violated his right to be informed. The Respondent collected the mobile phone number of the Complainant and did not inform him that his personal data was being collected and that it was going to be used to send him promotional messages. Further, the Respondent did not provide details or an explanation of

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where it got the contact details of the Complainant as it is alleged that the Respondent never signed up for its services.

34. The Respondent did not provide evidence of erasure/deletion of the Complainant's personal data from its database despite requests by the Complainant to do so thereby violating his right of erasure of personal data that was obtained unlawfully, contrary to Section 40(1)(b) of the Act. The Respondent neglected/failed to erase or destroy the personal data of the Complainant despite processing it for marketing purposes and the Complainant having objected to the processing, contrary to Regulation 12(1)(d) of the Data Protection (General) Regulations, 2021.

35. The Respondent also neglected/failed to perform its duty to notify by not informing the Complainant of the particulars contained in Section 29 of the Act.

36. Last but not least, the Respondent used the personal data of the Complainant for commercial purposes without seeking and obtaining his consent contrary to Section 37(1) of the Act.

37. In view of the foregoing, this office arrives at the conclusion that the Respondent violated the rights of the data subject as provided for in the Act.

F. FINAL DETERMINATION

38. 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 11th day of August 2023



**Immaculate Kassait, MBS
DATA COMMISSIONER**



