



THE RIGHT TO ERASURE: AN OVERVIEW OF THE JUDGMENT OF THE FEDERAL HIGH COURT IN OLATOKUN V POLARIS BANK VIS-À-VIS THE RIGHTS OF A DATA SUBJECT

DATA PROTECTION INSIGHTS



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1.0 INTRODUCTION

With the increase in the use of data in the world today, there has come the need to have the rights of the data subjects protected. Data subjects' rights refer to those rights available to a data subject to control and protect the use of his data. Data subjects' rights embody the soul of data protection as it affords data subjects the opportunity to limit the extent to which an organisation can lawfully process personal data, thereby safeguarding data subjects from any foreseen and unforeseen use of personal data for arbitrary use¹.

Accordingly, various countries have made efforts to ensure that these rights are properly protected by their various data protection laws. For example, in Nigeria, **Section 34-38 of the Nigeria Data Protection Act** ("NDPA") provides for the various rights conferred on a data subject². The right to erasure is one of the rights provided under the NDPA and it refers to the right of individuals to have their data deleted from an organisation's database. Often, this right is also referred to as the right to be forgotten, however the NDPA makes no provision for the phrase "right to be forgotten"

The right to erasure was upheld and judicially recognised in the recent landmark decision of the High Court of Lagos State in **Tokunbo Olatokun v Polaris Bank Limited** delivered by Honourable Justice Y.A. Adesanya on December 5, 2024³. The judgment was delivered in favour of the Applicant, who alleged a violation of his fundamental right to privacy and a breach of data protection regulations by the Respondent.

This case is pivotal to the practice of data protection in Nigeria. It lends credence to the recognition of the right to privacy of every Nigerian citizen guaranteed under **Section 37 of the 1999 Constitution of the Federal Republic of Nigeria**. It further strengthens the need for compliance with the laws guiding data protection operation in Nigeria, that is, the **Nigerian Data Protection Act 2023** and the **Nigerian Data Protection Regulation (NDPR) 2019**. It also suggests the judiciary's commitment to upholding the principles of privacy and data sovereignty in the digital age. Accordingly, this paper analyses of the case as well as its impact on the data protection practice in Nigeria.

1 Samuel Ngwu, 'Rights of Data Subjects' (A paper delivered at the Privacy Hub Data Protection Master class on January 31, 2025)

2 Right to Object to further processing, right to erasure, right to portability, etc.

3 Suit No: LD/17392MFHR/2024

2. BACKGROUND AND SUMMARY OF THE FACTS OF THE CASE

Mr Tokunbo Olatokun (Applicant) was a customer of the Polaris Bank Limited (Respondent) and sometime in the year 2024, the Applicant made a request to the Respondent to delete his information (email address and phone number) from the Respondent's database. The Applicant further requested that the Respondent refrain from sending him any message via text or email and the request was made in line with the Respondent's communicated process for deleting information from its database. Despite the clear request/ instructions which the Respondent acknowledged receipt of, the Applicant continued receiving unsolicited messages on his phone number and email.

In view of the continued unsolicited messages received by the Applicant from the Respondent, the Applicant initiated the instant suit against the Respondent at the High Court of Lagos State seeking the following reliefs amidst others:

- a. A declaration that the Respondent's repeated unsolicited emails to the Applicant constitute a violation of his fundamental Right to privacy guaranteed by Section 37 of the Constitution of the Federal Republic of Nigeria, 1999 (as amended).
- b. A declaration that the Respondent breached the provision of Section 36(1) and (2) of the Nigerian Data Protection Act, "NDPA" 2023 and the Applicant's right of objection when they refused to close his account and continued sending him marketing emails even after objecting to them.
- c. A declaration that the Respondent breached the provision of Section 34(1)(c) of the Applicant's right to restrict further processing of personal data when they continued to send him marketing emails even after instructing them to close the account.

The Applicant argued that the Respondent's continued messaging against his express instruction constituted a violation of his fundamental right to privacy. He also argued that these unsolicited messages were highly intrusive, disturbing, and offensive, and caused him emotional, psychological and mental injury, anxiety, and discomfort. In response to the suit, the Respondent argued that it complied with the Applicant's

request to close his account and that the unsolicited emails were sent pursuant to section 2.4.3. of the Central Bank of Nigeria's Consumer Protection Framework, which allows the Respondent to send marketing emails, text messages, etc., to its customers if it comes at no cost.

The Court, in its ruling, held that the Respondent breached the Applicant's right of objection to the processing of his data and his right to restrict further processing of his data pursuant to **Section 36(1) and (2) and Section 34(1)(a) and (c) of the NDPA** when it continued to send The Court also granted the sum of NGN 1,000,000 (One Million Naira) as general damages.

3. LEGAL ISSUES ARISING FROM THE JUDGMENT

i. The Scope and Practical Enforcement of Data Subject's Right

Over the years, various laws and decisions of the Court have established that data subject rights constitute fundamental rights. More particularly, the European Charter of Fundamental Rights provides that everyone has the right to protect their data.⁴ Various Court of Justice and European Union decisions have upheld these law provisions.⁵ Additionally, the Nigerian constitution guarantees the Right to privacy of a Nigerian citizen. The **Nigeria Data Protection Act 2023** further defines a data subject's rights. It gives examples of various rights, including the Right to be informed about data use, the Right to access personal data, the Right to rectification, the Right to erasure, the Right to restriction, and the Right to data portability.⁶

In **Tokunbo Olatokun v Polaris Bank Limited's case**, the Applicant exercised his Right to restrict further processing of his data when he instructed the Respondent to close his account and stop sending messages and his Right to erasure when he asked the Respondent to delete his phone number and email address from his records. The case provides a remedy for breach of a data subjects' rights to request deletion or erasure of his/her information.

Although the NDPA recognises this Right, the case suggests that some form of non-compliance could exist on the part of some data controllers. The difficulty in enforcing erasure requests suggests the need for stronger enforcement

4 Article 8 of the European Charter of Fundamental Rights

5 Case C-154/21 (RW v Österreichische Post AG) 2023, Case C-453/21 (X-FAB Dresden GmbH & Co. KG).

6 Section 34-38 of the NDPA2023

mechanisms on the part of the commission. The judgment highlights that data subjects must have accessible erasure effective avenues to demand erasure of their data, and organisations must honour such requests within the bounds of the law.

Honouring the request within the bounds of the law as stated above, suggests that these rights are not absolute as they may be subject to other lawful basis for processing personal data, such as:

- a. compliance with a legal obligation to which the data processor or controller is subject;
- b. To protect the interest of the data subject or another individual;
- c. Public interest;
- d. Where necessary for a legitimate interest pursued by the data controller or a third party.⁷

ii. Obligations of Data Controllers

A data controller is an individual, private entity, public commission, agency or any other body who, alone or jointly with others, determines the purposes and means of processing personal data.⁸

There are primary requirements expected of a data controller under the Nigeria Data Protection Act, ranging from the need to register with the Nigeria Data Protection Commission, "the commission", where a data controller or processor of major data importance⁹, provides information on data processing to the data subject, implement appropriate technical and organisational measures to ensure the security, integrity and confidentiality of personal data¹⁰, conduct Data Protection Impact Assessment where necessary¹¹, appointment of a Data Protection Officer where a data controller of significant importance, annual compliance audits amidst many others.

Failure to comply with such law provisions exposes data controllers to liability, reputational damage, and penalties imposed by regulatory authorities. It, therefore, behoves data controllers to adopt strict data protection mechanisms in

7 Section 25 1b (i-v) of the NDPA 2023

8 Section 65 of the NDPA

9 Section 44(1) of the NDPA

10 Section 29(c) of the NDPA

11 Section 28(1) of the NDPA

the processing of data by providing privacy-focused systems, drafting clear and transparent privacy policies, securing personal data with advanced protocol, etc.

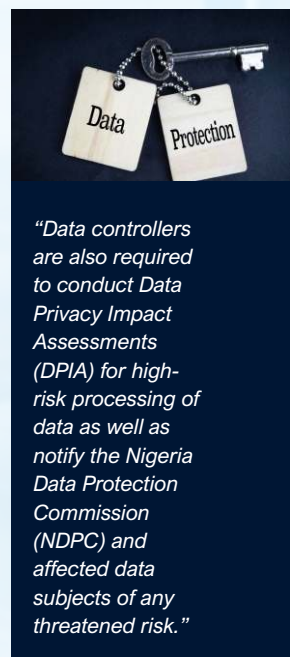
In addition to the above, the Act obligates a data controller/processor of major importance (one who handles data of over 2000 subjects) to appoint a data protection Officer and carry out annual compliance audits¹². Data controllers are also required to conduct Data Privacy Impact Assessments (DPIA) for high-risk processing of data as well as notify the Nigeria Data Protection Commission (NDPC) and affected data subjects of any threatened risk. Data controllers are encouraged to integrate robust data protection protocols to prevent similar breaches. In this case, if the Respondent complied with the various regulatory duties, it would have been easy for him to respect the Applicant's Rights.

4. IMPLICATIONS OF THE JUDGMENT ON DATA PROTECTION IN NIGERIA

The decision of the Court in ***Tokunbo Olatokun v Polaris Bank*** has a significant impact on data protection practice and jurisprudence in Nigeria. The judgment is a valuable addition to the list of cases, where the Court has recognized the justiciability and enforceability of the rights of data subjects in Nigeria. The judgment serves to reassure data subjects that their rights as provided under the NDPA are protected under the Law and that the Court is available, accessible and ready to do justice whenever its jurisdiction is competently activated in relation to the enforcement of breach of a data subject's rights under the NDPA.

In addition to the above, the judgment is a wake-up call to all organisations involved in the processing of personal data to take up the responsibility of accessing their data collection, retention, and processing cycle to ensure that it is in compliance with the NDPA and other relevant data protection laws. Data controllers must now take the requirements of annual audits and Data Protection Impact assessments very seriously to ensure they are not in breach of the rights of any data subject or not compliant with the provisions of the law.

The decision of the Court also serves to educate Nigerian citizens on their various privacy rights guaranteed by the **1999 Constitution of the Federal Republic of Nigeria**, the **NDPA** and other relevant data protection laws. This raises the likelihood of



12 Section 32 of the Data Protection Act 2023

potential disputes in future; hence, as highlighted above, organisations must tighten their seat belts and ensure compliance to prevent a floodgate of the Nigerian Courts with disputes tied to the rights of data subjects. It, therefore, behoves on the various regulatory bodies concerned with data protection, more particularly the Nigeria Data Protection Commission "NDPC" to see to the compliance with the NDPA by data controllers and processors.

5. CONCLUSION

The Court's decision lends credence to the development of Nigerian jurisprudence in privacy and data protection and highlights the importance of the fundamental Right to privacy in data protection in Nigeria. It also highlights the ever-evolving nature of the commitment to protect the rights of Data subjects in Nigeria. Starting with data subjects being well informed of their rights and ways to seek redress for any violation of such right.

Furthermore, it also places a duty on Data Controllers to pay keen attention to key pillars of data protection like consent, legal basis of processing data, accuracy, and purpose limitation, amongst others. This would enable them to avoid liabilities where necessary.

As our laws continue to evolve, organisations will need to strengthen their compliance efforts, especially regarding the use of data subjects' information and paying keen attention to addressing data subjects' complaints or requests. This sets a clear precedent for the balance between innovation and respect for privacy.

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