

The Truth of the Deed of Granting Liability Rights to Lawyers That Isn't Genuine Positive Legal Perspective in Indonesia

Aslan Noor

Pasundan University Bandung, Indonesia

Email: nooraslan@yahoo.com

Agnes Adila Kurnia

Pasundan University Bandung, Indonesia

Email: agnesadila16@gmail.com

Mohamad Bima Dwika

Pasundan University Bandung, Indonesia

Email: mohamad.228100017@mail.unpas.ac.id

Farid Ahmad Fauzy

Pasundan University Bandung, Indonesia

Email: faridahmadff4@gmail.com

M Reza Anugrah

Pasundan University Bandung, Indonesia

Email: mrezaanugrah1207@gmail.com

Abstract:

Mortgage Rights are security rights imposed on land rights, the granting of Mortgage Rights is always followed by a Deed of Granting Mortgage Rights (APHT), APHT regulates the terms and conditions regarding the granting of Mortgage Rights from debtors to creditors in connection with secured debts by Mortgage Rights. The Certificate of Enforcing Mortgage Rights (SKMHT) based on Article 15 paragraph (1) of the UUHT is one of the processes in granting Mortgage Rights made by Notaries and PPATs by following the applicable provisions by their

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positions. This research uses the juridical-normative method and descriptive-analytical research specifications. The results of the research on the validity of APHT based on the non-authentic SKMHT are that the Notary in making SKMHT must be based on the UUJN, while the PPAT in making SKMHT is based on PerKaban Number 8 of 2012. In practice, the Notary still makes SKMHT based on PerKaban Number 8 of 2012 and fills in the blank/format provided by the National Land Agency. so that the authenticity of the SKMHT made by the Notary disappears and the proof is less than perfect, if this happens, the SKMHT made by the Notary causes no legal consequences or null and void APHT which becomes an accessory agreement.

Hak Tanggungan merupakan hak jaminan yang dibebankan pada hak atas tanah, pemberian Hak Tanggungan selalu diikuti dengan Akta Pemberian Hak Tanggungan (APHT), APHT mengatur persyaratan dan ketentuan mengenai pemberian Hak Tanggungan dari debitor kepada kreditor sehubungan dengan hutang yang dijaminakan dengan Hak Tanggungan. Surat Keterangan Membebankan Hak Tanggungan (SKMHT) berdasarkan Pasal 15 ayat (1) UUHT merupakan salah satu proses dalam pemberian Hak Tanggungan yang dibuat oleh Notaris dan PPAT dengan mengikuti ketentuan yang berlaku sesuai dengan jabatan yang dimilikinya. Penelitian ini menggunakan metode yuridis-normatif, dan spesifikasi penelitian deskriptif-analitis. Hasil penelitian keabsahan APHT berdasarkan SKMHT yang tidak otentik yaitu bahwa Notaris dalam membuat SKMHT wajib berdasarkan UUJN, sementara PPAT dalam membuat SKMHT berdasarkan PerKaban Nomor 8 Tahun 2012. Pada praktiknya Notaris masih membuat SKMHT berdasarkan PerKaban Nomor 8 Tahun 2012 dan mengisi blanko/format yang disediakan oleh Badan Pertanahan Nasional. sehingga keotentikan dari SKMHT yang dibuat oleh Notaris tersebut lenyap dan pembuktiannya kurang sempurna, jika hal tersebut terjadi maka SKMHT yang dibuat oleh Notaris menyebabkan tidak mempunyai akibat hukum atau batal demi hukum APHT yang menjadi perjanjian aksesoirnya.

Key words: *Truth of the Deed; Rights of Liability; Lawyer; Not Original; Positive Law*

Introduction

Mortgage Rights are security rights imposed on land rights, whether or not they include other objects which are an integral part of the land, for the repayment of certain debts, which gives certain creditors a preferred position over other creditors . The granting of Mortgage Rights to an object must be preceded by a

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principal agreement, this is confirmed in Article 10 point (1) of the Mortgage Rights Law (hereinafter referred to as UUHT) which states that:

"The granting of mortgage rights is preceded by a promise to provide mortgage rights as collateral for the repayment of certain debts, which is stated in and is an inseparable part of the debt and receivable agreement in question and other agreements giving rise to the debt."

The granting of Mortgage Rights is always followed by a Deed of Grant of Mortgage Rights (APHT). APHT regulates the terms and conditions regarding the granting of Mortgage Rights from debtors to creditors in connection with debts secured by Mortgage Rights. The deed is a guarantee for repayment of the debtor's debt to the creditor in connection with the loan/credit agreement entered into by the creditor. In banking practice, the debtor usually does not legally own the object of collateral which will be charged by the Mortgage. This is because the certificate of the object of the mortgage is still in the name of the developer. , the object of the mortgage right is not in the same domicile as the debtor, which makes the debtor unable to appear before the PPAT. In practice, the creditor, in this case the bank, will make a SKMHT in which the bank or creditor can represent the collateral provider to carry out the assignment of the mortgage right by signing the APHT.

SKMHT based on Article 15 paragraph (1) UUHT must be made with a Notarial deed or PPAT deed.¹ SKMHT is one of the processes in granting Mortgage Rights where the authority to make SKMHT is given to the Notary and PPAT, by following the applicable rules according to the position they hold.²

Notaries with their position in making SKMHT as one of the processes of granting Mortgage Rights must be based on the rules contained in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notaries (hereinafter referred to as UUJN).³ UUJN has regulated the authority of Notaries in Article 15 paragraph (2) which states that Notaries have the right to make deeds related to land, in which case the deeds related to land include SKMHT, carried out by issuing their own notarial deed which has been typed or

¹Wiguna, Made Oka Cahyadi. "Surat Kuasa Membebankan Hak Tanggungan (Skmht) Dan Pengaruhnya Terhadap Pemenuhan Asas Publisitas Dalam Proses Pemberian Hak Tanggungan Power Of Attorney Imposing Security Rights (Skhmt) And Its Influence To Publicity Rights Fullfilment In Security Rights Providing." *Jurnal Legislasi Indonesia* 12.2 (2018).

²Sari, Ni Made Arnita, I. Nyoman Sumardika, and Ni Made Puspasutari Ujianti. "Wewenang Notaris Membuat Surat Kuasa Membebankan Hak Tanggungan (SKMHT) Menggunakan Blanko Yang Disediakan oleh Badan Pertanahan Republik Indonesia." *Jurnal Analogi Hukum* 3.1 (2021), p. 62-67.

³M. Djia, and Tan D. "Keabsahan Dari Akta Surat Kuasa Membebankan Hak Tanggungan Yang Dibuat Oleh Notaris." *Jurnal Ilmiah Hukum Kenotariatan* 11.1 (2022).

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prepared by the notary, in relation to By filling in the blank/SKMHT format, the Notary is obliged, based on the UUJN rules, to make a deed in accordance with the provisions of Article 38 UUJN. In practice, several Notaries in making the SKMHT use the form of a deed based on Perkaban Number 8 of 2012, and this is very wrong because it causes the authenticity of the SKMHT they make to disappear if the person fills in the blank/SKMHT format based on Perkaban No. 8/2012 is a Notary.⁴

At this time, the rules governing the authority of Notaries in making SKMHT based on positive law in Indonesia are very clear, but in practice by Notaries, the deeds they make should be obliged to follow the provisions for making authentic deeds as regulated in the UUJN, but Notaries still often use blank/format based on PerKaban No. 8/2012 provided by the National Land Agency of the Republic of Indonesia, where filling in the blank should be a provision that becomes a guideline for PPAT.

The provisions of Article 15 paragraph (2) UUJN which gives Notaries the authority to make deeds regarding land,⁵ but in practice these provisions cannot work well, and for the problems that arise,⁶ of course the government's role is very necessary in ensuring legal certainty regarding the granting of authority in terms of making land deed which in this case is SKMHT made by a Notary, this is to protect the interests of all relevant stakeholders, regarding this problem the author is interested in discussing the Validity of the Deed of Granting Mortgage Rights based on a Power of Attorney Imposing Inauthentic Mortgage Rights Connected to Positive Law in Indonesia

Method

The research method used is normative juridical with descriptive analytical research specifications. The emphasis of this research aims to analyze the applicable laws and regulations and legal theory with implementation practice in reality. Data was collected through literature study, then analyzed using qualitative normative methods.

⁴Ni Made Arnita Sari , "Authority of Notaries to Make Power of Attorney to Encumber Mortgage Rights (SKMHT) Using Blanks Provided by the Land Agency of the Republic of Indonesia ", *Journal of Legal Anology* , Vol. 3, January 2021 , p. 62-67 .

⁵Denico Doly, "Kewenangan Notaris Dalam Pembuatan Akta Yang Berhubungan Dengan Tanah." *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan 2.2* (2016), p. 269-286.

⁶Abdulloh, *Kewenangan Notaris Dalam Pembuatan Akta Yang Berkaitan Dengan Pertanahan Dalam Konteks Pendaftaran Tanah*. Diss. Brawijaya University, 2016.

Discussion

Duties and Authorities of PPAT

PPAT In making a power of attorney , it imposes the right of patronage based on Government Regulation Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning Position Regulations for Land Deed Officials.⁷

PPAT based on Article 1 number 1 PP PPAT is a public official who is given the authority to make authentic deeds regarding certain legal acts regarding Land Rights or Ownership Rights over Flat Units. The various types of PPAT are divided into two, namely Temporary PPAT and Special PPAT.⁸ Temporary PPAT is a government official appointed because of his position to carry out PPAT duties by making PPAT deeds in areas where there are not yet enough PPATs. Special PPAT is an official of the National Land Agency who is appointed because of his position to carry out PPAT duties by making certain PPAT deeds specifically in the context of implementing certain government programs or tasks.

Land Deed Making Officials (PPAT) are qualified as public officials and are given the authority to make certain deeds in the field of transfer and assignment of land rights.⁹ PPAT's authority is based on Article 3 paragraphs (1) and (2) of PP PPAT which determines that:

- (1) PPAT has the authority to make authentic deeds regarding all legal acts as intended in Article 2 paragraph (2) regarding land rights and ownership rights for apartment units located within its area.
- (2) The Special PPAT only has the authority to make deeds regarding legal acts specifically mentioned in its appointment.

Furthermore, in Article 4 paragraph (1) PP PPAT, PPAT only has the authority to make deeds regarding land rights or ownership rights for apartment units located within its work area.

PPAT based on Article 2 paragraph (1) PP PPAT has the main task of carrying out some land registration activities by making deeds as proof that certain legal acts have been carried out regarding Land Rights or Ownership Rights over

⁷Hariyanto, and Nurmala Saputri. "Analisis Yuridis Pembuatan Surat Kuasa Membebaskan Hak Tanggungan (SKMHT) oleh Notaris." *Legalitas: Jurnal Hukum* 14.1 (2022), p. 70-77.

⁸Junaedi, and Gunawan Djajaputra. "Tanggung Jawab PPAT Sementara Dan Akibat Hukum Akta Jual Beli Yang Dibatalkan Melalui Putusan Pengadilan." *Jurnal Suara Hukum* 4.1 (2022), p. 107-136.

⁹Habib Adjie, *Knitting Thoughts in the World of Notaries and PPAT* , PT. Citra Aditya Bakti, Bandung: 2014, p. 91.

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Flat Units, which will be used as the basis for registering changes to land registration data. resulting from the legal action.

These legal actions based on Article 2 paragraph (2) PP PPAT, are as follows:

- a. Buy and sell;
- b. Exchange;
- c. Grant;
- d. Income into the company (inbreng);
- e. Sharing of joint rights;
- f. Granting Building Use Rights/Use Rights over Freehold land;
- g. Granting Mortgage Rights;
- h. Granting power of attorney imposes mortgage rights

Based on the explanation of Article 2 paragraph (2) PP PPAT above, in carrying out its main duties, a PPAT has the authority to make authentic deeds regarding all legal acts as intended in Article 2 paragraph (2) regarding rights to land. In accordance with PPAT's position as a public official, the deed he made was given the status of an authentic deed.

Article 2 paragraph (2) PP PPAT letters g and h, one of PPAT's authorities is to make SKMHT and APHT, SKMHT and APHT are made by following the provisions in accordance with the Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 8 of 2012 concerning Amendments to the Regulation of the Minister of State for Agrarian Affairs/Head of the National Land Agency Number 3 of 1997 concerning Provisions for Implementing Government Regulation Number 24 of 1997 concerning Land Registration (hereinafter referred to as PerKaban No. 8/2012) whose form/format is provided by BPN RI. The procedure for filling it out must also follow the provisions of Perkaban no. 8/2012. The SKMHT has been provided in blank/format form by BPN RI, so PPAT just needs to fill it in according to the instructions for filling out the relevant SKMHT blank/format.

SKMHT made by PPAT, the form of the deed must be in accordance with what has been determined by BPN RI in the form of a blank/SKMHT format and must remember the area of authority of the PPAT concerned.¹⁰ SKMHT in the form of a written authentic deed is mandatory and must be implemented, PPAT

¹⁰Gita, Ketut Nurcahya, and I. Made Udiana. *Kepastian Hukum Dalam Pembuatan Surat Kuasa Membebaskan Hak Tanggungan*. Diss. Udayana University, 2021.

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only fills in according to the data on the SKMHT form/format.¹¹ A Notary in Making a Power of Attorney imposes the right of patronage based on Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary.

A notary based on Article 1 number 1 UUJN is a public official who has the authority to make authentic deeds and has other authorities as intended in this Law or based on other Laws. Notary as a public official according to Article 15 paragraph (1) UUJN states that;

"Notaries have the authority to make authentic Deeds regarding all acts, agreements and stipulations that are required by statutory regulations and/or that are desired by those interested to be stated in authentic Deeds, guarantee certainty of the date of making the Deed, store the Deed, provide grosses, copies and quotations "Deeds, all of which as long as the deed is made are not assigned or excluded to other officials or other people as determined by law."

Based on Article 15 paragraph (2) UUJN, apart from the authority as intended in paragraph (1), Notaries also have the authority to:

- a. Validate the signature and determine the certainty of the date of the letter under the hand by registering it in a special book;
- b. Record letters privately by registering them in a special book;
- c. Make a copy of the original letter under your hand in the form of a copy containing the description as written and depicted in the letter concerned;
- d. Validate the suitability of the photocopy with the original letter;
- e. Providing legal counseling regarding the making of Deeds;
- f. Make deeds relating to land; or
- g. Make a deed of auction minutes.

Article 15 paragraph (2) letter f UUJN states that a Notary has the right to make deeds related to land, which deeds related to land are known as SKMHT Notaril. SKMHT made by a Notary must be made based on UUJN and does not follow the provisions of Perkaban Number 8 of 2012. Based on Article 38 UUJN, when making a Notary's SKMHT deed it should contain the following:

1. Each Deed consists of:
 - a. Beginning of the Deed or head of the Deed;
 - b. Deed Body; And
 - c. End or closing of the Deed.
2. The beginning of the Deed or head of the Deed contains:
 - a. Deed Title;

¹¹AA Andi Prajitno, 2013, *Practical Knowledge About What and Who Officials Who Make Land Deeds*, Selaras, Malang: 2013, p. 114.

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- b. Deed number;
 - c. Hour, day, date, month and year; And
 - d. Full name and position of Notary.
3. The Deed Body contains:
 - a. Full name, place and date of birth, nationality, occupation, title, position, place of residence of the presenters and/or the person they represent;
 - b. Information regarding the acting position of the facing person;
 - c. Contents of the Deed which constitute the wishes and desires of the interested parties; And
 - d. Full name, place and date of birth, as well as occupation, title, position and residence of each identifying witness.
 4. The end or closing of the Deed contains:
 - a. Description of the reading of the Deed as intended in Article 16 paragraph (1) letter m or Article 16 paragraph (7);
 - b. Description of the signing and place of signing or translation of the Deed, if any;
 - c. Full name, place and date of birth, occupation, title, position and residence of each witness to the Deed;
 - d. A description of the absence of changes that occurred in the making of the Deed or a description of any changes which may be in the form of additions, deletions or replacements and the number of changes.
 5. The Deed of Substitute Notary and Temporary Notary, apart from containing the provisions as intended in paragraph (2), paragraph (3), and paragraph (4), also contains the number and date of the appointment, as well as the official who appointed him.

Validity of the Deed of Granting Mortgage Rights Based on a Power of Attorney Imposing Inauthentic Mortgage Rights Linked to Positive Law in Indonesia

A guarantee agreement is a special agreement made by a creditor with a debtor or with a third party who makes a promise by pledging certain objects or the capabilities of a third party with the aim of providing security and legal certainty for the return of credit or the implementation of the guarantee agreement.

Security agreements consist of material guarantees and individual agreements, however in banking practice material guarantee agreements are chosen to guarantee the protection and certainty of their rights, to further secure the funds channeled by the creditor to the debtor, the creditor will ask for a special guarantee, usually the collateral is in the form of land. This land guarantee institution is called Mortgage Guarantee. Mortgage rights which are in the nature of (accessoir) where

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the birth, transition, existence, execution and deletion of a mortgage right are determined by the transfer and elimination of the guaranteed receivables.¹²

Mortgage Rights are considered to be the safest banking credit collateral, and it is easy to identify collateral objects, this is because Mortgage Rights have absolute rights/material rights, namely *droit de suite* and *droit de preference*, namely the right to fulfill receivables first and have separatist rights. Purwahid Patrik and Kashadi explained that;

"Mortgage Rights as a strong collateral institution has *droit de preference* (having a priority position for the holder) and *droit de suite* (following the object of the Mortgage Rights in whoever's hands the object is) as its characteristics.¹³

Mortgage Rights based on Article 1 number 1 UUHT states that Mortgage Rights are collateral rights imposed on land rights as intended in Law Number 5 of 1960 concerning Basic Agrarian Principles Regulations, including or not including other objects which form one unit. with the land, for the repayment of certain debts, which gives certain creditors a preferential position over other creditors.

Mortgage rights as collateral for land cannot be an agreement that can stand alone, but in the agreement there must be a clause regarding the granting of mortgage rights as collateral for debt.¹⁴ This clause is based on Article 10 paragraph (2) UUHT as outlined in the APHT made by the PPAT, in the presence of the grantor of the mortgage right (debtor) in front of a Notary or Land Deed Making Official.¹⁵ The granting of mortgage rights must meet the special requirements (Article 11 paragraph (1) UUHT) which include the name and identity of the holder and grantor of the mortgage right, the domicile of the parties, the holder and grantor of the mortgage right, clear indication of the debt or debts whose repayment is guaranteed.

At the stage of signing the APHT by the person giving the Mortgage Rights to the creditor, the Mortgage Rights in question have not yet been created. The Mortgage Right is only created when the Mortgage Rights land book is created by the Land Office, based on Article 13 UUHT, namely by registration. The creditor whose APHT is registered first in the Mortgage Land Book by the Land Office is

¹²Boedi Harsono, *Indonesian Agrarian Law History of the Formation of Basic Agrarian Laws Content and Implementation* , Revised Edition, Djangkat, Jakarta: 2005, p. 420.

¹³Purawahid Patrik and Kashadi, *Guarantee Law* , Diponegoro University Publishing Agency, Semarang: 2009, p. 109.

¹⁴Gatot Supramono, *Debt and Receivable Agreement* , Kencana, Jakarta: 2013, p. 117.

¹⁵Racmadi Usman , "Authority of a Notary in Making Power of Attorney to Encumber Mortgage Rights with a Deed", *Journal of Indonesian Legislation* , Vol. 3, October 2018, p. 7.

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the creditor who must take priority over other creditors. Registration of Mortgage Rights is very important for creditors, in connection with the emergence of preferential claim rights from creditors, determining the level or position of creditors relative to fellow creditors in the event that there is a confiscation of collateral (*conservatoir beslag*) for collateral objects.¹⁶

Basically, the granting of Mortgage Rights must be attended and carried out personally by the Grantor of Mortgage Rights as the party who has the authority to carry out legal actions to impose Mortgage Rights on objects used as collateral before the PPAT, but in practice due to the length of time encumbrances on Mortgage Rights, the quite high costs of making Mortgage Rights, banking requirements regarding the immediate fulfillment of credit, then the debtor's needs, this is what makes the debtor unable to appear before the PPAT. In practice, the creditor, in this case the bank, will make a SKMHT in which the bank or creditor can represent the collateral provider to carry out the imposition of mortgage rights by signing the APHT as regulated in Article 15 UUHT.

Based on Article 15 paragraph (1) UUHT states that SKMHT must be made with a Notarial deed or PPAT deed and fulfill the following requirements:

1. Does not contain the power to carry out legal actions other than imposing mortgage rights;
2. Does not contain substitution power;
3. Clearly include the object of the Mortgage Rights, the amount of the debt and the name and identity of the creditor, the name and identity of the debtor if the debtor is not the provider of the Mortgage Rights.

In accordance with the provisions above, SKMHT can be made with a Notarial deed, then Article 15 paragraph (2) letter f UUJN clearly gives authority to a notary, if the notary also has the authority to make land deeds. Making SKMHT by a Notary with this deed must of course follow the form and conditions of the Notary's deed as regulated in the UUJN, but the form of SKMHT is apparently determined in the form of a form as regulated in *Perkaban No. 8/2012*, as a result of not making the SKMHT deed in accordance with the applicable provisions, the APHT has no legal consequences or is null and void.¹⁷

¹⁶J. Satrio, *Guarantee Law: Guarantee Rights. Mortgage Rights*, Citra Aditya Bakti: Bandung, 1998, p. 38.

¹⁷Herlien Budiono, *Collection of Civil Law Writings in the Field of Notary Affairs*, Citra Aditya Bakti, Bandung: 2007, p. 57.

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A Notarial Deed is an authentic deed, the preparation of which must be carried out by an official authorized to make the deed.¹⁸ This is required in Article 1868 of the Civil Code which states, that "an authentic deed is a deed which, in the form determined by law, is made by or in the presence of public officials authorized to do so in a place where where the deed was made." In Article 1870 of the Civil Code, for interested parties and their heirs or for people who obtain rights from them, an authentic deed provides perfect proof of what is contained in it. And the elements of an authentic deed are a deed made in a form determined by law, made before an authorized public official, made at the place where the deed is made. what he saw and what he did.

There are differences that affect the authenticity of the SKMHT, the Notary in making the SKMHT must be based on the UUJN, while the PPAT in making the SKMHT based on Perkaban Number 8 of 2012, the PPAT fills in the form/format provided by the National Land Agency. In practice, Notaries still make SKMHT based on Perkaban Number 8 of 2012 and fill in the form/format provided by the National Land Agency. so that the authenticity of the SKMHT made by the Notary is lost and the proof is less than perfect, if this happens then the SKMHT made by the Notary will result in the APHT being null and void as the accession agreement.

The notary can later be required to compensate for material and immaterial losses, including fines, for creditors who will be threatened with not having an accessoir agreement which has extra-terrial force for the object being guaranteed, so that creditors will have difficulty executing, if the debtor defaults or breaches his contract, because in the UUHT It has been explained that if the debtor is in default, the object which is the object of the mortgage right can be executed by executing executorial title, selling the object which is the object of the mortgage right and selling it privately.

Conclusion

Notaries and PPATs as officials who have the authority to make authentic deeds have been regulated in statutory regulations. However, there are differences that affect the authenticity of SKMHT, Notaries in making SKMHT are required to be based on UUJN, while PPATs in making SKMHT are based on Perkaban

¹⁸ Agus Toni Purnayasa, "Akibat Hukum Terdegradasinya Akta Notaris yang Tidak Memenuhi Syarat Pembuatan Akta Autentik." *Acta Comitas: Jurnal Hukum Kenotariatan* 3.3 (2018), p. 395-409. Compare with, Entin Sholikhah, and Jawade Hafidz. "Perlindungan Hukum Terhadap Jabatan Notaris Yang Diduga Melakukan Malpraktek Dalam Proses Pembuatan Akta Otentik." *Jurnal Akta* 4.1 (2017). p. 47-50.

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Number 8 of 2012, PPAT fills in the blank/ format provided by the National Land Agency. In practice, Notaries still make SKMHT based on Perkaban Number 8 of 2012 and fill in the form/format provided by the National Land Agency. so that the authenticity of the SKMHT made by the Notary is lost and the proof is less than perfect, if this happens then the SKMHT made by the Notary will have no legal consequences or will be null and void by the law of the APHT which is the accessory agreement.

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