



Received: 25-01-2024  
Accepted: 05-03-2024

## International Journal of Advanced Multidisciplinary Research and Studies

ISSN: 2583-049X

### Problematics of Sale and Purchase Binding Agreements Made by a Notary without the Creditor's Consent

<sup>1</sup> Imam Sanusi, <sup>2</sup> Bhim Prakoso, <sup>3</sup> Firman Floranta Adonara

<sup>1, 2, 3</sup> The Master of Notary Study Program, Faculty of Law, University of Jember, Indonesia

DOI: <https://doi.org/10.62225/2583049X.2024.4.2.2487>

Corresponding Author: **Imam Sanusi**

#### Abstract

Housing and settlements have an important function and role in people's lives, because they reflect and embody human identity, both individually and in an integrated unity and togetherness with the natural environment. People's desire to get a decent home for themselves and their families continues to increase and is proven by people's enthusiasm in using the KPR program. The government's efforts to overcome this problem were delegated to the Ministry of Public Works and Public Housing through the Director General of Public Works and Housing Infrastructure Financing to organize the FLPP program, which is a form of government attention to Low Income Communities. The problem with making a PPJB deed is that the notary often

does not understand the position of the parties, so he is still willing to make the PPJB Deed, even though there are losses that will arise in the future. A PPJB Deed and Authorization to Sell Deed were drawn up, even though what was done at a glance looked legal, in substance there was no legal protection for creditors or third parties. Because it is very possible for the debtor to give up or disappear and therefore not want to take responsibility for the process. Therefore, the author will examine whether a binding sale and purchase agreement for the transfer of mortgage rights without creditor approval made by a notary can provide legal certainty.

**Keywords:** PPJB, Notary, Legal Certainty

#### Introduction

Housing and settlements have an important function and role in people's lives, because they reflect and embody human identity, both individually and in an integrated unity and togetherness with the natural environment<sup>1</sup>. Planning for housing and settlement development cannot be separated from choosing a location as a place for housing to be built, this is important because the location chosen must be truly on target so that housing development can be efficient and successful.<sup>2</sup> One of the things that causes problems in several areas in Indonesia, such as Jember Regency, is the need for housing which is difficult to obtain as well as population growth which continues to increase due to natural increase and foreign people who migrate and stay either temporarily or permanently which results in higher land prices, wider areas. Increasingly narrow and land availability increasingly limited.<sup>3</sup>

People's desire to get a decent home for themselves and their families continues to increase and is proven by people's enthusiasm in using the Home Ownership Credit program.<sup>4</sup> Meeting the community's needs for adequate housing is a mandate from the constitution. This mandate is contained in Article 28H paragraph (1) of the 1945 Constitution, which guarantees that

<sup>1</sup> I Gede Astra Wesnawa, *Geografi Permukiman*, (Yogyakarta: Graha Ilmu, 2015), h. 2.

<sup>2</sup> Sulasman, *Analisis Kebutuhan Perumahan Untuk Masyarakat Menengah Ke Bawah Di Ogan Permata Indah (OPI) Jaka Baring Palembang*, Jurnal PILAR Teknik Sipil, Volume 7, No. 2, September 2012, h. 57-65.

<sup>3</sup> Marlina, A., & O. (2018). *Analisis Kemampuan Membayar (Capacity to Repayment) Dalam Mengambil KPR BTN Bersubsidi iBdi Bank Tabungan Negara Kantor Cabang Syariah Bogor*. Moneter: Jurnal Keuangan Dan Perbankan, 6(1), 1.

<sup>4</sup> Azaria, V. P., Bela, P. A., & Deliyanto, B. (2020). *Studi Kelayakan Perumahan Bersubsidi Penunjang Kawasan Industri (Lokasi: Saga, Balaraja, Kabupaten Tangerang)*. Jurnal Sains, Teknologi, Urban, Perancangan, Arsitektur (Stupa), 2(2), 2589.

every person has the right to live in physical and spiritual prosperity, to have a place to live, and to have a good and healthy living environment. And as stated in the preamble to letter b of Law Number 1 of 2011 concerning Housing and Settlement Areas, it is stated that the state is responsible for protecting the entire Indonesian nation through the provision of housing and residential areas so that people are able to live and live in decent and affordable houses in adequate housing. Healthy, safe, harmonious and sustainable throughout Indonesia.<sup>5</sup>

The government's efforts to overcome this problem were delegated to the Ministry of Public Works and Public Housing through the Director General of Public Works and Housing Infrastructure Financing to organize the Housing Financing Liquidity Facility program, which is a form of government attention to Low Income Communities. In order to strengthen this policy, the government has made regulations related to meeting the need for housing for MBR as outlined in the Decree of the Minister of Public Works and Public Housing Number 689/KPTS/M/2023 concerning Limits on Land Area, Floor Area and Selling Price Limits for Public Houses on Sites. Implementation of housing credit/financing, housing financing liquidity facilities and the amount of subsidies for housing down payment assistance. The substance of the Minister's Decree is an effort to overcome the housing shortage (backlog) and encourage MBR to have livable houses.

The government's efforts to increase MBR's access and affordability to livable housing financing, the PUPR Ministry continues to provide convenience facilities and housing financing assistance in the form of Housing Financing Liquidity Facilities (FLPP), Savings-Based Housing Financing Assistance (BP2BT), Down Payment Assistance Subsidy (SBUM), and Tapera Financing. The FLPP program is an effort to meet MBR needs through the Home Ownership Credit program (hereinafter abbreviated as KPR).<sup>6</sup> The implementation process involves banking which has a strategic role in procuring funds for providing KPR.<sup>7</sup> As stipulated in Article 3 of Law Number 10 of 1998 concerning Amendments to Law Number 7 of 1992 concerning Banking (hereinafter referred to as the Banking Law) states that the main function of banking is as a collector and channeler of public funds aimed at supporting the implementation of national development towards improving the welfare of many people.

Providing mortgage facilities is an effort to overcome the problem of housing needs, between creditors and debtors making an agreement as outlined in the credit agreement and additional agreements in the form of guarantees for the

objects of the credit agreement.<sup>8</sup> The position of a credit agreement is an important basis for home ownership, because the agreement made is used to guarantee legal certainty and protect the interests of the parties, while home ownership is a credit agreement between the bank and the customer or creditor and debtor with a fairly long credit period.<sup>9</sup> The agreement is made as an effort to reduce risk for creditors because it contains risks, so that creditors apply the principle of prudence.<sup>10</sup>

Guided by the debtor's ability and ability to carry out its obligations in accordance with the agreed time period, the creditor applies 5C to the debtor. If the debtor has fulfilled this and the creditor is confident in the debtor's ability, then the collateral is sufficient only in the form of basic collateral and the bank is not obliged to ask for additional collateral.<sup>11</sup> The credit granting process carried out by banks can provide credit with collateral or without collateral. However, providing credit without collateral can pose a risk for the creditor, if the debtor experiences bad credit in paying the credit, it will be difficult for the bank to cover the credit losses that have been disbursed.<sup>12</sup> On the other hand, if the credit is granted with collateral, the position of the creditor is relatively safer, because if the debtor is unable to pay the credit, it can be covered with collateral.<sup>13</sup>

However, in general banking institutions have a procedure that every debtor who borrows money from the bank is required to submit a credit application and the application is submitted in writing to the bank, regardless of the amount of credit requested.<sup>14</sup> Each credit agreement is followed by an additional agreement relating to collateral, because credit collateral can be interpreted as a transfer of assets, or a statement of the ability to repay a debt. An agreement with collateral makes creditors safer, as stipulated in Article 1131 of the Civil Code, that: “*All property of the debtor, both movable and immovable, both existing and new in the future, shall be borne by all personal obligations.*”

The basis of a person's responsibility for his obligations or debts lies in all the debtor's assets. This article provides security for creditors regarding collateral agreements, because the collateral has economic value. Property rights provide collateral and can be defended against anyone, whether in the form of movable or immovable objects,

<sup>8</sup> Alfi Fahmi Adicahya, *Jurnal Hukum: Kredit Kepemilikan Rumah dan Prosedur Hukumnya*, Jurnal Lex Yudisia, Jakarta, 2019), h.18.

<sup>9</sup> Vikriatuz Zahro, Iswi Hariyani, & Iwan Rachmad Soetijono, *Juridical Implications of the Issuance of Covernotes by A Notary as Basis of Disbursing Credit of Banking*, Jurnal Ilmu Kenotariatan, Vol. 4, No. 2, (2023), h. 110.

<sup>10</sup> Arie S Hutagalung, *Condominium dan Permasalahannya*, (Depok, Badan Penerbit Fakultas Hukum Universitas Indonesia, 2007), h.1.

<sup>11</sup> Hermansyah, *Hukum perbankan Nasional Indonesia (edisi revisi)*, (Jakarta: Kencana Prenada Media Group, 2005), h.126.

<sup>12</sup> Adrian David, “*Perlindungan Hukum Terhadap Kreditur Atas Objek Hak Tanggungan DariUpaya Sita Jaminan Oleh Pihak Ketiga*”, *Lex Privatum*, 2014, Vol. 2, No. 1, h. 89.

<sup>13</sup> Kasmir, *Bank Dan Lembaga Keuangan Lainnya*; Edisi Revisi, (Jakarta: Raja Grafindo Persada, 2010), h.102.

<sup>14</sup> Hermansyah, *Hukum Perbankan Indonesia*, Cet. II, (Jakarta: Raja Grafindo Persada, 2013), h.68.

<sup>5</sup> Caecilia Waha, dan Jemmy Sondakh, *Pemenuhan Hak Atas Perumahan Yang Layak Bagi Masyarakat Miskin Di Perkotaan (Suatu Kajian Dalam Perspektif Hak Asasi Manusia)*, Jurnal LPPM Bidang EkoSosBudKum, Volume 1 Nomor 2 Tahun 2014, h.86-102.

<sup>6</sup> Handri Rahardjo, *Cara Pintar Memilih dan Mengajukan Kredit*, (Yogyakarta, Pustaka Yustisia, 2003), h. 94.

<sup>7</sup> Manurung, Mandala dan Rahardja, Prathama. *Uang, Perbankan, dan Ekonomi Moneter*.(Jakarta: Lembaga Penerbit Fakultas Ekonomi Universitas Indonesia. 2004), h.18.

which are collateral used by the debtor in the event of default. The objects pledged as collateral can be taken by the creditor as repayment of the debt.<sup>15</sup> The regulation of immovable objects as collateral or Mortgage Rights is regulated in Law Number 1996 concerning Mortgage Rights (hereinafter referred to as the Mortgage Rights Law).

The meaning in Article 1 paragraph (1) of the Mortgage Rights Law is that Mortgage Rights are rights imposed on land rights as intended in Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations (hereinafter referred to as the Basic Agrarian Law) and mortgage rights are accessory to certain receivables. The FLPP program is a government program given to MBR, to obtain this program they must fulfill the provisions of article 3 paragraph (2) of the Minister of Public Works and Public Housing Regulation No. 35 of 2021 concerning Ease and Assistance in Home Ownership for Low-Income Communities (hereinafter abbreviated as PUPR Ministerial Decree 35 of 2021) which is as follows:

The MBR as intended in paragraph (1) must fulfill at least the following requirements:

- a. Indonesian citizen;
- b. registered as a resident in 1 (one) district/city area;
- c. have never received subsidies or housing financing assistance from the government related to credit/financing for home ownership and/or credit/financing for self-help housing construction; And
- d. unmarried individuals or married couples

The signing of a credit agreement between a creditor and a debtor is proof of the existence of a legal relationship, so that both parties have rights and obligations and are obliged to comply with all agreed restrictions. Based on Article 22 paragraph (3), paragraph (4) and paragraph (5) PUPR Ministerial Decree 35 /2021 states that:

(3). SBUM beneficiaries can only rent and/or transfer ownership of the Tapak Public House to another party in case:

- a. Inheritance;
- b. Occupancy after a minimum period of 5 (five) years;

(4) The transfer of ownership as intended in paragraph (3) letter b is carried out by the agency carrying out the task of transferring ownership of Public Houses with the facilities provided by the government to MBR in accordance with the provisions of statutory regulations.

(5) In the event that the SBUM beneficiary experiences credit or financing problems, the transfer of the Tapak Public House is carried out in accordance with statutory provisions

The legal fact that occurred in Jember Regency is that the FLPP Program carried out by the government to provide subsidies for underprivileged people has been running well, it is proven that many MBRs already own houses, but in its implementation, there are MBRs who transferred their subsidized housing objects to other parties without their consent. Creditor. In the transfer process to a third party by

<sup>15</sup> Yunita Krysna Valayvi, "Jaminan Hak Tanggungan Atas Tanah Milik Pihak Ketiga Dalam Perjanjian Kredit Di Lembaga Keuangan Perbankan Berdasarkan Undang - Undang Nomor 4 Tahun 1996 Tentang Hak Tanggungan", *Privat Law*, 2016, Vol. 4, No. 2, h. 132

selling, the buyer is given the debtor's account book and ATM as a means of paying in installments, then both parties go to the Notary to make a Deed of Sale and Purchase Agreement (hereinafter abbreviated as PPJB) and Power of Attorney to Sell.

The process of transferring credit rights over immovable objects is carried out not in accordance with regulated norms, where the debtor transfers the object of mortgage rights without the creditor's consent. A frequent practice in society is that legal subjects carry out legal actions, namely between the debtor and a third party, an agreement is reached to transfer the FLPP object using the services of a Notary in connection with the making of a PPJB Deed with the power to sell. The debtor's actions will cause problems for third parties, because third parties have no ties or agreements with creditors. The process of transferring home ownership credit which is the object of collateral for mortgage rights to a third party without the creditor's approval through a PPJB Deed with Power of Sale made by a Notary is interesting to examine in relation to the authority of the notary and legal certainty regarding the PPJB Deed and the Deed of power of sale made by the Notary.

Based on this description, the researcher is interested in examining the transfer of home ownership credit which is the object of mortgage rights to a third party without the creditor's approval, and discusses it in the form of an article by determining the legal issue of whether a sale and purchase binding agreement for the transfer of the object of mortgage rights without the creditor's approval made by a Notary can be providing legal certainty, the author will develop it in his discussion.

## Research Methods

Legal research is a scientific method of finding a solution to a legal problem in order to provide a prescription about what should be done regarding the legal problem.<sup>16</sup> The main focus of legal research is to identify, process, interpret and collect data and then provide an in-depth understanding of legal concepts.<sup>17</sup> This journal uses a normative juridical research type, namely research by reviewing formal regulations such as legislation, theoretical literature and then relating it to the problems discussed.<sup>18</sup> In preparing this journal, the author used a legislative approach, a conceptual approach, and a historical approach.

## Discussion

### 1. Sale and Purchase Binding Agreement for the Transfer of Mortgage Objects Without Creditor Approval Made by a Notary Can Provide Legal Certainty

In the concept of land buying and selling transactions, namely clear and cash, the meaning of "clear" means that it is carried out openly, the object and subject of the owner are clear, complete with documents and proof of ownership. Meanwhile, the meaning of "cash" means being paid immediately and all at once. The taxes are paid, AJB signs

<sup>16</sup> Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2021), h. 103

<sup>17</sup> J Portman, *Legal Research: How to Find and Understand the Law* (USA: Nolo, 2009), h. 4, dalam A'an Efendi & Dyah Ochtorina Susanti, *Penelitian Hukum (Legal Research)* (Jakarta: Sinar Grafika, 2018), h. 4

<sup>18</sup> Peter Mahmud Marzuki, *Op.Cit.*, h. 194

and then the title certificate is processed. If an object has not been paid for in full by the buyer, the PPJB Deed is a binding sign as a sign of the sale and purchase transaction while waiting for it to be paid off.<sup>19</sup> If the PPJB Deed has not been paid off, then there is no power to sell except the conditions for fulfilling an obligation if the payment has been paid in full and a Paid PPJB Deed is made, then it is accompanied by a Power of Sale from the Seller to the Buyer.

The position of the PPJB Deed and the power to sell in making it to the Notary based on the provisions of Article 15 paragraph (2) letter (f) of the Law on Notary Positions must be recognized as a valid agreement, because this authority has been normatively regulated in positive law. The parties in the PPJB must be seen as subjects who will carry out the sale and purchase of land rights, but the sale and purchase of land rights has not yet occurred. In the case that is the object of research, namely the PPJB Deed made by a notary regarding the transfer of the FLPP object without the approval of the creditor. This PPJB practice is often used by developers who can function as a down payment from buyers.

If the PPJB deed is signed with the power of sale by all parties in the presence of a public official, the PPJB deed is included in the authentic deed, so that the position of the authentic deed is perfect, unless proven otherwise. Legal protection for the parties is seen from two perspectives or points of view, namely legal protection. The PPJB deed contains the rights and obligations of the seller and buyer. As for examples that are practiced, for example, the PPJB deed requires the buyer to make payment of a certain amount of money within an agreed time period, and is also linked to the existence of a cancellation requirement if this is not carried out in accordance with the provisions of the PPJB deed.

A deed will become a problem if one party does not fulfill its achievements or one party feels disadvantaged. This causes losses for the parties who have made and agreed to the deed that has been made, but in the course of the deed the agreement does not proceed according to the agreement of the parties who made it, there are conditions which result in an agreement having to end not in accordance with the initial agreement.<sup>20</sup> There are several factors that result in the cancellation of the sale and purchase deed, namely the sale and purchase price agreed upon in the sale and purchase agreement is not paid by the buyer within the agreed time period; the parties do not fulfill their obligations in paying taxes; and the land documents required for the process of transferring land rights (land sale and purchase before PPAT) have not been completed until the agreed period of time.

The legal protection in the PPJB deed can be formulated by the prospective seller himself, usually in the form of

requirements which are usually requested by the prospective seller himself. In contrast to protection for prospective sellers, protection for buyers is usually carried out with conditions and is also accompanied by a request for an irrevocable power of attorney. The aim is that if the seller does not comply, the buyer can sue and ask for compensation in accordance with the agreement stipulated in the sales and purchase agreement. Thus, legal protection can be provided to all parties in the PPJB. Apart from legal protection, the deed is also based on Article 1338 of the Civil Code which is based on freedom of contract, as well as the good intentions of the parties to fulfill the agreement that has been made.

Apart from having strong and perfect proof, by making a PPJB and power of sale it can also provide legal protection for the buyer as follows: Regarding tax, the buyer does not bear the sales tax, if the seller has died because at the time the PPJB Deed was signed, the PPh had already been paid in full. Before the PPJB Deed is signed, this is based on article 1 paragraph (3) letter a Government Regulation Number 34 of 2016 concerning Income Tax on Income from the Transfer of Rights to Land and/or Buildings, and Binding Agreements for Sale and Purchase of Land and/or Buildings and their Amendments. Because before the implementation of this PP in practice, when making a PPJB and the authority to sell without PPh being paid first, so that if the seller dies, it is the buyer who bears the PPh, and usually the PPh is only paid at the time the AJB is made.

Legal ownership can be proven by a PPJB Deed and the power of sale made before a Notary is very strong, if the seller dies then the heirs cannot interfere with the lawsuit over ownership of the land even though the land has not been made an AJB. Because heirs must comply with the provisions contained in the clauses of the PPJB Deed and the power to sell. The legal force of the PPJB Deed on land and buildings with the power to sell. Acquiring rights to land and buildings requires a certain mechanism process, for example obtaining the acquisition from grants, inheritance or buying and selling, etc. In this case, the acquisition is through a transaction carried out before a Notary/PPAT in order to carry out the transfer and its registration at the Land Office so that legal certainty can be achieved as also regulated in the Basic Agrarian Law and PP Number 24 of 1997 which has been amended by PP No. 18 of 2020, one of the objectives of land registration is to create orderly administration.

A binding agreement between the buyer and seller in this case is known as the PPJB Deed, which is often carried out in practice to maintain security before making an AJB. Even though in practice binding sales and purchase agreements have often been used, it turns out that PPJB only uses the general principles of agreements regulated in the Civil Code or in other words, it has never been regulated in laws and regulations relating to land rights. The parties in the process of buying and selling land and buildings carry out PPJB for several reasons including the following: The parties, both sellers and buyers, have not been able to control the object, administrative files similar to letters or object documents have not been completed, payment for the object in full has not been made, or paid off, and there is still no agreement between the parties.

The existence of the PPJB had a very important role before the existence of the AJB. The existence of the PPJB did not prevent the parties from carrying out transactions even

<sup>19</sup> Alusianto Hamonangan, Mhd. Taufiqurrahman Rosma Mediana Pasaribu, *Perjanjian Pengikatan Jual Beli (PPJB) Dalam Transaksi Peralihan Hak Atas Tanah Dan Atau Bangunan*, Jurnal Rectum, Volume 3, Nomor 2, Juli 2021 h.239-255

<sup>20</sup> Misbah Imam Soleh Hadi & Bayu Indra Permana, *Konstruksi Hukum Pembebasan Pajak Penghasilan Terhadap Peralihan Hak Atas Tanah Dalam Pembagian Hak Bersama Waris*, Jurnal Ilmu Kenotariatan, Vol. 3, No. 1, (2022), h. 5.



though in practice at the time of signing the PPJB there was no transfer of land rights due to several considerations because the transfer had to go through the AJB. Meanwhile, the PPJB intended is to bind sellers and buyers, which is generally carried out by developers to make it easier to carry out property sale and purchase transactions and PPJB is a preliminary agreement, so the function of this PPJB is basically to prepare the main agreement/main agreement which will later be carried out by the Deed. Buy and sell.

Actually, there are two types of PPJB: Paid PPJB and non-paid PPJB. The following includes the PPJB Repayment Deed. There is a power of attorney clause and the buyer must be given full power of attorney. This purchase is not canceled due to the death of one of the parties, but is reduced and remains valid for the heirs. The PPJB certificate which contains non-payment in full also contains provisions regarding the conditions in the event of cancellation of the sale midway, such as if the buyer cancels the purchase. The PPJB and AJB deeds are authentic deeds that have full evidentiary value, unless it can be proven otherwise, because the PPJB is made before a Notary and the sale and purchase deed is made before the local PPAT. Party in the PPJB document certification. The parties do not rule out the possibility of submitting the entire contents of the PPJB document to a notary.

Based on the principle of freedom of contract, this freedom has limitations because it violates common sense and public policy. By making a PPJB deed in the form of an original deed, it can be used as a form of respect between parties who use the original deed to carry out the process of buying and selling land and/or buildings that have been agreed upon with certain conditions. As strong evidence if disputes or problems arise in the future due to the implementation of services or the contents of the PPJB contract.

## 2. Legal Status of the Sale and Purchase Agreement (PPJB) and Deed of Authorization to Sell Without Creditor Approval

A PPJB deed is basically an agreement to buy property, (for example land, house, unit, apartment, etc.) where the seller promises that at a specified time he will sell the land to the buyer and the buyer promises that at a specified time he will buy the land from seller. In carrying out the transfer of a sale and purchase agreement, it is generally mandatory to fulfill certain conditions stipulated by the parties concerned in the sale and purchase agreement itself. Once the conditions are met, the transfer can be carried out.<sup>21</sup> Upon the transfer of a sale and purchase agreement, Income Tax (PPH) will be subject to income from the transfer of rights to land and/or buildings. Transfer of rights is more often known as transfer of rights, namely through buying and selling.

According to the provisions of Article 1458 of the Civil Code, this sale and purchase is deemed to have occurred between the two parties, immediately afterwards these people reach an agreement regarding the object and its price, even though the object has not been handed over, nor the price has been paid. Article 1338 of the Civil Code also explains that all agreements made legally apply as law for those who make them.

The correct transfer of land rights must be in accordance with PP Number 24 of 1997 concerning Land Registration which has been amended by PP No. 18 of 2021 concerning Management Rights, Land Rights, Flats, and Land Registration with the form of a land deed made by PPAT which will later be used as a condition for registering the transfer of land rights to the Regency/City Land Office where the land is located. One example of a case of transferring an FLPP object using a sale and purchase agreement without the creditor's approval, to make it clearer, the author will tell the incident chronologically, namely that Mrs. 1 year old Mrs. B offered her house to Mr. C for 5 million, under the pretext of being part of the excess credit. To convince the buyer, the seller invites a PPJB Deed with the Power of Sale to be drawn up, because the person concerned agrees, the two deeds are drawn up by one of the Notaries. Even though it looks simple, the problem is very complicated, because in substance it appears that there is no legal protection for buyers or banks.

In practice, to transfer a sale and purchase agreement, an agreement from the developer is required for the transfer, accompanied by an obligation to pay administration fees. Furthermore, because the house is the object of mortgage ownership from the bank, there are several alternatives that can be used.<sup>22</sup> For example, with a credit transfer. In practice, this credit transfer can be carried out with a debt transfer agreement (novation), as regulated in Article 1413 paragraph (2) jo. Article 1415 Civil Code. Over credit is carried out by debt renewal, where new debtors are appointed to replace old debtors. The old debtor by credit, in this case the bank, is released from his obligation. Typically, the bank will issue a letter of approval from the debtor's expert, which will then be followed by the implementation of the credit transfer agreement.<sup>23</sup>

Next, the new debtor will pay and be responsible for the entire mortgage on the house. After the PPJB Deed transfer agreement has been signed, the KPR credit has been paid off by the new buyer (new debtor), and all the requirements for signing the AJB in the PPJB Deed have been fulfilled, the new buyer (new debtor) can sign the AJB before the PPAT. The implementation of the AJB signing will be carried out in accordance with what has been stipulated in the PPJB Deed. Based on the Regulation of the Minister of Public Works and Public Housing concerning the Preliminary Agreement System for the Sale and Purchase of Houses, the signing of the AJB for land and house buildings must be signed by the seller and buyer before the PPAT, in the event that the following aspects have been fulfilled:

- a. The house building has been completed and is ready to be occupied;
- b. The buyer has paid in full the entire price of the land and house building, along with taxes and other costs related thereto; And
- c. The application process for Building Use Rights over the land has been completed, and the Building Use

<sup>21</sup> Andy Hartanto, "Panduan Lengkap Hukum Praktis: Kepemilikan Tanah," (LaksBang Justitia: Surabaya, 2015), h 19

<sup>22</sup> Maya Puspita Dewi, Herowati Poesoko, & Aries Harianto, *Prinsip Pembacaan Akta Oleh Notaris Dihadapan Penghadap dan Saksi*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 1, (2021), h. 98.

<sup>23</sup> Devita, Purnamasari Irma. *Hukum Jaminan Perbankan*. (Bandung: Mizan Pustaka, 2014),h.15

Rights certificate is registered in the name of the seller.<sup>24</sup>

The act of transferring the FLPP object carried out by Mrs. B to Mr. C without a letter of approval from the creditor issued by the bank, is an unlawful act, even though a PPJB Deed with the power of sale has been made before an authorized official, the deed can be categorized as null and void.

### 3. Legal certainty of the Deed of Sale and Purchase Agreement for the Transfer of Mortgage Rights Objects Made by a Notary Without Creditor Approval

The agreement was deliberately made as a means of evidence for those who are interested, so that if a party is injured, they have evidence of protection to file a claim for justice against the other party.<sup>25</sup> If within the scope of civil law, a seller who defaults can be sued with demands for compensation, cancellation of the agreement, transfer of risk and payment of court costs, then within the scope of criminal law, a debtor who defaults can be sued for committing an act of fraud, because what has been agreed turns out not to be in accordance with the agreement. What has been given.

The method of transferring land rights that is very common in everyday life is through sale and purchase transactions. The definition of buying and selling is contained in the provisions of the Civil Code Article, namely "*sale and purchase is an agreement, whereby one party binds himself to hand over an object, and the other party to pay the price that has been promised.*" The concept of buying and selling land is based on the Basic Agrarian Law, namely a procedure that can be used as proof that a transfer of rights has taken place, originally from the Seller to the Buyer.<sup>26</sup>

Basically, the rules used in land buying and selling transactions are not the rules listed in Book III of the Civil Code, but refer to the UUPA. Land buying and selling transactions are guided by the view of customary law, meaning that buying and selling has clear and cash characteristics, where leverage absolutely must be carried out.<sup>27</sup> However, the law regarding land sale and purchase transactions as stipulated in the Basic Agrarian Law and the Mortgage Rights Law and its implementing regulations is still not specifically defined. This causes the public to continue to pay attention to the rules regarding Contract

Law which are included in the elements of Contract Law in Book III of the Civil Code.<sup>28</sup>

In practice, land rights sale and purchase agreements often begin with a Deed of Sale and Purchase Agreement because the 'clear and cash' requirements for entering into a Sale and Purchase Deed cannot yet be fulfilled.<sup>29</sup> The clear terms require that the process of buying and selling land rights be carried out in the presence of an official who has the authority to do so. Observing the provisions of Article 37 of Government Regulation Number 18 of 2021, the official appointed to make the deed of transfer of land rights, including the Sale and Purchase Deed is PPAT. Cash characteristics can be seen in the implementation of the Deed of Sale and Purchase where the transfer of rights from the Seller coincides with the payment of the land price from the Buyer and at this time the land rights have been transferred.<sup>30</sup>

The purpose of holding a PPJB Deed is to form an attachment between the Seller and the Buyer which will then be followed up with AJB. The essence of the PPJB Deed is that it contains the Seller's consensus to transfer ownership of the land to the Buyer followed by payment from the Buyer to the Seller and setting a date for carrying out the AJB before the PPAT. The PPJB Deed usually also includes requirements as agreed by the parties concerned.<sup>31</sup> In general, the Sale and Purchase Agreement is stated in the form of a PPJB Deed made and issued by a Notary, even though it can actually be executed privately.

The tendency to include the Sale and Purchase Agreement into a Notarial Deed is based on the consideration that there is a difference between the PPJB Deed and the power of sale agreement.<sup>32</sup> A deed made and issued by a Notary is an authentic deed as intended in the provisions of Article 1868 of the Civil Code. This type of deed is capable of providing perfect evidentiary power according to the law and its truth cannot be denied by the parties, of course this is different from private agreements.

A private agreement cannot be declared as a perfect means of proof, where this agreement is only signed by the parties without appearing before a Notary, so that if it is submitted as evidence it can still be disputed and the parties must confirm its truth.<sup>33</sup> In carrying out his position, a Notary must always comply with the Notary's Position Regulations

<sup>24</sup> *Prosedur Menjual Rumah dengan Dasar PPJB,*" hukumonline.com/klinik, accessed September 19, 2023, <https://www.hukumonline.com/klinik/detail/ulasan/lt5098d3928a7bf/prosedur-menjual-rumah-dengandasar-ppjb>

<sup>25</sup> Dendik Surya Wardana, Iswi Hariyani, & Dodik Prihatin AN, *Pertanggung Jawaban Notaris Terhadap Keabsahan Akta Otentik Yang Dilakukan Secara Electronic Dalam Pembuktian Di Pengadilan*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 2, (2021), h. 19.

<sup>26</sup> Basyarudin, *Perlindungan Hukum Terhadap Pembeli Pihak Ketiga Yang Membeli Tanah dan Bangunan Yang Telah Dibebeani Hak Tanggungan*, (Surabaya: Jakad Media Publishing, 2021), h. 11

<sup>27</sup> Subekti dan Veronika Nugraheni Sri Lestari, *Perlindungan Hukum Bagi Konsumen Rumah Tapak Dalam Kontrak Jual Beli Berdasarkan Perjanjian Pengikatan Jual Beli*, (Surabaya: Jakad Media Publishing, 2020),h.14

<sup>28</sup> Solahudin Pugung, *Perihal Tanah dan Hukum Jual Belinya Serta Tanggung Jawab PPAT Terhadap Akta Yang Mengandung Cacat Perspektif Negara Hukum*, (Yogyakarta: Penerbit Deepublish, 2021), h. 4

<sup>29</sup> Kamaluddin Patradi, *Pemberian Kuasa Dalam Praktek Perjanjian Pengikatan Jual Beli Hak Atas Tanah*, (Yogyakarta, Gamma Press, 2010),h.45

<sup>30</sup> Sigit Spto Nugroho, Hilman Syahril Haq dan Anik Tri Haryani, *Pengantar Hukum Indonesia*, (Klaten: Penerbit Lakeisha, 2019), h. 147

<sup>31</sup> Ahmad Farich Sultoni, *Batas Pertanggungjawaban Notaris atas Pembuatan Akta Otentik*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 1, ((2021)), h. 80.

<sup>32</sup> I Made Hendra Kusuma, *Problematic Notaris Dalam Praktik* (Kumpulan Makalah), (Bandung: Alumni, 2019), h. 21.

<sup>33</sup> Muhammad Reza Syariffudin, *Pengantar Ilmu Hukum dan Aspek Hukum Dalam Ekonomi*, (Jakarta: Penerbit Kencana, 2022), h. 109.

and the Notary's Code of Ethics.<sup>34</sup> The notary must ensure that all stages or formalities in making the deed have been passed because if a stage is missed and successfully proven it can have an impact on the authenticity of the deed.<sup>35</sup> The consequence is that the court procedure may decide that the status of a deed that was previously authentic has changed to a private agreement.<sup>36</sup> This is in accordance with the provisions of Article 44 of the Notary Position Law and the provisions of Article 1869 of the Civil Code.<sup>37</sup>

The PPJB Deed contains an agreement between the parties which applies as law for the Seller and Buyer, so the Notary needs to carefully observe whether the requirements regarding the validity of an agreement have been fulfilled or not. In the PPJB Deed, it is often agreed to grant power of attorney from the Seller to the Buyer to represent the Seller in handling various matters relating to the land being traded. The definition of granting power of attorney as stated in the provisions of Article 1792 of the Civil Code is as follows: "Power of attorney is an agreement in which a person gives authority to another person, who receives it, to carry out an affair on his behalf."

Things that should be considered when granting a power of attorney are the subject and object of the power of attorney because the power given involves legal action against property belonging to the person giving the power of attorney, in this case the seller. The notary needs to investigate whether the object of the power of attorney is property owned by the Seller alone or is classified as property owned simultaneously with another person, for example joint property between husband and wife who are married without a marriage agreement. The problem that often occurs in granting power of attorney over land as a joint property object is the lack of permission from the husband or wife to grant the power of attorney, even worse if the seller is not honest about the marital status and position of the land which is actually joint property belonging to both of them.

The reason that the seller may base for doing this is to escape his obligation to include the consent of the marriage partner. Legal actions carried out by the husband unilaterally regarding joint assets will definitely have an impact on the validity of the PPJB Deed, where the power of attorney clause included in it results in the deed containing legal defects.<sup>38</sup> The PPJB Deed, although its contents regulate the sale and purchase of land, but its format is only limited to the sale and purchase agreement, namely a form of agreement which is or is preliminary.

<sup>34</sup> Rudy Haposan Siahaan, *et al.*, *Hukum Kenotariatan Indonesia Jilid 1*, (Tangerang: Media Sains Indonesia, 2022), h. 28

<sup>35</sup> Khafid Setiawan, Bhim Prakoso, & Moh. Ali, *Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian*, Jurnal Ilmu Kenotariatan, Vol. 2, No. 2, (2021), h. 44.

<sup>36</sup> Habib Adjie, *Penerapan Pasal 38 UUJN-P Dalam Pelaksanaan Tugas Jabatan Notaris*, (Yogyakarta: Bintang Pustaka Madani, 2021), h. 13

<sup>37</sup> Oemar Moechthar, *Dasar-Dasar Teknik Pembuatan Akta*, (Surabaya: Airlangga University Press, 2017), h. 16.

<sup>38</sup> Wahyono Darmabrata dan Surini Ahlan Sjarif, *Hukum Perkawinan dan Keluarga di Indonesia*, (Jakarta: Badan Penerbit FH-UI, 2015), h.116

Transferring mortgage ownership to the Bank through buying and selling is not prohibited as long as it is carried out in accordance with the procedures established by the Bank. For the sale and purchase of houses and land that are carried out privately, the deed cannot be made by a PPAT Notary because the process is carried out without the approval of the Bank as the creditor and is not in accordance with applicable procedures, so the notary cannot make the deed as proof that there has been a transfer of KPR ownership<sup>39</sup> with any form of deed.

If the notary makes a deed relating to the transfer of the mortgage, the notary can be sued at a later date by the injured party, especially the buyer and the bank, because he has made a deed that is contrary to the law. Buying and selling land and mortgage houses that are done privately will be very detrimental to the buyer (new owner).

Apart from the above, the buyer (in a private mortgage transfer) according to the author will experience difficulties in taking the land certificate from BTN, because the bank will only hand over the certificate to the old debtor. This becomes even more complicated if the old debtor is not willing to take it or the old debtor's whereabouts are no longer known. So legal protection for buyers is very weak. Based on research that the author has conducted, there are quite a lot of cases of underhanded transfer of debtors.

## References

1. I Gede Astra Wesnawa. Geografi Permukiman, (Yogyakarta: Graha Ilmu), h. 2, 2015.
2. Sulasman. Analisis Kebutuhan Perumahan Untuk Masyarakat Menengah Ke Bawah Di Ogan Permata Indah (OPI) Jaka Baring Palembang. Jurnal PILAR Teknik Sipil, 2012; 7(2).
3. Marlina A, O. Analisis Kemampuan Membayar (Capacity to Repayment) Dalam Mengambil KPR BTN Bersubsidi iBdi Bank Tabungan Negara Kantor Cabang Syariah Bogor. Moneter: Jurnal Keuangan Dan Perbankan. 2018; 6(1):1.
4. Azaria VP, Bela PA, Deliyanto B. Studi Kelayakan Perumahan Bersubsidi Penunjang Kawasan Industri (Lokasi: Saga, Balaraja, Kabupaten Tangerang). Jurnal Sains, Teknologi, Urban, Perancangan, Arsitektur (Stupa). 2020; 2(2):2589.
5. Caecilia Waha, dan Jemmy Sondakh. Pemenuhan Hak Atas Perumahan Yang Layak Bagi Masyarakat Miskin Di Perkotaan (Suatu Kajian Dalam Perspektif Hak Asasi Manusia). Jurnal LPPM Bidang EkoSosBudKum. 2014; 1(2).
6. Handri Rahardjo. Cara Pintar Memilih dan Mengajukan Kredit, (Yogyakarta, Pustaka Yustisia), 2003.
7. Manurung Mandala dan Rahardja. Prathama. Uang, Perbankan, dan Ekonomi Moneter. (Jakarta: Lembaga Penerbit Fakultas Ekonomi Universitas Indonesia), 2004.
8. Alfi Fahmi Adicahya. Jurnal Hukum: Kredit Kepemilikan Rumah dan Prosedur Hukumnya, Jurnal Lex Yudisia, Jakarta, 2019.

<sup>39</sup> Tumpak Siregar, Jaminuddin Marbun, Syawal Amry Siregar, *Tinjauan Yuridis Terhadap Kepastian Hukum Akta Perjanjian Jual Beli Yang Objeknya Dijadikan Jaminan Di Bank*, Jurnal Retenrum, Volume.1 No. 02 Agustus 2020, h.101-109

9. Arie S Hutagalung. Condominium dan Permasalahannya, (Depok, Badan Penerbit Fakultas Hukum Universitas Indonesia), 2007.
10. Hermansyah. Hukum Perbankan Nasional Indonesia (edisi revisi), (Jakarta: Kencana Prenada Media Group), 2005.
11. Adrian David. Perlindungan Hukum Terhadap Kreditur Atas Objek Hak Tanggungan Dari Upaya Sita Jaminan Oleh Pihak Ketiga. *Lex Privatum*. 2014; 2(1).
12. Peter Mahmud Marzuki. Penelitian Hukum (Jakarta: Kencana), 2021.
13. Portman J. Legal Research: How to Find and Understand the Law (USA: Nolo), dalam A'an Efendi & Dyah Ochtorina Susanti, 2018, Penelitian Hukum (Legal Research) (Jakarta: Sinar Grafika), 2009.
14. Alusianto Hamonangan Mhd. Taufiqurrahman Rosma Mediana Pasaribu, Perjanjian Pengikatan Jual Beli (PPJB) Dalam Transaksi Peralihan Hak Atas Tanah Dan Atau Bangunan. *Jurnal Rectum*. 2021; 3(2).
15. Andy Hartanto. Panduan Lengkap Hukum Praktis: Kepemilikan Tanah. (LaksBang Justitia: Surabaya), 2015.
16. Misbah Imam Soleh Hadi, Bayu Indra Permana. Konstruksi Hukum Pembebasan Pajak Penghasilan Terhadap Peralihan Hak Atas Tanah Dalam Pembagian Hak Bersama Waris. *Jurnal Ilmu Kenotariatan*. 2022; 3(1).
17. Devita, Purnamasari Irma. Hukum Jaminan Perbankan. (Bandung: Mizan Pustaka), 2014.
18. Prosedur Menjual Rumah dengan Dasar PPJB. [hukumonline.com/klinik](https://www.hukumonline.com/klinik/detail/ulasan/lt5098d3928a7bf/prosedur-menjual-rumah-dengandasar-ppjb), accessed September 19, 2023, <https://www.hukumonline.com/klinik/detail/ulasan/lt5098d3928a7bf/prosedur-menjual-rumah-dengandasar-ppjb>
19. Basyarudin. Perlindungan Hukum Terhadap Pembeli Pihak Ketiga Yang Membeli Tanah dan Bangunan Yang Telah Dibebani Hak Tanggungan, (Surabaya: Jakad Media Publishing), 2021.
20. Vikriatuz Zahro, Iswi Hariyani, Iwan Rachmad Soetijono. Juridical Implications of the Issuance of Covernotes by a Notary as Basis of Disbursing Credit of Banking. *Jurnal Ilmu Kenotariatan*. 2023; 4(2).
21. Subekti dan Veronika Nugraheni Sri Lestari. Perlindungan Hukum Bagi Konsumen Rumah Tapak Dalam Kontrak Jual Beli Berdasarkan Perjanjian Pengikatan Jual Beli, (Surabaya: Jakad Media Publishing), 2020.
22. Solahudin Pugung. Perihal Tanah dan Hukum Jual Belinya Serta Tanggung Jawab PPAT Terhadap Akta Yang Mengandung Cacat Perspektif Negara Hukum, (Yogyakarta: Penerbit Deepublish), 2021.
23. Kamaluddin Patradi. Pemberian Kuasa Dalam Praktek Perjanjian Pengikatan Jual Beli Hak Atas Tanah, (Yogyakarta, Gamma Press), 2010.
24. Khafid Setiawan, Bhim Prakoso, Moh Ali. Notaris Dalam Pembuatan Akta Kontrak Yang Berlandaskan Prinsip Kehati-hatian. *Jurnal Ilmu Kenotariatan*. 2021; 2(2).
25. Sigit Sapto Nugroho, Hilman Syahril Haq dan Anik Tri Haryani. Pengantar Hukum Indonesia, (Klaten: Penerbit Lakeisha), 2019.
26. I Made Hendra Kusuma. Problematik Notaris Dalam Praktik (Kumpulan Makalah), (Bandung: Alumni), 2019.
27. Ahmad Farich Sultoni. Batas Pertanggungjawaban Notaris atas Pembuatan Akta Otentik. *Jurnal Ilmu Kenotariatan*. 2021; 2(1).
28. Muhammad Reza Syarifuddin. Pengantar Ilmu Hukum dan Aspek Hukum Dalam Ekonomi, (Jakarta: Penerbit Kencana), 2022.
29. Maya Puspita Dewi, Herowati Poesoko, Aries Harianto. Prinsip Pembacaan Akta Oleh Notaris Dihadapan Penghadap dan Saksi. *Jurnal Ilmu Kenotariatan*. 2021; 2(1).
30. Rudy Haposan Siahaan, *et al.* Hukum Kenotariatan Indonesia Jilid 1, (Tangerang: Media Sains Indonesia), 2022.
31. Habib Adjie. Penerapan Pasal 38 UUJN-P Dalam Pelaksanaan Tugas Jabatan Notaris, (Yogyakarta: Bintang Pustaka Madani), 2021.
32. Oemar Moechthar. Dasar-Dasar Teknik Pembuatan Akta, (Surabaya: Airlangga University Press), 2017.
33. Wahyono Darmabrata dan Surini Ahlan Sjarif. Hukum Perkawinan dan Keluarga di Indonesia, (Jakarta: Badan Penerbit FH-UI), 2015.
34. Tumpak Siregar, Jaminuddin Marbun, Syawal Amry Siregar, Tinjauan Yuridis Terhadap Kepastian Hukum Akta Perjanjian Jual Beli Yang Objeknya Dijadikan Jaminan Di Bank, *Jurnal Retenrum*. 2020; 1(02).
35. Dendik Surya Wardana, Iswi Hariyani, Dodik Prihatin AN. Pertanggung Jawaban Notaris Terhadap Keabsahan Akta Outentik Yang Dilakukan Secara Electronic Dalam Pembuktian Di Pengadilan. *Jurnal Ilmu Kenotariatan*. 2021; 2(2).