

Legal Position of Power of Attorney to Encumber Mortgage Rights in Subsidized Home Ownership Credit Facilities

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Abstract. *A Power of Attorney to Encumber Mortgage Rights is a letter containing a power of attorney made or given by the collateral provider or land owner, in this case the debtor as the party providing the power of attorney to the creditor as the party receiving the power of attorney to represent the power of attorney in granting mortgage rights to the creditor over the land belonging to the power of attorney. Regarding SKMHT, a time period is set for the SKMHT to be followed into a Deed of Granting Mortgage Rights (APHT). In practice, based on the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency Number 22 of 2017 concerning Determination of Time Limits for the Use of Power of Attorney to Encumber Mortgage Rights to Guarantee Repayment of Certain Credits, the SKMHT is valid until the end of the main agreement, one of which is Subsidized Home Ownership Credit. This research aims to find out and explain the procedures for making SKMHT in subsidized home ownership credit facilities at Bank BNI Pekalongan Branch, to find out and explain the legal position of SKMHT in subsidized home ownership credit at Bank BNI Pekalongan Branch and to find out and explain the legal consequences of SKMHT for defaulting debtors at Bank BNI Pekalongan Branch, the research approach used in this thesis is an empirical juridical legal research method which relies on primary data (field research) and the research specifications applied in this research are analytical descriptive with a population and the sampling technique used is Non Random Sampling with purposive sampling. This research shows that the procedure for making SKMHT must be made specifically and authentically before a Notary/PPAT, preceded by the signing of a credit agreement. The function of SKMHT as a Power of Attorney is addressed to the holder of mortgage rights or another party to represent the person giving the mortgage rights. In the event that the debtor defaults, the recipient of the power of attorney can proceed with making a Deed of Granting Mortgage Rights so that the creditor is the preferred creditor.*

Keywords: Agrarian; Attorney; Mortgage.

1. Introduction

Banking institutions as creditors in providing credit are not without risk, so the risk that will harm the creditor needs to be taken more seriously by the Bank. In addition to the process of providing credit, the banking party will always pay attention to the principles of healthy credit provision, it is only right that the bank asks for adequate collateral to provide protection and legal certainty for both the creditor itself and the debtor or other interested parties.

For legal certainty and to obtain legal protection, regarding the credit application is stated in the form of a credit agreement which is the main agreement, while the existence of a guarantee in the main agreement gives rise to an additional agreement regarding the guarantee. Additional agreements or better known as Accessory Agreements cannot stand alone but their existence and deletion depend on the main agreement.

The agreement according to Article 1867 of the Civil Code (KUH-Perdata) can be done authentically or underhand. Generally, what is used in the banking world to bind credit agreements is an authentic deed. An authentic deed according to Article 1868 of the Civil Code explains: "An authentic deed is one that is made in the form determined by law by or before a public official authorized for that purpose, at the place where it is made."

The relationship between Article 1868 of the Civil Code is Article 1 number 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN) which explains that: "A notary is a public official who is authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws."

Based on Article 1 number 1 of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Making Officials, "Land Deed Making Officials, hereinafter referred to as PPAT, are public officials who are authorized to make authentic deeds regarding certain legal acts regarding land rights or Ownership Rights of Apartment Units." PPAT is a position formed based on the provisions of Article 19 of Government Regulation Number 10 of 1961 concerning Land Registration, because in the Government Regulation it is ordered that all legal acts that intend to transfer land rights or burden land rights as collateral for debt must be proven by a deed made by or before an official appointed by the Minister.¹These provisions are further regulated in the Minister

¹ Samsaimun, 2018, *PPAT Job Regulations Introduction to the Job Regulations of Land Deed Making Officials (PPAT) in the Transfer of Land Rights in Indonesia*, Bandung: Pustaka Reka Cipta, p. 3.

of Agrarian Affairs Regulation Number 10 of 1961 which states firmly that land deeds are the authority of the Land Deed Making Officer.

In general, Land Deed Making Officials also hold the position of Notary. This dual position is made possible by the provisions of Article 7 paragraph (1) of Government Regulation Number 37 of 1998 concerning the Regulations on the Position of Land Deed Making Officials which explains that "PPATs can hold dual positions as Notaries, Consultants, or Legal Advisors". This dual position is made possible because both have the same status as public officials, although Notaries are public officials with more general and broader authority than PPATs.²

In the banking world, especially in providing credit, the existence of a Power of Attorney to Encumber Mortgage Rights and a Deed of Granting Mortgage Rights has a very important function. One of the elements in providing credit and as a means of protection for creditor security for the certainty of debtor debt repayment is a guarantee institution. One of the guarantee institutions used by creditors/banks in providing credit is Mortgage Rights.

Mortgage Rights according to the provisions of Article 1 paragraph (1) of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects related to land are "Guarantee rights imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Agrarian Principles, including or not including other objects that are an integral part of the land for the payment of certain debts, which give a priority position to certain creditors over other creditors."

In the installation and registration of Mortgage Rights under certain conditions, it is necessary to first make a Power of Attorney to Encumber Mortgage Rights related to the condition of the Mortgage Right object. A very diverse routine of legal subjects has implications for the possibility of being unable to attend when the signing of the Mortgage Right Deed should be carried out, meaning that it is impossible to sign the deed directly at that time. In this condition, the law provides a solution by granting power of attorney to encumber mortgage rights in the form of a Power of Attorney to Encumber Mortgage Rights whose form has been determined.

The Power of Attorney to Encumber Mortgage Rights is a tool to overcome when the grantor of the Mortgage Rights cannot be present before the Land Deed Making Officer and the power of attorney must be given directly by the grantor of the Mortgage Rights. Related to the Power of Attorney to Encumber Mortgage Rights, Article 15 paragraph (3) of the Mortgage Rights Law explains that "The

² *Ibid*, p. 4

Power of Attorney to Encumber Mortgage Rights regarding registered land rights must be followed by the making of a Deed of Grant of Mortgage Rights no later than 1 (one) month after being granted". Article 15 paragraph (4) explains that "The Power of Attorney to Encumber Mortgage Rights regarding unregistered land rights must be followed by the making of a Deed of Grant of Mortgage Rights no later than 3 (three) months after being granted". This is to prevent the granting of power of attorney from being prolonged and to create legal certainty, so that the Power of Attorney to Encumber Mortgage Rights has a limited time period.

The existing reality is that the provisions of Article 15 paragraph (3) and Article 15 paragraph (4) of the Mortgage Law are not sufficient, namely land that has not been registered for transfer of rights, its division, or its merger. This is often found in home ownership credit (KPR). The house certificate is still in the name of the developer or seller, so it is necessary to carry out the name change process first based on the deed of sale and purchase to the debtor/home buyer. This is according to the provisions of Article 4 paragraph (5) of the Mortgage Law which explains that: "If the building, plants, and works as referred to in paragraph (4) are not owned by the holder of the land rights, the encumbrance of Mortgage Rights on these objects can only be done by signing and on the relevant Deed of Granting of Mortgage Rights by the owner or someone who is authorized to do so by him with an authentic deed."

The authentic deed referred to in this article based on the explanation of Article 4 paragraph (5) of the Mortgage Law is a Power of Attorney to Charge Mortgage. With the increasing interest in KPR today, it is only natural that the Power of Attorney to Charge Mortgage becomes one of the facilities that is often used in credit in banking.

The problem that can occur in the legal status of the power of attorney to charge mortgage in the provision of subsidized home ownership credit facilities is when the debtor defaults in paying his installments, the creditor holding the Power of Attorney to Charge Mortgage must immediately follow up by making a Deed of Granting Mortgage with the installation of Mortgage so that the creditor's position becomes a preferred creditor.

Thus, based on the matters that have been conveyed in this background, it is an attraction for the author to conduct further research to find out and analyze the legal status of the power of attorney to charge mortgage in the provision of subsidized home ownership credit facilities.

2. Research Methods

This research method uses an empirical legal approach based on primary data (field research) where the data used to determine the problems that arise related to the legal status of the power of attorney to impose mortgage rights (SKMHT) in the provision of subsidized home ownership credit (KPR) facilities. The specification of this research is descriptive analytical, namely research that only describes the overall condition of the research object by grouping, categorizing according to the research objectives to answer the problems in the research. Data sources and data collection methods use primary data obtained by direct interviews with sources who are considered to understand the research topic and secondary data obtained by reviewing literature related to the research topic. The data obtained are analyzed qualitatively, namely analysis in the form of sentences and coherent, orderly, logical descriptions so that a picture will be obtained to facilitate understanding of the analysis results.

3. Results and Discussion

3.1. Legal Position of Power of Attorney to Encumber Mortgage Rights in the Provision of Subsidized Home Ownership Credit Facilities

Credit provision is generally carried out by banks (creditors) because a bank's income or profit comes more from providing credit to debtors. This is in accordance with the provisions of Article 3 of Law Number 7 of 1992 concerning Banking that the main function of Indonesian banking is as a collector of funds and distributor of public funds.

In the Subsidized KPR agreement, the debtor only makes a Power of Attorney to Encumber Mortgage Rights on the grounds that the rights to the land being pledged are not yet in the name of the mortgagee, because the land rights certificate has not been divided individually and is still in the process of being transferred to the name of the mortgagee.

The validity period of the Power of Attorney to Charge Mortgage Rights used to guarantee the Subsidized KPR agreement according to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency No. 4 of 1996 is valid until the end of the validity period of the main agreement. So as long as the main agreement lasts, the Power of Attorney to Charge Mortgage Rights is still valid without a Deed of Granting Mortgage Rights being drawn up. The purpose of granting power of attorney to impose mortgage rights is considering that the steps for installing collateral with Mortgage Rights are not easy, must go through certain formalities, take a long time and cost a lot of money, and land rights are not yet the property of the guarantor, so sometimes credit is given by The creditor is

sufficiently guaranteed by simply obtaining power of attorney from the debtor to put up collateral.

Granting of power of attorney or *lastgeving*, in Dutch, is an agreement by which a person grants power or authority (*macht*) to another person, who receives it for and on behalf of the grantor (*lasgever*). The granting and receiving of power of attorney can be done by authentic deed, by private writing, by ordinary letter and/or verbally.³As for the recipient, apart from being express, it can also be done secretly and its implementation can be concluded. The granting of power of attorney is not promised to occur for free.

Based on Article 10 paragraph (2) of the Mortgage Law, after the main agreement is made, the granting of the Mortgage must be carried out by the grantor of the Mortgage by making a Deed of Granting of Mortgage (APHT) made by the Land Deed Making Officer in accordance with applicable laws and regulations. However, if the grantor of the Mortgage cannot be present when making the Deed of Granting of Mortgage, then it can be done with a power of attorney (Power of Attorney to Encumber Mortgage) which has been regulated in the Mortgage Law, this is because the grantor of the power of attorney is not in the jurisdiction where the object of the mortgage is located.

The Deed of Power of Attorney to Charge Mortgage Rights has a function, in addition to being a special power of attorney addressed to the holder of the mortgage right or other party to represent the mortgagee to be present before the Land Deed Making Officer to charge the mortgage right, also as a form of binding credit guarantee to provide guarantees to the bank as the creditor. Indeed, this method is very practical and does not require expensive costs. Moreover, if the debtor in implementing the agreement fulfills the agreement as determined, it will be very easy for the debtor.

The Power of Attorney to Encumber Mortgage Rights is indeed not a guarantee institution like existing guarantee institutions such as Mortgage Rights or Fiduciary. However, if the Power of Attorney to Encumber Mortgage Rights is followed up into a Deed of Granting Mortgage Rights and the Deed of Granting Mortgage Rights is registered with the local National Land Agency Office by issuing a Mortgage Rights Certificate, then the Mortgage Rights guarantee institution will arise.⁴

³ Komar Andarsasmita, 1982, *Notary II*. Bandung, Sumur, p. 453

⁴ Abdul Rahim Lubis, 2014, *Property Ownership in Indonesia*, Bandung, Mandar Maju, p. 38

In relation to the description of the position of the power of attorney to impose mortgage rights, the Power of Attorney to Impose Mortgage Rights, namely as follows:

1. Does not have a (strong) collateral value because the holder of the Power of Attorney to Encumber the Mortgage does not have the position as a preferred creditor for the land which is planned to be encumbered with the Mortgage. This creditor's position is only as an ordinary creditor.
2. There is a risk of loss for the bank if the debtor suddenly goes bankrupt or defaults.
3. There is no special principle to provide legal certainty and certainty of rights.
4. Not fulfilling the principle of publicity of Mortgage Rights granted with a PPAT deed must be registered with the National Land Agency in the Land Registration sector so that the land burden can be known by the wider community. Then recorded in the Land Book, and as proof of this, a Mortgage Rights certificate is issued.⁵

Based on the principle of encumbrance, the mortgage right must be carried out personally by the person giving the mortgage right as the person entitled to the object of the mortgage right. Only if it is really necessary and cannot be present in person, this must be authorized by another party. In the event that the mortgage right giver cannot appear before a Notary/PPAT, Article 15 of the Mortgage Rights Law also provides the mortgage right giver the opportunity to use a Power of Attorney to Encumber the Mortgage Rights.

The absence of the mortgagee before the PPAT at the time of making the Deed of Granting of Mortgage Rights is a reason that allows the mortgagee to make and use a Power of Attorney to Encumber Mortgage Rights, therefore Article 15 paragraph (1) of the Mortgage Rights Law emphasizes that the power of attorney in question must be special and authentic and must be made before a Notary/PPAT. Thus, the substance of the Power of Attorney to Encumber Mortgage Rights is the granting of power from one legal object (person/legal entity) to another legal subject (person/legal entity) (recipient of the power of attorney) to carry out a certain matter.

In relation to this, it is also necessary to pay attention to the provisions on granting power of attorney according to the Civil Code which provides a legal basis for all forms of granting power of attorney. Granting power of attorney is regulated in the

⁵ Sri Soedewi, 2015, *Guarantee Law in Indonesia Principles of Guarantee Law and Personal Guarantee*, Yogyakarta, Libertu, p. 45

Civil Code Articles 1792 to 1819. Furthermore, granting power of attorney as referred to in Article 1972 of the Civil Code, reads: "Granting Power of Attorney is an agreement by which a person grants power or authority to another person, who receives it, to carry out an affair on his behalf."⁶

The substance of the Power of Attorney to Grant Mortgage Rights is the granting of power of attorney in accordance with the meaning of the power of attorney, namely to carry out or carry out one particular interest, namely to encumber mortgage rights only in the form of a Deed of Granting Mortgage Rights.

3.2. Legal Consequences of a Power of Attorney Imposing Mortgage Rights on a Subsidized Home Ownership Credit Debtor in Default

In practice, credit agreements accompanied by the making of a Power of Attorney to Encumber Mortgage Rights do not comply with Article 15 paragraph (3) of the Mortgage Rights Law which states: "A Power of Attorney to Encumber Mortgage Rights regarding registered land rights must be followed by the making of a Deed of Grant of Mortgage Rights no later than 1 (one) month after being granted." And Article 15 paragraph (4) of the Mortgage Rights Law, a Power of Attorney to Encumber Mortgage Rights regarding land rights that have not been registered must be followed by the making of a Deed of Grant of Mortgage Rights no later than 3 (three) months after being granted. The delay regarding the follow-up of the Power of Attorney to Encumber Mortgage Rights is due to the length of time required in practice for the process of making a Power of Attorney to Encumber Mortgage Rights, which sometimes exceeds 1 (one) month.

The making of a Power of Attorney to Encumber Mortgage Rights is used as a bridge for making a Deed of Granting Mortgage Rights in the future because at that time the Deed of Granting Mortgage Rights could not be made. Thus it can be concluded that the validity period of the Power of Attorney to Encumber Mortgage Rights cannot be extended therefore the Notary/PPAT must really pay attention and take into account the validity period of the SKMHT so that there are no problems when a Deed of Granting Mortgage Rights will be made due to the expiration of the validity period of the SKMHT.

In an agreement there is a possibility that one party does not fulfill the performance which is said to be a breach of contract. The form of breach of contract can be:

- a. Not doing what he promised to do;

⁶ Article 1972 of the Civil Code

- b. Carry out what was promised, but not as promised;
- c. Doing what was promised but late;
- d. Doing something according to the agreement is not permissible to do. ⁷

In the event that the debtor is in default, based on Article 1276 of the Civil Code, the creditor may sue for the following matters:

1. Fulfill/implement the agreement;
2. Fulfill the agreement along with the obligation to pay compensation;
3. Pay compensation;
4. Cancel the agreement; and
5. Cancel the agreement accompanied by compensation.

If the debtor is in default and the creditor has a right to a material guarantee, one of which is a mortgage right, then the creditor can exercise his rights based on Article 20 of the Mortgage Rights Law, namely:

1. Based on the right of the first Mortgage Rights holder to sell the Mortgage Rights object as referred to in Article 6, or
2. Based on the executorial title contained in the Mortgage Right certificate as referred to in Article 14 paragraph (2), the Mortgage Right object is sold through a public auction according to the procedures determined in statutory regulations to pay off the debts of the Mortgage Right holder with priority rights over other creditors.
3. Based on the agreement between the grantor and the holder of the Mortgage Right, the sale of the Mortgage Right object can be carried out privately if in doing so the highest price will be obtained which is beneficial to all parties.

In the provision of subsidized home ownership credit facilities, only a Power of Attorney to Encumber Mortgage Rights is made with a validity period according to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 4 of 1996 valid until the end of the validity period of the main agreement. So as long as the subsidized KPR agreement is ongoing, the SKMHT is still valid, without a Deed of Granting Mortgage Rights being made.

For defaulting debtors who only have a Power of Attorney to Encumber Mortgage Rights, the Mortgage Rights have not occurred. Therefore, the creditor does not

⁷R. Subekti, 1990, Contract Law, Jakarta, PT. Intermasa, p. 128

have the rights as the recipient of the mortgage rights and thus cannot execute as in the method of executing the object of the mortgage rights regulated in Article 20 of the Mortgage Rights Law. The creditor is also not in the position of a preferred creditor, in this case the creditor can only file a lawsuit in court if the debtor is in default because there is no special guarantee in the form of a vehicle guarantee and only a general guarantee as stipulated in Article 1131 of the Civil Code that all of the debtor's assets become collateral for the debtor's obligations to the creditors. Article 1132 of the Civil Code states that all of the debtor's assets become joint collateral for the creditors and the distribution is balanced according to the size of their respective receivables unless there are legitimate reasons to prioritize one receivable over another.

The process of settling defaulting debtors for subsidized home ownership credit with a default category that only has a Power of Attorney to Encumber Mortgage Rights attached is continued by making a Deed of Granting Mortgage Rights. The APHT process according to Article 13 paragraph (1) of the Mortgage Rights Law must be registered at the Land Office. Article 13 paragraph (2) and paragraph (3) of the Mortgage Rights Law explains the method of registering Mortgage Rights, namely as follows:

1. After the signing of the APHT made by the PPAT is carried out by the parties, the PPAT sends the relevant APHT and other documents required by the Land Office. The delivery must be carried out by the relevant PPAT no later than 7 (seven) working days after the signing of the APHT.
2. Registration of Mortgage Rights is carried out by the Land Office by making a Mortgage Rights Land Book and recording it in the land rights book for the land that is the object of the Mortgage Rights and copying the record on the relevant land rights certificate.
3. The date of the Mortgage Right land book is the seventh day after the complete receipt of the documents required for its registration and if the seventh day falls on a holiday, the relevant land book is dated the next working day.

After the process is completed, the creditor has the right to a material guarantee, namely the Mortgage Right and can request his rights based on Article 20 of the Mortgage Right Law, namely:

1. Based on the right of the first Mortgage Right holder to sell the Mortgage Right object as referred to in Article 6, or
2. Based on the executorial title contained in the Mortgage Right certificate as referred to in Article 14 paragraph (2), the Mortgage Right object is sold through a public auction according to the procedures determined in the laws and

regulations for the settlement of the Mortgage Right holder's receivables with priority rights over other creditors.

3. Upon agreement between the grantor and the Mortgage Right holder, the sale of the Mortgage Right object can be carried out privately if in doing so the highest price can be obtained that benefits all parties.

Furthermore, after the debt has been settled, according to Article 22 paragraph (1) of the Mortgage Law, "after the Mortgage Right is extinguished as referred to in Article 18 of the Mortgage Law, the Land Office shall delete the Mortgage Right record in the land title book and its certificate." The application for deletion as referred to in Article 22 paragraph (1) of the Mortgage Law, is stipulated by Article 22 paragraph (4) of the Mortgage Law to be submitted by the interested party by attaching the Mortgage Right certificate which has been noted by the Creditor that the Mortgage Right has been extinguished because the receivable whose payment is guaranteed by the Mortgage Right has been paid off.

4. Conclusion

The Power of Attorney Encumbrance Rights has the function of a power of attorney addressed to the holder of the Rights of Dependency or other parties to represent the grantor of the rights of dependency to appear before the Land Deed Maker's Office to encumber the Rights of Dependency, also as a form of binding guarantees to the creditor. SKMHT is not a guarantee institution so the position of SKMHT does not have a strong guarantee value because the holder of SKMHT does not have a position as a preferred creditor on land burdened with liens so the creditor's position is only as an ordinary creditor, there is a risk of loss for the creditor if the debtor suddenly goes bankrupt or breach of promise (non-performance), does not have a basis of speciality in order to provide legal certainty and certainty of rights, does not have a publicist basis of Liability. In the case of a defaulting debtor, the creditor can cancel based on Article 1276 of the Civil Code, namely: fulfill/implement the agreement, fulfill the agreement accompanied by the obligation to pay damages, pay damages, cancel the agreement and cancel the agreement accompanied by damages.

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