

THE BINDING POWER OF GRANTING A POWER OF ATTORNEY FOR A LAND RIGHT TRANSFER

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ABSTRACT

Granting a power of attorney for land right transfer has often caused problems and even disputes. This is caused by the lack of understanding and disreputable faith (misuse of power) of the parties in making the power of attorneys, which consequently result in the inconsistency of the transfer of the certain rights of land with the intended purposes, provisions and applicable laws. In certain conditions, a power of attorney already that has been issued is not necessarily usable to execute the transfer of a land right, and worse still, it shall be declared to be invalid/no longer effective. All the parties concerned to the granting of the power of attorney definitely need legal certainty and justice to execute the granting of the power of attorney. This kind of study is one of normative law. Based on these issues, the study highlights the legal meaning of granting and making a power of attorney and their binding power regarding the transfer of right of land. Thereby, the title of this study is "The Binding Power of Granting a Power of Attorney for a Land Right Transfer."

Keywords: Power of Attorney, Transfer of Right of Land

INTRODUCTION

Granting of a power of attorney is intended to simplify and expedite every business or trade activities. The power given by the grantor to the grantee to represent his or her interest may, in turn, cause problems. The problems may be generated by various factors, inter alia: the lack of understanding of the meaning of a) the power of attorney, b) the procedures for granting the power of attorney, c) the strict legal rules regarding the granting of the power of attorney, the validity period of the power of attorney, prohibitions in issuing the power of attorney, and the binding power of the making of the attorney. Those various issues have often generated disputes in the public society, particularly within business and trade relationships. As a consequence, the illegal granting of the power of attorney may make the power of attorney be revoked or ending up in losses to the grantor and grantee and may even cause a criminal consequence if it contains bad faith. This may happen in a business transaction regarding a transfer of right of land.

Each individual in their life requires legal certainty and the existing regulations are expected to realize the real justice for all people as provided in the Preamble of the Constitution of the Republic of Indonesia of 1945. The same is expected to happen in business and trade relationships. The good understanding of the laws is supposed to be able to fulfill the needs for law-observing and the guarantee of certainty and justice for anyone whose life is related to business and trading activities, and also to family relationships. However, if laws are not properly understood and no verdict able to accommodate the public legal needs for legal certainty and justice in business, trade and family relationships, this uncertain conditions may the growth of public and state economy which in turn make the benefits that people may get tend to

be quite little and even nil (zero). Ground by the problems described above, the present study addresses two issues: (1) What is meant by granting the power of attorney for the transfer of right of and? (2) What is the binding power of the granting of power of attorney for land right transfer? Therefore, the title of this study is "Binding Power of Granting of a Power of Attorney for Land Right Transfer".

RESEARCH METHODS

The type of research used in this study is Normative Law Study with the statute approach. The legal materials in this study comprise primary legal materials and the secondary legal materials. Primary legal materials refer to the legal materials generated from certain authority and having binding power in the form of statutory regulations and other regulations related to granting the power of attorney. The secondary ones refer to legal materials that provide clarifications to the primary legal materials representing the instructions for the direction of the study. The secondary materials are collected from personal bibliography, articles, and the results of related previous studies and snowball technique by searching or finding one or two main sources or investigated by legal materials which is the main legal sources until the information is sufficient for this study. The procedures taken to identify the problems to determine in main subjects are elaborating the sub-subject that is later made as the basis for collecting legal materials, processing and analyzing the data to serve as the basis for systematically arranging them to ultimately make them a result of legal study resulted by describing it does. Furthermore, primary and secondary legal materials are analyzed using systematic legal interpretation methods and authentic interpretations and realized by describing it descriptively.

DISCUSSION

The Grant the Power of Attorney for Transfer of Land Right

The grant of power of attorney as referred to in articles 1792 - 1819 of the Indonesian Civil Code (KUHPerdata) constitutes the grant of power by an Grantor or Grantee to act in the interest of the grantor, and attorney and therefore in the power of entails certain obligations, to both the grantor and grantee and such power may be terminated or terminate for the reasons as mentioned in articles 1813 - 1819 of the Indonesian Civil Code (KUHPerdata). In granting a power of attorney for the interest of the grantor, the grantee is obliged to, inter alia: perform or exercise the power of attorney as along as he or she is not free from such power, bear all the expenses, losses and interest accrued if the power of attorney is not executed, perform all the activities that have been started when the Grantor dies, give reports and all the considerations regarding the execution of the power of attorney, be responsible for the person whom he or she has appointed to replace him/her, be responsible for the negligence by that person. Although the Grantee executes the power of attorney for the interest of the Grantor, the Grantee shall be responsible for the power of attorney granted to him or her as mentioned above. The same shall apply to the grantor, for the power of attorney given to the grantee, the grantor is liable to certain obligations for the grant of such power of attorney. These obligations include, among other things: to meet all the agreements that are made by the grantee in accordance with the power that has been granted to him or her, to reimburse all the expenses that the Grantee has spent and the interest thereof, if any. The grant of a power of attorney for the interest of the grantor shall cease: with the withdrawal of such power of attorney from the grantee, with the notice of suspension or

termination of the power of attorney, with the grantor or the grantee being put into custody or being bankrupt, with the marriage of a female grantor or grantee, with the appointment of a new grantee by the grantor to act for the same purposes and the revocation of the first/initial power of attorney. A power of attorney may also terminate with the grantee releasing him or her therefrom by giving a notice of termination to the grantor and a power of attorney may terminate if the grantor or the grantee deceases, or if both the grantor and the grantee die.

The grant of a power of attorney for the interest of the grantor that has not been executed or performed within a relatively long period of time, and performed subsequently, cannot be used in practice, particularly the power of attorney of the transfer of right of land. If the grantee intends to exercise his or her power to perform the transfer of right of land aforesaid, the relevant official for the transfer of the right of land (a notary public or Land Deed Official (PPAT)), shall ascertain that such power of attorney is still valid, neither revoked nor transferred by the Grantor to a new Grantee. For a power of attorney that has been made for a long time, a confirmation statement is required to declare that the power of attorney is still valid. The grant of power for the interest of the Grantor shall be proven to be existing and valid, and not having been revoked and the grantor are still alive, evidenced by an authentic statement by the Grantor (made before a Notary Public). With the fulfillment of all the provisions as mentioned above, the purpose of the grant of a power of attorney for the interest of the grantor may achieve the objective and a sense of legal certainty for all the parties concerned and a sense of justice will be created in such grant of power of attorney.

Nevertheless, power abuse is unavoidable, leading to the possible ensuing conflicts or disputes, especially in relation to the grant of power of attorney in relation to agrarian affairs/transfer of rights of land. The power of attorney granted to an grantee in a transfer of right of land for the interest of the grantor to transfer his or her right of land may be abused by the grantee to favor his or her own personal interest and not duly performing all the obligations that have been assigned to him or her as an grantee. Therefore, the purpose of the grant of a power of attorney of acting for and on behalf of the grantor even provides legal uncertainty and a sense of injustice for the grantor as his or her rights in the power of attorney are not fulfilled by the grantee.

According to Bergstein (Herlien Budiono, 2014: 220), an irrevocable power of attorney shall qualify the following requirements:

The agreement shall be based on the foundation of valid right/legal; entitlement

Interest for non-grantor shall be the minimum requirement for the validity of the right/entitlement,

The valid legal obligations conferred to a grantee shall be irrevocable; and

There is a "cause" to the effect of such legal obligations, the cause in terms of being accepted as a public requirement. The grant of a power of attorney of the transfer of right of land which is based on an agreement shall be the grant of power of attorney to comply with all the obligations of the grantor to complete an agreement to transfer the right of land which has been previously made by them. Prior to the creation of an agreement of grant of power of attorney, the parties shall first enter into an agreement of the transfer of right of land, for example a transfer of right of land made with a sale and purchase agreement, bequest, trade, or revenue (inbreng). The grant of power of attorney of the right of land as a result of the agreements prior to such grant of power of attorney shall become the grant of an irrevocable power of attorney by the grantor or a power of attorney which cannot be revoked unilaterally, except with the mutual approval of the grantor and the grantee, as provided in the provisions of

articles 1813 – 1819 of the Indonesian Civil Code (KUHPdata) (on the termination of the grant of a power of attorney). If the grantee desires to exercise his or her power to transfer the right of land, the relevant authority concerning the transfer of the right (a notary public or land deed official (PPAT) shall no longer ascertain that the power of attorney is still valid, or has been revoked or transferred to a new grantee by the grantor. The grant of a power of attorney of the right of land to a grantee for the benefit of the grantor knows no elapse of time, either caused by the fact that the power of attorney has been in existence for a long time or a statement of confirmation that such power of attorney is still valid is no longer required. This grant of power of attorney for the interest of the grantor requires no evidence that the power is still in existence and valid, the power has not been revoked and it does not require a statement that the grantor is still alive, evidenced with an authentic statement (which is made before a notary public) by the grantor, grantee of a transfer of right of land in favor of the grantee, given with the ground of right shall prove that such power of attorney is classified as an absolute power as referred to in the Instructions of the Minister of Domestic Affairs (Menteri Dalam Negeri) Number 14 of 1982, and that the existence of such power of attorney is the result of an agreement of the transfer of right of land evidenced by a deed of agreement of a transfer of the right of land.

The grant of a power of attorney of a transfer of the right of land shall be a restricted or prohibited grant of power of attorney if such grant of power of a transfer of the right of land is classified as an absolute power as referred to in the Instructions of the Minister of Domestic Affairs No. 14 of 1982. In provisions of the Instructions of the Minister of Domestic Affairs No. 14 of 1982, the grant of a power of attorney as regulated in article 1796 of the Indonesian Civil Code (KUHPdata), it is implied that there are some uncertainty of the provisions themselves. The prohibition of the absolute power does not automatically mean that any transfer of the right of land shall not use an absolute power. If the purpose of the issuance of the Instructions of the Domestic Affairs No. 14 of 1982 is further probed, it is the consequence of the illegal conditions violating a sense of justice for the Grantor. Before the issuance of the Instructions of the Minister of Domestic Affairs No.14 of 1982, there had been a lot of abuses and improper and unjust controls and ownership of land and there had been a lot of grants of power of attorney to transfer the right of land conducted secretly using an absolute power, that eventually rendered losses and even the loss caused by the transfer of the right of land in the grant of such power of attorney, and such conditions certainly violate the sense of justice for the grantor.

In the case of a transfer of the right of land as a result of that right of land being used as a guarantee of a loan, such right of land is temporarily transferred to the lender for a period as long as the loan is not fully paid. To provide a guarantee of a proper repayment of a loan of a debtor, an agreement is made between the lender and the debtor in which the debtor gives a power of attorney to place the right of liability of the land being used as the guarantee of the loan, the power as such is given as a Power of Attorney that places or inflicts the right of liability (abbreviated as SKMHT in Indonesian). SKMHT is a limited of specific power of attorney that places the right of liability. SKMHT shall be made in a notarial deed with a notary public or land deed official (PPAT) and may not be made as deed signed by the parties only. The power in an SKMHT constitutes a specific power of attorney, a power of attorney limited to bear the power to encumber the right of liability as one referred to in article 1795 of the Indonesian Civil Code (KUHPdata) and Constitution of the Republic of Indonesia No. 4 of 1996 (UU No.4 th 1996). Article 15-point (1) of the said constitution holds that: a Power of Attorney of the Encumbrance of the Right of Liability shall be made as a deed of a notary public or land deed official (PPAT) and shall fulfill the following requirements:

- a. It shall not contain a power of attorney to perform any other legal action other than to encumber or place the right of liability;
- b. It does not contain the right of substitution;
- c. It clearly specifies the object of the right of liability, the amount of the loan and the name and identity of the creditor, the name and identity of the debtor if the debtor is not the grantor of such right of liability.

In the Regulation of the Ministry of Agrarian Affairs and Spatial Detail/Head of National Agrarian Board (Perkaban) No. 22 of 2017, it is mentioned in article 2 that : a Power of attorney that encumbers the Right of Liability to ensure the repayment of a credit/financing/loan shall be valid in the termination of the principal loan, as regulated below:

- a. Credit/financing/loan given to a Micro and Small Businesses within the meaning scope of a productive business owned by a person and/or a business of a natural person.
- b. Credit/financing/loan shall be aimed to provide residences (housing), which shall include: Ownership or renovation of the main house, simple house or tenement with the maximum size of land being 200 m² (two hundred square meters) and minimum size of 72 m² (seventy-two square meters) and a credit given to finance the building.
- c. Any other type of productive credit/financing/loan limited up to Rp. 200,000,000 (two hundred million rupiah).

Article 3 of the Permaban No. 22 of 2017 holds that: a power of Attorney of the Encumbrance of the Right of Liability is valid for up to 3 (three) months to apply to the right of the land the certificate of which is in the process of arrangement, with the following criteria:

- a. productive credit, financing or loan for a Micro/Small Businesses with a limit between Rp. 50,000,000 (fifty million rupiah) up to Rp. 250,000,000 (two hundred and fifty million rupiah).
- b. productive credit/financing/loan aimed at the provision of shop-houses by Micro/Small Businesses, with a size of land being 200 m² (two hundred square meters) and building size of 70 m² (seventy square meters) with a credit/financing/loan limit not exceeding Rp 250,000,000 (two hundred and fifty million rupiah) secured with the right of land the provision of which is financed by such credit/financing/loan.

Lease agreements often contain the provision that the lessee may use the object of lease in accordance with what has been agreed upon and the lessee is allowed to transfer its lease to any other party or its right executor. Such clauses in a lease agreement of land lease may be understood that the lessor gives a power to the lessee to perform such actions. Thereby, it indicates that there is a grant of power from the grantor to the grantee of the right of land owned by the lessor to perform actions that include using the object of lease and conducting the transfer of the right of lease. The grants of power by the grantor/lessor to the lessee constitute a limited power of attorney for a specified period of time, valid as long as the right of lease that the lessee possesses.

The grant of power which is started with an agreement of transfer of the right of land, in the form of sale and purchase, trade, bequest, legacy, will, common division of right, revenue (inbreng) to a legal entity company, settlement (in the case of disputes over land), shall be become an absolute power of attorney that does not violate any prohibitions, as referred to in the Instruction of the Minister of Domestic Affairs No. 14 of 1982 and it does not cause a power of attorney given on the basis of a transfer of the right of land terminate, as referred to in articles 1813 – 1819 of the Indonesian Civil Code (KUHPerdota). The grant of power of attorney which is based on an agreement of a transfer of the right of land in the form of fully paid sale and purchase, trade, bequest, division of common rights, revenue (inbreng), settlement (in the case of disputes over land) waiving the provisions of article 1813 BW is aimed to supporting the legal standing of the parties who acquire the transfer of right of land as the grantees and right

executors. As such, the laws will function properly because the transfer of right(s) which is done in good faith will bring legal certainty and justice for all parties, in particular those who receive the transfer of rights as mention above, who have shown good faith.

A deed of transfer of the right of land which is followed by a power of attorney of transfer of the right of land shall be drawn up authentically by a notary public (for all types of agreement deeds) or Land Deed Official or PPAT (for SKMHT only), therefore, based on the deed of power of attorney, may continue the transfer of right before the relevant authority (Land Deed Official/PPAT), for a Land Deed Official to cause to be made, in the form of a sale and purchase, trade, deed of bequest, deed of common right division, APHT, or a deed of revenue (inbreng) into a legal entity company, to be registered with the National Agrarian Board Office to satisfy the ground of publication so that the transfer of the right of land becomes publicly clear, and thereby the public is legally consider to have known that the right of the land has been transferred, and no party or person may raise disputes against it, except for finding the evidences that the transfer of the land has otherwise been in breach of the provisions of transfers of the right of land.

Binding Power of the Grant of Power of Attorney for Transfer of the Right of Land

In sale and purchase agreements, the parties also agree upon on the method to guarantee the interest of the buyer of the sale and purchase of the right of land transacted in the sale and purchase in good faith to give the buyer a power of attorney to transfer the right of land before the relevant Land Deed Official (PPAT), and therefore the object of purchase is reregistered in the name of the buyer. The grant of a power of attorney of transfer of right of land as a consequence of a sale and purchase, the right of the land and it shall become a grant of power to protect the grantee (in this case is the buyer of the land), stating that in due time, the grantee (buyer) may re-register the right of land in the absence of the grantor (seller). The grant of power of attorney in an agreement of transfer of right based on a sale and purchase agreement shall not terminate with the death of the grantor and the heirs of the grantor shall comply with what has been agreed upon between the grantor and grantee. Therefore, the power in a transfer of the right of land based on the ground of entitlement (based on the existence of a sale and purchase agreement), is irrevocable or shall not become null and void as long as all the legal requirement of the validity of the agreement are met, as mentioned in article 1320 of the Indonesian Civil Code (KUHPerdota). The grant of power of the transfer of right of land based on a fully paid sale and purchase agreement is classified as an absolute power, but not the absolute power as referred to in the Instructions of the Minister of Domestic Affairs No. 14 of 1982. The grant of power in a fully paid sale and purchase constituting an absolute power based on valid entitlement cannot be cancelled or revoked and apply as Legislation (Undang-Undang) for the parties and shall be observed to protect the interest and provide the legal protection for the buyer who has bought the land in good faith. And therefore, the grant of a power in a sale and purchase agreement of a fully paid transaction has legal power and is applicable as legislation for the parties, and everyone or judges shall observe and respect it.

In a sale and purchase agreement with periodical payments (installments), the parties have not fully received their respective rights but the certainty of such an agreement shall be able to be predicted/assured by the parties, the potential probabilities, and obstacles ad even the possibility of not achieving the purposed shall be anticipated. The parties, however, in such situation, may require that a power of attorney of a transfer be made, which (power of attorney) may be used if the aspects agreed upon in the agreement have been achieved (fully paid). That power of attorney

shall only become legally powerful if the grantee has fully fulfilled his or her obligations to pay as required in the said sale and purchase agreement and that power of attorney shall become invalid or invalid if the requirements (full payment) are not fully fulfilled.

In a loan agreement, the creditors as the lender oftentimes require a guarantee from the borrower as security for the credit. The debtor shall assign his or her assets as the guarantee of the amortization of his/her loan by giving a power of attorney to the creditor. The power of attorney given by a debtor to a creditor is a power that encumbers the right of liability (SKMHT) as provided in Law (UU) No.4 of 1996 on the Right of Liability of Land and all the Objects related to Land.

The deed of the right of liability of land (SKMHT) is a power of attorney that encumbers the right of liability by the debtor (borrower) to another party/bank (creditor/lender) to encumber the right of liability in the due time with the Deed of Grant of Right of Liability (Indonesian: Akta Pemberian Hak Tanggungan (APHT)) for the object of the guarantee (the right of land and building). The grant of power of attorney with a SKMHT is a grant of power of attorney of a specified period of time, and thereby a grant of power of attorney with an SKMHT shall only be valid for a period of time specified in the loan/credit agreement, as referred to in article 2 of the Perkaban No. 22 of 2017, as for any other aspects other those mentioned in article 2 of the Perkaban No. 22 of 2017, the grant of power of attorney of encumbrance of the right of liability shall be followed by the creation of Deed of Grant of Right of Liability (APHT), at the latest 1 (one) month following the date of the creation of such Power of Attorney of Encumbrance of the Right of Liability (SKMHT).

The grant of power of attorney of transfer of the right of land on the basis of right or entitlement (the existence of a bequest agreement, common right division agreement, a trade agreement, an agreement of a gift with revenue (inbreng), it is agreed upon to materialize the purposes of the transfer mentioned above. The grant of a power of attorney in this case is equal to that of a fully-paid sale and purchase transaction. The grant of power of attorney of the transfer of the right of land as mentioned above is agreed upon to protect the grantee (in this case the recipient of the right of land by bequest or trade or revenue (inbreng) or division of common rights) to, in due time, conduct the process to re-register the right of land without the presence of the grantor. The power of attorney in a transfer of the right of land so granted shall not terminate with the death of the grantor, and the heirs of the grantor shall comply with what has been agreed upon between the grantor and grantee. The grant of power of attorney of a transfer of the right of land on the ground of entitlement as mentioned above shall not be revoked or becomes null and void and represents an absolute power, but not the absolute power referred to in the Instructions of the Minister of Domestic Affairs No.14 of 1982.

In law enforcement, there are 3 (three) elements to be considered, namely: legal certainty (Rechtssicherheit), benefits (Zweckmassigkeit), and justice (Gerechtigkeit). The public hopes that there is legal certainty, as with the legal certainty, the public will be orderly. The laws are supposed to create legal certainty to maintain public orders. Further, the public also expect the benefits on the performance or law enforcement. The law implementation or law enforcement shall be fair (Sudikso, 2019: 223). There are three aspects to be considered in enforcing the laws: legal certainty, benefits and justice, in order to create the law enforcement as expected by the public, it is very difficult to do in its implementation, but it does not mean impossible to be done, provided that in the implementation of law enforcement there are compromises of the three. The same applies to the grant of power of attorney of transfer of the right of land; it shall give the

sense of legal certainty, benefits and justice to the public, in relation to the grant of such power of attorney.

CONCLUSION

The conclusion of the issues and discussion as above mentioned is detailed as follows:

The grant of power of attorney of transfer for the right of land is an approval/agreement between the grantor and grantee to perform the transfer of the right of land for the interest of the grantor and/or the grantee based on the reasons/provisions as referred to in such grant of power of attorney and not included in the prohibitions of the making of a power of attorney so that purpose and objective of such grant of power can be achieved.

The binding power of the grant of power to transfer the right of land is clarified as follows:

The grant of a power of attorney to transfer the right of land based on a prior agreement of a transfer of the right of land that has qualified all the requirement of the validity of the agreement as provided in article 1320 of the Indonesian Civil Code (KUHPerdara), for example, with the existence of a sale and purchase, trade, revenue agreement or any other agreements as an applicable provision for a transfer/hand, over of the right of land, then such a power of attorney applies as an absolute power of attorney and is irrevocable, except by the mutual agreement of all the parties making such power of attorney.

The grant of power of attorney regarding transfer of the right of land for the interest of the grantor bears legal power as a power of attorney as long as it fulfills the provisions of granting a power of attorney as provided in article in article 1792 until Article 1812 of the Indonesian Civil Code (KUHPerdara) and as long as such power of attorney does not terminate as referred to in article 1813 - article 1819 of the Indonesian Civil Code (KUHPerdara).

The grant of a power of transfer of the right of land bearing legal power as intended to be a grant of power shall not become an absolute power of attorney as referred to in the Instructions of the Ministry of Domestic Affairs No. 14 of 1982.

The grant of power of attorney of the right of land having a legal power is intended to be a grant of power if that power constitutes a grant of power of Attorney given with the Power of Attorney of Encumbrance of the Right of Liability as described in Constitution No. 4 of 1996 and the Perkaban No. 22 of 2017.

The grant of power of attorney as aforesaid shall be made with an authentic deed that is made before a relevant authority, a notary public of land deed official (PPAT), in accordance with his or her jurisdiction.

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