



Analyzing the juridical of violating article 1868 kuhperdata in the preparation of deed of mortgage by Notary's

Safira Nurul Fatia¹, Sanusi², Husnaina Aflinda²

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

² Lecturer at the Faculty of Law, Syiah Kuala University, Aceh, Indonesia

Abstract

According to Article 15 paragraph (1) of the Land Deed Law (UUHT), the Deed of Mortgage with Power of Attorney (SKMHT) must be made through a notarial deed or a PPAT deed. Notaries and PPATs are two different positions with distinct authorities. When creating a deed, a Notary must comply with the provisions of the National Land Agency Law (UUJN), while a PPAT must adhere to the provisions of BPN Regulation No. 8 of 2012. Based on Article 1868 of the Civil Code in conjunction with Article 1 number 7 of the UUJN, one of the requirements for an authentic deed is that its form must be determined by law, and in this case, for Notarial deeds, the form is determined by the UUJN. However, in practice, there are land offices that require notaries to follow the format of BPN Regulation No. 8 of 2012 when preparing SKMHT. The research utilizes legal approaches including statutory approach, conceptual approach, and case approach. The legal materials used in this study are secondary data consisting of primary legal sources, secondary legal sources, and tertiary legal sources. The results of this study indicate that there is a contradiction between the form of SKMHT based on BPN Regulation No. 8 of 2012 and SKMHT based on Article 38 of the UUJN. This contradiction arises because there are several required provisions stated in Article 38 of the UUJN that are not included in the SKMHT deed based on BPN Regulation No. 8 of 2012. Furthermore, the study shows that SKMHT made through a Notarial deed that does not fulfill the elements stated in Article 1868 of the Civil Code in conjunction with Article 38 of the UUJN will downgrade the SKMHT to a private deed. It is recommended for the Land Office not to reject SKMHT made through Notarial deeds following the form specified in Article 38 of the UUJN. It is advised for notaries to create SKMHT in accordance with the form and procedures established by the UUJN to ensure the full evidentiary strength of the SKMHT.

Keywords: SKMHT, authentic deed, Notary/PPAT

Introduction

In carrying out their duties, a notary must adhere to the Notary Position Law, namely Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary. The Notary Position Law regulates the authority, obligations, and prohibitions for notaries. These three aspects are important in relation to the implementation of the notarial profession. The authority granted to notaries to create authentic deeds opens up opportunities for violations to occur, such as violations regarding the form of the deed.

Regarding the creation of Conditional Sale and Purchase Deeds (SKMHT), there is a difference in the form of deeds made by notaries compared to SKMHT made by Land Deed Officials (PPAT). PPAT refers to the form of the deed as regulated in PERKA BPN No. 8 of 2012 on the Creation of SKMHT. Although the Notary Law also grants authority to notaries to create SKMHT, notaries cannot create SKMHT in the form specified by PERKA BPN No. 8 of 2012. In addition to Article 38 of the Notary Law, Article 1868 of the Civil Code is the key for notaries in creating a deed, so that the deed can be considered an authentic deed. There are three important elements that notaries must consider when creating a deed. First, the form of the deed must be regulated by the law. Second, the official who creates the deed must have the authority to create it. Third, the deed must be made at the place where it is created.

According to Article 15, paragraph (1) of the Land Deed Law, SKMHT must be made by a notarial deed or a PPAT deed. Notaries and PPAT are two different positions with different authorities. In creating deeds, notaries are subject to the provisions of the Notary Law, while PPAT is subject to the provisions of PERKA BPN No. 8 of 2012. Based on Article 1868 of the Civil Code in conjunction with Article 1, number 7 of the Notary Law, one of the requirements for an authentic deed is that its form must be determined by the law, and in this case, for notarial deeds, the form is determined by the Notary Law. However, in practice, there are land offices that require notaries to follow the format specified in PERKA BPN No. 8 of 2012 when creating SKMHT.

Research Methodology

First, the statutory approach is an approach that cannot be separated from legal provisions. Second, the case approach is used because the basis of the research is a case.

Research Findings

Violation is an act or action committed by a legal subject that violates the provisions or regulations that have been established. Notaries, as legal subjects, support rights and obligations as well as being members of the Indonesian Notary Association, an association/organization. They have obligations to comply with and prohibitions to avoid in carrying out their duties.

Notaries are responsible for the deeds made in their presence that contain legal defects or do not meet the requirements for deed creation according to the Law on Notary Position (UUJN). Because notaries have a moral responsibility in making deeds, the consequences of any mistakes made by notaries can lead to claims for compensation from the parties harmed due to their negligence.

In addition to compensation, legal consequences also apply to notaries who violate the law, including positive legal sanctions, moral sanctions from society, and spiritual sanctions according to their religious laws. As public officials entrusted with part of the state's duties, notaries cannot justify any means to achieve professionalism. Legal responsibility can be categorized into three areas of responsibility:

1. Civil responsibility, The emergence of civil responsibility is caused by the legal subject's failure to perform obligations and/or engaging in unlawful acts. The legal subject's obligation is to perform, do, or refrain from doing something. If the legal subject fails to fulfill their obligations, they can be sued or held civilly liable, which means fulfilling the obligations and/or paying compensation to the injured party, as stipulated in Article 1346 of the Civil Code. Similarly, if the legal subject commits an unlawful act, they can be sued for damages, as regulated in Article 1365 of the Civil Code.
2. Criminal responsibility, In the field of criminal law, perpetrators can be held criminally liable for committing criminal acts. The form of responsibility imposed on the perpetrator of a criminal act is the imposition of criminal sanctions.
3. Administrative responsibility, In the administrative field, the form of responsibility is imposed on subjects who commit administrative errors. For example, in the field of healthcare, if a doctor makes a professional mistake, their practice license can be revoked by the Minister of Health or the relevant authority.

In addition to the notaries themselves, legal consequences also apply to the deeds they make. Deeds made by and in the presence of notaries can be downgraded to private deeds if the formalities of authentic deed creation prescribed by UUJN are not met. In such cases, the notarial deed may lose its full evidentiary value and its strength is reduced to that of a private deed.

In this case, the deed of SKMHT (Deed of Power of Attorney with Security) that does not comply with the prescribed form by the law (UUJN) and does not meet the requirements of an authentic deed as stated in Article 1868 of the Civil Code, does not fulfill the formalities as an authentic deed. Therefore, acts that do not meet the requirements to be considered authentic deeds only hold the status of private deeds.

Failure to meet the formalities of an authentic deed not only has legal consequences for notaries and the status of their deeds but also affects the parties involved in the deed. The purpose of creating an authentic deed is to serve as conclusive evidence in case of disputes between the parties to the agreement. An authentic deed has full probative force and is binding. The notarial deed is considered to have full probative force because it fulfills two elements of evidence: written evidence and witnesses. Once the court accepts an

authentic deed as evidence, it cannot question its probative force unless there is other evidence to the contrary.

The parties create a notarial deed for their own interests and to bind the parties in the agreement. If the creation of the deed does not meet the formalities and elements of an authentic

Conclusion

There are several types of violations in the creation of deeds that can result in the downgrading of the evidentiary strength of deeds made by notaries. In the case of notarial deeds, particularly the Deed of Power of Attorney with Security (SKMHT), if it does not meet the requirements for the authenticity of the deed, such as the prescribed form determined by the law and being made by or in the presence of an authorized public official, there are legal consequences for the deed. By failing to meet the elements of an authentic deed, the deed made by the official will have its evidentiary strength downgraded from having full probative force to being considered a private deed. If the SKMHT is downgraded to a private deed, it can invalidate the subsequent Deed of Mortgage (APHT). This is because the requirements for creating the APHT are not fulfilled.

References

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