

## **Juridical Study Of Unregistered Land As A Guarantee In The Framework Of Empowerment Micro Small And Medium Enterprises**

Don Arfan<sup>1</sup>; Efridani Lubis<sup>2</sup>

<sup>1</sup>Mahasiswa Doktor Ilmu Hukum Universitas Islam As-Syafi'iyah (UIA);

Email : donarfan555@gmail.com

<sup>2</sup>Universitas Islam As-Syafi'iyah; [efridani@yahoo.com](mailto:efridani@yahoo.com)

### **Abstract**

Not all Indonesian lands have been registered and have land certificates. The history of land ownership includes the hereditary land tenure which is referred to as customary rights. According to customary law the land is owned by the customary law community. They can benefit from the natural resources of the land. The existence of land is used as a place to build houses, farming land, gardening and others, so that it becomes a basic need in sustaining life. In order to obtain business capital, land can be used as collateral for banks, cooperatives and or other financing institutions. But usually the requirement to be used as collateral is a land certificate. Land that has not been registered can also be used as collateral for the bank, because the implementation of binding collateral for unregistered land is also regulated in the Mortgage Law Number 4 of 1996 concerning Mortgage Rights. By making it easy for the community to obtain business capital by utilizing existing resources such as unregistered land, it can support economic growth for the community. The reason for taking this title is to study and provide insight into agrarian law, guarantee law and land policy. The methodology of this study uses normative studies and literature studies. The conclusion of this study is that the agrarian law policies and laws and regulations that have been formed can bring prosperity, welfare and justice to the State and the people, especially for small and medium micro enterprises and banks or other financial institutions and obtain legal certainty.

**Keywords:** unregistered land, guarantee, legal certainty

## **I. INTRODUCTION**

### **A. Background**

Micro, Small and Medium Enterprises (MSME) or (UMKM) are one of the pillars of the national economy. When Indonesia was hit by the Covid 19 pandemic, many people lost their jobs due to layoffs. For the sake of very urgent needs and survival, in the end, many of the people switched professions to become UMKM actors.

To obtain business capital, MSME apply for capital loans from banks, cooperatives and financial institutions with the condition that the land guarantee given to the bank is a land certificate. However, there are people who own land but do not have a land certificate. If you apply for a capital loan for an unsecured MSME business, the business capital provided by banks and other financing institutions is limited and relatively small.

The need for sufficient business capital to meet the needs of MSME actors is very important in order to grow and compete in the midst of today's global economic competition. Lots of businesses that should be run by the community as MSME actors are instead controlled by corporations, which indirectly create business monopoly because they are supported by large capital. It is very important that attention and policies that support MSME actors from the Government.

Indeed, many Government policies have been made in order to support the MSME program, but in practice there are many obstacles that prevent business actors from being able to compete, one of the obstacles for MSME actors is capital. Capital is still insufficient and sufficient so that MSME players can compete and grow to become big businesses.

As for the Government's policy in facilitating MSME during the covid 19 pandemic, it seems that it was only implemented downstream, namely with the existence of National

Economic Recovery (PEN) programs such as providing stimulus through loan policies, additional capital loan assistance and other relief, which only get venture capital very limited for MSME actors, so it is very difficult to compete and can grow to become a big business. Meanwhile, policies upstream are not optimal and seem to have not been touched to be optimized, such as convenience for the business community to be able to immediately take advantage of the existing facilities at their disposal, namely utilizing their permanent assets such as houses, places of business, plantation land and agricultural land that do not yet have land certificates to obtain land certificates. used as collateral for business capital loans to banks and other financial institutions.

## II. DISCUSSION

### A. Insufficient Arrangements Concerning the Binding of Land Collateral Not Registered in Law Number 4 of 1996 Concerning Mortgage Rights.

As stipulated in Article 1 point 1 of the UUHT, the definition of a mortgage is a mortgage right over land and objects related to land, hereinafter referred to as a mortgage right, which is a security right that is imposed on land rights as referred to in Law Number 5 of 1960 concerning Basic Regulations Basic Agrarian Law (UUPA), including or not including other objects which are an integral part of the land for the settlement of certain debts, which gives priority to certain creditors over other creditors. From this understanding it can be said that the Mortgage Right is the guarantee right that is imposed on the land.

The provisions in Article 4 of the UUHT state what objects can be subject to Mortgage Rights, it is explained that land rights that can be subject to Mortgage are Property Rights, Business Use Rights, Building Use Rights. Of the three rights, the Property Right is the strongest right in the sense that there is no other time limit, as with the Cultivation Right and the Building Use Right, there is a time limit, theoretically it can be extended again.

Notary or Land Deed Making Officer (PPAT) is given the authority to make authentic deeds, namely regarding the Power of Attorney to Charge Mortgage Rights (SKMHT) and then set forth in the Deed of Granting Mortgage Rights (APHT), namely land collateral owners who have agreed and made a debt agreement receivables with creditors willing to surrender material guarantees, namely the land by giving power to creditors to register their land guarantees with mortgage institutions for the benefit of legal protection for creditors.

Pursuant to Article 15 paragraph (4) of the Mortgage Law it states that "A Power of Attorney to impose Mortgage rights regarding land rights that have not been registered must be followed by making a Deed of Granting Mortgage no later than 3 (three) months after being granted (Sentosa Sembiring, 2000)

Furthermore, it is explained in the Elucidation of the article which states "Land that has not been registered is land as referred to in Article 10 paragraph (3). The deadline for using the Power of Attorney for Imposing Mortgage regarding land rights that have not been registered is determined to be longer than for land that has been registered in paragraph (3), bearing in mind that the making of the Deed of Granting Mortgage Rights on land rights that have not been registered must be carried out together with the application for registration of rights. on the land in question as specified in Article 10 paragraph (3), which must first be completed with the requirements.

The requirements for land registration that have not been registered must be to obtain a letter of introduction from the local Village or Kelurahan such as a certificate of land history, a statement of non-dispute, a statement that the land in question has not been certified, and if the proof of ownership of the land is still in the name of a deceased person, then a certificate of inheritance is required ( Undang-Undang Nomor 4 Tahun 1996 tentang Hak Tanggungan)

The mechanism for binding collateral for land that has not been registered is clearly regulated in the UUHT, but it still requires completeness of the requirements and the first land registration process. Land rights for which proof of ownership has not been registered basically consist of proof of ownership in the name of the right holder at the time the UUPA came into effect. If the rights are then transferred, then the history of the transfer is explained as proof that the land rights in succession reached the hands of the right holders at the time the rights were recorded. The intended written evidence can be in the form of:

- a. Grosse deed of eigendom rights issued based on the Overschrijvings Ordonnantie (Staatsblad 1834-27), which has been affixed with a note that the eigendom rights concerned are converted to property rights; or
- b. Grosse deed of eigendom rights issued based on the Overschrijvings Ordonantie (S.1834-27) from the enactment of the UUPA until the date the land registration was carried out according to Government Regulation Number 10 of 1961 in the area concerned; or
- c. Proof of ownership rights issued based on the relevant Swapraja Regulations; or
- d. Certificate of ownership rights issued based on the Regulation of the Minister of Agrarian Affairs Number 9 of 1959; or
- e. Decree on the granting of property rights from an authorized official, either before or since the UUPA came into force, which is not accompanied by an obligation to register the rights granted, but has fulfilled all the obligations mentioned therein; or
- f. Deed of transfer of rights made underhand signed by the Head of Customs/Village/Kelurahan made before the enactment of Government Regulation Number 24 of 1997 concerning Land Registration; or
- g. Deed of transfer of land rights made by the PPAT, where the land has not been recorded; or
- h. Deed of waqf pledge/waqf pledge made before or since the implementation of Government Regulation Number 28 of 1997 concerning Waqf of Owned Land; or

- i. Minutes of auction made by the authorized Auction Officer, whose land has not been recorded; or
- j. Letter of appointment or purchase of land parcels to replace land taken by the Government or Regional Government; or
- k. Land/Landrete Tax Rules, girik, pipil, kekitir and Indonesian Verponding before the enactment of Government Regulation Number 10 of 1961; or
- l. Certificate of land history that was made by the Land and Building Tax Service Office; or
- m. Other forms of written evidence under any name as referred to in Articles II, VI and VII of the UUPA Conversion Provisions (J. Andy Hartanto, 2014).

In the event that the complete means of proof are no longer available, the bookkeeping of rights can be carried out based on the fact of physical possession by the applicant for registration and his predecessors by fulfilling the following conditions:

- a. Ownership and use of land is carried out in real terms and in good faith for 20 (twenty) years or more consecutively;
- b. The fact of ownership and use of the said land is not contested and therefore is deemed to be acknowledged and justified by the customary law community or the village/kelurahan concerned;
- c. This fact is reinforced by the testimonies of people who can be trusted;
- d. The other party has been given the opportunity to file an objection through an announcement;
- e. The aforementioned truths have been examined;
- f. Conclusions regarding land status and rights holders are set forth in decisions in the form of acknowledging the rights concerned by the Adjudication Committee in systematic land registration, and by the Head of the Land Office in sporadic land registration.

Furthermore, from the description above, it can be referred to as the basis of rights as proof of mastery over certain land parcels which become an attachment at the time of the first land registration at the local Land Office. First-time land registration is one of the activities in the implementation of land registration, namely the collection and processing of physical data, proof of rights and bookkeeping, issuance of certificates, presentation of physical data and juridical data and storage of general registers and documents.

In binding land guarantees that have not been registered, it can be done between the creditor and the guarantor by signing the loan agreement as the main agreement accompanied by signing the deed of Power of Attorney to Charge Mortgage Rights (SKMHT) which is based on the provisions of UUHT article 15 paragraph (4) the term is valid for three months, and after that it is obligatory to proceed with making a Mortgage Deed (APHT) provided that all rights attached to the first land registration have been registered and have received a registration receipt from the local land office.

#### **B. Legal certainty for creditors as collateral holders for land that has not been registered**

In general, the lending and borrowing agreement will emphasize the obligation of the borrower to pay off, return, or repay the principal debt or remuneration in accordance with the specified time. Financial institutions such as banks, cooperatives or non-bank financing institutions and others, have activities to finance community needs, both productive and consumptive. In providing financing, the considerations commonly used in the banking world to evaluate prospective debtors are often referred to as the 5C (the five C's principles), namely: Capacity, Capital, Collateral, Condition of Economic. economy), Character (honesty or good faith.) ( Ade Arthesa & Edia Hadiman ,2009).

In administering credit, this will always be related to collateral issues. It is known that collateral has a very important meaning in the implementation of credit. In granting credit to customers, banks and financing institutions will always make efforts to prevent or

protect the banks and financing institutions from being harmed if in the future the credit recipient (debtor) defaults or in other words cannot repay the credit, this prevention is by binding guarantees. So if the debtor defaults, the guarantee will function as a substitute for credit payments that have been given by banks and financial institutions.

Whereas based on article 20 UUHT we can actually find that the implementation of the execution of mortgage rights can be carried out in three ways as follows:

1. Execution based on article 6 UUHT, namely if the debtor defaults, then based on the right of the first mortgage holder to sell the mortgage object.
2. Execution based on the executorial title contained in the Mortgage certificate as referred to in article 14 paragraph (2), the Mortgage object is sold through a public auction according to the procedure specified in the laws and regulations for settlement of receivables of the Mortgage holder with prior rights from the creditors -Other creditors.
3. Based on the agreement between the giver and the holder of the Mortgage Right, namely the sale of the object of the Mortgage Right can be carried out privately if in this way the highest price that benefits all parties can be obtained.

Thus the law gives authority to the creditor to carry out the execution of the Mortgage without requiring the approval of any party. That in UUHT article 14 paragraph (3) regarding the executorial title "For the sake of Justice Based on Belief in the One and Only God" is included in the Mortgage certificate which is a law order.

Bonding of guarantees for land that has not been registered, which is preceded by the making of SKMHT for no later than three months, then must be stated in the form of APHT by obligatory attaching a receipt for the first registration issued by the local Land Office. After the APHT is made, then the creditor as the guarantee holder waits for the issuance of a land certificate issued by the local Land Office. If the land certificate has been issued, then APHT registration can be carried out to be charged with the Mortgage Right on the



newly issued certificate. As a result of the APHT registration, a Mortgage certificate is issued through the local Land Office.

The implementation of land registration for the first time is carried out through systematic land registration and or with sporadic land registration. Systematic land registration is based on a work plan and implemented in areas determined by the Minister. In the event that a village/kelurahan has not been designated as a land registration area systematically, the registration shall be carried out through sporadic land registration. Sporadic land registration is carried out at the request of interested parties.

The obstacles that occur are at the time of the first land registration, namely the need for a rather long time for the issuance of the certificate of land rights and the cost constraint, because costs are required to take care of the first land registration at the land office. From these constraints, it can have an impact on legal certainty for creditors or debtors.

### **C. Optimization of Unregistered Land Collateral Binding Through Power of Attorney Imposing Mortgage Rights.**

In the case of binding collateral for land that has not been registered by the Creditor, it is obligatory to carry out the first land registration which is carried out sporadically, because this is carried out at the request of the interested party, namely the Creditor as the guarantee holder.

The creditor as the collateral holder has carried out the land collateral binding perfectly if he has obtained the guarantee documents consisting of a land certificate marked as collateral and a certificate of his Mortgage. So that the creditor's position becomes a preferred creditor.

Pursuant to Article 15 paragraph (4) of the Mortgage Law it states that "A Power of Attorney to impose Mortgage rights regarding land rights that have not been registered

must be followed by making a Deed of Granting Mortgage no later than 3 (three) months after being granted.

Furthermore, it is explained in the Elucidation of the article which states "Land that has not been registered is land as referred to in Article 10 paragraph (3). The deadline for using the Power of Attorney for Imposing Mortgage regarding land rights that have not been registered is determined to be longer than for land that has been registered in paragraph (3), bearing in mind that the making of the Deed of Granting Mortgage Rights on land rights that have not been registered must be carried out together with the application for registration of rights. on the land in question as specified in Article 10 paragraph (3), which must first be completed with the requirements.

In order to empower MSMEs, according to the author, it is possible to optimize the use of a Power of Attorney for Imposing Mortgage related to collateral for land that has not been registered, namely by removing the limitation on the validity period of the Power of Attorney for Imposing Mortgage. The validity period of the power of attorney continues as long as the Debt and Credit Agreement between the Creditor and the Debtor is still ongoing. For this reason, changes are needed to the rules in the Mortgage Act.

### **III. CONCLUSIONS AND RECOMMENDATIONS**

Land that has not been registered can be used as collateral to guarantee payment of debt to a bank or other financial institution. However, the Mortgage Law has not explicitly regulated so that it has not optimally provided legal certainty for creditors and debtors.

Through optimizing the making of a Power of Attorney to impose Mortgage, namely removing the limitation on the validity period of the power of attorney, it can provide legal certainty. The term of the power of attorney should remain valid as long as the term of the loan agreement between the creditor and the debtor remains valid.

MSME activities require business capital, which includes applying for business capital loans to banks or other financing institutions. Collateral from the capital loan includes land certificates. However, not all land in Indonesian territory has a certificate, so there are people who provide land that has not been registered as collateral for business capital loans to banks. The government should, in the framework of empowering MSME, be able to provide convenience, acceleration and/or specificity in the framework of registering unregistered lands which are used as collateral for business capital for MSME actors.

The specificity given to MSME actors is that land registration is carried out by applying systematic land registration, namely free fees and a fast processing time because the registration program is through a government program.

The problem is that if unregistered land is used as collateral with the sporadic land registration procedure, it really requires a process and time to register the land, because in order to be subject to a Mortgage Right, the unregistered land must first be registered at the Land Office.

The interest of registering collateral is in the interest of the creditor, by making the first land registration which is carried out sporadically in the interest of the creditor. The binding of collateral for land that has not been registered by the creditor as long as it fulfills all the requirements for land registration for the first time will then get protection and legal certainty for the creditor.

#### **IV. SUGGESTIONS**

1. In order for the Government to amend the Mortgage Law and the Regulation of the Minister of Agrarian Affairs/Head of BPN Number 4 of 1996 concerning Stipulation of the Deadline for the Validity of SKMHT to Guarantee Certain Types of Credit, specifically eliminating the limitation on the validity period of SKMHT for imposing land collateral that has not been registered .

2. In order for the Government, through the local land office, to implement special services, namely implementing a systematic first land registration program, with regard to the process of binding land guarantees in the context of applying for MSME capital.
3. So that the Government can evaluate or make new regulations regarding the land registration process, with a focus on optimizing the first land registration which is carried out based on a work plan and implemented in designated areas, aiming to achieve orderly land administration in Indonesia.
4. So that the Notary or PPAT and the land office together can provide comprehensive information about binding guarantees and legal certainty for creditors.
5. For the Land Office to further improve services in terms of completion time for the issuance of certificates, so that mortgage rights can be imposed to provide legal certainty to creditors as land guarantee recipients who have not been registered.

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