

**PROTECTING THE RIGHT TO ADEQUATE HOUSING - THE DUTY OF THE STATE TO  
PROVIDE PROTECTION OVER ARBITRARY EXECUTION ON MORTGAGED  
RESIDENTIAL PROPERTY IN MALAWI**

**Submitted in partial fulfilment of the requirements for the award of the Master of Laws  
in Human Rights and Democratisation in Africa**

**By**

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**31 October 2012**

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## DEDICATION

To my mother

Emily Moira Muyaya (1951 - 2007)

*It takes a mother's love to make a house a home ~ Helen Steiner Rice*

You were the beacon of love and I greatly miss you with each passing day.

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Mortgage Act No 8 of 2009.

#### **United Kingdom**

Administration of Justice Act, 1970.

## LIST OF ABBREVIATIONS AND ACRONYMS

ACHPR	African Court on Human and Peoples' Rights
CEDAW	Convention on the Elimination of all forms of Discrimination against Women
CML	Council of Mortgage Lenders
CRC	Convention on the rights of the child
CSO	Civil Society Organisations
ECHR	European Court of Human Rights
IAHR	Inter - American Court of Human Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
MAT	Money Advice Trust
NBM	National Bank of Malawi
NBS	New Building Society
NGOs	Non-Governmental Organisations
NHRCs	National Human Rights Commissions
NHRIs	National Human Rights Institutions
RBM	Reserve Bank of Malawi
RBM	Reserve Bank of Malawi
RLA	Registered Land Act.
SRSG - BHR	United Nations Special Representative of the Secretary General on Business and Human Rights

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# PROTECTING THE RIGHT TO ADEQUATE HOUSING: THE DUTY OF THE STATE TO PROVIDE PROTECTION OVER ARBITRARY EXECUTION ON MORTGAGED RESIDENTIAL PROPERTY IN MALAWI

## CHAPTER ONE: INTRODUCTION

### 1.1 Background to the study

Housing is one of the basic necessities of life.<sup>1</sup> Housing fulfils physical needs of a person by providing security and shelter from weather and climate; psychological needs by providing a sense of personal space and privacy; and social needs by providing a gathering area and communal space for the human family as the basic unit of society.<sup>2</sup> The right to adequate housing is provided for in numerous instruments among which is article 11 (1) of the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>3</sup> This right has been recognised to be of paramount importance.<sup>4</sup> The right is essential for the enjoyment of social economic rights and all other human rights.<sup>5</sup> A violation of this right affects a wide range of human rights such as the right to health, property and protection of the family.<sup>6</sup> Despite the obvious relevance of the right, most countries do not sufficiently protect this right in their laws and practices.<sup>7</sup> Furthermore, it is not justiciable in many African countries.<sup>8</sup>

A factor that has contributed to the violation of the right to adequate housing is the perceived divide that has existed between human rights in the public law domain; and other fields of law such as contract law, commercial law, property law and the law of torts which are regarded as being in the private domain.<sup>9</sup> As will be observed in this study, this has contributed to emphasis on the commercial aspects of mortgage transactions without taking due regard of the human rights implications of mortgage transactions.<sup>10</sup> As a result, financial lending institutions, upon a mortgagor defaulting, often times arbitrarily execute on

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<sup>1</sup> H, Onaria (2007) 'Guaranteeing the right to adequate housing and shelter in Uganda: The case of women and people with disabilities' (2007) 1.

<sup>2</sup> *Port Elizabeth Municipality v Various occupiers (Occupiers case)* Case CCT 53/03 para 17.

<sup>3</sup> ICESCR, 1966, article of art 14 (2) (h) CEDAW 1979, CRC art 16 (1) 1989.

<sup>4</sup> United Nations Factsheet 21: The right to adequate housing 9.

<sup>5</sup> L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing to those subject to eviction' in *Human rights law review* 8:1 (2008) 105.

<sup>6</sup> *Social and Economic Rights Action Centre Another v Nigeria (SERAC case)* (2001) AHRLR 60 (ACHPR 2001) para 60.

<sup>7</sup> S Leckie *National perspectives on housing rights* (2003) 4.

<sup>8</sup> SA Yeshanew 'Approaches to the justiciability of economic, social and cultural rights in the jurisprudence of the African Commission on Human and Peoples' Rights' in *African Human Rights Law Journal* (2011) 11 (2) 319.

<sup>9</sup> M Friedman 'Introduction' in M Friedman *Human rights in private law* (2001)1.

<sup>10</sup> According to section 2 of the Registered Land Act (Chapter 58:01 of the Laws of Malawi) a charge [or mortgage] means an interest in land securing the payment of money or money's worth or the fulfilment of any condition, and includes a sub-charge and the instrument creating a charge; chargee [or mortgagee] means the proprietor of a charge; chargor [mortgagor] means the proprietor of charged land or of a charged lease or charge.

mortgaged residential property.<sup>11</sup> Consequently, many mortgagors are left homeless. This is done by initiating execution against mortgaged residential property of mortgagors without sufficient or any judicial oversight to ensure that all affected interests are considered.<sup>12</sup> This entails the failure of the state to fulfil its duty to 'protect' which requires the state to take measures that prevent third parties from interfering with the human rights of its citizens.<sup>13</sup>

Against this background, the main focus of the dissertation is on mortgaged residential property, given its direct link with the right to adequate housing. However, it is acknowledged that it is not only residential property that is used as collateral in mortgage transactions.<sup>14</sup> The motivation to focus on residential property is the fact that the loss of a home, which has been mortgaged, through execution often results in the defaulting mortgagor and their family being left homeless. While some executions on residential property are admittedly obtained in accordance with the law, the failure by the state to provide adequate oversight and protection against possible violation of the fundamental human rights of mortgagors, such as the right to adequate housing, is the subject of this dissertation.

The study aims to provide a comprehensive understanding of the right to adequate housing and the obligations that states have, to ensure its protection. This will ensure that people are protected from being left homeless by acts of third parties, such as financial institutions.

The problem identified in this paper is present in most African countries. Malawi is used as the case study of the dissertation by surveying the legal framework and practice, and examining the extent to which the state protects individuals against arbitrary execution on mortgage default. The choice of Malawi is both strategic and pragmatic. As a citizen of Malawi, from a practical viewpoint, the candidate is quite familiar with the laws, regulations, policies and practices of the country. A comparison with Uganda is undertaken as the country has a similar socio-economic status and legal framework including the bill of rights as that of Malawi. In addition, the candidate was based and resident in Uganda for the purpose of this research, and as such was able to make a comparative analysis and readily source relevant data on the subject matter.

The dissertation further teases out best lessons and practices from other countries particularly South Africa and the United Kingdom which have progressive bill of rights in their Constitutions. The practice in Uganda where there is need for spousal consent in mortgaging

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<sup>11</sup> *Mortgaged residential property* in this paper is understood to mean the primary residence for a family or a mortgagor that is used as security for a loan; whether the loan is for buying the house or improving the house or is for other purposes such as business capital or investment venture. Primary residence or home in the paper is understood as the mortgagor's usual home, or his/her ordinary place of residence, and does not include additional dwellings such as a holiday home – *First Rand Bank v Folscher & another (Folscher case)* 2011 (4) SA 314 (GNP) paras 38, 29 & 51. *Financial institutions* in this paper are understood to be banks, micro-finance institutions and other agencies that advance loans.

<sup>12</sup> S Liebenberg *Socio-economic rights: Adjudication under a transformative constitution* (2010) 357.

<sup>13</sup> UN Factsheet (n 4above) 30-33.

<sup>14</sup> OT Ojienda *Principles of conveyancing in Kenya: A practical approach* (2007) 206.



matrimonial property is examined as an enhancer to the requirement for judicial oversight in execution on mortgaged residential property. This serves to illustrate that it is possible and legitimate to protect individuals against the actions of third parties that have the potential to violate their fundamental human rights especially the right to adequate housing. In addition, since Malawi, like many other African countries, does not have the right to adequate housing entrenched in its Constitution, the study examines India's- progressive jurisprudence on the right to life and property as a potential solution. It proposes that the right to life and the right to property has and can be broadly interpreted by courts to include the right to adequate housing, as has been done in India and also by the African Commission on Human and Peoples' Rights (African Commission).<sup>15</sup>

## 1.2 Statement of the research problem

The right to adequate housing lacks protection in many African countries leading to violation of the right by third parties.<sup>16</sup> Violations of the right to adequate housing emanate from, among other things, forced evictions as a result of development projects such as building of dams, oil drilling; internal displacements and forced relocations in the context of armed conflict.<sup>17</sup> However, a violation that is not mostly highlighted is one that occurs when financial institutions execute on mortgaged residential property of a defaulter without sufficient or any judicial oversight. Many Malawians have actually lost their homes due to such execution on mortgaged residential property, by financial institutions, when they default on loans.<sup>18</sup>

The right to adequate housing is not entrenched in the bill of rights nor is it reflected in the principles of national policy of the Malawian Constitution.<sup>19</sup> Currently, the main legislation that regulates mortgage transactions is the Registered Land Act. Mortgages can either be legal or equitable mortgages. A legal mortgage is created when a mortgage instrument is duly executed between the mortgagor and mortgagee.<sup>20</sup> On the other hand, an equitable mortgage arises where all formalities for creating a mortgage have not been observed but there is proof that the parties intended to create a mortgage.<sup>21</sup>

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<sup>15</sup> In SERAC (n 6 above) case the African Commission held that the right to property, health and protection of the family should be interpreted to encompass the right to adequate housing.

<sup>16</sup> Yeshanew ( n 8 above) 319

<sup>17</sup> UN Committee on Economic, Social and Cultural Rights 'General Comment No. 7: The right to adequate housing (Art.11.1): Forced evictions' UN Doc E/1998/22 (1998) para 5.

<sup>18</sup> D Mzale 'Chuka speaks on bank challenges' 1 October 2012 <<http://www.mwnation.com/business-news-the-nation/10877-chuka-speaks-on-bank-challenge> > (accessed 1 October 2012).

<sup>19</sup> D Chirwa *Human Rights under the Malawian Constitution* (2011)

<sup>20</sup> T Nyirenda 'Mortgagee's exercise of power of sale vis-a-vis mortgagor's right to property' (2006)17.

<sup>21</sup> *Commercial Bank of Malawi v Kara* 9 MLR 220.

Other relevant statutes related to mortgage transactions in Malawi include the Conveyancing Act<sup>22</sup>, the Micro Finance Act<sup>23</sup>, Finance Services Act,<sup>24</sup> the Sheriffs Act<sup>25</sup> and the Courts Act.<sup>26</sup> It is worth noting that despite the enactment of the Micro- Finance Act there is still insufficient regulation of informal financial institutions, such as micro-financial institutions, in Malawi. For instance, many of these institutions charge exorbitant interest rates.<sup>27</sup> Consequently, this presents a high probability of defaulting by those who obtain loans from these institutions. Additionally, many people actually prefer taking loans from such institutions as they are easy to access; this is because their processes are quick and do not require thorough verification of items used as collateral.<sup>28</sup> Another relevant piece of legislation is the Consumer's Protection Act<sup>29</sup> which was enacted to protect consumers. However this Act fails to cover mortgage transactions, but is nonetheless important as a standard setting law.<sup>30</sup>

It has been suggested that applications for stay of execution and payment of debt by instalments are sufficient safeguards to ensure the protection of the rights of a defaulter.<sup>31</sup> However, it is contended that these processes do not offer adequate protection.<sup>32</sup> This is because most mortgagors are in most cases individuals without sufficient means of approaching a court and may not even know of these processes.<sup>33</sup> As such, where it is a legal prerequisite that before sale of mortgaged residential property, a financial institution obtains a court order, there is guarantee of a defaulter appearing before a court to present their case.<sup>34</sup> Thus, a court will be able to consider all the necessary circumstances.<sup>35</sup>

Other arguments that have been advanced against the requirement of judicial oversight in execution on mortgaged residential property include the notion that regulation will result in financial institutions shying away from advancing credit to borrowers who provide residential property as collateral for loans.<sup>36</sup> However, there is need for a middle ground to be established to ensure there is sufficient protection to defaulters and also to encompass the interests of financial institutions. Another argument put forward is that such a process delays

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<sup>22</sup> CAP 58:03 Laws of Malawi.

<sup>23</sup> Act 21 of 2010.

<sup>24</sup> Act 26 of 2010.

<sup>25</sup> CAP 3:05 Laws of Malawi.

<sup>26</sup> CAP 3:02 Laws of Malawi.

<sup>27</sup> MAZ Manda, S Nkhoma & D Mitlin 'Understanding pro-poor housing finance in Malawi' (2011) 9.

<sup>28</sup> UN Habitat 'Malawi: Urban Housing Sector Profile' (2010) 60.

<sup>29</sup> Act 14 of 2003.

<sup>30</sup> Nyirenda (n 20 above) 12.

<sup>31</sup> 2005 (2) SA 140 (CC) para 55.

<sup>32</sup> As above.

<sup>33</sup> As above

<sup>34</sup> Ministry of Justice, United Kingdom (MOJ – UK) Consultation paper on mortgages, power of sale and residential property (2009) 23 <<http://www.justice.gov.uk/downloads/consultations/mortgages-power-sale.pdf>> (accessed 5 July 2012).

<sup>35</sup> *Jaftha* ( n 31 above) para

<sup>36</sup> Council of Mortgage Lenders (CML) 'Response to MOJ consultation paper on mortgages, power of sale and residential property' para 1 <<http://www.cml.org.uk>> (accessed 19 July 2012).

financial institutions in collecting their funds and this leads to more costs accumulating which are later transferred to the mortgagor.<sup>37</sup> While such arguments may find some justifications particularly among financial institutions, given the possibility and prospects of abuse, if the mortgagor is given an opportunity to state circumstances to be considered by courts, such costs are likely to be averted.

It is therefore contended that Malawi needs to be duly diligent in reforming its laws, policies and regulatory framework so as to offer sufficient protection to its citizens.

### **1.3 Objectives of the study**

The principal objective of this study is to determine how Malawi as a state can protect the right to adequate housing in the face of execution on mortgaged residential property by financial institutions. The specific aims of the study are to:

- a. Examine the legal, regulatory, policy and institutional frameworks that are available in Malawi in relation to the subject matter.
- b. Examine how other jurisdictions have provided protection in similar circumstances.
- c. Examine whether the judiciary in Malawi takes an active role in the protection of the right to adequate housing as relates to execution on residential property or whether the minimal judicial oversight that is available focuses on the financial aspects of the transaction without taking into account the human rights aspects.
- d. Identify best practices that can inform Malawi's strategies in addressing the problem.

### **1.4 Research questions**

The study attempts to answer the following questions:

- a. What are the legal, regulatory, policy and institutional frameworks that are in place with regard to the right to adequate housing and execution on mortgaged residential property in Malawi?

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<sup>37</sup> P Ndzamela 'Con Court rules delay banks property repossessions' <<http://www.moneyweb.com>> (accessed 10 July 2012).

- b. Has Malawi fulfilled its duty of due diligence in this area by preventing, protecting and investigating actions by third parties, specifically financial institutions?
- c. Does judicial oversight offer protection of the right to adequate housing in the process of execution on mortgaged residential property by financial institutions?
- d. What are the best practices that can ensure protection of the right to adequate housing in the circumstances?

## 1.5 Literature review

The available literature reveals that different scholars have written on the protection of the right to adequate housing in the African context. Liebenberg discusses how socio-economic rights are affecting private law.<sup>38</sup> She discusses how South African courts have used the right to access adequate housing in section 26 of the South African Constitution in proceedings to obtain default or summary judgments against those defaulting on their home loans and to declare mortgaged property executable.<sup>39</sup> She analyses some cases including *Jaftha v Schoeman*,<sup>40</sup> and *Standard Bank of South Africa Ltd v Saunderson*.<sup>41</sup> In these cases the South African Constitutional Court dealt with the question of the requirement for judicial oversight when a warrant of execution is sought. She concludes by making the observation that the South African Constitutional Court has consistently held that procedures which result in people being deprived of access to their homes must be subject to judicial oversight and control.<sup>42</sup> Her work is very relevant to this study, but it is limited to South Africa.

There is literature that discusses the status of socio-economic rights in Malawi, such as the right to adequate housing. Chirwa in his book *Human rights under the Malawian Constitution* in discussing socio-economic rights, he relays the fact that the right to adequate housing is not entrenched in the Malawian Constitution. He points to the fact that the right can be implied from such rights as the right to development which are provided for under the bill of rights. Another writer, Mbazira, discusses the need to reinforce the protection of socio-economic rights under the Malawian constitution.<sup>43</sup> He focuses on providing the theoretical basis for including socio-economic rights, such as the right to adequate housing, as justiciable protections within the Malawian Constitution.<sup>44</sup> Chirwa and Mbazira in their works do not provide a discussion of the protection of the right to adequate housing in Malawi

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<sup>38</sup> Liebenberg (n 12 above) 351.

<sup>39</sup> As above.

<sup>40</sup> n 31 above.

<sup>41</sup> 2006 (2) SA 264 (SCA).

<sup>42</sup> Liebenberg (n 12 above ) 358.

<sup>43</sup> C Mbazira 'Socio-economic rights under the Malawian Constitution' in *Malawi Law Journal* 2007 1 (2) 220

<sup>44</sup> As above

during the process of execution on mortgaged residential property. It is from this angle that the present study is relevant to fill in the gaps.

Many authors have written on judicial enforcement of socio-economic rights. Gauri and Brinks writing on this same subject proceed on the basis that courts are the paradigmatic institutions for identifying legal duties and responding to claims of violation of rights.<sup>45</sup> Their study is focused on the right to health and right to education in India, South Africa, Nigeria, Brazil and Indonesia.<sup>46</sup> They acknowledge that courts are never fully independent in advancing socio-economic rights as there are several political pressures.<sup>47</sup> Nonetheless, they argue that courts are the forum that ‘help overcome political blockages, channel important information to political and bureaucratic actors, create spaces of deliberation and compromise between competing interests, and hold states accountable for incomplete commitments’.<sup>48</sup> This work does not focus on the right to adequate housing and has limited countries of focus.

Similarly, Langford explores the emergence of social rights jurisprudence from twenty-nine national and international jurisdictions.<sup>49</sup> He notes that the origin of the social rights movements is partly rooted in the role of private entities in social rights violations.<sup>50</sup> He states how overtime many social rights claims have been brought against private entities in cases which conventionally would have been brought under contract or consumer law.<sup>51</sup> Further, he observes that social rights adjudication has an impact both directly on poverty and discrimination and also indirectly in areas of policy, law, mobilisation and consciousness raising.<sup>52</sup> He acknowledges that the impact is influenced by several factors such as the nature of the order, political and organisational power of claimants and the institutional strength of the State.<sup>53</sup> Langford’s work provides a comprehensive study of social rights jurisprudence, but does not offer the Malawian perspective nor does it specifically tackle the subject matter of this study.

Leckie broadly discusses national perspectives on housing rights. The perspectives are of several countries in the world, such as South Africa and Finland.<sup>54</sup> However, the work does not bring out the protection of the right in circumstances where financial institutions intend to execute on mortgaged residential property. Furthermore, it does not give a representation of

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<sup>45</sup> V Gauri & DM Brink ‘Introduction: The elements of legalization and the triangular shape of social and economic rights’ in Gauri, V and Brinks, DM (eds) *Courting social justice: Judicial enforcement of social economic rights in the developing world* (2008) 1.

<sup>46</sup> As above.

<sup>47</sup> As above.

<sup>48</sup> As above.

<sup>49</sup> Langford ‘The justiciability of social rights: From practice to theory’ in M Langford *Social rights jurisprudence: Emerging trends in International and Comparative Law* (2008)1

<sup>50</sup> Langford ‘The justiciability of social rights: From practice to theory’ in Langford (n 49 above) 17.

<sup>51</sup> As above.

<sup>52</sup> As above.

<sup>53</sup> As above.

<sup>54</sup> Leckie (n 7 above) 1.

the right in Malawi. Additionally, Chenwi discusses how South African courts seek to enforce the right to adequate housing of those faced with evictions while at the same time protecting the right of landowners.<sup>55</sup> Her work is however limited to South Africa and is not an in depth analysis of evictions of mortgagors from their homes that emanate from mortgage transactions.

Nyirenda and Ojienda write on mortgage laws with some discussion of their effects on human rights, specifically proprietary rights.<sup>56</sup> Nyirenda's work principally analyses the limitability of the mortgagor's right to property in mortgage transactions. He discusses the exercise of powers by the mortgagee particularly during the process of power of sale. As much as the work provides an analysis of the right to property in relation to mortgage transactions in Malawi, it does not specifically focus on the right to adequate housing. On the other hand, Ojienda discusses mortgage laws and regulation in Kenya. He laments abuse by financial institutions of the power of sale and how families have suffered by losing land at the hands of financial institutions.<sup>57</sup> However his study is not an in depth analysis of how the power of sale infringes on the right to adequate housing and his focus is essentially on Kenya.

Unlike the studies reviewed above this research looks at the protection of the right to adequate housing in Malawi with regard to arbitrary execution on mortgaged residential property. It seeks to bolster the incorporation of human rights in private law, specifically mortgage transactions. The process of applying human rights to private law is an untamed area that lacks a lot of research and work.<sup>58</sup> As such this study contributes to the academic pool of resources in this area.

## 1.6 Significance of the study

The mortgage laws and regulations in Malawi do not offer sufficient protection of the right to adequate housing of those who default on loans. The regulation of execution on mortgaged residential property is not adequate. Consequently, financial institutions who are driven on the basis of maximising profits arbitrarily execute on mortgaged residential property leaving many people homeless. The Registered Land Act in section 68 provides for the remedies available to mortgagees as follows:

- (1) If default is made in payment of the principal sum or of any interest or any other periodical payment or of any part thereof, or in the performance or observance of any agreement

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<sup>55</sup> Chenwi ( n 5 above) 105.

<sup>56</sup> Nyirenda ( n 20 above) & Ojienda ( n 14 above).

<sup>57</sup> Ojienda ( n 14 above) 248.

<sup>58</sup> S Joseph 'Liability of multinational corporations' in Langford (n 49 above) 615.

expressed or implied in any charge, and continues for one month, the chargee may serve on the chargor notice in writing to pay the money owing or to perform and observe the agreement, as the case may be.

(2) If the chargor does not comply, within three months of the date of service, with a notice served on him under subsection (1), the chargee may—

(a) appoint a receiver of the income of the charged property; or

(b) sell the charged property:

Provided that a chargee who has appointed a receiver may not exercise the power of sale unless the chargor fails to comply, within three months of the date of service, with a further notice served on him under that subsection.

It will be observed from the provision above that there is no requirement for a financial institution to obtain a court order before executing on mortgaged residential property. The financial institution only has to give a mortgagor 30 days notice and then proceed to sell the property to recover the debt. As stated earlier, the prospects of abuse in these circumstances are high with the result that many Malawians have suffered the arbitrary loss of homes due to lack of judicial oversight in this area. As much as the formal banking sector may provide some guarantee of protection, most people take loans from the informal financial institutions.<sup>59</sup> This is premised on the fact that the informal lending institutions do not have stringent rules for people to access loans as compared to formal banks.<sup>60</sup> However, these informal financial institutions offer loans at exorbitant interest rates, with many resultant defaults.<sup>61</sup> It is hoped that the contributions made in the paper when implemented by Malawi will result in the adequate and sufficient protection of the right to adequate housing.

## 1.7 Methodology

The research is a socio-legal analysis with a focus on the existing laws pertaining to adequate housing and those regulating execution on mortgaged residential property in Malawi. The methods used were desk research and empirical research.

### 1.7.1 Desk research

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<sup>59</sup> Habitat (n 28 above) 60.

<sup>60</sup> As above.

<sup>61</sup> A 'Housing support services for housing microfinance lending in east and southern Africa: A case study of Centre for Community Organisation and Development / Malawi Homeless People's Federation / The Mchenga urban poor fund 2 <<http://www.housingfinanceafrica.org/wp-content/uploads/2012/03/CCODE-case-study2.pdf>> (accessed 29 July 2012) .



Principally, the study involved intensive desk research whereby an in depth legal and descriptive analysis of materials was conducted. The literature reviewed was critically analysed in discussion of the research questions to derive relevant deductions. Primary sources such as statutes, treaties, declarations, resolutions and reports of regional and global organisations were examined. The author also partly relied on her practical experiences of this area in Malawi as primary data. Additionally, secondary data was obtained from books, journals, articles, policies, case law and scholarly materials from the internet.

### **1.7.2 Empirical research**

Qualitative data was gathered through pre-arranged interviews and responses to questionnaires. Those interviewed were judges in the commercial and land divisions of the High Court in Uganda who adjudicate on mortgage transaction matters. The face to face interviews were unstructured to allow the respondents to offer their knowledge and opinions freely. Further, questionnaires were sent through email to judges and financial institutions dealing with mortgage transactions in Malawi. The study has significantly benefitted from the relevant insight obtained through the interviews and questionnaires.

### **1.8 Limitations**

The challenges of the study included the inability to conduct field visits to interview the subjects of the study, particularly mortgagors. As such, information relied upon was secondary information obtained by researchers. Further, there is limited literature specifically focusing on the right to adequate housing and execution on mortgaged residential property. Additionally, the responses to the questionnaires sent to judges and financial institutions were few and general in nature. As such, reliance was placed on the different aspects contained in the topic and the author's personal experience in Malawi.

The study focuses on Malawi only despite the problem being prevalent in many African countries. The reason is that the time and scope of the dissertation was limited. However, reference is made to other countries notably South Africa, Kenya and Uganda in examination of how the problem identified in this study has been resolved. The time-frame of the study is mostly from the time of the enactment of the Constitution of Malawi in 1994 to the present.



The choice of the right to adequate housing is based on the fact that it is one of the central rights essential in the realisation of socio-economic rights and human rights in general.<sup>62</sup>

## 1.9 Overview of the chapters

Chapter one deals with the research questions and highlights the methodology used in carrying out the study. It also gives an overview of the study, literature review and limitations of the study.

Chapter two focuses on the status of the right to adequate housing and mortgage laws in Malawi. The nature of the right to adequate housing is discussed followed by an overview of the subject of mortgaged residential property in Malawi. The chapter explores the legal and regulatory framework in Malawi and discusses consumer protection in relation to mortgage transactions.

Chapter three addresses the integration of human rights into mortgage transactions. The chapter analyses the recent trends of application of human rights in the private law domain. It further discusses the concept of due diligence and the reasons that support the need to infuse human rights in mortgage transactions. Further, the necessary stakeholders are identified and their role in the process is examined.

In chapter four the need for judicial oversight in the process of execution on mortgaged residential property is discussed. The chapter commences with a comparative survey of the practices in South Africa, Uganda and the United Kingdom. The arguments for and against judicial oversight are critically analysed in this chapter. An in - depth analysis of the relevant circumstances that need to be considered by courts in providing judicial oversight is conducted. The chapter is partly informed by empirical data.

Finally, chapter five provides an analysis of the findings of the study. The necessary conclusions and recommendations are also made in this chapter.

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<sup>62</sup> Chenwi (n 5 above) 105.

## CHAPTER TWO: THE STATUS OF THE RIGHT TO ADEQUATE HOUSING AND MORTGAGE LAWS IN MALAWI

### 2.1 Introduction

This chapter discusses the status of the right to adequate housing and mortgage laws in Malawi. The chapter starts by discussing the general overview of the nature of the right to adequate housing. This is followed by an examination of residential secured mortgages in Malawi. The next section discusses the legal framework of mortgages and consumer protection in relation to mortgage transactions.

### 2.2 The right to adequate housing

#### 2.2.1 The nature of the right to adequate housing

The right to adequate housing is of great importance as it is crucial for the enjoyment of economic, social and all other rights.<sup>63</sup> The essence of the right is not captured when interpreted to merely mean shelter provided by having a roof over one's head or viewing shelter as a commodity.<sup>64</sup> The right encompasses the right to live somewhere in security, peace and dignity.<sup>65</sup> Factors such as legal security of tenure; availability of services and infrastructure; affordability; habitability; accessibility; and cultural adequacy are essential components to consider in determining whether particular forms of shelter are adequate.<sup>66</sup> In *The Government of South Africa and others v Grootboom and others* the court held that the right to adequate housing is essential in ensuring dignity and equality.<sup>67</sup> The nature of this right is thus very pertinent to the very existence of any human being.

#### 2.2.2 State obligations

States have duties to respect, protect, promote and fulfil human rights under international human rights law.<sup>68</sup> Malawi, therefore, has the duty to respect, protect, promote and fulfil the right to adequate housing.

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<sup>63</sup> UN Committee on Economic, Social and Cultural Rights 'General Comment No. 4: The right to adequate housing UN Doc E/1992/23 (1992) para 1.

<sup>64</sup> As above.

<sup>65</sup> As above.

<sup>66</sup> As above.

<sup>67</sup> 2001 (1) SA 46 (CC) Paras 23 & 33-34.

<sup>68</sup> SERAC (n 6 above) para. 44.

The duty to respect entails that the state refrains from decisions and actions that would result in the infringement, violation, neglect or abuse of human rights.<sup>69</sup> While the duty to protect entails an obligation to protect people from abuse or threat of their rights by decisions or actions of other people or third parties.<sup>70</sup> This involves the creation and maintenance of an atmosphere or framework of an effective interplay of laws and regulation, enabling individuals to freely realise their rights and freedoms.<sup>71</sup> The duty to promote requires the state to advance the need for people to demand their human rights and for the state to perform corresponding obligations by promoting tolerance, raising awareness and building infrastructures.<sup>72</sup> As for the duty to provide, this requires direct provision of goods and services especially to the disadvantaged.<sup>73</sup> It is more of a positive expectation on the part of the state to move its machinery towards the actual realisation of rights.<sup>74</sup>

This study focuses on the duty of Malawi to protect the right to adequate housing with regard to execution on mortgaged residential property. The duties to respect, promote and fulfil are equally pertinent, however they are not within the scope of this study. However, where need be these obligations are discussed. Of course the limitation of the scope is not to imply that Malawi has fully complied with these obligations since problems in housing rights are widespread in Malawi.<sup>75</sup>

As noted earlier, the duty to protect calls for positive action on the part of the state in fulfilling its obligations.<sup>76</sup> The government of Malawi is required to take measures, such as legislation and regulations, to prohibit financial institutions from interfering with the enjoyment of human rights, specifically the right to adequate housing.<sup>77</sup> The violation that is being addressed in this study is that which is likely to occur when financial institutions execute on mortgaged residential property upon default of a mortgagor. Additionally, the state should put in place an effective framework for seeking redress for violations of rights committed by financial institutions.<sup>78</sup>

### 2.3 Status of the right to adequate housing in Malawi

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<sup>69</sup> SERAC (n 6 above) para. 45.

<sup>70</sup> M Nowak 'Indivisibility of human rights' in R Smith & C Anker *The essentials of human rights* (eds.) (2005)179-180.

<sup>71</sup> SERAC (n 6 above) para 46.

<sup>72</sup> As above

<sup>73</sup> G Kamchedzera & C Banda (2002) 'We are people too : The right to development, the quality of rural life, and the performance of legislative duties during Malawi's first five years of multiparty politics' (2002) 11.

<sup>74</sup> As above.

<sup>75</sup> Universal Periodic Review Report: Malawi 4 January 2011 UN Doc A/HRC/16/4 <<http://www2.ohchr.org/english/bodies/hrcouncil/docs/16session/A-HRC-16-4.pdf>> (accessed 8 July 2012).

<sup>76</sup> S Leckie 'The right to adequate housing' in A Eide, A Krause & C Rosa (eds) *Economic, Social and cultural rights* (2001) 157.

<sup>77</sup> Mbazira (n 43 above) 230.

<sup>78</sup> Leckie 'The right to adequate housing' in Eide, Krause & Rosa (n 76 above) 157.

The Malawian Constitution has a few socio-economic rights in the bill of rights while others are enshrined in the principles of national policy.<sup>79</sup> The rights expressly recognised in the Malawian bill of rights include the right to family protection,<sup>80</sup> the right to education,<sup>81</sup> cultural and language rights,<sup>82</sup> the right to property,<sup>83</sup> the right to economic activity,<sup>84</sup> the right to development<sup>85</sup> and labour rights.<sup>86</sup> The right to adequate housing is not entrenched in the bill of rights nor is it reflected in the principles of national policy.<sup>87</sup> However, it has been argued that the rights expressly recognised in the bill of rights and even the national state principles can be interpreted to include the right to adequate housing.<sup>88</sup> For instance, the provision on the right to development is broad that it can be interpreted to encompass the right to adequate housing.<sup>89</sup>

Further, Malawi has ratified several treaties that protect the right to adequate housing and these include the ICESCR,<sup>90</sup> the African Charter,<sup>91</sup> the CRC<sup>92</sup> and CEDAW.<sup>93</sup> These treaties have the force of law in Malawi.<sup>94</sup> The Constitution provides that treaties ratified before the 1994 Constitution came into force automatically become part of the laws of Malawi from the date of the Constitution.<sup>95</sup> This is regardless of whether the treaties are domesticated by an Act of Parliament before then or after.<sup>96</sup> On the other hand, treaties ratified after the Constitution became operational do not form part of domestic law unless incorporated or domesticated by an Act of Parliament.<sup>97</sup> As such the provisions of these treaties on the right to adequate housing can be enforced by Malawian courts.<sup>98</sup>

Further, the provision on property and family protection contained in sections 28 and 22 of the bill of rights can be interpreted to include the right to adequate housing. The African Commission in *SERAC* found that the right to adequate housing was implied from article 14 on property and article 18(1) on the right to family protection of the African Charter.<sup>99</sup>

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<sup>79</sup> Mbazira (n 43 above) 220.

<sup>80</sup> Sec 22.

<sup>81</sup> Sec 25.

<sup>82</sup> Sec 26.

<sup>83</sup> Sec 28.

<sup>84</sup> Sec 29.

<sup>85</sup> Sec 30.

<sup>86</sup> Sec 31.

<sup>87</sup> D Chirwa 'A Full Loaf Is Better Than Half: The Constitutional Protection of Economic, Social And Cultural Rights Malawi' (2005) 49 (2) *Journal of African Law* 212-213.

<sup>88</sup> Chirwa (n 19 above) 25-26.

<sup>89</sup> Chirwa (n 19 above) 259.

<sup>90</sup> Acceded 22 December 1993

<sup>91</sup> Acceded 17 November 1989.

<sup>92</sup> Acceded 2 January 1991.

<sup>93</sup> Acceded 12 March 1987.

<sup>94</sup> Chirwa (n 19 above) 271.

<sup>95</sup> Sec 211 (2).

<sup>96</sup> As above.

<sup>97</sup> Sec 211 (1).

<sup>98</sup> Chirwa (n 19 above) 279.

<sup>99</sup> *SERAC* (n 6 above) para 63.

Another option is to interpret the civil and political rights enshrined in the bill of rights, such as the right to life, to encompass the right to adequate housing. This has been done in India where the Constitution does not expressly recognise the right to adequate housing.<sup>100</sup> For instance, in *Shanti Star Builders v Narayan K Totame*<sup>101</sup> the court held that the right to life would take within its sweep the right to food and reasonable accommodation.

From the foregoing, Malawi is under an obligation to protect its citizens from the violation of the right to adequate housing by financial institutions. This is because this right is part of the laws of Malawi as shown in the preceding discussion.

### 2.3.1 Residential secured mortgages in Malawi

Residential secured mortgages are loans that are secured using the home of a mortgagor.<sup>102</sup> The loan would be for any purpose such improving a house, buying the house to stay in or even for other business ventures.<sup>103</sup> In order to understand the aspect of residential secured mortgages in Malawi, this section examines institutions that advance such loans; loan interests rates and access to loans.

#### a. Institutions, interest rate and access

Currently, there are several public and private institutions that offer residential secured mortgages in Malawi. These include banks, micro-finance institutions and even other non-financial institutions.<sup>104</sup> As of 2007, Malawi had a small banking sector comprised of nine banks, two discount houses, one leasing company, eight insurance companies, four development finance institutions, and a growing micro-finance industry.<sup>105</sup> The number of people accessing loans from micro-finance institutions steadily increased from 600,000 in 2008 to 800,000 in 2010.<sup>106</sup>

Malawi experienced high inflation and high interest rates in the decade prior to 2004.<sup>107</sup> It recently had some of the highest interest rates in the world.<sup>108</sup> Mortgage interest rates

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<sup>100</sup> S Muralidhar 'India: The expectations and challenges of judicial enforcement of social rights' in Langford (n 49 above) 112.

<sup>101</sup> (1990) 1 SCC 520.

<sup>102</sup> MOJ – UK (n 34 above) 23.

<sup>103</sup> As above.

<sup>104</sup> Habitat (n 28 above) 60.

<sup>105</sup> As above.

<sup>106</sup> As above.

<sup>107</sup> Houston (n 61 above) 2.

<sup>108</sup> Habitat (n 28 above) 60.

depend on the purpose of the loan.<sup>109</sup> As of 2011, for an owner-occupied house, the rate was at 17.5 per cent and loans for personal or business purposes had an interest rate of 24.5 per cent.<sup>110</sup> Recently, the interest rates have further increased as a result of the 49 per cent devaluation of the currency.<sup>111</sup> This has raised fear of loan repayment default of many bank clients.<sup>112</sup>

The key challenges to accessing mortgage funding in Malawi include the prohibitive eligibility requirements including requisite collateral and high interest rates.<sup>113</sup> This is mostly in the formal financial institutions such as banks.<sup>114</sup> All financial lenders require a substantial deposit (20 per cent of the property value) and collateral in the form of real property.<sup>115</sup> Any property that is not registered cannot be pledged as security and the owners are excluded from loan finance.<sup>116</sup> These represent a high threshold for access to mortgage funding for most Malawians.<sup>117</sup> The great majority of households in Malawi do not earn enough to qualify for any mortgage loans and can only draw on informal loans.<sup>118</sup>

Data on the amount of residential secured mortgages offered by financial institutions is not readily available. Nonetheless, findings of research on housing finance in Malawi provide a picture of these mortgages. For instance, the National Bank of Malawi (NBM) has since 2004 supplied over 949.4 million Malawi Kwacha (MWK) (USD 6.8 million) for the housing sector; and it has invested over MWK 3 billion (USD 21.4 Million) for a mortgage facility.<sup>119</sup> The main prerequisite for loans to be advanced in most financial institutions is use of real property as security.<sup>120</sup> It follows, therefore, that many of the loans advanced by financial institutions in Malawi are secured using residential property.

Further, despite the fact that a majority of Malawians are not able to access loans and use residential property as collateral, a significant number still access these loans. The state cannot therefore stand back and neglect to protect this group from violation of their right to adequate housing.

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<sup>109</sup> Manda, Nkhoma & Mitlin (n 27 above) 9.

<sup>110</sup> As above.

<sup>111</sup> C Chiyembekerza 'Market experts fear interest rate may rise' <<http://www.mwnation.com/business-news-the-nation/8404-market-experts-fear-interest-rate-may-rise>> (5 august 2012 accessed 2012).

<sup>112</sup> As above.

<sup>113</sup> Houston (n 61 above) 2.

<sup>114</sup> Manda, Nkhoma & Mitlin (n 27 above) 16.

<sup>115</sup> Habitat (n 28 above) 61.

<sup>116</sup> As above.

<sup>117</sup> Habitat (n 28 above) 60.

<sup>118</sup> As above.

<sup>119</sup> Habitat (n 29 above) 63.

<sup>120</sup> As above.

## 2.4 Legal and regulatory framework of mortgages in Malawi

### 2.4.1 Overview of mortgages in Malawi

Mortgages are essential socio – economic development tools that enable individuals to acquire homes, make investments and access capital.<sup>121</sup> A mortgage is designed to provide mortgagees with a valuable form of security for loan money advanced by them.<sup>122</sup> In *Santley v Wilde*<sup>123</sup> a mortgage was defined as ‘a disposition of some interest in land or other property, as a security for the payment of a debt or the discharge of some other obligation for which it is given’. Basically, a mortgage is a conveyance of land as security for the payment of a debt or the discharge of some other obligation.<sup>124</sup>

The main statute that regulates mortgage transactions in Malawi is the Registered Land Act.<sup>125</sup> According to section 2 of the Act:

a charge [or mortgage] means an interest in land securing the payment of money or money’s worth or the fulfilment of any condition, and includes a sub-charge and the instrument creating a charge.

A charge is basically a species of a mortgage.<sup>126</sup> A charge basically gives the chargee certain rights in respect of possession and sale over the property charged as security for the loan.<sup>127</sup> A mortgage actually invests the mortgagee with an interest in the secured property.<sup>128</sup> Thus, the term mortgage is used in this study to refer to both charges and mortgages despite the fact that the Registered Land Act uses charge in its provisions and not mortgage. It is worth noting that the right to entry into possession or foreclosure transactions were repealed from the laws of Malawi.<sup>129</sup>

Mortgages transactions encompass several aspects such as the requirement for the mortgagee’s duty to act in good faith, the power of sale; and the equity of redemption available to mortgagors.<sup>130</sup> However, this study will only focus on equity of redemption and power of sale as these are directly connected to the subject matter.

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<sup>121</sup> *Folscher* (n 11 above) para 39.

<sup>122</sup> K Gray *Elements of land law* (1987) 563.

<sup>123</sup> (1899) 2 Ch 474.

<sup>124</sup> *Ojienda* (n 14 above) 206.

<sup>125</sup> n 10 above.

<sup>126</sup> As above.

<sup>127</sup> C Harpum, S Bridge, M Dixon *The Law of real property by R Megarry and W Wade* (2008) 1079.

<sup>128</sup> As above.

<sup>129</sup> Sec 74 RLA.

<sup>130</sup> G Mwaiondola ‘The modern law of mortgages in Tanzania: The role of the Land Act, 1999’ (2007) 196 – 200.

### a. Equity of redemption

Equity of redemption is the right of the borrower to redeem the security by paying off the debt.<sup>131</sup> It is based on recognition that the mortgagee, as a money lender, usually has superior bargaining power and economic capacity which are capable of being abused to the detriment of the mortgagor.<sup>132</sup> Equity of redemption avails to the mortgagor before the sale of mortgaged property, and cannot be invoked after the property is sold.<sup>133</sup> Where irregularities are found after exercise of the power of sale, the mortgagor has remedies in damages against the person exercising the power.<sup>134</sup> Equity of redemption is provided for in section 66 of the Registered Land Act as follows:

- (1) Subject to this section, a chargor, on payment of all money due and owing under the charge at the time of payment or on fulfilment of any condition secured thereby and on payment of any costs or expenses properly incurred by the chargee in exercising any power conferred on him by section 68, may redeem the charged land or lease or charge at any time before it has been sold under section 71, and any agreement or provision which purports to deprive the chargor of this right of redemption shall be void. For the purposes of this subsection, land, a lease or a charge shall be deemed to have been sold when a bid has been accepted at the auction sale.

‘Clogs’ or ‘fetters’ on equity of redemption are not acceptable.<sup>135</sup> This means the mortgagor cannot be prevented from eventually redeeming his property on repayment of the sum advanced together with interest due and the mortgagee’s proper costs; and also that, after redemption, he is free from all the conditions of the mortgage.<sup>136</sup> Thus, any term that deprives a mortgagor of the right of redemption is void.<sup>137</sup>

### b. Power of sale

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<sup>131</sup> *Logart v First Merchant Bank* HC Civil cause 455 of 2004 (unreported) 28.

<sup>132</sup> KJ Gray & PD Symes *Real property and real people: Principles of land law* (1981) 513 – 514.

<sup>133</sup> *Chikumbanje v Indefund Limited* (Chikumbanje case) HC Civil cause No 340 of 2003 (unreported).

<sup>134</sup> Sec 71 (3) RLA.

<sup>135</sup> *Jones v Morgan* [2001] EWCA Civ 995, (2001).

<sup>136</sup> Harpum, Bridge & Dixon (n 127 above) 1142.

<sup>137</sup> Sec 66 (1) RLA.



The power of sale is a statutory right vested in the mortgagee, to sell property used as security in mortgage transactions to recover an outstanding debt.<sup>138</sup> Generally, the statutory power of sale is exercisable without any order of court.<sup>139</sup>

In Malawi, section 68 of the Registered Land Act provides for this right as one of the remedies available to the mortgagee with the other being appointment of a receiver.<sup>140</sup> This right arises when the mortgagor has defaulted for a month on the loan instalments or when the loan is due.<sup>141</sup> The mortgagee upon such default has to inform the mortgagor in writing to make the necessary payments, if this is not settled within three months the mortgagee is entitled to sell the property without further notice to the mortgagor.<sup>142</sup>

Courts are usually reluctant to restrain the mortgagee from exercising the statutory power of sale.<sup>143</sup> Despite this reluctance, some circumstances will suffice to restrain a mortgagee from exercising the power of sale. Hence, the mortgagor can approach a court for a stay of execution or to pay the debt by instalments.<sup>144</sup> For instance, where it is proven that the power is exercised oppressively or irregularly, a stay of execution order may be granted.<sup>145</sup> Other conditions precedent for granting an equitable remedy must also be satisfied such as the mortgagor coming to court with clean hands.<sup>146</sup> He must also make full disclosure of material facts related to the case.<sup>147</sup> A court will not grant an application for a stay order where it is sought merely as a delaying tactic.<sup>148</sup>

Essentially, the regulation of mortgages has developed mostly to advance the benefits of mortgagees to the detriment of the interests of mortgagors.<sup>149</sup> The power of sale in most African countries, including Malawi, has occasioned great suffering to families as residential property is lost and families are left homeless.<sup>150</sup> It is against this backdrop that the study seeks to advance the need for judicial oversight at the time of initiating the power of sale by the mortgagee.

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<sup>138</sup> *New Building Society v Gondwe* (Gondwe case) SCA Civil application no 21 of 1994 (unreported).

<sup>139</sup> Harpum, Bridge & Dixon (n 127 above) 104.

<sup>140</sup> Sec 68 (a) (b) of the Registered Land Act.

<sup>141</sup> *Msonda v New Building Society* (Msonda case) 13 MLR 265.

<sup>142</sup> Sec 71 RLA. See also *Mlotha v New Building Society* (Mlotha case) HC Civil cause no 2539 of 2000 (unreported) where the court held that where the first notice has been served as required under the RLA, the failure to serve a subsequent notice did not infringe on the human rights of the mortgagor.

<sup>143</sup> *Mkhumbwe v National Bank of Malawi* (Mkhumbwe case) HC, Civil cause no 2702 of 2000 (unreported).

<sup>144</sup> Sec 11, Courts Act.

<sup>145</sup> *Bautula v New Building Society* (Bautula case) HC Civil cause no 285 of 2004 (unreported).

<sup>146</sup> *Mkhubwe* (n 143 above).

<sup>147</sup> *Kasema v National Bank of Malawi* (Kasema case) Civil cause no 2299 of 2001 (unreported).

<sup>148</sup> *George Gikubu Mbuthia & others v Small Enterprises Finance Ltd & another* Civil App No 54 of 1998 at Nairobi (unreported).

<sup>149</sup> *Housing Finance Company of Kenya Ltd v Palm Homes Ltd & others* cited in Ojienda (n 14 above) 227.

<sup>150</sup> Ojienda (n 14 above) 248.

## 2.4.2 Mortgagors and Consumer protection

'The consumer, unlike other classes with claims on public bounty, is everybody all the time'.<sup>151</sup> Thus, mortgagors are consumers who are entitled to protection. The concept of consumer protection has developed over the years to protect consumers from unfair and abusive practices of traders.<sup>152</sup> In Malawi, the Consumers Protection Act (CPA)<sup>153</sup> was enacted with this in mind. However, the CPA fails to cover mortgage transactions, in that no protection is obtainable to mortgagors from the unfair practices of mortgagees.<sup>154</sup>

Further, the Micro-Finance Act and Finance Services Act were enacted to provide regulation and supervision of the finance market.<sup>155</sup> However, these statutes are not effectively enforced to protect mortgagors. As a result, mortgagors suffer at the hands of unregulated financial institutions, for instance, by being charged exorbitant interest rates.<sup>156</sup> These high interest rates present a high probability of default with the result that mortgagors, who use their primary residence as security, are likely to lose their homes. Thus, the right to adequate housing is infringed upon.

It is therefore imperative that the CPA be amended to afford protection to mortgagors thus ensuring protection of the right to adequate housing. Further, mechanisms should be put in place to ensure the effective regulation of the finance market through the Micro – Finance Act and the Finance Services Act.

## 2.5 Conclusion

The right to adequate housing is very essential for the enjoyment of all other human rights. This right is not entrenched in the Constitution of Malawi. However, it can be implied from other rights, such as the right to development, contained in the bill of rights and treaties such as the ICESCR ratified by Malawi. A survey of residential secured mortgages in Malawi reveals high interest rates that present a high probability of default. Mortgages are mainly regulated by the Registered Land Act which provides for the power of sale and equity of redemption. These aspects are directly linked to the subject matter of the study. Further, consumer protection has been discussed in relation to mortgage transactions. From the foregoing discussion, whereby the power of sale is reluctantly restrained by courts applying

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<sup>151</sup> Molony Committee on Consumer Protection (1961) as quoted in R Lowe & G Woodroffe *Consumer Law and Practice* 4<sup>th</sup> edition (1995) 1.

<sup>152</sup> Nyirenda (n 20 above) 5.

<sup>153</sup> Act of 2003.

<sup>154</sup> Nyirenda (n 20 above) 43.

<sup>155</sup> Reserve Bank of Malawi (RBM) 'Microfinance and capital market financial sector report' (2010) 2 <<http://www.rbm.mw/documents/mcsu/Microfinance%20and%20Capital%20Markets%20Financial%20Sector%20Report%202010.pdf>> (accessed 27 August 2012).

<sup>156</sup> Manda, Nkhoma & Mitlin (n 27 above ) 9.

the common law, it is clear that human rights have to be infused in mortgage transactions. Thus, the rights of mortgagors will be balanced against the interests of financial institutions.

## CHAPTER THREE: INFUSING HUMAN RIGHTS IN MORTGAGE TRANSACTIONS

### 3.1 Introduction

Human rights and private law are generally looked at from different perspectives.<sup>157</sup> The purpose of this chapter is to demonstrate how human rights can be infused in mortgage transactions which are essentially in the private law domain. The current trends where human rights are applied in the private law domain are discussed. This is followed by a discussion of the concept of due diligence and factors that necessitate the use of a human rights based approach in mortgage transactions. In order for such a process to be effective, the necessary stakeholders are identified and their roles are described.

### 3.2 Private law and public law divide: Recent trends

Private law is traditionally perceived as being concerned with the legal regulation of relationships between private parties – in such areas as family law, property law and contractual law.<sup>158</sup> The distinction between the private law and public law spheres may at times not be apparent.<sup>159</sup> This study proceeds on the basis that the public law sphere is where the state is the actor; while the private law sphere has private entities or non - state actors.<sup>160</sup>

The strict adherence to the private/public divide results in shielding the private sphere from human rights values.<sup>161</sup> However, there is now increased acceptance of how private and public law are intertwined.<sup>162</sup> This can be observed from recent trends where states are held liable for violation of rights as a result of domestic violence;<sup>163</sup> transnational corporations are being held liable for human rights violations;<sup>164</sup> the advocating for human rights inclusion in businesses for instance through the United Nations Global Compact<sup>165</sup> and the inclusion of the horizontal application of human rights in the constitutions of South Africa<sup>166</sup> and Kenya.<sup>167</sup> With human rights being infused into the private law sphere, it is imperative for courts to

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<sup>157</sup> D Chirwa 'The horizontal application of constitutional rights in a comparative perspective' in *Law, democracy & development* (2006) 10 (2) 21.

<sup>158</sup> Liebenberg, S (2009) 'Socio-economic rights and their impact on private law' <<http://www.phuhlisani.com/oid%5Cdownloads%5Csecuring%20SER%20workshop%20report%2031%20Aug%20to%202%20Sep%2009%20draft%203%20w%20exec%20summary.pdf>> (accessed 12 September 2012).

<sup>159</sup> HJ Steiner, P Alston, R Goodman *International Human Rights in context: Law, politics, morals* 3<sup>rd</sup> ed (2007) 213.

<sup>160</sup> As above.

<sup>161</sup> As above. .

<sup>162</sup> As above.

<sup>163</sup> *Opuz v Turkey* [2009] ECHR 3340/02 (9 June 2009).

<sup>164</sup> Joseph 'Liability of multinational corporations' in Langford (n 49 above) 613.

<sup>165</sup> <<http://www.unglobalcompact.org>> (accessed 17 August 2012).

<sup>166</sup> Sec 8 (2).

<sup>167</sup> Sec 20.

balance human rights and the doctrines of the private sphere.<sup>168</sup> Indeed, such common law doctrines as freedom of contract ought to be respected; however such doctrines should not be elevated above the human rights value system.<sup>169</sup>

From the foregoing, the study contends that human rights should be infused in mortgage transactions. This will bring about a balancing exercise of human rights and, contractual and commercial principles. This will ensure that where a mortgagor uses a primary residence as security, the right to adequate housing is protected. For this to be possible, a mortgagee should be required to obtain a court order before executing on mortgaged residential property. The court, in such a case, will be able to strike a balance by considering the human rights implications and the contractual, commercial and other relevant factors of the mortgage transaction.<sup>170</sup> Courts will equally need to consider the inequalities in bargaining power inherent in relationships between financial institutions and their clients.<sup>171</sup> In that way, courts will not treat mortgage transactions just as any other commercial transactions.<sup>172</sup>

In advancing the incorporation of human rights into mortgage transactions, it is imperative to discuss the concept of due diligence. This concept has emerged with the acknowledgment of human rights applicability in the private sphere.<sup>173</sup>

### 3.3 Due diligence and mortgage transactions

The delineations of the state's duties regarding human rights in the private sphere are currently underdeveloped in international jurisprudence.<sup>174</sup> In *Velásquez Rodríguez v Honduras*,<sup>175</sup> the court held that when a state allows private persons or groups to act freely and with impunity to the detriment of the rights recognised, it would be in clear violation of its obligations to protect the human rights of its citizens.<sup>176</sup> The court further held that a state must take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur.<sup>177</sup>

The concept has equally been applied in various cases of domestic violence against women. For instance, in the cases of *Kontrova v Slovakia*<sup>178</sup> and *AT v Hungary*<sup>179</sup> the states were

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<sup>168</sup> Liebenberg ( n 158 above) 2-3.

<sup>169</sup> As above.

<sup>170</sup> Liebenberg ( n 158 above) 4.

<sup>171</sup> As above.

<sup>172</sup> As above.

<sup>173</sup> As above.

<sup>174</sup> Joseph 'Liability of multinational corporations' in Langford (n 49 above) 615.

<sup>175</sup> IACHR (29 July 1988) Ser C No 4.

<sup>176</sup> As above para 136.

<sup>177</sup> As above.

<sup>178</sup> ( 31 May 2007) App No 7510/04.

<sup>179</sup> ( 26 January 2005) Communication No 2/2003, Committee on ED AW, UN Doc CEDAW/C/32/2/2003.

held liable for violation of the human rights of the complainants as a result of failing to exercise due diligence to prevent the violations and protect the complainants. Further, the concept has been adopted in the United Nations general comments such as General Recommendation 19 of the Committee on the Elimination of Discrimination against Women,<sup>180</sup> which at paragraph 9 provides that: ‘States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence’.

The concept of due diligence requires the state to take action to prevent human rights violations, and to investigate, prosecute and punish them when they occur.<sup>181</sup> Where the state fails or omits to take preventive or protective action, in fulfilling such duty, the state is liable for the human rights violations occasioned.<sup>182</sup>

It is therefore contended that Malawi has a duty to be duly diligent in preventing human rights violations and protecting the rights of its citizens. In mortgage transactions, the state is obliged to be duly diligent in preventing the violation of human rights of the mortgagor, particularly, the right to adequate housing, as would be perpetrated by the mortgagee. Where such violation occurs, the duty is heavily weighed on the state to investigate, prosecute and punish the mortgagee. Further, there is need for avenues for requisite redress to be available.

### **3.4 Factors in support of infusing human rights in mortgage transactions**

There are many factors that support the infusion of human rights in mortgage transactions. These include the adverse effects of losing a home and the developmental implications of a country, to state but a few.

In *Mkhumbwe* the court stated that fairness and justice demands that where a mortgagor fails to repay a debt, the mortgagee is entitled to recourse of the security irrespective of the hardship on the borrower.<sup>183</sup> However, this view can be counteracted with the holding in *Olga Tellis and others v Bombay Municipal Corp and others*<sup>184</sup> where the court held that depriving someone of their home is essentially depriving them of their livelihood.<sup>185</sup> There are psychological effects that come as a result of losing a home through mortgage transactions;

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<sup>180</sup> UN Doc A/47/38 (1992) para 9.

<sup>181</sup> JF Sherman & A Lehr ‘Human rights due diligence: Is it too risky’ 3 <[http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper\\_55\\_shermanlehr.pdf](http://www.hks.harvard.edu/m-rcbg/CSRI/publications/workingpaper_55_shermanlehr.pdf)> (accessed 10 September 2012).

<sup>182</sup> As above.

<sup>183</sup> n 143 above.

<sup>184</sup> AIR (1986) SC 180.

<sup>185</sup> As above para 32.

such as depression, stress, fear and hopelessness among other things.<sup>186</sup> Additionally, the loss of a home deprives one of human dignity and other rights as the right to family protection.<sup>187</sup>

The loss of a home also affects personal development and consequently the development of the state.<sup>188</sup> As one woman who was about to lose her home because of a mortgage put it:

This is not only a house to me. This is a home, my source of income, a legacy that I would like to leave for my children. With this house, I want to break the chain of poverty that has been handed within my family from generation to generation.<sup>189</sup>

It is observed, therefore, that when many people lose their homes through mortgage transactions, it contributes to growing levels of poverty; consequently the development levels of a country are adversely affected.<sup>190</sup> The need to infuse human rights can therefore not be undermined. For this process to be effective, there are various stakeholders that have to fulfil the duties that are bestowed on them.

### 3.5 Key stakeholders

Realisation of human rights is an inclusive enterprise.<sup>191</sup> In ensuring infusion of human rights in mortgage transactions, diverse stakeholders have to be involved. These are the state, mortgagors, financial institutions, national human rights institutions and civil society organisations.

#### 3.5.1 The State

The state is the primary duty bearer that is legally obliged to provide protection of human rights under its national constitution, and legal system.<sup>192</sup> Human rights are most effectively

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<sup>186</sup> Michel A 'Peoples panel: The psychological cost of US foreclosure' 29 May 2012 <http://www.guardian.co.uk/commentisfree/2012/may/29/us-foreclosures-peoples-panel> (accessed 20 August 2012).

<sup>187</sup> *Occupiers* (n 2 above) para 18.

<sup>188</sup> *Habitat* (n 28 above) 60.

<sup>189</sup> Words of Elsie Gundwana quoted in P De Vos 'On banks judges and the right to adequate housing' 13 April 2011 <<http://constitutionallyspeaking.co.za/on-banks-judges-and-the-right-to-housing/>> (accessed 1 June 2012). Her case became a landmark decision. In *Elsie Gundwana v Steko Development and others* (Gundwana case) [2011] ZACC 14) the Constitutional Court held that there is need for judicial oversight when executing on mortgaged residential property.

<sup>190</sup> UN Special Rapporteur on adequate housing 'Promotion and protection of human rights: Human rights questions including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms' UN Doc A/67/286 (2012) paras 29-30 <<http://www.ohchr.org/Documents/Issues/Housing/A-67-286.pdf>> (accessed 12 September 2012).

<sup>191</sup> CA Odinkalu 'Why more Africans don't use human rights language (2001)' in C Heyns, & K Stefiszyn, K (eds) (2006) *Human rights, peace and justice in Africa: A reader* (2006) 186.

<sup>192</sup> AA An-Na'im 'Introduction: Expanding legal protection of Human Rights in African contexts' in AA An-Na'im *Human rights under African constitutions: Realizing the promise for ourselves* (2003) 1.



protected at the domestic level.<sup>193</sup> The main institutions tasked with this process are the three arms of government: Executive, Legislature and the Judiciary.

The UN Special Representative to the Secretary General (SRSG) on Business and Human Rights in his report titled 'Protect, respect and remedy' emphasises the state's duty to protect individual rights against abuse by non-state actors.<sup>194</sup> States are encouraged to introduce regulatory measures to strengthen the legal framework governing human rights and business, as well as to provide mechanisms for the enforcement of such obligations.<sup>195</sup> This involves ensuring that investigative processes take place where violations are alleged, as well as making provision for redress and punishment where required.<sup>196</sup> The effectiveness of human rights protection requires institutional capacity and political will on the part of the state.<sup>197</sup> Otherwise human rights will become mere aspirations even with forward-looking legal frameworks.<sup>198</sup>

### 3.4.1.1 The Executive, Legislature and Judiciary in Malawi

The duties of the Executive, Legislature and Judiciary in Malawi are provided for in Chapters VI, VIII and IX of the Constitution of Malawi. The mechanisms for checks and balances are also provided in these chapters.

#### a. The Executive

The duty of the Executive as provided for in section 7 of the Constitution is to initiate policies and legislation that promotes the 'express wishes' of Malawians and to promote principles of the Constitution. Sections 78-102 of the Constitution, vests executive power in the President. It is therefore incumbent on the Executive branch in Malawi to initiate laws and policies that will ensure the protection of the right to adequate housing of a mortgagor. The President, as the head of the Executive, will have to take a leading role in this endeavour so as to ensure that the Constitution is upheld.<sup>199</sup> In order to attain the full protection of this right, the Executive will further have to avoid domineering and controlling the Legislature and the

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<sup>193</sup> F Viljoen *International human rights law in Africa* (2007) 10.

<sup>194</sup> United Nations, Special Representative to the Secretary-General on Business and Human Rights (SRSG-BHR) 'Protect, respect and remedy: A Framework for business and human Rights' UN Doc A/HRC/8/5 (2008), para 18 <<http://www.reportsand-materials.org/Ruggie-report-7-Apr-2008.pdf>> (accessed on: 29 July 2012).

<sup>195</sup> As above.

<sup>196</sup> D Bilchitz 'The Ruggie framework: An adequate rubric for corporate human rights obligations' in *SUR Journal* 2010 (7) 2 204.

<sup>197</sup> AA An-Na'im 'Introduction: Expanding legal protection of Human Rights in African contexts' in An-Na'im (n 192 above) 4.

<sup>198</sup> DS Zimber 'Between the insidious and the sanitised: National Human rights institutions and human rights language in Africa' in J Akokpari & DS Zimber *Africa's Human Rights Architecture* (2008) 122.

<sup>199</sup> Sec 89 of Constitution.



Judiciary.<sup>200</sup> This will ensure that these branches of government are independent to perform their duties towards achieving this goal.<sup>201</sup>

## **b. The Legislature**

The duty and functions of the Legislature are provided for in section 8 of the Constitution as follows. The Legislature generally performs three main functions; law-making, representation and oversight.<sup>202</sup> However, the Legislature is poorly funded and thus greatly hampered in performance of its functions.<sup>203</sup> The Legislature in Malawi needs to enact and amend necessary laws to achieve the goal of protecting the right to adequate housing of a mortgagor. Further, the Legislature should provide oversight of the actions of the Executive in this regard. In addition, adequate funds will have to be allocated to the Legislature for the realisation of this goal.

## **c. The Judiciary**

Section 9 of the Constitution provides for the function of the Judiciary. The independence of the judiciary is entrenched in the Constitution; however it has been challenged on several occasions, in the past, by the Executive and the Legislature.<sup>204</sup> Nonetheless, the Judiciary in Malawi has been found to be impartiality and that it effectively acts as a custodian of the Constitution.<sup>205</sup> The Judiciary in Malawi has a pivotal role in ensuring that the right to adequate housing of mortgagors is effectively protected. This will be achieved by taking into consideration all relevant circumstances when an application to execute on mortgaged residential property is sought. The decisions have to be arrived at in an impartial and independent manner. Additionally, as provided in section 46(3) of the Constitution, courts will have to make orders that are necessary and appropriate to prevent violations of the mortgagors' right to adequate housing.

Further, the Judiciary in Malawi is poorly funded and not easily accessible.<sup>206</sup> The judiciary is understaffed resulting in backlog of cases.<sup>207</sup> Hence, adequate funding will have to be allocated to the Judiciary for it to function effectively; and mechanisms will have to be set and

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<sup>200</sup> N Patel, R Tumbulasi, B Molande & A Mpesi *Consolidating democratic governance in Southern Africa: Malawi* (2007) 24.

<sup>201</sup> As above.

<sup>202</sup> As above.

<sup>203</sup> Patel, Tumbulasi, Molande & Mpesi (n 200 above) 38.

<sup>204</sup> Patel, Tumbulasi, Molande & Mpesi (n 200 above) 45.

<sup>205</sup> As above.

<sup>206</sup> FE Kanyongolo *Malawi: Justice sector and the rule of law* (2006) 131-142.

<sup>207</sup> As above.

implemented to improve accessibility. For instance, there should be awareness raising of judicial functions; courts should be built at accessible distances; and there should be provision of legal aid to ensure that the costs of judicial proceedings are mitigated.<sup>208</sup>

### 3.5.2 Mortgagors

The advancement of human rights inclusion in mortgage transactions would be incomplete if the duties of the mortgagors are not examined. Mortgagors are obliged to pay the debt they owe under mortgage transactions.<sup>209</sup> As stated in *Jaftha* 'it is important to bear in mind that there is a widely recognised legal and social value that must be acknowledged in debtors meeting the debts that they incur'.<sup>210</sup>

A law which is not even handed by only advancing the interests of the mortgagor would not be just.<sup>211</sup> Financial institutions hold depositors funds and are accountable to their clients.<sup>212</sup> Thus, where mortgagors without good cause fail to fulfil their obligations in repaying loans, the business of financial institutions is detrimentally affected.<sup>213</sup> Consequently, financial institutions would avert advancing loans to those who use primary residences as security.<sup>214</sup> In turn, with mortgage finance being remote, the private means of accessing housing which assists the state in realisation of the right to adequate housing would also be trampled upon.<sup>215</sup> The result would be that the advocacy for human rights inclusion in mortgage transactions would be illusory, as mortgage facilities needing such inclusion would be remote.

### 3.5.3 Financial institutions

Businesses constitute powerful forces capable of generating economic growth, reducing poverty and increasing demand for the rule of law.<sup>216</sup> They contribute to the realisation of a wide range of human rights.<sup>217</sup> However, businesses such as financial institutions pose a threat to society when their scope and power is beyond the reach of institutional

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<sup>208</sup> Patel, Tambulasi, Molande & Mpesi (n 200 above) 42.

<sup>209</sup> *Folscher* (n 11 above) para 39.

<sup>210</sup> *Jaftha* (n 31 above) para 57.

<sup>211</sup> *Mkhumbwe* (n 143 above).

<sup>212</sup> As above.

<sup>213</sup> As above.

<sup>214</sup> *Folscher* (n 11 above) para 39.

<sup>215</sup> *Standard Bank of South Africa Ltd v Bekker* (*Bekker case*) Case nos 6628, 6635, 6644, 7032 & 7047/2011 para 20.

<sup>216</sup> UNSRSG- BHR (n 194 above) para 18.

<sup>217</sup> As above.

underpinnings that allow them to be accountable, function smoothly and ensure their political sustainability.<sup>218</sup>

The 'Ruggie framework' relays the fact that businesses have the responsibility to respect human rights.<sup>219</sup> The report articulates that 'to respect rights essentially means not to infringe on the rights of others'.<sup>220</sup> Financial institutions, in Malawi, are therefore tasked with ensuring that their businesses do not infringe on the rights of their customers such as mortgagors. They should ensure that when they seek to execute on mortgaged residential property; they do that without infringing on the right to adequate housing of a mortgagor by applying for an execution order from a court of law.<sup>221</sup> Thus, the court will be able to consider the interests of the financial institution and those of the mortgagor to come up with an amicable decision.<sup>222</sup> Additionally, such an order will provide a safety net to financial institutions as the execution process will be judicially sanctioned.<sup>223</sup>

Financial institutions in Malawi do not have alternative dispute resolution forums. Thus as was held in *ABSA Bank Ltd v Ntsane*,<sup>224</sup> the financial services sector in Malawi should seriously consider the creation of a speedy and inexpensive arbitration tribunal for facilitating proportional resolutions of disputes between mortgagees and mortgagors.<sup>225</sup> Thus amicable solutions will be reached with dignity and with less expenses incurred.<sup>226</sup>

### 3.5.4 National human rights institutions

National human rights institutions (NHRIs) are usually autonomous, quasi-governmental institutions.<sup>227</sup> Their tasks include advising governments on human rights protection; review of human rights legislation; preparation of human rights reports; and investigation of complaints of human rights abuses.<sup>228</sup> One of the main NHRIs are national human rights commissions (NHRCs).<sup>229</sup> The functions of NHRCs are greatly enhanced where there are independent judicial and representative legislative branches, disciplined law enforcement forces and a vocal civil society.<sup>230</sup>

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<sup>218</sup> As above.

<sup>219</sup> Bilchitz (n 196 above) 204.

<sup>220</sup> SRSG- BHR (n 194 above ) para 18.

<sup>221</sup> *Mkhize v Umvoti Municipality (Mkhize case)* [2011] ZASCA 184 para 19-20.

<sup>222</sup> *Occupiers* (n 2 above) para 23.

<sup>223</sup> MOJ – UK (n 34 above) 27.

<sup>224</sup> 2007 (3) SA 554 (T).

<sup>225</sup> n above paras 97-98.

<sup>226</sup> *Occupiers* (n 2 above) para 42.

<sup>227</sup> D Weissbrodt & Connie de la Vega International human rights law: An introduction (2007) 346.

<sup>228</sup> As above.

<sup>229</sup> Human Rights Watch 'Protectors or Pretenders? Government Human Rights Commissions in Africa (2001) in Heyns & Steffiszyn (n 191 above) 181.

<sup>230</sup> As above.

In Malawi, there is the Malawi Human Rights Commission (MHRC) established under section 129 of the Constitution and its operations are regulated by the Human Rights Commission Act, 1998.<sup>231</sup> The primary functions of the MHRC are the promotion and protection of human rights and investigation of violations of human rights accorded by the Constitution or any other law.<sup>232</sup> The Commission's broad mandate entitles it to take up matters to court as a party, or on behalf of complainants, and to act as *amicus curiae* where necessary.<sup>233</sup> The MHRC also carries out public awareness campaigns and trainings on human rights.<sup>234</sup> The MHRC is generally regarded as independent but its functions are greatly curtailed due to inadequate resources.<sup>235</sup>

The MHRC is therefore central to the protection of the right to adequate housing of mortgagors. In this role it can conduct investigations on allegations of violation of the right with regard to execution of financial institutions on mortgaged residential properties. Where necessary, the MHRC would have to take matters to court or alternatively conduct mediation to resolve such disputes. It can also ensure awareness of the rights that accord to mortgagors through trainings and awareness campaigns. This should be preceded by baseline studies in which the nature and content of the right to adequate housing is clearly defined and minimum standards for execution on mortgaged residential property are established.<sup>236</sup>

This whole process requires sufficient funds to be allocated to the institution.<sup>237</sup> Further, the MHRC leadership should strengthen staff expertise and capacity through trainings in this area to ensure that the impact is lasting and not temporary.<sup>238</sup> Furthermore, partnership with civil society is equally key to this process.<sup>239</sup>

### 3.5.5 Civil society organisations

Civil society organisations (CSOs) are greatly influential in lobbying for effective human rights systems in Africa.<sup>240</sup> They achieve this by formulating standards, monitoring, advocacy, campaigning, education, conciliation and assistance of victims.<sup>241</sup> CSOs mainly document

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<sup>231</sup> Cap 3:08 Laws of Malawi.

<sup>232</sup> Sec 129.

<sup>233</sup> Electoral Institute for the Sustainability of Democracy in Africa (EISA) 'Malawi Human Rights Commission' <<http://www.eisa.org.za/WEP/malagency1.htm>> (accessed 30 July 2012).

<sup>234</sup> As above.

<sup>235</sup> As above.

<sup>236</sup> C Jacobs 'National Human Rights Institutions and the promotion of democracy and development in Africa' in Akokpari & Zimble (n 198 above) 160.

<sup>237</sup> EISA (n 233 above).

<sup>238</sup> C Jacobs 'National Human Rights Institutions and the promotion of democracy and development in Africa' in Akokpari & Zimble (n 198 above) 154.

<sup>239</sup> As above.

<sup>240</sup> W Mutunga 'Constitutions, law and civil society: Discourses on the legitimacy of people's power' in J Oloka-Onyango *Constitutionalism in Africa: Creating opportunities, facing challenges* (2001) 130.

<sup>241</sup> Weissbrodt & Vega (n 227 above) 359.

and publicise problems, and press for open political processes through which issues are addressed.<sup>242</sup> CSOs are an essential bridge between people and their governments.<sup>243</sup> However, the problem with most CSOs in Africa is their over reliance on overseas donors for financial and material support.<sup>244</sup> Consequently, the donors become the sources of reference and accountability, and not service of social obligations.<sup>245</sup>

CSOs in Malawi have the role of advancing the need to change the laws and policies to ensure the protection of the right to adequate housing of the mortgagor. Such processes as lobbying, investigating and submitting reports to government on the situation would prove to be influential. This will also require CSOs to build their capacity and expertise by training activists.<sup>246</sup> Further, CSOs will have to source adequate funds. However, strategies should be instituted to ensure that the cause is served and not solely the agendas of donors.

### 3.6 Conclusion

The chapter has shown that it is imperative for the state to proactively ensure the protection of rights in the private law sphere by fulfilling the obligation of due diligence. Other key stakeholders, such as mortgagors, financial institutions, NHRIs and CSOs need to equally execute their duties meritoriously. Consequently, the infusion of human rights in mortgage transactions shall be realised. One of the ways of infusing human rights into mortgage transactions is the requirement for judicial oversight before executing on mortgaged residential property. The need for judicial oversight in this process is the subject of the next chapter.

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<sup>242</sup> CE Wlech 'The NGO Revolution (1995) in Heyns& Stefiszyn (n 191 above) 184.

<sup>243</sup> N Mbelle 'Civil society and the promotion of human rights in Africa' Akokpari & Zimble (n 198 above) 163.

<sup>244</sup> Kampala Declaration on strengthening the human rights movement in Africa (2003).

<sup>245</sup> CA Odinkalu 'Why more Africans don't use human rights language (2001) in Heyns & Stefiszyn (n 191 above).

<sup>246</sup> Kampala Declaration ( n above).

## CHAPTER FOUR: THE NEED FOR JUDICIAL OVERSIGHT IN EXECUTION ON MORTGAGED RESIDENTIAL PROPERTY

### 4.1 Introduction

This chapter discusses the need for judicial oversight in execution on mortgaged residential property. The practises in South Africa, Uganda and the United Kingdom are surveyed. This is followed by a discussion on the rationale for such oversight and a determination of whether judicial oversight provides the necessary protection envisaged in such a process. The different objections that have arisen from the proposal of requiring judicial oversight are then reviewed. Further, the circumstances that need to be considered by courts in such cases are analysed. The chapter is partly informed by empirical findings.

It should be noted that the need for judicial oversight does not imply that a mortgagee does not have to execute on the property of a mortgagor to recover a debt.<sup>247</sup> However, it directs courts to consider all relevant circumstances so as to assess the impact of execution on a mortgagor who is at risk of losing a home.<sup>248</sup> The process also allows for consideration of alternative and reasonable means of settling the debt which does not have dire consequences.<sup>249</sup> Execution in itself is not the problem but rather the process and procedures it entails especially if abused by the mortgagee to deny the mortgagor an opportunity to explore all available avenues and means to avoid losing the property.<sup>250</sup>

### 4.2 Comparable practices in South Africa, Uganda and United Kingdom

#### 4.2.1 South Africa

Section 29 of the Constitution of South Africa provides for the justiciable right to housing. Section 29 (3) prohibits arbitrary evictions by requiring a court order to be obtained where eviction or demolition is sought. Furthermore, rule 46(1) of the High Court Rules as amended on 24 December 2010 provides that:

- (a) No writ of execution against the immovable property of any judgment debtor shall issue until:
  - (ii) such immovable property shall have been declared to be specially executable by the court.....*Provided that, where the property sought to be*

<sup>247</sup> Gundwana (n 189 above) para 53.

<sup>248</sup> As above.

<sup>249</sup> As above.

<sup>250</sup> As above.

*attached is the primary residence of the judgment debtor, no writ shall issue unless the court, having considered all the relevant circumstances, orders execution against such property (emphasis provided).*

The current practice in South Africa requires a court order to be obtained before execution on the primary residence of a judgment debtor is effected thus providing a court with an opportunity to assess all relevant factors of the case.<sup>251</sup> The protection offered by the Constitution and High Court rules is reinforced by the National Credit Act (NCA). For instance, section 129 (1) (a) requires mortgagees to propose mortgagors alternative means of resolving the dispute such as referring the matter to an alternative dispute resolution agent. Thus approaching a court of law to recover the debt is as a matter of last resort.<sup>252</sup>

The protection afforded to mortgagors under the South African legal framework as found in the Constitution, High Court Rules and the NCA is not present in Malawi. It is important to recall that unlike in the South African Constitution, the Malawian Constitution does not have the justiciable right to adequate housing entrenched. Further, there is no provision in the laws requiring judicial oversight in execution on mortgaged residential property nor is there a National Credit Act. Clearly, this presents a high risk to mortgagors who may lose their homes arbitrarily.

Further, the Malawian courts in *Mlotha*<sup>253</sup> and *Mbeakeni*<sup>254</sup> dismissed arguments that the human rights of mortgagors would be implicated upon exercise of power of sale by the mortgagee. This is unlike the South African jurisprudence, where in such cases as *Gundwana*, the court while recognising the importance of banks in providing loans for citizens to access housing, also acknowledged the need for constitutional rights to be respected and given considerations in executing on mortgaged residential property.<sup>255</sup>

There is need, therefore, for the Malawian Constitution to be amended and explicitly provide for the justiciable right to adequate housing and the requirement for a court order in cases of evictions similar to section 26 of the South African Constitution. The Registered Land Act and/or the Courts Act should equally be amended to provide for mortgagees to apply for a court order when seeking to execute on a mortgagor's residential property; for the court to consider all relevant circumstances in the matter. Additionally, there is need to enact a similar National Credit Act as that available in South Africa to safeguard the interests and rights of mortgagors.

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<sup>251</sup> L Mills 'Judges, not registrars, to declare homes executable' 2011 *De Rebus* 51 <[http://www.myvirtualpaper.com/doc/derebus/de\\_rebus\\_june\\_2011\\_opt/2011052602/52.html#53](http://www.myvirtualpaper.com/doc/derebus/de_rebus_june_2011_opt/2011052602/52.html#53)> ( accessed 1 June 2012).

<sup>252</sup> No 34 of 2005.

<sup>253</sup> n 142 above.

<sup>254</sup> n 143above.

<sup>255</sup> Mirugi-Mukundi 'Judicial oversight required for sale in execution of residential property' in *ESR Review* (2011) 12 (1) 7.



## 4.2.2 Uganda

Like in Malawi, the right to adequate housing is similarly not entrenched in the Ugandan constitution.<sup>256</sup> Mortgage transactions in Uganda are mainly regulated by the Land Act<sup>257</sup> and the Mortgage Act 2009<sup>258</sup>. The Mortgage Act was enacted to provide safe guards in mortgage transactions, such as protecting the sanctity of the matrimonial home.<sup>259</sup> This was in recognition of problems faced by families who would only come to know of mortgage agreements entered by spouses at the time they are faced with an eviction.<sup>260</sup>

Section 39 of the Land Act provides for the need for spousal consent to be obtained when a matrimonial home is to be mortgaged. This is equally the requirement under section 5 of the Mortgage Act.

However, this process has not been short of abuse. Justice Murangira recalled cases where spouses connived to refute the consent provided as not being genuine.<sup>261</sup> Some of the cases that have been instituted in the Land Division are by spouses suing the financial institution (mortgagee) and the other spouse (mortgagor) on allegation that the consent obtained was not valid and legitimate.<sup>262</sup> Others, he stated, would actually take someone to personify their spouse to sign the spousal consent form.<sup>263</sup> When the financial institution intends to execute on the property, the actual spouse appears to deny the spousal consent, thus preventing the financial institution from exercising the power of sale.<sup>264</sup>

Nonetheless, the Land Act and the Mortgage Act do offer some degree of protection to mortgagors' right to adequate housing in Uganda. These provisions recognise that mortgages are not merely commercial transactions without any effect on families.<sup>265</sup> There is assurance through the provisions for informed and prior consent of spouses and where there are children, the best interests of the child, regarding their right to adequate housing, are not overlooked.<sup>266</sup> However, this protection is limited only to prospective married mortgagors.

The protection of families present in Ugandan, by requiring spousal consent to mortgage matrimonial property, is not available in Malawian laws. Resultantly, families face hardships and homelessness in cases where a spouse contracted mortgage agreements without the knowledge and consent of the other spouse. It is contended therefore that the Registered

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<sup>256</sup> Onaria (n 1 above) 11.

<sup>257</sup> CAP 227 Laws of Uganda.

<sup>258</sup> Act No 8 of 2009.

<sup>259</sup> Justice Christopher Madrama, Commercial High Court, Uganda (12 October 2012).

<sup>260</sup> Justice Joseph Murangira, Land Division, High Court, Uganda (17 October 2012).

<sup>261</sup> As above.

<sup>262</sup> As above.

<sup>263</sup> As above.

<sup>264</sup> As above.

<sup>265</sup> Mwaisondola (n 130 above) 105.

<sup>266</sup> Mwaisondola, (n 130 above) 147.



Land Act should be amended to incorporate spousal consent, as avails in Uganda, in mortgaging a matrimonial home. With the requirement of judicial oversight put in place, courts of law will therefore be able to consider whether the use of matrimonial homes in mortgages was with prior and informed consent of spouses and to consider the effects of execution on the rights of the child.

#### 4.2.3 United Kingdom

In 2008, the United Kingdom (UK) High Court held in *Horsham Properties Group Ltd v Clark and Beech*<sup>267</sup> that a mortgagee can exercise its power of sale without first getting a court order and this was not incompatible with the mortgagor's human rights.<sup>268</sup> The decision raised a lot of questions and concerns pertaining to its implications.<sup>269</sup> The UK government noted that the case revealed 'a potential gap in the legal protection given to homeowners' and thus initiated consultations for law reform in relation of proposals to amend the law in relation to residential owner-occupier mortgages.<sup>270</sup>

The responses to the proposal among different stakeholders were divergent. According to the Council of Mortgage Lenders (CML)<sup>271</sup> there was no justification for the proposed reform. This was because the 'power of sale and law surrounding it had been in place for many years and there was no evidence of abuse of the power or of consumer detriment'.<sup>272</sup> On the contrary, the Money Advice Trust (MAT)<sup>273</sup> strongly supported the proposal for legislative change.<sup>274</sup> MAT's reasoning was that 'such a change would give a degree of comfort and certainty to borrowers in this position and provide a useful preventative measure'.<sup>275</sup> They further stated that despite that the CML had indicated that the policy of their members was not to exercise the power of sale in practice; this did not offer the same level of protection as that afforded by legislation.<sup>276</sup>

However, despite these consultations and proposals for law reform, the pressure on the UK government by the CML has seemingly stalled any foreseen legal reforms.<sup>277</sup> Nonetheless,

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<sup>267</sup> [2008] EWH (Ch) 2327.

<sup>268</sup> As above.

<sup>269</sup> UK - MOJ (n 34 above) 29.

<sup>270</sup> As above.

<sup>271</sup> CML (n 36 above) para 1.

<sup>272</sup> As above.

<sup>273</sup> MAT 'Response to Ministry of Justice Consultation: Mortgages, power of sale and residential property' 2 <<http://www.moneyadvicetrust.org/images/MAT%20response%20to%20MOJ%20Mortgages%20power%20of%20sale%20and%20residential%20property%20consultation%20paper.pdf>> (accessed 19 July 2012).

<sup>274</sup> As above.

<sup>275</sup> As above.

<sup>276</sup> As above.

<sup>277</sup> 'Orders for sale after Horsham' <<http://www.legalmortgage.co.uk/#/orders-for-sale-after-horsham/4538803765>> (accessed 19 July 2012).

there are other statutes in the UK that were enacted long before the *Horsham* case that provide protection to mortgagors. One of which is the Administration of Justice Act 1970 discussed below.

#### a. Administration of Justice Act, 1970

The Administration of Justice Act 1970 was enacted to provide relief to defaulting mortgagors.<sup>278</sup> The purpose of the statute is to offer protection to mortgagors who are unfortunate to fall in problems with paying their mortgage instalments.<sup>279</sup>

The relevant provision with regard to mortgage transactions is section 36 of the Administration of Justice Act 1970, as amended by section 8 of the Administration of Justice Act 1973.<sup>280</sup> The provision gives discretionary powers to courts to grant relief to mortgagors facing repossession proceedings.<sup>281</sup> The mortgagors have to show that their financial difficulty is likely to be temporary and they will be able to resolve their difficulties within a reasonable period.<sup>282</sup> Where a court is satisfied, it may adjourn proceedings, suspend an order for repossession made or postpone the date for repossession.<sup>283</sup>

There is no particular time designated as a reasonable period to pay off the arrears.<sup>284</sup> This varies according to the facts of the case.<sup>285</sup> For instance in *Cheltenham & Gloucester BS v Norgan*<sup>286</sup> it was ruled that arrears could be paid off in instalments over the entire remaining period of the mortgage. However, the practice seems to be that payment of the arrears will be spread over two - four years as the court deems fit.<sup>287</sup> The Administration of Justice Act therefore offers protection to mortgagors, inclusive those who use primary residences as security for mortgages.

In Malawi, there is no provision as available in the UK Administration of Justice Act which offers protection to mortgagors who happen to temporarily face problems in repaying their loans. The power of sale, in Malawi, is exercisable by the mortgagee as soon as there is any default of any instalment, by the mortgagor.<sup>288</sup> Essentially, mortgagors who temporarily fail to pay an instalment are prone to lose their homes in such circumstances. Thus, the Malawian

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<sup>278</sup> Nyirenda (n 20 above) 45.

<sup>279</sup> As above.

<sup>280</sup> MOJ - UK (n 34 above) 16.

<sup>281</sup> As above.

<sup>282</sup> As above.

<sup>283</sup> As above.

<sup>284</sup> MOJ – UK (n 34 above) 17.

<sup>285</sup> As above.

<sup>286</sup> [1996] 1 All ER 449.

<sup>287</sup> MOJ – UK (n 34 above) 17.

<sup>288</sup> Sec 68 RLA.

legal framework should provide for the need of judicial oversight in all cases where there is sought execution on a mortgagor's primary residence. In this way, space will be created for courts to consider prevailing circumstances and determine whether the default is temporary thus not requiring the sale of a mortgagor's home. Further, as was done in the UK, after the *Horsham* case, the government of Malawi should conduct consultations on the need to amend the law to require judicial oversight in execution on mortgaged residential property. Such consultations, would thus inform the law and policy reform process.

### 4.3 Rationale for judicial oversight in execution on mortgaged residential property

The main thrust for advocating for judicial oversight in execution on mortgaged residential property is to avert the arbitrary deprivation of homes of mortgagors.<sup>289</sup> It ensures that the right to adequate housing is protected as security of tenure is upheld.<sup>290</sup>

Judicial officers interviewed for this research point to the fact that the prevailing law and regulations should provide the requisite protection and safeguards for the human rights of mortgagors. Justice Kiryabwire of the Ugandan High Court, for instance, alluded to the fact that where interest rates are unconscionable, a court of law will strike down such mortgage transactions.<sup>291</sup> However, as has been noted in the study most of the protection offered by legislation is not readily known. In this regard, Justice Madrama of the Ugandan High Court was of the view that sensitisation of the law is thus necessary.<sup>292</sup>

In as much as judicial oversight can guarantee some form of protection of the right to adequate housing, this was viewed as likely to put a strain on the operations of financial institutions in the financial market.<sup>293</sup> Justice Madrama stated that the human rights interplay in such areas of commercial and contractual law needs to be advanced on recognition that commercial and contract law offer rough justice.<sup>294</sup> Conversely, Zunzo Mitole, a lawyer working at National Bank of Malawi (NBM), stated that such a process would not affect the business of the bank.<sup>295</sup> Actually, she was of the view that it would essentially speed up loan recovery thus enhancing the business of the bank.<sup>296</sup>

Nonetheless, the need for judicial oversight seems to be acceptable only in certain circumstances; not necessarily in protection of the right to adequate housing. Justices

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<sup>289</sup> *Mkhize* (n 221 above) para 19 – 20.

<sup>290</sup> *Gundwana* (n 189 above) para 41.

<sup>291</sup> Justice Geoffrey Kiryabwire, Commercial High Court, Uganda (12 October 2012). See also DJ Bakibinga *Law of contract in Uganda* (2001) 92.

<sup>292</sup> Madrama (n 259 above).

<sup>293</sup> Justice E Chombo, High Court, Malawi. Questionnaire response through email of 15 October 2012.

<sup>294</sup> Madrama (n 259 above). In support of his view he made reference to the case of *Fibrosa Spolki Akyjana v Fairbaigl Lawsom Combi Abbour* 1942 2 All ER 122 at 141.

<sup>295</sup> Zunzo Mitole, Legal Counsel, National Bank of Malawi. Questionnaire response through email of 15 October 2012.

<sup>296</sup> As above.

Kapanda and Chombo of the High Court of Malawi, were of the view that judicial oversight was essential specifically where a sale is not in keeping with the terms of the mortgage agreement.<sup>297</sup> The acknowledgment of the need for judicial oversight in certain circumstances, does establish that mortgagors' rights are likely to be infringed upon. Thus, judicial oversight provides the necessary protection, to rights as the right to adequate housing.

In *Jaftha* the court stated that the justification for judicial oversight is the fact that it 'permits a [court] to consider all the relevant circumstances of a case to determine whether there is good cause to order execution'.<sup>298</sup> As such:

this has the effect of preventing the potentially unjustifiable sale in execution of the homes of people who, because of their lack of knowledge of the legal process, are ill-equipped to avail themselves of the remedies currently provided in the [law].<sup>299</sup>

The need for judicial oversight in execution on mortgaged residential property cannot be over – emphasised. It provides guarantee for the interests of mortgagors, such as the right to adequate housing, to be balanced with the commercial interests of the mortgagee.

#### **4.4 Assessing the protection offered by judicial oversight**

This section seeks to assess whether judicial oversight in execution on mortgaged residential property offers protection to the rights of mortgagors, specifically, the right to adequate housing.

Courts have invariably come to the aid of many in ensuring that their rights are protected.<sup>300</sup> The South African jurisprudence provides a compelling justification of the protection that has been afforded to mortgagors by provision of judicial oversight. For instance, in the *Jaftha* case the court acknowledged that the appellants would have lost their homes had it not been for the protection of the court.<sup>301</sup> In *Folscher* it was stated that courts provide an institutionalised mechanism for parties to resolve their differences.<sup>302</sup> Thus, providing judicial oversight enables a court to balance out and reconcile opposing claims in a just manner, taking into account the interest of the parties involved and the specific factors relevant in each particular case.<sup>303</sup>

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<sup>297</sup> Justice Frank E Kapanda, Commercial Division, High Court, Malawi. Questionnaire response through email of 22 October 2012 and Chombo ( n above).

<sup>298</sup> *Jaftha* (n 31 above) para 55.

<sup>299</sup> As above.

<sup>300</sup> Muralidhar 'India: The expectations and challenges of judicial enforcement of social rights' in Langford (n 49 above) 117.

<sup>301</sup> n 31 above , para 47.

<sup>302</sup> *Folscher* (n 11 above) para 15.

<sup>303</sup> *Occupiers* (n 2 above) para 23.

According to Justice Chombo, judicial oversight in execution over mortgaged residential property would inevitably offer protection to the mortgagor's right to adequate housing.<sup>304</sup> Indeed, the judiciary in Malawi has come to the aid of mortgagors despite not expressly using the right to adequate housing as a justification. This can be observed in the case of *VD Chidzankufa t/a V&C Distributors v Nedbank Malawi Limited*.<sup>305</sup> The court granted a stay of execution pending appeal on the consideration that:

It would not be possible for the appellant to be restored substantially to his former position if the judgment against him [was] executed. In that, once the house [was] sold it would not be given back to him...and the appellant had shown that without a stay of execution the appellant and his family [would] be ruined.<sup>306</sup>

On the contrary, Justice Kapanda opined that judicial oversight does not necessarily offer the envisaged protection.<sup>307</sup> He observed that the prevailing legislation and regulations offer the necessary protection and safeguards.<sup>308</sup> However, in cognisance of this, Justice Chombo was of the view that the requirement for judicial oversight will provide a platform for courts to consider the means of the mortgagor and enhance the right to adequate housing where necessary.<sup>309</sup>

From a different perspective, Justice Kiryabwire was of the view that as much as judicial oversight provides protection, it would be preferable to explore other avenues such as consumer protection by the establishment of citizen advice bureaus.<sup>310</sup> In agreement, Justice Chombo was of the view that such advisory services should be set up by the state and that the information should be provided at the on - set of mortgage agreements.<sup>311</sup>

Evidently, in as much as laws and regulations provide protection, judicial oversight guarantees protection to mortgagors by ensuring observance and enforcement of such laws and regulations. This protection would essentially not be available in lieu of judicial oversight. To effectively deliver, Justice Murangira opined that courts will have to be proactive to safeguard the rights of the disadvantaged.<sup>312</sup> He went on to state that, there is need to keep in mind that a bank is a legal person, thus it is equally entitled to the administration of justice.<sup>313</sup>

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<sup>304</sup> *Chombo* (n 293 above).

<sup>305</sup> MSCA 70 of 2009 SC (unreported).

<sup>306</sup> As above.

<sup>307</sup> Kapanda (n 279 above).

<sup>308</sup> As above.

<sup>309</sup> As above.

<sup>310</sup> Kiryabwire (n 291 above).

<sup>311</sup> Chombo (n 293 above).

<sup>312</sup> Murangira (n 260 above).

<sup>313</sup> As above.

## 4.5 Objections to judicial oversight

Objections to judicial oversight over the execution on mortgaged residential property include some of the following arguments:

- a. equity of redemption provides necessary protection to mortgagors;
- b. applications for stay of execution and payment of debt by instalments offer protection;
- c. in exercising freedom of contract mortgagors freely enter into mortgage agreements knowing the dire consequences;
- d. requirement of judicial oversight will result in case- back log in the judiciary;
- e. the process is prone to be abused by mortgagors;
- f. process is likely to be costly and this would be detrimental to mortgagor; and
- g. financial institutions may avoid providing mortgage facilities as this process may adversely affect their business.

The discussion below addresses these objections to ascertain whether they are justifiable or not.

### 4.5.1 Equity of redemption provides adequate protection to mortgagors

Equity of redemption as providing protection is the one arguments advanced in objecting to the need for judicial oversight.<sup>314</sup> Its proponents argue that a mortgagor is given the chance to recovery property through this doctrine which is lost upon sale of the property.<sup>315</sup> However, Justice Madrama acknowledged that as much as this doctrine is present, some unscrupulous financial institutions may not be caught by the hand of the law thus judicial oversight would provide a degree of protection.<sup>316</sup>

Further, where a sale has been completed this doctrine cannot be enforced. Thus, where a home is arbitrarily sold, the mortgagor cannot recover the property. The option available at that point is to sue for damages.<sup>317</sup> However, it is contended that damages would not suffice

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<sup>314</sup> Madrama (n 259 above).

<sup>315</sup> As above.

<sup>316</sup> As above.

<sup>317</sup> *Mkhumbwe* (n 143 above).

in replacing a home. Further, losing a home affects one's dignity; no damages would be able to compensate one's loss of the right to human dignity. Additionally, where a mortgagor sues for damages the process is tedious and thus recovery of funds to obtain another home would be draining.

#### **4.5.2 Applications of stay of execution or payment of debt by instalments offer relevant protection**

It has also been argued that applications by mortgagors to stay execution or pay debt by instalments offer the much needed protection.<sup>318</sup> In Malawi, the Courts Act provides for these processes in sections 11(iv) and 11(x) respectively. The court in *Jaftha* in response to such arguments held that such processes place a burden on the mortgagor, whose home is subject to be sold, to approach a court and show good cause why such execution should be stayed.<sup>319</sup> The court went further to state that such arguments overlook the fact that many debtors are unaware of the protection offered by such provisions and are generally indigent people unable to approach a court of law.<sup>320</sup> The court went further to point out that unlike in cases where the mortgagor applies for a stay of execution or to pay debt by instalments; where the law provides for judicial oversight, the latter process invariably takes place without initiative of the mortgagor.<sup>321</sup>

It is worth noting that courts rarely grant stay of execution in such applications as they follow common law doctrines.<sup>322</sup> Thus, the human rights dimension would add another layer of protection. Alternatively, it may be argued that provisions for applications of stay of execution and payment of debt by instalments in law, actually acknowledge the probable risk of arbitrary loss of property that is present for mortgagors. Insisting on a requirement for judicial oversight would essentially imply reinforcing a practice that is already available in law. It is not acceptable, therefore, to leave unregulated the probability of people losing their homes even in circumstances where the law provides for other avenues. The requirement of judicial oversight would cure such a defect and avert the infringement of the right to adequate housing of mortgagors.

#### **4.5.3 Freedom of contract**

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<sup>318</sup> *Jaftha* (n 31 above) para 47.

<sup>319</sup> As above.

<sup>320</sup> As above.

<sup>321</sup> *Jaftha* (n 31 above) para 55.

<sup>322</sup> Kapanda (n 279 above).



In property law as in contract law individuals are viewed as having the power to effect changes in their legal relations, which power is a fundamental incident of having property.<sup>323</sup>

In *Printing and Numerical Registering Co v Sampson* the court stated that:

men of full age and competent understanding should have the utmost liberty of contracting and...their contract when entered into freely and voluntarily should be held sacred and [should] be enforced by courts of justice.<sup>324</sup>

In the market arena, freedom of contract is perceived to entail that parties relying on their own skills and judgment, can choose whether to contract or not; the parties to contract with and the terms of the contract. It has therefore been argued that where agreements have been freely made on informed consent basis, the temptation to release parties from hard bargains should be resisted unless the contract was not freely contracted.<sup>325</sup>

The view obtaining is that entry into mortgage transactions by mortgagors implies waiver their rights.<sup>326</sup> Justice Madrama, pointed to the holding in *Matex Co v Euro Bank*,<sup>327</sup> where it was observed that a mortgagor offering property as security does the same on the understanding that upon default the property will be lost, even if such a property is of sentimental value.<sup>328</sup>

In view of this argument the court in *Gundwana* held as follows:

The voluntary placing-at-risk argument also runs into difficulty. It is true that a mortgagor willingly provides her immovable property as security for the loan she obtains from the mortgagee and that she thereby accepts that the property may be executed upon in order to obtain satisfaction of the debt. But does that particular willingness imply that she accepts that—

- (a) the mortgage debt may be enforced without court sanction;
- (b) she has waived her right to have access to adequate housing or eviction only under court sanction under section 26(1) and (3); and
- (c) the mortgagee is entitled to enforce performance, in the form of execution, even when that enforcement is done in bad faith?

I think not.<sup>329</sup>

In terms of mortgage transactions, it is understood that a mortgagor freely enters into a mortgage agreement with a mortgagee and chooses to use their residence as security. It may

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<sup>323</sup> Atiyah (1979) 'The rise and fall of freedom of contract' in HG Beale, WD Bishop, MP Furmston Contract Cases and Materials 5<sup>th</sup> ed (2008) 47.

<sup>324</sup> (1875) Lr Eq 462.

<sup>325</sup> R Brownsword 'Freedom of contract' in Friedman (n 9 above) 185.

<sup>326</sup> Murangira (n 260 above)

<sup>327</sup> [2008] 1 EA 216.

<sup>328</sup> Madrama (n 259 above).

<sup>329</sup> *Gundwana* (n 189 above) para 44.



also be taken that in entering the agreement, the mortgagor was fully informed and that they freely chose to contract with the probability of losing their residential property upon default. However, this cannot be conclusive. As has been observed in preceding sections, mortgagors are necessitous men who may enter into agreements even with harsh terms. It is possible for mortgagors not to be fully informed of the possibility of losing their homes upon default. The finding in *Gundwana* therefore brings to the fore that freedom of contract does not suffice as a reason for not offering protection to the rights of mortgagors.

#### 4.5.4 Case back-log in the judiciary

The requirement for judicial oversight has been viewed to be a process that will essentially over-burden the judiciary which already has a back - log of cases.<sup>330</sup> This essentially results in late delivery of judgments on execution matters.<sup>331</sup> Consequently, this would likely affect the business of financial institutions; in turn mortgage facilities would become remote as financial institutions avoid issuing them to those who provide primary residences as security.<sup>332</sup> Further, the adversarial court system provides the probability of non – ending litigation as appeals are taken from one court to another.<sup>333</sup>

As much as this concern is valid, litigation is likely to be a matter of last resort opted by financial institutions.<sup>334</sup> According to Mitole, financial institutions take certain measures before proceeding to execute on mortgaged residential property.<sup>335</sup> For instance, they will examine the default period and pattern of default and where there are satisfactory reasons for such default considerations are made to extend the repayment period before executing.<sup>336</sup> Thus, resort to courts for judicial oversight would be rare and not affect the case backlog of the judiciary. Indeed, some cases will be instituted, thus in ensuring the protection of mortgagors' rights, the state is obliged to recruit more judicial officers to fill existent vacancies and ensure the effective management of case back-log.

#### 4.5.5 Abuse of process by mortgagors

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<sup>330</sup> Kiryabwire (n 291 above).

<sup>331</sup> As above)

<sup>332</sup> As above.

<sup>333</sup> As above,

<sup>334</sup> Mitole (n 295 above).

<sup>335</sup> As above.

<sup>336</sup> As above

The need for judicial oversight may be abused by mortgagors who are unwilling to fulfil their obligations under the mortgage, is another argument propounded against this process. Justice Murangira observed that just as the need for spousal consent in mortgaging matrimonial home is abused in Uganda, by spouses denying validity of spousal consent to the detriment of mortgagee; he opined that the need for judicial oversight would prospectively be abused by mortgagors.<sup>337</sup> For instance, a mortgagor who decides not to honour his repayment obligations may frivolously abuse the court process by appealing the case in different appellate courts, thus keeping away from repaying the loan.<sup>338</sup> Further, this would delay the mortgagee in recovering the loan as judgments usually take long to be delivered.<sup>339</sup>

In as much as there are prospects of abuse, this does not suffice to deny protection of the right to adequate housing of mortgagors. Actually, a court of law would be better placed to examine all the circumstances of a case to determine whether it is an abuse of the court process by the mortgagor.<sup>340</sup> Where it is determined that the mortgagor is abusing the process, the court will most likely grant an order for execution.

#### 4.5.6 Effects on access to credit

Another argument against judicial oversight is that since financial institutions would be constrained in recovering their funds, thus they may not advance loans to those that wish to use their primary residence as security.<sup>341</sup> In as much as judicial oversight is vital, financial institutions are accountable to customers who deposit with them.<sup>342</sup> The money they advance as loans is that of depositors to whom they are accountable to.<sup>343</sup>

The argument of that judicial oversight will adversely affect credit access assumes that financial institutions lose out through the process. Where judicial oversight is provided and an order for execution is granted, the financial institution is protected. This is because the enforcement of the power of sale will be judicially sanctioned.<sup>344</sup> As such, a mortgagor who had the opportunity to have their matter heard before a court would not return to question the sale by the financial institution.

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<sup>337</sup> Murangira (n 260 above).

<sup>338</sup> As above.

<sup>339</sup> As above.

<sup>340</sup> M Plessis & G Penfold 'Bill of Rights Jurisprudence' 2005 *Annual Survey of South African Law* 27 87.

<sup>341</sup> UK – MOJ (n 34 above) 23.

<sup>342</sup> Kabwirye ( n 291 above).

<sup>343</sup> As above.

<sup>344</sup> MOJ- UK (n 34 above) 42.

Mitole states that the requirement for judicial oversight would not result in her institution, NBM, avoiding the advancement of loans.<sup>345</sup> However, she points out that her institution seriously scrutinises several factors before advancing loans to those wishing to use primary residences as security.<sup>346</sup> She opined that judicial oversight would actually speed up the loan recovery process.<sup>347</sup> This is because, currently, without such a process in place, financial institutions are usually served with injunctions thus keeping them from execution on property to recover a debt.<sup>348</sup>

Accordingly, there are no valid reasons for financial institutions to keep away from advancing loans. However, there is need for a balancing act to ensure that the interests of both the mortgagee and mortgagor are considered by courts.

#### **4.5.7 Delay of loan recovery will result in costs being transferred to defaulting mortgagors**

Another argument that has been raised is that judicial oversight will delay financial institutions in recovering their funds advanced through a loan.<sup>349</sup> The requirement for judicial oversight is said to be costly and time consuming.<sup>350</sup> Consequently, it is argued, the costs incurred in such a process would be transferred to the mortgagor.<sup>351</sup> According to Justice Kiryabwire, financial institutions actually have the resources and capacity to keep cases on – going in courts to the detriment of the mortgagors.<sup>352</sup>

On the contrary, Mitole, as pointed out above, is of the view that such a process would speed up the loan recovery process.<sup>353</sup> This is because the bank would avoid the numerous injunctions that are served on it when it proceeds to execute on mortgaged residential property.<sup>354</sup> This is position is supported by the responses obtained from several bank officials in South Africa after the *Gundwana* judgment.<sup>355</sup> The bank officials noted that the need for judicial oversight will not have material impact as execution was a matter of last resort.<sup>356</sup>

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<sup>345</sup> Mitole ( n 295 above),

<sup>346</sup> As above.

<sup>347</sup> As above.

<sup>348</sup> As above.

<sup>349</sup> Ndzamela (n 37 above).

<sup>350</sup> As above.

<sup>351</sup> CML (n 36 above) para 7.

<sup>352</sup> Kiryabwire ( n above).

<sup>353</sup> Mitole (n 295 above).

<sup>354</sup> As above.

<sup>355</sup> Ndzamela (n 37 above).

<sup>356</sup> As above,

It follows, therefore, that the anticipated costs that would be transferred to the mortgagor would equally be minimal. Additionally, even in cases where the matter is taken before a court, it can be argued that the costs that would be incurred, would be less than the cost of losing a home.

#### 4.6 Factors to be considered by Courts

When a court is determining whether or not to grant an order for execution on mortgaged residential property there are several relevant circumstances that the court will have to consider. In *Jaftha* the court alluded to the fact that it would be unwise to have an exhaustive list of factors to be considered in such cases.<sup>357</sup> This is because each case has to be decided on its own peculiar facts and circumstances.<sup>358</sup> However, despite not being exhaustive, the following are some of the pertinent factors that a court will have to consider:

- a. amount of the debt<sup>359</sup>
- b. any attempts made by the debtor to pay off the debt<sup>360</sup>
- c. alternative way of repaying the debt<sup>361</sup>
- d. financial situation of the parties<sup>362</sup>
- e. debtors repayment history<sup>363</sup>

This section discusses the first two factors as these present the paramount considerations that courts have to examine in an application for an execution order.

##### 4.6.1 Amount of the debt

The amount of the debt outstanding is a very pertinent factor to consider because lose of a home because of a trivial amount is unjustifiable.<sup>364</sup> However, in determining what is a trivial debt the facts of each case ought to be analysed.<sup>365</sup> Hence, in *Dawood* an execution order was not granted where the mortgagee was claiming for 54 507.08 Rands and the court held that granting such an order for such a trivial amount would be disproportionate in the circumstances with the additional consideration that there was available an alternative

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<sup>357</sup> *Jaftha* (n 31 above) para 56.

<sup>358</sup> As above.

<sup>359</sup> *Jaftha* para (n 31 above ) 60.

<sup>360</sup> As above.

<sup>361</sup> *Jaftha* (n 31 above) para 59.

<sup>362</sup> As above.

<sup>363</sup> *Folscher* (n 11 above) para 41.

<sup>364</sup> *Jaftha* (n 31 above) para 57

<sup>365</sup> As above

repayment mechanism of the debt.<sup>366</sup> Thus, where the debt is disproportionately a small amount of money relating to the value of the home that will be lost, consideration will have to be taken of the dire consequences of losing a home by the mortgagor.<sup>367</sup>

#### 4.6.2 Attempts to repay the debt

Attempts made by the debtor to pay off the debt are a very crucial factor to be considered by the court.<sup>368</sup> This is because some financial institutions are largely driven by maximising profits which they would accrue through a sale, rather than having the debt repaid. This consideration would have been of great assistance to the mortgagor in the Malawian case of *Mbekeani v New Building Society*.<sup>369</sup>

In the case the mortgagor having defaulted in his loan was notified of the intention to exercise the power of sale by the mortgagee. Before the sale, he met with the bank manager with whom he agreed to repay the loan through Finance Corporation Malawi (FCM). The bank sent a letter accepting the alternative repayment mechanism. However, the cheque issued to the bank covering the whole debt was turned down. It was alleged that the letter accepting the proposal was issued without due oversight, as the property had already been sold at the time. In an application to dissolve an injunction stopping the sale obtained by the mortgagor, the court held that the mortgagor's right to redeem was extinguished as the contract of sale was already effected. Further, the court held that the mortgagor had not been arbitrarily deprived of property as he had consented to the mortgage agreement. Consequently, the exercise by the defendant of the power of sale was a lawful act arising from the mortgage agreement between them.

If judicial oversight was provided before executing on the residential property of the mortgagor, the house would not have been lost. This is because the court would have considered the attempt by the mortgagor to repay the debt. This underscores the fact that mortgage transactions cannot be considered from a purely commercial perspective, entitling a mortgagee to sell a home even when a mortgagor attempts to repay the loan. When human rights are acknowledged, such attempts to repay by mortgagor would be upheld and sale of homes resulting in homelessness would be prevented.

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<sup>366</sup> n 31 para 35.

<sup>367</sup> M Plessis & G Penfold 'Bills of rights jurisprudence' 2006 *Annual Survey of South African Law* 89-90.

<sup>368</sup> *Jaftha* ( n 31 above) para 60

<sup>369</sup> Civil case no 597 of 1999.

## 4.7 Conclusion

This chapter has discussed the need for judicial oversight before executing on mortgaged residential property. The practices in South Africa and the United Kingdom provide standards worth emulating through law and policy reform. The Ugandan provision for spousal consent in mortgaging matrimonial property would provide an enhancement for the requirement of judicial oversight. The protection of the right to adequate to housing as rationale for such a process provides a strong foundation against the objections levelled against the need for judicial oversight. While acknowledging the objections raised as valuable, the discussion shows that these objections are outweighed by the human rights concerns of mortgagors. Furthermore, the protection is not only afforded to mortgagors but mortgagees as well. This is because where an execution order is granted; such execution when effected will be judicially sanctioned. The circumstances that need to be considered by the court are also discussed without laying down an exhaustive list.

From the foregoing discussion, it is argued that the need for judicial oversight is very crucial in executing on mortgaged residential property. Apart from violating the right to adequate housing, human dignity, another core right, is adversely affected by the loss of a home. It is from this basis that the following chapter recommends the necessary law and policy reforms that need to take place in Malawi.

## CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

### 5.1 Introduction

The main objective of this study was to investigate how the right to adequate housing is violated by arbitrary execution on mortgaged residential property. The focus of the study was on Malawi. This chapter contains a summary of findings and the conclusion drawn. This is followed by proposed recommendations to ensure the protection of the right to adequate housing of mortgagors.

### 5.2 Summary of findings and conclusion

The right to adequate housing is a vital and fundamental right. It is incumbent upon states, including Malawi, to ensure protection of this right from violation by third parties. From the study, it is noted that the right to adequate housing is not provided for in the Constitution of Malawi. However, the right can be implied from other rights that are entrenched in the Malawian bill of rights such as the right to development and treaties, such as the ICESCR, that form part of the laws of Malawi.<sup>370</sup>

The focus of the study was to illustrate how the right to adequate housing can be violated by execution on mortgaged residential property. Many Malawians in obtaining loans use their primary residences as security. Hence, the possibility of losing homes under these mortgage transactions is always a present. This possibility is heightened by the high interests rates that are prevalent in Malawi.

Generally, mortgage transactions, being commercial in nature, are regarded as being part of the private law realm. While human rights are taken to be in the public law realm. However, it has been shown that such a division results in mortgage transactions being shielded from human rights standards, to the detriment of mortgagors. Hence, human rights ought to be infused in mortgage transactions. Accordingly, this bestows the duty of due diligence on Malawi to prevent, investigate and punish financial institutions that violate the right to adequate housing through arbitrary executions on mortgaged residential property. Apart from the state organs in Malawi; national human rights institutions, specifically, the Malawi Human Rights Commission (MHRC), mortgagors, financial institutions and CSOs are tasked with ensuring the infusion of human rights in mortgage transactions.

Furthermore, the study shows that judicial oversight is crucial in execution on mortgaged residential property. This is supported by practices examined from South Africa, Uganda and

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<sup>370</sup> Sec 211 (2) of the Constitution.

the United Kingdom. Despite the objections raised against the process, the human rights considerations of the mortgagors outweigh them. Moreover, judicial oversight equally benefits mortgagees by sanctioning execution where an order is granted. Unless the mortgagor appeals the decision, there is no room for contestation of exercise of such power by the mortgagee in such situations. Some of the factors that courts have to consider in providing judicial oversight include; amount of debt; alternative repayment mechanism; and attempts by the debtor to repay the debt.

In conclusion, the need for judicial oversight in execution on mortgaged residential property cannot be overemphasised. This protects the right to adequate housing of mortgagors. Consequently, such a process bolsters the economy and development of a nation. As people are maintained in their homes, poverty is remarkably reduced. Malawi being a least developed country stands to greatly benefit by implementing such a process.

### **5.3 Recommendations**

In achieving the desired goal, the following recommendations are proposed for adoption and implementation in Malawi. It is worth noting that these recommendations are equally applicable to other African countries that do not provide for judicial oversight in execution on mortgaged residential property.

#### **5.3.1 Law reform**

An amendment to the Constitution is necessary in order to provide for the justiciable right to adequate housing to ensure solid protection of this right. Further, the law should expressly provide for the need of judicial oversight in execution on mortgaged residential property. This should be reflected in the Constitution, Registered Land Act and the Courts Act.

The Consumer's Protection Act (CPA) should be amended to expressly provide for protection of mortgage transactions which are currently not covered in the Act. The CPA should provide for the establishment of citizen advice bureaus. Further, there is need to adopt legislation to regulate credit transactions like the South African National Credit Act. The Credit Act should require mortgagees to make efforts in seeking alternative and speedy means of settling the debt before approaching a court. Essentially, this will only be a matter of codifying an existent practice since financial institutions resort to execution as a matter of last resort; after pursuing alternative means such as restructuring of payments within acceptable time limits.



### **5.3.2 Institutional reform**

There is need for specialised training of Malawian judicial officers in the area of socio-economic rights, specifically the right to adequate housing. Thus, judges will be able to balance the interests of mortgagors and those of mortgagees. Additionally, since access to courts is costly for most indigent mortgagors, the Ministry of Justice and Constitutional Affairs through the Department of Legal Aid should provide legal representation in such matters. Further, courts should be built at accessible distances and campaigns should be launched to raise awareness of the functions of courts in providing protection to mortgagors.

The regulation of financial institutions through the Micro-Finance Act and the Finance Services Act has been noted to be ineffectively enforced. As a result some financial institutions conduct mortgage transactions to the detriment of mortgagors' rights, for instance, by charging exorbitant interest rates. The statutes thus have to be effectively enforced to ensure that financial institutions that infringe mortgagors' rights, such as the right to adequate housing, are held accountable.

Financial institutions in Malawi will have to incorporate human rights in their business dealings, specifically mortgage transactions, to ensure protection of the rights of mortgagors. Further, financial institutions should come up with alternative dispute resolution forums that will allow for expeditious settlements without recourse to the sale of mortgagors' primary residence.

The MHRC should be proactive in investigating and assisting victims who suffer from arbitrarily execution on their primary residence. This will require capacity building programs of the MHRC staff and comprehensive research in this area.

### **5.3.3 Awareness campaigns**

The protection provided for in most laws is not used by many because of lack of knowledge. Hence, there is need for Malawi to set up extensive sensitisation campaigns on the protection afforded to mortgagors available in diverse laws. This task is not only for the government. Other stakeholders such as the MHRC and CSOs also have a role to play in the sensitisation programs. This can be done through training workshops, dissemination of information through the media and reaching out to those in rural areas.

### **5.3.4 Allocation of resources**

It is imperative that human resource, financial and material resources are allocated towards the achievement of this goal. Although it may be argued that socio-economic rights are expensive to achieve, it has been established that civil and political rights equally require extensive resources.<sup>371</sup> The resources should be allocated to the necessary institutions. For instance, there is need for the employment of more judicial officers to manage the caseload that would originate from mortgage transactions.

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<sup>371</sup> Mbazira (n 43 above) 220.

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## ANNEXES

### Annex A: Questionnaire for the Judiciary

University of Pretoria, Centre for Human Rights

In partnership with Makerere University, Faculty of Law

Masters in Human Rights and Democratisation in Africa, LLM (HRDA)

#### 1. Introduction

It is well established that the right to adequate housing is of paramount importance. The violation of this right has adverse effects on other rights such as the right to health, life and family protection. A discourse has arisen as to the effects of mortgage transactions on the right to adequate housing. Specifically, the discourse focuses on how execution on mortgaged residential property by financial lending institutions without judicial oversight can infringe on a mortgagor's right to adequate housing. The questionnaire seeks to understand the implications of requiring judicial oversight before executing on mortgaged residential property. Despite the fact that there are other forms of security or collateral used in mortgage transactions; the study focuses on residential mortgaged property as this is closely linked to the right to adequate housing.

**Instruction:** Please fill in the questionnaire and send it to the following email(s): [tadala\\_muyaya@yahoo.com](mailto:tadala_muyaya@yahoo.com) or [tdlmuyaya99@gmail.com](mailto:tdlmuyaya99@gmail.com).

#### 2. Particulars of the respondent

1.	<b>Name (Optional)</b>	
2.	<b>Email address</b>	
3.	<b>Profession</b>	
4.	<b>Institution and position held</b>	

### 3. List of questions

<p>1. What is your view of the exercise of power of sale by financial lending institutions on mortgage transactions?</p>	
<p>2. When an application to stay the power of sale is brought before your court,</p> <p>a. under what circumstances would you allow the power of sale to proceed?</p> <p>b. under what circumstances would you stay the process?</p>	
<p>3. Do you think there is need for judicial oversight before a mortgagee exercises the power of sale over mortgaged residential property?</p>	
<p>4. Would this procedure offer protection of the right to adequate housing of the mortgagor?</p>	
<p>5. Would there be need for the right to adequate housing to be provided for in the laws of Malawi (such as being a justiciable right in the constitution) for such a process to be effective?</p>	
<p>6. If such procedure were in place, what circumstances would have to be considered in determining whether or not to grant an order for execution over mortgaged residential property?</p>	
<p>7. Do you have further comments on the subject-matter?</p>	

Thank you for taking the time to consider the questions raised. Your insight will be greatly appreciated.

**Tadala Peggy Muyaya, LLM (HRDA) student, 2012.**

## Annex B: Questionnaire for Financial Institutions

University of Pretoria, Centre for Human Rights

In partnership with Makerere University, Faculty of Law

Masters in Human Rights and Democratisation in Africa, LLM (HRDA)

### 1. Introduction

It is well established that the right to adequate housing is of paramount importance. The violation of this right has adverse effects on other rights such as the right to health, life and family protection. A discourse has arisen as to the effects of mortgage transactions on the right to adequate housing. Specifically, the discourse focuses on how execution on mortgaged residential property, by financial institutions, without judicial oversight can infringe on a mortgagor's right to adequate housing. The questionnaire seeks to understand the implications of requiring judicial oversight before executing on mortgaged residential property. Despite the fact that there are other forms of security or collateral used in mortgage transactions; the study focuses on residential mortgaged property as this is closely linked to the right to adequate housing.

**Instruction:** Please fill in the questionnaire and send it to the following email(s): [tadala\\_muyaya@yahoo.com](mailto:tadala_muyaya@yahoo.com) or [tdlmuyaya99@gmail.com](mailto:tdlmuyaya99@gmail.com).

### 2. Particulars of the respondent

1.	<b>Name (Optional)</b>	
2.	<b>Email address</b>	
3.	<b>Profession</b>	
4.	<b>Institution and position held</b>	

### 3. List of questions

1. What is the percentage of residential backed security loans that are issued annually by your institution?	
2. When seeking to execute on residential mortgaged property what factors do you take into account?	
3. What is your view of the proposal that before executing on residential property there should be a court order obtained?	
4. Would such a process affect your business?	
a. If the response above was affirmative, how would such a process affect your business?	
b. If the response above was negative, why will your business not be affected?	
5. If such a process was put in place would your institution shy away from providing loans to those who seek to use their primary residence as security?	
6. Do you have any further comments?	

Thank you for taking the time to consider the questions raised. Your insight will be greatly appreciated.

**Tadala Peggy Muyaya**

**LLM (HRDA) student, 2012.**