

The Making of Drafting a Mortgage Agreement as Security for Credit Facilities Without the Mortgagor's Consent

Jihan Fadillah Sari Junus¹, Hasbir Paserangi² and Haeranah³

Abstract

This study aims to examine the obligations of Land Deed Officials (PPAT) regarding mortgage deeds not signed by mortgage providers. A crucial requirement for creating a Mortgage Deed (APHT) is that all mortgage providers must sign it in the presence of the Land Deed Officials to ensure legal validity. However, the cases examined in this research reveal instances where a Mortgage Deed were executed without the knowledge or consent of all mortgage providers, resulting in the property being encumbered with a mortgage that does not meet the Mortgage Deed creation criteria. This research employs an empirical legal research approach, utilizing field research and literature review methods, and qualitatively analyzes data through field observations and literature synthesis. The study's findings include an examination of the obligations of Land Deed Officials' responsibilities concerning unsigned mortgage deeds, encompassing potential civil, criminal, and administrative liabilities.

Keywords: *Drafting a Mortgage Agreement, Security for Credit Facilities, and Mortgagor's Consent.*

INTRODUCTION

The financing arrangement commonly known in banking as a Credit Agreement is (Alya & Neltje, 2022) defined under Article 1 number 11 of Law Number 10 Year 1998 Amending Law Number 7 Year 1992 Regarding Banking. Credit refers to the provision of funds or equivalent claims, based on an agreement or loan contract between a bank and another party. This agreement obliges the borrower to repay the borrowed amount with interest within a specified period. Huswan, et.al., (2024) state credit is the provision of money or bills that can be equated with it. Credit extensions to the public are formalized through a credit agreement between the lender and the borrower, establishing a legal relationship between them.

In Indonesia, various forms of collateral exist, one of which is Mortgage Rights. (Wardhana et al., 2020) defined under Article 1 number 1 of Law Number 4 Year 1996 concerning Mortgage Rights over Land and Related Objects (referred to as UUHT), Mortgage Rights entail security interests imposed on land rights as defined in Law Number 5 Year 1960 concerning Basic Agrarian Principles. This includes or excludes other objects considered integral to the land, serving as security for specific debts and providing priority to certain creditors over others.

Furthermore, the collateral objects of Mortgage Rights encompass ownership rights, rights of cultivation, building rights, and rights to use state land. These rights must be formally registered and are transferable in nature, as outlined in Article 4 paragraph (2) of the UUHT (Purwa et al., 2023). Additional objects eligible for Mortgage Rights include apartment buildings constructed on land with ownership rights, building rights, and state-granted usage rights, as well as Ownership Rights of Apartment Units situated on such land, as stipulated in Article 27 of the UUHT (Abrarsyah & Djajaputra, 2022).

According to (Lemercier & Zalc, 2012), mortgage Rights establish a principle known as *droit de préférence*, where certain creditors are granted priority over others. This gives creditors preferential rights, ensuring that their repayment takes precedence or is privileged from the proceeds generated by the sale of land encumbered by Mortgage Rights. The role of Mortgage Rights is to secure debts outlined in credit agreements or loan contracts. They function to safeguard creditors by ensuring repayment of debts extended to borrowers. (Monkkonen, 2013) claims for legal certainty, Mortgage Rights must be formalized through an authentic deed

¹ Notarial Studies Program, Faculty of Law, Hasanuddin University, Makassar, South Sulawesi, Indonesia, Email: jihaanjunus02@gmail.com

² Notarial Studies Program, Faculty of Law, Hasanuddin University, Makassar, South Sulawesi, Indonesia, Email: hasbir_paserangi@yahoo.co.id

³ Notarial Studies Program, Faculty of Law, Hasanuddin University, Makassar, South Sulawesi, Indonesia, Email: haeranahnurdin1966@gmail.com

executed before a Land Deed Official, known as a Mortgage Deed as specified in Article 2 paragraph (2) of Government Regulation Number 37 Year 1998 regarding Land Deed Officials (referred to as PP No. 37 Year 1998). This regulation governs the legal actions that Land Deed Officials can undertake, including transactions such as sale and purchase, exchange, gift, incorporation into a company, division of joint rights, granting of Building Rights/Usage Rights over Ownership Rights land, establishment of Mortgage Rights, and authorization to encumber Mortgage Rights.

According to Article 10 paragraph (1) of the UUHT, the procedure for granting Mortgage Rights begins with a promise to provide Mortgage Rights as security for a specific debt, which is included in and forms an integral part of the corresponding loan agreement or other debt-creating agreements (Lea, 2021). Article 11 of the UUHT outlines the mandatory elements of the Deed of Mortgage, including: the names and identities of the holder and grantor of the Mortgage Rights; the domiciles of the involved parties, with a chosen domicile in Indonesia required if any party is domiciled abroad, or otherwise the office of the Land Deed Official where the Deed is made is considered the chosen domicile; a clear indication of the secured debt(s); the value of the encumbrance; and a detailed description of the object of the Mortgage Rights. The grantor must personally appear before the Land Deed Official, indicating that the Mortgage Rights must be granted by the owner of the object. Only in exceptional cases, where the grantor cannot be present, is it permissible to delegate this authority to another party (Foster, 2023).

In instances where there is a discrepancy between the mortgage provider and the credit debtor, the mortgage provider must be present and sign the Deed of Mortgage to consent to encumber their land as security for the debtor's credit.

However, in practice, there are cases where the mortgage provider neither signs nor is aware that their land has been encumbered by the debtor. It is only when the debtor defaults and the property is set for auction that the mortgage provider learns their land and building have been encumbered. (Biswas et al., 2023) indicate that not all mortgage providers were present when the Deed of Mortgage was created. In such cases, the Land Deed Official (PPAT) has violated Article 1320 of the Civil Code, which outlines the conditions for a valid agreement, and Article 22 of Government Regulation Number 37 Year 1998, which mandates that the PPAT Deed must be read out and explained to the parties in the presence of at least two witnesses before being immediately signed by the parties, witnesses, and the PPAT.

The case is adjudicated at the Palu District Court, resulting in Decision Number: 1/Pdt.G/2023/PN PAL. Following this, PT. Bank Mandiri and Notary/PPAT 'F' file an appeal, which leads to a decision at the Central Sulawesi High Court with Decision Number: 105/PDT/2023/PT PAL. However, PT. Bank Mandiri pursues further legal action by filing a cassation appeal, as indicated by Cassation Notification Statement Number: 1/Pdt.G/2023/PN Pal, thus leaving the case without a final and binding legal resolution.

LITERATURE REVIEW

The theory of legal responsibility is a theory that analyzes the responsibility of legal subjects or actors who have committed unlawful acts or criminal acts to bear the costs or to serve penalties for their faults or negligence (Dannecker & Schröder, 2023). According to (Ratner, 2001), an individual is legally accountable for a specific action or holds legal responsibility, implying they are subject to sanctions if the act violates legal provisions. As (Simons, 2009) states the failure to exercise the required legal caution is called negligence, and negligence is generally viewed as another type of fault (*culpa*). Although not as grave as deliberate misconduct resulting from foreseen and intentional actions, whether with or without malicious intent, it still poses risks.

In banking, the term credit refers to individuals entrusted by the bank. This trust typically corresponds to the core banking function of loaning money to the public. Hence, credit denotes customers whom the bank trusts to lend money. It is further understood that the foundation for a bank's extension of credit to customers lies in the trust it places in them (Riegelsberger et al., 2005). The loan agreement is regulated in Book III of the Civil Code (KUHPdata) Article 1754, which states that 'a loan agreement is an agreement whereby one party provides a certain amount of goods that are depleted through use to another party, on the condition that the latter will return an equal amount of the same kind and condition.' Compared to the provisions of the loan

agreement in Article 1754 of the Civil Code, the same principles apply to credit agreements. Thus, it can be observed that a credit agreement is a more specific form of a loan agreement. This specificity includes:

Credit agreements are a type of loan agreement.

Credit agreements are prevalent in society.

Credit agreements involve loans with specified terms and may include interest charges.

Therefore, credit agreements are considered named agreements, based on the loan agreement as regulated in Book III of the Civil Code (Sriwati, 2021).

The Land Deed Official or PPAT, as defined in Article 1 paragraph 1 of Government Regulation Number 24 Year 2016 amending Government Regulation Number 37 Year 1998 concerning the Position of Land Deed Officials (referred to as PP 24/2016), is a government-appointed official authorized to authenticate deeds related to specific legal transactions concerning land rights or ownership rights of apartment units (Di Matteo, 2022). Article 1 paragraph 4 of the UUHT also specifies that the Land Deed Official or PPAT is a public servant authorized to execute deeds for the transfer of land rights, imposition of encumbrances on land rights, and granting of power of attorney to encumber Mortgage Rights in accordance with applicable laws and regulations (Hosada, 2017). According to (van der Wal, 2020), a public servant is an individual designated by the government with the responsibility and authority to provide public services within a specific domain.

According to (Asti & Arsin, 2023), the duty of the Land Deed Official (PPAT) is to create deeds that serve as one of the juridical data needed for updating land registration administration. Article 2 of Government Regulation Number 37 Year 1998 concerning the Position of Land Deed Officials (referred to as PP 37/98) outlines the PPAT's duties and authority, which include performing certain land registration activities by creating land deeds that evidence specific legal acts concerning land rights or ownership rights of apartment units. These deeds form the basis for registering changes in land registration data resulting from these legal acts. Such legal acts include Sale and Purchase, Exchange, Grant, Contribution to a Company (Inbreng), Division of Joint Rights, Granting of Building Rights/Usage Rights over Ownership Rights land, Granting of Mortgage Rights, and Granting Power of Attorney to Encumber Mortgage Rights.

In carrying out their duties, the deeds created by the PPAT are considered authentic deeds. The PPAT is authorized to create eight types of authentic deeds based on the aforementioned legal acts. Activities beyond these eight types of deeds are not permitted. However, PPAT offices often handle matters unrelated to their authority due to public requests. The PPAT also serves the legal needs of the public, adhering to their official regulations and professional code of ethics as PPATs

RESEARCH METHODS

The type of research conducted for this thesis is empirical research. Empirical legal research involves observing law in its practical application and examining how it functions within society (Dagan et al., 2018). The research locations include the Land Deed Official (PPAT) in Banggai Regency, the Land Affairs Office/National Land Agency (ATR/BPN) in Banggai Regency, Bank Mandiri in the Palu Area, and the Mortgage Rights Grantor. This study utilizes both primary and secondary data sources. Data collection methods include field research and subsequent library research. The data analysis is performed using qualitative data analysis techniques.

RESULTS AND DISCUSSION

(Tyas Saputra et al., 2021) state a Land Deed Official (PPAT) is a public official authorized to create authentic deeds related to land transactions. According to an interviewer, a PPAT in Banggai Regency, a PPAT is required to verify and identify documents and parties before signing the deed. A PPAT holds authority over the authentic deeds they create, which are civil legal acts performed by the involved parties. Under certain conditions, if a legal defect is present, the deed can be annulled by law.

Moreover, (Saputro et al., 2021) suggest a PPAT is subject to specific duties and prohibitions as outlined in PP 24/16 and the Decree of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land

Agency of the Republic of Indonesia Number 112/Kep-4.1/IV/2017, concerning the Ratification of the Code of Ethics for Land Deed Officials (referred to as the PPAT Code of Ethics). Consequently, each PPAT faces sanctions for violations of applicable laws and regulations. Although PP 24/16 does not specify criminal sanctions for PPATs, if a PPAT is found to be involved in illegal actions or violations related to the authentic deeds they create, such actions can be classified as criminal acts. In an interview conducted with Erni Hingkua, a PPAT in Banggai Regency, it was revealed that the responsibility of a PPAT as a public official authorized to create land deeds extends not only to the creation of the deeds but also to the period after the signing of the deeds. Therefore, this research discusses legal responsibility, which can be categorized into three types:

Civil Legal Responsibility

A PPAT can be held civilly liable if they commit an error or an unlawful act as specified in Article 1365 of the Civil Code. Unlawful acts can be either active or passive. An active unlawful act involves committing an action that causes harm to another party, while a passive unlawful act involves failing to perform a required action or obligation, resulting in harm to another party. The elements of an unlawful act include the existence of the act, fault, and resulting damage. More specifically, an unlawful act occurs when there is a violation of applicable laws, an infringement of another person's legally protected rights. (Irwansyah et al., 2016) claim protection and law enforcement in the field of environment is very important. an act contrary to the legal obligations of the perpetrator, an act against morality, or an act contrary to the good conduct expected in society that considers the interests of others (Simmā & Paulus, 1999).

A PPAT is only responsible for the formalities of an authentic deed and not for the substance of the deed. This obligation requires the PPAT to remain neutral and impartial, providing legal advice to clients who seek legal guidance from them. Benefit and legal certainty must be realized for the sake of good law enforcement (Amusroh & Paserangi, 2022).

Criminal Legal Responsibility

If a PPAT engages in an act prohibited by law, whether intentionally or due to negligence, resulting in harm to another party, they may face criminal liability. These prohibitions are accompanied by sanctions or potential specific criminal penalties for offenders. Criminal penalties are not specified in the Regulations on the Position of PPAT, but a PPAT who commits a criminal act may face sanctions.

The Regulations on the Position of PPAT primarily address sanctions for violations committed by a PPAT, such as deeds lacking authentic validity or being merely evidential deeds. Sanctions against PPATs can range from warnings to dismissal. The criminal liability of a PPAT for violating formal requirements in deed-making must also be considered under Regulation PP 37/98, which outlines the criteria for a deed to fulfill all three aspects—external, formal, and substantive—as specified in PP 37/98. Therefore, the criminal accountability of a PPAT under the Criminal Code is intertwined with Regulation PP 37/98, which governs the execution of their duties as PPATs.

Administrative Responsibility

If a PPAT (Official of Land Deed Making) commits an error with elements of intentionality or negligence while exercising their authority to create authentic deeds, they may face administrative sanctions such as warnings, reprimands, temporary suspension, dismissal, or termination, depending on the severity of the violation. According to interviewer, a Notary/PPAT in Kab. Banggai, in performing their duties, Notaries/PPATs are obligated to accurately and meticulously create deeds. This entails ensuring that the deeds produced meet the expectations of the public and the requirements of the involved parties. Notaries/PPATs must generate high-quality deeds that adhere to legal regulations and accurately reflect the genuine intentions of the parties, rather than the preferences of the Notary/PPAT. They are also responsible for explaining the accuracy of the content and procedures of the deeds to the parties involved, ensuring that the deeds possess strong evidential validity that is universally recognized. The interviewee further highlighted that administrative issues often arise regarding formal aspects, particularly concerning the precise details such as the day, date, month, year, time of appearance, the identities of the parties present, and their signatures. Therefore, Notaries/PPATs carry full responsibility for these administrative matters.

In cases where an APHT (Deed of Transfer of Mortgage Rights) is based on an SKMHT (Deed of Loan and Mortgage), the PPAT must meticulously examine the SKMHT conditions beforehand, including its validity period, the authority of the executing officer, and the formalities required for deed creation. Failure by the PPAT to adhere to the stipulations outlined in Article 11 of the Law of Mortgage (UUHT), the registration requirements for APHT as detailed in Article 13 of UUHT, and the conditions for creating SKMHT as specified in Article 15 of UUHT or its implementing regulations, may result in administrative sanctions under Article 23 of UUHT and Article 28 of PERKABAN No. 1/2006 (Hasana, 2021).

A significant violation committed by Notary/PPAT R in the creation of APHT involves the absence of authorized parties during the procedure. This results in incomplete APHTs lacking initial sections and lacking signatures from all authorized parties. Creating an APHT without the presence of all parties, especially the mortgage provider, renders the deed legally invalid. The PPAT, as the responsible official, bears accountability for any errors or violations committed. Such omissions could lead to accusations of misconduct against the PPAT.

Notary/PPAT R has engaged in acts contrary to the rights of others and has failed to fulfill their legal obligations. Acting against the rights of others includes proceeding with APHT creation without all mortgage providers present simultaneously, despite their entitlement to be there. Failing to fulfill legal obligations involves creating APHT that does not comply with existing laws and regulations, particularly regarding the requirement for all parties to be present together before the PPAT. According to Article 28 of PERKABAN No. 1/2006, the absence of legally authorized parties during legal proceedings constitutes a serious violation. Therefore, the possible sanction for Notary/PPAT R for such serious violations could be dismissal from their position. Under Article 263 of the Criminal Code (KUHP), anyone who falsifies a document that could affect rights, obligations, or debt release, or is intended as evidence for any matter, with the intention of using it or instructing others to use it as true, is subject to imprisonment for up to six years for document forgery, if such actions cause harm

CONCLUSION

The accountability of PPAT in the creation of APHT (Deed of Transfer of Mortgage Rights) includes civil, criminal, and administrative responsibilities. According to Article 10 paragraph 2 of the UUHT (Law of Mortgage), the granting of mortgage rights is carried out through the creation of APHT by PPAT in accordance with applicable laws and regulations. Based on Article 28 of PERKABAN No. 1/2006, it is understood that a serious violation occurs when legally authorized parties fail to appear before the PPAT during legal proceedings. In such cases, the sanction that can be imposed on the PPAT committing such serious violations is dishonorable discharge from their position.

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