



OFFICE OF THE DATA PROTECTION COMMISSIONER

ODPC COMPLAINT NO. ...677...2022

ALLEN WAIYAKI GICHUHI.....1ST COMPLAINANT

CHARLES WAMAE.....2ND COMPLAINANT

-VERSUS-

FLORENCE MATHENGE.....1ST RESPONDENT

AMBROSE WAIGWA.....2ND 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 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.
2. Section 8 (f) of the Act guarantees that the Office of the Data Commissioner (Hereinafter known as 'ODPC') 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.

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3. ODPC is a regulatory Office, established pursuant to Section 5 of the Act. ODPC 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. ODPC received a complaint on 21st July 2022 dated 20th July 2022 pursuant to Section 56 of the Act and Regulation 14 of the Data Protection (Complaints Handling Procedure and Enforcement) Regulations, 2021 ('the Regulations') and has conducted full investigations into the complaint. The 1st and 2nd Complainants (Hereinafter known as 'the Complainants') are partners at the firm of Wamae & Allen Advocates (Hereinafter known as 'the firm').
5. The 1st and 2nd Respondents (Hereinafter known as 'the Respondents') are former employees of the firm. However, the basis of the complaint is that the 1st Respondent allegedly sent confidential information from the firm to her personal email as well as to the 2nd Respondent while she was still an employee of the firm.
6. The complaint dated 20th July 2022, initially filed by the firm, was received by ODPC on 21st July 2022. The complaint was accompanied by a sworn Affidavit dated 20th July 2022 of Prestone Wawire (Hereinafter known as the 'deponent'), a Partner in the firm. The affidavit contained the evidence that the complainants relied on including the email correspondence between the 1st and 2nd Respondent.
7. In a letter dated 18th August 2022 and bearing the reference number MM/2022/LIT./A023/520, the complainants instructed Muchemi & Co. Advocates to represent them in their capacity as data subjects. The letter also made it clear that the complaint has two levels: one level is made by the complainants on behalf of the firm for disclosing its intellectual property to unauthorized parties, and the other level is made on behalf of the firm's clients,

who may be either private individuals or corporations. A collection of documents that were allegedly shared by the first respondent with the second respondent were attached to the letter.

8. ODPC, as mandated under the Act and the Regulations, notified the Respondents of the complaint filed against them and required their response within 21 days, again as mandated under the Act and the Regulations. Upon receipt of the responses, ODPC conducted investigations as required by Regulation 13 (1)(d) of the Regulations.
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 COMPLAINT

10. The complainant alleged that the 1st Respondent, shared and disclosed personal and sensitive data to a third-party, the 2nd Respondent herein, without consent of the data subjects and the Complainants. Moreover, the firm, allegedly, discovered a series of communication between the Respondents which was ongoing for more than a year. The 2nd Respondent was a third party and not entitled to the communication as he was a former employee of the firm.
11. Similarly, the complaint contained a summary of documents allegedly shared as between the 1st and 2nd Respondent in the affidavit dated 20th July 2022 deposed by Preston Wawire specifically at paragraph 17. It was alleged that the documents shared included court documents such as pleadings and supporting documents, applications, affidavits, submissions and legal opinions. Other documents allegedly shared included bank statements, correspondences, invoices and subscription emails as shown below:

No.	EMAIL DATE	EMAIL SENT TO	FILE REF & DETAILS	TYPE OF DOCUMENT SHARED
1.	12 th April 2021	awaiqwa@cmadvo.cates.com	5702/54/2020 Osho chemicals	Notice of intention to sue
2.	7 th May 2021	awaiqwa@cmadvo.cates.com	5562/119/1 Consolidated Bank of Kenya-vs- Pine Crib Limited	Certificate of Urgency and Affidavit in Support of urgency
3.	26 th May 2021	awaiqwa@cmadvo.cates.com	Neils Bruels Vs Moses Wachira & Others	Submissions on review and certification to the Supreme Court and Applicant's List of Authorities
4.	3 rd June 2021	awaiqwa@cmadvo.cates.com	5703/127/19 I & M Limited vs Buzeki Enterprises Limited	Plaintiff's rejoinder submissions, Defendant submissions and Plaintiff's written submissions.
5.	15 th June 2021	awaiqwa@cmadvo.cates.com	Santowels vs Stanbic Bank	Certificate of urgency on Stay Application
6.	15 th June 2021	awaiqwa@cmadvo.cates.com	Tajdin Thanawalla, Jane Kameme & Veronica Musyimi	Certified Final Arbitration award dated 19 th April 2021
7.	15 th June 2021	awaiqwa@cmadvo.cates.com	5835/1/5 Mamtah Peyush Mahajan -vs- Yashwant Kumari Mahajan	Plaintiff's written submissions
8.	23 rd June 2021	awaiqwa@cmadvo.cates.com	Mark Properties vs Coulson Harney Advocates	Replying Affidavit by Ino Ponangipalli Venkata Ramana Rao and Supporting Affidavit by Christopher Ndolo

				-Certificate of urgency by Chris Mutuku and chamber summons application dated 11 th June 2021.
9.	7 th July 2021	awaiqwa@cmadvocates.com	5696/1/13 Ryan Properties & Philip Jalango	Certificate of urgency and application for stay pending appeal dated 1 st March 2021
10.	28 th July 2021	awaiqwa@cmadvocates.com	Alpha Grain Millers & 7 others vs Ministry of Agriculture, Livestock and Fisheries and the Attorney General	Notice of Motion (Setting aside Arbitral Award), Chamber summons and Supporting Affidavit
11.	25 th August 2021	awaiqwa@cmadvocates.com	Simon Frase vs Timarflor	Notice of Motion, Legal opinion, Supporting Affidavit, Petition, Supplementary Affidavit and Petitioner's submissions
12.	25 th August 2021	awaiqwa@cmadvocates.com	Precedents	Wamae & Allen Appeal Checklist
13.	2 nd September 2021	Wamuyumathenge902@gmail.com	Stanbic Bank & Ahono Greens 5988/1/19 Sidian Bank & Waveron Limited	Certificate of Urgency, Notice of Motion and Supporting Affidavit
14.	8 th December 2021	awaiqwa@cmadvocates.com	5904/1/17 Kirogani Investments vs Sigma & Sigma & 9 others Sidian Bank & Waveron Limited	Third Party Notice dated 17/11/17 and 19/12/17

15.	12 th December 2021	awaigwa@cmadvo.cates.com	5703/203C/21 Mark Prime Properties	Draft Consent
16.	10 th December 2021	awaigwa@cmadvo.cates.com	Prepare by Allen	Petition to Parliament on the in duplum rule 16/01/18
17.	12 th January 2022	awaigwa@cmadvo.cates.com	5717/47/18 Bank of Africa vs Seven Seas	Plaint
18.	14 th January 2022	awaigwa@cmadvo.cates.com	5703/220/2 I&M Bank & Dishon Kiman	Amended Complaint and Application for Inhibition Orders
19.	17 th February 2022	awaigwa@cmadvo.cates.com	Saham Insurance vs Gas & Go Petroleum & Another	Chamber Summons dated 14/12/20 and 16/12/20
20.	11 th March 2022	awaigwa@cmadvo.cates.com Wamuyumathenge902@gmail.com	5835/19/119 Shalimar Flowers & Mwangi Gathimba & Associates	Plaint Legal Opinion 23/5/19 Legal Opinion 29/4/19
21.	11 th March 2022	awaigwa@cmadvo.cates.com Wamuyumathenge902@gmail.com		Complaint to Disciplinary Committee by Prestone Wawire
22.	12 th April 2022	awaigwa@cmadvo.cates.com	5727/7/20 Prime Bank vs Porshe Kenya Limited	Injunction dated 15/1/21, 11/1/21 and 15/1/21
23.	10 th May 2022	awaigwa@cmadvo.cates.com	Basil Criticos Vs NBK	Appellants Submissions

24.	10 th May 2022	awaiigwa@cmadvo.cates.com	E003 of 2022 Milliam Iyende Mayaka vs Rao & General Printiers	Ruling dated 6 th May 2022
25.	11 th May 2022	awaiigwa@cmadvo.cates.com Wamuyumathenge902@gmail.com	5703/255/202 I &M Bank	Administrators Consent, Affidavit of statement of facts, Gazette Notice of Appointment of an Administrator & Statutory Declaration
26.	23 rd May 2022	awaiigwa@cmadvo.cates.com	5395/102/17 Remax vs Sichuan Huashi Limited	Submissions on Review
27.	6 th July 2022	awaiigwa@cmadvo.cates.com		Complaint to Disciplinary Committee dated 12/1/19
28.	5 th July 2022	Wamuyumathenge902@gmail.com	5703/197/21 Emmanuel Kuria - vs- Invesco & 3 others	Original order dated 21/3/22, Notice of Motion dated 12/1/22, Record of Appeal and Memorandum of Appeal.
29.	6 th July 2022	Wamuyumathenge902@gmail.com	146-Wamae & Allen	W & A Guide on Administration under Insolvency Act, 2015.
30.	4 th July 2022	Wamuyumathenge902@gmail.com	Civil Application No. E036 of 2022 Mehul Patel & Another vs Champaklal Ramji & 2others	2 nd Respondent's Submissions dated 29/6/2022 and Replying Affidavit by Andrew Muchina dated 22/6/22

Handwritten signature

12. The Complainants through their advocates on record further produced documents they relied on to support their case vide their letter dated 18th August 2022 as detailed below:

- i. Amended Plaint dated 14.01.2022-Nai CMCC No. E1562 of 2021; I&M Bank Ltd vs Dishon Mutegi Kimani;
- ii. Garnishee Replying Affidavit sworn on 13.05.2022- Kilgoris PMCC No. 50 of 2017; Thomas Onyango Onchonga vs. AMACO;
- iii. Exhibit Marked CNM-2 of a third party sworn on 11th June 2021; and
- iv. Originating Summons-Nai HCCOMM No. of 2021; Prime Bank Limited vs. Porsche Center Nairobi Limited.

13. The Complainants further allege that the documents shared by the 1st Respondent to the 2nd Respondent are the firm's trade secrets and intellectual property which cannot be shared to an external party without authorization. The Complainants asserted that the Act was violated, particularly section 72 which prohibits data controllers from unlawfully disclosing personal data to third parties, which prohibition extends to data processors.

14. The Complainants also attached a certificate of electronic evidence dated 18th July 2022 signed by Ms. Maurine Sumba an employee of the firm as per section 78A, 106A and 177 of the Evidence Act, cap 80 of the Laws of Kenya in respect of the documents attached to the affidavit of the deponent.

C. THE RESPONDENTS' CASE

I. 1st RESPONDENT'S RESPONSE

15. The 1st Respondent averred in response to the complaint vide a letter dated 18th October 2022 that ODPC does not have jurisdiction to interrogate alleged breaches of intellectual property rights. The 1st Respondent similarly asserted that the documents in question were public documents that fell under section 79 of the Evidence Act on the definition of public documents.

16. Moreover, the 1st Respondent also alleged that the Complainants are forum shopping and hence the whole process is an abuse of the legal process in an attempt to stop her from initiating legal proceedings against the managing partner in other circumstances. It is her assertion that the 1st Complainant authorised the issuance of the templates from the firm.

17. The 1st Respondent further averred that the firm had not been registered as a Data Controller or Data Processor as at the time she responded to the complaint and therefore, the Act cannot be applied retrospectively. The emails that the 1st Respondent allegedly sent to the 2nd Respondent were sent before the 14th of July 2022 which date marked the commencement of the registration of Data Controllers and Data Processors.

18. Additionally, the 1st Respondent's avers that she was never furnished with any employment policies as required under the Employment Act. Similarly, she asserts that she is neither a registered as a Data Controller or a Data Processor as she was only an employee at the complainant firm until her resignation as such.

19. The 1st Respondent also reiterated that the court documents sent to 2nd Respondent are public documents by dint of section 79 of the Evidence Act. Consequently, the various documents were filed in court by the Complainants on behalf of their clients, some who are companies registered under the Companies Act, 2015 and are therefore not data subjects as per the definition in section 2 of the Data Protection Act.

20. the 1st Respondent also cited the case of **Robert Ngande Kathathi v Francis Kiviva Kitonde (2020) eKLR** where the Court held that submissions are generally parties' "marketing language". It was her argument that submissions are not personal data.

21. Accordingly, the 1st Respondent implies that legal opinions contain mere analysis of the law which are then replicated into pleadings and therefore do not constitute as personal data.

22. The 1st Respondent also alleges that documents shared to her personal email were not shared with a third party as she is the sole custodian of the said email address. the 1st Respondent indicated that some of the pleadings she sent to her personal email were for purposes of working from home during the COVID-19 pandemic and were not shared to a third party and stated that the complainant firm was well aware that she was sending these documents to her personal email for the purposes of working from home.

II. 2ND RESPONDENT'S RESPONSE

23. The 2nd Respondent vide a letter dated 19th October, 2022 responded to the complaint through his advocates on record, CM Advocates LLP. In the said letter, the 2nd Respondent drew ODPC's attention to a number of parallel proceedings that were commenced by the same complainant. These ongoing legal proceedings were lodged and are currently pending before the High Court (HCCC No. E135 of 2022; Allen Gichuhi and 4 others -vs- Ambrose Ndung'u Waigwa), the LSK Disciplinary Tribunal and at the Director of Criminal Investigations.

24. Moreover, the 2nd Respondent stated that the multiplicity of the same complaints in the various institutions over similar issues will fetter his right to administrative action, and his right to a fair hearing. The 2nd Respondent also alleges that the complaints at the different fora will be a violation of the legal doctrine of *sub judice* and will jeopardise attempts at amicable settlement of the matter as formally initiated by the President of the Law Society of Kenya.

D. ISSUES FOR DETERMINATION

- i. Whether ODPC has jurisdiction to determine the issues raised in the Complaint.
- ii. Whether there was breach of the Act.
- iii. Whether the Complainants are entitled to any remedy under the Act.

E. ANALYSIS AND DETERMINATION

I. WHETHER ODPC HAS JURISDICTION TO DETERMINE ISSUES RAISED IN THE COMPLAINT

25. ODPC is a regulatory Office, established pursuant to the Act 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.

26. Section 2 of the Act sets out the meaning of **personal data** *as any information relating to an identified or identifiable natural person*; **personal data breach** *as breach of security leading to the accidental or unlawful destruction, loss, alteration, unauthorised disclosure of, or access to, personal data transmitted, stored or otherwise processed*; and **sensitive personal data** *as data revealing the natural person's race, health status, ethnic social origin, conscience, belief, genetic data, biometric data, property details, marital status, family details including names of the person's children, parents, spouse or spouses, sex or the sexual orientation of the data subject*.

27. Similarly, section 72 (3) and (4) of the Act on which the complaint is anchored provides that any person who obtains access to personal data without prior authority of the data controller and further also discloses the said information to a

third party commits an offence. Moreover, the said provisions do not apply to a person who is an employee or agent of the data controller or data processor acting within the scope of that mandate.

28. In the foregoing case and having carefully considered the complaint and the responses thereto, the nature of the complaint involves the disclosure of personal and sensitive data to a third party without consent of the data controller. Personal and sensitive data falls under the confines of the Act thereby giving ODPC the jurisdiction to determine the complaint.

29. Similarly, it was noted that the 1st Respondent challenged the jurisdiction of ODPC on the basis that the firm had not been registered as a Data Controller or Data Processor as at the time the complaint was instituted and therefore, the Act cannot be applied retrospectively. ODPC notes that the Complainants and their firm, having not yet been registered as data controllers or data processors does not preclude them from being under the confines of the Act. Similarly, there is no relationship between handling of complaints and registration of data controllers.

30. Moreover, ODPC is not persuaded by the 2nd Respondent that the cases filed before High Court that is HCCC No. E135 of 2022; Allen Gichuhi and 4 others -vs- Ambrose Ndung'u Waigwa, the Directorate of Criminal Investigations (DCI) and Advocates Disciplinary Tribunal prevents ODPC from handling the complaint.

31. The matter before the High Court is a defamation suit against the 2nd Respondent over remarks posted on his twitter handle. Similarly, the matter before the Advocates Disciplinary Tribunal established under the Law Society Act, Cap 18 Laws of Kenya relates to matters of professional ethics and conduct of the 1st and 2nd Respondent. Lastly, the Directorate of Criminal Investigations, established under the National Police Service Act, 2014 has the mandate to conduct criminal investigations on matters within their mandate.

32. ODPC operates within the limits of the Act and the Regulations thereof to protect personal data and therefore has jurisdiction to determine this complaint. In

response to matters relating to infringement of intellectual property rights as alleged by the Complainant, ODPC's jurisdiction does not extend to intellectual property rights hence cannot make a determination on the same. The decision of the ODPC will be limited to the issues that fall within the Act.

II. WHETHER THERE WAS BREACH OF THE ACT

33. The Complainant alleged unlawful disclosure of personal and sensitive data contained in the documents shared between the 1st and 2nd Respondents. Each document is analysed below to establish whether there was breach of the Act.

No. 1 - File Ref: 5702/54/2020 Osho Chemicals

34. The document allegedly shared was the Notice of intention to sue. However, the Complainant did not provide a copy of the said document in order for the contents thereon to be scrutinized as to whether personal and/or sensitive data was unlawfully disclosed. Therefore, ODPC cannot make a determination on whether there was breach of the Act.

35. Furthermore, section 2 of the Act defines a data subject as an identified or identifiable natural person who is the subject of personal data. It is our understanding that Osho chemicals is not a natural person and hence not a data subject for the purposes of the Act. Without prejudice to the foregoing, there was no breach of the Act.

No. 2 - File ref: 5562/119/1- Consolidated Bank of Kenya vs Pine Crib Limited

36. The document relates to pleadings filed in court that is certificate of urgency application and the affidavit in support of the same. These documents were not adduced. Therefore, ODPC is unable to ascertain whether there was personal and sensitive data contained in those documents in order to make a determination on whether there was breach of the Act.

37. From ODPC's findings, it was noted that the said matter is a reported case available at Kenya Law Reports that is **Consolidated Bank of Kenya Limited v Pine Crib Apartments Co. Ltd & another; China Wu Yi Company Limited (Garnishee); Mashariki Investments Limited (Interested party) [2020] eKLR**. Moreover, the details available in the public domain include the property details, escrow account number amongst other information. Section 79 of the Evidence Act, Cap 80 of the Laws of Kenya provides that public records include documents forming the acts or records of judicial officers. Similarly, Section 2 of Public Archives and Documentation Service Act, cap 19, Laws of Kenya provides for the definition of a public record as records specified in the schedule. The Schedule thereto includes the records of the High Court and of any other court or tribunal as public records. The ODPC therefore holds that there was no breach of the Act in this regard.

No. 3 - Neils Bruels vs Moses Wachira & Others

38. The document relates to pleadings such as submissions on review and certification to the supreme court, application to review the judgment of the Court of Appeal and List of Authorities. ODPC, upon scrutiny of the documents provided by the Complainant, noted that the same was not provided hence the Office cannot make a determination on whether there was breach of the Act.

39. However, as alleged by the 1st Respondent, a quick search on <http://kenyalaw.org/caselaw/cases/view/110193/> as well as the AfricanLii Database <https://africanlii.org/> reveals that the Complainants made the said case to be available to the general public as it is reported. ODPC therefore finds that there was no breach of the Act as section 79 of the Evidence Act, Cap 80 of the Laws of Kenya and the Schedule of the Public Archives and Documentation Service Act, Cap 19 Laws of Kenya qualifies records of the High Court and of any other court or tribunal as public records.

No. 4 - File Ref: 5703/127/19 – I & M Vs Buzeki Enterprises Limited

40. The Complainants allege that the documents shared included Plaintiff and Defendant submissions and authorities. We note that the Complainant did not provide any of these documents in order to ascertain whether they contained personal or sensitive data hence ODPC cannot make a determination on whether there was breach of the Act.

41. Moreover, the said case has been reported at Kenya Law Reports Website as **I & M Bank Limited v Buzeki Enterprises Limited [2020] eKLR**. In this regard, the documents form part of public records and therefore, there was no breach of the Act.

No. 5 - Santowels vs Stanbic Bank

42. The documents allegedly shared by the 1st Respondent to the 2nd Respondent include certificate of urgency application, stay application and submissions by both parties. The said documents were not provided by the Complainants. The ODPC is therefore unable to ascertain which kind of data was contained in the said documents and therefore cannot make a determination as to whether there was breach of the Act.

43. From ODPC's findings, the said case is also a reported case on the Kenya Law Reports Website cited as **Santowels Limited v Stanbic Bank Kenya Ltd [2020] eKLR** constituting public records. We therefore find that since said case is already in public domain, there was no breach of the Act.

No. 6 - Tadjin Thanawalla, Jane Kamene & Veronica Musyimi

44. The Complainants alleged that the 1st Respondent shared a certified Arbitration Award with the 2nd Respondent. However, the said Award was not provided. The ODPC is therefore unable to ascertain what kind of data was contained in the said documents hence cannot determine whether there was breach of the Act.

No. 7 - File ref: 5835/1/15 Mamta Peyush Mahajan vs Yashwant Kumari Mahajan

45. The information alleged to have been disclosed in this regard are the Plaintiff's written submissions. ODPC's findings revealed the said case is reported and can be found at the Kenya Law Reports website and is therefore part of public records. It has been cited as **Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] v Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan] [2017] eKLR**. In this regard, ODPC finds that that there was no breach of the Act.

No. 8 - Mark Properties vs Coulson Harney Advocates

46. The Complainant alleged that the 1st Respondent shared the following documents with the 2nd Respondent; Replying affidavit, supporting affidavit, certificate of urgency dated 11th June 2021 and Chamber Summons dated 11th June 2021. From the evidence attached, the complainant produced exhibit "CNM-2" extract only. We note that the other pleadings such as Replying affidavit, supporting affidavit, certificate of urgency dated 11th June 2021 and Chamber Summons dated 11th June 2021 were not produced for scrutiny by this office. Therefore, a determination regarding breach of the Act cannot be made on those documents.
47. From ODPC's findings, it was noted that the exhibit "CNM 2" contained information relating to emails between third parties who were not part of the complaint. Similarly, the said third parties were not complainants in respect to this matter. Therefore, ODPC cannot make a determination relating to the document herein.
48. The upshot of the foregoing is that the case at hand is also a reported case cited at the Kenya Law Report as **Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Limited & another (Applicants) [2021] eKLR** and therefore in the public domain and hence cannot be constituted as a violation of the Act. We reiterate that section 79 of the Evidence

Act, cap 80 Laws of Kenya and Schedule of the Public Archives and Documentation Service Act includes the records of the High Court and of any other court or tribunal as public records.

No. 9 - File Ref: 5696/1/3 Ryan Properties & Philip Jalango

49. The Complainants alleged that the 1st Respondent shared pleadings such as stay pending appeal and a certificate of urgency dated 1st March 2021 with the 2nd Respondent. The said documents were not adduced. ODPC is therefore unable to ascertain what kind of personal or sensitive data was contained in the said documents and therefore cannot make a determination on the same.
50. However, the decision has been cited at the Kenya Law Reports website as **Philip Jalango v Ryan Properties Limited [2021] eKLR** and therefore, already in the public domain, hence there was no breach of the Act.

No. 10 - Alpha Grain Millers & 7others vs Ministry of Agriculture, Livestock and Fisheries and the Attorney General

51. The Complainants averred that the information shared between the Respondents included pleadings such as chamber summons and supporting affidavit. It is ODPC's finding that said pleadings were not produced to ascertain whether it contained personal data. Therefore, this Office cannot make a determination on whether there was breach of the Act.
52. Furthermore, the said matter is a reported decision at the Kenya Law Report Website cited as **Alpha Grain Millers Limited & 7others v Ministry of Agriculture, Livestock and Fisheries & another [2021] eKLR** and therefore in the public domain. In this regard, ODPC finds that there was no breach of the Act.

No. 11 - Simon Fraser vs Timarflor

53. The Complainants alleged that the documents shared between the Respondents were various pleadings. However, the Complainants did not provide copies of the



said documents in order for the contents thereon to be analysed as to whether personal data was revealed. Therefore, ODPC cannot make a determination on whether there was breach of the Act in the circumstances.

No. 12 - Precedents-Wamae & Allen Appeal Checklist

54. The Complainant did not provide the said checklist that was allegedly shared between the Respondents. It is our finding that the ODPC cannot make a determination on whether there is personal data contained or even a breach under the Act.

No. 13 - Stanbic Bank & Ahono Gardens

55. In this case, it is alleged that the 1st Respondent shared pleadings such as certificate of urgency, notice of motion application and a supporting affidavit. The complainants did not provide these documents in order for ODPC to ascertain whether there was personal and sensitive data contained in the documents. Therefore, a determination cannot be made with regards to breach of the Act.

No. 14 - 5988/1/19- Sidian Bank & Waveron Limited

56. The Complainants alleged that the 1st Respondent shared supporting affidavit for extension of registration of charge. However, these documents were not provided in order for ODPC to ascertain whether the said document contained personal data or sensitive data. Therefore, this office is unable to make a determination on whether there was breach of the Act.

No. 15 - File Ref: 5904/1/17- Kirogani Investments vs Sigma Limited & 9 others

57. The documents that were allegedly shared between the Respondents are pleadings such as third-party notice application, the third-party notice and the supporting affidavit. Again, these documents were not provided to ODPC for the Office to ascertain whether the said pleadings contained personal data. Therefore, a determination cannot be made on whether there was breach of the Act.

58. Additionally, the said decision is available at Kenya Law Reports website cited **Kingorani Investments Limited v Sigma Limited & 9 others [2018] eKLR** thereby being in the public domain hence there was no breach of the Act.

No. 16 - File ref: 5703/203C/21- Mark Prime Properties

59. The Complainants alleged that the documents shared between the Respondents in relation to this case is a draft consent order. These documents were not availed to ODPC to ascertain whether the said draft consent contained personal data and therefore a determination cannot be made regarding breach of the Act.

60. However, the decision regarding the said consent is cited at the Kenya Law reports as **Mark Properties Limited v Coulson Harney LLP Advocates; Le Mac Management Company Limited & another (Applicants) [2021] eKLR** and therefore within the public domain.

No. 17 - Petition to Parliament on the *In Duplum* rule

61. The Complainants alleged that the 1st Respondent shared a petition to the 2nd Respondent regarding the *In Duplum* rule. The complainant did not provide a copy of the said petition in order for the ODPC to ascertain whether there was personal and sensitive data contained therein. Nevertheless, Section 6 of the Petitions to Parliament (Procedure) Act, 2012 makes a provision as to the Register of petitions as follows:

1. The Clerk of each House of Parliament shall keep and maintain a register in which shall be recorded all petitions and supporting documents, and the decisions of the House.
2. The register of petitions under subsection (1) shall be accessible to the public during working hours.

62. In light of the above, petitions to parliament are considered as public documents. Additionally, as per schedule of the Public Archives and Documentation Service Act, the records of Parliament are deemed to be public records. In this regard, ODPC finds that there was no breach of the Act.



No. 18 - File Ref: 5717/47/18- Bank of Africa vs Seven Seas

63. The document allegedly shared as between the Respondents is a pleading, specifically a plaint dated 10th June 2019. However, the said document was not availed to ODPC to ascertain whether it had personal and sensitive data. In the circumstances, ODPC cannot make a determination on the same.

No. 19 - File ref: 5703/220/2 – I&M Bank & Dishon Kimani

64. The Complainants alleged that the 1st Respondent shared pleadings such as an amended plaint and an application for inhibition orders. Similarly, the complainants alleged that these documents contained property details such as Land References and Title Numbers as well as Bank Account details. We do note that the complainants produced this document and also adduced evidence to demonstrate that the 1st Respondent shared the said document to the 2nd Respondent vide an email dated 14th January 2022.

65. Upon analysis of the document, ODPC noted that the Plaintiff and the 2nd Defendant in the case are not natural persons but legal persons hence are not data subjects as provided under the Act. Section 2 defines a "**data subject**" as an identified or identifiable natural person who is the subject of personal data. Issues regarding data of legal persons can only be reported to the ODPC in form of notification of data breaches under section 43 of the Act.

66. ODPC further notes that the 1st Defendant is a natural person in line with the provisions of the Act. However, the said party is a third party with regards to the complaint at hand as he is not a party to the complaint. Equally, the complainants have not demonstrated that they had authorization to act on behalf of the said third party.



No. 20 - Saham Insurance vs Gas & Go Petroleum and another

67. The Complainants alleged that the document shared between the Respondents are pleadings including a chamber summons application dated 14th December 2020 and 16th December 2020. The said document has not been produced before the ODPC. We therefore cannot ascertain whether the said documents contained personal data and sensitive data.

No. 21 - File ref: 5835/19/119- Shalimar Flowers & Mwangi Gathimba & Associates

68. The documents shared between the Respondents include pleadings such as plaint and legal opinions. The said documents were not availed to the ODPC in order to ascertain whether the same contained personal and sensitive data. ODPC can therefore not make a determination as to whether there was breach of the Act.

No. 22 - Complaint to disciplinary committee by Preston Wawire

69. The above complaint to disciplinary committee was not adduced. ODPC is therefore unable to ascertain what data was contained in the said documents. In that regard, this Office cannot make a determination on whether there was breach of the Act.

No. 23 - File ref: 5727/7/20- Prime Bank -vs- Porsche Kenya

70. The document relates to pleadings filed in court and specifically an application for injunction. ODPC notes that the said document was provided. Upon scrutiny of the same, it was our finding that the said document contains possible personal and sensitive data, specifically, property details.

71. However, it is our finding that the said case is a reported case available at the Kenya Law Reports Website cited as **Prime Bank Limited v Porsche Center Nairobi Limited [2021] eKLR** and therefore a public record. The said case contains all the details that had been contained in the said application including the property details such as land reference numbers that the complainant alleges to have been shared as personal data. We reiterate that section 79 of the Evidence Act as well as the Schedule of the Public Archives and Documentation Service Act

includes the records of the High Court and of any other court or tribunal as public records. In that regard, we hold that the case herein is a matter that is in the public domain thereby not in violation of the Act.

No. 24 - Basil Criticos -vs- NBK

72. The document allegedly shared between the Respondents in this case was pleadings and specifically the appellants' submissions. Upon scrutiny of the various documents provided by the complainants, the said document was not availed. Therefore, this Office cannot ascertain whether the said draft consent contained personal data. However, the decision regarding the said Appeal is cited at the Kenya Law reports as **Criticos v National Bank of Kenya Limited (as the successor in Business to Kenya National Capital Corporation Limited "KENYAC") & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment)** and was therefore in the public domain hence it cannot be said that the Act was breached in this instance.

73. Similarly, the Complainant publicized the said case in their firm website titled "*A Commentary on the Basil Criticos v National Bank Judgment: Damages for wrongful sale of security*" available at <https://wamaeallen.com/a-commentary-on-the-basil-criticos-v-national-bank-judgment-damages-for-wrongful-sale-of-a-security/>.

74. Additionally, the Business Daily published an article in the website on the 5th May 2022 titled, "*Former MP gets 2Bn in a court fight with NBK*" available at <https://www.businessdailyafrica.com/bd/economy/former-mp-gets-sh2bn-in-court-fight-with-nbk-3804692>. In this regard, we hold that the said case is within public domain and therefore no breach of the Act.

No. 25 - E003 of 2022 -Milliam Iyende Mayaka vs Rao & General Printers

75. The document allegedly shared between the Respondents is a ruling of the court. The said ruling was produced by the 1st Respondent in her bundle of documents. Moreover, the ruling was pronounced by Justice Mabeya in open court on the 6th

May 2022. In this regard, we hold that a ruling is a public record within section 79 of the Evidence Act and the Schedule of the Public Archives and Documentation Service Act which includes the records of the High Court and of any other court or tribunal as public records.

No. 26 - 5703/255/2022 -I&M Bank templates for appointment of an Administrator under S.534

76. The document allegedly shared between the Respondents is a pleading and specifically plaint dated 10th June 2019. However, the said document was not availed to us to ascertain whether it had personal data and therefore ODPC cannot determine whether there was breach of the Act.

No. 27 - 5395/102/17 Remax vs Sichuan Huashi

77. The documents that were allegedly shared between the Respondents are pleadings such as submissions on review. However, the said documents were not availed. Accordingly, we cannot ascertain whether the said pleadings contain personal data and whether there was breach of the Act.

78. However, it is ODPC's finding that the said decision is available at Kenya Law Reports website cited **Sichuan Huashi Development Company Ltd v Remax Realtor Limited [2020] eKLR** thereby being in the public domain.

No. 28 - File Ref: 5703/197/21 Emmanuel Kuria vs Invesco & 3 Others

79. The Complainant alleges that the 1st Respondent shared documents such as original order, notice of motion application, record of appeal and a filled memorandum of appeal to her personal email. However, these documents were not availed for ODPC to ascertain whether the said draft consent contained personal data. Therefore, ODPC cannot make a determination on whether there was breach of the Act.

No. 29 - File Ref: 146-Wamae and Allen

80. The Complainant alleges that the 1st Respondent shared W & A Guide on Administration under the Insolvency Act 2015 to her personal email. However, this document was not availed. Accordingly, we cannot ascertain whether the said draft consent contained personal data and cannot therefore make a determination on whether there was breach of the Act.

No. 30 - Civil Application No. E036 of 2022 Mehul Patel & Another vs Champaklal Ramji Raishi Shah & 2 others

81. The Complainant alleges that the 1st Respondent shared documents of the 2nd Respondent's submissions dated 29th June 2022 and Replying affidavit dated 22nd June 2022 to her personal email. These documents were not availed for ODPC to ascertain whether the said draft consent contained personal data. Therefore, the Office cannot make a determination on whether there was breach of the Act.

82. As referred to in paragraph 12 of this determination, the Complainants, through their advocates availed various documents in support of their complaint. However, ODPC noted that one of the documents attached **Garnishee Replying Affidavit sworn on 13th May 2022; Kilgoris PMCC No. 50 of 2017 Thomas Onyango Onchonga -vs- AMACO** did not form part of the complaint. The complainants alleged that the document contained personal and sensitive information particularly bank account details including account statements and 3rd party account numbers. It is our finding that on this particular document, there was no demonstration that the same was shared as between the 1st and the 2nd Respondent. In light of the above, ODPC cannot make a determination as to whether there was breach of the Act in the circumstances.

III. WHETHER THE COMPLAINANTS ARE ENTITLED TO ANY REMEDY UNDER THE DATA PROTECTION ACT, 2019.

83. Section 2 of the Act defines a data subject as an identified or identifiable natural person who is the subject of personal data. This is important in terms of distinguishing whether legal persons are also data subjects within the confines of

the Act. Similarly, the Regulations under Regulation 2 define a complainant as a data subject or a person who has lodged a complaint. The said regulation further stipulates that a complaint may be lodged by the complainant in person, by a person acting on behalf of the complainant, by any other person authorized by law to act on behalf of a data subject or anonymously.

84. The complainants have not demonstrated in any of the cases above that their own personal or even sensitive data has been infringed in their capacity as data subjects. Instead, the cases that form part of the complaint belong to their clients, whom are mostly legal persons and not data subjects within the confines of the Act. Furthermore, the cases have been reported making them available in the public domain as public records which cannot be regarded as personal data within the Act.

85. Moreover, vide a letter referenced ODPC/CONF/1/5 and dated 28th July 2022, ODPC requested for information regarding the authority by Muchemi & Co. Advocates to represent all the data subjects whose information had been allegedly breached. The same was not provided. In view of the foregoing, we hold that the firm of Muchemi & Co. Advocates did not have the express authority to bring the complaint on behalf of all the data subjects whom the complainants alleged that their personal data was breached by the respondents.

86. Section 45 of the Act provides for instances where sensitive personal data may be processed. Likewise, section 45(b) provides that sensitive personal data of a data subject may be processed where the processing relates to personal data which is manifestly made public by the data subject or where processing is necessary for the establishment, exercise or defence of a legal claim. As demonstrated from an analysis of all the documents provided by the complainants, most of the documents are reported cases available on the Kenya Law Reports Website and other sites, some of which are hosted by the complainants in their capacity as partners of their firm. Since the complainants have not demonstrated breach of the Act, ODPC finds that a remedy cannot ensue in the circumstances.

F. FINAL DETERMINATION

87. In consideration of all the facts of the complaint and evidence tendered, the Data Commissioner makes the following final determination:

- i. The complaint is dismissed.
- ii. The Complainants have the right to appeal this Determination.

DATED at NAIROBI this ^{6th} day of JANUARY 2023



Immaculate Kassait, MBS
DATA COMMISSIONER

