



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1872 OF 2023

JOY MATHEKA.....COMPLAINANT

-VERSUS-

AMREF STAFF SAVINGS AND CREDIT SOCIETY LIMITED.....1ST RESPONDENT

GLEANNMORE LIMITED.....2ND 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. On 2nd October 2023, the Office received a complaint against the 1st Respondent regarding continuous calls to the complainant requesting for a third party whom she never guaranteed and was unaware of the loan until she began getting the calls.

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 Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (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. BACKGROUND OF THE COMPLAINT

6. This Office received a complaint by Joy Matheka (hereinafter 'the Complainant') on 2nd October 2023 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter the 'Enforcement Regulations') from the Complainant who is the aggrieved data subject.
7. AMREF Staff Savings and Credit Society Limited (hereinafter the '1st Respondent') is a Savings and Credit Society (Sacco) regulated by the Sacco Society Regulatory Authority (SASRA) which offers credit facilities to its members.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office, notified the Respondent of the complaint filed against it *vide* a letter dated 19th October, 2023 referenced ODPC/CONF/1/5 VOL 1 (508) 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 Standard Contract between itself and the Complainant, if any; and whether the Complainant consented to the processing of her personal data;
 - d. The legal basis relied upon to engage with the Complainant and whether it fulfilled the duty to notify under Section 29 of the Act;



- e. The mitigation measures adopted or being adopted to address the complaint;
 - f. Its data protection policy;
 - g. Demonstration of its level of compliance with the requirements under the Act and the Regulations.
9. The 1st Respondent responded to the notification of complaint letter *vide* a letter dated 1st November, 2023.
10. In its response, the 1st Respondent indicated that they outsourced debt collection from Gleannmore Limited. It was upon this basis that this Office made the decision to enjoin Gleannmore Limited as a 2nd Respondent and notified them of the said decision via a letter dated 6th November 2023 referenced **ODPC/CONF/1/5 VOL 1 (531)**. This decision was pegged on the powers of this Office to enjoin a party pursuant to Regulation 12 (1) of the Enforcement Regulations.
11. In the said letter, the 2nd Respondent was asked 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. Details of how it obtained the Complainant's personal data;
 - e. The legal basis relied upon to engage with the Complainant's personal data and whether or how it fulfilled the duty to notify under Section 29 of the Act; and
 - f. Whether the Complainant consented to the processing of her personal data.
12. The 2nd Respondent responded to the notification of complaint *vide* a letter dated 4th December 2023.
13. This determination is therefore as a result of analysis of the complaint as received and the responses from the Respondents.

D. NATURE OF THE COMPLAINT

14. The Complainant claimed the 1st Respondent approached her about a loan from a third party she had never guaranteed and was unaware of the loan until she was contacted. The Complainant indicated that she had requested that they not contact her, but they persisted, prompting the filing of a complaint with this Office.

E. SUMMARY OF EVIDENCE ADDUCED

i. THE COMPLAINANT'S CASE

15. The Complainant filled the complaint form with her details and the nature of the complaint. She adduced screenshots of phone numbers whom she stated always identified as working for the 1st Respondent.

ii. THE 1ST RESPONDENT'S RESPONSE

16. The 1st Respondent responded to the notification of complaint vide a letter dated 1st November 2023. The 1st Respondent denied the allegations against it in totality.

17. In its response, the 1st Respondent stated that as it was standard practice, one of the requirements for the advancement of a credit facility is that the borrower must provide guarantors who willingly execute guarantees for the credit facilities and commit to repay the loan should the borrower default.

18. The 1st Respondent observes that they always outsource their debt collection activities and only give relevant information whenever instructing any entity on its debt collection panel. Therefore, the 1st Respondent averred that they restrict themselves to giving the details of the borrower and the guarantors to their debt collection purposes.

19. The 1st Respondent avers that anyone who purported to contacting a third party to the two parties disclosed is overzealous, acting outside the scope of their instructions, on a frolic of their own and unlawful, which acts they do not sanction, whether for debt collection and for any other purposes.

20. The 1st Respondent averred that they outsourced collection of the borrower's debt to the 2nd Respondent and provided them with a schedule of information that contained details of only the borrower and his guarantors.

21. They stated that they never issued the contacts of the Complainant to the debt collection firm and they did not have the said contacts and they believed they were not relevant to collection of the debt.

22. The 1st Respondent therefore indicated that they did not call the Complainant but it was the 2nd Respondent who made the said calls and acted outside the scope of their instructions and outside the scope of their Debt Collection

- Agreement (the Agreement) of December 2020. The 1st Respondent availed the said Agreement as proof of the same.
23. The 1st Respondent pointed out that Clause 8 of the Agreement provided for confidentiality as a requirement and there was expectation that the details of the loan and issues related to privacy would be complied with.
24. The 1st Respondent submitted a copy of the loan Application and an Agreement form for the loan facility advances by themselves to the borrower. It was noted that the Complainant was not a guarantor of the said loan and therefore never submitted her details to the 1st Respondent.
25. The 1st Respondent also availed copies of schedule of debts forwarded to the 2nd Respondent and debt collection reports submitted by the 2nd Respondent. The borrower was listed as a defaulter by the 1st Respondent in the list of debtors forwarded to the 2nd Respondent and in the report submitted by the 2nd Respondent, it was indicated that the debtor was not picking calls and on trying to call the Complainant, she stated that they should stop calling her.
26. The 1st Respondent reiterated their position that they did not know the Complainant and did not make any call to her neither did they have her contact or supply the same to the 2nd Respondent.
27. Further, the 2nd Respondent stated that they informed the 2nd Respondent to cease and desist from making the calls complained of. They submitted a letter addressed to the 2nd Respondent dated 27th October 2023 directing them to cease and desist from contacting the Complainant.
28. The 1st Respondent stated that they have developed a Data Protection Policy which outlines the complaint process and other data protection processes. They attached the policy as proof of the same.

iii. THE 2ND RESPONDENT'S RESPONSE

29. Upon analysing the evidence adduced to this Office, it was apparent that the 2nd Respondent be enjoined as a party to this matter.
30. They responded to the notification of complaint via a letter dated 4th December 2023. The 2nd Respondent confirmed that two of the phone calls were made to the Complainant by two of their officers contracted by themselves.

31. The 2nd Respondent stated that the phone calls were made to the Complainant as enquiries to the whereabouts of the debtor. They stated that the Complainant was receptive to the first call and offered to revert to the officer with information as to the whereabouts of the debtor.
32. The 2nd Respondent averred that to their surprise, the Complainant has turned her back on the said officers and lodged the complaint yet the officers were simply making a call for assistance and they denied that there was any form of violating conduct.
33. The 2nd Respondent stated that whilst it refutes any allegations that it breached the data protection laws and regulations, they pointed out that the Complainant acknowledged that no harm was occasioned upon her.
34. Further, upon notification of the complaint, the 2nd Respondent stated that it communicated to the said officers to cease making further communication to the Complainant.
35. The 2nd Respondent averred that it had been sensitizing its staff, agents and contractors on the best data protection policies in the wake of the enactment of the Act. Further, it is registered as a data processor with this Office and has in place a Privacy Statement to guide its staff, agents and contractors on their interactions with stakeholders and third parties.

F. ISSUES FOR DETERMINATION

36. 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 Respondents fulfilled their obligations under the Act; and
- iii. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

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

37. The Complainant is a data subject with rights under Section 26 the Act. Moreover, the Complainant had the right to be **informed** of the use to which her personal data was to be put.

38. The 1st Respondent indicated that it did not collect nor process the Complainant's phone number and subsequently did not contact her. An analysis of the response by the 1st Respondent proves that they did not collect the Complainant's phone number as she was not one of the borrower's guarantors.
39. However, the 2nd Respondent failed to demonstrate to this Office how they collected the Complainant's phone number and called her severally regarding the borrower's debt yet she was not one of the guarantors.
40. Further, Section 28 of the Act provides that a data processor shall collect personal data **directly** from the data subject unless they can prove the exemptions under subsection 2 of the said provision.
41. The 1st Respondent proved that they did not collect the Complainant's phone number and therefore did not submit it to the 2nd Respondent as part of its debt collecting activities.
42. The 2nd Respondent failed to prove how and where from it collected the Complainant's personal number despite the allegation of her cooperation with their Officers.
43. Therefore, this Office finds that the 2nd Respondent violated the Complainant's rights under the Act.

II. WHETHER THE RESPONDENTS FULFILLED THEIR OBLIGATIONS UNDER THE ACT

44. The 1st Respondent is a data controller and the 2nd Respondent a data processor within the definitions of the Act and therefore both have obligations pursuant to the Act.
45. The Respondents had an obligation under Section 25 of the Act to adhere to the principles of data protection while processing the Complainant's personal data. Particularly, the Respondents were obligated under Section 25 (a) and (c) of the Act to ensure that personal data is processed in accordance with the right to privacy of the data subject and is collected for explicit, specified and legitimate purposes and not further processed in a manner incompatible with those purposes.
46. From its response, the 1st Respondent was able to establish that it fulfilled its obligations under Section 25 of the Act in line with this particular complaint.
47. The 2nd Respondent did not demonstrate how it fulfilled its obligations under Section 25 (a) and (c) of the Act especially the manner in which it collected the

Complainant's phone number and from where. The 2nd Respondent admitted that its officers contacted the Complainant in pursue of the borrower. However, they did not demonstrate where they got her number from therefore a violation of the principles of data protection under the Act.

48. Section 30 of the Act gives instances where a data controller or processor can lawfully process personal data. It stated that a data controller or processor **shall not** process data unless the data subject consents to the processing for one or more specified purposes or the process is necessary for the reasons given in subsection (b).
49. In the notification of complaint, the 2nd Respondent was asked to provide proof that it had a lawful basis to collect and process the Complainant's data. The Respondent failed to state how it collected the Complainant's personal phone number and whether she consented to be contacted regarding the defaulting borrower. She was not a guarantor of the loan advanced to the borrower hence it remains unanswered how and where they got her phone number from.
50. Section 32 of the Act provides for the conditions of consent and provides that a data controller and processor shall bear the burden of proof to establish that the data subject consented to the processing of their personal data for a specified purpose.
51. The 1st Respondent discharged this burden by proving that they did not collect the Complainant's phone number neither did they call her.
52. On the other hand, the 2nd Respondent failed to discharge this burden by failing to establish how it collected the Complainant's personal data.
53. Section 41 of the Act provides for data protection by design or by default and mandates the data controller to implement appropriate technical and organisational measures designed to implement the data protection principles in an effective manner and to integrate necessary safeguards for that purpose into the processing. This duty applies both at the time of determining the means of processing the data and at the time of processing the data.
54. The 2nd Respondent, admitting to having called the Complainant but failing to demonstrate to this Office how they collected her phone number is a clear indication that they have not incorporated the necessary safeguards of data protection by design or by default. This Office notes that they have a data processor certificate from this Office, however that is not sufficient proof of compliance with their obligations under the Act.

55. Therefore, the 2nd Respondent did not fulfil its obligations under the Act with regards to this complaint.

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

56. The Complainant sought she should stop being called. The 1st Respondent stated that it directed the 2nd Respondent to cease and desist calling her and the 2nd Respondent also stated that it directed its officers to stop contacting the Complainant.

57. However, having found that the 2nd Respondent violated the Complainant's rights and failed to fulfil its obligations under the Act, an Enforcement Notice shall be issued against the 2nd Respondent pursuant to Section 58 of the Act.

G. FINAL DETERMINATION

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

- i. The 1st Respondent is not liable for violation of the Complainant's rights and fulfilled its obligations under the Act with regards to this complaint;
- ii. The 2nd Respondent is hereby found liable for violating the Complainant's personal data;
- iii. An Enforcement Notice be issued against the 2nd Respondent; and
- iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at NAIROBI this 15th day of December 2023.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

