



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1593 OF 2023

BENEDICT NYAGA.....COMPLAINANT

-VERSUS-

CERES TECH LIMITED T/A CHAPAA LOAN.....RESPONDENT

DETERMINATION

(Pursuant to Section 8 (1) (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. This Complaint relates to the alleged contacting of the Complainant by the Respondent regarding a loan that he was unaware of and had not consented to being listed as a referee/guarantor.

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 as 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter as 'this Office' 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 (1) (f) of the Act provides that the Office can receive and investigate any complaint by any person on infringements of the rights under the Act. Furthermore, Section 56 (1) of the Act provides that a data subject who is aggrieved by a decision of any person under the Act may lodge a complaint with the Data Commissioner in accordance with the Act.
5. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as 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.

C. NATURE OF THE COMPLAINT

6. The Office received a complaint by Benedict Nyaga (hereinafter as 'the Complainant') on 30th August, 2023 pursuant to Section 56 of the Act and Regulation 14 of the Enforcement Regulations.
7. Ceres Tech Limited (hereinafter as 'the Respondent') is a digital credit provider that lends money to its customers through its mobile application Chapaa Loan.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the Complaint filed against it vide a letter dated 14th September, 2023 referenced ODPC/CONF/1/5 VOL 1(423) and required its response within 14 days. In the Notification of the Complaint filed against the Respondent, the Respondent was to provide: -
 - a. A response to the allegation made against it by the Complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The Standard Contract that it has with the Complainant, and whether the Complainant consented to the processing of his personal data;

- d. The legal basis relied upon to process and engage with the Complainant and whether or how it fulfils the duty to notify under Section 29 of the Data Protection Act, 2019; and
 - e. Details of all the product names/mobile money lending applications that it runs.
9. On 28th September, 2023 the Office sent a reminder to the Respondent, giving it 7 days to respond the notification of complaint letter dated 14th September, 2023.
 10. *Via* a letter dated 28th September, 2023, the Respondent responded to the notification of complaint letter.
 11. This determination is therefore as a result of analysis of the complaint as received and investigations conducted by the Office.

D. SUMMARY OF EVIDENCE ADDUCED

I. COMPLAINANT'S CASE

12. The Complainant alleged that on diverse dates in the month of August, he received abusive and insulting text messages and calls from the Respondent. The messages and calls were regarding an unpaid loan by a loanee who is unknown to the Complainant.
13. The Complainant further stated that the Respondent needs to conduct thorough background checks on potential customers before lending them money. The mentioned loanee is unknown to the Complainant and he had not consented to be listed as a referee/guarantor to the loan.
14. The Complainant provided screenshots of messages sent to him by the Respondent as proof of the allegations made. The messages indicated that the Complainant should inform the loanee to pay a loan disbursed by the

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Respondent or alternatively, the Complainant should pay on behalf of the loanee as he was allegedly listed as a guarantor to the loan.

15. The Complainant further stated that the late night and early morning abusive calls have caused psychological torture that has seen him seek medical treatment for high blood pressure and the Respondent needs to take full responsibility for that.

II. RESPONDENT'S RESPONSE

16. The Respondent, on 28th September 2023, provided a response to the allegations made against it.

17. The Respondent stated that the Complainant's phone number was provided by their customer, David Muiruri, who provided the number as a next of kin contact implying that his mother was the phone number's registered owner.

18. The Respondent averred that the collection of next of kin contact information is informed by clause 10 of the company's Data Policies that states, *"...customers will be required to provide the name, telephone number, and email address of at least one individual who shall act as their next of kin when registering to our app. We only contact the third party upon express consent from the data subject which consent is provided by the data subject at the point of registering to use our app."*

19. Further, the Respondent stated that it relies on Section 31 of the Banking Act as its legal basis for collecting next of kin information.

20. The Respondent stated that its customer and loanee, David Muiruri, provided false information and that it conducted investigations upon receiving the Complainant's complaint and immediately deleted the information. Further, the Respondent stated that employees and agents who violate its policies are subjected to various disciplinary measures and that for this particular case, it terminated its services with the agent in question.

21. The Respondent provided its data protection policies and procedures, its terms and conditions of use and its standard consent form for processing data subject's data for marketing purposes.

22. Regarding the duty to notify as provided for under Section 29 of the Act, the Respondent stated that clause 21 of its policy provides that the Company has a duty to notify data subjects of their rights when signing up to use its application(s). The Company will therefore inform the customers of; (i) their rights under Section 26 of the Act, (ii) the fact that personal data is being collected and the purpose for which the personal data is being collected, (iii) the third parties whose personal data has been or will be transferred to, including details of safeguards adopted.

23. The Respondent confirmed that it runs **Chapaa Loan** application, Lemon Kash and Rocket Pesa loan applications.

E. ISSUES FOR DETERMINATION

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

- i. Whether there was a violation of Complainant's rights under the Act; and
- ii. Whether the Respondent had obligations to fulfil under the Act.

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

25. 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.

26. This right was violated by the Respondent by failing to inform the Complainant that he was listed as a guarantor by David Muiruri, who took the loan from Chapaa Loan. The Respondent should have informed the Complainant of his listing as a guarantor and sought consent directly from him and not from the

loanee. The Complainant was only informed of his listing as a guarantor after the loanee had failed to pay the loan on time.

27. This right was 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.

28. 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

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

30. 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.

31. In collecting personal data, the Respondent is mandated by Section 28 of the Act to collect the data directly from the data subject. Section 28 (2) sets out instances where personal data may be collected indirectly. None of them were proven by the Respondent.

32. 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.

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 disbursed 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.

33. 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 prove that it had obtained prior consent from the Complainant before processing his personal data.

34. 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 as it instead stated that it obtained consent to process the Complainant's data from its customer.

35. From the foregoing, this Office finds that the Respondent failed to fulfil the above obligations as set out under the Act.

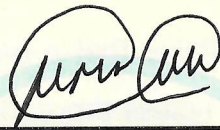
36. From the totality of the above, and noting that the Respondent is a repeat offender, having been found liable for similar violations of the Act in ***ODPC COMPLAINT NO. 869 OF 2023, JOHN OTIENO VS CERES TECH LIMITED***, an Enforcement Notice shall be issued on the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Regulations.

F. FINAL DETERMINATION

37. 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 27th day of NOVEMBER 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER