



**OFFICE OF THE DATA PROTECTION COMMISSIONER**

**ODPC COMPLAINT NO. 1994 OF 2023 AS CONSOLIDATED WITH ODPC COMPLAINT NO. 1998 OF 2023 AND 2298 OF 2023**

**DAVID OWUOR.....1<sup>ST</sup> COMPLAINANT**

**DENNIS MWENDA.....2<sup>ND</sup> COMPLAINANT**

**RICHARD ABONGO.....3<sup>RD</sup> COMPLAINANT**

**-VERSUS-**

**CERES TECH LIMITED T/A ROCKETPESA.....RESPONDENT**

**DETERMINATION**

*(Pursuant to Section 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 three complaints lodged against Ceres Tech Limited (hereinafter as 'the Respondent') relate to the alleged unsolicited promotional messages and calls directed at the Complainants, aiming to induce the Complainants to take a loan with the Respondent.

**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 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 premised on the provisions of Regulation 14 of the Data Protection (Complaints 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 three complaints from David Owuor, Dennis Mwenda and Richard Abongo (hereinafter collectively as 'the Complainants' and/or the 1<sup>st</sup> Complainant, 2<sup>nd</sup> Complainant and 3<sup>rd</sup> Complainant) dated 10<sup>th</sup> October 2023, 10<sup>th</sup> October 2023 and 7<sup>th</sup> November 2023 respectively, against Ceres Tech Limited. This is pursuant to Section 56 of the Act and Regulation 4 of the Enforcement Regulations.
7. The Respondent is a digital credit provider that lends money to its customers through its mobile application '**Rocketpesa**'.

8. Pursuant to Regulation 11 of the Enforcement Regulations, the Office notified the Respondent of the Complaints filed against it *vide* letters dated 9<sup>th</sup> November, 2023 and 22<sup>nd</sup> November, 2023 referenced ODPC/CONF/1/5 VOL 1(541) and ODPC/CONF/1/5 VOL 1(582) respectively. The Respondent was required to respond within 14 days of receipt of the letters. In the Notification of the Complaints filed against the Respondent, the Respondent was to provide:
- - a. A response to the allegations made against it by the Complainants;
  - b. Any relevant materials or evidence in support of the response;
  - c. The mitigation measures adopted or being adopted to address the complaints to the satisfaction of the Complainants;
  - d. Details of how it obtains, stores and processes personal data, and whether the Complainants consented to the processing of their personal data;
  - e. The standard contract that it has with the Complainants, if any;
  - f. The legal basis relied upon to process and engage with the Complainants' personal data and whether or how it fulfils the duty to notify under Section 29 of the Act;
  - g. Details in writing of the technological and organizational safeguards that have been put in place to ensure that such occurrence mentioned in the complaints do not take place again; and
  - h. Demonstration (by way of written statement) of its level of compliance with the requirements under the Act and the Regulations. In particular, an elaborate representation of how data subjects can exercise their rights in relation to data protection.
9. The Respondent put in its response to the complaints *via* two letters, both dated 4<sup>th</sup> December, 2023.

10. 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 COMPLAINANTS' CASE**

11. The 1<sup>st</sup> Complainant alleged that he has been receiving promotional messages and calls from the Respondent despite having not registered with them or given his contact. He stated that he has reached out to them to stop but they haven't stopped sending the promotional messages and calls to him. He provided screenshots of messages sent to him by the Respondent as proof of the allegations made.

12. The 2<sup>nd</sup> Complainant alleged that he has been receiving unsolicited messages from different phone numbers claiming to be the Respondent's representatives and urging him to take a loan. He further stated that he has blocked their SMS and calls but the SMS are still getting through. He adduced screenshots of messages sent to him by the Respondent as proof of the allegations made.

13. The 3<sup>rd</sup> Complainant alleged that he has been receiving unsolicited promotional messages from the Respondent's agents about a loan app called Rocketpesa without his subscription or consent. He provided screenshots of the messages sent to him by the Respondent as proof of the allegations made.

##### **II. RESPONDENT'S RESPONSE**

14. The Respondent, *via* two letters, both dated 4<sup>th</sup> December 2023, responded to the Notification of complaints letters.

15. In response to the complaints filed by the 1<sup>st</sup> and 2<sup>nd</sup> Complainants, the Respondent stated that it had carried out thorough investigations and found no evidence that its company sent the messages in question.

16. The Respondent further stated that it strictly adheres to all applicable laws and regulations governing marketing practices. Additionally, it has established stringent procedures to ensure that it obtains proper consent before sending any marketing communications. The Respondent adduced its consent form and data privacy protection policy which it stated provides its guidelines on marketing.
17. In response to the complaint filed by the 3<sup>rd</sup> Complainant, the Respondent vehemently disputed the allegations that unsolicited messages were disseminated by its marketers. It stated that its internal investigations revealed that its marketing team strictly adheres to established protocols, including implementation of measures to prevent the transmission of unsolicited messages.
18. Further, the Respondent stated that its company ensures that all marketing messages clearly convey to data subjects the option to opt out of receiving further communications and that this information is conspicuously indicated within its marketing messages, serving as an explicit notification to data subjects regarding their right to cease such communications.
19. Additionally, the Respondent stated that it places great emphasis on verbal communication with data subjects regarding the option to opt out of marketing messages. Its customer service representatives routinely convey this information during interaction with users, ensuring that data subjects are aware of and empowered to exercise their right to opt out.

#### **E. ISSUES FOR DETERMINATION**

20. The following issues fall for determination by this Office:
- i. Whether the promotional messages received by the Complainants were sent by the Respondent;
  - ii. Whether there was a violation of Complainants' rights under the Act;

- iii. Whether the Respondent provided an opt out mechanism to the Complainants to its promotional messages;
- iv. Whether the Respondent had obligations to fulfil under the Act; and
- v. Whether the Complainants are entitled to any remedies under the Act and the attendant Regulations.

**I. WHETHER THE PROMOTIONAL MESSAGES RECEIVED BY THE COMPLAINANTS WERE SENT BY THE RESPONDENT**

21. The Complainants alleged that they received promotional messages from the Respondent and/or the Respondent's representatives.

22. The Respondent on the other hand denied that it sent the promotional messages in question to the Complainants.

23. This Office noted that the links shared in the messages sent to the Complainants direct one to the Respondent's mobile application which is available for download at the Google PlayStore.

24. The Respondent did not deny operating the loan application Rocketpesa. As the owner and operator of the Rocketpesa Application, the Office finds that it is only the Respondent that stood to gain financially by inducing the Complainants to take up a loan with it.

25. From the foregoing, the Office finds that the promotional messages received by the Complainants were sent by the Respondent.

**II. WHETHER THERE WAS A VIOLATION OF COMPLAINANTS' RIGHTS UNDER THE ACT**

26. 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 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 mobile phone numbers of the Complainants and did not inform them that they were to be used to send promotional messages to them.

27. Section 26 (c) of the Act provides for the right to object to the processing of personal data. The 1<sup>st</sup> and 3<sup>rd</sup> Complainants objected to the processing of their personal data *via* text messages sent to the various mobile phone numbers used by the Respondent and/or its agents to contact them. Despite having objected to the further processing of their personal data, the Respondent ignored/failed to stop sending the messages and therefore violated the 1<sup>st</sup> and 3<sup>rd</sup> Complainants' right to object to the processing of their personal data.

28. This Office therefore finds that the Complainants' rights under Sections 26 (a) and 26 (c) of the Act were violated by the Respondent.

### **III. WHETHER THE RESPONDENT PROVIDED AN OPT OUT MECHANISM TO THE COMPLAINANTS TO ITS PROMOTIONAL MESSAGES**

29. 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.*

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

31. 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."* The messages sent by the Respondent did not comply with the above Regulation.

of the Complainants' personal data. The Respondent failed to fulfil this obligation under Section 29 of the Act.

40. 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 Complainants before processing their personal data.

41. 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 Complainants before processing their personal data. The Respondent did not also demonstrate that the Complainants had subscribed to receive their promotional messages.

42. Additionally, no evidence was tabled by the Respondent to prove that it obtained prior consent from the Complainants to use their personal data for commercial purposes contrary to Section 37 (1) (a) of the Act.

#### **V. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDIES UNDER THE ACT AND THE ATTENDANT REGULATIONS**

43. Having found that that the Complainants' rights under the Act were violated and that the Respondent did not fulfil its obligations under the Act, an Enforcement Notice shall be issued against the Respondent pursuant to Section 58 of the Act and Regulation 16 of the Enforcement Regulations.

44. The Office notes that the Respondent is a repeat offender having been found liable for similar violations of the Act in ***ODPC COMPLAINT NO. 869 OF 2023 – JOHN OTIENO VS . CERES TECH LIMITED T/A ROCKETPESA***. An Enforcement Notice was issued in the aforementioned matter, which was not complied with.





45. 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.
46. Regulation 14 (3) (e) provides that the Data Commissioner may make an order for compensation to the data subject by the Respondent.
47. This Office has found that the Complainants' rights were violated. Further, the Complainants were distressed by the incessant promotional messages sent to them in a bid to induce them to take up the Respondent's product. The Respondent did not provide proof of obtaining consent from the Complainants for them to receive promotional messages. The Complainants also had no way of opting out from receiving the promotional messages.
48. Further, despite the 1<sup>st</sup> and 3<sup>rd</sup> Complainants having objected to the processing of their personal data, the Respondent ignored/failed to comply with the requests and continued sending promotional messages to them.
49. From the foregoing, the Complainants are entitled to compensation from the Respondent.

## **F. FINAL DETERMINATION**

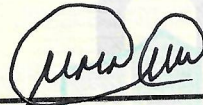
50. The Data Commissioner therefore makes the following final determination;
- i. The Respondent is hereby found liable.
  - ii. An Enforcement Notice to issue to the Respondent.

iii. An award for compensation is issued to the Complainants as follows:

- a) **The 1<sup>st</sup> Complainant** – Kenya Shillings Nine Hundred and Fifty Thousand (KES 950,000).
- b) **The 2<sup>nd</sup> Complainant** – Kenya Shillings Seven Hundred Thousand (KES 700,000).
- c) **The 3<sup>rd</sup> Complainant** – Kenya Shillings Nine Hundred and Fifty Thousand (KES 950,000).

iv. Parties have the right to appeal this determination to the High Court of Kenya within thirty (30) days.

DATED at **NAIROBI** this 5<sup>th</sup> day of January 2024.



**IMMACULATE KASSAIT, MBS**  
**DATA COMMISSIONER**