

Legal Implications of Signing a Deed of Power of Attorney to Encumber Mortgage Rights Not Carried Out Before a Notary.

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Abstract. *This research aims to review the implementation of a power of attorney to encumber mortgage rights (SKMHT) made before a Notary in a land office legal study and the legal consequences of a power of attorney to encumber mortgage rights (SKMHT) made before a Notary following the format of the national land agency, Research A power of attorney to impose mortgage rights (SKMHT) must be made in a notarial deed or PPAT deed, however in practice the notarial making of an SKMHT deed can only be carried out by following the SKMHT format of Perkaban Number 8 of 2012. A Notary when using the SKMHT form is subject to the procedures for filling out SKMHT blanks and Notary Position Law (UUJN). Due to the discrepancy between the form of the Notarial deed as regulated in Article 38 UUJN and the format of the BPN, there are deficiencies which result in the SKMHT deed not meeting the criteria as an authentic Notarial deed. This research was analyzed descriptively analytically using a sociological juridical approach. By using a sociological juridical approach. A Notarial deed must fulfill the formal and material requirements to be declared a Notarial deed which has the power of proof as an authentic deed. This research analysis uses the theory of legal certainty and legal protection. From the results of this research analysis, it turns out that the SKMHT format does not comply with the form of Notarial deed specified by UUJN. SKMHT made before a Notary is not in accordance with UUJN provisions, so all legal acts that occur after the SKMHT takes place will not maintain the quality of the deed, it will become a private deed, if the formal requirements of a Notarial deed are not fulfilled. If the Notary's cause of losses, you can file a civil lawsuit and the Notary can be subject to civil sanctions and compensation costs and interests against the Notary concerned. Suggestions for Notaries in carrying out their positions must be in accordance with the provisions of applicable law. Therefore, as long as the provisions regarding the form and procedures for filling out the SKMHT form have not been changed, a Notary must fill in the SKMHT form by also looking at the provisions contained in the UUJN. In this case, a Notary can make changes (renvoi) in the SKMHT Blank both at the beginning of the deed and at the end or closing of the*

deed, so that the SKMHT deed made by the Notary still has perfect evidentiary power.

Keywords: Attorney; Imposing; Mortgage; Rights.

1. Introduction

The authority of a Notary is subject to the provisions stipulated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary. The authority of a PPAT is subject to the provisions stipulated in the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 Amendments to the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 23 of 2009 Amendments to the Regulation of the Head of the National Land Agency of the Republic of Indonesia Number 1 of 2006 Amendments to the Implementation of Government Regulation Number 24 of 1997 Concerning Land Registration. And in the provisions stipulated in Government Regulation Number 24 of 2016 Amendments to Government Regulation Number 37 of 1998 Concerning the Regulations on the Position of Land Deed Making Officials and Their Implementing Regulations.

Article 1 paragraph (7) of the Notary Law (hereinafter referred to as UUJN) confirms that a notarial deed is an authentic deed made by or before a Notary according to the form and procedures stipulated in this Law, the authenticity or otherwise of a deed is not sufficient if the words are made by and before an official only, besides that an authentic deed must be made according to the provisions stipulated by Law. Thus, if a deed is made by or before a notary but does not follow the form and procedures stipulated by Law, then its authenticity will be lost or non-existent and its evidentiary force can be degraded, namely it will only become a deed under hand.

The mechanism for signing a notarial deed is not only limited to the issue that the deed must be signed, however, the signing of the deed must also be done before a notary as regulated in Article 16 paragraph (1) letter I UUJN which states "the deed must be read out before the person appearing in the presence of at least 2 (two) witnesses and signed at that time by the person appearing, witnesses and notary".¹

¹ Article 16 Paragraph 1 Letter 1 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary.

In the case of the signing as mentioned above, it is reaffirmed in Article 44 UUJN which stipulates that: (1) Immediately after the deed is read, the deed is signed by each person appearing, witness and notary unless there is a person appearing who cannot sign by stating the reason; (2) The reason as referred to in paragraph (1) is stated explicitly in the deed; (3) The deed as referred to in Article 43 paragraph (3) is signed by the person appearing, notary and witness and translator; (4) The reading, translation or explanation and signing as referred to in paragraph (1) and paragraph (3) and Article 43 paragraph (2), paragraph (3) and paragraph (5) are stated explicitly at the end of the deed.²

Reading the deed until signing is a unity of the deed formalization (*verlijden*), in this case the focus of the discussion is the signing of the deed where the signing must also be done before a notary that before the deed is signed, the deed is first read before the parties concerned in order to convey the truth of the contents of the deed with the wishes of the parties then the deed is signed, of course in the presence of the parties and two (2) witnesses. The provisions of the Article provide certainty that the presence of the parties present before the notary is the party who also signed the deed. However, in reality it is suspected that the signing of the deed was not done before a notary because of the binding that occurred simultaneously.

The habit of signing deeds that are not carried out before a notary is based on the habit of binding deeds carried out at a notary's office. If the binding occurs simultaneously in different places, then the notary will not be able to be in 1 (one) different place at the same time. In relation to this, it is necessary to review further the practice of signing deeds that are not carried out before a notary and the responsibility of a notary who does not sign a deed carried out before him in this case is the Deed of Power of Attorney to impose mortgage rights (SKMHT) on PT BPR BKK Jepara.

2. Research Methods

This study uses Sociological approach which uses specifications analytical descriptive. The data used includes secondary data and primary data. Data retrieval comes from primary legal materials, secondary legal materials, and tertiary legal materials.³

² Article 43-44 of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary.

³ Soejono Soekanto, 2007, Introduction to Legal Research, UI Press, Jakarta, p. 45

3. Results and Discussion

3.1. Legal implications of signing a Power of Attorney to impose Mortgage Rights (SKMHT) which is not carried out before a Notary

The SKMHT installation stage is carried out before a Notary or PPAT and is carried out after a credit agreement as the main agreement containing the agreements of the parties regarding borrowing money by installing a Mortgage Right. Ownership of land rights that will be burdened with a Mortgage Right through SKMHT, Notary or PPAT must pay attention to the name of the land. This is because in the comparison of the SKMHT that will be made, it must be stated in accordance with what is stated in the certificate.⁴

The installation of one or more land rights in one SKMHT made by the PPAT is carried out based on the form and content of the SKMHT as determined by PMNA/Head of BPN Number 8 of 2012 concerning the Form of Power of Attorney to Charge Mortgage Rights. After the SKMHT is signed, the Notary or PPAT must check the existence of the land rights that will be used as the object of the Mortgage Right at the request of the creditor. This is done by the Notary or PPAT by making a letter of application to the National Land Agency (BPN) Land Registration Section to provide information on the existence of the land that will be used as the object of the Mortgage Right, whether the land rights are free from disputes and whether the land rights are being burdened with other land rights and at what rank the last Mortgage Right is above the land rights that will be used as the object of the Mortgage Right.⁵

Article 15 paragraph 1 of Law No. 4 of 1996 (UUHT) stipulates that "A Power of Attorney to Encumber Mortgage Rights must be made with a notarial deed or a PPAT deed". Based on the provisions of Article 15 paragraph 1 of the UUHT, it is clear that the granting of power of attorney in the context of granting Mortgage Rights (SKMHT) must be made with an authentic deed made before a Notary or PPAT. Of course, the Notary or PPAT referred to in Article 15 paragraph 1 of the UUHT is a Notary or PPAT who is authorized in accordance with the provisions of the laws and regulations in force in Indonesia, namely a Notary or PPAT in Indonesia.

Society expects legal certainty, because with legal certainty society will be more orderly. The law is tasked with creating legal certainty because it aims to order society. Without legal certainty people do not know what to do so that eventually unrest arises. However, if we place too much emphasis on legal certainty and

⁴ Interview with Mr. Nugraha, PPAT Notary in Jepara Regency, January 8, 2024, 14.00 WIB

⁵ Rachmadi Usman, 1999, Articles on Mortgage Rights on Land, Djambatan, Jakarta, p. 440.

strictly obey legal regulations, the result will be rigid and create a sense of injustice. Whatever happens, the regulations remain as they are, so they must be obeyed and implemented. The law often feels cruel when implemented strictly, *lex dura sed tamen scripta* (the law is cruel, but that is what it says).⁶

Reviewed from the theory of legal certainty of Gustav Radbruch, the implementation of the credit agreement must be given with a guarantee of legal certainty for the interested parties. This is in accordance with the principle in the implementation and enforcement of the law must pay attention to three basic values as stated by Gustav Radbruch, namely legal certainty (*rechtssicherheit*), benefit (*zweckmassigkeit*) and justice (*gerechtigkeit*). One of them is by making a credit agreement that gives rise to rights and obligations for the parties. The credit agreement is the main agreement followed by a guarantee agreement as an additional agreement. Both are made separately, but the position of the guarantee agreement is very dependent on the main agreement.

Based on the description above, by using the theory of legal certainty which is the analytical tool in this study, it is concluded that the implementation of a credit agreement with SKMHT collateral at PT BPR BKK Jepara is only permitted in special circumstances, namely if the Mortgage giver cannot be present in person before a Notary/PPAT to make an APHT. In this case, the Mortgage giver is required to appoint another party as an attorney with a SKMHT in the form of an authentic deed and its preparation is submitted to a Notary or PPAT. The power of attorney must be given directly by the Mortgage giver and must meet the requirements that have been set. The SKMHT installation stage is carried out before a Notary or PPAT and is carried out after there is a credit agreement as the main agreement containing the agreements of the parties regarding borrowing money by installing a Mortgage.

3.2. Legal Protection for the Parties against signing a Power of Attorney to impose Mortgage Rights (SKMHT) which is not carried out before a Notary

Charging Mortgage Rights can be done in two ways, namely first the Mortgage giver comes directly to give it before the PPAT by signing the APHT directly, second charging the Mortgage Rights by using SKMHT as the basis for acting in the granting of Mortgage Rights. The second method is used if the Mortgage giver cannot be present directly before the PPAT.

A power of attorney is generally a letter containing the delegation of authority

⁶Sudikno Mertokusumo, 1999, *Understanding Law: An Introduction*, Liberty, Yogyakarta, p.136

from the principal as the owner of the authority to the recipient of the power of attorney, to exercise the authority or represent the interests of the owner of the authority or the original principal in a certain event. The Civil Code explains that "granting power of attorney (lastgeving) is an agreement by which a person grants power to another person, who receives it to carry out an affair on his behalf". Basically, the granting of power of attorney is given in the form of an agreement between the principal and the recipient of the power of attorney to carry out a certain action or affair. Therefore, related to the validity of the granting of power of attorney, it must also contain the requirements for the validity of an agreement. Where in the agreement, there are subjective requirements, namely the agreement of those who bind themselves and the ability to make an agreement, then objective requirements, namely a certain thing and a lawful cause. The provisions regarding subjective requirements and objective requirements that apply in general in granting power of attorney, basically also apply in making SKMHT. This is because the substance contained in the SKMHT based on statutory regulations is included in the category of granting power of attorney.

Based on this, a SKMHT must be made in the form of an authentic deed. Notaries and PPAT are public officials who are authorized to make deeds that have perfect evidentiary power which are then better known as authentic deeds based on the provisions of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary⁷ hereinafter referred to as UUJN and Government Regulation Number 37 of 1998 concerning the Regulations on the Position of Land Deed Making Officials (PPAT).⁸

The authority of a notary in making SKMHT is based on the provisions contained in the UUJN. The UUJN states that a notary is authorized to make authentic deeds,¹⁸ deeds related to land.⁹ In addition, notaries also have the authority to make power of attorney deeds in original form.¹⁰ Based on these provisions, a notary is authorized to make a SKMHT either in the form of a deed minute or in original. However, according to Habib Adjie, normatively based on the provisions

⁷Gilang Wisudha, The Validity of a Power of Attorney to Encumber Mortgage Rights Made Against Collateral That Is Still Bound by Mortgage Rights for Other Creditors, *Jurnal Legal Reasoning* Vol. 1, No. 1, 2018, p. 15

⁸Delia Rizka, weaknesses of the power of attorney to impose mortgage rights (SKMHT) in binding mortgage rights, *Journal of the University of North Sumatra* Volume 1 Number 2, Medan, 2017, Page 78.

⁹Habib Adjie, 2011, *Cancellation and Revocation of Notarial Deeds*, First Edition, (Refika Aditama: Bandung), p.9.

¹⁰Muhammad Iqbal, Legal Analysis of the Power of Attorney to Charge Mortgage Rights II (Second) and Subsequently as an Extension of the Power of Attorney to Charge Mortgage Rights I (First) Which Has Expired, *Journal of the University of North Sumatra*, Vol. 1 No. 2 Medan, 2016, p. 143

of Article 15 paragraph (1) UUJN, the title of the making of the power of attorney to impose Mortgage Rights by a Notary should be Deed of Power of Attorney to Impose Mortgage Rights.¹¹

The form of a notarial deed must meet the provisions as mentioned above. So that there are legal consequences, if one of the elements of the provisions is not stated in a notarial deed. SKMHT as a notarial deed and in order to be fulfilled as an authentic deed must also meet these provisions. So that SKMHT has perfect evidentiary power as an authentic deed. Legal consequences are the consequences that arise from the implementation or non-implementation of a legal provision in a legal act. In the event that all provisions of the UUJN are not fulfilled by a Notary when making a deed, the legal consequence is that the deed is degraded into a private deed after the deed is signed. Normatively, in the Civil Code as the *lex generalis* of authentic deeds and the UUJN as the *lex specialist* of authentic deeds made by notaries, it has actually regulated the "sanctions" against deeds whose making does not meet the applicable provisions.

In this case, the binding occurs simultaneously, the Notary may not be in 2 (two) different places, this anticipates certain conditions. So according to the author, all notarial activities must be carried out in a notary's office, by signing the deed in a notary's office, the notary no longer needs to sign the deed in another place when the notary signs the deed together in the presence of the parties and witnesses, except when reading the deed. If the deed is signed not before a notary, the result may be a difference of opinion regarding the debtor's refusal to sign the deed. The legal consequences of the deed will lose its authenticity or be degraded to a private deed as stated in Article 16 paragraph (9) of the UUJN-P.

Based on the description above, by using the theory of legal protection which is the analytical tool in this study, the author draws a conclusion based on the explanation above that This has a great influence on the SKMHT made by a notary, if the Notary's actions cause losses to the party whose name is in the deed, which should have perfect evidentiary power, then the party can file a civil lawsuit and the Notary can be subject to civil sanctions and compensation costs and interest against the Notary concerned. Sanctions for violations of the provisions of Article 15 UUHT are stated in paragraph (5) which stipulates that THE CONSEQUENCE OF THE SKMHT IN CONNECTION IS VOID BY LAW. The legal consequences concerned are considered to have never existed from the start. the existence of cancellation sanctions to protect the public interest and a certain group of people (the parties). A deed that is void by law, then the deed is considered to have never existed or

¹¹Habib Adjie, 2009, Indonesian Notary Law: Thematic Interpretation of Law No. 30 of 2004 Concerning the Position of Notary, Second edition, (Refika Aditama: Bandung), p.78.

was never made. Something that was never made can be used as the basis for a claim for reimbursement of costs, compensation and interest to the Notary because if the parties feel disadvantaged by the legal relationship between the Notary and the parties.

A power of attorney is generally a letter containing the delegation of authority from the principal as the owner of the authority to the recipient of the power of attorney, to exercise the authority or represent the interests of the owner of the authority or the original principal in a certain event. The Civil Code explains that "granting power of attorney (lastgeving) is an agreement by which a person grants power to another person, who receives it to carry out an affair on his behalf". Basically, the granting of power of attorney is given in the form of an agreement between the principal and the recipient of the power of attorney to carry out a certain action or affair. Therefore, related to the validity of the granting of power of attorney, it must also contain the requirements for the validity of an agreement. Where in the agreement, there are subjective requirements, namely the agreement of those who bind themselves and the ability to make an agreement, then objective requirements, namely a certain thing and a lawful cause. The provisions regarding subjective requirements and objective requirements that apply in general in granting power of attorney, basically also apply in making SKMHT. This is because the substance contained in the SKMHT based on statutory regulations is included in the category of granting power of attorney.

4. Conclusion

The legal implications of signing a Power of Attorney to impose Mortgage Rights (SKMHT) that is not carried out in person in this case considering that the Power of Attorney to Impose Mortgage Rights (SKMHT) is indeed deliberately made specifically for the purpose of installing mortgage rights, then reflects the existence of legal certainty, certainty of the subject and object of its rights, certainty of the date of its creation so that it is difficult to dispute its validity, In order to realize the principle of legal certainty, the creation of SKMHT as a credit guarantee must meet the provisions or requirements stipulated in the applicable laws and regulations and must be complied with by every Notary or PPAT who will make the SKMHT or must be complied with by the PPAT who will make the APHT made based on the SKMHT. If the Notary or PPAT who will make the SKMHT or the PPAT who will make the APHT finds that the making of the SKMHT is not in accordance with the provisions of the applicable laws and regulations, then the Notary or PPAT must reject the making of the deed in question, because any deviation in the making of the SKMHT that is contrary to the provisions of the applicable laws and regulations can result in the SKMHT being null and void by law and therefore can have certain legal consequences for the Notary or PPAT who

made the deed.

The granting of power of attorney is given in the form of an agreement between the grantor and the grantee of power of attorney to carry out a certain action or matter. Therefore, related to the validity of the granting of power of attorney, it must also contain the conditions for the validity of an agreement. Where in the agreement, there are subjective conditions, namely the agreement of those who bind themselves and the capacity to make an agreement, then objective conditions, namely a certain thing and a lawful cause. The provisions regarding subjective conditions and objective conditions that apply in general in granting power of attorney, basically also apply in making SKMHT. This is because the substance contained in SKMHT based on statutory regulations is included in the category of granting power of attorney.

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