

## Legal Efforts to Resolve the Problem of Transferring Home Ownership Credit Underhand Between Debtors and Third Parties (Case Study of Decision Number 61/Pdt.P/2022/PN.Kdi)

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**Abstract.** *This research aims to find out, study and analyze the process of private transfer of home ownership credit between the debtor and a third party; to find out, study and analyze the legal consequences of the private transfer of home ownership credit between the debtor and a third party; and to find out, study and analyze legal efforts to resolve the issue of private transfer of home ownership credit between the debtor and a third party. This research method uses a type of normative legal research, with a statutory approach, conceptual approach and case approach. The type and source of data is secondary data, with data sources in the form of primary legal materials, secondary legal materials and tertiary legal materials which are carried out using data collection methods in the form of library studies, documentary studies and interviews. The data obtained is presented in the form of descriptions arranged systematically, logically and rationally, then the data is analyzed using qualitative descriptive analysis methods. The results of this research show that the transfer of home ownership credit under the hands of the debtor and a third party or without the knowledge and approval of the creditor or the bank providing the mortgage, the process does not take long, there is enough agreement between the debtor and the third party, but this action is not justified by the creditor. or is considered an act of default. Resulting in debtors and third parties compensating for losses incurred in the form of money or compensation for losses in the original condition. The legal effort to resolve the KPR transfer problem privately between the debtor and a third party is by taking legal action by filing a lawsuit or decision with the district court. So that the private transfer of home ownership credit between the debtor and a third party which is carried out by means of sale and purchase is declared valid and has permanent legal force regarding the validity of the private sale and purchase.*

**Keywords:** Action; Credit; Ownership; Transfer.

## **1. Introduction**

The provisions contained in Article 28H paragraph (1) of the 1945 Constitution state that everyone has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy environment. This is further explained in more specific provisions, namely the Explanation of Law Number 1 of 2011 concerning Housing and Residential Areas concerning the provision of housing and residential areas so that people throughout Indonesia can live and settle in decent and affordable homes in a healthy, safe, harmonious and sustainable environment.<sup>1</sup>This is a form of state responsibility in providing ease of housing acquisition for citizens.<sup>2</sup>

A house is a building that functions as a habitable place to live, a means of family development, a reflection of the dignity and status of its occupants and an asset for its owner.<sup>3</sup>Houses have become a primary need for many people that must be met to ensure their survival. Fulfillment of housing needs is not something that is affordable because of its high price, this is an obstacle to people's purchasing power for housing needs. The need for houses is inversely proportional to purchasing power because it is influenced by the economic factors of the Indonesian people which are not evenly distributed, so that not everyone can buy a house in cash. This condition provides an opportunity for banks to channel loans to the public for home purchases, so as not to be burdensome. Loan distribution is usually given through credit, for example Home Ownership Credit or known as KPR.

Almost all banks in Indonesia provide housing credit facilities (KPR). In accordance with the main function of banks as providers and distributors of funds to the community, KPR is the main alternative way for housing financing that can be done through cooperation or partnership. Buying a house through KPR provides convenience for prospective buyers. Almost all banks in Indonesia provide housing credit facilities (KPR). In accordance with the main function of banks as providers and distributors of funds to the community, KPR is the main alternative way for housing financing that can be done through cooperation or partnership. Buying a house through KPR provides convenience for prospective buyers. This is because prospective buyers can pay installments according to the economic capabilities of each prospective buyer. Although if calculated as a whole, the price tends to be

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<sup>1</sup> Explanation of Law Number 1 of 2011 concerning Housing and Residential Areas.

<sup>2</sup> Ibid.

<sup>3</sup> Article 1 paragraph (7) of Law Number 1 of 2011 concerning Housing and Residential Areas

more expensive compared to the price offered in cash because it is added with other costs and the KPR interest itself.

Taking a mortgage with a low interest rate or discount offered by the bank is very attractive to customers, but when entering the second year, the interest rate is no longer discounted or is already at the normal price. For some customers, this interest rate increase is difficult because they are used to paying installments at a discounted price, which will be very noticeable when the price is normal, this can be a cause of bad credit.<sup>4</sup>

In practice, customers who apply for a mortgage must meet the requirements set by the mortgage bank. One of these requirements is that the mortgage application process must be carried out based on the agreement and trust stated in the Home Ownership Credit Agreement between two parties, namely the applicant and the organizing bank. A mortgage is part of a consumer credit for ownership of a residential home in the form of a landed house or flat or apartment (excluding office houses and shop houses) with collateral in the form of a residential house provided by the bank to individual debtors with a maximum loan amount determined based on the collateral value. This agreement is made so that the parties can anticipate an undesirable situation that can harm one party, such as default.<sup>5</sup>

Even though a home ownership credit agreement has been made, problems are often encountered, including the transfer of rights to the KPR object, namely land and buildings, which is carried out by the Debtor with a third party underhand. Underhand means that the transfer is made by the parties without the consent or knowledge of the creditor, and does not involve a notary or authorized official. One case of the transfer of KPR motorcycles through an underhand agreement that has occurred is the case with the decision number: 61/Pdt.P/2022/PN.Kdi. In this case, the debtor transferred the KPR object by means of a private purchase without any legalization from a notary and only evidenced by a payment receipt.<sup>6</sup>

The above transfer act is contrary to Law Number 1 of 2011 concerning Housing and Residential Areas, in Article 55 paragraph (2), that in the case of transferring ownership of land and buildings obtained through home ownership credit, the

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<sup>4</sup> Wati Aris Astuti & Novi Nurmala Dewi, 2017 "Analysis of the Influence of Home Ownership Credit Interest Rates on the Number of Home Ownership Credit Applications at PT. Bank Rakyat Indonesia (Persero) Tbk. Pamanukan Branch Office", UNIKOM Scientific Magazine, Vol 15, No 1, p. 26

<sup>5</sup> Sularsi et al., 2016, Banking Policy and Practice in Indonesia: Study of Home Ownership Credit (KPR) Distribution related to Consumer Protection Principles, Bank Indonesia Responsive, Jakarta, p. 9.

<sup>6</sup> Directory of Decisions of the Supreme Court of the Republic of Indonesia Number: 61/Pdt.P/2022/PN.Kdi.

transfer must be carried out by an institution appointed or formed by the government or regional government in the field of housing and settlements. Where the authority is given by the government to the bank that organizes home ownership credit, to obtain approval from the bank as the creditor, so that the third party becomes a new debtor who replaces the position of the old debtor in the implementation of rights and obligations,<sup>7</sup> which is stated expressly in the deed as clear evidence by paying attention to the provisions contained in Article 1417 and Article 1415 of the Civil Code.

The transfer of mortgages underhand between debtors and third parties can occur due to factors such as rising interest rates so that old debtors sell their mortgages or debtors who want to move domicile, debtors who want to buy a better house or debtors who have died, as well as factors of the parties' lack of understanding regarding the law, especially regarding the process of transferring debtors in the transfer of mortgages. As a result of the above factors, more complex problems arise in the future, namely those related to legal certainty regarding home ownership rights.<sup>8</sup>

Considering the mortgage agreement where the bank only considers the debtor to be the one making the credit agreement and does not apply to third parties, as explained in the provisions of Article 1338 which formulates that an agreement that is legally made applies as a law for those who make it. This makes it more difficult for third parties to obtain the right to home ownership because the bank does not immediately provide a House Certificate because the House Certificate is still in the name of the debtor, in addition to the form of legal protection for the bank to obtain payment of mortgage credit installments.

## **2. Research Methods**

This research method uses a normative legal research type,<sup>9</sup> with the methods of legislative approach, conceptual approach, and case approach<sup>10</sup>. Types and sources of data are secondary data, with data sources in the form of primary legal materials, secondary legal materials and tertiary legal materials carried out using data collection methods in the form of literature studies, documentary studies and interviews. The data obtained are presented in the form of descriptions that are

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<sup>7</sup> Silmi Kaffa, Rosa Agustina and Isyana Wisnuwardhani sadjarwo, 2020, "The Validity of the Debtor's Transfer Agreement for Home Ownership Credit Underhand Without the Creditor's Knowledge (Case Study of Decision Number 64/Pdt.g/2018/PN.Cbn).", Indonesian Notary, Vol.2, No.3., p. 627.

<sup>8</sup> Cit, p. 26

<sup>9</sup> Irwansyah, 2020, Legal Research, Mira Buana Media, Yogyakarta., p. 42

<sup>10</sup> Mukti Fajar ND and Yulianto Achmad, 2010, Dualism of Normative Legal Research and Empirical Law, Pustaka Pelajar, Yogyakarta., p. 34.

arranged systematically, logically and rationally, then the data is analyzed using qualitative descriptive analysis methods.

### **3. Results and Discussion**

#### **3.1. The Process of Transferring Home Ownership Credit Underhand Between Debtor and Third Party**

It begins with an agreement between the old debtor (as the seller) and the third party (as the buyer) who will become the new debtor. The agreement made is to replace the old debtor regarding all matters related to home ownership credit, one of which is to continue the payment of credit installments that have been running until they are paid off. The agreement was made without involving the creditor as the KPR organizing bank. One case of the transfer of KPR credit objects underhand between the debtor and a third party that has occurred is the case of the District Court decision No. 61 / Pdt.P / 2022 / PN.Kdi. In the implementation of the agreement, the debtor's credit installments cannot be held accountable for the promises that were made, namely the process of managing with the bank and changing the name of the ownership of the KPR object house certificate. As a result, the third party has difficulty managing with the bank to obtain the right to own the house, because the bank does not immediately provide a house certificate and the third party does not have a valid legal basis to take the house certificate from the creditor or the bank organizing the home ownership credit.

When compared to the process of transferring home ownership credit according to bank procedures, it must go through a series of processes set by the bank that organizes the Home Ownership Credit (KPR). Starting from the credit application assessment process, after the bank will decide on the eligibility of the third party's application as a replacement debtor made in the debtor transfer approval letter. The debtor transfer approval letter must contain a statement from the bank that states firmly that it intends to free the debtor from his creditor based on the existing agreement and obligations in making installment payments and other legal relationships related to home ownership credit with the creditor or KPR organizing bank.

So it can be said that the transfer of home ownership credit underhand between the debtor and the third party is done because it avoids the lengthy transfer process with the bank which must start from the beginning of the home ownership credit application, which is considered quite time consuming and new costs for the transfer. Price negotiations are also flexible, depending on the agreement between the debtor and the third party. Therefore, the debtor and the third party prefer to make a transfer of home ownership credit underhand

with an agreement that after the credit installments are paid off, the name of the home ownership will be changed. This legal action is considered more effective and efficient for the debtor and the third party but is very risky if one of them does not keep his promise.

### **3.2. Legal Consequences of Transferring Home Ownership Credit Underhand Between Debtor and Third Party**

The transfer of home ownership credit underhand between the debtor and a third party or without the knowledge and approval of the credit party as the bank organizing the home ownership credit will certainly have legal consequences, the existence of a new legal relationship that is not recognized by the Bank and an act of default may be committed.<sup>11</sup> because he had violated the credit agreement and binding mortgage rights as explained in article 11 paragraph (2) of Law no. 4 of 1996 Calm Mortgage Rights on Land and Objects Related to Land.

The act of default has caused losses for the creditor as the bank that organizes the home ownership credit (KPR) and the third party (as the KPR buyer), the losses experienced are:

- a. The creditor as the bank that provides the home ownership credit (KPR) feels disadvantaged due to the failure to fulfill the credit agreement and the mortgage rights binding agreement that has been made;
- b. The bank refused to hand over the house ownership certificate, because the certificate was still registered in the name of the debtor who made the agreement with the bank, so that the third party could not legally control the house but only physically;
- c. The third party cannot carry out the process of changing the name of the house ownership, because the third party does not have a legal basis to carry out the process. Meanwhile, the certificate is still in the name of the debtor and is still the bank's collateral;
- d. The third party is also disadvantaged by the lack of certainty of obtaining a house certificate from the bank, because the debtor has disappeared or his whereabouts are unknown;
- e. The debtor may deny the underhanded credit transfer agreement and come to the bank to pay off and take the house certificate which is actually the right of a third party;
- f. If the debtor dies, there is often a possibility of a lawsuit between the heirs and a third party because the heirs acknowledge that the credit object is their right, even though the third party proves it with a payment receipt,

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<sup>11</sup>Subekti, 2002, Contract Law, PT. Intermasa, Jakarta, p. 59.

and that is not enough to prove that the house has been transferred by way of sale and purchase;

- g. In relation to the house that is used as the object of sale and purchase obtained from the Home Ownership Credit is still as a credit guarantee to the bank, in accordance with the law on mortgage rights, the debtor does not have the authority/right to transfer the house to another person without the consent of the bank. So that the bank has the authority to sue the debtor with allegations of embezzlement of the credit object, namely the house obtained from the Home Ownership Credit (KPR).

Based on this, according to Hans Kelsen in his theory of legal responsibility, a person is legally responsible for a certain act or that he bears legal responsibility when committing an act that is contrary to Considering the act of transferring credit underhand between the debtor and a third party has violated the provisions of the credit agreement and the binding of mortgage rights that have been agreed upon between the debtor and the bank that organizes the home ownership credit, it gives rise to the right for the creditor to claim losses in the form of money or compensation in the form of a return to its original condition. Examining the case above, the responsibility for the act of transferring credit underhand between the debtor and a third party is collective responsibility, which means that a person is responsible for a violation committed by another person, because the debtor has disappeared or his whereabouts are unknown.

### **3.3. Legal Efforts to Resolve the Problem of Transferring Home Ownership Credit Undercover Between Debtors and Third Parties**

For losses experienced by third parties in the transfer of ownership credit, in order to have legal certainty over home ownership both physically and legally, namely by taking legal action to file a lawsuit or decision with the District Court. This is in accordance with Article 188 paragraph (3) HIR concerning the relative competence of the court which states that if the defendant's place of residence and his actual place of residence are unknown, then this claim is submitted to the head of the district court at the plaintiff's place of residence, or if the claim concerns fixed assets, it is submitted to the district court in whose jurisdiction the assets are located. So that the transfer of home ownership credit underhand between the debtor and a third party carried out by means of a sale and purchase is declared valid and has permanent legal force regarding the validity of the underhand sale and purchase.

According to Gustav Radbruch, there are four things that underlie legal certainty, one of which is positive law, namely laws and other regulations or their

derivatives, including Government Regulation Number 24 of 1997 concerning Land Registration, in the provisions of Article 55 paragraph (2) that, recording changes to data regarding a registered land plot can also be done at the request of the interested party based on an official copy of a court decision that has permanent legal force or a copy of the determination of the head of the relevant court which is submitted by him to the head of the local land office. Therefore, with the existence of legal efforts to resolve problems through court decisions, such as the Kendari District Court Decision Number: 61/Pdt.P/2022/PN.Kdi, it can also be used as a legal basis for changing the name of a house certificate, namely land and buildings obtained through the transfer of home ownership credit under the hands of the debtor and the third party.

#### **4. Conclusion**

The process of transferring a home ownership credit underhand between the debtor and a third party begins with an agreement between the debtor (as the seller) and the third party (as the buyer) that with this agreement the debtor's obligations related to all matters relating to the home ownership credit (KPR) are replaced by continuing the payment of the credit installments that have been running until they are paid off. This legal act has legal consequences, namely the existence of a new legal relationship between the debtor and the third party in the form of buying and selling a house obtained through KPR. Because it does not involve the creditor as the bank organizing the home ownership credit (KPR), the new legal relationship between the debtor and the third party is not permitted by the creditor, or is considered an act of default. Where the debtor does not fulfill the credit agreement and the collateral binding agreement that has been made. So that it requires the debtor and the third party to be responsible for their actions by replacing the losses incurred in the form of money or compensation in the original state. In relation to the debtor's whereabouts are unknown, the legal responsibility is collective to the third party. Therefore, the legal effort to resolve the problem of transferring home ownership credit underhand between the debtor and the third party is by taking legal action to file a lawsuit or decision with the district court. So that the transfer of home ownership credit underhand between the debtor and the third party which is carried out by means of a sale and purchase is declared valid and has permanent legal force regarding the validity of the sale and purchase underhand. Thus, the third party is given the authority and power to take the certificate at the bank and carry out the process of changing the name on the sale and purchase that has been carried out underhand between the debtor and the third party.



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