

DEBTORS RESPONSIBILITY FOR LAND CERTIFICATE OWNED BY THIRD PARTY AS SUBSTITUTE COLLATERAL IN BANK

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**DEBTOR'S RESPONSIBILITY FOR LAND CERTIFICATE OWNED
BY THIRD PARTY AS SUBSTITUTE COLLATERAL IN BANK**

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Abstract

The purpose of writing this journal is to study and find out the debtor's responsibility to the owner of the land title certificate as replacement collateral at the bank. The problem discussed in this journal is: responsibility of debtors for owners of land ownership certificates as collateral at the bank. In writing this journal, we use a method with a normative juridical approach which refers to the legal rules that apply (positive) in Indonesia. The analysis uses material sourced from the 1945 Constitution, the Civil Code, statutory regulations, the Mortgage Law, legal expert opinions. This research focuses on legal protection for the owner as owner of credit collateral which is guaranteed by a second party as debtor according to applicable regulations. So it can be concluded in this paper that the debtor is obliged to be responsible for objects belonging to a third party which are used as collateral, whereupon the second party receives punishment or sanctions for the violations committed, because the obligations of the second party (the debtor) are violated as contained in the contents of the contract.

Keywords: Responsibility, Mortgage, Collateral

1. Introduction

Money is a medium of exchange and a means of payment for services or goods that people need. Money can come from savings or be obtained through loans from institutions that offer financing. Financial institutions play an important role in people's lives. One of their tasks is to provide and distribute funds or capital goods without collecting them directly from the community. Thanks to loans, people can more easily obtain financial resources in the form of money to secure their livelihoods. In addition, credit encourages the possibility of utilizing business capital, so that people become more productive.

Banks are financing centers in the form of institutions. In a country, the financial and payment system is organized through banks. A bank can be defined as an institution in the financial sector that plays an important role in the economy. According to the Big Indonesian Dictionary (KBBI), a bank is an institution that deals with the receipt and issuance of means of payment (money) in society, especially through lending, as well as regulating payment traffic. Regulations regarding banking and financial institutions in Indonesia are regulated in Law No. 10 of 1998 on Banking.

There are several definitions of bank and non-bank institutions¹:

- a. Bank Financial Institutions, are bodies that are said to be complete compared to non-bank institutions, because they collect and distribute these funds to the public in the form of loans, as well as other financial service activities.
- b. Non-Bank Financial Institutions, this non-bank entity only distributes funds, such as channeling funds to leasing companies in the form of capital goods, pawnshops channel funds by asking for collateral for movable objects in loans according to a predetermined period of time.

Lending to customers may require the provision of property as collateral. The function of collateral is to ensure that the second party (debtor) is guaranteed in the event of failure to pay the debt to the first party (creditor) or in the event of default. In general, credit collateral is set as a precondition for granting credit.

The Agreement for Granting Mortgage Rights is an agreement made by the second party (debtor) that grants mortgage rights. Mortgage rights are an additional agreement of debt repayment. The position of the bank in a credit agreement in which the collateral object pledged is a mortgage right, the creditor has a position and is prioritized over other creditors (droit de preference) and has the right to take precedence in debt repayment². Meanwhile, the principle of droit de preference is a right in a material object that takes precedence over those that take precedence or can be referred to as the principle of priority³.

Before the emergence and promulgation of the Mortgage Rights Law, there was Article 25 of Law No.5/1960 on Basic Agrarian Principles. However, it does not explain in detail the process or mechanism for obtaining Mortgage Rights. Then with the absence of detailed clarity regarding the procedures for obtaining mortgage rights, in 1996 Law Number 4 of 1996 concerning Mortgage Rights was born, in order to provide legal certainty for the community⁴.

It is not uncommon for people to take out a loan at a bank where the mortgage collateral is not based on property owned by the debtor, but on property owned by a third party. This third party is the holder of a mortgage in the form of a certificate of title to the pledged property. This often leads to conflicts in contracts secured by mortgage rights. The conflict arises because of a legal loophole that raises questions. If examined closely, the pledged object brought in by a third party as a substitute collateral is not always related to the object of collateral agreed in the credit agreement. Unfortunately, there is no clear rule that strictly regulates this.

Conflicts arise in contracts secured by mortgage rights. These conflicts are based on legal loopholes that raise questions, especially if the property pledged as replacement collateral by a third party does not match the collateral originally agreed in the credit agreement. The existing regulations do not yet cover cases like

¹ Susetyasi and Herdiansyah, "Mengenal Lembaga Keuangan Dan Lainnya" (Semarang, 2010).

² Mitia Intansari and I Made Walesa Putra, "Kedudukan Kreditur Pemegang Hak Tanggungan Dalam Hal Debitur Wanprestasi" 5, no. 2 (2017): 1-7, <https://ojs.unud.ac.id/index.php/kerthasemaya/article/view/20941>.

³ Lathifah Hanim Lila Kurniawati Khisni, "IMPLEMENTASI ASAS DROIT DE PREFERENCE TERHADAP JAMINAN HAK TANGGUNGAN OLEH PIHAK PERBANKAN DALAM PERJANJIAN KREDIT Lila," 2014, 97-102.

⁴ Ananda Putri Pratama, Sarrah Istighfarin, and Aathira Salsabila Iksir, "Perlindungan Hukum Pada Pihak Ketiga Sebagai Pemilik Objek Jaminan Hak Tanggungan," *DIH: Jurnal Ilmu Hukum* 19 nomor 2 (2023): 99-109.

this. In addition, Article 20 of Law No. 4 of 1996 on Mortgage implicitly only regulates the protection of the lender (creditor). However, the debtor's responsibility towards third parties who act as the owner of the collateral object is not considered.

The emergence of this problem raises a discussion regarding the debtor's responsibility towards third parties who act as owners of collateral objects. For this reason, this research discusses legal protection involving third parties, especially in the case of collateral objects in the form of land ownership certificates that are pledged as replacement collateral. In this context, the researcher analyzes the issue based on applicable and relevant legal regulations in Indonesia to ensure its compatibility with the existing legal system.

2. Materials and Methods

The research methodology in this article uses a normative legal approach, where the references used are based on legal provisions applicable in Indonesia. Normative analysis is conducted based on sources such as the 1945 Constitution, Civil Code, laws and regulations, Mortgage Law, expert opinions as well as scientific journals, theses and other relevant sources related to the topic of this research.

3. Results and Discussions

A. Legal Aspects of Third Party Land Collateral in Credit Agreement

Not all debtors have sufficient assets to be used as collateral in a credit agreement. Therefore, debtors can borrow assets from third parties, then third parties provide assets such as land as collateral for credit from debtors.

In this case, third parties can provide assets in the form of land pledged in a credit agreement raises legal considerations relating to Mortgage Rights, ownership, and transfer of rights to the land. Legal aspects that need to be understood regarding third-party land collateral in credit agreements:

a) Legality of the Security Agreement

A security agreement over a third party's property can be in the form of a Mortgage (land object that has been registered), or other forms of security, such as a Fiduciary Guarantee. Some legal aspects regarding its legality :

- a. The party who is the guarantor, in this case a third party by pledging land, whether in the form of ownership rights, business use rights, building use rights, as stipulated in Article 4 paragraph (1) of the Mortgage Rights Law.
- b. The consent of the third party, in this case the third party provides a guarantee in the form of a land guarantee and gives written consent.
- c. Deed of Land Security, this is when a third party pledges an object in the form of SHM Land, then it is stated in the Deed of Granting Mortgage Rights made by a Notary, and must be registered at the National Land Agency.

- d. Deed of Encumbrance, before using the Mortgage Rights, there needs to be a valid encumbrance deed, issued by the Land Office. This process makes the Mortgage Rights can be executed automatically if the debtor defaults.

b) Third Party Land Collateral in Credit Agreement

Credit agreements that use land owned by third parties as collateral, there are several things that need to be considered, namely :

- a. The relationship between the debtor (second party) and the third party, in this case the third party who provides the land as collateral is not directly involved in credit payment obligations. However, if the debtor fails to fulfill payment obligations, the third party will be affected, because the third party's land will be executed to pay off the debtor's debt.
- b. Risk for Third Parties, third parties will bear the consequences or risks if the debtor (second party) fails to fulfill its obligations. Therefore, the third party can ensure that the third party gets legal protection in the agreement.
- c. Third Party Protection To protect the interests of third parties, provisions are often included in credit agreements that ensure that if the debtor defaults, third parties will not bear more than the value of the pledged land. Third parties are also entitled to know the terms and conditions that apply in the credit agreement.

c) Land Ownership and Transfer of Rights

Before the transfer of the replacement guarantee object, the creditor (bank) must ask in detail and clearly, one of which is by surveying the prospective third party as the owner of the Land Ownership Certificate, such as SHM ownership of the Land, the existence of the object clearly and so on. then after the replacement of the guarantee, the bank will issue a proof letter that the guarantee object has changed hands. Land ownership is a very important thing in collateral, because valid collateral can only be given by the legal owner of the land. There are several things that need to be considered, namely :

- a. Verification of Ownership, this is done before third party land can be used as collateral, to verify land ownership through land certificates registered at the National Land Agency. It is intended that the land does not experience problems / disputes and really belongs to the legitimate third party.
- b. When granting a Mortgage Right, if the land is to be used as a Mortgage Right, it must be registered with the National Land Agency, after which the Mortgage Right must be registered and recorded in the land book at the BPN, in order to have binding legal force.
- c. Transfer of Land to Creditor, in this case, collateral on land owned by a third party does not mean that the land changes hands. The third party remains the owner of the land, but the land is tied to the

debtor's credit obligations. Execution or sale of the land will only occur if the debtor fails to fulfill its obligations.

d) **Obligations of Debtors, Creditors, and Third Parties**

a. **Debtor**

Debtors who use third-party land as collateral are still responsible for paying debts in accordance with the agreement. Failure to pay the debt will lead to the execution of the third-party land.

b. **Creditor**

Creditors have the right to execute third-party land if the debtor defaults. However, creditors are also required to comply with applicable legal procedures, such as a clear and valid notice of execution or land auction.

c. **Third Parties**

Third parties are entitled to receive clear information about their rights and obligations under the credit agreement. They must also ensure that the pledged land is not involved in a dispute and is in compliance with applicable legal provisions.

e) **Dispute Resolution**

In the event of a dispute between a third party and the creditor regarding the pledged land, it can be resolved through mediation, arbitration or court. Usually, these issues concern the validity of the agreement, the right of execution, or the validity of the documents relating to the land.

B. **Implication of Debtor's Default on the Use of Third Party Land Certificate**

Legal impact can be interpreted as the result of a legal action made by the perpetrator, which then appears/obtains an effect. Or it also means all the consequences in various legal actions made by legal subjects or the consequences of events by law which are considered legal consequences.

Although the third party is only limited to being a subject that provides an object in the form of a Land Ownership Certificate as a substitute guarantee by the debtor in a debt and credit agreement, the third party also has rights. The right that will be obtained by the third party is that they can still control and use the object of collateral, as stipulated in Article 12 of the Mortgage Rights Law.

Apart from that, third parties also have rights, namely the right to the remaining results of the execution. If the creditor sells the object (SHM Land) by auction and produces the remaining execution proceeds after the debt to the bank is paid off, then the remaining proceeds belong to a third party, as stated in the provisions and explanation of Article 6 of the Law. Mortgage Rights Law.

C. **Debtor And Third Party Responsibilities In Replacement Guarantee Cases**

Responsibility from a legal perspective is a theory that analyzes the responsibility of legal subjects or perpetrators who have committed unlawful acts or criminal acts in order to bear losses and make amends for their mistakes. Responsibility has become a part of life that has been imposed on every human being, which means acting as an embodiment of the obligation to be responsible for one's actions⁵. Etymologically, responsibility is an obligation for something or accepting the consequences of what has been done by oneself or another party.

This writing also discusses the responsibility of the second party to the third party if the collateral object in the form of a Land Ownership Certificate is auctioned by the bank (creditor), and the second party cannot carry out its performance obligations towards the third party, namely returning the Land Ownership Certificate or defaults, where the second party has not provided compensation to the third party, but the second party dies.

a. If the condition is still alive

The existence of a written agreement notarized by a notary is proof of the existence of a legal bond between the second party and the third party. From Hans Kelsen's theory, if obligations are violated there will be punishment or sanctions. If it is related to the responsibility of a second party towards a third party, then the second party will receive a penalty or sanction which means it is responsible for the violation committed⁶.

From the obligations violated by the second party to the third party contained in the contents of the contract in the agreement, namely the non-return of the object in the form of a Land Ownership Certificate to the third party as the owner which can give rise to responsibility, then the form of responsibility that must be carried out and obtained by the third party is the second party is in the form of compensation.

b. If Death occurs

If an undesirable event occurs, for example a second party does not compensate for losses lent to a third party but in the process the second party dies, then the settlement can be carried out based on civil law principles, which can be seen from the agreement. between the parties (second party and third party). third) which is stated in a written agreement and has been notarized.

If this happens, then there are several actions taken by the third party to obtain their rights, namely by :

⁵ Mustamu. Julista, "PERTANGGUNGJAWABAN HUKUM PEMERINTAH (Kajian Tentang Ruang Lingkup Dan Hubungan Dengan Diskresi)," *S A S I Jurnal Ilmiah Fakultas Hukum Universitas Pattimura Ambon* Volume 20 (2014).

⁶ Hans Kelsen, *Teori Hukum Murni (Dasar-Dasar Ilmu Hukum Normatif)*, ed. Raisul Muttaqien, edisi XVI (Bandung: Penerbit Nusa Media, 2014).

1. Third parties can ask for their rights from the heirs, because the obligations and responsibilities of the heirs will automatically transfer to the heirs, as stated in Article 833 of the Civil Code.
2. Furthermore, third parties can communicate and discuss to find common ground with the heirs, because the heirs inherit the rights, obligations and responsibilities of the heirs.

4. Conclusion

Legally, a person is obliged to behave in accordance with existing norms, otherwise subject to coercive action. However, this coercive action does not have to be directed at individuals who are required to be "offenders", but can be directed at other individuals who are related to the initial individual.

Therefore, if it is related to a problem, the second party will receive punishment or sanctions, which means being responsible for the violation committed. From the obligations violated by the second party to the third party contained in the contents of the contract in the agreement, namely the non-return of the object in the form of a Land Ownership Certificate to the third party as the owner which can give rise to responsibility, then the form of responsibility that must be carried out and obtained by the third party is the second party is compensation.

However, if something or an undesirable event occurs, for example the second party does not compensate for the loss of goods borrowed from a third party but dies during the journey, then in settlement the third party can sue the heirs (heirs) of the second party.

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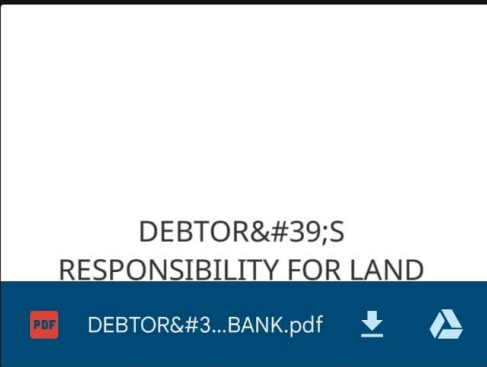
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