



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. 1764 OF 2023

MAINA KIMARU.....COMPLAINANT

-VERSUS-

PREMIER CREDIT LIMITED.....RESPONDENT

DETERMINATION

(Pursuant to Sections 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 complaint lodged against Premier Credit Limited (hereinafter as 'the Respondent') pertains to the alleged incessant calls and promotional messages directed at the Complainant, aiming to promote the Respondent's loan products to the Complainant.

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 that the processing of personal data of a data subject is guided by the principles

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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 pegged on the provisions of Regulation 14 of the Data Protection (Complaint 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 a complaint from Maina Kimaru (hereinafter as 'the Complainant') dated 26th September, 2023 against Premier Credit Limited. This is pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. The Respondent is a microfinance company that offers financial solutions to its clients.
8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the Complaint filed against it *vide* a letter dated 12th October, 2023 and referenced ODPC/CONF/1/5 VOL 1(486) 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 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; and
 - d. The legal basis relied upon to collect, store, process and engage with the Complainant's personal data and whether or how it fulfills the duty to notify under Section 29 of the Act.
9. The Respondent put in its response to the complaint *via* a letter dated 24th October, 2023.
10. On 1st December 2023, the Office *via* a letter referenced ODPC/CONF/1/5 Vol 1 (609) requested the Respondent to furnish it with copies of the contracts or independent sales agent agreements it had with the sales agents that contacted the Complainant.
11. On 6th December 2023, the Respondent furnished the Office with the said documents in paragraph 13 above.
12. This determination is therefore as a result of analysis of the complaint as received, the response by the Respondent and investigations conducted by the Office.

D. SUMMARY OF EVIDENCE ADDUCED

I. THE COMPLAINANT'S CASE

13. The Complainant alleged that he has been receiving incessant calls and messages from the Respondent trying to induce him to take up their products.
14. The Complainant further states that he has repeatedly responded to the messages and indicated that he is disinterested but the Respondent hasn't stopped calling and sending promotional messages to him.

15. The Complainant provided screenshots of messages received as proof of the above. No evidence was adduced to prove that he had received calls from the Respondent.

II. THE RESPONDENT'S RESPONSE

16. The Respondent *via* a letter dated 24th October 2023, responded to the notification of complaint letter.

17. In the said letter, the Respondent stated that it had completed internal investigations of the phone number 070*****43 belonging to the Complainant and confirmed that his details do not exist in its database.

18. Further, internal investigations of the three phone numbers used to contact the Complainant i.e., 079*****90, 076*****07 and 079*****13 confirmed that the numbers are registered to independent sales agents contracted by the Company.

19. The Respondent stated that the number 079*****13 belongs to an independent sales agent who left the Company on 1st October, 2022 while the numbers 079*****90 and 076*****07 belong to independent sales agents who, subsequent to the Office's notification, have since been terminated after investigations confirmed that they breached the terms of their independent sales agent agreement and the company policy. The Respondent provided the termination letters as proof.

20. Additionally, the Respondent stated that all its agents attend regular and continuous training to sensitize them of data protection principles and their obligations including to only market to persons who have expressly consented to the same using the various opt-in mechanisms established by the Company. However, no evidence was adduced to prove that the independent sales agents that contacted the Complainant had undergone training on data protection.

21. The Respondent provided copies of the independent sales agent agreements that it had with the independent sales agents that contacted the Complainant after the Office requested for copies of the same.

E. ISSUES FOR DETERMINATION

22. Having considered the evidence adduced, it is not in dispute that the Respondent through its data processors (independent sales agents), sent promotional messages to the Complainants.

23. The issues that fall for determination are therefore:

- i. Whether the Respondent provided an opt out mechanism to the Complainant to its promotional messages;
- ii. Whether there was violation of the Complainant's rights under the Act;
- iii. Whether the Respondent had obligations to fulfil under the Act;
- iv. Whether the independent sales agents breached the terms of their independent sales agent agreement; and
- v. Whether the Complainant is entitled to any remedies under the Act and the attendant Regulations.

I. WHETHER THE RESPONDENT PROVIDED AN OPT OUT MECHANISM TO THE COMPLAINANT TO ITS PROMOTIONAL MESSAGES

24. Regulation 15 (1) (d) of the Data Protection (General) Regulations, 2021 provides that *a data controller or data processor may use personal data, concerning a data subject for the purpose of direct marketing where the data controller or the data processor provides a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.*

25. A perusal of the screenshots of the messages sent to the Complainant reveal that no opt out mechanism was provided for the Complainant to request not to receive the promotional messages.

26. Regulation 17 (1) of the Data Protection (General) Regulations, 2021 states that, *"In communicating with a data subject on direct marketing, a data controller or data processor shall include a statement which is prominently displayed, or otherwise draws the attention of the data subject to the fact that the data subject may make an opt out request."* No evidence was tabled by the Respondent to prove that it had complied with the above Regulation.

27. Regulation 17 (2) of the Data Protection (General) Regulations, 2021 states that, *"A data controller or a data processor may, in complying with an opt out requirement –*

(a) Clearly indicate, in each direct marketing message, that a data subject may opt out of receiving future messages by replying with a single word instruction in the subject line;

(b) Ensure that a link is prominently located in the email, which takes a data subject to the subscription control centre;

(c) Clearly indicate that a data subject may opt out of future direct marketing by replying to a direct marketing text message with a single word instruction;

(d) Inform the recipient of a direct marketing phone call that they can verbally opt out from any future calls; and

(e) Include instructions on how to opt out from future direct marketing, in each message.

28. The promotional messages sent to the Complainant did not comply with (a), (c) and (e) above.

29. The Complainant attempted to opt out from receiving the promotional messages by replying to the messages sent to him by the Respondent. Despite these efforts, the Respondent persisted in sending promotional messages to him.

30. The upshot is that the Office finds that the Respondent did not provide a simplified opt out mechanism to its promotional messages, contrary to Regulation 15 (1) (d) of the Data Protection (General) Regulations, 2021 which directs data controllers and data processors to provide a simplified opt out mechanism for the data subject to request not to receive direct marketing communications.

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

31. Section 26 (a) of the Act provides for the right to be informed of the use to which a data subject's personal data is to be put. The Respondent, by not informing the Complainant of the use to which his personal data was to be put at the point of collection of the personal data, violated his right to be informed. The Respondent collected the mobile phone number of the Complainant and did not inform him that it was to be used to send promotional messages to him.

32. Section 26 (c) of the Act provides for the right of a data subject to object to the processing of all or part of their personal data. The 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 send him promotional messages. Despite having objected to the further processing of his personal data, the Respondent ignored/failed to stop sending the promotional messages and therefore violated the Complainant's right to object to the processing of his personal data.

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

33. The Respondent is a data controller within the definitions of the Act and therefore has obligations pursuant to the Act.

34. 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.

35. In collecting personal data, the Respondent is mandated by Section 28 (1) of the Act to collect the data directly from the data subject. Section 28 (2) sets out instances where personal data may be collected indirectly. The Respondent did not demonstrate that any of the conditions set out in Section 28 (2) were relevant in this matter.

36. 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;
- iv. the third parties whose personal data has been or will be transferred to, including details of the safeguards adopted; and
- v. 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 Complainant of his rights under the Act, the fact that his mobile phone number was collected to be used to send him promotional messages, and the measures it has in place to ensure safety of the Complainant's personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

37. 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 Complainant before processing his personal data.

38. 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 as it did not prove that it had obtained Consent from the Complainant before processing his personal data.

39. Also, no evidence was tabled by the Respondent to prove that it obtained prior consent from the Complainant to use his personal data for commercial purposes contrary to Section 37 (1) (a) of the Act. Additionally, no evidence was tabled to prove that the Respondent is authorised under any written law and that the Complainant was informed of such use when his data was collected contrary to Section 37 (1) (b) of the Act.

40. Section 42 (2), (3) & (4) of the Act provides as follows -

(2) Where a data controller is using the services of a data processor—

(a) the data controller shall opt for a data processor who provides sufficient guarantees in respect of organisational measures for the purpose of complying with section 41(1); and

(b) the data controller and the data processor shall enter into a written contract which shall provide that the data processor shall act only on instructions received from the data controller and shall be bound by obligations of the data controller.

(3) Where a data processor processes personal data other than as instructed by the data controller, the data processor shall be deemed to be a data controller in respect of that processing.

(4) A data controller or data processor shall take all reasonable steps to ensure that any person employed by or acting under the authority of the data controller or data processor, complies with the relevant security measures.

41. The particulars of the contract envisaged between the Data Controller and the Processor are espoused in Regulation 24(2) of the Data Protection (General) Regulations.

42. No evidence was adduced by the Respondent to demonstrate that they entered into data processing agreements with the Independent Sales Agents processing personal data on their instructions.

43. From the foregoing, this Office finds that the Respondent failed to fulfil the above obligations as set out under the Act.

IV. WHETHER THE RESPONDENT'S INDEPENDENT SALES AGENTS BREACHED THE TERMS OF THEIR INDEPENDENT SALES AGENT AGREEMENTS

44. The Respondent contracted independent sales agents to market and sell its products on its behalf. The independent sales agents were therefore data processors as they processed personal data on behalf of the Respondent who was the data controller.

45. The Respondent alleged that the number 079*****13 belongs to an independent sales agent who left the Company on 1st October, 2022 while the numbers 079*****90 and 076*****07 belong to independent sales agents who, subsequent to the Office's notification, have since been terminated after investigations confirmed that they breached the terms of their independent sales agent agreement and the company policy.

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46. In the termination of the independent sales agent agreements adduced to this Office, the Respondent stated verbatim, *"As you know, the terms of the agreement state that you are obligated to ensure that you do not market the Company's products or solicit applications for the provision of the Company's products to any individual you have not met physically. However, you have failed to meet these obligations by contacting prospective clients without their consent."*

47. A perusal of the independent sales agent agreements provided by the Respondent reveals no such explicit clause in the agreements that directs independent sales agents not to market the Company's products or solicit applications for the provision of the Company's products to any individual they have not met physically.

48. Section 65 (2) (a) of the Act states that, *"a data controller involved in processing of personal data is liable for any damage caused by the processing."* While Section 65 (2) (b) states that, *"a data processor involved in processing of personal data is liable for damage caused by the processing only if the processor: -*

- (i) has not complied with an obligation under the Act specifically directed at data processors; or*
- (ii) has acted outside, or contrary to, the data controller's lawful instructions."*

49. The Respondent did not provide any evidence of having instructed the independent sales agents concerned not to market its products or solicit applications for the Company's products to any individual they have not met physically. A cursory perusal of the independent sales agent agreements indicates that the independent sales agents were granted broad rights to market and sell the loan product(s) of the Respondent within designated areas without any express limitations. The independent sales agents were not

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expressly prohibited from marketing the Respondent's products to individuals they have not met physically. Therefore, the Respondent did not prove that the independent sales agents acted outside, or contrary to its lawful instructions and are therefore the Respondent is liable for any damage caused by the processing activities undertaken by the independent sales agents who were its data processors.

50. From the foregoing, and in the context of the Respondent's non-compliance with Section 42 of the Act as read with Regulation 24(2) of the Data Protection (General) Regulations, this Office finds that the Respondent's independent sales agents did not breach the terms of their independent sales agent agreements and therefore the Respondent is liable for the damage caused by the processing activities of its independent sales agents.

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

51. Having found that the Complainant's rights were violated and noting that the Respondent is a repeat offender having been found liable for similar violations of the Act in ***ODPC COMPLAINT NO. 830 OF 2023, TOM RUTO & ANOTHER VS. PREMIER CREDIT LIMITED***, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

52. 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.

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

54. The Complainant was distressed by the incessant promotional messages sent to him in a bid to induce him to take up the Respondent's products. The Respondent did not provide proof of obtaining consent from the Complainant for him to receive their promotional messages. The Complainant also had no way of opting out from receiving the said promotional messages.

55. Further, despite the Complainant having objected to the further processing of his personal data, the Respondent ignored/failed to comply with the requests and continued sending promotional messages to the Complainant.

56. From the foregoing, the Complainant is entitled to compensation from the Respondent.

F. FINAL DETERMINATION

- I. 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. An award of **Kenya Shillings seven hundred thousand (KES 700,000)** in compensation to the Complainant.
 - iv. Parties have the right to appeal this determination to the High Court of Kenya.

DATED at **NAIROBI** this 15th day of December 2023



IMMACULATE KASSAIT, MBS
DATA COMMISSIONER

