

The Legality of Land Transactions with Certificates Encumbered by Mortgage Rights

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Abstract: The sale and purchase of land in Indonesia, particularly when a mortgage right encumbers the land certificate, often gives rise to legal complications. This study examines the legal validity of land sale transactions in which the mortgage has not been officially discharged (Roya). By analyzing court rulings and statutory regulations, the study aims to provide insights into the implications of such transactions, especially concerning the protection of creditor rights and legal certainty for buyers. This research employs a normative legal research method, focusing on applicable legal norms and their implementation in practice. The results show that while the sale of land encumbered by a mortgage may be considered legally valid if the parties involved have fulfilled the basic requirements of agreement, capacity, a specific object, and lawful cause as stipulated in Article 1320 of the Civil Code, the transaction remains legally risky if the mortgage is not officially discharged. This study contributes to the discussion of agrarian law in Indonesia by offering a deeper understanding of the legal nuances of land transactions burdened by a mortgage. It provides recommendations for legal practitioners, academics, and other relevant parties.

1. Introduction

Land plays a crucial role in Indonesian society's lives, especially as a source of welfare and prosperity. According to Article 33, paragraph (3) of the 1945 Constitution, land and the natural resources contained therein are assets controlled by the state for the greatest possible prosperity of the people. In line with this constitutional mandate, the Indonesian government enacted Law No. 5 of 1960 concerning the Basic Agrarian Law (UUPA), which serves as the primary foundation for agrarian regulation, including land sale transactions.¹ The term "sale and purchase" related to land affairs is included and regulated in legislation, specifically in Article 26 paragraph (1) of the UUPA, which states that sale and purchase, exchange, donation, granting by will, and other actions intended to transfer ownership rights and supervision are governed by government regulations. The legal basis for this legal certainty is regulated in the 1945 Constitution Article 28D paragraph (1),

¹ Aldhi Arrahman, Bagus Kurniawan, Ayu Faradilla, Muhammad Syahrul Rafli, and Liga Alakbar, "Penyelesaian Sengketa Peralihan Hak atas Tanah Melalui Jual Beli di Bawah Tangan," *Consensus: Jurnal Ilmu Hukum* 1, no. 4 (2023): 161-168, <https://doi.org/10.46839/consensus.v1i4.22>.

which reads, “everyone has the right to fair legal recognition, guarantee, protection and certainty as well as equal treatment before the law.” The purpose of the law that is close to reality is legal certainty; legal certainty must be provided by every Indonesian citizen so that legal relations between people, including legal entities, with earth, water, space, and authorities are derived from legal relations.² According to Hans Kelsen, law is a system of norms. A norm is a statement that emphasizes the “should” or *das sollen* aspect by including some rules about what to do. Norms are deliberative products and human actions. Laws that contain general rules are guidelines for individuals to behave in society, both in relationships with fellow individuals and in relationships with society. These rules limit the community in burdening or taking action against individuals. The existence of the rule and the implementation of the rule create legal certainty.³

However, in practice, not all land sale and purchase transactions can provide the expected legal certainty. One type of transaction that often causes problems is under-the-table land sales, typically conducted without an authorized land deed official (PPAT). Although these transactions are often based on trust between the parties involved, they carry a high legal risk, mainly when they are only supported by a receipt without a valid deed. This situation can disadvantage the buyer, particularly about land ownership that has not yet received formal recognition from the state, considering the importance of land certificates as legitimate proof of ownership in the eyes of the law.⁴

One of the issues in land sale and purchase transactions occurred between M. Usman and Alfian Adel. Decision Number 87/Pdt.G/2023/PN.Ptk from the Pontianak District Court is a ruling in a civil case between M. Usman as the plaintiff and Alfian Adel as the defendant, with the Pontianak Land Office as a co-defendant. This case concerns a dispute over the ownership of a plot of land in Pontianak City, West Kalimantan, covering an area of 377m² and evidenced by Ownership Certificate (SHM) Number 2747. In this case, the plaintiff, M. Usman, owned a plot of land with an SHM previously under the defendant’s name, Alfian Adel, in Pontianak City. The plaintiff purchased the land from the defendant after the defendant approached him for assistance in buying back the land, which had been used as collateral at PT. Bank Mandiri, Tbk. Pontianak Branch, due to defaulted credit. In 2015, after a price agreement was reached, the plaintiff and the defendant jointly paid off the defendant’s debt to Bank Mandiri and obtained the original SHM documents. This event was witnessed by a Bank Mandiri employee named Samsul Huda. A private sale then took place, with payment evidence of IDR 100,000,000. However, transferring the SHM ownership was not completed due to the plaintiff’s financial limitations. The plaintiff has taken possession of the land without objection from any other party.

In 2020, the plaintiff attempted to process the transfer of the SHM ownership but encountered difficulties because the defendant could not be located, resulting in administrative issues at the Pontianak Land Office. The plaintiff then filed a lawsuit to validate the sale and purchase transaction’s legality and sought permission to transfer the SHM. However, the court dismissed the

² A. Jumriani, B., S., & Darmawati, D. “Peran Pemerintah Dalam Memberikan Kepastian Hukum Bagi Masyarakat Suku Bajo Di Desa Torosiaje Laut”. *Jurnal Restorative Justice*, 7(1), (2023) 18-29. <https://doi.org/10.35724/jrj.v7i1.5165>

³ Hans Kelsen, “*General Theory of Law and State*”, Translate by Anders Wedberg, New York: Russel and Russel, 1991, dikutip dari Jimly Ashidiqqie dan M ali Safa’at, Gustav Radbruch dikutip dari Muhammad Erwin, *Filsafat Hukum*, (Jakarta: Raja Grafindo, 2012), h.12-14.

⁴ Aldhi Arrahman, Bagus Kurniawan, Ayu Faradilla, Muhammad Syahrul Rafli, and Liga Alakbar. “Penegakan Hukum Dan Penyelesaian Sengketa Peralihan Hak Atas Tanah Melalui Jual Beli Di Bawah Tangan”. *Consensus : Jurnal Ilmu Hukum* 1 (4), 2023: 105-10. <https://doi.org/10.46839/consensus.v1i4.22>.

lawsuit because it was premature and lacked necessary parties, reasoning that PT. Bank Mandiri, as the holder of the mortgage on the land, had not been included in the lawsuit. Additionally, the judge considered that the lawsuit for the transfer of the SHM could not proceed because the land was still subject to an unresolved mortgage. As long as this mortgage remains, the land cannot be freely sold or have its ownership transferred.

The sale of land encumbered by a mortgage requires the fulfillment of strict legal requirements to ensure the validity of the transaction and the protection of the creditor's rights. According to the provisions of Article 11(2)(g) of Law No. 4 of 1996 on Land Mortgages and Objects Related to Land (UUHT), the owner of land used as collateral cannot transfer the land to another party without written consent from the creditor. This is intended to protect the creditor's rights over the mortgaged object and to ensure that the land subject to the mortgage remains under the creditor's legal control until the debtor's debt is fully paid.⁵

A mortgage is granted through encumbering the land rights, followed by registration at the Land Office. The mortgage is a granted deed (APHT) before a PPAT. This deed is then registered at the Land Office, which records it in the land book and issues a mortgage certificate as proof of the existence of the mortgage. The mortgage may be extinguished if the debt it secures is repaid in full or if the object of the mortgage no longer exists.⁶ In various legal theories, it is stated that in addition to providing legal certainty, a court ruling is considered a good decision when it effectively resolves the issue. This is because, in essence, a court ruling, as the culmination of the judicial process, is always aimed at concluding or settling a case. If, in the end, the decision does not resolve the problem and instead creates new issues, it can be said that the ruling is not a good one.⁷

As stated in the judge's considerations, land encumbered by a mortgage cannot be freely sold, which has legal implications for the validity of the sale conducted between the plaintiff and the defendant. The plaintiff faces significant losses. These losses include financial harm and the potential legal risks that may arise from the invalid transaction. In civil law, the fundamental principle of sale and purchase is an agreement between the seller and the buyer and the presence of the object being sold, as stipulated in Article 1320 of the Civil Code (KUHPPerdata).⁸ Based on this, even though the sale was conducted privately and a mortgage still encumbers the land certificate, the validity of the sale can still be upheld. This is grounded in the fulfillment of the element of the agreement between both parties, where the defendant and the plaintiff agreed to the sale of the land with mutually accepted terms regarding price and payment method.

The legality of land transactions involving certificates encumbered by mortgage rights is a complex issue that intersects property law, contract law, and financial regulation. In most legal systems, land can be transferred even if a mortgage encumbers it, but such transactions are subject to specific conditions. A land certificate encumbered by a mortgage signifies that the property is held as collateral for a debt. As such, the property transfer may not fully discharge the underlying financial obligation. The legality of such transactions often hinges on the mortgage holder's consent

⁵ B. Basyarudin, "Pelaksanaan Jual Beli Tanah yang Dilakukan Pihak Ketiga terhadap Tanah yang Telah Dibebani Hak Tanggungan," *Jurnal Ilmiah Hukum dan Keadilan* 6, no. 2 (2019): 1-18, <https://doi.org/10.59635/jihk.v6i2.60>.

⁶ Maiyestati, *Hukum Agraria* (Padang: LPPM Universitas Bung Hatta, 2023), h. 102.

⁷ O. Yanto, *Negara Hukum: Kepastian, Keadilan dan Kemanfaatan Hukum (Dalam Sistem Peradilan Pidana Indonesia)* (Bandung: Reka Cipta, 2020), h. 308.

⁸ Junaedi, "Hubungan antara Pasal 1338 dan Pasal 1320 KUHPPerdata dalam Hukum Perjanjian Jual-Beli Tanah di Indonesia," *Jurnal Cakrawala Ilmiah* 1, no. 4 (2021): 777-794, <https://doi.org/10.53625/jcijurnalcakrawalailmiah.v1i4.899>.

or the fulfillment of certain formalities, such as the settlement of the debt or the assumption of the mortgage by the buyer. Failure to address these factors may result in legal disputes over ownership and mortgage enforcement. Additionally, many jurisdictions require that the encumbrance be disclosed to potential buyers, ensuring transparency and protecting the interests of both parties. As a result, land transfer encumbered by mortgage rights must carefully navigate these legal principles to ensure validity and prevent future litigation.

Based on the above discussion, this research aims to analyze and understand the validity of land sale transactions where the certificate has not yet undergone the removal of the mortgage (Roya). This study is expected to provide new insights into the legal implications of land sale transactions under such conditions. Therefore, this research's findings are anticipated to significantly contribute to the development of agrarian law in Indonesia and serve as a reference for legal practitioners, academics, and other relevant parties in understanding the dynamics of land sales involving certificates still encumbered by a mortgage right.

2. Method

This research employs a normative legal research method, focusing on studying applicable legal norms and their implementation in legal practice. The research is conducted using a statute approach and a case approach. Primary legal materials include relevant laws and court decisions, while secondary legal materials consist of legal literature, journal articles, and other academic sources relevant to the research topic. Data for this research is collected through document studies and analysis of the legal materials gathered. The collected data is then processed and analyzed qualitatively to understand and interpret the legal implications of land sales where a mortgage still encumbers the certificates.

3. Analytic The Legality of Land Transactions with Certificates Encumbered by Mortgage Rights

In the practice of land sales in Indonesia, issues often arise concerning the legal status of land encumbered by a mortgage. A mortgage provides creditors with security for the repayment of the debtor's debt by granting the right to execute the collateral if the debtor defaults. However, when land that a mortgage has encumbered is transferred to a third party without the removal of the mortgage, significant legal uncertainty arises. This key topic requires further analysis, given its impact on legal certainty and fairness for all parties involved. Legal certainty of the existence of a replacement certificate, if a mortgage is charged, is from UUPA and Government Regulation Number 24 of 1997 concerning Land Registration in Article 32 paragraph (1). The second certificate (substitute) is a certificate of land rights issued by the Land Office as a substitute for the lost first certificate of the same parcel of land; in this case, the subject of the rights is the same, and the object is also the same.⁹ So that the replacement certificate can also be used as collateral for one's debt to financial institutions, both banks, and non-banks, the certificate is used as collateral from a bank,

⁹ Avia Surya Ningrum, Jawade Hafidz, Widayati Widayati, dan Peni Rinda Listyawati, "The Legal Protection for Buyer in Deed of Selling By Using A Substitute Certificate", *Sultan Agung Notary Law Review* Vol 4, No 1 (2022), <http://dx.doi.org/10.30659/sanlar.4.1.36-47>.

both bank and non-bank, then the certificate is burdened with mortgage rights so that because of the legal guarantee of ownership of the land, someone can receive it as securities.

The analytic examination of the legality of land transactions involving certificates encumbered by mortgage rights necessitates an exploration of the interplay between property ownership, contractual obligations, and the rights of third parties, particularly mortgage holders. In most legal systems, land transactions can occur even when the property is mortgaged; however, the transaction's validity is contingent upon several key factors. First, a mortgage encumbrance on the certificate signifies that the seller has not fully satisfied the underlying debt, meaning that the property cannot be transferred without addressing the mortgage. From a legal standpoint, a transaction involving a mortgaged property is typically subject to the mortgagee's approval or must ensure that the mortgage is either discharged or transferred to the new owner as part of the transaction. The transaction risks being deemed invalid or incomplete if these conditions are unmet.

Furthermore, depending on jurisdiction, the buyer must be fully informed about the encumbrance, as failure to disclose such a fact may lead to legal liabilities for the seller. Therefore, a valid land sale involving encumbered certificates ensures that all parties fulfill their obligations and that the mortgage rights are either extinguished or transferred by legal procedures. From an analytical perspective, the complexity of such transactions underscores the need for a nuanced understanding of both property law and financial instruments and the protection of buyer and seller interests within a framework of transparency and legal compliance.

One of the issues in land sale transactions occurred between M. Usman and Alfian Adel. Decision Number 87/Pdt.G/2023/PN.Ptk from the Pontianak District Court is a ruling in a civil case between M. Usman as the plaintiff and Alfian Adel as the defendant, with the Pontianak Land Office as a co-defendant. This case involves a dispute over the ownership of a plot of land in Pontianak City, West Kalimantan, covering an area of 377m² and evidenced by Ownership Certificate (SHM) Number 2747. In this case, M. Usman, as the plaintiff, filed a lawsuit regarding a 377 m² plot of land on Jalan Berdikari, Pontianak City, which he purchased from Alfian Adel (the defendant) in 2015. The land had previously been used as collateral by the defendant for a loan from Bank Mandiri. The plaintiff settled the loan and obtained the original SHM documents and the roya letter. However, due to financial constraints, the plaintiff did not immediately transfer the certificate into his name. The results showed that the legal protection measures for the bank against the management of land title certificates encumbered with mortgage rights could be done by making a power of attorney to charge and making them sell.¹⁰

Transactions involving land certificates encumbered by mortgage rights present unique legal challenges, as they involve the transfer of property subject to a financial lien. In most jurisdictions, a mortgage on a land certificate indicates that the property is collateral for a loan or debt. When such a property is sold, the transaction typically requires the resolution of the encumbrance to ensure that the buyer receives a clear title to the land. This can occur through various mechanisms, such as the seller paying off the debt before the sale, the buyer assuming the mortgage, or the mortgage being transferred to the buyer upon agreement. The legality of these transactions depends on compliance with relevant property and contract laws and the mortgagee's rights (the lender).

¹⁰ I Putu Gian Favian Adhi Pradana, I Made Suwitra, & I Ketut Sukadana. "Pemecahan Sertifikat Hak Atas Tanah yang Sedang Dibeberikan Hak Tanggungan". *Jurnal Preferensi Hukum* 1 (2) 2020: 128-32. <https://doi.org/10.22225/jph.1.2.2349.128-132>.

Sometimes, the transaction may require explicit consent from the mortgagee, mainly if the debt is not settled at the sale. Moreover, the buyer must be fully informed of the encumbrance to avoid future disputes regarding ownership and the mortgage obligation. In situations where the mortgage is not resolved or disclosed, the transaction may be subject to legal challenges, including claims of invalidity or breach of contract. Therefore, the legal framework surrounding transactions with encumbered land certificates seeks to balance the interests of both parties while ensuring that the rights of creditors are adequately protected.

In 2020, the plaintiff intended to transfer the SHM into his name but was hindered by the fact that he could not locate the defendant, who had become unreachable. The plaintiff then filed this lawsuit to legally validate the sale and obtain permission from the court to proceed with the transfer of the SHM at the Pontianak Land Office, which was named as a co-defendant. However, the co-defendant, in its objection, stated that the SHM was still encumbered by a mortgage from Bank Mandiri, which had not yet been removed (no roya had been issued), making it impossible to transfer the rights or change the name on the certificate before the mortgage was cleared. Furthermore, the co-defendant also argued that the plaintiff's lawsuit lacked necessary parties, as Bank Mandiri had not been included in the case. The Pontianak District Court panel of judges accepted and upheld the co-defendant's objection, ruling that the plaintiff's lawsuit lacked necessary parties and declared the lawsuit inadmissible.

Regarding the court decision on the lack of parties in the land dispute case between M. Usman and Alfian Adel, it can be concluded that the court made the correct decision by declaring that the lawsuit filed by M. Usman was lacking in parties. In this case, PT. Bank Mandiri, which holds the mortgage rights over the land, was not included in the lawsuit despite its necessary involvement given the land's status as collateral. This provision aligns with the principles outlined in Article 11 paragraph (2) letter g of the Mortgage Law (UUHT), which states that the owner of land used as collateral cannot transfer the land to another party without written consent from the creditor. This aims to protect the creditor's rights over the mortgaged object and ensure that the land under the mortgage remains under the legal control of the creditor until the debtor's debt is fully paid.

The bank is cautious in settling customer credit and in the process of storing land title certificates. The bank has also anticipated customer default by keeping land certificates as a form of urgency in settling customer credit. The bank is fully responsible for keeping the land certificate. In the event that the land certificate is lost, the bank is responsible for arranging the issuance of a new certificate.¹¹

Article 51 of the Basic Agrarian Law (UUPA) established the Mortgage Law (UUHT). Mortgage rights are a form of security right that can be imposed on land rights, replacing the institutions of Hypotheek and Credietverband.¹² A mortgage right is a security right over land for the repayment of a specific debt, which grants a particular creditor priority over other creditors. This means that if the debtor defaults, the creditor holding the mortgage right has the authority to sell

¹¹ Melky Kurniawan Menra, Kurnia Warman, Rembrandt Rembrandt, "Storage Certificate of Land Rights by the Saddled Mortgage Bank Loan for Redemption Legal Certainty in Padang", *International Journal of Multicultural and Multireligious Understanding*, Vol 7, No 11 (2020), <http://dx.doi.org/10.18415/ijmmu.v7i11.2199>.

¹² F. Windradi and G. C. Setiono, "Konsekuensi Yuridis Jual Beli Tanah yang Dibebeani Hak Tanggungan," *Transparansi Hukum* 2, no. 1 (2019), <https://doi.org/10.30737/transparansi.v2i1.342>.

the land used as collateral through a public auction, by the relevant legal provisions, with the right to be prioritized over other creditors.¹³

The Mortgage Deed is issued with a gross of the Mortgage deed and Article 224 of the HIR Jo. Article 195 of the HIR, with the irahs contained in the gross of the Mortgage deed, if it is stated for the sake of justice based on the One Godhead, then the Mortgage has an *executorial kracht* attached to it because the law itself equates it with a judge's decision or justice that has permanent legal force.¹⁴ Material rights to guarantee the right of birth dependents if registration is carried out as referred to in Article 13, paragraph 5 of the UUHT. The birth of material rights over the guarantee of dependent rights depends on fulfilling the principle of publicity, so if the Deed of Grant of Dependent Rights (APHT) is not registered with the Land Office, material rights will never be born. Consequently, creditors do not have a position as preferential creditors, only have a position as concurrent creditors, so they do not have superior characteristics of material rights.¹⁵ Hipotek is a form of credit repayment guarantee, which is regulated in Burgelik Wetboek.¹⁶

Mortgage rights are a critical component of property law, representing a legal interest granted to a lender (mortgagee) over a property owned by the borrower (mortgagor) as collateral for a debt. These rights enable the lender to seek repayment by asserting claims against the property, which serves as security for the loan. In essence, a mortgage creates a dual relationship: it provides the borrower access to credit while offering the lender protection in case of default. Mortgage rights typically include the ability to foreclose on the property, a legal process through which the lender can sell the property to recover the outstanding debt. The conditions under which these rights are enforced are governed by the terms of the mortgage contract, which must comply with applicable property and contract laws. Depending on the jurisdiction, mortgage rights may vary in priority, with certain mortgages (such as first mortgages) taking precedence over others in the event of liquidation. The existence of mortgage rights can significantly affect land transactions, as properties encumbered by mortgages cannot be transferred freely without addressing the debt obligation or obtaining the lender's consent. As such, mortgage rights balance provides financial security to lenders and ensures fair treatment for property owners and potential buyers.

The court's approach, which emphasizes the importance of involving all interested parties, especially the creditor, demonstrates that the principles of justice and legal certainty must be upheld in civil judicial processes – the exclusion of PT. Bank Mandiri rendered M. Usman's lawsuit premature and unable to proceed further, as it failed to meet the necessary formal requirements. This aligns with the legal doctrine stating that a lawsuit must include all parties involved in the dispute to ensure fairness and the completeness of the legal process.¹⁷ However, as stated in one of the judge's considerations in Decision No. 87/Pdt.G/2023/PN.Ptk, land burdened by a mortgage

¹³ A. Nurasa and D. A. Mujiburohman, *Pemeliharaan Data Pendaftaran Tanah* (Yogyakarta: STPN Press, 2020), h. 53.

¹⁴ Zainuddin Yasin. "Pengaturan Perlindungan Hukum Terhadap Kreditur dalam Eksekusi Objek Hipotek Kapal Laut yang Dijaminkan Ke Bank Berdasarkan Perspektif Perundang-Undangan". *Recital Review* 4 (1) 2022 : 114-39. <https://doi.org/10.22437/rr.v4i1.14089>.

¹⁵ Rodrico Agustino Renee, "Hipotek Sebagai Jaminan Hak Kebendaan Setelah Berlakunya Undang-Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan", Vol. 9 No. 1 (2021): *Lex Et Societatis*, <https://doi.org/10.35796/les.v9i1.32193>.

¹⁶ Syahril Syahril, and Hamler. "Rescue Of Collateral Objects Owned Third Parties Due To Breach Of Debtors With Subrogation As Legal Remedies In Ship Cases Above 20 M3". *PENA LAW: International Journal of Law* 2 (1)2023 :17-24. <https://doi.org/10.56107/penalaw.v2i1.114>.

¹⁷ R. Hidayat, "Gugatan Kurang Pihak (Plurium Litis Consortium) dalam Sengketa Lelang Tanah (Studi Kasus Putusan Nomor 30/Pdt.G/2019/PN BJN.)", *Mimbar Yustitia* 5, no. 1 (2022): 42-57, <https://doi.org/10.52166/mimbar.v5i1.2630>.

cannot be freely sold, making the sale transaction legally invalid. As a result of this invalid transaction, the plaintiff, as the buyer, suffered both financial and legal losses. The plaintiff did not acquire the rights to the land being sold, and this action also has the potential to cause further losses due to the violation of applicable legal provisions.

The cancellation of land rights can be carried out using an application through the Head of the Registry/City Land Office, which is then forwarded to the Head of the Provincial Regional Office as described in Article 125-130 of the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights which are the Implementing Regulations of Government Regulations Number 24 of 1997 concerning Land Registration.¹⁸

The process of land transactions in Indonesia is strictly regulated by law, mainly through the Basic Agrarian Law (UUPA) and its implementing regulations. The term “sale and purchase” related to land is defined and governed by legislation, specifically in Article 26 paragraph (1) of the UUPA, which states that sale, exchange, donation, bequest, and other actions intended to transfer ownership rights, as well as oversight, are regulated by government regulations. In this case, it refers to Government Regulation No. 24 1997 concerning Land Registration.¹⁹ The sale and purchase of land must meet strict legal requirements to ensure the transaction’s validity and provide legal protection to the parties involved. One of the main requirements is the creation of a deed of sale and purchase by a Land Deed Official (PPAT), which is then registered with the Land Office. This process aims to provide legal certainty regarding the transfer of land ownership from the seller to the buyer.²⁰

However, in practice, informal land sale transactions, like the one conducted by the plaintiff and defendant, still frequently occur. Such transactions are typically carried out without a PPAT and are only evidenced by a receipt or a simple agreement between the seller and buyer. Although socially acceptable to both parties, these transactions pose significant legal risks, particularly for the buyer. Without an authentic deed prepared by a PPAT, the buyer lacks strong legal proof to claim ownership of the purchased land, which could become a serious issue during the title transfer process or in the event of a future dispute.²¹

The sale of land burdened by a mortgage requires the fulfillment of several strict legal conditions to ensure the validity of the transaction and the protection of the creditor’s rights. According to Article 39, paragraph (1) of Government Regulation No. 24 of 1997, the sale of land burdened by a mortgage must be evidenced by a deed made by a PPAT. This deed will be used to register changes at the Land Office. The judge in Decision No. 87/Pdt.G/2023/PN.Ptk correctly considered that land still burdened by a mortgage cannot be freely sold. This ruling provides legal certainty for creditors, ensuring that the mortgaged property remains under their control until the debtor’s

¹⁸ Bima Setoaji, Sulistyandari, and Siti Kunarti. “Validity of Land Rights Transfer Based on Debt with Collateral of Land Certificate under Indonesian Law”. *Problems of Legality*, no. 160 (March, 2023): 284-303. <https://doi.org/10.21564/2414-990X.160.269672>.

¹⁹ A. Sandra Dewi, “Peralihan Hak atas Tanah terhadap Proses Jual Beli,” *Juripol* 4, no. 2 (2021): 37-42, <https://doi.org/10.33395/juripol.v4i2.11103>.

²⁰ N. Nuridin and M. Wildan, “Pelaksanaan Pendaftaran Peralihan Hak atas Tanah Karena Jual Beli,” *Diktum: Jurnal Ilmu Hukum* 8, no. 2 (2020): 192-201, <https://doi.org/10.24905/diktum.v8i2.91>.

²¹ A. Silviana, K. Anami, and H. Djoko Waloejo, “Memahami Pentingnya Akta Jual Beli (AJB) dalam Transaksi Pemindahan Hak atas Tanah karena Jual Beli Tanah,” *Law, Development and Justice Review* 3, no. 2 (2020): 191-195, <https://doi.org/10.14710/ldjr.v3i2.9523>.

obligations are fulfilled. Consequently, any transaction conducted without meeting these requirements will be deemed invalid and pose a risk of loss for the buyer, as experienced by the plaintiff in this case. The approach taken by the judge also reflects the principle of justice, where all parties with an interest in the disputed property, including the creditor, must be involved in the legal process. This is crucial to ensure that the rights of all parties are protected and that no one is unfairly disadvantaged. Furthermore, the judge emphasized that, despite the plaintiff repaying the defendant's loan, the mortgage remains attached to the land until it is officially removed (Roya). Therefore, the decision to reject the plaintiff's lawsuit is considered appropriate within the existing legal framework, upholding the principles of legal certainty and creditor rights protection.

Based on the theory of authority, the court has authority in Article 1 number 9 of Law No. 51 of 2009 concerning the Judiciary, which states that: "A court decision is a written determination issued by a state administrative body or official that contains state administrative legal actions based on applicable laws and regulations, which are concrete, individual and final that cause legal consequences for a person or a civil legal entity."²² However, the validity of a land sale with a certificate still burdened by a mortgage can be considered based on the provisions of Article 1320 of the Civil Code (KUH Perdata). This article establishes four requirements for a valid contract: agreement, the capacity of the parties, a specific object, and a lawful cause. By fulfilling these conditions, even though the land certificate is still subject to a mortgage, the sale is still considered valid, as the agreement has met the applicable legal provisions.²³

Based on the Seven Principles of Agrarian Law, land should be used to benefit the community. However, facts on the ground show that much land is controlled unilaterally by the land mafia. They used various methods, including making fake letters and cultivating empty land to sell at high prices. This has led to many ownership disputes and legal problems for legitimate landowners and defrauded buyers. To avoid this problem, the public is advised to process the legality of their land certificates through the National Land Agency (BPN). Article 19 and Article 23 of the Basic Agrarian Law (UUPA) no. 5 of 1960 and Law no. 4 of 1996 concerning Mortgage Rights are the legal basis supporting the importance of land certificates.²⁴

Making of the Sale and Purchase Deed was based on the Sale and Purchase Agreement Deed and the Power of Attorney to Sell, which contained legal defects and affected its validity. The cancellation of land rights can be carried out using an application through the Head of the Regency/City Land Office, which is then forwarded to the Head of the Provincial Regional Office as described in Article 125-130 of the Regulation of the State Minister of Agrarian Affairs/Head of the National Land Agency Number 9 of 1999 concerning Procedures for Granting and Cancellation of State Land Rights and Management Rights which are the Implementing Regulations of Government Regulations Number 24 of 1997 concerning Land Registration.²⁵

The validity of land sale transactions involving certificates that have not undergone the removal of the mortgage (referred to as "Roya" in some legal systems) raises significant concerns

²² Rusman, Winner A. Siregar, La Ode Munawir, Hijriani, La Ode Bariun, & Suriani Bt Tolo. "Kepastian Hukum Pembatalan Sertifikat Hak Milik Atas Tanah Yang Dibebankan Hak Tanggungan." *Sultra Research of Law*, 6(2), (2024). 51-60. <https://doi.org/10.54297/surel.v6i2.75>.

²³ Muhammad Aprianto et al., "Pelaksanaan Prinsip Keterbukaan dalam Jual Beli Tanah Berdasarkan KUHPerdata," *Consensus: Jurnal Ilmu Hukum* 2, no. 1 (2023): 11-20, <https://doi.org/10.46839/consensus.v2i1.33>.

²⁴ Tamaulina Br. Sembiring. "Rampant Land Dispute Cases". *Ipsa Jure* 1 (5) 2024: 18-25. <https://doi.org/10.62872/7vvr1814>.

²⁵ Bima, Setoaji, and Siti Kunarti. "Validity of Land Rights Transfer Based on Debt with Collateral of Land Certificate under Indonesian Law." *Problems of Legality*, 2023 284-303. [doi:10.21564/2414-990x.160.269672](https://doi.org/10.21564/2414-990x.160.269672).

in property law. As a legal encumbrance on land, a mortgage implies that the property is still subject to a financial obligation that must be settled before full ownership can be transferred. In many jurisdictions, the sale of land with an encumbered certificate, where the mortgage has not been officially removed or discharged, typically requires that the buyer be informed of the existing encumbrance. The transaction's validity often depends on the legal framework surrounding such sales, which may include the requirement for the seller to settle the debt or to guarantee that the mortgage will be paid off through the sale proceeds. Without removing the mortgage or explicit provisions for its settlement, the buyer may risk assuming the debt or encountering difficulties securing a clear title to the property. Consequently, for a land sale to be legally valid under these circumstances, the transaction must adhere to specific legal procedures that ensure the seller's and buyer's rights are protected, and the mortgage obligations are adequately addressed. Failure to comply with these regulations may make the transaction voidable or subject to legal challenges.

Firstly, in this case, even though the sale was conducted informally and a mortgage still burdened the land certificate, the validity of the sale can still be upheld. This is based on the fulfillment of the element of agreement between both parties, where Defendant and Plaintiff agreed to the sale of the land, including the price and payment method. Additionally, both parties are considered legally competent, thus meeting the second requirement of Article 1320 of the Civil Code. Secondly, the requirement of a specific object has also been fulfilled in this agreement, as the object of the transaction, namely the land with SHM No. 2747, has been identified. Although a mortgage still burdens the certificate, this does not affect the legal validity of the agreement as long as both parties are aware of and agree to the condition. Therefore, the sale remains legally valid according to the applicable law, even though administrative procedures, such as removing the mortgage (*roya*), have not yet been completed.

This analysis underscores the importance of fulfilling all legal requirements in land sales, especially when a mortgage burdens the land. Even though there may be an agreement between the parties involved, transactions that do not comply with legal procedures – such as involving the creditor and ensuring the removal of the mortgage – are at high risk of being deemed invalid. To eliminate worries, creditors need legal protection against their collateral.²⁶ Therefore, the court's decision to reject the validity of the sale aligns with efforts to uphold legal certainty and protect the rights of creditors.

4. Conclusion

The court's decision to reject M. Usman's lawsuit due to a lack of parties and its premature nature underscores the importance of creditor involvement in the sale of land burdened by a mortgage. Nevertheless, legally, the sale of land can still be considered valid if it meets the requirements of the agreement, the competency of the parties, and the clarity of the object being sold, even if administrative steps like the cancellation of the mortgage have not yet been completed. This highlights the importance of legal certainty and protecting creditors' rights in land transactions in Indonesia.

²⁶ Adhi Kresna Purnama Komang, I Nyoman Alit Puspadma, dan Ni Gusti Ketut Sei Astiti, "Pelaksanaan Perubahan Hak Guna Bangunan yang Dibebani Hak Tanggungan Menjadi Hak Milik Untuk Rumah Tinggal," *Jurnal Konstruksi Hukum* Vol. 2 No. 1 (2021), <https://doi.org/10.22225/jkh.2.1.2984.144-148>.

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