

Preferences For Land As A Pawn Object In Notarial Deeds

Realizhar Adillah Kharisma Ramadhan¹

¹Faculty of Social Science and Law Makassar State University

Corresponding author : realizhar.adillah@unm.ac.id

Abstract

Land plays a crucial role as collateral in loan or credit transactions in Indonesia. Although the term "land mortgage" is still commonly used, the legal provisions stipulate that land collateral must be carried out through a Deed of Mortgage (Akta Pemberian Hak Tanggungan - APHT). Registering Mortgage Rights is important as it provides preferential position for creditors in debt repayment, creates legal certainty, protects creditors' interests, enhances transparency, and supports investment security. However, there are still challenges related to errors committed by Notaries and Land Deed Officials (Pejabat Pembuat Akta Tanah - PPAT) which potentially violate legal provisions and ethical codes. Therefore, steps are needed to increase awareness of duty responsibilities and enforcement of ethical codes for Notaries and PPATs to maintain the integrity and public trust in the agrarian legal system.

Keywords: *Mortgage Rights, Notarial Deeds, Legal Certainty.*

INTRODUCTION

Land holds a significant role in Indonesian society, both economically, socially, and culturally. The utilization of land as collateral in loan or credit transactions has become a common practice. In this context, notarial deeds play an important role in ensuring legal certainty and protection of rights for the parties involved, especially creditors and debtors (Subekti: 2007).

Although in practice the use of the term "land mortgage" still exists in agreements between individuals, however, the applicable legal provisions stipulate that land collateral must be carried out through a Deed of Mortgage (APHT). APHT is an accessory agreement



accompanying the main agreement, such as the loan acceptance agreement, and serves as collateral for the implementation of the main agreement.

Basically, the form of a deed is not a problem, whether it is a private deed or an authentic deed made by or in front of a notary, as long as the parties remain committed to fulfilling the obligations and rights stated in the deed (Subekti: 2007). It will become a problem for the parties if one of the parties involved later denies the agreement, leading to a dispute that could harm many parties. Such risks can occur due to differences in the interests of each individual, unclear identities, and denial of a performance resulting in conflicts between individuals (Kosoemawati: 2009).

Komar Andasasmita (1981) stated that "so that every notary has sufficient and in-depth knowledge and skills to become the community's mainstay in designing, drafting, and creating various authentic deeds, so that the language structure, juridical technicalities are neat, good, and correct, because besides expertise, honesty or sincerity and objective nature or views are also required."

RESEARCH METHOD:

This research uses a normative juridical approach by assessing legislation and literature related to the researched issues. The normative juridical approach is chosen because this research focuses on the analysis of positive legal norms governing land preference as collateral in notarial deeds, especially related to the Deed of Mortgage (APHT) and registration of Mortgage Rights.

The data sources in this research are secondary data consisting of:

1. Primary legal materials, namely legislation related to the research object, such as Law Number 4 of 1996 concerning Mortgage Rights Over Land and Related Objects, and its implementing regulations.
2. Secondary legal materials, namely literature providing explanations regarding primary legal materials, such as books, scientific journals, research results, and other relevant sources related to the research object.
3. Tertiary legal materials, namely materials providing guidance or explanations for primary and secondary legal materials, such as legal dictionaries, encyclopedias, and others.

The data collection technique is carried out through library study by collecting, reviewing, and analyzing legal materials related to the research object.



Data analysis is conducted qualitatively by elaborating and explaining relevant legislation and literature, followed by interpretation and legal construction to answer the researched problems.

DISCUSSION

1. Deed of Granting Mortgage Rights (APHT)

Generally, notaries are reluctant to draft pledge guarantee deeds if the object is land, considering the law stipulates that guarantees must be movable property. However, there is a possibility of using the term "pledge" in the title of the agreement deed, even though in substance, the accessory deed involved does not use a land pledge deed but rather a Deed of Granting Mortgage Rights (APHT).

A common phenomenon in society is agreement between individuals made and agreed upon outside the notary's jurisdiction, often using the term land pledge. It should be emphasized that loans regulated by financial institutions require the creation of an APHT as a form of guarantee. This practice can be illustrated by the Pawnshop, which does not use the term land pledge, but rather adopts an accessory agreement recorded in an APHT prepared by the Land Deed Official (PPAT) and is subject to the laws and regulations governing guarantees on immovable property.

An accessory agreement, as defined in the context of land security law, is an additional agreement that cannot stand alone and substantially accompanies the main agreement. One common form of this accessory agreement is the Deed of Granting Mortgage Rights (APHT), which functions as security for the execution of the main agreement. The primary function of APHT is to protect creditors from the risk of default by the debtor. The presence of such an accessory agreement supports adequate legal protection for the creditor's rights in accordance with the applicable provisions.

The legal basis for accessory agreements in the context of mortgage rights is regulated in Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land. Article 10 paragraph (1) of this law emphasizes that the granting of mortgage rights must be documented through a deed of granting mortgage rights (APHT) made by the Land Deed Official (PPAT). Article 4 paragraph (1) also emphasizes that mortgage rights are an accessory agreement that cannot be separated from the main agreement that imposes an obligation on the debtor to fulfill a certain performance.

APHT stipulates the terms and conditions related to the granting of Mortgage Rights from



the debtor to the creditor in the context of debt secured by Mortgage Rights. The purpose of granting this right is to give priority to the relevant creditor (preferred creditor) over other creditors (concurrent creditors), as stipulated in Article 1 paragraph (1) of Law No. 4 of 1996 (UUHT). Thus, the Granting of Mortgage Rights serves as a guarantee for the repayment of the debtor's debt to the creditor in the context of the related loan or credit agreement.

2. Registration of Mortgage Rights

The registration of mortgage rights in Indonesia is a critical aspect of the agrarian legal system, aimed at providing legal certainty and protection to the involved parties, particularly creditors and debtors. Mortgage rights, as regulated under Law Number 4 of 1996 on Mortgage Rights Over Land and Land-Related Objects, play a crucial role in establishing the priority of rights over the mortgaged land. This priority implies that creditors with mortgage rights have the primary right to receive debt repayment from the proceeds of the sale of the mortgaged asset, compared to other creditors without mortgage rights (concurrent creditors).

The importance of registering mortgage rights in the context of the preferential status of mortgaged land objects is explained through several aspects:

- 1) **Creating Legal Certainty:** This registration functions to create legal certainty. In this context, legal certainty means that the rights and obligations of the parties involved in the mortgage agreement can be clearly and explicitly known. The registration of mortgage rights provides official evidence regarding the existence and legal status of the granted mortgage rights. As Harsono (2008) stated, "The legal certainty resulting from the registration of mortgage rights provides clear legal protection guarantees for both creditors and debtors."
- 2) **Protecting Creditor Interests:** The registration of mortgage rights also serves to protect the interests of creditors. By having registered mortgage rights, creditors obtain a preferred position compared to other creditors (concurrent) in the event of bankruptcy or liquidation of the mortgaged assets (Harsono: 2008). This aligns with the objective of the Mortgage Rights Law, which asserts that mortgage rights give creditors priority to settle their debts from the proceeds of the mortgaged assets (Harsono: 2008). The registration of mortgage rights provides creditors with the priority right to settle their claims from the sale proceeds of the mortgaged assets before other creditors can take their share. In situations where the debtor faces financial difficulties or bankruptcy, registered mortgage creditors will be



prioritized in debt repayment. Furthermore, according to Salim HS (2011), "The preferential position provided by registered mortgage rights ensures that those creditors receive stronger legal protection compared to concurrent creditors."

By having their mortgage rights registered, creditors gain a stronger legal position in executing their rights over the mortgaged land. This offers security and confidence to creditors in extending loans or credit. Without registration, creditors do not have the legal certainty to execute their mortgage rights. As explained by Setiawan (2012), "The registration of mortgage rights strengthens the creditor's legal position in obtaining debt repayment from the mortgaged objects, thereby reducing the risk of financial loss."

- 3) **Transparency and Accountability:** The registration of mortgage rights has significant implications in terms of transparency and accountability. Information regarding registered mortgage rights can be accessed by the public, reducing the risk of misuse or manipulation of data related to the legal status of the mortgaged land or property. According to Surya (2010), "The transparency resulting from the registration of mortgage rights not only protects creditors but also instills confidence in the broader society towards the agrarian legal system."

The registration of mortgage rights at the land office provides transparency and publicity regarding the status of the mortgaged land objects. This information is available to interested parties, allowing them to know whether the land has been mortgaged and to whom. This reduces the possibility of disputes or multiple claims over the same land. Furthermore, Suryono (2013) emphasizes that, "The transparency and publicity resulting from the registration of mortgage rights provide confidence to creditors and society in the agrarian legal system and prevent legal conflicts related to land status."

- 4) **Supporting Administrative Order:** The registration of mortgage rights supports administrative order in the management and supervision of land assets. With regular and systematic recording, the government and related institutions can more easily monitor and oversee asset movements and changes in ownership or use status of the mortgaged land (Suryono: 2013).
- 5) **Supporting Investment Security:** Creditors providing loans with mortgage rights need assurance that their investments are secure. The registration of mortgage rights provides this security by ensuring that creditors' rights are legally recognized and prioritized in debt repayment. In studies on the role of mortgage rights in supporting investment security,



Sunaryo (2014) states, "The registration of mortgage rights provides security for creditors that their investments are legally protected, which in turn promotes economic growth through increased access to credit."

Overall, the registration of mortgage rights is not only crucial for creating legal certainty, protecting creditor rights, transparency, and administrative order in Indonesia's agrarian legal system but also for ensuring the preferential status of mortgaged land objects. This provides significant benefits for creditors in terms of debt repayment priority, strengthening their legal position, enhancing transparency and publicity, and providing investment security. Sunaryo asserts that the importance of this registration not only benefits the directly involved parties but also contributes to the stability and public confidence in the existing legal system (Sunaryo: 2014).

The process of drafting a pledge binding deed with land as collateral at a notary office follows several necessary procedures. If the deed is to be made privately, the parties first create an agreement independently and then sign it in the presence of the notary for legalization. However, if the parties wish to register the collateral, a loan agreement deed will be created, followed by the creation of the Deed of Granting of Mortgage Rights (APHT), which is then registered as a mortgage encumbrance. The requirements for making a pledge binding deed with land as collateral include the identification cards of the parties, the legality of the object being used as collateral, and the substance of the agreement between the parties.

Verification of the validity of the land ownership documents being used as collateral is conducted through checks with the National Land Agency (BPN), while verification of other document completeness is done directly in front of the notary. The role of the notary in ensuring the conformity of the pledge binding deed with applicable legal provisions is relatively limited. This is because land pledges no longer comply with the provisions since the enactment of the Mortgage Law, so the notary's role is more in conveying information regarding the rules and provisions that must be adhered to according to the law rather than stipulating additional requirements in the deed.

The notary's responsibility regarding the validity and accuracy of the information in the pledge binding deed with land as collateral is limited to executing the information in accordance with the applicable legal provisions. There are differences in the process of making a pledge binding deed between land as collateral and other objects of collateral. For land, the APHT applies, whereas for vehicles, fiduciary applies. To ensure that the creditor's position in the pledge binding deed with land as collateral has adequate preference, the notary will create the APHT and register



the collateral object in the Mortgage Rights registration, thereby obtaining preference for the creditor.

In carrying out their duties, authorities, and obligations, especially related to the creation of deeds, Notaries and/or Land Deed Officials (PPAT) can be involved in errors, which may be material or formal, either intentionally or unintentionally. Challenges faced by Notaries and/or PPAT in certain situations have the potential to lead to actions that violate the law, whether in the civil, administrative, or criminal scope. In practice, there are still Notaries and/or PPAT who neglect their responsibilities towards official obligations and the Notary code of ethics, as well as the PPAT Position Regulations and PPAT code of ethics. Violations of the provisions in these regulations impact not only the Notary and/or PPAT concerned but also the deed they create. If this situation occurs, the party that feels disadvantaged is those who use the services of the Notary and/or PPAT, who are supposed to be trusted parties.

CONCLUSION

The preferential status of land as collateral in a notarial deed plays a crucial role in ensuring legal certainty, creditor rights protection, transparency, and administrative order within Indonesia's agrarian legal system. The registration of the Mortgage Right is a critical step in establishing creditor priority in debt repayment, strengthening the legal position of creditors, enhancing transparency and publicity, and providing investment security. With the Mortgage Right Protection Deed (APHT), creditors are guaranteed repayment from the sale of the pledged asset, thereby reducing the risk of financial loss.

However, in practice, there are still challenges related to errors committed by Notaries and/or Land Deed Officials (PPAT) that have the potential to violate legal provisions and the code of ethics. Therefore, measures are needed to raise awareness about the responsibilities of the profession and enforce the code of ethics for Notaries and/or PPATs to maintain integrity and public trust in the agrarian legal system.

In conclusion, the preferential status of land as collateral in a notarial deed is of utmost importance in ensuring legal certainty, protecting creditor rights, enhancing transparency, and providing investment security. The registration of the Mortgage Right is crucial in determining creditor preference in debt repayment and providing legal certainty for all parties involved. Despite the challenges and potential errors in notary or PPAT practices, it is essential for them to adhere to the applicable code of ethics and regulations to maintain public trust and legal certainty.



RECOMMENDATIONS

To optimize the special status of land as collateral in a notarial deed, several strategic steps need to be taken. First, legislation and the code of ethics for the profession of notaries and Land Deed Officials (PPAT) need to be enhanced to minimize the risk of errors and violations. Second, there needs to be more extensive public awareness campaigns regarding the procedures and importance of Mortgage Right registration to increase compliance awareness. Third, the government should conduct regular monitoring and evaluation of the performance of notaries and PPATs to ensure that their duties are carried out with high integrity and professionalism. By implementing these steps, the expected Mortgage Right registration system can function effectively and provide optimal benefits for all parties involved.

REFERENCE

- R. Subekti, Hukum Pembuktian, 2007, cet. XVI, Padya Paramita, Jakarta, page.25
- Ira Koesoemawati & Yunirman Rijan, 2009, Kenotariatan, Raih Asa Sukses, Jakarta, page.6
- Komar Andasasmita, 1981, Notaris Dengan Sejarah, Peranan, Tugas Kewajiban, Rahasia Jabatannya, Sumur, Bandung, page.14.
- Harsono, B, 2008, Hukum Agraria Indonesia: Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya, Djambatan, Jakarta, page.50.
- Salim, H.S, Perkembangan Hukum Jaminan di Indonesia. Rajawali Pers, Jakarta, 2011, page.70.
- Setiawan, B, Hukum Jaminan dan Eksekusi Hak Tanggungan, 2012, Gadjah Mada University Press, Yogyakarta, page.59.
- Surya, D, 2010, Pentingnya Pendaftaran Hak Tanggungan dalam Sistem Hukum Agraria di Indonesia, Jurnal Hukum dan Keadilan, 12(1), page.45-60.
- Suryono, A, 2013, Transparansi dalam Pendaftaran Hak Tanggungan, Jurnal Hukum Agraria, 15(2), page.78-92.
- Sunaryo, H, 2014, Peran Hak Tanggungan dalam Mendukung Keamanan Investasi, Jurnal Ekonomi dan Hukum, 8(1), page.45-58.

