



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 0574 OF 2023

JEFF NDUKO.....COMPLAINANT

-VERSUS-

ONE ACRE FUND.....RESPONDENT

DETERMINATION

(Pursuant to Section 8(f), 56 and 57 of the Data Protection Act, 2019, and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021)

A. INTRODUCTION

1. The Constitution of Kenya 2010, under Article 31 recognizes the right to privacy. Consequently, in an effort to further guarantee the same, the Data Protection Act, 2019 (hereinafter "the Act") was enacted. Section 8 (1) (f) 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.
2. The Office of the Data Protection Commissioner (hereinafter as "the Office") is a regulatory Office, established pursuant to the Data Protection Act, 2019. The Office 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.

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3. The Office received a complaint dated 14th April 2023 by Jeff Nduko against the Respondent. The complaint relates to the unwarranted use of the data subjects' personal data.
4. On 29th May 2023, the Office in the exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaint filed against it. The respondent received the notification letter on 2nd June 2023. In the notification of the complaint filed against the Respondent, the Respondent was to provide: -
- a) A response to the allegations made against it;
 - b) Any relevant materials or evidence in support of the response in (a) above;
 - c) Details of how you collect, store, and process the Complainant's data;
 - d) The legal basis relied upon to process and engage with the complainant's data;
 - e) Proof of the mitigation measures adopted or being adopted to address the complaint to the satisfaction of the Complainant;
 - f) A data Protection policy outlining the complaints handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the regulations, and any other alleged contravention directed to your attention by data subjects;
 - g) Details of One Acre Fund's level of accuracy while retaining personal data; and
 - h) A Demonstration (by way of a written statement) of their level of compliance with the requirements under the Act and the Regulations.
5. On 15th June 2023, the office received a response from the Respondent responding to the notification of the complaint letter dated 29th May 2023. It addressed all the issues that it was called upon to address in the notification letter (section C of this determination). The Respondent also adduced its Company's Data Protection Policy and certificate of registration as a data controller as evidence of its compliance with the Act.

6. On 19th June 2023, the Complainant wrote to this office via email confirming that he no longer receives the Respondent's messages.
7. This determination is pegged on the provisions of Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations 2021 which states that the Data Commissioner shall, upon the conclusion of the investigations, make a determination based on the findings of the investigations.

B. NATURE OF THE COMPLAINT

8. The complaint relates to the unwarranted and unlawful use of the data subjects' personal data.
9. The Complainant alleges that the Respondent has infringed on their right to privacy by sending him unwarranted messages and making unnecessary calls requiring him to pay back a loan he never took. That the complainant has been receiving messages from the Respondent yet the Complainant has used and or subscribed to the Respondent's services and or products.

C. THE RESPONDENT'S RESPONSE TO THE COMPLAINT

10. The response to the complaint was made via a letter dated 15th June 2023 and received on the same day.
11. In its response, the Respondent stated as follows:
 - a) From the look of the Respondent's messages sent to the Respondent, the Respondent was addressing itself to a client by the name of Pamela and Jeff, the Complainant herein.
 - b) The Respondent confirmed that Pamela is their client and her data is stored by the Respondent upon her agreeing to the organization's terms and conditions which permits the Respondent to access and process their client's data.
 - c) The Respondent further admitted that they erroneously entered their client's number into their database. Instead of 07XXXX6977 which belonged to their client, they entered, captured, and or stored the number as 07XXXX6877 which belongs to the Complainant.
12. The Respondent further confirmed that the Complainant is not and has never been a Respondent's client and that they do not have and have never had access to the

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Complainant's personal information other than the erroneous phone number that to them belonged to their client.

13. As to the mitigation measures adopted by the Respondent; the Respondent stated that:

- a) One Acre Fund has stopped the loan repayment messages that Jeff has been receiving effective immediately.
- b) They are organizing additional data protection training for their staff who enroll customers/ clients into their program.
- c) They will implement a phone number verification step in the customer/ client enrolment process to ensure that they are obtaining phone numbers registered in the names of the customers/clients they enroll.

14. As to the technological and organizational measures, the Respondent stated:

- a) The Respondent shall continue to improve the implementation of data validation mechanisms in its enrolment process and technological system to ensure the accuracy and completeness of their customer's data, especially their phone numbers, and that they will continuously validate and verify the authenticity of phone numbers before enrolling or sending any messages to customers/ clients.
- b) That the Respondent will implement a Know Your Client/ Customer (KYC) Policy wherein they intend to send a clear internal communication mechanism, especially between departments responsible for enrolment and customer data management to adhere to the OAF KYC Policy that requires certain verification processes to identify customers/ clients and also promote a data accuracy/authenticity campaign through this communication.
- c) That they shall conduct regular training for their employees involved in enrolment and customer data management. The training will focus on the importance of handling accurate data and the need to avoid sending erroneous messages to unsuspecting members of the public.

15. The company has a complaint-handling mechanism that ensures that it is always accountable to the data subject for processing his/her personal information.

16. With regards to the level of compliance with the Act, the Respondent stated that it is compliant with the Data Protection Act, 2019, and its regulations. The

Respondent went ahead to produce the Company's certificate of registration as a valid data controller and the company's data protection policy.

D. ISSUE FOR DETERMINATION

- i. Whether the Respondent has violated the Principles of Data Protection as envisaged in the Data Protection Act, 2019.

E. ANALYSIS AND DETERMINATION

I. WHETHER THE RESPONDENT HAS VIOLATED THE PRINCIPLES OF DATA PROTECTION AS ENVISAGED IN THE DATA PROTECTION ACT, 2019

17. Before delving into this issue, this office would like to note that after the complaint was notified to the Respondent, the Respondent rectified the Complainant's data stored in its system. The Complainant also confirmed this correction and or rectification.
18. The Complainant also brought his complaint to this office as a first port of call. The Complainant did not try to exercise his right as envisaged under section 26 of the Data Protection Act No.19 of 2019 (Act) with the Respondent in the first instance.
19. That being said, this office will now turn to address the crux of the Complaint. The crux of the complaint herein relates to the principles of processing personal data. The complaint relates to the processing of personal data obtained from the Respondent's customers. As stated by the Respondent in its response, the Respondent collects personal data from the customers/clients for purposes of communicating with them and informing them of the Respondent's products, loans, and loan repayments. The Respondent confirmed and admitted to the 'mistake' of recording and entering the wrong number into the database. Instead of 07XXX6977 which belonged to their Client/ Customer, the Respondent entered, captured, and or stored the number as 07XXX6877 which belongs to the Complainant.
20. Section 25 of the Data Protection Act provides for the principles of data protection.

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25. Principles of data protection

Every data controller or data processor shall ensure that personal data is:

- i. Processed in accordance with the right to privacy of the data subject;*
- ii. Processed lawfully, fairly, and in a transparent manner in relation to any data subject;*
- iii. Collected for explicit, specified, and legitimate purposes and not further processed in a manner incompatible with those purposes;*
- iv. Adequate, relevant, limited to what is necessary in relation to the purposes for which it is processed;*
- v. Collected only where a valid explanation is provided whenever information relating to family or private affairs is required;*
- vi. 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;*
- vii. Kept in a form which identifies the data subjects for no longer than is necessary for the purposes for which it was collected; and*
- viii. Not transferred outside Kenya, unless there is proof of adequate data protection safeguards or consent from the data subject.*
(emphasis mine)

21. The same Act goes further to qualify and emphasize the importance of abiding by the principles of data protection in the processing of personal data under section 44 of the Act. Section 44 of the Act categorically states that

," no category of sensitive personal data shall be processed unless section 25 applies to that processing."

22. From the above it is so evident that the principles of data protection are the hallmark of any form of processing of personal data. They provide the parameters within which the mode, means, and any form of processing of personal data should be carried out.

23. From the complaint before this office, it is evident that the said principles of data protection were never followed to the latter. More specifically the principle of accuracy and where necessary to keep the records up to date in every step of processing. Had the Respondent accurately captured data information belonging to their customer/client, the complainant would not have received the messages from the Respondent. To this, the Respondent admitted terming it as a 'mistake'

saying that the Complainant has never been its client and that it had never had any access to his personal information apart from his number.

24. In as much as it was a case of mistake as stated by the Respondent, the Respondent upon notification of the complaint updated its records. This is confirmed by the Complainant that he no longer receives messages from the Respondent. All in all, The Respondent should have ensured the information kept by it for its customers is up to date and accurate at all material times in conducting its business operations.
25. That being said this office would like to note that Compliance with the Data Protection Act and its regulations is an ever-continuous process. An entity commits itself to abide by the Data Protection laws from the moment an entity starts collecting personal data from individuals, customers, and or clients. This commitment need not only to be seen on paper through having data protection structures, policies, registration certificate, etc. but in practice through implementation and operationalization.
26. The Respondent has adduced to this office evidence of how it has complied with the data protection laws and regulations. This office has had a chance to go through each and every piece of evidence and we must say that the Respondent has really demonstrated how it has complied with the data protection laws and regulations. The Respondent has demonstrated an immense level of commitment. However, as earlier stated, the commitment need not only be seen on paper but also in practice through implementation and operationalization. The evidence adduced demonstrates that the Respondent has taken measures to prevent infringement of their data subject's personal data.
27. On the certificate of registration as a Data Controller produced by the Respondent, this office would like to note that a certificate of Registration **is not proof of compliance** with the Data Protection Act and Regulations. It only shows you have registered with this office as a data controller or data processor and nothing else. Registration is one of the steps for compliance with the Data Protection Act and Regulations. On the same breadth, this office also notes that the Respondent has only registered as a data controller and not as a data processor as well yet it also processes its client's personal data. The Respondent should also register as a data processor as it performs both the data controller and data

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processor functions as such the statutory obligations for a data controller and a data processor ensue and applies to the Respondent.

28. Finally, this office observes that the complainant's main complaint is that the Respondent sends him unwanted messages. With the assistance of this office, the Respondent took reasonable steps, as required by Section 25(4) of the DPA, to guarantee that erroneous personal data is erased or rectified without delay as confirmed by the Complainant.

F. FINAL DETERMINATION

29. The Data Commissioner, therefore, makes the following final determination;

- a. The Complaint against the Respondent by the Complainant stands resolved and as such it is marked as closed.
- b. Parties have the right to appeal to the High Court of Kenya.

DATED at NAIROBI this 5th day of July 2023.



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**