



Legal responsibility of the notary absence/land deed making officer (PPAT) when signing the power of attorney to impose the mortgage rights deed before the parties

Yudianto Syahputra¹, Yanis Rinaldi², Teuku Abdurrahman²

¹ Master of Notary, Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia

² Faculty of Law, Syiah Kuala University, Banda Aceh, Indonesia

Abstract

Based on Article 16 Point m of UUJN states that “read the deed in front of the audience attended by at least 2 (two) witnesses, or 4 (four) witnesses specifically for the making of the testament deed under the hand, and signed at the same time by the audience, witnesses and Notaries”. However, in reality, notaries still violate these provisions for notarial acts which were not present at the signing of the Power of Attorney to Impose Mortgage Right (hereinafter referred to as SKMHT) before the parties resulted in the deed being degraded and the parties suffered losses. This study aims to examine and analyze the laws and regulations against the absence of a notary when signing the deed of SKMHT, reviewed and analyzed the making of the deed process of SKMHT by the provisions of the UUHT, as well as reviewed and analyzed the legal consequences of the notary absence when signing the SKMHT deed. This type of research is normative juridical research and used legislation, conceptual, and case approach. Data were collected through library research and then analyzed qualitatively. The results showed that the absence of a notary was an unlawful acted and the notary might be held civilly responsible by indemnifying the parties, criminally that the Notary has made a false deed, and by UUJN was given administrative sanctions. The birth of the SKMHT deed was when the mortgage right giver really cannot appear before the notary/Land Deed Making Officer (PPAT) was appointed to replace him and made with an authentic deed. The consequence of notaris' absence when the SKMHT deed was signed resulted in the degradation of the deed into a private deed. Suggestion from the results of this study was notaries should carry out their duties and positions must comply with applicable laws and regulations, including in terms of attending the reading and signing of authentic deeds before the parties. With the presence of a notary, the deed was valid to become perfect evidence and has legal certainty, which would avoid problems that can arise in the future.

Keywords: responsibility, notary absence, power of attorney to impose mortgage right (SKMHT)

Introduction

Based on Article 1 Point 1 of Law Number 30 of 2004 in conjunction with Law Number 2 of 2014 concerning the Notary Position (hereinafter referred to as UUJN), is a public official authorized to make authentic deeds and other authorities as referred to in Article 15 of UUJN. Notaries as public officials (*openbaar ambtenaar*) are required to be responsible for carrying out their duties and authorities to make authentic deeds in accordance with Article 15 Paragraph 1 of UUJN which states that:

“A notary is authorized to make an authentic deed regarding all acts, agreements, and stipulations obliged by laws and regulations and/or desired by those interested to be stated in the authentic deed, guarantee the certainty of the deed date, keep the deed, provide Grosse, as well as copies and excerpts of the deed, all of those as long as the deed is not also assigned or excluded to other officials or other people stipulated by law.”

An authentic deed has perfect evidentiary power, whether outwardly, formally, or even materially. Formally, it is true that the parties have explained what is written in the deed. While materially, what is explained in the deed is true. Therefore, it must be fulfilled in terms of authority, formality, and substance of the deed, for a notary must be responsible for the outward, formal, and material truth of the deed. If the deed is not made as prescribed by the laws and regulations, it will result in the deed experiencing juridical defects which can result in the deed losing its autonomy or invalidation of the deed. The cancellation of an authentic deed may be caused the notary to be liable.

The provisions regulated in Article 1868 of the Civil Code affirm that: “An authentic deed is a deed in the form prescribed by law, made by or in the presence of public servants who have power for that at the place where the deed was made.” A notarial deed is specifically regulated in the provisions of Article 1 Point (7) of UUJN which states that: “A notarial deed is an authentic deed made by or before a notary according to the form and procedure stipulated in this law.” The deed itself is the letter that is evidence that has been signed, containing the events that form the basis of a right or an engagement and was made from the beginning deliberately for proof. Hence,

to be classified as a deed, the letter must be signed. The necessity for the signing of a letter to be referred to as a deed is contained in the provisions of Article 1869 of the Civil Code.

The mechanism for signing a notarial deed is not only limited to the issue that the deed must be signed, however, the signing of the deed must also be in the presence of a notary as stipulated in Article 16 Paragraph (1) Point m of UUJN which states that "The notary is obliged to read the deed in front of the audience attended by at least two witnesses and signed at the same time by the appeared, witnesses, and notary".

The affirmation of the provisions of Article 16 Paragraph (1) Point m of UUJN has emphasized that the inaugurating process of the deed from reading to signing must be carried out before a notary. In the other words, the notary must physically be attending the moment as well as dealing with the first and the second party, and the notary him/herself is obliged to read the authentic deed which cannot be represented by other parties or staff in the notary's office.

The presence of a notary in the signing of an authentic deed is essential. The notary should read the deed and be obliged to provide education and legal advocacy related to the deed and the parties. The aim and purpose of the notary in providing education and legal advocacy related to the deed for the parties are considered to understand the contents of the deed and understand the purpose of making an authentic deed as evidence if problems occur in the future. By signing the deed before the notary by the parties, the agreement they have agreed to has been binding and applicable as law for them. The moment of signing the deed is one of the determinants of the birth of the agreement.

If the making of a notarial deed is not in accordance with the provisions outlined in UUJN, then the result is a deed only having power under the hand or a deed becomes null and void can be a reason for the party who suffered losses to demand reimbursement of costs, damages, and interest to the notary.

Mortgage Right is a guarantee right explanation on land for the settlement of certain debts, with the right to precede its collateral object in the form of land rights as regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA). Granting the Mortgage Right will only occur if previously preceded by a principal agreement which creates a legal relationship of debts and receivables whose settlement is guaranteed with Mortgage Right. In Article 10 Paragraph (2) of Mortgage Law (UUHT), the Granting of Mortgage Right is done by a written agreement, which is made in the form of an authentic deed, namely the Deed of Granting Mortgage (APHT). According to Article 1 Point 5 of the Mortgage Law, APHT is a PPAT deed which contains the granting of Mortgage Right to particular creditors as collateral for the settlement of their receivables. Refers to the Article, then every sharia financing contract should not be attached to a mortgage guarantee, because not all financing in sharia banking do a debt relationship. Nevertheless, this practice still happen in Islamic Banking, the funding provided by the Islamic Bank to customers is usually attached with a material guarantee, especially Mortgage Rights.

The process of imposing Mortgage Rights in order to provide legal certainty must make an authentic deed in the presence of debtors and creditors to sign the Land Mortgage Deed (hereinafter referred to as APHT) in front of the Land Deed Maker Officer. However, there are times when the time is set for signing the deed, the debtor is unable to attend, then the law determines that the Power of Attorney to Impose Mortgage Right (hereinafter referred to as SKMHT) is given to the recipient of the Mortgage (Bank) in the form of an authentic deed.

The Power of Attorney to Impose Mortgage Rights (SKMHT) is a special power of attorney, where the ability to grant special powers is only limited to certain essential actions. In principle, the legal action concerned can only be carried out by the attorney him/herself. Basically, the making process cannot be carried out by the power based on the power of attorney. To eliminate this inability, a special form of power is made so that an action can only be carried out by the person concerned personally or can be represented by the power.

The birth of the Deed of Power of Attorney to Impose Mortgage Rights (SKMHT) does not escape from notaries and PPAT work. Notaries and PPAT as public officials appointed by the government have the authority to investigate and publish the deed in the field. It is a notary who makes a deed that can be used as written evidence that has perfect evidentiary power.

Although the basic provisions and principles for the birth of SKMHT have been explained, in the issuance of SKMHT however, some irregularities can arise, such as the birth of SKMHT without the knowledge of the land owner. The birth of SKMHT without the knowledge of the landlord is an illegal action. In reality, some parties share information and data that do not match the reality to a notary or PPAT in society. This resulted in the validity of the deed which caused aggrieved to the landowner.

A notary, in fact, in the implementation of the SKMHT signing deed, was not all performing their obligation duty for reading the SKMHT deed in their office. Nor does the notary directly read the deed at the creditor's office (bank) where the bank will provide its financing facility. It frequently happens in the implementation that notaries who come to the creditor's office (bank) do not read the contents of the deed to the parties, both leaders who represent the bank as creditors and debtors. After the notary explained briefly the deed in the creditor's office (bank), then either the leader representing the bank as the creditor or the debtor signed the deed, followed by the sign of the bank employee. Then the notary brought the deed back to the notary office to be signed by the other notary officer as a witness so that the requirement of two witnesses is fulfilled, then the last step is signed by the concerned notary.

For example, a case happened in Banda Aceh City, where a husband and his wife (sellers) selling their shophouse, and someone (buyer) wanted to buy it. Then, a Deed of Binding Agreement of the Sales and Purchases has been made for this purpose, and it was agreed that the selling price of the shophouse is Rp.

2,000,000,000, - (two billion rupiahs) which was divided into 2 (two) steps of payment, the first stage will be paid Rp. 100,000,000, - (one hundred million rupiahs) and the rest payment in the second stage. To realize the sale and purchase agreement, the buyer asked the seller to come to the bank, while the bank has prepared a Deed of Power of Attorney to Impose Mortgage Rights (SKMHT) made by Notary Z. At the bank, only the buyer and Bank Parties who were present, while Notary Z was absent. The buyer told the seller to sign the SKMHT if they wanted the shophouse payment paid off immediately. Based on trust, the seller signs the SKMHT without the deed being read and attended by the Notary who made the deed.

As a result, the seller did not know the actual aim and purpose of the deed (SKMHT). So that with limited knowledge, awareness, and experience of the seller as a public society, by the signing of the SKMHT Deed, the Ownership Certificate of the Shophouse belonging to the seller is under the bank authority that is used as a guarantee for financing by the buyer, and the seller's right to immediately get the shophouse payment cannot be fulfilled. This would not happen if the notary was present to read the contents of the SKMHT deed and at its signing-time.

Problems arise as a result of the deed contents that were born without the knowledge of the landowner, the consequences that arise will risk the party who did it in terms of compensation for losses, file returns, fines to criminal penalties. On the contrary, to the guarantee which was burdened with Mortgage Rights, if the debtor defaults then the legal consequences of the act were as stated in the mortgage rights certificate which has the same executorial power as the judge's decision who has permanent legal force.

Based on the above case, when signing the deed of Power of Attorney to Impose Mortgage Rights (SKMHT), the notary should attend and read the SKMHT deed to the parties. After the parties understood and comprehend the contents of the SKMHT deed made by the notary, the parties then signed it, followed by the witnesses, and the last was the notary's signature. Then the notary issued a copy of the SKMHT document to each party, while the minutes of the deed were kept by the notary in the notary protocol.

Research Method

This research is normative juridical research. Normative legal research is legal research conducted by examining library materials or secondary data. Therefore, the approach used in the study uses the approach of legislation and conceptual approach. The data collection techniques are carried out through library research. Data analysis in this study used qualitative data analysis. Qualitative data analysis is an effort made by working with data, organizing data, sorting it into manageable units, synthesizing it, looking for and finding patterns, discovering what is important and what is learned, and deciding what can be told to others. This study is an analytical descriptive study, the data that has been obtained from the results of this study were compiled and analyzed qualitatively, then the data is described descriptively in order to obtain a picture that can be understood clearly and directed to answer the problems studied.

Results And Discussion

A. The Role of a Notary/PPAT Mandatory Attendance in the Signing of the SKMHT Deed

It is an obligation in the process of reading and signing in the making of a notarial deed, in which the reading of the deed is carried out in front of the audience presence of at least 2 (two) witnesses and is signed at the same time by the parties, the witnesses and the notary him/herself. In addition, a notary doesn't need to read it, if the appearer has read it himself and received an explanation from the notary, and understands the contents of the deed, under the special condition that on each page of the minutes of the deed must be affixed initials of the appearers, witnesses, and the notary. A reading by a notary or by the appearers themselves is intended to ensure that the signatories understand the contents of the deed so that the notary deed makes the will or is in accordance with the will of those who signed.

A notary presence at the time of reading and signing the deed is not only beneficial for the notary but also for the parties, one of the benefits of reading the deed by a notary is the notary still has the opportunity to correct mistakes that were previously undetected. The reading of the deed is the last possibility for a notary to check the deed that has been made. With the notary present, the appearers have the opportunity to ask the notary directly about the things that are unclear in the contents of the deed, the reading of the deed allows the notary and the appearers at the last seconds before the deed is completed with the signature of the appearer, witnesses, and notary to revise the agreement contents so that there will be no problems in the future.

The role of the notary, in this case, is only to record or do a legal action carried out by the parties to the deed. The notary merely maintains what is happening, what is seen, and experienced by the parties, and adjusts the formal requirements for the subsequent drafting of the authentic act and put it into the deed. The notary is not obliged to investigate the truth of the authentic deed's material contents, however, the notary should act neutrally and not biased, and also provide some kind of legal advice to clients who seek legal advice from the notary concerned.

Legal products issued by a notary are in the form of deeds that have authentic properties and perfect evidentiary power based on the provisions of Article 1868 Burgerlijk Wetboek (BW), it was formulated that an authentic deed is a deed in the form prescribed by law, made by or in the presence of competent public officials for that purpose at the place where the act is made.

The role of notaries in making SKMHT for creditors and debtors is to bridge the interests between debtors and creditors so that both parties equally get a sense of justice, benefit, and legal certainty in binding mortgage guarantees.

The role of notaries also lies in their responsibilities, which are the responsibility for the deed made and the protection of the parties concerned in the deed. If there is a dispute between parties in the future, then the authorized legal official can make the deed as a reference without the need to recall the notary because it is already represented by the deed made by the notary. This means the deed made by the notary must be done correctly to make up a sense of security for the parties so that everything can run smoothly and no party is harmed.

B. Responsibility Against Notary's Absence During the Signing of the SKMHT Deed Containing Unlawful Acts

The system of liability for unlawful acts by the notary is related to the absence of a Notary at the signing of the SKMHT Deed carried out by the parties, which resulted in the deed being degraded into a private deed. It can be grouped into three systems of liability: the civil liability system, the criminal responsibility system, and the UUJN-based responsibilities system.

The notary liability system in acts against the law (*Onrechtmatige daad*) in the civil context is stipulated in Chapter 1365 of Code of the Civil Law or *Burgerlijk Wetboek* (BW), in Book III BW, in the Paragraph "Contracts arising by force of law", saying: "A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefor".

In order to determine an act that can be classified as an act against the law, four conditions are required: there is an act of law violation; there is a case (theme) of the violation; there is a potential loss; and there is an interconnection between these factors involved.

Elements of the action against the law contained in Article 1365 of the Civil Code when associated with making of an authentic SKMHT deed by a notary, and because of the negligence/error of the notary who does not comply with the provisions regarding the procedures and manner for making an authentic notary deed in accordance with the provisions of Article 16 Paragraph (1) Point m of UUJN, resulted in the degradation of the authentic deed into a private deed, which caused harm to the interested party in the credit agreement deed, issuing the right for the aggrieved party to file a claim for compensation against the notary to the court.

Elements of unlawful acts that have been committed by a notary in making the SKMHT deed include:

- a. There was an error committed by the notary by not directly witnessing the signing of the SKMHT deed that she/he made by the parties and witnesses.
- b. The mistakes made by the notary in making the SKMHT deed resulted in the degradation of the authentic deed, resulting in losses for interested parties.
- c. Notaris' mistake in making an authentic deed makes the deed has a very close causal relationship. Since the notary does not comply with the provisions regarding the procedure of authentic deed, the authentic deed of the credit agreement only has the power as an underhand deed.

The SKMHT deed which was degraded into a private deed resulted in losses to the parties concerned about the authentic SKMHT deed. This is because the aims and purposes of the parties who have paid for the services of a notary in making the authentic deed of the credit agreement were not attained so the parties who have an interest in the SKMHT deed have suffered considerable losses.

The fulfillment elements of unlawful acts committed by the notary then issue the right for the aggrieved party to claim compensation for the costs and interest against the notary who has made the error/omission. The error/omission made by the Notary was not directly witnessing the signing of the credit agreement deed, thus violating the provisions contained in Article 16 Paragraph (1) Point m of UUJN.

The liability system of a notary for unlawful acts by not attending the SKMHT deed signing-time by the parties can be carried out by using criminal law. The use of criminal law in the notary's liability system can be done using the provisions of Article 266 of the Criminal Code, which is putting false information into an authentic deed. As a result, the notary can be reported to the authorities (police) on charges of inserting false information into the authentic deed, because the notary did not witness the signing of the authentic SKMHT deed at the bank by the parties. The criminal liability of the notary may occur if aggrieved parties complain about the notary to the authorities (police). If there is no complaint, then the notary is free from criminal law liability.

The term "unlawfully" in this Article includes acts against the law in both formal and material sense. This means an act can be punished even though the act is not regulated by laws and regulations while it is considered reprehensible since not in accordance with a sense of justice or the norms of society's social life. The significant difference between acts against Civil Law and acts against Criminal Law is the public nature of Criminal Law while Civil Law is private.

Thus it can be said that the difference between acts against the criminal law and acts against the civil law is based on their nature. The acts against the criminal law mean violating public interest (besides, perhaps also the interests of individuals), while an act against the Civil Law is violating personal interests only.

A notary as a public official has the authority under the UUJN to make an authentic deed, as long as the authority to make an authentic deed is not given to other officials based on the provisions of other laws and regulations. UUJN stipulates the procedure for making an authentic notarial deed so that the notarial deed could

have autonomy (as an authentic deed) and perfect evidentiary power if there is a dispute between the parties happen in the future. However, if the deed made by the notary did not comply with the terms as required in the UUJN, then the deed made by the notary only has the power as a deed under the hand. This was because, in the making process of the notary's authentic deed, there were legal provisions on the procedure which was violated by the notary, resulting in the degradation of the authentic notarial deed into a private deed.

Notaries who made an SKMHT deed but did not comply with the provisions of Article 16 Paragraph (1) Point m and Article 44 Paragraph (2) of UUJN regarding the obligation of directly present at the place of signing the SKMHT deed by parties, means the notary has committed an act against Civil Law, which stated in the provisions of Article 16 Paragraph (1) Point m and Article 44 Paragraph (2) of UUJN, resulting in the SKMHT deed degraded into a private deed. As a consequence of the degradation of the SKMHT deed, there was an occurrence of losses to the parties which were the bank as the creditor and the borrower as the debtor who has paid a notary fee to make the SKMHT deed in the form of an authentic notarial deed. Therefore, the aggrieved parties could claim a notary for the loss under Article 1365 of the Civil Code which stated, "A party who commits an illegal act which causes damage to another party shall be obliged to compensate therefor". The notary's liability for the act against the Civil Law which he has committed was in the form of compensation, costs, and interest. It was contained in the provisions of Article 16 Paragraph (1) Point m of UUJN which stated, "Notaries who violate the provisions of Article 16 Paragraph (1) Point m can be sued for damages, costs, and interest by the aggrieved party for the degradation of the authentic deed into a private deed, because the notary did not witness directly the signing of the SKMHT deed by the parties."

The absence of a notary when the signing of the SKMHT deed by the addressees means that the notary has committed acts against civil law; Article 16 Paragraph (1) Point m UUJN. Therefore, the responsibility of the notary for the unlawful act that caused harm to the other party is that the notary is obliged to compensate the losses, costs, and interest to the aggrieved party. The notary's obligation to indemnify losses, costs, and interest due to unlawful acts is based on the existence of a lawsuit from the injured party to the court, and the court has issued a decision that has permanent legal force. Nevertheless, compensation of losses, costs, and interest by the notary to the injured party for the degradation of the authentic deed into a deed under the hand can also be implemented without entering the course of litigation, but through deliberation and consensus between the notary and the aggrieved party.

It can be said from the description of Articles 84 and 85 of UUJN that the responsibility of the notary based on the UUJN against the non-fulfillment of an obligation that requires the notary to witness directly the signing of the SKMHT deed can result in the authentic deed being degraded into a private deed, or the cancellation may be requested in court. In addition, acts of the notary which do not directly witness the signing of the SKMHT deed made by the notary may result in the imposition of sanctions on the notary in the form of oral reprimands, written reprimands, temporary dismissal, honorable dismissal, or disrespectful dismissal.

Conclusion

Notaries have duties and obligations in carrying out their positions as public officials according to the provisions of Law Number 2 of 2014 concerning the Position of Notary. In making an authentic deed, the notary is required to be present at the time of reading and signing the deed based on the Article 16 Paragraph 1 Point m of UUJN which states that "read the deed before an audience in the presence of at least 2 (two) witnesses, or 4 (four) special witnesses for making a private will, and signed at the same time by the appearers, witnesses and notaries". If the notary in making the authentic deed does not comply with the article, the authentic deed will be degraded and its legal force will be changed to an underhand deed, and the parties will suffer losses due to the degradation of the deed.

References

1. Abdul Ghofur Anshori. Indonesian Notary Institutions, Legal and Ethical Perspectives, Yogyakarta: UII Press, 2009.
2. Adrian Sutedi. Mortgage Law, Jakarta: Sinar Grafika, 2012.
3. Aman. Legal Protection of Notaries in Implementing Job Secrets, Jurnal Recital Review, 2019, 1(2).
4. Dwi Merlyan. Obligation to Read Authentic Deeds by Notaries Before the Appeal (Related to the Cyber Notary Concept), Tesis, Law Faculty, Sriwijaya University, Master of Notary Programs, 2019.
5. Ferdiansyah Putra. Legal Protection Against Parties who are harmed by Legal Counseling by a Notary, Jurnal Komunikasi Hukum (JKH), 2018, 4(2).
6. Ghansham Anand. Characteristics of Notary Positions in Indonesia and Limits of Liability, Disertasi, Law Faculty, Airlangga University, 2013.
7. Habib Adjie. Indonesian Notary Law (Thematic Interpretation of Law No. 30 of 2004 concerning Notary Positions), Bandung: Refika Aditama, 2008.
8. Indonesia, Guidelines for the Implementation of the Duties of the Notary Supervisory Board, Jakarta: CV. Madya Duta, 2005.
9. Kartini Muljadi, Gunawan Widjaja. Mortgage right, Jakarta: Kencana Prenada Media Group, 2005.
10. Kunni Afifah. Responsibilities and Legal Protection for Notaries in Civil Law Against Deeds, 2017, 2(1).
11. Rosnantiti Prayitno. History of Notary Institutions in Indonesia, Jakarta: Rajawali Press, 2013.\

12. Salim HS. Deed Making Techniques (Theoretical Concepts, Authority of Notaries, Form and Minutes of Deeds), Jakarta: Raja Grafindo Persada, 2015.
13. Sjaifurrachman. Aspects of Notary Accountability in Making Deed, Bandung: Mandar Maju, 2011.
14. Soegondo Notodisoerjo. Notary Law in Indonesia: An Explanation, Jakarta: Rajawali, 2012.
15. Sudikno Mertokusumo. Getting to Know the Law An Introduction (Revised Edition), Yogyakarta: Cahaya Atma Pustaka, 2010.
16. Windra Rahmanto. Standard Clauses in Covenant Law and Their Legal Consequences, Jakarta: Rajawali Press, 2010.