



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1926 OF 2023**

**ELIJAH MOKUA.....COMPLAINANT**

**-VERSUS-**

**ASA INTERNATIONAL KENYA LIMITED .....1<sup>ST</sup> RESPONDENT**

**BIDII CREDIT LIMITED.....2<sup>ND</sup> RESPONDENT**

**OYA MICRO-CREDIT COMPANY LTD.....3<sup>RD</sup> 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. This Complaint is in respect of the Complainant's claim that the Respondents have been continuously contacting him to repay a loan that was taken by his wife yet he was not her guarantor at all material times when his wife took the loan from the Respondents.

**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 from the Complainant on 5<sup>th</sup> October 2023. The complaint was lodged 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.
7. The 1<sup>st</sup> Respondent, ASA International Kenya Limited, is a subsidiary of ASA International and has been operational in Kenya since 2013 with a presence of 132 marketing offices in 38 counties. It states that it offers socially responsible loans to underbanked, low-income female micro-entrepreneurs in Asia and Africa.
8. The 2<sup>nd</sup> Respondent, Bidii Credit Limited, is a money lending institution that provides credit facilities to Small and Medium business Enterprises (SMEs)

9. The 3<sup>rd</sup> Respondent, Oya Micro-Credit Company Limited is a money lending institution that lends money to Micro Enterprises.
10. Pursuant to Regulation 11 of the Enforcement Regulations, on 9<sup>th</sup> November 2023 this Office notified all the Respondents of the complaint filed against them. The Respondents were to provide their response within 14 days.
11. On different dates within November and December, the Respondents responded to the notifications of the complaint.
12. This determination is therefore as a result of analysis of the complaint as received and the response from the Respondent.

#### **D. NATURE OF THE COMPLAINT**

13. The Complainant alleges that the Respondents are incessantly calling and sending him messages using different numbers telling him to repay the loan amounts that the Complainant's wife took with the different Respondents yet he was not a guarantor to the loans that his wife took from the Respondents.

#### **E. SUMMARY OF EVIDENCE ADDUCED**

##### **i. THE COMPLAINANTS' CASE**

14. In addition to filing his complaint *via* email, the Complainant provided additional evidence in support of his complaint.

##### **ii. THE RESPONDENT'S RESPONSE**

15. In its response, the 1<sup>st</sup> Respondent stated that two of its employees contacted the Complainant while pursuing a loan taken by the Complainant's wife that was in default. It further stated that the Complainant is neither the first Respondent's client nor a guarantor of any loan and there exists no contract between the 1<sup>st</sup> Respondent and the Complainant. The 1<sup>st</sup> Respondent further stated that the Complainant visited its Rongai Branch on 28<sup>th</sup> September 2023 and voluntarily agreed to settle his wife's loan. The 1<sup>st</sup> Respondent further stated that it is as a

- result of this voluntary agreement that its staff thereafter contacted the Complainant to make a follow-up after failing to pay as agreed.
16. In its response, the 2<sup>nd</sup> Respondent stated that its employee reached out to the Complainant after the Complainant's wife had given them the Complainant's number as a way of contacting her.
17. In its response, the 3<sup>rd</sup> Respondent stated that it had advanced a loan to the complainant's wife, Josephine, who faithfully repaid the loan weekly for four (4) weeks but stated defaulting on the fifth week. The default prompted the 3<sup>rd</sup> Respondent's field officers to make a follow-up at her business premises. That upon visiting the business premises, they found the Complainant who introduced himself as Josephine's husband. He acknowledged that he was aware of the loan and committed to repay the same. That on 19<sup>th</sup> September 2023, he made a payment of Kshs. Two Thousand *via* Mpesa using his Safaricom line.
18. The 3<sup>rd</sup> Respondent stated that ordinarily, where there is continued default they take legal measures by filing matters at the small claims court but however before instituting matters their field officers follow up on payments since some of their customers may be facing distress and the matters can be amicably negotiated and loans restructured instead of suing. The 3<sup>rd</sup> Respondent further contended that it is on this basis that its officers made a follow up since they only sue as a last resort since it adds costs for their customers and most are small businesses who cannot afford the costs.
19. It was the 3<sup>rd</sup> Respondent's position that the Complainant willingly shared his number with its field officers and went ahead to make payment using the same number. That since, payment is meant to be done weekly their field officers were only following up through phone calls to remind him about payments and that indeed through the follow up the Complainant committed to repay the loan fully which the company agreed to.

## F. ISSUE FOR DETERMINATION

20. The following issue falls for determination by this Office:

- i. Whether the Complainant's personal information/data was lawfully processed.

### I. WHETHER THE COMPLAINANT'S PERSONAL INFORMATION/ DATA WAS LAWFULLY PROCESSED

21. From the allegations put forth by the Complainant, it is evident that the complaint relates to the processing of personal data wherein the Complainant alleges that he has been receiving incessant calls and messages from the Respondent demanding payment from him as a guarantor of a loan taken by his wife yet he never guaranteed the same.

22. Section 2 of the Data Protection Act defines processing as *"any operation or sets of operations which is performed on personal data or on sets of personal data whether or not by automated means such as:- (a) collection, recording, organization, structuring; (b) storage, adaptation or alteration; (c) retrieval, consultation or use; (d) disclosure by transmission, dissemination, or otherwise making available; or (e) alignment or combination, restriction, erasure or destruction."*

23. The above definition augments the earlier stated position that at all material times, the Respondent was processing the Complainant's personal data.

24. Having established that indeed all the while the Respondent was processing the Complainant's personal data, we now turn to the question on whether the Complainant's personal information/data was lawfully processed.

25. Section 30 of the Data Protection Act provides the lawful bases for processing personal data. It provides:-

*30. Lawful processing of personal data*

*(1) A data controller or data processor shall not process personal data, unless (a) the data subject consents to the processing for one or more specified purposes;*

*or*

*(b) 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.*

*(2).....*

26. The above-stated bases are the lawful instances upon which a data controller, the Respondent herein, should have processed the Complainant's personal data.

27. Related to the Complaint, we note that it is undisputed that the Complainant's wife took a loan facility with each of the Respondents who are money lending institutions. It is also undisputed that from the loan application forms and agreement, the Complainant was not a guarantor of the said loans. The complainant was not a party to the loan agreement between his wife and the respondents. The Respondents were acting ultra vires of the loan agreements. As such the processing of the Complainant's personal data was unlawful and violated Section 30 of the Data Protection Act.

28. In addition to the foregoing, we note that the allegations that the Complainant on his own volition agreed to be contacted on behalf of the wife remain unsubstantiated. In as much as the Respondent's representations that they contacted the Complainant because he was a spouse to the loan defaulter might make common and logical sense, it does not make legal sense. Legal sense is substantiated and backed with law and evidence. Data protection rights as provided for by the Data Protection Act are individualistic. They apply to individual persons and not a union by cohabitation or marriage.

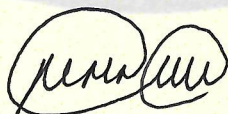
29. As such, this Office therefore finds that the Complainant's personal data was not processed lawfully.

#### **G. FINAL DETERMINATION**

30. In the ultimate, the Data Commissioner therefore makes the following final determination;

- i. The Respondents are hereby found liable for unlawfully processing the Complainant's personal data.
- ii. Enforcement Notices be and are hereby issued against all the Respondents.
- iii. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

**DATED** at **NAIROBI** this 2<sup>nd</sup> day of January 2024.



**IMMACULATE KASSAIT, MBS  
DATA COMMISSIONER**

