



Juridical review of the executorial power of the encumbrance certificate on the granted land object that has been canceled by the decision of the syar'iah court

Wildan Dinullah, Ilyas, Teuku Muttaqin Mansur

Magister of Notarial Law of the Faculty of Law, University of Syiah Kuala, Banda Aceh, Indonesia

Abstract

According to Article 6 of Law Number 4 of Encumbrance Rights, the debtor who breaks the promise has the right to sell the object of the Encumbrance under his power. In reality, however, many obstacles appeared during its execution process, one of those was the transfer of land rights due to the cancellation of parental grants to children based on the decision of the Syar'iah Court. Thus resulted the position of the Encumbrance Certificate became unclear. This study aimed to examine and analyze the legal consequences of the land grants cancellation that has been charged with Mortgage in the bank credit agreement, examine and analyze the executorial power of the Encumbrance Certificate in fulfilling the parties' rights which were bound under the guarantee with the Mortgage that the object has canceled its ownership, as well as reviewing and analyzing legal remedies that creditor could take against the object of guarantee of Mortgage from the grant which has been canceled by the Syar'iah Court. This type of study is normative juridical research using a statutory approach, conceptual approach, and case approach. Data were collected through library research and field research, which were then analyzed qualitatively. Results of the study showed that based on the characteristic of *droit de suite*, the Encumbrance Certificate still has executorial power despite having a land grant object that has been canceled by the court, yet the Encumbrance Certificate holder can still execute the collateral object. Therefore, it is recommended to the holder of the Encumbrance Certificate continue to execute the collateral object even though the court has canceled the grant deed.

Keywords: executorial power, encumbrance certificate, grant deed

Introduction

To avoid risks in granting credit, a bank as a creditor will ask for a guarantee from the debtor on the credit received by the debtor. Based on Article 1 Point 1 of Law Number 4 of 1996 on Encumbrance Rights (hereinafter referred to as *UUHT*) stated: "Encumbrance Rights are security rights that are imposed on land rights as referred to Law Number 5 of 1960 on Basic Regulation Agrarian Principles (*UUPA*), including or not including other objects which are unity with the land, for the repayment of certain debts, which gives priority to certain creditors over other creditors".

One of the characteristics of Encumbrance is easy and sure in the implementation of its execution if the debtor breaks the pledge. Regarding this matter, it is stipulated in Article 6 of *UUHT*: "The First Encumbrance holder has the right to sell the object of the Encumbrance on his power through a public auction and take repayment of his receivables from the sale proceeds". This means, the first Encumbrance holder does not need to obtain approval from the Encumbrance provider and asks for a local court determination to execute the Encumbrance object. Encumbrance holders can come directly to the State Assets and Auction Service Office (*KPKNL*) to submit an auction application for the Encumbrance object.

The execution of the Encumbrance can only be carried out if the Encumbrance has been registered, this is marked by the issuance of an Encumbrance Certificate which functions as an evidence letter of the Encumbrance. According to the provisions of Article 14 Paragraph (2) of *UUHT*, the Encumbrance Certificate contains a verdict "FOR JUSTICE UNDER GOD ALMIGHTY" which means that the Encumbrance Certificate has the same executorial power as a court decision that already has permanent legal force. This is in line with the provisions of Article 20 Paragraph (1) and Paragraph (2) of *UUHT*. Although the Encumbrance Certificate contains the executorial title which makes the position of the certificate equivalent to a court ruling, the implementation of the Encumbrance Execution in practice is not easy because of many obstacles that lead to legal uncertainty in its implementation.

One of the legal uncertainty examples in the execution of Encumbrance is in the case of grant cancellation that has been decided by the Syar'iah Court of Banda Aceh with Decision Number 112/Pdt.G/2017/MS. Bna. The cancellation of this grant land was made by a mother to her child. Basically, regarding the revocation of grants, *Jumhur Ulama* (opinions or agreements of the majority of Islamic scholars that can be followed) stated that the grants that have been given and received cannot be withdrawn unless the parent grants to their children. This is in accordance with the hadith of the Prophet Muhammad (Pbuh) narrated by Abu Daud, An-Nasai, Ibn Majah,

and At-Tirmizi from Ibn Abbas and Ibn Umar, said: “*It is forbidden for someone to take back the things that he/she has given to someone else except the given from the parents to their children*”.

In line with the hadith above, Article 212 of the Compilation of Islamic Laws (hereinafter referred to as *KHI*) also states that “Grants cannot be withdrawn unless the parent grants to their children”. By referring to the provisions of Article 212 of *KHI*, the Judge decided to cancel the Deed of Grant. In this ruling, the Judge not only annulled the Deed of Grant but also cancels the Certificate of Ownership on behalf of the grantee, the Deed of Encumbrance of Mortgage Rights (hereinafter referred to as *APHT*), the Encumbrance Certificate, and the credit agreements that have been made by the grantee.

Furthermore, the problem is that the land that has been granted and the (land) title transferred document which has been changed is currently being used as collateral for a loan at a bank. Execution will be carried out on the land because the credit received by the grantee is in bad credit status. Based on the provisions of Article 6 of UUHT, if the debtor breaks the pledge, the creditor can execute the guarantee object of Encumbrance rights. However, due to the decision to cancel the grant, the execution of the mortgage cannot be carried out by the bank. However, due to the cancellation decision of the grant, the execution of the Mortgage cannot be carried out by the bank.

The provision of Article 7 of UUHT, states: “Hypothecation follows its object regardless of who holds it”. Referring to the provisions of Article 7 of UUHT, the bank supposes to be still able to execute the land that is the object of Encumbrance rights. However, with the Syar’iah Court decision, the Encumbrance Certificate position becomes unclear. The bank as the creditor and the holder of Encumbrance Rights also lost caused of the debtor who broke the promise, so the bank could not execute the collateral object because the judge had canceled the *APHT* and the credit agreement.

Research Method

This study is normative juridical research. Normative legal research is conducted by examining library materials or secondary data. Therefore, the approach used in this study is the statutory approach and conceptual approach. The data collection technique is carried out through library research activities and data analysis in this study used qualitative data analysis. This study is analytical descriptive research, the data obtained from this study is compiled and analyzed qualitatively, then the data is explained descriptively to obtain a picture that can be understood clearly and directed to answer the investigated case of the study.

Results and Discussion

Encumbrance is a guarantee of land rights that provides legal certainty for the parties, this is because encumbrance has essential characteristics; *droit de preference* and *droit de suite*, which will be explained as follows:

1. *Droit de preference* is a characteristic of Mortgage that gives priority position or precedence to the Encumbrance holder (the creditor). It gives precedence to a certain creditor position against other creditors, which can be seen in the General Elucidation Point 4 of UUHT that “If the debtor injury appointment, creditors Encumbrance holder the right to sell through the auction of public land as collateral under the terms of the legislation in question, with the right to precede rather than other creditors”.
2. *Droit de suite* is a characteristic of Mortgage which always follows the guaranteed object in the hands of whoever the object is. This can be seen in the provisions of Article 7 of UUHT which states that the Mortgage remains to follow the object in the hands of whoever the object is so that the Encumbrance will not end even if the Mortgage object is transferred to another party for any reason. This *droit de suite* principle gives certainty to creditors regarding their rights to obtain repayment from the proceeds of the sale of the physical control land or juridical control land rights, which become the object of Encumbrance if the debtor defaults, even if the land or land rights that are the object of the Encumbrance are sold by the owner or grantor of Encumbrance to the third party.

According to Prof. Ny. Arie S. Hutagalung, with the characteristics possessed by Encumbrance Rights, it was expected that the banking sector as the largest share of credit can be protected in distributing funds to the community and indirectly creating a conducive and healthier economic growth and development.

Based on the characteristics of the *droit de preference* and *droit de suite* Mortgage Rights, if there is a cancellation of the parent's grant to the child by the District Court where the land grant has been guaranteed as Encumbrance, then the bank as the Mortgage creditor/holder still has the right to obtain repayment from the land sale and take precedence against other creditors. As stated in Article 4 and Article 7 of UUHT which has prior rights over other creditors and always follows the object pledged in whoever the object holder is. So that, even though the court decision cancels the grant which resulted in the transfer of property rights from the child back to the parent's property right, the holder of Encumbrance still has the right to execute the land in whoever hands and to take precedence over other creditors.

As it is known that the cause of Encumbrance Rights cancellation is regulated in Article 18 of UUHT, one of which is the abolition of land rights burdened with Encumbrance Rights. Regarding this, Article 27 of UUPA has explained that the abolition of land ownership rights is caused by 2 (two) things:

1. The land falls to the state, due to:

- a. The right revocation according to the provisions of Article 18 of UUPA, for the public interest including nation, state, and common people interests, land rights may be revoked, by giving appropriate compensation and according to the law regulated method.
 - b. Voluntary surrender by the owner of the land, which occurs after going through deliberation that resulted in an agreement between parties, the owner voluntarily surrenders the land for the developmental implementation in the public interest or release/surrender for rights in other forms.
 - c. The abandoned land. The regulation on abandoned land is regulated in Government Regulation Number 36 of 1998 concerning Control and Utilization of Abandoned Land. Criteria for abandoned land have been regulated in Article 3 and 4: land that is not utilized and/or not properly maintained and land that is not used in accordance with the circumstances, nature, or purpose of the granting of rights.
2. The land is destroyed, that is the land owned is destroyed, disappears, or perishes. The destruction of the land could be caused by earthquakes, floods, and other reasons. Therefore, it can be understood that the land is no longer used even with any kind of effort to get its benefit back.

If it is associated with the abolition reasons of Mortgage Rights caused by the land rights encumbered abolition with the Encumbrance Rights as mentioned above, the cancellation of the parental grant to the child by the court on which the grant land has been guaranteed Encumbrance is not included in the reasons for the abolition of land rights that has been encumbered with Mortgage Rights. The cancellation of parental grants to the child only resulted in the transfer of land rights from the property rights of the child and then back again to the property rights of the parents. Meanwhile, what is meant by the abolition of land rights that have been encumbered with Encumbrance Rights as stipulated in Article 18 of UUHT is in case of the land rights fall to the state or the land is destroyed due to natural disasters such as earthquakes or other catastrophes.

The cancellation of the parent's grant to the child based on this court decision only resulted in the transfer of land rights, which before the cancellation of the land grant was the property of the child, then after the cancellation, the land rights were transferred back to the property of the parents. It should be understood, however, that this Encumbrance has the right of *droit de suite* characteristic which continues to follow the object owner, or the right to follow the object in the hands of anyone (*het recht volgt de eigendom van de zaak*).

This material right itself is an absolute right, meaning the rights attached to an object, giving direct power over the object, and can be defended against demands by everyone. So that, even though the land that has been guaranteed the Encumbrance has been canceled by the court, the Mortgage agreement does not end and the Encumbrance holder still has the right of execution on the land if the debtor breaks the promise.

Connecting with the annulment of this grant, the court was supposed to state that the lawsuit for the cancellation of a parent's grant to a child whose object is still under the guarantee of a financial institution cannot be accepted because this did not provide legal certainty for the financial guarantee institution. The Supreme Court through the Supreme Court Circular Number 3 of 2018 Chapter III Legal Formulation of the Religion Chamber (hereinafter referred to as SEMA No. 3 of 2018) has prohibited the judiciary, especially the Religious Court/Syari'ah Court, not to grant the lawsuit cancellation of parental grants to a child whose objects were still guaranteed by the financial institution.

The contents of SEMA No. 3 of 2018 provision is to determine the lawsuit related to the revocation of parental grants to the child whose object is still under the guarantee of the syari'ah financial institutions must be stated unacceptable because it can lose third parties. SEMA provision No. 3 of 2018 is one of the State's efforts through the judiciary to provide legal certainty for Encumbrance certificate holders.

Legal certainty is a guarantee of law that contains justice. Norms that advance justice must truly function as rules to be obeyed. This legal certainty refers to the application of a clear, permanent, and consistent law where its implementation cannot be influenced by subjective circumstances. The existence of SEMA No. 3 of 2018 is one form that the law is clear, fixed, and consistent. This can be seen in the provision of SEMA No. 3 of 2018 is in line with the provisions of Article 6, Article 7, and Article 20 Paragraph (1) and (2) which regulated the executive power and the characteristics of the *droit de suite* of Encumbrance Rights.

Concluding from the explanation above, the characteristic of the *droit de suite* of Encumbrance Right regulated in Article 7 of UUHT, the Encumbrance Certificate still has executorial power even though it has a land grant object canceling by the court. This is to create legal certainty for Encumbrance holders. Consequently, in the event of a debtor's breach of contract/default, the Encumbrance holder can do an execution, in which accordance with the provisions of Article 6 UUHT which stipulates that "The first Encumbrance holder has the right to sell the Mortgage object on his own power through a public auction and take repayment of the receivables from the proceeds of that sale."

Conclusion

Based on the characteristic of *droit de suite* Encumbrance stipulated in Article 7 of the UUHT, the Encumbrance Certificate still has executorial power despite having a land grant object that has been canceled by the court and the debtor breaches the promise. The Encumbrance Certificate holder can still execute the collateral object in accordance with the provisions of Article 6 in observance with the provisions of Article 20 Paragraph (1) and (2) of UUHT. Even though the deed of the grant has been canceled by the court, in the case that the debtor breaks the promise with the Encumbrance Holder, it is supposed to continue executing the collateral object. In addition,

if there is resistance from the land rights holder, the party that has the authority to determine whether the execution carried out by the holder of the Encumbrance Rights is valid or not is the District Court.

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