

Legal Protection For Creditors Holding Mortgage Rights On Double Certified Owned Land

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Abstract: This article analyzes how legal protection is for creditors holding mortgage rights on land with multiple certificates. This article was prepared using doctrinal research methods with literature study using secondary data and analyzed juridically-qualitatively by examining applicable regulations. The Mortgage Law gives the right of *droit de preference* or priority to creditors holding mortgage rights. However, in practice, this right is often injured by disputes over collateral rights, one of which is the dispute over the issuance of multiple certificates. In these conditions, the Land Office as the agency that issues the certificate has legal responsibility for the emergence of two certificates for land which of course is very detrimental to creditors. This is regulated in Article 54 paragraphs (1) and (2) of the Regulation of the Head of BPN RI Number 3 of 2011 concerning Management, Assessment and Handling of Land Cases. The Land Office has the obligation to cancel one of the duplicate certificates and announce it to the public. Thus, this action was taken to ensure order and certainty in land matters and maintain the integrity and public trust in the land system, as well as protect the legal position of creditors holding mortgage rights to land.

Keywords: : Legal Protection of Creditors, Mortgage Holders, Double Certificates, Legal Certainty of the Land Office

1. Introduction

In credit practice, it often happens that not all debtors are able to complete their obligations to pay debts. Based on "Article 6 of the Mortgage Rights Law, if the debtor fails to fulfill his promise, the first Mortgage Right holder has the right to sell the object that is the collateral (Mortgage Rights) by means of a public auction and use the proceeds of the sale to pay off the unpaid debt." This execution process is carried out by the creditor, executing the mortgage guarantee, there are often various obstacles faced by the creditor. Obstacles in the form of lawsuits from other parties can result in delays or even cancellation of the execution process for collateral objects, which of course is detrimental to creditors holding mortgage rights.¹

¹ Dahlan Siamat, *Manajemen Lembaga Keuangan*, (Jakarta: Intermedia, 1995), 99

The implementation of credit practices often faces situations where not all debtors can complete their obligations to pay off debts. In this case, Article 6 of the Mortgage Rights Law explains that "if the debtor fails to fulfill the promise or is unable to pay the debt, the first Mortgage Right holder has the right to sell the Mortgage Rights object through a public auction and use the proceeds of the sale to pay off the outstanding receivables." The execution process by creditors often faces various obstacles, one of which is the occurrence of lawsuits from other parties who also have rights to collateral objects that are used as Mortgage Rights. This lawsuit can arise because the collateral object may be used as collateral for more than one credit or debt, so that there are other parties who also have rights to the same object.²

In this situation, the execution process can become complicated and face legal challenges, because the creditor must ensure that the rights of other parties entitled to the collateral object are also considered and fulfilled. This lawsuit from another party could cause a delay or even cancellation of the execution process, depending on the legal decision taken. Therefore, in implementing credit practices and execution, it is important to comply with applicable legal provisions and maintain prudence in providing credit and evaluating the collateral used to protect the interests of creditors. In this way, the risk of lawsuits and other problems can be minimized, and protection of the rights of all parties can be guaranteed fairly and in accordance with the provisions stated in the Law.³

Based on the background that has been described, it is necessary to carry out research to analyze the law regarding existing problems, namely regarding legal protection for creditors as holders of mortgage rights to collateral objects that are in dispute due to the cancellation of the transfer of land rights to the debtor as the provider of the mortgage rights.

2. Method

This research takes the form of doctrinal (black-letter law), namely legal research that focuses on the law itself as an independent regulation. This research is usually carried out by analyzing legal and statutory texts, with little or no reference to other scientific disciplines. Meanwhile, 'law in context' is a research approach that considers law in a broader context, including aspects such as social, economic, political and cultural. Doctrinal research which focuses on the use of library materials as a research source, this research does not use observations or interviews with respondents.⁴

This research uses a statutory approach. A normative juridical research requires a statutory approach, because the focus of the research is various legal regulations comprehensively including a systematic collection of legal norms regarding the legal protection of creditors who hold rights.⁵ The data analysis technique that will be used in

² Sutan Remi Sjahdeini, *Hak Tanggungan Asas-Asas, Ketentuan-ketentuan Pokok Dan Masalah Yang Dihadapi Oleh Perbankan*. (Bandung : Alumni, 1999), 15.

³ *Ibid*

⁴ Hakim, M. H. *Pergeseran Orientasi Penelitian Hukum: Dari Doktrinal Ke Sosio-Legal*. *Syariah: Jurnal Hukum dan Pemikiran*, 16(2), (2017). 106-117

⁵ Fajar Mughti dan Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*, Pustaka Pelajar, Yogyakarta, 2009, 185-192.

this research is juridical-qualitative analysis in the form of library research by examining regulations, provisions, reference books and theories which are then analyzed qualitatively so as to provide illustrations of legal aspects related to the problem to be researched. The results of data analysis in this research will be presented in the form of qualitative analysis, namely the data obtained, then arranged systematically and then analyzed qualitatively, to obtain clarity on the problems to be discussed.⁶

3. Legal Protection For Creditors Holding Mortgage Rights On Double-Certified Land

Mortgage rights are a type of security right placed on land rights and objects that are an inseparable part of the land. The aim is to provide guarantees to creditors so that they can obtain preferred debt repayment (preferred creditors) if the debtor fails to fulfill its obligations. The function of the Mortgage Rights Institution is as a protection tool used by banks or creditors to ensure security in credit transactions. This includes assurance that the debtor's debt will be repaid or that the achievements promised by the debtor or his guarantor will be carried out if the debtor is unable to fulfill all obligations related to the credit. With the existence of a mortgage right, the creditor has a security guarantee for the assets used as collateral, namely land and objects related to the land.⁷

The legal position of creditors who have mortgage rights changes when the rights to the land they work on become invalid, and this is covered in one of the aspects explained in the concept of mortgage rights. The definition of mortgage rights has been outlined in Article 1 point (1) of the Mortgage Rights Law, which describes "mortgage rights as collateral applied to land rights in accordance with the definition in UUPA, either with or without additional objects that are integrally connected to the land to pay certain debts. It gives priority to certain creditors over other creditors."⁸

There are two (two) types of legal protection for mortgage rights holders. Preventive protection is found in Article 1131 of the Civil Code and Article 1132 of the Civil Code, Article 12A of the Banking Law, and Article 1 point 1 of the UUHT. Repressive protection is found in Article 6 of the Mortgage Law, Article 7 of the Mortgage Law, Article 11 of the Mortgage Law, Article 14 of the Mortgage Law, and Article 20 of the Mortgage Law.

3.1. Preventive Protection.

Preventive legal protection aims to prevent problems or disputes from occurring by giving legal subjects the opportunity to submit objections or opinions before a government decision takes definitive form.⁹ This type of protection is protection that is given before something happens to the community in the form of opposing decisions made by the government. This protection can also be achieved through efforts made by the parties to reduce future losses. In this case, banking can take the following preventive protection measures:

⁶ Ronny Hanitijo Soemitro, *Metode Penelitian Hukum dan Jurimetri*, Cetakan 4, (Jakarta: Ghalia Indonesia), 1990, 118

⁷ Herawati, Poesoko, *Parate Executie Objek Hak Tanggungan (Inkonsistensi, Konflik Norma dan Kesesatan Penalaran Dalam UUHT)*, Cet. I, (Yogyakarta: Laksbang Pressindo), 2007, 185.

⁸ Salim HS, 2004, *Perkembangan Hukum Jaminan Di Indonesia*, PT Raja Grafindo Persada, Jakarta, Hlm. 95

⁹ Almaida, Z. and Imanullah, M.N., *Perlindungan hukum preventif dan represif bagi pengguna uang elektronik dalam melakukan transaksi tol nontunai*. *Privat Law*, 9 (1), 2021, 218-226.

- a. Follow the principle of prudence and check credit and collateral applications. According to Article 8 Paragraph 1 of the Banking Law, banks must carry out an analysis of the potential debtor's ability to pay off their debt before providing credit to the prospective debtor.¹⁰ This obligation is intended to prevent banks from failing to provide credit to prospective debtors. Banks can do the following things before providing credit and asking for collateral:
 - 1) Binding ensures to the land office that collateral can be attached or not.
 - 2) Valuation includes fair market value, projected liquidation value, and fair market value.
 - 3) Security ensures that the collateral can be attached safely and does not cause disputes in the future.
 - 4) Supervision means that banks can control collateral until the credit is repaid.
 - 5) Utilization means ensuring that the collateral is not used for purposes that violate Indonesian law.
- b. Making credit and guarantee agreements with the addition of certain clauses. In order for the credit agreement to pay off the debt, the collateral must be bound by a clause granting mortgage rights through the preparation of a Deed of Granting Mortgage Rights (APHT) by the Land Deed Making Officer (PPAT). After that, the APHT must be made by the PPAT, as stated in Article 10 paragraph (2) UUHT, which states that "the granting of mortgage rights is carried out by making a Deed of Granting Mortgage Rights by the Land Deed Making Officer in accordance with applicable laws and regulations." Apart from that, as a legal requirement for the APHT, promises to protect creditors must be included in the APHT. Then, the process of assigning mortgage rights goes through two stages, namely registering the mortgage and issuing the mortgage right. To protect banking rights, bank credit agreements may include the following clauses:¹¹
 - 1) Banks can carry out collections under certain circumstances if the debtor is declared bankrupt, under guardianship, etc;
 - 2) The debtor submits goods as collateral to pay off the debt; And
 - 3) Banks can take certain necessary actions regarding collateral, such as installing collateral protection.

The guarantee agreement must meet certain conditions. This includes the debt that is burdened, the existence of debtors and creditors, the existence of assets that can be used as collateral, and the existence of agreements that protect the rights of creditors. One of the types of guarantees most commonly used by the public is fiduciary guarantees and mortgage rights. The fiduciary guarantee

¹⁰ Indonesia, Undang Undang Tentang Perubahan Atas Undang Undang Nomor 7 Tahun 1992 Tentang Perbankan, UU No. 10 Tahun 1998, LN Nomor 182, TLN Nomor 3790, Pasal. 8 Ayat (1).

¹¹ Carolina, C., *Perlindungan Hukum Kreditur Terhadap Penerbitan Sertipikat Ganda Yang Digunakan Sebagai Jaminan Utang (Studi Putusan Mahkamah Agung Nomor 124K/PDT/2020)*. *Indonesian Notary*, 4(1), 2022, 11.

agreement is made by a notary, while the mortgage rights guarantee agreement is made by PPAT. PPAT is a public official who is given the authority to make authentic deeds relating to land rights or apartment unit ownership rights.¹²

The process of registering collateral with the authorities follows the provisions regulated in the Mortgage Rights Law (UUHT). As outlined in Article 13 Paragraph (1) and Paragraph (2) of the UUHT, the granting of mortgage rights must follow several stages which include registration at the land office, recording in the land book, and copying the information in the land title certificate. The stage of issuing mortgage rights is usually identified by the issuance of a mortgage rights certificate by the land office.¹³

3.2 Repressive Protection

Repressive legal protection is the final protection which consists of sanctions such as fines, imprisonment and additional penalties which are applied if there is a dispute or a violation has been committed (Philipus M. Hadjon, 1987: 2-5). In the Civil Code, Articles 1131 and 1132 regulate legal protection for creditors. These articles state that a guarantee of certainty for the debtor is definitely given, and that the debtor's obligations will always be fulfilled or paid off with the guarantee. Efforts to resolve disputes can be done in several ways, including:

1. Conduct mediation and file a lawsuit in court. Before the parties litigate in court, mediation is usually used because in the principles of civil procedural law, the preferred dispute resolution is mediation. If mediation is unsuccessful, the parties can file a lawsuit in court.
2. Providing compensation to banks as creditors. Compensation can occur due to breach of contract or unlawful acts. Compensation for damages due to default is carried out if a party does not carry out the agreed agreement, thereby causing losses.
3. Provide a replacement guarantee. Article 18 Paragraph (1) mortgage law explains that mortgage rights can be removed because:
 - a. Mortgage rights released by the mortgage rights holder.
 - b. Cleaning of mortgage rights by the chairman of the district court.
 - c. Elimination of land rights.

Because mortgage law does not discuss replacing collateral, creditors can request replacement of collateral as an effort to guarantee outstanding debts if mortgage rights are removed for a reasonable reason.

¹² Peraturan Pemerintah Nomor 37 Tahun 1998 tentang Peraturan Jabatan Pejabat Pembuat Akta Tanah (PPAT)

¹³ Sumardjono, M. S. *Pendaftaran Hak Tanggungan*. Unisia, (17), (1993), 80-84.

4. Legal responsibility of the Land Office for the issuance of two certificates

Currently, the use of land rights as collateral to ensure repayment of debtors' debts is no longer strange. To protect the interests of all parties involved in such transactions, strong legal regulations are needed that can meet the demands of the times. Provisions regarding Mortgage Rights only came into existence after the enactment of a valid law on April 9 1996. This law is Law Number 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land, which is hereinafter referred to as UUHT. The UUHT establishes the legal framework governing mortgage rights over land and property related to land, and this is the legal basis for the use of land as collateral in financial transactions.¹⁴

A certificate is evidence that has strong legal force, but is not absolute or perfect evidence as regulated in the Basic Agrarian Law (UUPA) and its implementing regulations such as Government Regulation Number 10 of 1961 and Government Regulation Number 24 of 1961. This means that the information contained in the certificate must be considered true by the judge as long as there is no other evidence that can prove otherwise. In other words, a certificate is strong evidence but not absolute, and its truth can be challenged if there is evidence that reveals different facts.¹⁵

Disputes that arise in the land context, especially those that are closely related to property rights certificates, can be considered as a form of dispute that falls within the realm of State Administrative Law. This kind of dispute often arises as a result of an object being debated or disputed between the parties involved, and the underlying cause is a legal act issued by a government entity. In administrative law terminology, disputes that occur are known as administrative disputes because the main focus is on administrative decisions, namely decisions made by state administrative bodies or officials.¹⁶

¹⁴ Abdurrahman. *Beberapa Catatan tentang Hukum Jaminan dan Hak-Hak Jaminan atas Tanah*, Alumni, Bandung, 1985, 4.

¹⁵ Arie S. Hutagalung, *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, cet. 1, (Jakarta: LPHI, 2005), 81.

¹⁶ Sadjijono, *Bab-Bab Pokok Hukum Administrasi Negara*, (Yogyakarta: Laksbang Pressindo), 2008, 132

The Land Office can apply civil sanctions for acts of negligence or inaccuracy in carrying out and checking physical data and juridical data. This civil sanction refers to Article 1365 and Article 1366 of the Civil Code (Civil Code) which states: Article 1365 of the Civil Code: "Every act that violates the law, which brings harm to another person, requires that the loss be compensated for the loss." This article implies that if the Land Office's acts of negligence or inaccuracy in carrying out or checking data result in losses for other parties, the Land Office may be obliged to reimburse the Land Office. The Land Office can apply civil sanctions for acts of negligence or inaccuracy in carrying out and checking physical data and juridical data. This civil sanction refers to Article 1365 and Article 1366 of the Civil Code (Civil Code) which states: Article 1365 of the Civil Code: "Every act that violates the law, which brings harm to another person, requires that the loss be compensated for the loss. This means that if their actions cause losses to interested parties, the Land Office could be civilly responsible for compensating for those losses."¹⁷

4.1 Preventive Protection

Rights holders and governments are becoming more careful when making decisions about land thanks to preventive protection. Adrian Sutedi explained that the UUPA wants three legal certainties, namely certainty about land rights, certainty about the subject matter, and certainty about the status of rights.¹⁸ Thus, there are three legal certainties that will avoid disputes. Based on the case in this Decision, it can be seen that the Land Office does not have big data so that when PRONA is registered, different Ownership Certificates are issued on the same land.

In this case, according to Article 24 (1) PP24/1997, a PPAT deed is a written document used to register rights that can be used to prove old rights. As evidence, the PPAT deed is then used as a basis for registering proof of old rights. Therefore, a PPAT is responsible in making the deed to check the legal conditions for the legal action being carried out by comparing the current data with the appropriate data before the legal action related to the implementation of land registration. To avoid uncertainty for rights holders when using a private letter to issue a certificate, all parties must prioritize accuracy and accuracy during the process of making the letter.¹⁹

As stated in Juknis 3/2022 for electronic certificate checking services which can be submitted by PPAT by making a statement letter²⁰, PPAT is responsible for monitoring data that will be processed in the BPN system. In this case, if there is an indication of overlapping land, the PPAT should not continue to make the deed. PPAT is responsible for the legality of actions according to the statements of the parties and guarantees the authenticity of the deed and is responsible according to procedures (formally). By using the ATR/BPN application, the community as land owners have the ability to take preventive action if there is a discrepancy between their ownership and that in the system by verifying it with the Land Office. This can

¹⁷ Kitab Undang Undang Hukum Perdata, Pasal 1365

¹⁸ Adrian Sutedi, *Peralihan Hak Atas Tanah dan Pendaftarannya*. Sinar Grafika. 2023, 170

¹⁹ Adrian Sutedi, *Sertifikat hak atas tanah*. Sinar Grafika. 2023, 186

²⁰ Petunjuk Teknis Nomor 3/Juknis-HK.02/IV/2022 Tahun 2022

prevent overlap because there is already big data held by the Land Office or BPN regarding a plot of land. In this case, duplicate certificates appeared due to data discrepancies because the Land Office did not have complete data.²¹

4.2 Repressive Protection

If deliberation or mediation does not reach an agreement, dispute resolution can be carried out through non-judicial channels (deliberation, mediation), or through court or litigation.²² As stated in Article 24 paragraph (7) PERMEN ATR/BPN 11/2016, only one certificate is valid for one plot of land, so two (or more) certificates that are valid for the same object must be cancelled. According to PERMEN ATR/BPN 21/2020, "Only one land title certificate can be issued for one plot of land unless otherwise determined by statutory regulations." In cases of land disputes in court, the authenticity of the certificate will be checked to see whether it was actually issued by BPN: the history and process of obtaining the certificate, whether it started from sale and purchase to issuance, and how the issuance of the certificate occurred in the land registration process. As long as stated in Article 24 paragraph (7) PERMEN ATR/BPN 11/2016, only one certificate is valid for one plot of land, so two (or more) certificates that are valid for the same object must be cancelled. According to PERMEN ATR/BPN 21/2020, "Only one land title certificate can be issued for one plot of land unless otherwise determined by statutory regulations." In cases of land disputes in court, the authenticity of the certificate will be checked to see whether it was actually issued by BPN: the history and process of obtaining the certificate, whether it started from sale and purchase to issuance, and how the issuance of the certificate occurred in the land registration process. As long as there is no evidence to prove otherwise, the words contained in the land certificate are valid as legal truth and must be recognized by the court as true. If there is incorrect evidence, the court's decision will be changed and corrected. Considering that Article 32 Paragraph (2) PP 24/1997 no longer applies, the judge can decide in this case who was the first to register the land. as there is no evidence to prove otherwise, the words contained in the land certificate are valid as legal truth and must be recognized by the court as true. If there is incorrect evidence, the court's decision will be changed and corrected. Considering that Article 32 Paragraph (2) PP 24/1997 no longer applies, the judge can decide in this case who was the first to register the land.

5. Conclusion

Legal protection for creditors, regarding land as collateral for mortgage rights through a Mortgage Rights Certificate, has the basis of executorial power and preventive legal protection. Jurisprudence strengthens this provision, such as in the Supreme Court Decision which states the validity of the Mortgage Rights Certificate. This decision postpones the implementation of lawsuits against the vacation of land and buildings until the end of the Mortgage Rights, with a deadline for debt repayment on August 21 2024 as a form of repressive legal protection. If the debtor does not pay off the debt after the

²¹ *Ibid*

²² Sihombing, I.D.R. and SH, M., *Cacat Administrasi: Pembatalan Sertifikat Tanah oleh BPN Tanpa Putusan Pengadilan*. Prenada Media. 2022, 223

mortgage rights end, the creditor can use the Debt Acknowledgment Deed as a basis for execution, ensuring legal certainty and security in obtaining the receivable.

The Land Office has clear responsibilities regarding dual certificates, must act firmly in accordance with the law, and apply sanctions such as civil compensation, criminal sanctions for measuring officers and the Head of the Land Office, and administrative sanctions in the form of dismissal of negligent officers. Dismissal is carried out after a court decision which has permanent legal force. After the legal process, the Land Office is obliged to cancel a certificate and announce it to maintain the order and certainty of land law and increase public trust.

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Petunjuk Teknis Nomor 3/Juknis-HK.02/IV/2022 Tahun 2022

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