



Review the Legal Subject Status of Buyers in Underhand Sales of Mortgage Objects

Fahrul Fauzi

Faculty of Law, Universitas Indonesia, Jakarta, Indonesia

Email: fahrul.fauzi@ui.ac.id

Published: 30/09/2023

How to cite (in APA style):

Fauzi, F. (2023). Review the Legal Subject Status of Buyers in Underhand Sales of Mortgage Objects. *Jurnal Hukum Prasada*, 10(2), 86-92. doi: <https://doi.org/10.22225/jhp.10.2.2023.86-92>

Abstract

The Mortgage Law regulates three types of execution of mortgage rights, namely Title Executorial, Parate Execution, and Underhand Execution. In the underhand execution, it is important to pay attention to the buyer's legal subject of the mortgage's object. This article examines the buyer's legal subject of the mortgage's object in underhand sales in the framework of the execution of the mortgage. The buyer's legal subject is important, considering that the national land law stipulates that the status of the land determines the status of the subject who can own it. This study uses normative juridical research methods using sources of legislation and other secondary legal materials. This study found that the underhand execution of the mortgage object must be carried out by considering the legal conditions of buying and selling land, both material and formal. Material requirements in the form of the importance of the legal subject status of a land buyer are essential things that need attention. If the material requirements are not met, the sale and purchase are null and void by law. The legal subject status of the buyer of the mortgage object must see the provisions in the Basic Agrarian Law or its derivative provisions to ensure that he has the right to hold land with the status of the rights in question.

Keyword: execution; mortgage right; subject status; underhand sales.

I. INTRODUCTION

Indonesia has 191.09 million hectares of land area, so it cannot be denied that Indonesia is a country that has a vast land area. The extent of this land area is a blessing from God Almighty. It becomes challenging for policymakers and society to manage the grace that only some countries have. Indonesia's shift to become an industrialized country accompanied by an increasing population has resulted in the agrarian, spatial planning, and land areas becoming strategic and complex issues to manage.

Mainland, or in Indonesian, it is better known as land, is a national asset that is essential and fundamentally needed because every resident lives and develops in direct contact with the land. Society positions the land as vital because the land is the main factor in efforts to increase agricultural productivity. Within the development framework, a land is an essential object because the land is the capital for development.

One of the agrarian policies related to national development is the Mortgage Law, passed in 1996 through "Law Number 4 of 1996 concerning Mortgage Law on Land and Objects Related to Land (Mortgage Law)". The formation of the Mortgage Law is an implementation of the mandate of "Law Number 5 of 1960 concerning Basic Agrarian Law" (Hasbullah, 2009). The Basic Agrarian Law stipulates that ownership rights, business use rights, and building use rights can be used as collateral for debts burdened with mortgage rights. Further arrangements for Mortgage Rights will be regulated by law.

The Mortgage Law was formed because it is a mandate from the UUPA and, at the same time, an effort to increase efforts to support the implementation of national development, especially in securing the distribution of funds through credit facilities for various needs. With this national law, the Mortgage Law can guarantee legal certainty and protection for interested parties in a balanced manner.

However, it can be accepted that the formation of the Mortgage Law takes a long time or can be said to be very slow. As mentioned above, the Basic Agrarian Law mandated the formation of a Mortgage Law in 1960, but only 35 years later, a Mortgage Law was formed. So, for 35 years after the enactment of the Basic Agrarian Law, Mortgage Institutions in Indonesia have yet to be able to function as they should because there is no or no law that specifically regulates it. Prior to the establishment of the Mortgage Law, arrangements regarding land rights guarantee institutions still referred to mortgage provisions as stipulated in Book II of the Civil Code and *credietverband* provisions in the Staatsblad 1937-190. The Basic Agrarian Law states that these rules will still be enforced until the Mortgage Law is formed (Pratama, 2015).

Article 1 point 1 Mortgage Law defines Mortgage Rights as "*collateral rights imposed on land rights as referred to in the Basic Agrarian Law, including or not including other objects that are an integral part of the land, for repayment of certain debts, which give the position priority given to certain creditors over other creditors.*" As a guarantee institution, the Mortgage is not a stand-alone agreement but an agreement that is an accessory, namely a follow-up agreement from another main agreement (Doly, 2011).

Mortgage Right has several benefits, one of which is that they can be used as collateral by the bank, which then the bank will provide business capital. Banks, as providers of funds for economic activities through credit facilities channeled to customers, pay attention to several vital aspects in assessing potential customers, one of which is the existence of guarantees. Guarantees for lenders are essential in order to maintain capital security and legal certainty for the lenders (Kasmir, 2004).

As proof of a mortgage right, the Land Office must issue a mortgage certificate and contains the sentence "*Pro Justice in The Name of The Only God.*" The Mortgage Certificate has the same executorial power as a court decision with permanent legal force. It is valid as a substitute for *grosse acte hyphoteek* insofar as it concerns land rights. The certificate will provide creditors convenience and legal certainty if the debtor defaults one day.

In practice, if the debtor defaults, the creditor or the holder of the mortgage rights sends a warning letter three times to the debtor to pay off the debt. If, after three warnings properly, the debtor still does not pay off the debt, then the debtor can be in default so that the mortgage holder, in this case, can execute the mortgage rights imposed on the debt guarantee. The execution in question is the auction of collateral objects subject to mortgage rights.

Article 6 of the Mortgage Law states that if the debtor defaults, the first mortgage holder has the right to sell the object of the mortgage on his power through a public auction and collect the settlement of his receivables from the proceeds of the auction. The execution procedure regulated in Article 6 of the Mortgage Law is called *Parate Executie*. Based on this article, the right of the holder of the mortgage right to exercise his right is a right that is solely granted by law. However, this does not mean that by law, these rights exist but must be agreed upon in advance by the parties in the Deed of Encumbrance of Mortgage Rights on land rights (Mulydi & Widjaja, 2005).

Based on the Mortgage Law, there are three types of execution of mortgage rights: Title Executorial, Parate Execution, and Underhand Execution. Distinguishing the three types of execution of the mortgage right is found in the implementation procedure. The Underhand Execution must fulfill the elements listed in Article 20 of the Mortgage Law, namely the existence of an agreement between the mortgage right and the mortgage holder (Rahman, 1995). The focus of this article is the discussion regarding the legal provisions for executing Mortgage objects through private sales and how the provisions for the legal subject status of the buyer of Mortgage objects are executed through underhand

sales.

II. METHOD

The research method used in this research is normative legal research (normative juridical). This is legal research whose data comes from library materials or is often referred to as secondary data. Other literature mentions that normative legal research is library research (Soekanto & Mamudji, 1985). Normative legal research is commonly used in the development of legal science, which is commonly called legal dogmatics (Sidharta, 2009). This study focuses on the use of written legal norms that are relevant to the problem.

Secondary data is obtained through library materials consisting of primary, secondary, and tertiary legal materials (Mamudji, 2005). Primary legal materials are mainly Mortgage Law, Basic Agrarian Law, and Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flats Units, and Land Registration. This paper also refers to secondary legal materials in the form of international and national reputable journals related to the topic of the problem. It is enriched with tertiary legal materials such as legal dictionaries and encyclopedias (Sunggono, 2003).

III. DISCUSSION

Execution of Mortgage Objects

The Mortgage Law provides convenience for holders of mortgage rights if the debtor defaults, namely the choice of execution of objects guaranteed by mortgage rights can be made in 3 (three) ways, namely underhand sales, parate execution, and executorial titles (Ayuningtyas, 2017). The object of the Mortgage is sold through a public auction according to the procedure specified in the applicable laws and regulations, and the holder of the Mortgage has the right to take all or part of the proceeds for repayment of his receivables, with the right to precede creditors another.

The provisions of Article 20 paragraph (1) of the Mortgage Law state that if the debtor defaults, then based on: a. the right of the first mortgage holder to sell the mortgage object or b. the executorial title contained in the right mortgage certificate, the mortgage object is sold through a public auction according to the procedure specified in the laws and regulations for the settlement of receivables of the Mortgage holder with prior rights than other creditors.

From the provisions in Article 20 paragraph (1) of the Mortgage Law, it can be seen that there are two ways or bases for executing the Mortgage, namely: 1) based on parate execution as referred to in Article 6 of the Mortgage Law; 2) Based on the executorial title contained in the Mortgage Certificate (Article 14 paragraph (2) Mortgage Law).

The mention of the two methods sequentially indicates that the legislator is aware that the implementation of the two methods is different; one is based on an executorial title and, therefore, like a court decision, must follow the procedure specified in civil procedural law, while the other is execution outside of interference court's hand.

Article 6 of the Mortgage Law authorizes the holder of the first mortgage right to sell the Mortgage object on his power through a public auction and collect the settlement of the receivables from the sale proceeds if the debtor defaults. The holder of the first mortgage right does not need to ask for the decision of the Head of the local District Court to carry out the execution. It is sufficient if the holder of the first mortgage right submits a request to the Head of the local State Auction Office to carry out the execution. Because the authority of the holder of the first Mortgage Right is the authority granted by law (the authority is owned by law), the Head of the State Auction Office must respect and comply with this authority.

In addition, the execution of the Mortgage right can also be based on the executorial title stated in the Mortgage certificate. Besides functioning as proof of the existence of mortgage rights, the certificate of mortgage rights is also useful as a basis for executing mortgage rights if the debtor defaults. Using the executorial title as contained in the mortgage certificate, if the debtor defaults, the creditor can sell the object of the mortgage in question to collect receivables from the sale of the mortgage.

Then the provisions in Article 20 paragraph (2) of the Mortgage Law allow deviating from the principle of executing mortgage rights through a public auction. Article 20, paragraph (2) of the Mortgage Law stipulates that upon agreement between the giver and the holder of the mortgage, the sale of the mortgage object can be carried out privately if, in this way, the highest price that benefits all parties can be obtained. Thus, execution through underhand sales can only be executed if the giver and the mortgage holder have agreed upon this. It is specified in the Elucidation of Article 20 paragraph (2) of the Mortgage Law that the possibility of execution through private sales is intended to accelerate the sale of the mortgage object at the highest selling price because sales through public auctions are not expected to produce the highest price.

Underhand Sales: Alternative Execution of Mortgage Objects

Underhand sales have advantages or advantages compared to execution through execution parates or executorial titles, among others (Herryani & Njoto, 2018):

- Cheaper costs because there is no auction fee; only administrative fees are paid.
- The fee for a public auction is higher; the creditor must pay a public auction fee of 6.5% (six points five percent) of the liquidation value of the mortgage object. For underhand sales, the only costs required are notary and administration fees.
- The settlement process is faster; interested parties can bargain directly.
- A public auction will be offered to the auction participants; if the selling price is as desired in the public auction process, the mortgage object will be released. If the bid does not match the desired price in the public auction, the 2nd to the following public auction will be held. Thus there is no time limit for selling the mortgage object. Underhand sales on collateral in the form of mortgage rights, there is a time limit for selling, and the debtor is given a maximum period of 6 months.
- The potential to get a high selling price is immense; the debtor can immediately offer it to prospective buyers.
- The selling price can be achieved high, prospective buyers bid directly, not through intermediaries, and there are no additional costs. In public auctions, auction participants tend to buy auction items at low prices.
- The potential for lawsuits is relatively minor; the sale proceeds are an agreement of the parties.
- The parties have agreed to sell and use it to repay bad loans. This minimizes the parties to sue the Bank.
- The sociological impact borne by debtors, creditors, and buyers are relatively better and can be accepted by all parties.
- The social impact must be considered and maintained; the people's mindset towards bad loans and mortgage objects being sold will have an adverse impact.
- Transferring rights can be done more quickly at the Land Deed Making Officer or the deed process at the notary.

Transfer of rights can be done quickly because the requirements can be fulfilled immediately to return the name to the buyer.

Selling through public auctions does not result in the highest price. The implementation of self-sale of the mortgage object under the hands must only be carried out following the provisions of Article 20 paragraph (2) of the Mortgage Law, with the following conditions:

- If agreed by the giver and the mortgage holder.
- After one month has passed since the notification in writing by the giver or mortgage holder to interested parties.
- Announced in at least 2 (two) newspapers circulating in the area concerned or local mass media whose reach includes the location of the object of the mortgage in question.

- Neither party expressed any objections.

The agreement between the giver and the mortgage holder is a crucial element in the sale of collateral in the form of mortgage rights underhand, namely if, in this way, the highest price that benefits all parties can be obtained. Underhand selling is more effective and efficient than selling through public auctions because underhand selling involves few parties, and the costs are not too high. In addition, the procedure is not complicated and takes a short time.

Article 20, paragraph (2) of the Mortgage Law regulates underhand sales if the highest price is obtained, which benefits all parties. Private sales are carried out because it is thought that selling through a public auction cannot produce a high price, provided that the giver and the mortgage holder have agreed upon this and the specified conditions have been met.

Certain conditions "*the bank considers it better if the guarantee is sold privately rather than through a public auction. This is because the creditor/bank has an interest so that the proceeds from the sale of the collateral are sufficient to pay the debtor's debts.*" The difficulties experienced by creditors/banks who will carry out private sales include the debtor not having good faith or not being willing to be met by the bank, or his whereabouts are no longer known.

The sale and purchase of mortgage objects under the hand must still pay attention to the provisions of the legal subject of land rights. This is because the material terms of sale and purchase stipulate that the seller has the right to land, and the buyer is a suitable subject to own the land he has purchased. The non-fulfillment of the material elements can result in the cancellation of the transfer of land rights in private buying and selling.

Legal Subject Status of the Mortgage Object Purchaser

Boedi Harsono said that the sale and purchase of land rights is a legal act in the form of surrendering property rights (forever) by the seller to the buyer, who at that time also hands over the price to the seller, which results in the transfer of land ownership rights from the seller to the buyer. According to customary law, buying and selling land is a legal action intended to transfer land rights from the seller (right holder) to the buyer by paying a sum of money in cash, which is done explicitly. (Harsono, 2002).

The legal requirement for buying and selling land according to customary law is that the seller and the buyer must fulfill the material and formal requirements. The material requirement is that the seller and buyer must be legal subjects according to the law of the land being traded. While the formal requirement is that the sale and purchase are carried out in the presence of the village head (customary head) where the land being traded is located. Currently, the sale and purchase of land no longer have to be carried out before the village head (customary head) but must be carried out before the land deed official (PPAT). This follows the provisions of Article 37 paragraph (1) PP 24/1997 jo. PP 18/2021. The terms of the sale and purchase of land, which are material requirements and formal conditions are as follows (Hartanto, 2015):

The material requirements for buying and selling land rights focus on the subject and object of the rights to be traded. Holders of land rights must have rights and the authority to sell land rights. In addition, the buyer must fulfill the requirements as the holder (subject) of the right to buy the object of sale and purchase. Material requirements, namely: people who have the right to buy and sell (buyers and sellers), the object being traded is not in dispute.

The formal terms of buying and selling land rights constitute the formality of the sale and purchase transaction. These formalities include the deed, proof of the sale and purchase agreement, and the official authorized to do the deed. In the context of registering the transfer of rights, the formal conditions for buying and selling land rights must be proven by a deed drawn up by and before the land deed official (PPAT). As in government regulation no. 24/1997, the sale and purchase are carried out before the PPAT, who will issue a sale and purchase deed; the deed is a condition for carrying out land registration at the Land Office. The deed made by the PPAT is or is qualified as an authentic deed.

To ensure legal certainty of the transfer of land rights through buying and selling,

according to PP 24/1997 jo, PP 18/2021, buying and selling can only be carried out on land owned based on land rights as evidenced by proof of legal ownership from the seller. Because proof of ownership of land rights, it means that the seller is a legal person or party to sell.

As stipulated in the law, land rights that can become the object of Mortgage Rights include Ownership Rights, Cultivation Rights, Building Use Rights, and Use Rights over State land, which according to their nature, can be transferred.

Ownership Rights are hereditary, the strongest and most whole rights people can have over land. Building use rights are rights to construct and own buildings on land that is not their own, with a maximum period of 30 years. Cultivation Right is the right to cultivate land directly controlled by the state, according to a maximum period of 25 years for an agricultural, fishery, or animal husbandry companies. The right to use state land is the right to use or collect produce from land directly controlled by the state.

The legal subjects of the holders of Ownership Rights, Cultivation Rights, Building Use Rights, and Use Rights are regulated in the provisions of the Basic Agrarian Law and Government Regulation No. 18 of 2021. By continuing to pay attention to nationality and social principles for land as stipulated in the Basic Agrarian Law.

Buying and selling privately must be carried out while still paying attention to the status of the subject of land rights because the status of land rights determines the status of legal subjects who can own it. For example, land owned by A (an individual Indonesian citizen) with an Certificate of Ownership Rights cannot be sold privately to PT X because a legal entity cannot own land with Certificate of Ownership Rights status. If this happens, the private sale and purchase in the framework of the execution of the mortgage becomes null and void and is considered to have never existed, and the status of the land can be returned to state control.

IV. CONCLUSION

The Mortgage Law provides convenience for holders of mortgage rights if the debtor defaults; namely, the choice of execution of objects guaranteed by mortgage rights can be made in 3 (three) ways, namely underhand sales, parate execution, and executorial titles. Underhand sales are carried out because it is thought that selling through a public auction cannot produce a high price, provided that the giver and the mortgage holder have agreed upon this and the specified conditions have been met.

Executing the mortgage object privately must be carried out by considering the legal requirements of buying and selling land, both material and formal. The material requirement is that the seller and buyer must be legal subjects according to the law of the land being traded. While the formal requirement is that the sale and purchase are carried out in the presence of the village head (customary head) where the land being traded is located. Material requirements in the form of the importance of the status of a legal subject who will buy land are important things that need attention. If the material requirements are not met, the sale and purchase are null and void by law.

REFERENCES

- Ayuningtyas, G. (2017). Tinjauan Yuridis Eksekusi Hak Tanggungan Melalui Penjualan di Bawah Tangan sebagai Alternatif Penyelesaian Kredit Macet. *Repertorium*, 4(1).
- Doly, D. (2011). Aspek Hukum Hak Tanggungan dalam Pelaksanaan Roya. *Negara Hukum*, 2(1).
- Harsono, B. (2002). *Menuju Penyempurnaan Hukum Tanah Nasional*. Universitas Trisakti.
- Hartanto, J. A. (2015). *Panduan Lengkap Hukum Praktis Kepemilikan Tanah*, . LaksBang Justitia.
- Hasbullah, F. H. (2009). *Hukum Kebendaan Perdata – Hak-Hak Yang Memberi Jaminan* (3rd ed.). Ind Hill-Co.
- Herryani, M. R. T. R., & Njoto, H. (2018). Penjualan Objek Hak Tanggungan Dibawah Tangan untuk Penyelesaian Kredit Macet di Bank. *Lex Journal* , 2.
- Indonesia. *Undang-Undang Peraturan Dasar Pokok-Pokok Agraria*. UU No. 5 Tahun 1960, LN No. 104 Tahun 1960, TLN No. 2043.
- Indonesia. *Undang-Undang Hak Tanggungan Atas Tanah beserta Benda-Benda yang Berkaitan*

- dengan Tanah. UU No 4 Tahun 1996, LN No 42 Tahun 1996, TLN No. 3632.
- Indonesia. *Peraturan Pemerintah Hak Pengelolaan, Hak Atas Tanah, Satuan Rumah Susun, dan Pendaftaran Tanah*. PP No. 18 Tahun 2021.
- Indonesia. Menteri Agraria dan Tata Ruang. *Peraturan Menteri Agraria dan Tata Ruang/Kepala Badan Pertanahan Nasional tentang Rencana Strategis Kementerian Agraria dan Tata Ruang/Badan Pertanahan Nasional Tahun 2015-2019*. PM No. 25 Tahun 2015.
- Kasmir. (2004). *Bank dan Lembaga Keuangan Lainnya*. PT Raja Grafindo Persada.
- Mamudji, S. (2005). *Metode Penelitian dan Penulisan Hukum*. Badan Penerbit Fakultas Hukum Universitas Indonesia.
- Mulydi, K., & Widjaja, G. (2005). *Seri Hukum Harta Kekayaan: Hak Tanggungan*. Kencana Prenada Media.
- Pratama, W. (2015). Tinjauan Hukum Tentang Sertifikat Hak Tanggungan Menurut Undang-Undang Nomor 4 Tahun 1996. *Metrologia*, 53(5).
- Rahman, H. (1995). *Aspek-Aspek Pembrian Kredit Perbankan di Indonesia*. Citra Aditya Bakti.
- Sidharta, B. A. (2009). *Penelitian Hukum Normatif: Analisis Penelitian Filosofikal dan Dogmatika dalam Metode Penelitian Hukum: Konstelasi dan Refleksi*. Yayasan Obor Indonesia.
- Soekanto, S., & Mamudji, S. (1985). *Penelitian Hukum Normatif Suatu Tinjauan Singkat* (5th ed.). Raja Grafindo Persada.
- Sunggono, B. (2003). *Metode Penelitian Hukum* (Vol. 5th). PT Raja Grafindo Persada.