



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 436 OF 2023

CHEPKOECH LORNA & 22 OTHERS.....COMPLAINANTS

-VERSUS-

**FIRCH INTERNATIONAL COMPANY LIMITED T/A PESA
PAY.....RESPONDENT**

FINAL 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 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 as "the Act") was enacted. 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.
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.

3. The Office received twenty three (23) complaints by 23 Complainants on diverse dates from 15th March 2023 to 28th March 2023 against Firch International Company Limited (hereinafter as "the Respondent") and pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 (hereinafter as "the Regulations") has conducted investigations into the complaints.
4. On 29th March 2023, the Office in exercise of its mandate as envisaged under the Act and in the promotion of justice, notified the Respondent of the complaints filed against it via a letter dated 28th March, 2023 and served upon the Respondent on 29th March, 2023. The Respondent declined to accept service by stamping on our copy of the letter as proof of service and was on 30th March, 2023 served with a copy of the letter via email. 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) The standard contract between the Respondent and the digital borrowers (the Complainants);
 - c) Details of how it obtained the contacts in the Complainants' phonebooks and whether the Complainants' consented to their phonebook contacts being accessed;
 - d) Details of how it fulfils the Data Subjects' right of rectification and erasure as per Section 40 of the Data Protection Act;

- e) The legal basis under which it contacts third party contacts obtained from the digital borrowers' phone books without the third parties' consent;
 - f) The legal basis which it relied on to disclose the Complainants' personal private information to third parties obtained in their (Complainants') phone book contacts;
 - g) Proof of registration with this Office as data controllers and data processors;
 - h) Details of: -
 - i. The mitigation measures adopted or being adopted to address the complaints;
 - ii. The technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaint do not occur again; and
 - iii. Its 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 alleged contravention directed to their attention by data subjects.
 - i) Demonstration (by way of written statement) of their level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subject can exercise their rights in relation to data protection.
5. On 12th April, 2023, the Respondent filed its response to the complaints via a letter dated 7th April, 2023.
6. On 27th April, 2023, the Office sent a request for more information letter to the Respondent requiring them to provide us with: -
- i) Proof of legal documents confirming its termination/business closure as alleged in its response;

- ii) Proof of consent obtained from third parties for them to be listed as emergency contacts; and
 - iii) Any other relevant information relating to the Complaint.
7. On 4th May, 2023 the Respondent responded to our request for more information letter by providing a document containing: -
- i) Proof that their product Pesa Pay has been removed/deleted from the Google Play store and is no longer available for download;
 - ii) The Lease Agreement for their office space located in Applewood Adams, Ngong Road, Nairobi.
 - iii) Email correspondences referenced as termination notices (Close of company business); and
 - iv) Its emergency contact information statement.
8. Upon receipt of the aforementioned letters and documents, investigations were conducted as required by Regulation 13 (1) of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021.
9. This determination is pegged on the provisions of Regulation 14 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 COMPLAINTS

10. On diverse dates in March 2023, it is alleged that the Respondent has been;
- i) Irregularly/unlawfully accessing the Complainants' mobile phone books;
 - ii) Sending unwarranted text messages to the Complainants;
 - iii) Requesting Complainants to make payments for loans not borrowed or for loans already settled, via text messages;
 - iv) Requesting third parties to make loan payments on behalf of loanees, when their consent was not obtained to be a guarantor/referee and they were not party to, or aware of the loan;

- v) Sharing of the Complainants' personal data (name and phone number) to third parties who were not listed as guarantors/referees; and
- vi) Putting the personal mobile phone number of one of its employees on the face of the Pesa Pay application without his consent.

C. THE RESPONDENT'S RESPONSE

11. The Respondent via a letter dated 7th April, 2023 responded to the Notification of Complaints filed against it. It stated that it had investigated the matter and made efforts to rectify the issues and prevent further breaches of privacy.
12. It also stated that it had decided to terminate its business in Kenya to rectify its data acquisition process and collection process.
13. The Respondent averred that the text messages sent to the Complainants were sent by its external partners namely Gleannmore Limited and Brites Management Services Limited and that it did not find any record of the messages in their internal systems. The Respondent further stated that it had warned their external partners to stop sending collection text messages to their customers contacts. The Respondent provided a copy of the contract it had with Gleannmore Limited for the provision of debt collection services and a copy of the contract it had with Brites Management Services Limited for staff outsourcing and head-hunting services.
14. The Respondent described how it obtained the contacts in the Complainants' phone book by providing a screenshot of their permission description from its Pesa Pay mobile application. It also stated verbatim that, "we notice that the Complainants are not our users, but our users' phone book contacts. So we did not obtain the contacts in our users' phone books." The users can only continue to use the application after they agree to give permission to the Respondent to access their contact list.

15. The Respondent further stated, "when a user selects an emergency contact, we will request access to the user's contact list, and only after the user clicks yes will we obtain access to the contact list."
16. The Respondent averred that the digital borrowers consented to it accessing their phone book contacts.
17. The Respondent in response to the notification of complaints on the question of how it fulfils the data subjects' right of rectification and erasure stated that, "on the account security page, it supports users to change their login password, transaction password, and bind/change email address."
18. On the question of the legal basis under which it contacts third party contacts obtained from the digital borrowers' phone books without the third parties' consent, the Respondent stated that, "when the user fills in the emergency contact, we will ask them to read the Emergency Information Statement, which requires the user to clearly inform the emergency contact person and obtain their consent." It further stated that, "We often encounter borrowers who do not answer collection calls, resulting in their loans often not being collected in a timely manner. Therefore, we would like borrowers to provide us with the contact information of their emergency contacts with the consent of the emergency contacts. We would also like to confirm with you (the Office) if this approach is legal and acceptable."
19. On the question of the legal basis on which it relied on to disclose the Complainants' personal private information to third parties obtained in their phone book contacts, the Respondent stated that, "the Complainants are not our users and we don't obtain their personal private information from their phonebook contacts."
20. On the question of the mitigation measures adopted or being adopted to address the complaints, the Respondent stated that upon receiving the notification of complaints, it immediately contacted its two external collection partners and asked them to stop sending collection messages to the customer's

non-emergency contacts and warned them that if the same happens again, they will consider terminating their cooperation. The Respondent attached email correspondences as proof of the same.

21. On the question of the technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaints do not occur again, the Respondent stated verbatim, "the system display panel will be adjusted so that the external collection partners could no longer see and access contact information other than the user and emergency contacts. We plan to terminate our business in Kenya shortly to rectify our data acquisition process and collection process."
22. The Respondent attached its Complaint Handling Policy in response to our request to have it provide its data protection policy outlining its complaint handling mechanisms to deal with matters relating to the rights of a data subject under the Act, the Regulations and any alleged contravention directed to its attention by data subjects.
23. In response to our request to provide legal documents confirming its termination/closure of business in Kenya, the Respondent provided a screenshot depicting that their Pesa Pay application was no longer available for download in the Google Play store. It also provided email correspondences referenced as termination notices (Close of company business).

D. ISSUES FOR DETERMINATION

- i. Whether the Respondent obtained contacts in its clients' phonebooks and contacted the Complainants regarding loans they had not consented to guarantee.
- ii. Whether the Respondent put the personal mobile number of one of its employees on the face of its Pesa Pay application without his consent.
- iii. Whether there was any infringement of the Complainants' Rights as data subjects as provided for in the Data Protection Act, 2019.

E. ANALYSIS AND DETERMINATION

I. WHETHER THE RESPONDENT OBTAINED CONTACTS IN ITS CLIENTS' PHONEBOOKS AND CONTACTED THE COMPLAINANTS REGARDING LOANS THEY HAD NOT CONSENTED TO GUARANTEE

24. The Complainants adduced screenshots of messages sent to them by the Respondent requesting them to make payments on behalf of loanees who had defaulted or were late in making payments. The Respondent in its response admitted to having obtained the contacts in their users' phonebooks and to reaching out to their external partners and asking them to stop sending collection messages to its customers' non-emergency contacts.

25. I find that the Respondent did not obtain prior consent from the Complainants before enlisting them as guarantors and did not have a mechanism whereby the proposed guarantor(s) can have the liberty to decide whether or not they will guarantee a loanee, how much they are going to guarantee and whom they are guaranteeing. The Complainants did not have an option to decline to guarantee a loanee and were only informed about the loan when the loanee had defaulted or failed to pay in time.

26. In view of the foregoing, it is evident that the Respondent obtained contacts in its clients' phonebooks and contacted the Complainants regarding loans they had not consented to guarantee, were not party to them and had no idea of their existence.

II. WHETHER THE RESPONDENT PUT THE PERSONAL MOBILE NUMBER OF ONE OF ITS EMPLOYEES ON THE FACE OF THE PESA PAY APPLICATION WITHOUT HIS CONSENT

27. One of the Complainants, Morris Simba of mobile phone number 0725545487 alleged that the Respondent put his mobile number on the face of the Pesa Pay application without his consent thereby subjecting him to unwanted calls from

customers, threats and insults to him as 'the owner' of the company. He asked the Respondent to remove his number and put the company registered mobile lines but they refused. The Complainant states that this has resulted in stress and that he can no longer use his line/Mpesa due to this.

28. The Complainant provided a screenshot as proof and the allegations remain uncontroverted as the Respondent did not respond to this allegation. I find that the Respondent put the personal mobile number of Morris Simba on the face of the Pesa Pay application without his consent and failed to remove it even after requests to have it removed.

III. WHETHER THERE WAS ANY INFRINGEMENT OF THE COMPLAINANTS' RIGHTS AS DATA SUBJECTS AS PROVIDED FOR IN THE DATA PROTECTION ACT, 2019

29. Section 26 of the Data Protection Act provides for the rights of a data subject which 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.

30. The Respondent by not informing the Complainants of the use to which their personal data was to be put, at the point of collection of the personal data, violated their right to be informed. The Respondent collected the contacts of the Complainants from its clients and did not inform the Complainants that their personal data was being collected and what it was going to be used for. It did not inform the Complainants that it was collecting their mobile phone numbers

and that it was going to process that information for the purpose of debt recovery from its defaulting clients.

31. The Respondent by putting the personal mobile number of one of the Complainants on the face of its Pesa Pay application and by refusing to remove it despite requests by the Complainant violated the Complainant's right to object to the processing of his personal data.

32. A data subject also has a right to request for deletion of personal data that the Respondent processed without his consent. The Respondent upon being requested to remove the Complainant's number from the face of the Pesa Pay application should have honoured the Complainant's request. By not doing so, the Respondent violated the Complainant's right to deletion of false or misleading data about him.

33. Further, the Respondent collected the mobile phone contacts of the Complainants from third parties without the consent of the Complainants contrary to section 28 (1) of the Act which states that, "a data controller or data processor shall collect personal data directly from the data subject."

34. I also note that the Respondent, contrary to section 61(a) of the Act, obstructed the Data Commissioner in the exercise of her powers by declining physical service of the Notification of Complaints letter that was delivered on its office on 29th March 2023. The Respondent declined to stamp and/or sign on our copy of the Notification letter that was to be used as evidence of service of the same. This necessitated the Office to serve the Respondent via email.

35. In view of the foregoing, I arrive at the conclusion that the Respondent violated the rights of the data subjects as provided for in the Act, the Respondent did not collect personal data directly from the data subjects and obstructed the Data Commissioner in the exercise of her powers.

F. FINAL DETERMINATION

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

- i. The Respondent is hereby found liable.
- ii. An Enforcement Notice to hereby be issued to the Respondent.
- iii. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 12th day of JUNE 2023



**IMMACULATE KASSAIT, MBS
DATA COMMISSIONER**

