



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1615 OF 2023

SHAKUNT R. SHAH.....COMPLAINANT

-VERSUS-

PRIME BANK 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 by Shakunt Shah (hereinafter 'the Complainant') against Prime Bank Limited (hereinafter 'the Respondent') alleging the violation of his right to privacy. The Complainant claimed that the Respondent disclosed his personal data pertaining to bank account details held jointly with another, to third parties without seeking his consent and that the Respondent's actions have since prejudiced him.

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 'the Act') was enacted.
3. The Office of the Data Protection Commissioner (hereinafter 'the Office') was established pursuant to Section 5 of the Act and is mandated with the responsibility of regulating the processing of personal data; ensuring that the processing of personal data of a data subject is guided by the principles set out in Section 25 of the Act; protecting the privacy of individuals; establishing the

legal and institutional mechanism to protect personal data and providing data subjects with rights and remedies to protect their personal data from processing that is not in accordance with the Act.

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) 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.

C. BACKGROUND OF THE COMPLAINT

5. The Office received a complaint by the Complainant on 29th November 2022 pursuant to Section 56 of the Act and Regulation 4 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject. The Complaint was however time barred and fell out of jurisdiction of this Office. The Complainant reinstated the complaint on 4th September, 2023.
6. Prime Bank Limited (hereinafter the 'Respondent') is a financial institution and the Complainant is its client.
7. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the complaint filed against it *vide* a letter dated 18th January, 2023 referenced ODPC/CONF/1/5 VOL 1 (121) and required their 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 them by the complainant;
 - b. Any relevant materials or evidence in support of the response;
 - c. The mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant
 - d. An indication as to when the alleged disclosure of financial data happened.

- e. The Company's data protection policy outlining the complaints handling mechanism to deal with matters relating to the rights of data subjects under the Act and the Regulations and any alleged contravention directed to your attention by data subjects.
 - f. Demonstration (by way of written statement) of your level of compliance with the requirements under the Act and the Enforcement Regulations. In particular, an elaborate representation of how data subject can exercise their rights in relation to data protection.
8. Although the Office had initiated investigations into the above complaint, in a judgement by the Honourable Justice Chigiti (SC) on 12th May 2023 in ***Allen Wamae Gichuhi SC & 20Others Vs. Data Protection Commissioner & 2) Others***, it was held that the Office had no jurisdiction to determine on complaints where 90 days had lapsed since receipt of complaint. The Complaint fell out of jurisdiction and therefore, no determination was made on the same.
 9. The Complainant, in the exercise of his rights, re-instituted the Complaint on 4th September 2023. A notification of the re-institution of the Complaint was done to the Respondent on 11th September 2023. In the interest of fairness and justice and to enable the Office give proper consideration to this matter, the Respondent was requested to provide a response to the complaint.
 10. In its Response dated 19th September 2023, the Respondent gave express consent to adopt and use all its previous responses.
 11. This determination is therefore as a result of analysis of the complaint as received, the responses from the Respondent and investigations conducted by the Office.

D. NATURE OF THE COMPLAINT

12. The Complainant operated a series of fixed deposit accounts for various sums held jointly with his late mother Mrs. Sudha Shah and which accounts were held on 'either or survivor' basis.
13. The Complainant's advocate on record states that by letters dated 3rd June 2016 Mrs. Sudha Shah issued instructions to the Respondent that on five (5)

aforementioned fixed deposit accounts held jointly, together with 8 fixed deposit accounts the late Mrs. Sudha Shah held in her own name, that all 13 fixed deposit accounts were, upon their maturity be renewed in the name of the Complainant. As a joint account holder of the 5 fixed deposit accounts, the Complainant signed the instructing letter as well. These instructions were neither varied nor counter-amended prior to Mrs. Sudha Shah's demise.

14. During a family meeting where all the beneficiaries to the estate of Mrs. Sudha Shah were present, the Complainant noticed that amongst the documents, details and information presented by the legal executors of the estate of the late Mrs. Sudha Shah were also details about the fixed deposit accounts that he held jointly with his mother.

15. The Complainant states that for clarity he wrote to the Respondent's branch manager in Kisumu requesting for investigation into how that information was shared without his knowledge or consent.

16. The Complainant, *via* email on 25th March 2020, reached out to the Kisumu Branch Manager following up on his concern. The Response was noted as received. On 30th March, 2020, the Respondent opted to send another email to the Respondent's Customer Service Department detailing all his concerns, issues and complaints regarding the alleged breach of privacy.

17. The Complainant received a response to his email on April 7th 2020 where the Respondent stated that their actions were under proper instructions of the executors of the estate of Mrs. Sudha Shah and as such, the Respondent acted within its scope.

18. The Complainant states that as a result of the privacy breach, his passport has been seized by the courts and a caveat put on his bank accounts. The Complainant further states that he is not able to travel, conduct business transactions nor seek out potential business and this has caused a lot of financial distress, reputational damage and as a result emotional stress.

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E. RESPONDENT'S RESPONSE

19. In its Response, the Respondent states that it received a letter from Nishi Pandit & Company Advocates acting on instruction from Mr. Ashok Shah, an executor in the estate of Mrs. Sudha Shah. In the letter, a reference was made to the accounts held by the late Mrs. Sudha Shah in her lifetime. The letter requested for a confirmation that the late Mrs. Sudha Shah had accounts with the Respondent and, if the confirmation was in the affirmative, furnish the firm with all account details i.e., account numbers, nature of accounts and the amount in the each of the accounts at the time of her death.
20. The executors to Mrs. Sudha Shah's estate *via* letters dated 5th February 2020 wrote to the Respondent acknowledging that they are the executors of the estate of Sudha Shah, attached a certificate of confirmation of grant of probate issued by the Kisumu High Court verifying the same and requested the Respondent to furnish Nishi Pandit & Company Advocates with the information requested for regarding the accounts held in the late Sudha Shah's name before she died.
21. The Respondent, acting on authority, furnished Nishi Pandit & Company Advocates with all the details and information on all accounts held either solely or jointly in the name of Mrs. Sudha Shah.
22. The Respondent states that it also received a letter dated 5th May 2020 from Owiti, Otieno and Ragot Advocates, acting on behalf of Prashant Shah and Sonal Shah, beneficiaries to the estate of the late Sudha Shah, requesting to be furnished with the details of the accounts held in Sudha Shah's name in her lifetime, which the Respondent declined *via* letter dated 5th May 2020 on the grounds that the beneficiaries had no capacity to access the details of the accounts since there were already legally appointed official executors to the estate of the late Mrs. Sudha Shah and a grant of probate had been issued in their names and the same filed with the Respondent.
23. The Respondent states that it received a letter from M/s Behan & Okero Advocates acting on behalf of the Complainant claiming that the Respondent

breached its duty of confidentiality to the Complainant. The Respondent, *via* letter dated 26th May 2020, responded to the Complainant's allegations and stated that it does not consider that the Complainant's complaint well founded, and that it had not acted improperly in any respect whatsoever.

F. EVIDENCE ADDUCED

I. THE COMPLAINANT'S EVIDENCE

24. As part of the Complainant's evidence, he attached:

- a. Copy of the last will and testament of Mrs. Sudha Shah.
- b. Email communication between himself and the Respondent regarding his complaint on the alleged breach of Confidentiality.
- c. Print out of a detailed deposit report of the joint account of Shakunt R. Shah and Sudha R. Shah that is a document presented as annexure 22 by the Respondent.
- d. Letters between the advocates on record for the Complainant and the Respondent.

II. THE RESPONDENT'S EVIDENCE

25. The Respondent provided a response to the allegations against them vide a letter dated 15th February, 2023, with annexures to support their statement as follows:

- a. A copy of the Will.
- b. Certificate of confirmation of Grant of probate issued to Ranok Shah and Ashok Shah.
- c. Letters of Instruction from the executors.
- d. RTGS Instructions and cheque from Mr. Shakunt R. Shah.
- e. Copies of bank statements issued to the executors.

G. ISSUES FOR DETERMINATION

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

- i. Whether the Complainant's claims on infringement of his right to privacy by the Respondent have merit according to the Data Protection Act;*
- ii. Whether the Respondent in its actions or otherwise caused a personal data breach against the Complainant; and*
- iii. Whether the Complainant is entitled to the remedies sought for the alleged breach.*

I. WHETHER THE COMPLAINANT'S CLAIM ON INFRINGEMENT OF HIS RIGHT TO PRIVACY BY THE RESPONDENT HAS MERIT ACCORDING TO THE DATA PROTECTION ACT

27. Data subject's rights are outlined under Section 26 of the Act and they 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*

28. In accordance with the data protection principles under Section 25 of the Act, every data controller or data processor shall ensure that personal data is: -

- a. processed in accordance with the right to privacy of the data subject*
- b. processed lawfully, fairly and in a transparent manner in relation to any data subject*
- c. collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes*
- d. adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed*
- e. collected only where a valid explanation is provided whenever information relating to family or private affairs is required*

- f. accurate and, where necessary, kept up to date, with every reasonable step being taken to ensure that any inaccurate personal data is erased or rectified without delay*
- g. kept in a form which identifies the data subjects for no longer than is necessary for the purposes which it was collected; and*
- h. not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject*

29. Pursuant to Section 25 of the Act and with regard to the issues herein, the Respondent has a duty to ensure that personal data and sensitive personal data is processed in accordance with the right to privacy of the data subject.

30. The existence of the right to privacy means that there exists a duty either not to disclose information or prevent unauthorized access to that information.

31. The Respondent states that it received letters from Ashok Shah and Ranok Shah stating that they are the legal executors of the estate of the late Mrs. Sudha Shah. A certificate of confirmation of grant, the deceased's last will and testament were attached to the letters acknowledging Ashok Shah and Ranok Shah as the legal executors. The letter requested the Respondent to respond to a letter from Nishi Pandit & Company Advocates dated 3rd February 2020 where they had requested for information and any other details of all accounts held by the Respondent in the name of the late Mrs. Sudha Shah.

32. In its response, the Respondent states that it had a lawful basis for processing of the personal data. It was complying with the legal obligation to which as the controller and processor, it is subject. Section 30(1)(b) of the Act as read together with Regulation 5(1) of the Data Protection (General) Regulations, 2021 provides that a data controller or data processor may process data without consent of a data subject if the processing is necessary for any reason set out in Section 30(1) (b) of the Act.

33. Regulation 5(2) of the Data Protection (General) Regulations, 2021 further provides that Processing under sub-regulation (1) shall only rely on one legal basis for processing at a time, which shall be established before the processing.

34. The Respondent states that it was legally mandated by operation of law, *via* the certificate of grant of probate issued by the High Court to the executors, to disclose the accounts details in issue. It is trite that a certificate of confirmation of grant is akin to an order or decree of Court.

35. Upon investigation, the Office found that:

- a. The Respondent had a lawful and legal basis to process the personal data in issue.
- b. The executors had proper authority to inquire into the deceased's estate.
- c. The Complainant does not question the validity of the authority of the executors.
- d. The Complainant's claim that any other person other than the named executors accessed his personal data is not sufficiently addressed or dispensed. No evidence adduced to this Office shows that the Respondent breached the Complainant's right to privacy by disclosing his personal data to a third party.

36. In view of the foregoing, the Office finds that the Respondent did not infringe on the rights of the Complainant as a data subject as provided for in Act, and as such the Complainant's claim is un-merited.

II. WHETHER THE RESPONDENT IN ITS ACTIONS OR OTHERWISE CAUSED A PERSONAL DATA BREACH AGAINST THE COMPLAINANT.

37. Section 2 of the Act defines "**personal data breach**" to mean 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.

38. The Complainant states that the Respondent disclosed his financial records to third parties without his consent. The Respondent states it had a lawful basis that warranted the processing of the personal data in issue.

39. Sections 25(b)&(c) of the Act provides that every data controller or data processor shall ensure that personal data is processed lawfully, fairly and in a

transparent manner and that it is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.

40. Section 30(1)(b) of the Act provides for the lawful processing of personal data without consent. It states that a data controller or data processor shall not process personal data, unless the processing is necessary –

- i. for the performance of a contract to which the data subject is a party or in order to take steps at the request of the data subject before entering into a contract*
- ii. for compliance with any legal obligation to which the controller is subject*
- iii. in order to protect the vital interests of the data subject or another natural person*
- iv. for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller*
- v. the performance of any task carried out by a public authority;*
- vi. for the exercise, by any person in the public interest, of any other functions of a public nature*
- vii. for the legitimate interests pursued by the data controller or data processor by a third party to whom the data is disclosed, except if the processing is unwarranted in any particular case having regard to the harm and prejudice to the rights and freedoms or legitimate interests of the data subject; or*
- viii. for the purpose of historical, statistical, journalistic, literature and art or scientific research.*

41. The Complainant states that the Respondent ought to have sought for his consent prior to disclosing the accounts details in question. The Respondent on the other hand states that the grant of probate placed upon it a legal obligation that could not be waived by an action of consent or no-consent from the Complainant.

42. Section 30(1)(b) of the Act as read with Regulation 5 of the Data Protection (General) Regulations, 2021 provides the Respondent a lawful basis to process

the personal data, that is, for compliance with a legal obligation to which the Respondent was subject.

43. Taking into consideration the evidence of the Complainant and the Respondent's response, the Office finds that –

- i. The Respondent had a lawful and legitimate basis to process the Complainant's personal data.
- ii. The processing of the Complainant's personal data was in accordance with the Respondent's data protection policy and caution was properly exercised to ensure the recipients of the personal data were duly authorised to receive the same.

44. In view of the foregoing, the Office finds that the Respondent did not, in its action or otherwise, cause a personal data breach to the Complainant according to the Act.

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

45. The Complainant sought for compensatory damages and civil discipline in regards to personal information against the Respondent.

46. It is trite that damages must be proximately caused by the wrongful conduct of the Respondent. Section 65 of the Act provides for compensation to a data subject. It states-

(1) A person who suffers damage by reason of a contravention of a requirement of this Act is entitled to compensation for that damage from the data controller or the data processor.

(2) Subject to subsection (1)

(a) a data controller involved in processing of personal data is liable for any damage caused by the processing; and

(b) a data processor involved in processing of personal data is liable for damage caused by the processing only if the processor

(i) has not complied with an obligation under the Act specifically directed at data processors;

(ii) has acted outside, or contrary to, the data controller's lawful instructions.

(3) A data controller or data processor is not liable in the manner specified in subsection (2) if the data controller or data processor proves that they are not in any way responsible for the event giving rise to the damage.

(4) In this section, "damage" includes financial loss and damage not involving financial loss, including distress.

47. The Office has found that the disclosure of the details of the accounts held in the name of Mrs. Sudha Shah by the Respondent to the executors, which details contained the name of the Complainant, was lawful. There is therefore no basis for compensation orders to issue.

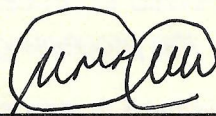
48. In view of the foregoing, and guided by the Act, the Office finds that the Complainant did not sufficiently dispense his allegations against the Respondent, and as such the complaint against the Respondent lacks merit. Herewith, the Complaint stands dismissed.

H. FINAL DETERMINATION

1. In consideration of all the facts of the complaint, the evidence tendered and the investigations conducted, the Data Commissioner makes the following determination:

- i. The complaint is dismissed.
- ii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 1st day of December **2023**



Immaculate Kassait, MBS

DATA COMMISSIONER