

Legal Analysis of the Enforcement of Two Mortgage Rights on One Land Certificate as a Credit Collateral Object

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ABSTRACT

The Civil Code provides two collateral institutions that can be used by the community, namely pawn and mortgage. Along with the development of law in Indonesia, there are two new collateral institutions, namely mortgages and fiduciaries. The definition of mortgage rights according to Article 1 point 1 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Associated with Land is a security institution attached to the object in the form of land rights. In practice, one land object can be charged by more than one mortgage right. This research aims to find out and analyze the laws and regulations in Indonesia that regulate the encumbrance of more than one mortgage right on a land object and understand the technical auction of a land object encumbered by more than one mortgage right. This research is written using the normative juridical method through the Law and case approach with binding primary legal materials and secondary legal materials as references. The result of this research is legal certainty against debt repayment with land object collateral that has been encumbered by more than one mortgage.

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I. INTRODUCTION

The Civil Code provides two collateral institutions that can be used by the public, namely pawn and mortgage. Pawn and mortgage are regulated in Book II of the Civil Code, Articles 1150-1161 and 1162-1232, respectively. Along with the development of law in Indonesia, there are two new collateral institutions, namely fiduciary and mortgage. Fiduciary is regulated in Law Number 42 of 1999 concerning Fiduciary Guarantees, while Mortgage Rights are regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land.

Morgatge is a security right imposed on land rights as referred to in Law No. 5/1960 on the Basic Regulation of Agrarian Principles, including or excluding other objects that are an integral part of the land, for the repayment of certain debts, which gives priority to certain creditors against other creditors. This is what is written in Article 1 Point 1 of Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land. Mortgage rights are security institutions attached to objects in the form of land rights. Land rights that can be burdened by mortgage rights are ownership rights, business use rights, building use rights and use rights on land ownership rights (UUHT).

The problem that then arises is regarding the execution of an object encumbered by more than one mortgage right, where the holders of each mortgage right demand the same thing for the execution of a mortgage object for

the repayment of a debt. From this background, the author takes a legal writing study with the title "Legal Analysis of the Encumbrance of Two Mortgage Rights on One Land Certificate as a Credit Guarantee Object".

This research aims to find out and analyze the laws and regulations in Indonesia that regulate the encumbrance of more than one mortgage right on a land object and understand the technical auction of a land object encumbered by more than one mortgage right. This research is written using a normative juridical method through a law and case approach with binding primary legal materials and secondary legal materials as references. As for previous research that discusses mortgage rights as reference material for writing this research, namely research by Jefri Guntoro, et al (2020) with the title Juridical Review of Mortgage Registration in Electronically Integrated Mortgage Rights Services. The similarity between this research and the author's research is that both discuss Mortgage Rights related to the registration mechanism. The difference is that the author's research discusses one collateral land object that has two Mortgage Rights imposed on it as debt collateral. In addition, there is research by Pandam Nurwulan (2021) entitled Implementation of Electronic Mortgage Services for Creditors and Land Deed Officials. This research also discusses mortgage rights, the difference is that the research discusses the procedure for registering mortgage rights by the Land Deed Official, while this research discusses the mechanism of Mortgage Rights along with applicable laws and regulations as well as provisions related to the imposition of two Mortgage Rights on one land object as debt collateral along with auctions and repayments.

II. RESEARCH PROBLEMS

1. How does Indonesian legislation regulate one land object that is encumbered by two mortgages as credit collateral?
2. How is the technical implementation of execution and repayment auctions related to one land object encumbered by two mortgages?

III. RESEARCH METHODS

The type of research used in this writing is normative juridical, namely by examining the provisions of laws and regulations and presented in a descriptive analysis, the intention is to describe, find legal facts thoroughly, and systematically examine government policies in regulating the encumbrance of two mortgages on one land object as a credit guarantee along with the technical implementation of execution auctions and repayments.

To solve the problems that are the subject of discussion in legal research, the author uses a legal approach and a case approach with research data sources in the form of primary legal materials supported by secondary legal materials as writing references. The data collection method used by the author is a literature study by inventorying all relevant information from secondary data. The data analysis method used in writing this research is qualitative analysis where the research technique produces analytical descriptive data in the form of writing.

IV. RESULT AND DISCUSSION

1. Laws and Regulations in Indonesia Regulating One Land Object Encumbered by Two Mortgage Rights as Credit Collateral

The development of collateral law in Indonesia is the cause of the Government providing various means to support capital by providing credit facilities through financial institutions, whether in the form of BUMN or private, in order to encourage the nation's economy. Credit facilities provided by the Government through several financial institutions are obtained by entering into a credit agreement. Credit agreements have a certain period of time, within a predetermined time limit the debtor as a money borrower must return the loan to the creditor along with interest.

The existence of land as collateral in the Indonesian legal system has been perfected in the Mortgage Law, namely Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land.¹ Mortgage Rights are regulated in Law Number 4 of 1996 which was issued as an implementer of Articles 51 and 57 of the Basic Agrarian Law (UUPA) intended to end dualism in the regulation of security rights over land which previously used mortgage and *credietverband* security institutions. Through UUHT, land security rights are converted and unified into Mortgage Rights.²

The agreement to encumber a mortgage right is set forth in the form of a Deed of Granting Mortgage Rights (hereinafter referred to as APHT) by a Land Deed Official (hereinafter referred to as PPAT) as an authorized official in forming APHT as stipulated in Article 1 point 4 of the Mortgage Rights Law. In order for APHT to have legal force, it is necessary to register it at the Land Office. Initially, the registration of mortgage rights was carried out manually, where the applicant, namely,

¹ Nur Hayatun Nufus, *Proses Pembebanan Hak Tanggungan terhadap Tanah yang Belum Bersertifikat (Studi di PT Bank Rakyat Indonesia Tbk Unit Bekasi Kota)*, Tesis, Program Studi Magister Kenotariatan, Universitas Diponegoro, Semarang, 2010, hlm 5

² M. Khoidin, *Hukum Jaminan (Hak-hak Jaminan, Hak Tanggungan dan Eksekusi Hak Tanggungan)* (Laksbang Yustitia 2017). Hlm. 52.

the PPAT, sent the APHT and other documents to the Land Office no later than 7 days after the signing of the deed, as stipulated in Article 13 paragraph (2) of the Mortgage Rights Law. Along with the development of technology, the registration of mortgage rights has also changed where the registration is carried out electronically after the enactment of Regulation of the Minister of Agrarian and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 9 of 2019 concerning Electronically Integrated Mortgage Rights Services (hereinafter referred to as Perkaban Number 9/2019).³

The process of electronic registration of mortgage rights is carried out by registered users by submitting an application for mortgage rights services through the HT-el system as specified in Article 9 of Perkaban Number 9/2019. As well as making a statement letter regarding the responsibility for the validity and correctness of the electronic documents submitted. Both the application and the statement letter are submitted in the form of electronic documents in accordance with Article 9 paragraph (4). In addition to these requirements, there is also a requirement in the form of a Land Rights Certificate or Flat Unit Ownership Rights which must be in the name of the debtor as stipulated in Article 9 paragraph (5). As mentioned above, the application is submitted by a registered user as a party entitled to use the HT-el system which in the case of a mortgage application is carried out by a PPAT as per Article 10 paragraph (1) "in the case of an application for registration of mortgage rights, the application requirements in the form of APHT are submitted by a PPAT in electronic form". After the submission of the application is accepted by the HT-el system, a proof of application will be given by the system which contains:

- a. Application registration file number
- b. Date of application registration
- c. Name of the applicant, and
- d. Service fee payment code.

Regarding the proof of application and the matters contained in the proof of application mentioned above, Article 11 paragraphs (1) and (2) have been regulated. The proof of application contains one of the service fee payment codes, which after obtaining the proof of application must be paid at the perception bank within the last 3 days after the date of registration in accordance with Article 12 paragraph (2). The process of new mortgage services is processed by the Head of the Land Agency after the application is confirmed by the HT-el system and the process is carried out for 7 days, according to Article 14 paragraph (5). After 7 days, the application is confirmed, then the results of the mortgage rights service through the HT-el system are issued in the form of a "Certificate of Mortgage Rights and a record of the mortgage rights in the land book and the Certificate of Land Rights or Property Rights over an apartment unit in the form of electronic documents" as stipulated in Article 14 paragraphs (1) and (2). The results of the mortgage rights service in the form of a Mortgage Rights Certificate issued in the form of an electronic document, in order to maintain its authenticity, an electronic signature is given by the Head of the Land Agency as stipulated in Article 14 paragraph (3).⁴

The mechanism for registering Mortgage Rights under the electronic system must still be recorded in the land book. This is done by the creditor up to printing the Mortgage Rights Certificate and attaching it to the Land Rights Certificate. Electronic Mortgage Services based on Permen ATR Number 5 of 2020 aims to fulfill the principles of openness, timeliness, speed, convenience and affordability. In addition, it is also to improve effective and efficient mortgage rights services by adjusting legal developments and information technology. Mortgage objects that can be processed are Mortgage objects as regulated in laws and regulations. The output of this Electronic Mortgage Rights service is an Electronic Mortgage Rights Certificate for the user, namely the Creditor (can be an institution / Banking Financial Institution, can also be an individual) as the recipient of the Electronic Mortgage Rights. The encumbrance of more than one mortgage is regulated in Law Number 4 of 1996 Article 5 and Article 18, where we are familiar with the terms first rank, second rank and so on. The ranking is determined based on the registration of the application file for the installation of the Mortgage Rights.

2. Technical Implementation of Execution Auction and Repayment Related to One Land Object Encumbered by Two Mortgage Rights

³ I Wayan Jody, Tinjauan Yuridis Terkait Pendaftaran Hak Tanggungan Secara Elektronik, *Jurnal Hukum Kenotariatan*, Vol. 05, No. 01, 2020, hlm. 81

⁴ Ibid, hlm. 84

The use of the Mortgage Rights Institution by financial institutions as collateral for credit from debtors for debt repayment is felt to provide more security in terms of granting credit, when compared to the provisions regarding collateral in the Civil Code in Article 1131. Article 29 of the UUHT stipulates that with the enactment of the UUHT, the provisions regarding *credietverband* and the provisions regarding *hypotheek* as stated in Book II of the Civil Code insofar as they relate to the encumbrance of mortgage rights on land rights and objects related to land are declared invalid. So with the enactment of the UUHT, the mortgage right is the only land security right institution in written national law.⁵

Article 20 of the UUHT stipulates three alternative methods that can be used by creditors to execute the object of mortgage collateral if the debtor defaults, namely by *parate executie*, execution on the basis of the executorial title in the Mortgage Rights Certificate and sale under the hand. The three executions of mortgage rights mentioned above each have differences in their implementation procedures. For executions that use the executorial title based on the Mortgage Rights Certificate (previously using the *grosse acte hypotheek*), the sale of collateral objects is subject to and complies with the civil procedural law as regulated in Article 224 H.I.R. and Article 258 R.Bg. Meanwhile, execution under the hand must fulfill several requirements, including an agreement between the mortgagor and the holder of the mortgage.⁶

Settlement related to a land object that is burdened by two mortgages is seen from the value of the guarantee based on calculations that have been determined by each bank or financial institution concerned. If the collateral value of a land object can still fulfill to be charged with more than one mortgage right, the collateral object can be installed with the next rank of mortgage rights. In practice, before a mortgage right is installed, the debtor and creditor enter into a credit agreement which becomes the main agreement before the existence of a mortgage right guarantee. The main agreement contains clauses that must be fulfilled by the debtor as a borrower. The contents of the credit agreement depend on when the debtor provides the object of collateral to install the mortgage.

Obstacles faced in the implementation of the auction of collateral land bound by Mortgage Rights, including: (1) inconsistency of material content in the UUHT; (2) Supreme Court Decision Number 3021/K/Pdt/1984 dated January 30, 1986, which states that *parate execution* directly carried out to the Auction Office without going through the fiat of the Chairman of the District Court is against the law; (3) Supreme Court Circular Letter (SEMA) Number 7 of 2012, which states that: Mortgage auctions conducted by creditors themselves through the Auction Office, if the auctioned does not want to vacate the object being auctioned, cannot be vacated based on Article 200 paragraph (11) HIR but must be filed a lawsuit. Because the auction above is not an execution auction but a voluntary auction; (4) lack of enthusiasts / buyers on the object of collateral to be auctioned at the State Property and Auction Service Office (KPKNL); (5) a lawsuit to the court by the debtor after or after the object of collateral is auctioned; (6) a challenge from the debtor; (7) the State Property and Auction Service Office (KPKNL) does not have the authority to execute the object of Mortgage Rights if there is resistance from the debtor who does not want to submit the collateral that has been auctioned. Here is the procedure of auction of execution on an object land charged with the right of ownership:

a. by Lenda

- 1) Submission of a written application concerning the execution to the Head of the Office of State Property and Lending Services (“KPKNL”), which is a government agency under the Directorate-General of State Assets of the Ministry of Finance. In this case, the bank can also request to use pre-sale services from the private auction hall;
- 2) KPKNL/Private Auction Officers will conduct an examination of the completeness of auction documents, i.e. including but not limited to the Credit Agreement, Certificate of Rights of Responsibility, Evidence of debt details of the amount of debtor, proof of warning of non-performance to the Debtor, evidence of ownership of the right, Proof of notice of the auction to the debtor;
- 3) Once the above documents are considered complete, then KPKNL will issue a written auction schedule to the Bank; The bank makes an auction announcement.
- 4) If the auctioned goods are immovable goods or unmoving goods sold together with movable items, then the announcement is made twice, with a period of 15 days. The first announcement can be made through a typical announcement that can be read by the public or through a daily

⁵ Offi Jayanti, Agung Darmawan, Pelaksanaan Lelang Tanah Jaminan yang Terikat Hak Tanggungan, *Kanun Jurnal Ilmu Hukum*, Vol. 20, No. 3, Desember 2018, hlm. 462.

⁶ Lusita Sulastri, Konstruksi Perlindungan Hukum Debitur dalam Penyelesaian Kredit Bermasalah dengan Pelaksanaan Lelang Jaminan Hak Tanggungan, *Jurnal Pembaharuan Hukum*, Vol. 2 No. 1 Januari-April, 2015, hlm. 86.

newspaper. But the second announcement must be made through the daily newspaper and made 14 days before the auction. If the goods auctioned are movable goods, the announcement is made 1 (one) time through the daily newspaper no later than 6 (six) calendar days before the auction.

5) The bank makes an auction notice to the debtor.

b. Execution of licensing

If there is a potential objection / rejection or even a lawsuit from the debtor / executed, then the Bank in practice will seek an alternative auction execution with fiat execution from the Head of the State Court. Where the State Court shall deliver an appeal to the debtor so that the debtor comes to face on the prescribed day and performs his obligations to the Bank, when the appeal is not complied with by the Debtor, then the State court shall carry out the execution on the guarantee of the debtors.⁷

The sale of executions against an object loaded with two holding rights is carried out in accordance with the order of the holding right. The rank of rights is determined on the basis of file registration. In order to fulfill the settlement if there is a case of default by the debtor then the party entitled to carry out the auction of execution is the holder of the right of responsibility of the first level. If at the time of auction the value of an object of land exceeds the amount to be paid by the debtor, then the creditor in this case is the bank will return the surplus to the Debtor. Once the first-tier liability holder has completed all his obligations, the new second-tier Liability holder can conduct an auction of execution in order to settle his debts. When the auction of enforcement has taken place but the value of the guarantee does not meet the amount of credit or debt to be paid by the debtor, the Debtor is obliged to pay the deficit on the settlement of his debt. Otherwise, if the debtor uses the guarantee belonging to another person, the other person whose name is listed as the holder of the right to guarantee must be prepared when it is secured by the bank. This happens when in the credit agreement has been mentioned "if the debtor fails to perform then the guarantor is also liable by releasing the guarantee in the bank seizure." At the time of drawing up the credit agreement, the party acting as the holder of the guarantee shall sign the credit contract.

V. CONCLUSION

The existence of land as a guarantee in the legal system in Indonesia, has been perfected in the Law on the Rights of Dependency, namely Law No. 4 of 1996 on the Right of Dependence on Land and Things Related to Land. The right of liability is regulated by Law No. 4 of 1996 published as enforcement of Articles 51 and 57 of the Agricultural Tree Act (UUPA) intended to end dualism in the regulation of land guarantee rights that encompass the use of mortgage guarantee agencies and credietverband. In accordance with Article 14 (1) and (2). Technical Implementation of Lending Execution and Payment Related to One Land Object charged Two Rights of Use of the Institution of the Rights of Responsibility by the financial institution as a guarantee on credit from the debtor for debt repayment is felt to give a more secure sense in terms of granting credit, when compared to the provisions on the presence of guarantees in the Covenant on Article 1131.

In Article 29 of the Treaty on the Functioning of the European Union, the provisions concerning the credietverband and the clauses concerning mortgages, as set out in the Book II of the treaty, as regards the imposition of liability on the right to land, as well as the items related to the land, are no longer applicable. In Article 20 of this Treaty, the three alternative ways can be used by the creditor to execute the object of guarantee of the liability if the debtor does not perform, namely by parate execution, execution on the basis of the executive title that exists in the Certificate of Liability and sale under hand are determined.

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⁷ Maria Astri Yunita, S.H., M.H., Prosedur Lelang Jaminan Kredit, <https://www.hukumonline.com/klinik/a/prosedur-lelang-jaminan-kredit-cl7020/>, diakses pada 5 Juli 2023 Pukul 21.30

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