

## Legal Strength of Power of Attorney of Imposing Guarantee Rights Regarding the Issuance of Regulation of the Head of the National Land Agency Number 8 of 2012

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### Abstract

*The Power of Attorney for Imposing Mortgage is a special power of attorney, does not contain the power to take other legal actions other than imposing Mortgage as stipulated in chapter 15 of Law no. 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (UUHT). Notary as a Public Official who is authorized to make authentic deeds is also authorized to make a Power of Attorney to impose Mortgage in accordance with the provisions stipulated in Law Number 2 of 2014 concerning the Position of Notary (UUJN). However, in its development the process of making a Power of Attorney for Imposing Mortgage by a Notary experienced obstacles which became a problem in writing this thesis which was related to the Regulation of the Head of the National Land Agency Number 8 of 2012 concerning Amendments to the Regulation of the Minister of Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning provisions for the Implementation of Government Regulation Number 24 of 1997 concerning Land Registration. This research is a normative research, namely by looking for legal materials based on library research. Legal materials obtained from library research will be analyzed using a qualitative descriptive method. The type of approach used is the legal concept analysis approach and the approach through laws and regulations. The results of the study show that the Power of Attorney for Imposing Mortgage made by a Notary after the issuance of Regulation of the Head of the National Land Agency Number 8 of 2012 has permanent legal force. Notaries have their own legal umbrella within their authority to make a Power of Attorney to impose Mortgage as*

*stipulated in UUJN. Therefore, the provisions contained in the Regulation of the Head of the National Land Agency Number 8 of 2012 cannot be applied to Notaries.*

## 1. Intrudaction

He development of a country's economic activity cannot be separated from the role of banks in making the biggest contribution, for example providing credit and as a place to guarantee public savings (Bachtiar, 2019). Mortgage is a form of guarantee for repayment of debt, with the right of precedence, with the object of collateral in the form of land rights as stipulated in Law Number 5 of 1960 concerning Basic Agrarian Regulations or the Basic Agrarian Law (Azhar, 2018).

Mortgage Law chapter 10 verse (2) The granting of Mortgage Rights is carried out by making a Deed of Granting Mortgage Rights by the Land Deed Deed Making Officer (PPAT). Then the Mortgage giver must be registered with the Land Office by making a Mortgage land book and recording it in the land title book which is the object of the Mortgage and copying the record on the relevant land title certificate (Sukarman, 2021). In granting mortgage rights, the mortgagee giver (debtor) cannot always be present before the PPAT, to expedite the process of granting mortgage rights the mortgagee giver is required to appoint another party as his proxy by making a Power of Attorney for Imposing Mortgage Rights. In chapter 15 verse (1) of Law no. 4 of 1996 concerning Mortgage, states that the Power of Attorney to impose Mortgage must be made with a Notary deed or PPAT deed.

Power of attorney to impose mortgage rights in a notarial deed, the provisions for making it are regulated in chapter 38 of Law no. 30 of 2004 concerning the Position of Notary (UUJN), while the Power of Attorney for Imposing Mortgage Rights in the PPAT deed, the provisions are regulated in Regulation of the Head of the National Land Agency No. 8 of 2012 (Perkaban) (Lubis, 2021).

In practice, in order to fulfill the conditions for registration of Mortgage Rights and not to refuse the Power of Attorney to Assign Rights made by a Notary/PPAT at the Land office, the Notary/PPAT carries out the wrong provisions in which the Power of Attorney Imposing Rights made with a Notary deed but the provisions for making the deed are subject to chapter 96 verse (1) Kabbalah. The Power of Attorney for Imposing Mortgage made with a Notary deed should be based on chapter 38 UUJN not based on chapter 96 verse (1)

Perkaban which should be a regulation for PPAT.

The Power of Attorney to Encumber Rights is often used by creditors (banks) in binding Mortgage Rights, so it does not directly burden the object of Mortgage which becomes credit collateral. The creditor only requests (masters) a Power of Attorney to impose Mortgage Rights to bind the collateral object in the form of land to fulfill the creditor's receivables if the debtor defaults or goes bankrupt (Made, 2017). The creditor does not directly charge the Mortgage right on the land that is the collateral for the credit, only asking for a Power of Attorney to Encumber the Mortgage from the Mortgage giver on the grounds that the cost of imposing the Mortgage is felt to be very expensive by the debtor, while the credit (loan) given is not too large and the term time is also not long. Another reason is that the land that is used as collateral is still not registered and not certified, so that the processing and issuance of the certificate takes a long time, while credit (loan) is urgently needed. The certificate is still in the process of applying for its rights, the creditor binds the debtor with a Power of Attorney to Assign Rights.

The existence of the Deed of Power of Attorney to impose mortgage rights has been guaranteed in the UUHT, but cannot be used as a basis for executing collateral. In order to be able to execute the guarantee and give preference to the holder (creditor), the deed of Power of Attorney for Imposing Mortgage must be followed by making APHT and then issuing a Mortgage certificate by the National Land Agency which makes the basis of executorial legal force for creditors. Weaknesses in the deed of Power of Attorney Imposing Rights cannot be avoided, but they are still used. In the future, it is undeniable that there will be a legal problem regarding its use. Furthermore, in the UUHT it is stated "that what can be charged with Mortgage Rights are Property Rights, Business Use Rights, Building Use Rights and Usage Rights" (KP. 4 UU RI No.4 Tahun 1996). The granting of Mortgage Rights to land rights above which are also known as Mortgage objects is carried out by making a Deed of Mortgage Granting (APHT) by the Land Deed Making Officer (PPAT) which is given directly by the Mortgage giver himself. According to Boedi Harsono, "basically the granting of a Mortgage is an accessoir in which the birth, existence, transition, execution and abolition of a Mortgage are determined by the presence, transfer and abolition of guaranteed receivables" (Boedi, 2005).

## 2. Research Method

The research method used in this research is the normative juridical method or normative legal research. By using a narrative review approach, the articles are obtained from searching on Google Scholar and Pubmed (Depri, 2014). The articles used are national and international journals with full text, and are in accordance with the contents and objectives of this research. The analysis technique used is through a qualitative descriptive method used in examining issues related to the legal force of the power of attorney for imposing mortgage rights to the issuance of the Head of the National Land Agency regulation number 8 of 2012. The collection of legal materials is

carried out using library techniques, namely through the collection of legal materials originating from primary legal materials and secondary legal materials. The source of primary legal material is in the form of relevant laws and regulations and the collection of secondary legal material originating from e-journals, books and websites (Muhaimin, 2020). The data obtained were then analyzed descriptively qualitatively to obtain conclusions from the research conducted.

### 3. Results And Discussion

Notaries have the authority to make deeds regarding land as stated in chapter 15 of Law no. 2 of 2014 concerning the Position of Notary (UUJN). Based on these provisions, various interpretations emerge, one of which is related to the authority of a Notary in making a Power of Attorney for Imposing Mortgage Rights (SKMHT). In the development of the Notary's authority in making SKMHT which will later be attached as a document in the registration of the Deed of Granting Mortgage Rights, it is contradicted by Regulation of the Head of the National Land Agency (Perkaban) No. 8 of 2012 concerning Amendments to the Regulation of the State Minister for Agrarian Affairs/Head of the National Land Agency No. 3 of 1997 concerning Provisions for the Implementation of Government Regulation No. 24 of 1997 concerning Land Registration, hereinafter referred to as Perkaban No. 8 of 2012. In Appendices VIII A and VIII B Perkaban No. 8 of 2012, implies that in making a Power of Attorney to impose rights made by a Notary must refer to the Perkaban. This condition proves that there is an asymmetry between the regulations in the UUJN and Perkaban which both regulate the provisions for making a Power of Attorney to Encumber Rights. The legal consequence of this condition is that SKMHT made by Notaries in several places are rejected when they are about to register Mortgage Rights at the Land Office. Basically the Power of Attorney for Imposing Rights is a power of attorney drawn up in the form of an authentic deed used in the process of making the Deed for Granting Mortgage Rights. Formal provisions regarding the Power of Attorney to Encumber Rights can be seen in the formulation of Article 15 paragraph (1) UUHT. A notary in his authority to make a Power of Attorney to Encumber Rights must of course be in accordance with the provisions stipulated in UUJN. Based on the SKMHT made by a Notary, the final part of the Power of Attorney to impose rights is as follows:

"..... as witnesses, and after being read and explained, then as proof of the truth of the statement put forward by the Authorizer and Authorized Officer mentioned above, this deed is signed by the Authorizer, the Authorized person, the witnesses and I, the Land Deed Making Officer. / Notary in the amount of 2 (two) copies of the original consisting of 1 (one) first copy kept in my office, and 1 (one) second copy submitted to the Attorney to be used as the basis for signing the Deed of Granting Mortgage in question" (Metta, 2022).

Looking at the form of the final deed made by the Notary, it is not much

different from the format of the Power of Attorney to Assign Rights made by the PPAT. There is only a difference on the letterhead in the Power of Attorney to Assign Rights. Deeds drawn up by Notaries and PPATs are basically a form of authentic deed as stipulated in chapter 1868 of the Civil Code. Where the provisions in chapter 1868 are general provisions regarding authentic deeds and UUJN are special provisions. Where special legal rules can overrule general legal rules in accordance with the principle of *Lex Specialis Derogat legi Generali* (Baggir, 2004). While Perkaban No. 8 of 2012 regulates the terms and conditions for the Power of Attorney to impose rights by PPAT listed in chapter 96 verse (1) which states that, the form of the deed used in making the deed as referred to in chapter 95 verse (1) and verse (2), and the filling procedure is made in accordance with the annex to this regulation which consists of:

- a. Deed of sale & purchase;
- b. Deed of Exchange;
- c. Grant Deed;
- d. Deed of Entry into the Company;
- e. Shared Rights Deed;
- f. Mortgage Granting Deed;
- g. Deed of Granting Building Utilization Rights/Using Rights over Owned Land;
- h. Power of Attorney Imposing Mortgage Right.

The authority of the PPAT in making a Power of Attorney to Encumber Rights which is said to be a legal act, is also regulated in PP No. 37 of 1998 concerning the Regulations for the Position of Officials for Making Land Deeds listed in chapter 2. If you look at the provisions above, it is clear that notaries and PPATs have their own legal umbrella within their authority to make Power of Attorney to impose rights.

If there is a conflict of regulations, in this case what is considered is the order of the laws and regulations that apply in a country. Based on the theory of levels of legal norms (*die Theorie vom Stuentordnung der Rechtsnormen*) expressed by Hans Nawiasky, in the system of legal norms of the Republic of Indonesia, the applicable legal norms are in a layered and tiered system, as well as in groups. , where a norm is always valid, sourced from and based on higher norms, and higher norms apply, sourced and based on even higher norms, and so on up to a basic norm of the Republic of Indonesia, namely Pancasila (Muhammad, 2022).

In Indonesia, in its current development, it formally follows the type of hierarchy of laws and regulations listed in Law no. 12 of 2011 concerning Formation of Legislation regulated in chapter 7 verse (1) The type of hierarchy of Legislation consists of:

- a. the 1945 Constitution;
- b. Decree of the People's Consultative Assembly;
- c. Laws/Government Regulations in Lieu of Laws;
- d. Government regulations;
- e. Presidential decree;

- f. Provincial Regulation; And
- g. District/City Regional Regulations.

In the study of state administrative law, every grant of authority to certain government officials implies the responsibility of the officials concerned in accordance with one of the principles of the rule of law, namely, "geen bevoegdheid zonder verant woordelijkheid or there is no authority without responsibility" which means, there is no authority without accountability. If the provisions stipulated in the Perkaban are followed in making a Power of Attorney to Encumber Rights by a Notary, there will be a violation of abuse of authority which can result in the deed not meeting the requirements as an authentic deed as stipulated in UUJN.

Therefore, the provisions for making a Power of Attorney to Encumber Rights made by Perkaban cannot be applied to Notaries, because Notaries are subject to the provisions that apply to Notaries, namely UUJN. Where the UUJN has a higher position than the Perkaban position regarding an annex contained therein, which is an inseparable part of the legislation itself (Siti *et al.*, 2019). In accordance with the order of the laws and regulations above, every lower legal rule may not conflict with a higher legal rule, in which case the principle of Lex Superior Derogat Legi Inferior can be applied. Thus, the legal force of the Power of Attorney Imposing Mortgage made by the Notary after the issuance of Regulation of the Head of the National Land Agency No. 8 of 2012, can still be used as a basis for making Deeds for Granting Mortgage Rights, as long as they follow the provisions in making authentic deeds regulated in UUJN.

#### 4. Conclusion

The legal force of the Power of Attorney for Imposing Mortgage made by a Notary after the issuance of the Regulation of the Head of the National Land Agency Number 8 of 2012, has permanent legal force which can be used as a basis for making Deeds for Granting Mortgage, as long as it follows the provisions in making an authentic deed that regulated in UUJN. Because, the provisions of the Power of Attorney Imposing Mortgage Rights in Perkaban refer to PPAT. Therefore, the provisions for making a Power of Attorney for Imposing Mortgage made by Perkaban cannot be applied to a Notary. Both the Notary and the PPAT have their own legal umbrella in exercising their authority and must be accountable.

The government is expected to be able to overcome this problem by synchronizing regulations between regulations made in UUJN and regulations made in Perkaban. Particularly in terms of the provisions for making a Power of Attorney to Encumber Rights by a Notary can not follow the provisions for making a Power of Attorney to Encumber Rights which are regulated in the Perkaban which refers to the PPAT. In addition, the process of granting Mortgage Rights is also expected to be in accordance with and in line with the provisions of the applicable laws and regulations

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