
Encumbrance of Mortgage Rights on Uncertified Land

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Abstract

In the General Explanation of Mortgage Law (*UUHT*) it is stated that there are two absolute elements of land rights that can be used as mortgage objects, one of which is that the right in accordance with applicable provisions shall be registered at the Land Office. Thus, every Mortgage Object shall be registered and have a land title certificate. Nevertheless, on land having not been certified, Mortgage Rights may also be charged as long as the grant is carried out at the same time as the application for registration of the land rights in question. The problem is how to carry out the registration of mortgage rights on uncertified land and what are the legal consequences of granting mortgage rights to uncertified land rights? This study uses a juridical-empirical research method. There are two types of data used, such as primary and secondary data. The encumbrance of Mortgage Rights on land having not been certified has never been carried out by banks by making a Deed of Encumbrance of Mortgage Rights (*APHT*) directly. Banks are only limited to making a Power of Attorney to Charge Mortgage (*SKMHT*) only. The consideration for not making *APHT* for land that has not been registered is because the ownership of the titles to the land is not yet clear. In practice, Notaries/Land Deed Officials always make *SKMHT* in accordance with Article 15 (4) *UUHT* to bind collateral for land that has not been certified. This is an obstacle because the certification process takes more than 3 months, even a year. In dealing with problems in the form of unpaid loans with uncertified land collateral, while the debtor has died and left an heir, then there are several ways of settling the bank, such as: if the credit is due, then the payment is taken over by credit insurance. If the credit has matured and the credit insurance has expired, it will be billed until it is paid off to the heirs in a family manner by offering interest relief on the loan, asking the heirs concerned to make an underhand sale of the object of the guarantee.

Keywords: mortgage rights; certificate.

I. INTRODUCTION

Credit in general serves to facilitate a business activity, and especially for economic activities in Indonesia, it plays a very important role in its position, both for production businesses and private businesses that are developed independently because they aim to improve people's living standards. Banking institutions carry out the main function of Indonesian banking, namely as collectors and distributors of funds from the public aimed at supporting the implementation of national development towards improving people's welfare, by collecting funds from the public in the form of deposits, demand deposits, time deposits, certificates of deposit, savings, and channeling funds from community by providing credit in the form of bank credit (Sitompul, 2013).

The most widely used form of collateral in bank credit agreements is land rights, which refers to the provisions in Article 51 of Law Number 5 of 1960 concerning Basic Agrarian Regulations (referred to as *UUPA*). The article clearly states that a strong guarantee institution that shall be imposed on land rights, namely Mortgage Rights as a substitute for mortgage and credit verb and institutions (Rasjidi, 2003). This Mortgage Guarantee Institution has recognized its existence through Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land, hereinafter referred to as the Mortgage Law (*UUHT*) and makes the interests of debtors and creditors obtain legal protection from the

government (Soedikno Mertokusumo, 2012). The object of Mortgage shall be registered and have a land title certificate. However, for lands that have not been certified, Mortgage Rights may also be imposed as long as the granting of Mortgage Rights is carried out simultaneously with the application for registration of the land rights in question.

The legal issue of imposing Mortgage on land having not been certified will be more complicated if the holder of the land right who has imposed the Mortgage on dies and has an heir who has the right to inherit (Maria S.W. Sumardjono, 2001). The case becomes more significant if the granting of Mortgage is carried out by means of a Power of Attorney to Impose Mortgage Rights (*SKMHT*), because for land that has not been registered, the granting of *SKMHT* shall be followed by a Deed of Assignment of Mortgage Rights (*APHT*), no later than a period of 3 months after the administration of *SKMHT*. Building upon the background described above there are two problems that are examined in this paper, namely: How is the registration of mortgage rights on uncertified land titles implemented? What are the legal consequences of granting mortgage rights to uncertified land titles?

II. METHOD

Empirical legal research is intended to invite researchers not only to think about legal issues that are normative (law in book), but also to conduct a study of law in society in fact (law in action). (Nurhayat et al, Jurnal Penegakan Hukum Indonesia (JPHI), Volume 2, Issue 1, February 2021) This research will rely on existing theories and facts and it is based on the discipline of law. In line with Sudikno Mertokusumo's opinion, the target of the research is norms in the form of law (*das Sollen*) for library research and behavior (*das Sein*) for field research (Sudikno Mertokusumo, 1999). This research was conducted at the Office of Notary I Gusti Ngurah Maha Buana, Notary/PPAT I Made Widiada, which is in Denpasar City, as well as the Office of Bank Padma Denpasar which has the authority in the field of binding guarantees and registration of mortgage rights. The sample in this study was determined by purposive sampling technique, namely the researcher used his own judgment armed with sufficient knowledge about the population to select sample members, with the hope that the data obtained would lead to a lot of conclusions. Primary data collection was done through interviews and secondary data collection was done through literature study. Interview as a technique in research, aims to collect information or data. (Soerjono Soekanto, Jurnal Hukum dan Pembangunan, Vol 5, No 1 tahun 1975, <http://www.jhp.ui.ac.id/index.php/home/article/view/609>). Data analysis was carried out using a systematic interpretation method with a sequential and coherent mindset to obtain conclusions on the two problems discussed in this study. Then the results are presented descriptively by Hasibuan & Harahap, (2019), namely by describing the circumstances or facts that occur regarding the imposition of mortgage rights on land that has not been certified.

III. RESULTS AND DISCUSSION

Registration of Mortgage Rights on Uncertified Land Title

The implementation of the encumbrance of Mortgage is carried out through two stages of activity, namely the stage of Granting Mortgage, and the stage of Registration of Mortgage. For land rights originating from the conversion of registered land rights, it is possible to use them as collateral for debt repayment by being encumbered with Mortgage Rights by referring to the provisions of Article 10 paragraph (3) of the *UUHT*, namely if the object of Mortgage is in the form of land rights originating from the conversion of old rights that have met the requirements to be registered but the registration has not been carried out, the granting of mortgage rights shall be carried out simultaneously with the application for registration of the land rights in question. In line with this, in the explanation of Article 8 of Law Number 7 of 1992 concerning Banking as amended by Law Number 10 of 1998 it is stated that land whose ownership is based on customary law, namely land whose proof of ownership is based on customary law, namely land whose proof of ownership is in the form of *girik*, *petuk*, and others of the same type can be used as collateral.

However, the binding of credit guarantees with Mortgage Rights in practice is not carried out based on the provisions of Article 10 *UUHT*, or by making *APHT*. However, the bank in this case only

makes a power of attorney to provide mortgage rights. According to Putu Arsana, Bachelor of Law, Branch Head of Bank Padma Denpasar Headquarters, the binding of credit on uncertified lands has never been done and if it is to be done, it will be procedurally carried out in the following way:

- a. Making a deed of credit agreement under the hand which can then also be registered in *waarmerking* (recorded in a special book by a notary);
- b. Making the Power of Attorney for Imposing Mortgage (*SKMHT*);
- c. The land owner authorizes the bank to register the land (certificate-making process) and submit all the necessary documents for that purpose;
- d. The land registration (certificate making process) of the collateral object is carried out through the Notary Office/Land Deed Official appointed by the bank;
- e. If the land registration process (certificate-making process) is completed and the land certificate has been issued, the land owner has authorized the bank to receive the certificate and continue the process of installing the *APHT* at the local land office.

From the results of interviews conducted with Cokorda Gede Mahadewa, President Director, Bank Padma, Denpasar, it was explained that in practice Bank Padma Denpasar in particular had never made *APHT* directly to bind collateral for land rights that had not been certified, the bank in this case was only limited to making *SKMHT* only. In the opinion of I Gusti Ngurah Maha Buana and I Made Widiada, both Notaries in Denpasar, the legal consideration for not making *APHT* for lands that have not been registered is because there is a possibility that the rights to the land still have the potential to cause legal conflicts in the future. and this can drag the Notary/Land Deed Official into the legal conflict of the parties (Interview on 17 June 2021)

The Notary/Land Deed Official always uses the Power of Attorney to Give Mortgage Rights (*SKMHT*) as an instrument by referring to the provisions of Article 15 (4) *UUHT*, to bind collateral for uncertified lands that will be used as collateral/collateral. The next obstacle faced by Notary/Land Deed Official is that the certification process takes more than 3 (three) months, even up to 1 (one) year. With regard to the limited period of validity of the *SKMHT*, the next obstacle is presenting the parties concerned, including scheduling the right time. This is a factually unavoidable condition.

The limitation of *UUHT* is that it does not explain further and in detail how the mechanism for registering Mortgage Rights for lands that have not been certified. However, when referring to the explanation of Article 117 paragraphs (2) and (3) of Regulation of Ministry of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning Provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration, in the case of registration of Mortgage Rights on land that has not been certified, the registration of the right in question is carried out first, either through confirmation of conversion or through recognition of rights. Thus, the registration of Mortgage can only be carried out after the certification process for the object of the Mortgage is completed, so that the birth of the Mortgage on the Uncertified Mortgage object does not occur on the 7th day as referred to in Article 13 *UUHT*, but after the certification process is complete.

Considering that the birth of Mortgage Rights on the lands of former Customary Ownership Rights is highly dependent on the certification process, in this case there is no legal certainty. This is because it is very possible that the certification process will experience problems. If during the 60-day announcement period to fulfill the principle of publicity in land registration there is a claim from a third party, the certificate cannot be issued. If the land certificate cannot be issued, the Mortgage registration process cannot be carried out. Putu Arsana, Bachelor of Law, in an interview argued that making *APHT* whose object is land rights that have not been registered or not yet certified for credit with a large enough ceiling is very unsafe for the bank and carries a high risk. It is highly avoided to receive collateral in the form of land with Title which has not yet been certified, even though the law allows to do so. Furthermore, it is explained that for small loans, it may not be too risky for banks to still consider receiving collateral in the form of Title on land that has not been certified.

Taking into account the banking problems in the implementation of the encumbrance of Mortgage Rights, both regarding rates and the implementation period, the registration period stipulated in the

UUHT cannot be said to be accommodating to banking problems, because there are still quite a lot of land rights that are guaranteed not yet certified.

Legal Consequences for Granting Mortgage Rights on Uncertified Land Title

A credit agreement is always expected to run well in accordance with the initial agreement, on the basis that each agreement is carried out in good faith from the parties who made it. However, the existence of bad debts or those that are not paid by the debtor is a fact that cannot be avoided in every loan provision. Giving credit is a bank activity that has a high risk, especially since the credit has not been secured by Mortgage through *APHT*. This is clearly very difficult for the bank to carry out executions to get their receivables repaid. For loans with collateral rights in the form of land that has not been certified, in the event of bad credit, the bank will experience obstacles to executing or selling the land collateral that has not been certified. As it is known the process of granting credit with land collateral that has not been certified is basically almost the same as granting credit in general. What makes the difference is the amount of the ceiling. By granting a limited amount of credit, the *SKMHT* period will apply the same as the credit agreement. This step is an effort to minimize credit risk from the bank for collateral for land rights that have not been certified.

The procedure for binding collateral in the form of land having not been certified is preceded by the issuance of a Power of Attorney to impose Mortgage Rights (*SKMHT*) and includes several stages, namely:

- a. There is a credit agreement which is the main agreement signed by the creditor and debtor.
- b. The debtor and creditor face a notary/Land Deed Official to make a *SKMHT* based on a credit agreement that has been made and signed by attaching the conditions, namely: a letter of ownership of the debtor's land, a letter from the village apparatus stating the land belonging to the debtor is not the land in dispute, evidence payment of land tax, and physical control of land parcels.
- c. The signing of the *SKMHT* at the Notary Office/Land Deed Official, for land having not been certified in general shall also have a witness from the village apparatus.
- d. After the *SKMHT* is made, it is signed by the creditor, debtor, Notary/ Land Deed Official, and also, the witnesses. Furthermore, the debtor gives power to the creditor to be able to impose mortgage rights on the collateral for the land provided by the debtor.

The impact of granting credit with land collateral that has not been certified is that the process of binding collateral and encumbering mortgage rights will take longer because it requires a longer time and process. This makes it easier for creditors in the event of a default. In the event of a default, the best way to do this is through non-litigation, namely by negotiation, in this way the disputes that occur will be resolved quickly, not protractedly and the costs incurred are not much.

IV. CONCLUSION

The implementation of the registration of mortgage rights on land that has not been certified has never been carried out by banks by making *APHT* directly on lands that have not been certified. Banks in this case only make *SKMHT* only. The legal consideration for not making *APHT* for unregistered land is because there is a possibility that the rights to the land still have the potential to cause legal conflicts in the future. In practice, the Notary/Land Deed Official uses the *SKMHT* instrument in accordance with Article 15 paragraph (4) of the *UUHT* as the basis for binding guarantees on land rights that have not been certified as collateral. The legal consequences of granting mortgage rights to uncertified land that are used as collateral by debtors can be seen from the aspects of the collateral binding procedure and the imposition of mortgage rights which will take longer. If there is bad credit because the collateral is land rights that have not been certified, then the creditor and debtor make an initial commitment to jointly sell the object of the guarantee.

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