

## LEGAL PROTECTION OF CREDITORS RELATED TO COLLECTIVE RIGHTS ON LAND THAT HAVE NOT BEEN CERTIFIED AS A RESULT OF THE PROCESS OF REGISTRATION OF LAND RIGHTS HAS NOT BEEN COMPLETED

Hera Widjayanti  
Sekolah Tinggi Ilmu Hukum Painan, Banten, Indonesia  
herawidjayanti@gmail.com

### Abstract

Legal protection for creditors regarding their existence Mortgage rights over land that have not been certified as a result of the process of registering land rights that have not been completed, and using normative juridical research types with statutory approaches and conceptual approaches. The results of this study conclude that the results of the research show that the legal consequences of the registration of land rights that have not been completed (hereinafter referred to as apht) to bank credit agreements made by the parties before a notary/official making land deeds (hereinafter referred to as ppat) is that the creditor does not have a priority position. Where is the form of legal protection that can be given to creditors as a form of anticipation. The creditor's right to collateral in the event that the apht is not completed, that is, does not give precedence rights compared to other creditors. The purpose of imposing mortgage rights is to provide legal protection and certainty to all parties (especially creditors) and also to fulfill the principle of publicity. Article 1 paragraph (1) of the law on mortgages regulates provisions regarding the granting of mortgage rights from debtors to creditors in respect of debts secured by mortgage rights. The granting of this right is intended to give priority to the creditor concerned (preferred creditor) over other creditors. Thus the granting of a mortgage is a guarantee for repayment of the debtor's debt to the creditor in connection with the loan/credit agreement in question. Mortgage rights will not arise without APHT registration. The conclusion in this study is that legal protection is all kinds of activities carried out to provide a safe, comfortable and lawful environment. To guarantee legal certainty and defend the rights of creditors in granting credit, all efforts must be made in providing legal certainty and fair agreements between creditors and debtors such as preventive and repressive legal protection.

**Keywords:** legal protection; creditors; mortgage

**INTRODUCTION**

Land is something that has a very important value in people's lives, because land is synonymous with people's survival. It is not only land for living, but can also be a place for people's livelihoods. Land can be used by the people to achieve a decent living in accordance with the provisions in Article 27 paragraph (2) of the 1945 Constitution.

Land has economic value because land is an element that cannot be ruled out in the era of national development or to support economic growth. Besides having economic value, land also has social value, which means that land rights are not absolute, but the state guarantees and respects land rights granted to its citizens, so that legal certainty is needed in land tenure protected by law.

Land is the object that is most susceptible to disputes, both disputes between individuals, individual disputes with legal entities, disputes between legal entities, even disputes involving the government, so that legal arrangements related to the tenure/granting of land rights must be maximized to guarantee protection for rights holders. above ground.

The Basic Agrarian Law (UUPA) is another term for Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations. This law was ratified and promulgated on September 24, 1960. The purpose of issuing the UUPA was to end the dualism of agrarian law in Indonesia. Before the enactment of the UUPA, agrarian law which was based on western law clearly had the objectives and foundations of the colonial government. Agrarian law based on western law will obviously not be able to realize the ideals of the Republic of Indonesia as stated in the 1945 Constitution Article 33 paragraph (3), namely that the Earth, water and space and the natural resources contained therein are controlled by the State. and used as much as possible for the prosperity of the people.

With the birth of the UUPA, a national agrarian law was created, which will provide legal certainty for all people and enable the achievement of the functions of the earth, water and space as well as natural wealth as envisioned. Considering the nature and position of this UUPA as basic regulations for the new national agrarian law, this UUPA only contains basic agrarian principles and rules. To implement the provisions in the UUPA, implementing regulations are needed which are an elaboration of the UUPA. Legal certainty for owners of land rights can only be obtained through land registration procedures, as stated in Article 19 paragraph (1) of the UUPA.<sup>1</sup>

Provisions regarding the legal certainty of land rights are regulated in Government Regulation Number 24 of 1997 concerning Land Registration. According to Government Regulation Number 24 of 1997, legal certainty regarding land rights as mandated by the UUPA contains two dimensions, namely certainty of the object of land rights and certainty of the subject of land rights. One indication of the certainty of the object of land rights is by determining the physical data required for land registration, measurement and mapping of land parcels, location and land boundaries. While the certainty of the subject is indicated from the name of the holder of land rights listed in the land registration book at the land agency. In summary, a copy of the map and land registration book is known as a Land Certificate. A Land Certificate is a proof of title to plots of land owned by ownership rights, business use rights, building use rights, use rights, management rights, ownership rights to apartment units, waqf land, State land, and mortgage rights. According to the provisions of Article 1 paragraph (1) of Law no. 4 of 1996 concerning Mortgage Rights, what is meant by mortgage rights is the security rights imposed on land rights as intended by Law no. 5 of 1960 concerning the Basic Agrarian Regulations, including or not following other objects which are an integral part of the According to the provisions of Article 1 paragraph (1) of Law no. 4 of 1996 concerning Mortgage Rights, what is meant by mortgage rights are

---

<sup>1</sup>Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.

security rights that are burdened on land rights as referred to in Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles, whether or not the following are other objects which are part of the According to the provisions of Article 1 paragraph (1) of Law no. 4 of 1996 concerning Mortgage Rights, what is meant by mortgage rights is the security rights imposed on land rights as intended by Law no. 5 of 1960 concerning Basic Regulations on Agrarian Principles, whether or not the following are other objects which are part of the land, for the settlement of certain debts, which gives the creditor a priority position over other creditors.<sup>2</sup>

In this case, the creditor and debtor agree to form a debt and receivable agreement. Land rights that are encumbered with mortgage rights are used as collateral for credit from the debtor. This means that the Mortgage itself can be a form of collateral in terms of alternative settlement/payment of debts owned by the Debtor. An increase in the pace of the economy will lead to the growth and development of businesses carried out by the community, usually business actors in developing their businesses always try to increase their business capital by making loans or direct credit with banks. Where credit that has developed a lot in society is credit with mortgage rights, although in the guarantee law there are also several guarantee institutions such as fiduciaries, mortgages.

Banking institutions have a strategic role in encouraging the turning of the economy through their main activities, namely collecting public funds and distributing them to the community in the form of providing credit to support development. In current practice, banks distribute various types of credit according to community needs and activities.

## RESEARCH METHODS

In this legal research, the type of research used is normative research, namely research that focuses on examining the rules or norms in positive law. The use of this type of juridical-normative research is because this research tries to examine the legal norms contained in applicable laws and regulations related to mortgage rights. From the existing norms, an analysis of the problems contained in these regulations or norms is carried out.

The research approach is used to obtain information from various aspects regarding the issue being tried to find an answer. As for answering the existing problems, this research uses three research approaches:

- a. The Statute Approach (statutory approach) is an approach taken by examining all laws and regulations related to the legal issues being discussed. In this case, the regulations to be reviewed are the laws and regulations relating to mortgage rights
- b. Conceptual Approach (conceptual approach) is an approach that departs from the views and doctrines in legal science. The views and doctrines in the science of law aim to find ideas that give birth to legal notions, legal concepts and legal principles that are relevant to the legal issues at hand. So in relation to this research it refers to the doctrines related to the execution of mortgage rights.
- c. The Case Approach approach, namely by reviewing and examining the norms related to execution in civil law, as well as other laws and regulations related to Mortgage Rights, as well as reviewing the considerations of judges in court decisions regarding the appointment of collateral confiscations on land objects that have been encumbered with Rights dependents.

## RESULT AND DISCUSSION

Creditor Legal Protection regulated in the Mortgage Law. Regarding the definition of mortgage rights, according to Article 1 point 1 of Law number 4 of 1996 it is said that

---

<sup>2</sup>Law number 4 of 1996 concerning Mortgage Rights

mortgage rights are collateral rights that are charged to land rights including or not including other objects that is a unit with land, for the settlement of certain debts that give priority to certain creditors over other creditors.

In the process of granting credit carried out by banks as creditors to debtors, the possibility of risks such as failure or delays in debt repayment by debtors is very large. So, material collateral is required by the bank for the debtor to guarantee repayment of the credit. The most widely used collateral is land rights, because their value or price tends to increase. In the case above, it is clear that legal protection is given to creditors through Law Number 4 of 1996 concerning Mortgage Rights over Land and Objects Related to Land.

### Form of legal protection

The binding power of the agreement as a law for the parties who make it (*pacta sunt servanda*), in certain situations the validity is limited, among others, in good faith. Article 1338 paragraph (3) of the Civil Code states that "agreements must be executed in good faith". Wirjono Prodjodikoro provides a definition of good faith with the terms "honestly" or "honestly", while PL Werry as quoted by Daeng Naja gives the meaning of good faith in contract law, meaning that both parties must apply to the other based on decency between people who are polite without deceit, deceit, subterfuge and look not only for their own interests, but also for the interests of others.<sup>3</sup>

The National Civil Law Symposium organized by the National Legal Development Agency (BPHN) defines good faith as:

honesty when making contracts;

at the manufacturing stage it is emphasized, if the contract is made in the presence of an official, the parties are considered in good faith; and as propriety in the implementation stage, which is related to a good assessment of the behavior of the parties in carrying out what has been agreed in the contract, solely aimed at preventing inappropriate behavior in the implementation of the contract.<sup>4</sup>

Good faith plays an important role in making contracts and is part of the legal obligations in contract implementation that must be fulfilled, in other words good faith does not only apply at the implementation stage, but also at the signing stage and the stage before closing the agreement (precontractual phase). For each prospective party to the agreement there is an obligation to examine (*onderzoekplicht*) and notify (*medelingsplicht*) before signing the contract or each party must conduct an investigation within reasonable limits of the opposing party in closing the contract in good faith.<sup>5</sup>

Based on the understanding of good faith, parties entering into an agreement must not harm other parties, nor take advantage of other parties to benefit themselves. In this way, the agreement is not only determined by the words formulated by the parties, but the judge can intervene in the freedom of contract of the parties by basing it on the principle of good faith and interpreting the contents of the contract beyond the words that have been stated. 110 If this legal principle linked to the subject matter of the writing, then this legal principle is the basis for creditors to obtain their rights, and if the creditor has been proven to have good intentions by handing over a sum of money as a credit loan to the debtor, and has accepted the collateral in accordance with applicable regulations.

<sup>3</sup>Agus Yudha Hemoko, *Contract Law, Principle of Proportionality in Commercial Contracts*, Kencana Prenada Media Group, Jakarta, 2010, p. 143

<sup>4</sup>Daeng Naja, *Introduction to Indonesian Business Law*, Pustaka Yusticia, Yogyakarta, 2009, p. 141

<sup>5</sup>Yahman, *Characteristics of Default & criminal acts of fraud*, Achievement Pustakaraya, Jakarta, 2011, pp. 82-83

Legal protection for the right to continue holding the collateral object is based on Article 1338 paragraph (3) of the Civil Code which stipulates that all agreements must be implemented in good faith and Article 1339 of the Civil Code which states that agreements are not only binding regarding matters that are expressly stated in its contents but also for matters which according to the nature of the agreement are required by propriety, custom or law.

Based on the credit agreement between the creditor and debtor and the UUHT, it is appropriate for a collateral object that has been bound by procedures and formally meets the requirements in accordance with applicable legal provisions, requiring that the creditor as the party with the receivable remain protected in his rights as the right holder. dependents until the debtor pays off his debts at a predetermined time in accordance with the credit agreement. Judges are obliged to pay attention to the principle of good faith in every decision they make, especially regarding the issue of guarantee agreements in order to achieve legal protection and justice for the parties.

The process of binding a Credit Agreement with Mortgage Guarantee can be carried out in 2 (two) stages, namely:<sup>6</sup>

First Stage: Credit Agreement with Mortgage Provision Clause. The credit agreement is a principal agreement that is consensual (*pactade contrahendo obligatoir*) and is accompanied by an agreement or agreement between the creditor as the lender and the debtor as the recipient of the loan. Usually, those who act as credit facility providers are banks, which based on Article 3 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law) it is explained that the function of collecting and channeling funds to the community in the form of credit or loans. In banking practice, usually before a credit agreement is executed,<sup>7</sup>

The things required by the bank as stated in the form of the credit agreement include: If the bank considers the credit application to be appropriate to be given to the debtor in accordance with the completeness of the things required by the bank, the bank will provide a Credit Confirmation Letter or Ampliation containing: The amount or amount of credit approved; Credit repayment period; Costs such as the amount of interest and other necessary costs; Credit withdrawal conditions;

In general, legal acts are considered to be contrary to public order if the act violates or is contrary to the basic principles (fundamentals) of the social order, while legal acts are considered to be contrary to good morals if the act violates or is contrary to the moral norms of a society.

### **Failure to Fulfill Formal Agreements<sup>8</sup>**

An agreement consists of an *essentialia* part, a *naturalia* part, and an *accidentalia* part. The *essentialia* part is an absolute part that must exist in an agreement, where without the essential part it results in the agreement not existing (non-existent). The *naturalia* part means the part of the agreement regulated in the law (named agreement), as the governing law or the law adds and by the parties can be replaced or removed the *accidentalia* part means the part in an agreement added by the parties, because the law does not regulate it .

Article 1233 of the Civil Code states that an agreement gives rise to rights and obligations in the field of property law, meaning that the agreement also gives rise to rights and obligations in the field of property law for the parties making the agreement. This means that the maker of the agreement or the party entering into the agreement voluntarily commits

---

<sup>6</sup>Martha Noviaditya, "Legal Protection for Creditors in Credit Agreements with Mortgage Guarantee", Thesis, Faculty of Law, Sebelas Maret University, 2010, p. 65-71

himself to hand over something, to do something or not to do something for the benefit and benefit of the party to whom he has promised or bound himself, with guarantees or encumbrances in the form of assets owned or to be owned by the party who made the agreement or who has bound himself. The voluntary nature of the agreement must arise from the will and must be carried out in accordance with the intentions of the party making the agreement<sup>9</sup>Furthermore, the statement "in the field of assets" is intended to limit that the agreement referred to here is an agreement relating to a person's assets as guaranteed by Article 1131 of the Civil Code, namely "All the objects of the debtor (debtor) whether movable or immovable, whether already existing or not existing in the future will become a liability for all individual obligations." As has been explained, a guarantee agreement is made to provide legal protection to creditors for the repayment of their receivables. Even though a guarantee agreement has been made, the existence of general guarantees as regulated in Articles 1131 of the Civil Code and 1132 of the Civil Code remains in effect when the guarantee agreement made by the debtor and creditor collapses.<sup>10</sup>

Every creditor has general security rights as stated in Article 1131 of the Civil Code, summarizing the principles of creditor relations as follows:

A creditor may take payment from any part of the debtor's assets; Any part of the debtor's assets can be sold to pay off creditor bills; and The creditor's claim rights are only guaranteed by the debtor's assets, not by the "person of the debtor".

## CONCLUSION

The principle that everyone is responsible for his debts, which responsibility is in the form of providing his wealth, both movable and fixed objects if necessary, is sold to pay off his debts (Sculd and Haftung Principles). According to Mariam Darus, this principle is very fair, in accordance with the principle of trust in the Law of Engagement, where every person who gives a debt to someone believes that the debtor will fulfill his achievements in the future. Every person is obliged to fulfill his promises, which is a moral principle which the legislators strengthen as a legal.

## REFERENCES

- Agus Yudha Hernoko, Contract Law, Principle of Proportionality in Commercial Contracts, Kencana Prenada Media Group, Jakarta, 2010, p. 143
- Arnas, Y., Sutarjo, M., & Fajarianto, O. (2022). Differences of Students' Mathematics Learning Results using Student Team Achievement Division (STAD) and Expository Methods on Materials Build A Flat of A Rquange. *EduLine: Journal of Education and Learning Innovation*, 2(2), 146-150.
- Daeng Naja, Introduction to Indonesian Business Law, Pustaka Yusticia, Yogyakarta, 2009, p. 141
- H. Moch. Isnaeni, Introduction to Material Guarantee Law, Revka Petra Media, Surabaya, 2016, p. 108-110.
- Kartini Muljadi, Gunawan Widjaja, An Agreement Born from an Agreement, Rajawali Press, Jakarta, 2003, p. 2
- Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles.
- Law number 4 of 1996 concerning Mortgage Rights
- Martha Noviaditya, "Legal Protection for Creditors in Credit Agreements with Mortgage Guarantee", Thesis, Faculty of Law, Sebelas Maret University, 2010, p. 65-71.
- Rostini, D., Fajarianto, O., Fatolah, U., & Yel, M. (2021, January). Professional Performance

<sup>9</sup>Kartini Muljadi, Gunawan Widjaja, Engagements Born from Agreements, Rajawali Pers, Jakarta, 2003, p. 2

<sup>10</sup>H. Moch. Isnaeni, Introduction to Property Guarantee Law, Revka Petra Media, Surabaya, 2016, p. 108-110.

of The First Middle School Teacher in School Head Master Management. In *Proceedings of the 1st International Conference on Science and Technology in Administration and Management Information, ICSTIAMI 2019, 17-18 July 2019, Jakarta, Indonesia*.

Yeshman, Characteristics of Default & criminal acts of fraud, Achievement Pustakaraya, Jakarta, 2011, pp. 82-83