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Application of Nemo plus Yuris Principles on Buying and Sale Bondings and Authorizations for Sale which is Created When the Object Sold Is under the Bank Guarantee

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ABSTRACT

When a conventional or sharia banking institution provides a loan or financing. of course it will be bound or made an agreement/deed of Credit Agreement or Accounts Payable or Financing and other deeds to bind collateral such as SKMHT (Power of Attorney for Granting Mortgage Rights) or APHT (Deed of Credit). Granting Mortgage Rights which is then used as the basis for registering with the local Land Office will be issued a Mortgage Certificate (SHT). In practice the provision of guarantees is often deviated, namely the object is already under bank guarantee and (will) be encumbered with Mortgage Rights, which means that the material rights already exist with the Debtor, and the Debtor no longer has any rights, which should be according to law if the Debtor is in breach of contract or Default, the legal procedure is to sell it through an auction, this is in accordance with the provisions stipulated in the UUHT. Procedures or procedures like this are orders of the Mortgage Law (UUHT), and there is no need to look for other (legal) breakthroughs to make deviations, by making a deed of binding sale and purchase and power to sell made at the same time as making the agreement/deed of agreement Credit or Accounts Payable or Financing and other deeds to bind collateral such as SKMHT or APHT. The actions as mentioned above are not in accordance with the NemoPlus Yuris principle, in this case the Debtor no longer has any rights to the land that is used as collateral, except for occupying it for the duration of the credit, but in this case, a deed of binding sale and purchase was made. and Power to Sell with the aim that if the Debtor Defaults does not need to be auctioned but can be sold directly by the Creditor and avoids auction. To overcome this, after the Debtor Defaults, Cessie can be made, namely the Creditor transfers/sells the debtor's debt to another party.

Keywords: Default, Auction, Nemo Plus Yuris, Cessie.

INTRODUCTION

Law of the Republic of Indonesia No. 10 of 1998 on Amending the Banking Law of the Republic of Indonesia No. 7 of 1992 ((National Gazette of the Republic of Indonesia No. 182 of 1998) or Banking Law and Law of the Republic of Indonesia No. 21 of 2008 on Shariah Banking (State Gazette of the Republic of Indonesia No. 94 of 2008, Supplement to the State Gazette of the Republic of Indonesia No. 4867) or the Shariah Banking Law, both of which emphasize that, when extending credit, the bank must have confidence in the debtor's ability to pay the debt as agreed and ability (U.-U. R. I. Nomor, 10 C.E.), (U.-U. Nomor, 21 C.E.).

The main thing in providing credit is the "belief" of the bank as a creditor to the debtor. Whereas to obtain such confidence, Banks must carefully assess the character, capabilities, capital, collateral and business prospects of the debtor. In this regard, collateral is only one element in the provision of credit in order to minimize the risk in distributing credit, because in principle, it is not always necessary for a credit distribution to have collateral or collateral (collateral), because of the type of business and business opportunities owned by the debtor. basically it is a guarantee against the business prospect itself or in other words if the existing elements have been able to convince the creditor of the debtor's ability, the guarantee is sufficient only in the

form of a principal guarantee and the bank is not required to ask for additional guarantees.

The provisions mentioned above are normative in nature and are an ideal description in providing credit, and may be applied when good intentions (no default) can be identified from the start or when economic and political situations do not fluctuate or also when the value of honesty can be fully normed by the government creditors, but in order to implement the principle of prudential banks, almost every loan requires collateral or guarantees from the debtor. This is understandable because if a credit is released as collateral then it is very risky, and if the project or business field being financed fails or suffers a loss and the debtor is no longer able to pay it, then the bank or creditor will be harmed and the credit will be bad. . But if there is collateral, then the creditor will be able to withdraw the funds distributed by utilizing the guarantee.

In the practice of credit, requesting or providing collateral for immovable objects or collateral land form is the most ideal collateral, this is a natural thing, because economically, land prices are of high value.from time to time.

The enactment of the Banking Laws mentioned above (Banking Law and Sharia Banking Law) which are often referred to as Conventional Banks and Islamic Banks, both of which use UUHT for guarantee. Even using SKMHT (Power of Attorney for Imposing Mortgage) and APHT (Deed of Granting Mortgage) which refer to UUHT or to existing guarantee institutions. Whereas in fact the intentions and meanings between the Banking Law and Islamic Banking are different. for example. and conventional banking is known as the term Creditors. Debitor and Credit (U.-U. R. I. Nomor, 10 C.E.) and in Islamic banking, recognize the terms Customer and Financing based on Sharia Principles.

In the practice of providing good and correct credit or financing by banks, it is simple, starting from making a credit agreement deed (PK) or debts or borrowing - borrowing money or acknowledging debt, which is then followed up with SKMHT or directly APHT if the object is guarantee of land parcels in accordance with UUHT. When all the deeds are completed, there are still banks who request using the AYDA (Foreclosed Collateral) mechanism. Namely at the time of signing the deeds (PK, SKMHT or APHT or Fiduciary, and Cessie) the Debtor is also asked to make and sign a Deed of Sale and Purchase Binding Agreement (PPJB) and Power to Sell (KUM). The application of the AYDA is an effort from the Creditor on the grounds that if the Debtor is in Default, the auction procedure (Public Auction) as regulated in Article 20 paragraph (1) letter b of the UUHT can be avoided or not carried out by the Bank, even though according to such provisions as referred to in Article 20 paragraph (4) UUHT promises or legal actions like that are null and void. Notaries and banks are not aware of this. Banks take such actions on the grounds of "just in case" which will not be used if the debtor pays the debt smoothly. Whatever the reason, it cannot be justified under UUHT.

Law No. 4 of 1996 on Mortgage of Land and Land-Related Items or UUHT has determined a clear way if the Debtor is in default, it can be seen from several characteristics and characteristics of Mortgage in UUHT that must be understood properly, including:

A Characteristics of Mortgage Rights.

1. Giving priority to the holder of the guarantee (droit de preference), namely the creditor. This characteristic is stated in the last sentence of Article 1 point 1 UUHT, namely "... which gives priority to certain creditors over other creditors. This feature is then also mentioned in the last sentence of UUHT Article 20(1)b, emphasizing that "... the mortgage holder has the right to have priority over other creditors.

2. Regardless of who the Mortgage object is (droit de suite), that object is always followed. These characteristics are stated in Article 7 UUHT, namely the Mortgage Rights still follow the object in the hands of whoever the object is.

3. Meet the Principles of Speciality and Publicity. Fulfillment of the Specialty Principle in the mandatory content of the Deed of Granting Mortgage Rights (APHT), as stated in Article 11 UUHT, namely:

- Identity of the holder and grantor of Mortgage.
- domicile of the holder and grantor of Mortgage.
- Amount of guaranteed debts.
- Dependent value.
- The object or object of the Mortgage Rights.

Meanwhile;- the principle of publicity requires the registration of Mortgage Rights at the local land office (Article 13 UUHT).

4. It is easy and definite to carry out its execution, namely by:

a. Self-sell the collateral by way of public auction and repay its receivables with the sale proceeds (Article 6 UUHT).

b. The sale of the object of Mortgage under the hand, if in this way the highest price will be obtained that benefits all parties (Article 20 paragraph (2) UUHT).

c. Provide the possibility of using Parate Execution as regulated in Article 244 HIR and 258 Rbg (Article 26 in conjunction with Article 14 UUHT).

5. The object of the Mortgage shall not be included in the bankruptcy code of the grantor of the Mortgage before the creditor of the holder of the Mortgage takes repayment of the Proceeds from the sale of collateral (Article 21 UUHT).

A. Characteristics of Mortgage.

1. Cannot be divided (Article 21 UUHT). That the Mortgage encumbers the whole object of the Mortgage and every part thereof. This characteristic does not apply absolutely because there is a possibility to exclude or deviate from this indivisible nature based on Article 2 paragraph (2) UUHT, which is carried out with Partial Roya. This exception is allowed if agreed in the APHT. The meaning of this partial roya is that the repayment of the guaranteed debt can be carried out in installments with the amount equal to the value of each unit that is part of the object of the mortgage. The part that has been paid in installments will be freed from Mortgage which will just take care of the rest of the Mortgage object collateral for the debt that has not been repaid.

2. It is an accessory (a follow-up) to the main agreement, namely an agreement that creates a legal relationship between debts and debts. The existence of the expiration and the abolition of the Mortgage Rights depends on the debt which is guaranteed to be paid off.

The characteristics of the Mortgage mentioned in points 4 letters a and b above in the practice of providing guarantees are often deviated, that is, they already know and are certain that the object is already under bank guarantee and (will) be Mortgage which means that the property rights already exist with the creditor., and the Debtor no longer has any rights, which should be according to the law if the Debtor is in Default or Default, the legal procedure is to sell it through an auction, this complies with the provisions contained in the UUHT. Procedures or procedures like this are UUHT orders, and there is no need to look for other (legal) breakthroughs to make deviations, with a deed of binding sale and purchase and power of attorney to sell.

The act of making the Sale and Purchase Binding and Selling Authorization deed which is still or is under bank credit guarantee, whether something is justified or not and what the legal consequences are can be **viewed** from the perspective of the Nemo principle plus juris transfere potest quam ipse abel", meaning that no one can transfer or give something to another person in excess of his property or what he has. By making the debtor's property to the creditor as collateral for the debtor's debt to the creditor, the debtor has no right to transfer in any way, except the right to occupy until the debt is paid off or until it is auctioned off if the debtor defaults.

That to overcome this, it means that there is no need to do so by making a deed of binding sale and purchase and the power of sale which is still or is being guaranteed (collateral) for bank credit, after the debtor is in default in addition to following the provisions of Article 20 paragraph (2) and (3) of the UUHT. , can be done the Cessie way. This can actually be done becau15 Cessie is an institution that has long existed in Article 613 paragraph (1) of the Civil Code which can also be applied to overcome bad loans.

Problem Formulation

1. what is the legal standing of the sale and purchase binding deed and the selling authorization that is still or is being guaranteed (collateral) for bank credit?

2. can cessie be used to deal with debtors who are in default?

METHOD

As previously stated, the author's research approach for preparing this work is Normative Juridical Research. A literature law study undertaken by reviewing library resources or just secondary data is known as the normative judicial research method (Sunggono, 2003). In addition, the author employs the Deductive Thinking Method, which is a technique of thinking that is employed when drawing a conclusion from something that is general and has been demonstrated to be true, and then applying that conclusion to something specific (Sedarmayanti & Hidayat, 2002). Because of what the author has stated above, the purpose of qualitative research is a research method that refers to legal norms and regulations included in the Laws and Regulations (Soekanto & Mahmudhi, 2003).

RESULTS

The Legal Position Of The Buying Bonding Deed And The Authority Of The Sale Are Still Or Currently Under The Bank Credit Guarantee (Collateral)

When a Notary/PPAT performs all legal actions related to Credit Agreements or Lending and Borrowing Money with Guarantees or Debt Recognition as mentioned above, among others as PPAT makes the APHT deed then registered at the local Land Office or is made only in the form of SKMHT (Power of Attorney to Charge Mortgage) only. There is one action of a Notary, whether a Notary's suggestion (or Notary awareness/PPAT) to the Bank or the Bank's request which is granted by a Notary, namely a Deed of Owner Authorized to Sell (Debtor) to the Bank (Creditor), on the grounds that if the Debtor is in Default, then the auction procedure (Public Auction) according to Article 20 (1) letter b of the UUHT can be avoided or not carried out by the Bank, even though according to such provisions as referred to in Article 20 paragraph (4) of the UUHT the promise or legal action as such is null and void. Notaries and banks are not aware of this. Banks take such actions on the grounds of "just in case" which will not be used if the debtor pays the debt smoothly. Whatever the reason, it cannot be justified under UUHT.

Actually, if the Debtor has been confirmed to be in Default, it may not be possible to go through the auction procedure, and there is also no need for Power of Attorney for Sale, after confirming the Default Debtor, it can be pursued according to the terms 20 paragraphs (2) and (3) of the UUHT, namely:

1. An agreement is made between the giver and the mortgage holder, to sell under the band to get the highest price and benefit all parties.

2. The sale can only be made 1 (one) month later notification was made by the giver/mortgage holder to the interested party.

3. At least in 2 (two) newspapers in the area concerned.

4. No one objected to the sale.

So that such practices are not carried out by Banks, Bank Indonesia (BI), which has the authority to supervise all Banks in Indonesia, reprimands and disciplines banks that take legal actions that are not in accordance with the provisions of Articles 6 and 20 UUHT. indications that there is an unhealthy practice of giving guarantees and violating UUHT, as well as for Notaries, there is no need to suggest and fulfill such a request from the Bank, because they already know the deed of power of attorney to sell (if it is a Notary deed) or if it is under the hand that is registered or legalized as such, it will be cancelled. For the sake of law (Article 20 paragraph (4) UUHT), so legally it is considered never existed, and also to PPAT there is no need to serve the making of a deed of sale and purchase with the power to sell in a situation like the above, because it is based on a deed that null and void, then the sale and purchase deed is invalid or non-existent.

The legal action stated in the relevant deed (Sales and Purchase Binding and Selling Authorization) in addition to being null and void, is also not in accordance with the principle of "Nemo plus juris transfere potest quam ipse abel", meaning that no one can transfer or give something to another person beyond their rights. his property or what he owns or when a plot of land belonging to someone has been handed over to guarantee his debt to another party (such as a bank), actually the person concerned no longer has any rights to the land, this is in accordance with the Nemo Plus Juris Principle which states that people cannot transfer rights

beyond the rights that exist in them. This means that the transfer of rights by unauthorized persons is void.

Cessie Can Be Used To **Resolve Debtors** In **Default**

UUHT has determined 3 (three) types of Mortgage Execution according to UUHT, namely:

1. Executional Title

Execution based on irrah- irah "For Justice based on God Almighty" which is carried out through procedures using parate executie institutions. This execution it has the same enforcement force as a court decision which already has permanent legal force.

2. Execution on Own Power

Execution of this own power must be agreed in the previous agreement. According to Article 20 paragraph (1) letter (a) in conjunction with Article 6 UUHT, if the debtor defaults, then the creditor holding The first mortgagee has the right to sell the mortgaged property at a public auction on his own initiative and recover his receivables from the proceeds.

3. Underhand Execution

The execution of the sale under the Article 20 stipulates the hand of the collateral (2) and (3) of the UUHT.

In lending activities, it cannot be separated from the activities of providing guarantees carried out by the Debtor to the Creditor. Although the guarantee is not mandatory, to protect the interests of the parties Creditor in order to guarantee the repayment and/or repayment of any amount of money owed and must be paid by the Debtor to the Creditor, the guarantee eventually becomes a necessity.

The provision of this guarantee is Accessoir or Follow-up depending on the main agreement, and where the Reddit Agreement is the main agreement. Without the main agreement, there will be no accessor guarantee. A receivable arising from a credit agreement can be said to be an object owned by the creditor. Therefore, like an owner of an object, the creditor has the right to transfer his receivables to any third party based on his own good judgment without the need for approval from any party. The transfer of receivables by creditors is done by Cessie.

Cessie is a method of transferring and/or handing over receivables on behalf of as referred to in Article 613 paragraph (1) of the Civil Code (KUHPerdata), namely:

"Nominal handover of receivables and other intangibles by real or private deed, whereby rights to the property pass to another person."

Whereas Article 613 paragraph (1) of the Civil Code states that receivables regulated in Article 613 of the Civil Code are receivables or claims on behalf of. Claims on behalf of, the debtor knows for sure who the creditor is. One of the characteristics possessed by an invoice in the name is that the invoice in the name has no form. If a debenture is made, the debenture is only valid as evidence. This is because the existence of debt securities in any form is not something important from a bill on behalf of. Thus, if the claim in the name is stated in the form of debt securities, the physical delivery of the debt securities has not transferred the right to claim, as evidenced by the letter concerned. The provisions stipulated in Article 613 paragraph (1) of the Civil Code can only be applied to replace creditors and cannot be applied to replace debtors. The ownership rights are transferred in Cessie, and the cessie deed is signed, the levering has been completed.

With Cessie's handover of receivables, the third party becomes a new creditor who replaces the old creditor, followed by the transfer of all rights and obligations of the old creditor to the debtor to a third party as the new creditor. This is because the transfer of receivables by Cessie does not result in the termination of the existing a contract between a creditor and a debtor. The legal relationship between debtors and creditors based on pre-existing credit agreements is not broken so that there is no new legal relationship that replaces the old legal relationship. The old agreement still exists and is valid and binds the debtor and creditor who receives the transfer of the said receivable. Thus, what happens is assign all rights and obligations of a creditor based on an existing credit agreement to a third party who then becomes a new creditor.Based on the description that cessie is a way to transfer receivables on behalf of without resulting in a credit/borrowing agreement that results in the occurrence of the receivable being written off.

Cessie is a method of transfer and/or transfer of property rights where the object of the transfer referred to here is a receivable on behalf of. The transfer of receivables on behalf of a cessie can occur as an accessoir of a main agreement if there is a legal event that precedes it and can also occur without the existence of a legal event beforehand so that the cessie is obligatory on itself because it is a legal event itself. Because the matter regarding whether or not there is a legal event in advance to be able to transfer a receivable in the name or other intangible object is not regulated in Article 613 paragraph (1) of the Civil Code, without a legal event that precedes it, Cessie's deed can still be valid. made and the transfer of receivables on a cessie basis can still be carried out by creditors to new creditors who will be third parties.

With the transfer of receivables in that name, the person receiving the transfer becomes a new creditor while the debtor remains. To take advantage of the transfer of receivables on behalf of (cessie) as collateral, it is necessary to put it in the form of an authentic deed (Notary) or a private deed signed by the new creditor as the recipient of the receivables and the old creditor as the handover of the receivables. Cessie as collateral is accesoir where its existence depends on the credit agreement. If the credit agreement ends, the cessie will also be deleted. The cessie holder has no preferential rights or priority in payment. For example, if the debtor's assets are confiscated by another party, the cessie holder will not receive a priority payment from the auction results of the debtor's assets.

With the Cessie, the rights of the creditor as the Mortgage holder will be transferred and transferred to the third party who receives the transfer of the credit in question. This is regulated in Article 16 UUHT which states that:

(1) If the receivables guaranteed by the Mortgage are transferred due to cessie, subrogation, inheritance, or other reasons, the Mortgage will also be transferred by law to the new creditor.

(2) Assignment of mortgage rights referred to in paragraph (1) must be registered by the new creditor with the Land Office.

(3) Registration of the transfer of Mortgage referred to in subsection (2), by the Land Office by recording it in the Mortgage land book and land tittle if it becomes a mortgage, copy the notes on the mortgage certificate and land title certificate issued. (4) The date of recording in the land book as referred to in paragraph (3) it is the seventh day after the complete receipt of the documents required to register the Mortgage transfer, and if the seventh day falls on a non-working day, the note should be dated to the next business day..

(5) The transfer of Mortgage shall take effect for the third party on the date of recording as stated in the paragraph (4).

In the Elucidation of Article 16 it is stated that :

Paragraph (1)

Cessie is a legal act of transferring receivables by creditors holding Mortgages to other parties.

Subrogation is the replacement of creditors by third parties who pay off debtors' debts.

What is meant by "other causes" are things other than those specified in this paragraph, for example in the event of a takeover or merger of companies causing the transfer of receivables from the original company to the new company.

Because the transfer of Mortgage as regulated in this provision occurs by law, it does not need to be proven by a deed made by PPAT. It is sufficient to record the transfer of Mortgage Rights based on a deed that proves the transfer of guaranteed receivables to a new creditor.

Thus, Cessie's deed made before a Notary is evidence that the Mortgage Right has been transferred by law, therefore it does not need to Certificate of Deed by Land Deeds Officer. Registration of transfer of rights. In making Cessie, it must be notified to the Debtor in writing, and in this Cessie does not ask for approval from the Debtor, because the transfer of the debt is an inherent right of the Creditor.

In an ideal level all the procedures stipulated in the UUHT must be implemented, but in practice it can also happen such as:

1. For collateral, SKMHT is sufficient only, for a certain amount of credit, and is not followed up with APHT.

2. After making the APHT, it is not registered with the local land office, for certain reasons. For example, it is believed that the Debtor will not be in Default.

the two things mentioned above of course have a big risk for creditors, namely when the debtor defaults or is in default, which can no longer be billed, so that the execution procedure referred to above is very difficult to carry out, unless the debtor is willing to sell it himself and the proceeds from the sale are guaranteed which are not bound by the APHT to the Creditor. Such actions are very easy to take if the Debtor is cooperative and can still be identified. But if the Debtor is not cooperative or his whereabouts are known, then there must be a way that the Creditor can do so debtor's debt can be repaid.

To overcome the 2 (two) problems mentioned above, it can be done and pursued with Cessie. So actually Cessie can be done against:

I. Collateral that has been encumbered with Mortgage as The existence of a Mortgage Certificate from the local land office attests to this.

2. Guarantees only with SKMHT which are not followed up with APHT.

3. The local land office does not have APHT on file., for certain reasons.

That do Cessionaries have the right to be paid by selling the guarantee? If the position of the Cessionaries as a new Creditor, then the Cessionaries have the right to receive repayment from the Debtor. According to J. Satrio with cessie, a new creditor has the right to collect the debtor's debt and if the debtor defaults on the authority to execute the mortgage, either based on the grosse mortgage certificate or on the basis of his right to sell on his own power.

Ways that can be done by Cessionaries are:

I. Transferring the Cessie to another party, so that the Cessionaries will be located as Cedents and the new buyer will be the Cessionaries. And things are done again in accordance with Article 16 UUHT. Until now there is no rule of law that determines the limit of how many times Cessie can be transferred to another party.

2. Selling by Auction through Class I Auction Officer or Class II Auction Officer.

For Cessie who is encumbered with Mortgage or not encumbered by Mortgage, Cessionaries can submit an auction application to Class I Auction Officer in accordance with their authority as Execution Auctioneer.

In banking practice as mentioned above there are also:

1. Guarantees only with SKMHT which are not followed up with APHT.

2. APHT is not registered with the local land office, for certain reasons.

then if the Debtor is in default and the credit is in bad condition, the Creditor can be transferred by Cessie to another party who will act as the new Creditor. (Cessionaries). And Cessionaries are also entitled to repayment, by submitting an auction with the criteria of a Non-Voluntary Execution Auction which can be carried out by a Class I Auction Officer or a Class II Auction Officer. Why can it be done by Class II Auction Officers, because the 2 (two) things mentioned above do not meet the requirements of Article 6 of the Mortgage Law (UUHT).

CONCLUSION

Whereas the terminology of the deed is null and void, then the deed in question or the legal action is deemed to have never occurred from the start. If there is a third party who knows and understands this, due to default, the land that is collateral for the debt is sold by the bank based on power of attorney (or power of attorney to bank employees), and PPAT is followed up with the PPAT deed, for this case a lawsuit can be filed with a Notary , PPAT and the Bank for committing a legal act based on a deed or legal action which has been null and void by law. Another reason that needs to be considered is that the original intention of the debtor was to borrow money with collateral, if in default, the collateral can be sold through auction. But by creditors, they are not sold through auction, but are sold based on the power of attorney. The different initial intentions can be used as the basis for canceling the legal actions taken by the Bank and the PPAT Notary. This is in accordance with the principle of 'Nemo sibi ipse causam possessionis mutare potest", which means that no one changes for himself or the interests of his own party, the purpose of using the object. In view of entering into a binding deed of sale and purchase and authorization to sell made at the same time as the making of a

credit agreement/deed or debt or financing agreement and other deeds to bind collateral such as SKMHT or APHT is a deviation. The law in force in Indonesia has provided a solution, namely when the debtor is clearly and definitely in default, if an auction does not want to be carried out, the creditor can transfer or sell the debtor's debt to another party. So that the rights and obligations of the other party (Cessionaries) are guaranteed, meaning that the money can be returned, then the person concerned can submit an auction request to the Auction Officer.

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