



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1451 OF 2023

WESLEY OKELLO.....COMPLAINANT

-VERSUS-

RISINE CREDIT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f) and 56 of the Data Protection Act, 2019 and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Office received a complaint on 11th August 2023, in accordance with Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (the Regulations). The Complaint relates to the alleged contacting of the Complainant by the Respondent's product, Ipesa, regarding someone else's loan information that he had no knowledge about.

B. LEGAL BASIS

2. 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.
3. The Office of the Data Protection Commissioner (hereinafter 'this Office' and/or '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.

4. 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.
5. This determination is pegged on the provisions of Regulation 14 of the Regulations which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

C. NATURE OF THE COMPLAINT

6. The Complainant alleged that Ipesa, a product of the Respondent, unlawfully contacted him regarding a loan he had no knowledge about.
7. He provided a screenshot showing a message indicating that he should inform the loanee of the loan given by Ipesa of which he was allegedly a guarantor of the loan.

D. SUMMARY OF EVIDENCE ADDUCED AND INVESTIGATIONS UNDERTAKEN

8. This Office received the complaint dated 11th August 2023 pursuant to the provisions of the Act and the Regulations.
9. Upon admission of the complaint, this Office embarked on investigations to find out the parent company of Ipesa. Investigations revealed that the Respondent is the parent company and through a company search on the business registration services platform this Office established the physical location of the Respondent and their email address.

10. The Respondent was notified it of the complaint *vide* a letter dated 12th September 2023 to the Respondent's last known email address. A reminder of notification of complaint letter was also sent to the Respondent's email address on 29th September 2023.

11. The Respondent remains unresponsive to these letters and emails from this Office.

E. ISSUES FOR DETERMINATION

12. The following issues fall for determination by this Office:

- i. Whether there was a violation of Complainant's rights under the Act;
- ii. Whether the Respondent had obligations to fulfil under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and attendant Regulations.

I. WHETHER THERE WAS A VIOLATION OF COMPLAINANT'S RIGHTS UNDER THE ACT

13. The Complainant is a data subject with rights under Section 26 the Act. Moreover, the Complainant has the right to be informed of the use to which his personal data is to be put under Section 26(a) of the Act.

14. This right was violated by the Respondent by failing to inform him that he was listed as a guarantor by the person who took the loan from Ipesa. The Respondent should have informed the Complainant of his listing as a guarantor and sought consent from him of the same.

15. These rights were not upheld by the Respondent since the Complainant's rights under the section of the Act described above were violated by the Respondent's unlawful collection and processing of the Complainant's phone number and listing him as a guarantor to a loan without his consent.

16. This Office therefore finds that the Complainant's right under Section 26 (a) of the Act was violated by the Respondent.

II. WHETHER THE RESPONDENT HAD OBLIGATIONS TO FULFIL UNDER THE ACT

17. The Respondent is a data controller and a data processor within the definitions of the Act and therefore has obligations pursuant to the Act.

18. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainant's personal data is, among others:

- i. processed in accordance with his right to privacy;
- ii. processed lawfully, fairly and in a transparent manner in relation to the Complainant;
- iii. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes; and
- iv. collected only where a valid explanation is provided whenever information relating to private affairs is required.

19. In collecting personal data, the Respondent is mandated by Section 28 of the Act to collect the data directly from the data subject. Sub-section (2) sets out instances where personal data may be collected indirectly. However, the Respondent failed to respond to the complaint therefore these instances were not proven.

20. Further, Section 29 of the Act provides an obligation to data controllers or data processors of the duty to notify the data subject. Notably, the data subject has to be informed of, *inter alia*;

- i. rights specified under Section 26;
- ii. the fact that personal data was being collected;
- iii. the purpose of collection of their personal data; and
- iv. a description of the technical and organizational security measures taken to ensure the integrity and confidentiality of the data.

21. The Respondent had a duty to notify the Complainant of his rights under the Act, the fact that they collected his phone number for him to be listed as a guarantor

of the loan granted to the loanee, and the measures they have in place to ensure safety of his data. They failed to fulfil this obligation under Section 29 of the Act.

22. In the notification of complaint, the Respondent was required to provide the lawful basis upon which they processed the Complainant's personal data under Section 30 of the Act. Section 30 of the Act states that a data controller or data processor shall not process personal data unless the data subject consents to the processing for one or more specified purposes. The Respondent failed to provide the lawful basis for collection of the Complainant's personal data.

23. Further, Section 32 of the Act places the burden of proof on the Respondent for establishing a data subject's consent to the processing of their personal data. This burden was not discharged by the Respondent in their failure to respond to the notification of complaint.

24. The Respondent was non-responsive to the notification of complaint and therefore this Office finds that they failed to fulfil the above obligations as set out under the Act.

III. WHETHER THE COMPLAINANT IS ENTITLED TO ANY REMEDIES UNDER THE REGULATIONS.


25. In view of the foregoing and having found that the Respondent is liable for infringement of the Complainant's rights and having not fulfilled their obligations under the Act, an Enforcement Notice is hereby issued on the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Regulations.

F. FINAL DETERMINATION

26. The Data Commissioner therefore makes the following final determination;

- i. The Respondent is hereby found liable.
- ii. An Enforcement Notice to issue to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 8th day of November 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

