



Sales and Purchase Agreement on Mortgage-Bound Land in Padang City

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Abstract

The research objectives are to: 1) find out the process of making a sales and purchase agreement for mortgage-bound land, 2) find out the implementation of the contents and resolution of the agreement when dispute in implementing the sales and purchase agreement for mortgage-bound land occurs, 3) find out the notary liability if a dispute in the sales and purchase agreement for mortgage-bound land occurs. This research is an empirical juridical that applies a descriptive analytical approach. Dispute resolution of sales and purchase agreements whose objects are mortgaged can be carried out through several stages including: a deliberation and consensus process where the seller invites the buyer to resolve the issue by submitting the cancellation of the sales and purchase agreement and returning all costs of the sales and purchase agreement as before or ask the seller to seek approval from the mortgage holder. In carrying out the position, the notary must be based on accuracy, precision, and exactness. There are three notary liabilities that cover administrative, civil and criminal liabilities. In the case of a sales and purchase deed whose object is collateral in a bank, the notary does not provide legal counsel to the agreement to be made by the parties and does not provide advice based on confidence in the limits of ability and in the field the notary has mastered.

Keywords: Dispute Resolution; Sales And Purchase Agreement; Mortgage And Notary

Introduction

A sales and purchase agreement of land principally subject to the general provisions of the agreement listed in Book III of the Civil Code concerning Binding Article 1313 of the Civil Code provides the formula that “agreement is an act in which one person or more binds him/herself to one or more people other”. Subekti provides a definition of agreement as “an event where someone promises to another person or two people that promise to do something” (Subekti, 1996).

Article 1338 paragraph (1) of the Civil Code states that all agreements made legally apply as a law for those who make them. Article 1338 contains the principle of freedom of contract. It means that everyone is free to enter into an agreement in any form in terms of its form, content, name and to whom the agreement is intended. Based on this principle, it is concluded that the public is allowed to make

agreements in the form and contain anything (about anything) and the agreement is binding on those who make it like a law.

Before the sale and purchase of land before the authorized conveyancer, the parties made a sales and purchase agreement deed to the land before the notary. The binding is intended as a preliminary agreement of the main intention of the parties to transfer the rights to the land. This sales and purchase deed contains promises to buy and sell land when the requirements needed for that have been met (Supriadi, 2006).

Sale and purchase of land between the parties can be carried out through private deed or can also be carried out through a deed made before a Notary. For land that has a Certificate of Property Rights or land that does not have a Certificate of Property Rights, the sales and purchase can be carried out before a notary. The sale and purchase of land that has a Certificate of Property Rights is an initial legal act that precedes the legal act of sales and purchase of land. Therefore, sales and purchases are different from the legal acts of land sales and purchases. The notary has the authority to make a sale and purchase deed of land that has a Certificate of Property Rights but is not authorized to make an authentic deed of sales and purchase of land that has a Certificate of Property Rights because the authority belongs to the conveyancer (Harijanto, 2010).

In practice, sales and purchase deeds on land are often made in the form of authentic deeds before a notary. Thus, sales and purchase deed is an authentic deed that has the strength of perfect proof. The parameter to determine a notarial deed as an authentic deed is the signature of the relevant notary that is in the minutes and a copy of the deed or form of the deed from the beginning to the end of the deed. The parties intend this to provide more protection and legal certainty for the parties who made the deed because in making a deed, the notary does not take sides and protect the interests of the parties objectively.

With the help of a notary, those who make a sales and purchase agreement will get help in formulating the things that will be agreed. However, an agreement cannot always be in accordance with the agreement desired by the parties. Under certain conditions, various things can occur which result in the cancellation of an agreement that is canceled by the parties as well as by court order (Soekamto, 2005).

There are times when a case arises in the community related to a deed made by a notary. It caused a legal dispute because there were those who felt disadvantaged. In making the deed, the notary must apply in accordance with the rules set by the applicable laws and regulations. In reality, many legal problems and disputes arise from the transition of rights to mortgage-bound land. Provisions in Article 11 paragraph (2) letter g of Law No. 4 of 1996 concerning Mortgage does not forbid mortgage lenders to transfer/ release mortgage objects without the written consent of the mortgage recipient because the mortgage in principle follows the object in the hands of whoever the object is (the *droit de suite* principle). However, in practice, the deed of granting mortgages usually inevitably prohibits the mortgage lender from transferring/ releasing the object of the mortgage without the written consent of the mortgage recipient.

The notary, who will make a sales and purchase agreement deed for the mortgage-bound land, must first verify the object of the mortgage to the recipient of the mortgage, especially the mortgage deed; whether or not there is a promise that requires the lender to obtain written consent from the mortgage recipient if he/she is going to transfer/ release the object of the mortgage. This often happens where the notary rarely verifies and immediately makes a sales and purchase deed of the mortgage-bound land. One of them is deed No. 22 made by a notary in Padang. In this case, the land buyer has paid the mortgage-bound land in full without verifying the mortgage recipient.

The problem is that the deed can be null and void, because it is against the laws and regulations. In addition, if the seller (mortgage provider) does not redeem the debt and release the mortgage, it will weaken the position of the land buyer. Since if the land is executed/ auctioned by the holder of the mortgage, it can be carried out legally in accordance with the principle of *droit de suite* (the object of the right to follow in the hands of whoever the object is).

Research Method

Problem Approach

Based on the problems raised, in writing this legal research, the author uses legal writing that is empirical juridical; approaching the problem and application of laws and regulations that apply in reality that occurs in society, see what their application in the field and the community. Initially, secondary data are examined and then followed by research on primary data in the field; research on the parties involved in carrying out the duties of a notary public office. In legal research, the initial research process is on secondary data which is then followed by research on primary data in the field, or in the community (Soekanto, 2005).

Research Characteristic

This research is analytical descriptive, that is research that describes data about a situation or social symptoms that develop in the midst of society. Thus, it is expected to obtain a comprehensive, systematic overview of the object of research through this research (Shietra, 2016). From this study, the authors obtain data about a complete and thorough situation regarding the form of liability of the heirs of the notarial protocol to the temporary official notary.

Data Types and Sources

1. Primary data is data obtained directly in the field through interviews with respondent, notary in Padang City.
2. Secondary data is data that consists of legal materials such as:
 - a. Primary legal materials, namely binding legal materials such as laws and regulations and jurisprudence, including:
 - 1) The 1945 Constitution of the Republic of Indonesia
 - 2) Civil Code
 - 3) Law No. 5 of 1960 concerning Basic Rules of Agrarian Principles
 - 4) Law No. 2 of 2014 concerning Amendments to Law No. 30 of 2004 concerning Notary Position
 - b. Secondary legal material is legal material that provides an explanation of primary legal materials, including:
 - 1) Literature or writing results in the form of research results consisting of books and scientific journals
 - 2) The work of legal practitioners and writings of experts

- 3) Legal theories and opinions of scholars through the literature they use
- c. Tertiary legal materials are legal materials that provide instructions and explanations for primary and secondary legal materials; for instance, legal dictionaries, and binding legal materials especially in the notary sector.

Data Collection Technique

To obtain the data that this legal research requires, the data collection techniques are carried out as follows:

1. Library research: research carried out by visiting the library to collect data related to research problems which are carried through document studies. Document studies include studies of legal materials consisting of primary legal materials, secondary legal materials, and tertiary legal materials. Document study is a data collection technique by finding the theoretical foundation of research problems and studying documents and data relating to the object of research.
2. Interview: the role between personal or face to face when the interviewer asks questions designed to obtain answers that are relevant to the research problem to respondents. This interview was conducted with a semi-structured technique by making a list of questions. Even so, in practice, interviews may add or develop questions with a focus on research problems.

Data Analysis Technique

In research, data processing is carried out through editing and coding. Editing is the process of researching back notes, files, information collected by data seekers. It is expected to improve the quality of reliability of the data to be analyzed. After editing the coding is to give certain signs or certain codes to determine the relevant data or really needed.

In addition, this study uses qualitative data analysis in which the description of the data is analyzed based on the laws and regulations and the opinions of experts are then presented with sentences that have previously been analyzed. Then, it is interpreted and conclusions drawn in accordance with the issues discussed.

Results and Discussion

Process of Making Sales and Purchase Agreement of Mortgage-Bound Land in Padang City

Sales and purchase of land, according to the National Agrarian Law of the Republic of Indonesia is the permanent transfer of land rights so that it is termed cash. It means when a sale and purchase take place as evidenced by an authentic deed accompanied by a cash payment, immediately the transfer of rights has occurred perfectly. In other words, since then the relationship between the old juridical owner and the land has been cut off forever (Rahmat, 2005). Cash principle, has two options:

1. Paid in full when a sale-purchase agreement occurs; or
2. Paid in part/ half (down payment).

The down payment option usually occurs because the house is still in the form of a development plan or if the land in question is physically occupied by the seller or a third party and has not been handed over to the buyer, as contained in the Civil Code as follows:

Article 1474 of the Civil Code states:

“The seller has two main obligations, namely to surrender his/her goods and bear it”.

Article 1457 of the Civil Code states:

“Buying and selling is an agreement, in which one party binds itself to surrender a commodity and the other party pays the price promised”.

Article 1475 of the Civil Code states:

“Submission is a transfer of goods that have been sold into the power and possession of the buyer”.

In the National Agrarian Law, the fulfillment of the principle of light and cash is the minimum legal level of right transfer. While levering (physical handover) becomes a secondary level that is not a prerequisite for the transfer of rights, but is limited to norms after the transfer of rights. The sale of immovable property is declared valid if:

1. There is a basis for rights (buying and selling, exchanging);
2. There is a will to sell which is proven by the existence of down payment received by the seller;
3. The will and suitability of the will are written down in an authentic deed by the competent authority in the land sector; and
4. It has been paid in real terms, even if only half, while the payment of the remaining price can be paid in installments or paid on other occasions. Therefore, if the buyer does not pay off the buyer's nominal value in the future, the existing legal relationship will become a civil relationship of debts which are subject to and compliant with the Civil Code provisions because the land sale and purchase relationship is complete and finished when the principles of light and cash are fulfilled.

The juridical consequence is if the principle of light and cash in the transfer of land rights is fulfilled; the buyer cannot be sued on the basis of buying and selling land because the sale and purchase (transfer of land rights) is declared to be complete and perfect. In this case, the owner can only take it through efforts to collect debts from the land buyer.

The transfer of land rights must be through an authentic conveyancer deed which is a public official. Civil procedural law adheres to a formal proof system in which a notarial deed of the sale and purchase of land is a perfect proof before a judge (Gunawan, 2010), on the basis of:

1. Article 1868 of the Civil Code states
“an authentic deed is a deed made in the form prescribed by law by or in front of a public official authorized for that at the place where the deed was made”.

2. Article 1870 of the Civil Code states
“an authentic deed provides a perfect proof of what is contained therein to the parties along with their heirs or persons who have their rights”.
3. Article 1873 of the Civil Code states
“further consent in a separate deed, which contradicts the original deed, only provides evidence between the participating parties and their heirs or persons who have obtained their rights, and cannot apply to third parties”.

In addition, the deed which has formal proof also has a function as a proof (*probationis causa*). So, it is clear that the deed was made deliberately for the purpose of proof in the future. The written nature of an agreement in the form of the deed does not contain the validity of the agreement. However, it only aims to be used as evidence later on. The most important function of a deed, which was originally designed as evidence, is the strength of proof of the deed that is the strength of proof of birth (*acta publica probant sese ipsa*), formal strength of proof (it provides certainty about the event that officials and parties declare and do what contained in the deed), and the strength of proof of the material deed (which gives certainty the substance of the contents of the deed, events, promises, agreements, moral ties, ability, commitment, etc.).

Strength and Process of Making Sales and Purchase Agreement Deed on Mortgage-Bound Land in Padang City

Sales and purchase agreements which are generally referred to as “pre-sale and purchase” agreements indicate that there has been no formal sale and purchase or transfer of related object rights. It only raises preference rights. In practice, sales and purchase agreements are commonly used when the purchaser/recipient of the right has not been able to pay off his/her payment/compensation obligations or if the land is still in the process of being split, merged, separated or signed. Thus, the sale and purchase deed cannot be made yet. Since legally new buyers have preference rights, their juridical rights are only transferred when the transfer of rights through buying and selling has occurred and certificates in the name of the buyer have been issued.

In practice, sales and purchase agreements deed of land are often made before a notary in the form of an authentic deed. Thus, the deed sales and purchase agreement is an authentic deed which has the strength of perfect proof. The parties intend this to provide more protection and legal certainty for the parties who made it. In this case, in making a deed, the notary does not take sides and protect the interests of the parties objectively.

With the help of a notary, those who make a sales and purchase agreement will get help in formulating the things that will be promised. However, an agreement cannot always be in accordance with the agreement that the parties want. Under certain conditions, various things that result in an invalid agreement often occur, whether it is canceled by the parties or by court order (Mertokusumo, 2004).

Sales and purchase agreement actually has no difference with agreement in general. However, a sales and purchase agreement is an agreement that arises because of the open nature of Book III of the Civil Code which gives the widest possible freedom to legal subjects to enter into agreements that contain anything and in any form as long as it does not violate the laws and regulations. invitation, public order, and decency.

The contents of the sales and purchase agreement which is a preliminary agreement for the issuance of the core/main agreement are usually in the form of promises from the parties that contain provisions on the terms they agreed to for the validity of making the main agreement. For instance, the clause in the sales and purchase agreement of land rights usually contains promises from the seller of land rights and the buyer regarding the fulfillment of the conditions so that the main agreement, the sales and purchase agreement and the sale deed can be signed before the conveyancer. It is like a promise to arrange land certificates before the sale and purchase is carried out as the seller asks the buyer to promise to immediately make payment as a condition from the seller so that the sale and purchase certificate can be signed before the conveyancer (Arto, 2017).

According to Sudikno Mertokusomo, delivered at the Konperda IPPAT (Regional Conference of Conveyancer Association) in Central Java on February 15, 2004, those who found the law other than judges were notaries. The notary is not a judge who has to examine and try a case, but the notary has the authority to make an authentic deed regarding all actions, agreements and applications ordered by general regulations or requested by the parties concerned. The notary public faces a concrete legal problem from a client who wishes to make a deed. Concrete legal problems or events raised by judges are concrete events that must still be solved or formulated into legal events. In this case, the task of the notary is to make legal discoveries (Sutedi, 2012).

Thus, the legal discovery made by a Notary Public is a sales and purchase agreement. The discovery aims to solve the complex requirements that must be met by the parties before making sales and purchases in accordance with the laws and regulations governing land rights. In addition, all these requirements cannot be fulfilled at all times by the parties who will buy or sell land rights. It is intended that the process does not conflict with the provisions of the applicable laws and regulations.

The legal strength of the sales and purchase agreement deed made by a notary in the implementation of making a sales and purchase deed is very strong. Since the sales and purchase agreement made before a notary, the deed has become a notarial deed so that it is an authentic deed. On the other hand, a deed not made before a notary will be a private deed whose level of proof is below the authentic deed, even though Article 1875 of the Civil Code does indeed state that a private deed can have perfect proof like an authentic deed if the signature in the deed is recognized by the parties who signed it.

Implementation of Agreement Content and Resolution Form if Dispute Occurs in the Implementation of Sales and Purchase Agreement for Mortgage-Bound Land in Padang City

Usually, a dispute arises because of problems in the community. The problem is caused by two things as follows:

1. There is a difference between *das sollen* and *das sein*; and
2. There is a difference between what is expected and what happens.

The difference between what happens (*das sein*) and what is expected (*das sollen*) is a problem. The further the difference, the bigger the problem and the closer the difference, the smaller the problem. If *das sollen* and *das sein* are the same, there is no problem. In addition, the difference between what is expected and what happens is also a problem. Dispute to the sales and purchase agreement can be completed through the following stages:

Dispute Resolution of Sales and Purchase Implementation Through Deliberation and Consensus-Building

Deliberation means bargaining or counseling; discussion that intends to reach a decision on solving a joint problem. Deliberation is a form of democracy that has been used and run for centuries in Indonesia. The principle of deliberation has been stated in the Preamble to the 1945 Constitution.

This principle is the experience of precepts 4, democracy which is led by wisdom in consultation/representation. Indonesian citizens and community have the same status, rights and obligations. In exercising their rights, the community realizes the need to always pay attention and prioritize the interests of the state and the interests of the people.

Deliberation and consensus are the right solution in dispute resolution to the sales and purchase agreement of mortgage-bound objects because almost every clause in the agreement must include the procedure for dispute resolution.

Dispute Resolution of Sales and Purchase Implementation through Litigation Process at the Court of Appeal of the Parties (Choice of Court)

Executorial titles contained in a mortgage certificate legally give the right to the mortgage holder to execute or sell the object of the mortgage through an auction process if the mortgage provider breaks a promise in carrying out the achievement of the principal agreement. Regarding the executive power, when going to sell or transfer the object of the mortgage, the mortgage lender must obtain approval from the mortgage holder. Therefore, the sales and purchase agreement has the potential to cause a dispute if the implementation does not get approval from the Mortgage Holder. Therefore, settlement through the legal litigation process is necessary. The provisions of Article 142 paragraph (4) of Rbg, Article 118 paragraph (4) Hir, states:

“If there is a place of residence chosen by deed, the plaintiff may, if he/she wishes, submit his/her claim to the head of the district court in whose jurisdiction the item is located”.

Each agreement contains the stages of the procedure for dispute resolution through a judicial body appointed by the parties. In this case, it can take an effort to file a lawsuit to the District Court on the basis of breach of contract/ break the promise of the seller or buyer if one of the parties commit a default. However, the process of settling civil cases in the District Court, until there is a permanent and certain court decision (in kracht van gewijsde), usually through 3 (three) stages of the court level as follows:

- a. The District Court as the court of first instance;
- b. The High Court as the court of appeal; and
- c. The Supreme Court.

Based on the description of the case above, it has a connection with the case that the writer examined; i.e. there is an agreement between the debtor or seller with the buyer to make a sale and purchase transaction with a sales and purchase agreement, the power to pay installments and take certificates, and the power to sell. This is carried out because the certificate is still the object of the mortgage guarantee and is proof that the object of the mortgage guarantee has been transferred to another

party. However, this cannot be used as a basis that the holder of land and house rights in the certificate can change to the buyer's name.¹

In fact, many cases like this occur in the people of Padang City. The certificate which is the legal proof of the holder of land and house rights is still owned by the debtor. In this case, it is possible that the debtor or seller can someday pay off the debt and take the certificate. If this happens the land and house buyer will bear the loss because the deed cannot show that the land rights have been transferred.

In addition, the mortgage certificate which is supposed to be a collateral agreement does not guarantee the buyer's position if a dispute occurs and does not provide special rights where the buyer should be able to sell the collateral object. In actual practice, this authority is only held by the bank as the mortgage holder, which is carried out by transferring collateral items through an auction because the debtor or seller of the agreement.

This mortgage certificate has the same legal force as a court decision without first getting a court fiat. Under Article 6 of the Mortgage Law, banks do have the right to execute the collateral if the debtor does not pay off the debt in accordance with what was promised.

If the collateral object has been sold and controlled by another party, the bank will be protected by the existence of Article 7 of the Mortgage Law; objects that are the object of the mortgage will always be burdened by the mortgage even if the object is in the hands of anyone. However, if the buyer wants to save the land and the house, the buyer can pay off the debtor's debt so that the mortgage is erased because the debt is written off.

This is in line with the provisions of Article 1382 paragraph 2 of the Civil Code which states that an engagement can also be fulfilled with third parties who do not have an interest as long as the buyer acts on behalf of and to repay the debtor's remaining credit or act on his/her own behalf provided he/she does not replace the rights of the debtor .

In practice, the power of attorney to pay installments and take the certificate can be used by the buyer to take a certificate from the bank. Whereas for the process of making a sale and purchase deed and registration of the transfer of rights to the certificate, the buyer can use the deed of selling authority. However, if in the future the buyer finds it difficult to transfer the rights to his certificate administratively, the buyer can carry out repressive legal protection aimed at resolving the dispute that arises when there is a violation of legal norms in the legislation by filing a civil claim to the court.

Liability Notary When Dispute Related to Dispute Resolution of Sales and Purchase Agreement for Mortgage-Bound Land Occurs

In this case, the notary is obliged to be liable to the authentic deed he/she made because the public considers the notary to be someone who is an expert in the notary field. According to Habib Adjie, the position of notary in carrying out his/her liability is as follows:

As a public official, the final product of a notary public is an authentic deed. It is bound in the provisions of civil law, especially in the law of proof. Then the deed does not qualify as a concrete, individual, and final state administration decision and does not result in civil law for a person or civil

¹ Results of an interview with Desrizal Idrus Hakimi, Notary in Padang City on August 9, 2018, at 3:00 p.m. West Indonesia Time.

legal entity because the deed is a formulation of the wishes or expectations (*wilsvorming*) of the parties listed in the notary deed made by the notary deed or before a notary public and is not the will of the notary public.

In carrying out the position, the notary must be based on accuracy, precision, and exactness. Three elements of personal traits that should receive special attention in shaping the character to carry out the position of notary are as follows (Adjie, 2009):

1. Honest with ourselves
2. Good and right
3. Professional

One of the behaviors of a notary in carrying out the position is always to be professional. In holding the position, the notary must be honest with oneself based on spiritual, moral, mental, and moral good and right. In addition, the notary must have a high intellectual level and a neutral or impartial nature, independent, do not pursue material, uphold the dignity and professional notary. The daily behavior of a notary in carrying out the position must be professional which implies that:

1. It is in accordance with the law, the code of ethics, the articles of association, by-laws;
2. It is appropriate and mastered the deed making technique;
3. The notary must pay attention to the accuracy, carefulness, and prudence;
4. The notary is not affected and does not take sides;
5. The notary worries or makes a deed in accordance with the actual reality;
6. The notary does not justify any means or force the will;
7. It is completed in a fast and timely manner.

Conclusion

1. The making of a sales and purchase agreement is caused by several factors: (1) there is a debt between the parties that make the object of land as collateral for repayment of the land and is accompanied by a power of attorney, (2) the land is still in the process of splitting, merging, separating or verification, (3) land is customary land so the buyer must obtain the consent of the people to transfer the rights, (4) the transfer of land rights requires permission from the relevant agency such as cultural heritage land, (5) the land is being used as collateral (*borgtoch*) at the bank and bound The mortgage and tax administration have not yet been completed so that the transfer of land rights through a conveyancer cannot be carried out. A sales and purchase agreement of a mortgage-bound object can be made by making a sales and purchase agreement on the condition that it has the approval or permission of the mortgage holder/creditor to provide certainty and legal protection to the parties regarding the agreement they made. The position of the deed sales and purchase agreement is null and void because the legal conditions for an agreement are not fulfilled. Sales and purchase agreement sale and purchase is carried out on the basis of an agreement even though the buyer knows that the object of sale and purchase is a guarantee of debt to the bank by the seller. Based on the agreement, the notary made the deed sales and purchase agreement. However, the

sales and purchase agreement has a legal flaw because it does not fulfill one of the terms of the agreement in Article 1320 of the Civil Code. In this case, the agreement does not meet objective conditions. The mortgage giver (land owner) or the so-called seller violates Law No. 4 of 1996, Article 11 paragraph (2) letter g concerning Mortgages which states that the mortgage lender promises not to transfer the object of the mortgage. With the clause contained, the mortgage lender is bound not to act or take a stance that could result in ownership of the object of the mortgage being transferred to another party without the mortgage holder's consent.

2. Dispute resolution of sales and purchase agreements of mortgage-bound objects can be implemented through several stages. The first is through a process of deliberation and consensus in which the seller invites the buyer to negotiate the problem by requesting the cancellation of the sales and purchase agreement and returning all costs of the original sales and purchase agreement or by asking the seller to ask for approval from the mortgage holder. Next is through the litigation process by filing a lawsuit in court as the court is appointed by the parties (choice of court).
3. In carrying out the position, the notary must be based on accuracy, precision, and exactness. There are three notary liabilities that cover administrative, civil and criminal liabilities. In the case of a sales and purchase deed whose object is collateral in a bank, the notary does not provide legal counsel to the agreement to be made by the parties and does not provide advice based on confidence in the limits of ability and in the field the notary has mastered. The notary is obliged to provide legal counseling to the appearers who want to make a deed to the notary. The legal basis, Article 15 paragraph (2) letter e Law of Notary Position No. 2 of 2014, stated that "the function of the existence of a notary public officer guarantees the interests of the parties in carrying out a legal act". Legal counseling will be very useful in proving a deed. Thus, the parties understand the provisions of deed making that do not violate the applicable legal rules. Legal counseling can increase understanding to become a law conscious society.

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