

The Nature of Granting the Authority to Make Power of Attorney for Imposing Mortgage to the Land Deed Official

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Abstract

Article 15 of the Mortgage Law has determined that SKMHT must be made with a notarial deed or PPAT deed. Historically, the forerunner of the birth of SKMHT refers to the existence of a Power of Attorney to Install Mortgages. The existence of SKMHT on the one hand provides benefits for creditors, but the dualism of the authority to make SKMHT results in inefficient conditions. This study will analyze legal reasons for granting SKMHT authority to PPAT. This research is a normative legal research using a statutory approach, a conceptual approach, a historical approach and a philosophical approach. The results of the study concluded that SKMHT became the basis for providing legal protection for creditors and became the initial means to improve the position of creditors from being concurrent creditors to preferred creditors after the SKMHT was continued with the making of APHT. The concept of reconstructing the arrangement for making SKMHT that provides legal protection is to make a Notary as the only official authorized to make SKMHT.

Keywords: *Power of Attorney for Imposing Mortgage; Land Deed Official; Notary; Dualism*

Introduction

The process of assigning mortgages is carried out in two stages of activity. First, the stage of granting mortgages is carried out before the Land Deed Making Officer (PPAT), and second, the step of registration of mortgages is carried out at the Land Office. In principle, the encumbrance of Mortgage Rights must be carried out by the Mortgage Provider himself. Still, if the Mortgage Provider cannot be present before the PPAT when making the Mortgage Granting Deed (APHT), the Mortgage Provider, to make APHT, is allowed to make a Power of Attorney to Charge the Mortgage. Dependent (SKMHT) will be given to someone to represent his interests before PPAT.

The existence of SKMHT, on the one hand, provides benefits for creditors. This is related to the convenience obtained by the debtor if certain conditions cause the granting of Mortgage Rights cannot be carried out directly, for example, the object has not been renamed in the name of the debtor, or other stages are still needed in granting mortgage rights so that the existence of SKMHT becomes a tool for improving the position of the bank as a creditor in the provision of credit facilities. On the other hand, the existence of SKMHT also raises controversy because if it is based on historical aspects, the Notary should have the authority to make SKMHT, but the provisions in UUHT state that SKMHT is made by notarial deed or PPAT deed.

Historically, the forerunner of the birth of SKMHT refers to the existence of a Power of Attorney to Install Mortgages. A power of attorney to Install a Mortgage is regulated in Article 1171 paragraph (2) of the Civil Code (KUHPerdata): "...the authorization to grant a mortgage must be made with an authentic deed". The provisions contained in Article 15 UUHT, which states that SKMHT must be made with a notary deed or PPAT deed, do not eliminate the Notary's authority to make SKMHT, but the granting of such authority to PPAT becomes a matter of conflicting norms because the essence of power is a legal act to give power. to another person, who accepts it to carry out an affair on his behalf, so that the authority to make an authentic deed related to a power of attorney is only with the Notary.

The authority of a Notary to make SKMHT is in line with the authority granted in Article 15 paragraph (2) letter f of Law Number 30 of 2004 concerning the Position of a Notary as amended by Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning Position (UUJN), which determines that the Notary has the authority to do a Deed related to land.

The existence of SKMHT is a means of supporting the running of the economy in Indonesia because it is related to the running of banking activities. However, the dualism of the authority to make SKMHT is contrary to the philosophy of the national economy, which dictates that the national economy is organized based on fair efficiency.

The dualism of the authority to make SKMHT results in inefficient conditions. In addition, the dualism of the authority to make SKMHT is also contrary to Article 28 D paragraph (1) of the 1945 Constitution of the Republic of Indonesia, which stipulates that everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law. The dualism of making SKMHT occurred also gave birth to a theoretical conflict, namely the failure to achieve legal certainty. Legal certainty requires strict, clear, and consistent rules. Granting the authority to make SKMHT to PPAT creates legal uncertainty because if it is based on consistency, then the existing regulations should adapt to the existing historical side, namely that SKMHT is a substitute for the Power of Attorney Install Mortgages which is the authority of the Notary.

Methods

The present study uses a normative legal research method that is conducted in finding solutions for legal matters (Isnaini & Utomo, 2019). The research approach used is the statute approach, conceptual approaches, historical approach and philosophical approach.

Discussion

PPAT, in carrying out the duties of his position, has a working area limit, namely in 1 (one) district or city in his domicile. The limitation of the working area is closely related to the PPAT's obligation to process further all transactions and charges made before him to the Land Office, whose authority includes the location of the land in question. To smooth the land administration process and work efficiency, the implementation of the transfer and assignment of land is assigned to the PPAT, whose territory is close to the authorized Land Office, even though, based on what has been described previously, it is generally the debtor who is more interested in making SMHT lives far from the place or location of the object to be guaranteed. As for debtors who live close to the site of the land, of course, the possibility of being unable to face the PPAT alone is smaller when compared to those who live far from the object's location (Utomo, 2020).

UUHT was promulgated in 1996, at which time the distribution of Notaries was still not as widespread and even as it is today, so the granting of authority to PPAT to make SKMHT aims to facilitate banking activities in remote areas where at that time, there was no Notary. The granting of authority to make SKMHT to PPAT is also motivated by the existence of PPATS, who also carry out the

position as PPAT where PPATS can be held by the Camat or Village Head. This condition will certainly facilitate banking activities in providing convenience in credit disbursement. When binding the guarantee that was born from the credit agreement, it will no longer be difficult to find a Notary to make SKMHT, especially if there is still no Notary in the area. SKMHT and APHT under these conditions can be carried out in front of PPATS which is ex-officio held by the Camat or local Village Head (Hidayat et al., 2020).

Credit provided by banks contains risks so that in its implementation, banks must pay attention to sound credit principles. To reduce this risk, credit guarantees in the sense of confidence in the ability and ability of the debtor customer to pay off their obligations in accordance with the agreement is an important factor. Article 8 of the Banking Law stipulates that if other elements have been able to convince the bank of the debtor's ability, the guarantee is sufficient only in the form of a basic guarantee, and the bank is not required to ask for additional guarantees. Based on these provisions, it can be concluded that the Banking Law does not make guarantees an absolute requirement, and based on Article 8 of the Banking Law, it is possible to provide loans without collateral. The guarantee is only one of the additional conditions that must be met (Isnaeni, 2016).

To guarantee the creditor against the repayment of the debtor's credit, it is necessary to have a collateral object. Debt collateral objects can be in the form of goods as material guarantees or debt guarantee promises so that they are individual guarantees. Material guarantees in the form of providing material rights to guarantee holders (creditors) can be movable objects and immovable objects in the form of land rights. The guarantee in land rights for the repayment of credit (debt) is carried out through the Mortgage Rights institution. In principle, the encumbrance of the Mortgage must be carried out by the Mortgage Provider himself, only if necessary where the Mortgage Provider cannot be present in person before the PPAT, then it is allowed to use SKMHT, which must be made with an authentic deed, before a Notary or PPAT (Oeloem, 2015).

The appointment of PPAT as an official authorized to make SKMHT besides a Notary is based on the reason that PPAT is a public official authorized to make a deed of transfer of land rights and other deeds in the context of assigning land rights, the form of which is determined as evidence of certain legal actions regarding land located in the work area. Deeds made by PPAT meet the requirements as authentic deeds; it is necessary to remember that the existence of PPAT reaches the sub-district area so that it can serve those who need it. Thus, if a Notary has the authority to make SKMHT for lands throughout Indonesia, then the PPAT may only make SKMHT for lands within their area of an office, especially in places where there is no Notary duty.

General Elucidation number 7 UUHT determines that, in principle, the encumbrance of the Mortgage shall be carried out by the giver of the Mortgage itself. Only when necessary, namely if the mortgage provider cannot be present before the PPAT, is the use of SKMHT permitted. Accordingly, a power of attorney must be given directly by the Mortgage provider and must meet the requirements regarding the content as stipulated in this paragraph. Failure to fulfill this requirement results in a power of attorney in question being null and void, which means that a power of attorney in question cannot be used as the basis for making APHT.

In making SKMHT, it has been determined that the conditions do not contain the power to carry out other legal actions in this provision, for example, it does not contain the power to sell, lease the object of Mortgage, or extend land rights. In addition, there is also a prohibition on the power of substitution. What is meant by the definition of substitution according to UUHT is the replacement of a power of attorney through transfer. It is not a substitute if a power of attorney gives power to another party in the context of an assignment to act on his behalf, for example, the Board of Directors of the Bank assigns the exercise of the power he has received to the Head of the Branch or another party. In addition, it is also determined that clarity regarding the main elements in the imposition of a Mortgage is very necessary for

the protection of the Mortgage Provider. The amount of debt in question is the amount of debt by the agreement (Prasetya & Wahyu Utomo, 2019).

Article 15 paragraph (1) UUHT stipulates that SKMHT can be made before a Notary or PPAT so that there are 2 (two) officials who are authorized to make SKMHT. Making SKMHT, in addition to Notaries, is also assigned to PPAT, whose existence reaches the sub-district area, to facilitate the provision of services to parties who need it (Isnaini & Wanda, 2017). UUHT gives the authority to make SKMHT to PPAT because when UUHT was enacted in 1996, the number of Notaries in Indonesia was still not evenly distributed and still centered on big cities only. This will certainly make it difficult if land guarantee transactions are carried out in remote areas where there is no notary public. The granting of the authority to make SKMHT to PPAT is to provide convenience in the framework of land services so that by giving PPAT the authority to make SKMHT, creditors will find it easier to provide credit disbursement because the processes related to making power of attorney and binding collateral can be done through one door namely PPAT (Wibisono et al., 2019).

The existence of the authority to make SKMHT for Notaries and PPATs, on the one hand, provides benefits in the form of convenience for people in remote areas when they need SKMHT, but on the other hand, with the dualism of this authority, it results in a conflict related to products issued by each Notary or PPAT. The norm conflict occurs in relation to the laws and regulations governing the procedure for doing authentic deeds for each position. The General Explanation section number 7 UUHT states, "In providing Mortgage, the Mortgage provider must be present before the PPAT. Suppose, for some reason, he cannot attend himself. In that case, he is obliged to appoint another party as his proxy, with a Power of Attorney to impose a Mortgage, abbreviated as SKMHT, in the form of an authentic deed, which means that the SKMHT must be made with an authentic deed. The authentic deed itself has been explained in Article 1868 of the Civil Code "An authentic deed is a deed whose form is determined by law made by or before public officials in power for that at the place where the deed was done."

Based on the provisions stated in Article 1868 of the Civil Code, it can be concluded that the SKMHT is declared an authentic deed if it follows the provisions of Article 1868 of the Civil Code. Regarding the form of SKMHT, Perkaban No. 8 Th. 2012 has determined the form of the Deed, this also fulfills the provisions of Article 1868 of the Civil Code, which stipulates that an authentic deed is "made in the form determined by law." The form specified in Perkaban No. 8 Th. 2012 must be followed by a Notary or PPAT when making SKMHT, and if it is not followed, it cannot be used for APHT registration, as stated in Article 96 paragraph (3) Perkaban No. 8. Th. 2012: "Registration of changes in land registration data as referred to in Article 95 paragraph (1) and the making of a Deed of Granting Mortgage as referred to in Article 95 paragraph (2) cannot be carried out based on a deed whose preparation is not in accordance with the provisions in paragraph (1)".

The existence of these provisions means that if the Notary does not comply, the Deed made cannot be used in making the APHT, whereas for the Notary in doing an authentic deed, it is bound by the provisions of Article 38 UUJN (Adjie, 2008), which stipulates:

- (1) Each Deed consists of:
 - a. the beginning of the Deed or the head of the Deed;
 - b. Deed body; and
 - c. end or closing of the Deed.

 - (2) The beginning of the Deed or the head of the Deed contains:
 - a. title of Deed;
 - b. deed number;
 - c. hour, day, date, month, and year; and
 - d. full name and domicile of the Notary.
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- (3) The Deed Body contains:
 - a. full name, place and date of birth, nationality, occupation, position, position, the residence of the appearers and/or the person they represent;
 - b. information regarding the position of acting against;
 - c. the contents of the Deed, which is the will and desire of the interested party; and
 - d. full name, place, date of birth, occupation, position, position, and residence of each identifying witness.

- (4) The end or closing of the Deed contains:
 - a. a description of the reading of the Deed as referred to in Article 16 paragraph (1) letter m or Article 16 paragraph (7);
 - b. a description of the signing and the place of signing or translation of the Deed if any;
 - c. full name, place and date of birth, occupation, position, position, and residence of each witness to the Deed; and
 - d. a description of the absence of changes that occurred in the making of the Deed or a description of the changes that could be in the form of additions, deletions, or replacements as well as the amount of the changes.

- (5) The Deed of Substitute Notary Public and Temporary Notary Official, in addition to containing the provisions as referred to in paragraph (2), paragraph (3), and paragraph (4), also contains the number and date of appointment, as well as the official who appointed it.

The existence of provisions for the form of an authentic deed regulated in Article 38 of the UUJN has legal consequences if it is not implemented as stipulated in Article 41 of the UUJN, which states: "Violation of the provisions as referred to in Article 38, Article 39, and Article 40 results in the Deed only having the power of proof as a under hand deed."

Against the occurrence of a conflict of norms between UUJN and Perkaban No. 2 Th. 2012 can be solved by applying the principle of preference "lex superiori derogate legi inferiori" (higher regulations override lower regulations). Regarding the hierarchy of statutory levels, Article 7 of Law Number 12 of 2011 concerning the Establishment of Legislation has also been stipulated as follows:

- (1) Types and hierarchy of Legislation consist of:
 - a. the 1945 Constitution of the Republic of Indonesia;
 - b. Decree of the People's Consultative Assembly;
 - c. Laws/Government Regulations in Lieu of Laws;
 - d. Government regulations;
 - e. Presidential decree;
 - f. Provincial Regulations; and
 - g. Regency/City Regional Regulations.

- (2) The legal force of the Legislation is in accordance with the hierarchy as referred to in paragraph (1).

Based on the hierarchy above, the position of the Act is higher than the Regulation of the Head of the Agency, so in this case, the UUJN overrides Perkaban No. 8 Th. 2012, and in making the SKMHT deed, the Notary must still be guided by the UUJN. The existence of the hierarchy of laws and regulations mentioned above also confirms that in order for SKMHT to be qualified as an authentic deed, its preparation must follow the UUJN. PPAT cannot apply this, of course, because PPAT positions are not subject to UUJN.

The occurrence of a conflict of norms as described above if it is related to UUHT, which requires SKMHT to be made with an authentic deed, it can be concluded that what is valid as an authentic deed, in

this case, is a deed made by a Notary. This has consequences if the deed is not made by a notary, then it is not valid as an authentic deed, and in relation to SKMHT, it will have the consequence that it cannot be continued to APHT. If it is still forced to be used as the basis for making APHT, then legally, the APHT is not valid, and if the APHT is not valid, then it has no executive power.

Based on the conditions described above, it can be concluded that the SKMHT that is able to provide legal protection for creditors is the SKMHT made before a Notary, so it becomes an urgency that the authority to make SKMHT in PPAT must be abolished and given the authority to make SKMHT to the Notary as the only one authorized officer to do so.

Conclusion

Based on what has been described above, it can be concluded that the nature of SKMHT in the Guarantee Law is to provide convenience in making APHT if there is a condition that the Mortgage Provider cannot be present before the PPAT for certain reasons or reasons of efficiency. SKMHT is the basis for providing legal protection for creditors and is the initial means to improve the position of creditors from being concurrent creditors to preferred creditors after the SKMHT is continued with the making of APHT. The essence of giving the authority to make SKMHT to PPAT is to provide convenience in the context of land services. This authority is given to PPAT to support other authorities, namely making APHT. With the authority given to PPAT to make SKMHT, creditors will find it easier to provide credit disbursement because the processes related to making power of attorney and binding guarantees can be done through one door, namely PPAT.

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