



OFFICE OF THE DATA PROTECTION COMMISSIONER

**ODPC COMPLAINT NO. 1834 OF 2023 AS CONSOLIDATED WITH ODPC
COMPLAINT NO. 2056 OF 2023**

HARON KORIR.....1ST COMPLAINANT

ABDULKADIR AZIZ.....2ND COMPLAINANT

-VERSUS-

SURE CRED CAPITAL LIMITED T/A YESCASH.....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. The two complaints filed against Sure Cred Capital Limited (hereinafter as 'the Respondent') relate to the alleged contacting of the Complainants by the Respondent regarding loans that they were unaware of and had not given consent to be designated as emergency contacts.

B. LEGAL BASIS

2. Article 31 (c) and (d) of the Constitution of Kenya 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

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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 premised 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 two complaints from Haron Korir and Abdulkadir Aziz (hereinafter as 'the Complainants' and the 1st and 2nd Complainants respectively) dated 30th September, 2023 and 13th October, 2023 respectively, against Sure Cred Capital Limited. This is pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. The Respondent is a digital credit provider that lends money to its customers through its mobile application '**Yescash**'.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the Complaint filed against it *vide* a letter dated 2nd November, 2023 referenced ODPC/CONF/1/5 VOL 1(516) 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 allegations made against it by the Complainants;
 - b. Any relevant materials or evidence in support of the response;
 - c. Details of how it obtained the Complainants' contact details;
 - d. The Standard Contract that it had with the Complainants;
 - e. The legal basis relied upon to process and engage with the Complainants and whether or how it fulfils the duty to notify under Section 29 of the Act;
 - f. The mitigation measures adopted or being adopted to address the complaints to the satisfaction of the Complainants; and
 - g. A list of all the product names/money lending applications that it runs.
9. On 20th November, 2023 the Office sent a reminder to the Respondent, giving it 7 days to respond the notification of complaint letter dated 2nd November, 2023.
10. The Respondent remains unresponsive to the correspondences sent from this Office.
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. THE COMPLAINANTS' CASE

12. The 1st Complainant alleged that he has been receiving many threatening calls and messages concerning the Respondent's client who failed to pay their loan.
13. The 1st Complainant further alleged that his phone number was used without his consent. He provided screenshots of messages sent to him by the Respondent as proof of the allegations made. The messages indicated that the 1st Complainant should inform the loanee to pay a loan disbursed by the

Respondent as he was allegedly listed as an emergency contact by the Respondent's customer.

14. The 2nd Complainant alleged that he has been receiving calls and messages from the Respondent regarding a loan that he was listed as an emergency contact without his consent.

15. He further stated that the Respondent accessed his contact information through its mobile app installed on the loanee's phone.

16. The 2nd Complainant adduced screenshots of messages sent to him by the Respondent as proof of the allegations made. The messages indicated that the 2nd Complainant should remind the loanee to clear an overdue loan.

II. RESPONDENT'S RESPONSE

17. The Respondent did not respond to the Notification of Complaint letter sent to it.

E. ISSUES FOR DETERMINATION

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

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

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

19. The Complainants are data subjects with rights under Section 26 the Act. Moreover, the Complainants have the right to be informed of the use to which their personal data is to be put under Section 26(a) of the Act.

20. This right was violated by the Respondent by failing to inform the Complainants that they were listed as emergency contacts by the various persons who took the loans from the Respondent. The Respondent should have informed the Complainants of their listing as emergency contacts and sought consent from them of the same.
21. This right was not upheld by the Respondent since the Complainants' 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 by listing them as emergency contacts to loans without their consent.
22. Section 26 (c) of the Act provides for the right to object to the processing of personal data. The 1st Complainant objected to the processing of his personal data *via* text messages sent to the various mobile phone numbers used by the Respondent's agents to contact him. Despite having objected to the further processing of his personal data, the Respondent ignored/failed to stop sending the messages and therefore violated the 1st Complainant's right to object to the processing of his personal data.
23. This Office therefore finds that the Complainants' rights under Sections 26 (a) and 26 (c) of the Act were violated by the Respondent.

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

24. The Respondent is a data controller and a data processor within the definitions of the Act and therefore has obligations pursuant to the Act.
25. The Respondent had an obligation under Section 25 of the Act to ensure that the Complainants' personal data is, amongst others:
- i. processed in accordance with their right to privacy;
 - ii. processed lawfully, fairly and in a transparent manner in relation to the Complainants;

- 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.

26. 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 complaints therefore these instances were not proven.

27. 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 Complainants of their rights under the Act, the fact that their phone numbers were collected for use as emergency contacts of the loanees, and the measures they have in place to ensure safety of their personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

28. 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 Complainants before processing their personal data.

29. 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.

30. 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 COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS

31. Having found that the Respondent did not fulfil its obligations under the Act, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

32. In addition, Section 65 (1) of the Act provides for compensation to a data subject and states that a person who suffers damage by reason of a contravention of a requirement of the Act is entitled to compensation for that damage from the data controller. Section 65 (4) of the Act states that "damage" includes financial loss and damage not involving financial loss, including distress.

33. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.

34. This Office has found that the Complainants' rights were violated. Further, the Complainants were distressed by the text messages and calls made to them in a bid to coerce them to contact the loanees of the Respondent to pay their loans. The Respondent did not provide proof of obtaining consent from the Complainants for their phone numbers to be listed as emergency contacts. Therefore, they did not consent to be bombarded with calls and messages regarding the Respondents loanees.

35. Further, despite the 1st Complainant having objected to the further processing of his personal data, the Respondent ignored/failed to comply with the request and continued calling and sending messages to the 1st Complainant.


36. From the foregoing, the Complainants are entitled to compensation from the Respondent.

F. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable for violating the Complainants' rights under Section 26 of the Act.
- ii. An Enforcement Notice to issue to the Respondent.
- iii. An order for compensation to the Complainants as follows:
 - a) **The 1st Complainant** – Kenya Shillings five hundred and fifty thousand (**KES 550,000**).
 - b) **The 2nd Complainant** – Kenya Shillings three hundred thousand (**KES 300,000**).
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 11th day of December, 2023.



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER