

THE JURIDICAL REVIEW OF LEGAL POWER OF GROSSE DEED AS THE BASIS FOR EXECUTING MORTGAGE EXECUTION AUCTIONS

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Abstract

One of the executions of the mortgage object is the sale of the mortgage object through a public auction based on the executorial title contained in the Mortgage Certificate. Before the implementation is carried out by the creditor, a permit (fiat) is required by the local district court. The application for an auction for the execution of mortgage rights through a district court is closely related to obstacles, for example, a lawsuit from a third party (derden verzet) who feels he has the right to the object of execution even though it has nothing to do with creditors and debtors. This opposition made the Chief Justice of the District Court unable to grant the request for execution even though the creditor had a mortgage certificate that was encumbered but was forced to examine the relevant evidence in the trial forum to determine whether the resistance was sufficient reason or just a conspiracy with the debtor to delay the execution. Based on this explanation, the author wants to examine the legal force of the Grosse deed as the basis for the implementation of the mortgage execution auction. The type of research in writing scientific papers is a normative legal research type, with a statutory approach and a legal concept analysis approach (Analytical and Conceptual Approach). The sources of legal materials used in writing this scientific paper came from primary legal materials, secondary legal materials, and tertiary legal materials. The legal materials were collected using library research techniques. Then analyzed using description, systematization, evaluation and finally concluded with argumentation technique. The results of this study are expected to provide scientific knowledge for academics, law enforcers, and the public.

Keywords: Auction; Deed; Grosse; Mortgage; Right.

A. INTRODUCTION

Credit distribution to business actors as debtors is closely related to the risk of congestion. During the Covid-19 pandemic, many debtors/customers at multi-finance institutions found it difficult to meet the

obligation to pay credit/installment on time (normal conditions).¹ To reduce this risk, it is necessary to have a guarantee institution as a means of security. The law has provided security for creditors in channelling credit to debtors, namely by providing general guarantees in Article 1131 and Article 1132 of the Civil Code which stipulates that all debtors' assets, both movable and immovable, are already in place or new ones will serve as collateral for all of their engagements with creditors. In the event of a default, all of the debtor's assets are sold at auction and divided according to the size of the receivables of each creditor.

Mortgage rights are one of the most preferred credit guarantees by the customer through the bank. Collateral for objects that are easy to carry in the form of certificates, including certificates of houses, buildings, and land, have a high enough selling power so that customers apply for credit from banks in large enough quantities. The same thing also happened in several countries such as Australia, Canada, Denmark, Netherlands, Germany, Spain, and England. In short, the presence of a mortgage as collateral for the credit of objects in the form of immovable objects provides benefits to the bank. However, of course, the bank has principles and criteria so that credit can be carried out based on the principal agreement and access agreement.² S Deakin et al have researched the relationship between creditor protection and credit expansion in France, Germany, the United Kingdom and the United States.³

Other academic studies have a different focus or are more limited in scope. Particularly noteworthy is the empirical research by Davydenko and Franks on a sample of small firms in France, Germany and the United Kingdom defaulting on their bank debts. The design of the coding framework benefited from other studies applying a coding methodology. This strand of research is sometimes referred to as 'leximetrics' as it attempts to quantify law. The foundational work in this area by La Porta et al already focussed on law and finance.⁴

Use of the mortgage institutions by financial institutions as collateral for the credit of the debtor for repayment of debt, considered more a sense of security in terms of lending, compared with provisions on the guarantee in the Civil Code in Article 1131.⁵ The weakness in terms of guarantees contained in the provisions of Article 1131 of the Civil Code is very different from the conception of the imposition of bail in the mortgage rights Act

1 Andi Aina Ilmih, Kami Hartono, Ida Musofiana, The Financing Restructuring Legal Analysis For Debtors Affected By Covid-19 In Sharia Multifinance Institutions, *Jurnal Pembaharuan Hukum Journal*, Vol.8, No.2, August 2021, page.173

2 Ika Atikah, The Urgency of Mortgage Agreement as an Effort to Realize The Trust By Bank as Creditor, *Hukum dan Keadilan Journal*, Vol.10, No.2, 2021, page.36

3 S Deakin et al, Varieties of Creditor Protection: Insolvency Law Reform and Credit Expansion in Developed Market Economies, *Socio-Economic Review Journal*, Vol.15, No.1, 2017, page.359

4 R La Porta et al, Law and Finance, *Journal of Political Economy*, Vol. 106, No. 1, 1998, page. 1113

5 S A Davydenko and J R Franks, Do Bankruptcy Codes Matter? A Study of Defaults in France, Germany and the U.K., *Journal of Finance*, Vol.63, No.1, 2008

which guarantees the imposition of security rights institutions specifically tied and mutually exclusive because it applies only to one creditor only.⁶

In order to guarantee legal certainty and justice in the capital law sector in Indonesia, Act No. 4 of 1996 concerning Land Mortgage Rights and Landrelated Objects was drafted⁷. Act No. 4 of 1996 concerning Mortgage Rights to Land and Land-related Objects was formed with the spirit of supporting the realization of national economic development through the capital funding sector. So it is clear that Act No. 4 of 1996 concerning Mortgage Rights to Land and Objects Related to Land should maintain a balance between debtors and creditors in terms of guaranteeing rights and obligations in the world of capital and guarantees that are just and balanced in order to realize progress of the business world and the industrial world in order to sustain national economic progress.⁸

The execution can be carried out by executing the grosse deed, in which the Certificate of Mortgage contains the order of "FOR JUSTICE BASED ON ALMIGHTY GOD", so that it has the same executorial power as a court decision and has obtained permanent legal force. One of the features in terms of legal protection provided by the Mortgage Rights Law to creditors is manifested in the execution of the object of the guarantee of the mortgage if the debtor defaults.⁹

Nowadays, the most requested collateral related to debtor assets by banks, especially conventional banks are in the form of land, because economic land has profitable prospects. The birth of Act No. 4 of 1996 concerning Mortgage Rights, hereinafter referred to as the Mortgage Law is a material legal source, is expected to accommodate the needs of conventional banking institutions regarding land as collateral as an effort to secure loans extended to the public. One of the facilities provided by the Mortgage Law is that the execution is easy and certain if the mortgage provider (the debtor) does not fulfill the obligations as agreed, as stated in General Elucidation Number 9 of the Mortgage Law.

One way to implement the execution of the mortgage object is based on Article 20 Paragraph (1) letter (b) of the Mortgage Law which reads: "If the debtor is in breach of contract, then based on the executorial title contained in the Mortgage certificate as referred to in Article 14 paragraph (2), the object of the Mortgage is sold through a public auction according to the procedure specified in the laws and regulations for the settlement of the

6 Zaenal Arifin, Anis Mashdurohatun, *Reconstruction of Parate Execution Mortgage Rights to Land Based on The Value of Justice*, Vol The 2nd Proceeding, Indonesia Clean of Corruption in 2020, page.740

7 A Chuasanga, Ong Argo Victoria, *Legal Principles Under Criminal Law in Indonesia and Thailand*, *Jurnal Daulat Hukum*, Vol.2, No.1, 2019

8 Budi Supriyatno, Gunarto, Amin Purnawan, Hesti Kristi Wahyudi, Rais Firdaus Handoko, *Reconstruction of Legal Protection of Debtors in the Execution of Mortgage Guarantee Object Based on the Value of Pancasila Justice*, *Scholars International Journal of Law, Crime and Justice*, Vol.4 No.2, 2021, page.5

9 Mochamad Mochtar, Abdul Rachmad Budiono, Iwan Permadi, Siti Hamidah, *Reconstruction Parate Execution of Liability Rights and Roles the Parties in the Determination of Auction Price Limit Value Justice Based Warranty*, *International Journal of Multicultural and Multireligious Understanding*, Vol.8, No.2, 2021, page.570

debt of the holder of the Mortgage with prior rights over other creditors." Execution based on the executorial title contained in the Mortgage Certificate is often known as the Mortgage Execution based on the Grosse notarial deed through the District Court. This is because the solution requires the permission (fiat) of the Head of the District Court.

Fiat executions are executions carried out with special permission from the Head of the local District Court even though the District Court does not conduct an examination as in ordinary civil cases. The execution fiat from the Head of the District Court usually begins with a warning (*aanmaning*) to the debtor, if this is not responded to, an execution order is issued, followed by a confiscation order and then an auction sale order to the State Auction Office. Before the auction is carried out, it must be preceded by the announcement of the auction twice in a row within a grace period of 15 days through the appropriate newspaper (Article 200 paragraph 7 H.I.R).

The advantages of carrying out the execution through the above method are first, sometimes the debtor deliberately avoids or disappears so that the settlement of his debt makes it difficult for the creditor. In this case, it is impossible to place an agreement between the creditor and the debtor to sell the object at the market price. Second, regarding the sale of the mortgage object on its own power in accordance with Article 6 of the Mortgage Law, the Auction Office usually refuses if a permit (fiat) is not previously requested to the District Court.

The provisions of the Mortgage Law as a material law are in line with the provisions of Article 224 HIR/258 R.Bg as a formal law that adheres to a view other than a court decision that has permanent legal force, only limiting the Grosse mortgage deed and debt acknowledgment deed which can be executed by force with court assistance.

In formal civil law, it is determined that execution is an act of carrying out or carrying out a court decision. One of the principles contained in the law of execution is that executions are only carried out against court decisions that have permanent legal force, meaning that ordinary legal remedies (appeals and cassation) cannot be filed against the decision. In addition, execution is carried out by force, namely with court assistance. Whether against a decision the convicted party is willing to carry out (sufficiently) the contents of the decision voluntarily, then no execution is required. A new execution action is required if the convicted party does not want to fulfill the decision voluntarily.

Executions are carried out on orders and under the supervision of the Chief Justice of the District Court. The absolute authority to carry out the execution rests with the district court which renders the decision at the first instance. Although what is to be executed is the decision of the High Court or the Supreme Court, the authority to carry out the decision remains with the District Court as the first to carry out the decision. For a decision to be implemented, the decision must be stated: "For the sake of Justice Based on God Almighty".

Given that the Grosse deed has the same power as a judge's decision and has permanent legal force, then as with a judge's decision that must be implemented, the Grosse deed must be carried out by auctioning all the debtor's property based on Article 1131 of the Civil Code (both guaranteed or not guaranteed).¹⁰

In addition to court decisions that have permanent legal force, a Grosse notarial deed by law is also equated with a judge's decision so that it can be enforced by force if it is not fulfilled voluntarily by the parties. The gross deed can be used to sell the auction of the debtor's property without having to comply with the judicial process with all the consequences such as appeals and cassation. The Grosse holder can ask the court for the debtor's property to be executed and sold at auction.

The collateral aforementioned gives the strongest position to the creditors. The creditors are categorized as the preferent creditors who have the highest rank in the fulfillment of payment obligation. In order to get such position, the creditors should go follow a collateral binding procedure which is regulated by the law. For example, the land mortgage creditor must pay a visit to an official who is authorized by the state to make an authorized collateral act.¹¹

Execution based on a Grosse notarial deed is a shortcut to provide convenience to creditors in collecting receivables if the debtor defaults. The gross executorial power of the deed is regulated in Article 224 H.I.R which provides exceptions to documents or deeds that are not judges' decisions which can be executed by force with the assistance (orders) of the Head of the District Court, namely Grosse mortgage deed and Grosse deed of debt acknowledgment. Outside of the Grosse deed, the court is not authorized to carry out forced executions.

Grosse is a copy and a quote from a deed.¹² Grosse Deed is a copy/derivative of a mortgage deed or a debt acknowledgment deed made by a notary and affixed with the head "For Justice Based on the One Godhead" so that it has executive power as well as a judge's decision which has permanent legal force and regarding the contents of the deed cannot be doubtful again.¹³ According to GHS Lumban Tobing that Grosse deed is a copy or excerpt of a deed above which contains a sentence that reads "For the sake of Justice Based on God Almighty", and below it is stated "Given as First Grosse" by mentioning the name of the person on whose request the Grosse was given and date of delivery.¹⁴

10 Eugenia Liliawati Muljono dan Hadi Setia Tunggal, *Eksekusi Grosse Akta Hipotek Oleh Bank*, Rineka Cipta, Jakarta, 1996, page. 2.

11 Wurianalya Maria Novenanty, *The Legal Aspect of Credit Without Collateral In Indonesia*, *Vej Unpar Journal*, Vol.4, No.1, 2018, page.119

12 Central Jakarta District Court Decision No. 68/1983/G dated August 22, 1983.

13 Central Jakarta District Court Decision No. 68/1983/G dated August 22, 1983 jis. Jakarta High Court Decision No. 458/1982 PT Perdata dated April 30, 1984, Supreme Court Decision No. 3992.K/ Pdt/1986 dated September 25, 1989 and the Supreme Court Decision No. 411K/Pdt/1991 dated September 26, 1992.

14 I. Nyoman Raka, *Beberapa Masalah Hukum Eksekusi Grosse Akte Pengakuan Hutang dan Hipotek dalam Teori dan Praktek di Indonesia*, Tesis, Fakultas Hukum Universitas Indonesia, 1996

The description above shows that fiat execution is only given for Grosse deeds, namely: mortgages and debt securities made by a notary as the only public official appointed by law. The two types of Grosse deed are documents referred to in Article 224 HIR even though they have an executive title, but the execution must ask for permission (fiat execution) to the Head of the District Court because the two documents are not issued by the court but notary, so that if there is a juridical defect in the Grosse deed which is about to be executed will certainly be detrimental to the applicant for execution. As a result, the district court may refuse to grant a license (fiat). The existence of fiat execution from the Head of the District Court is an absolute requirement for execution based on the executorial title contained in the Mortgage Certificate.

Before granting the fiat of execution, the Head of the District Court should have conducted a study of the execution application file and assessed the terms of execution, both formal and material. According to Yahya Harahap, in judicial practice, the parameters for assessing the Grosse deed execution application (mortgage and debt acknowledgment) made by the Head of the District Court before giving the fiat execution include an assessment of:¹⁵

1. Whether or not the Grosse deed is correct;
2. The nature of the accessoir Grosse deed;
3. Document Grosse deed;
4. Assess whether or not the amount of debt stated in the Grosse deed is confirmed or not.

If these conditions are not met, the Head of the District Court has the authority to reject the request for execution. After the issuance of Act No. 4 of 1996 concerning Mortgage, the Grosse function of the deed as the basis for execution based on Article 224 H.I.R was replaced with a mortgage certificate. Article 14 Paragraph 2 and Paragraph 3 of Act No. 4 of 1996 concerning Mortgage Rights, there is a provision: the mortgage certificate has certificates with the words "For the sake of Justice Based on the One Godhead". Based on the description above, it means that there is an executorial title which means that the mortgage certificate is given the same power as a court decision that has permanent legal force, besides that the mortgage certificate applies as a substitute for the *Grosse acte hypotheek* as long as it concerns land rights.

Article 26 of Act No. 4 of 1996 concerning Mortgage has a similar construction to the execution of Mortgage. The execution of mortgage rights is regulated as in the execution of mortgages using Article 224 H.I.R, namely a mortgage certificate with an executorial title of execution is also carried out by requesting fiat to the Head of the District Court.

The mortgage certificate has legally fulfilled the requirements as a substitute for the Grosse deed in accordance with Article 224 H.I.R, because the inclusion of the executive title on the mortgage certificate based on Act

15 M.Yahya Harahap. *Kedudukan Grosse Akta Dalam Perkembangan Hukum di Indonesia*, Media Notariat, Jakarta,1988, page.109

No. 4 of 1996 concerning Mortgage on Land and Objects related to Land, contrary to the principle of execution law. Whereas H.I.R as a formal legal regulation, including regulating execution, has limitedly determined documents or deeds other than court decisions that can be executed by force only Grosse mortgage deed and Grosse deed of debt, but by Act No. 4 of 1996 concerning Mortgage on Land and Objects related to Land, plus a Mortgage Certificate. In view of Act No. 4 of 1996 concerning Mortgage on Land and Objects related to Land is a material law regulation, while the formal legal provisions still refer to Article 224 H.I.R and Article 258 R.Bg.

Act No. 4 of 1996 concerning Mortgage on Land and Objects related to Land, it has been stated that the mortgage certificate is valid as a substitute for the Grosse mortgage deed, but it is still to be tested whether the Grosse document of the mortgage deed, it still has to be tested whether the Grosse document of the notarial deed that underlies the issuance the mortgage certificate has met the requirements? This is the duty and authority of the Head of the District Court as the giver of fiat to assess the Grosse of the notarial deed. This regulation is not only referring to Article 224 H.I.R as a formal provision, but also covering the material provisions of Act No. 4 of 1996 concerning Mortgage on Land and Objects related to Land as well as other laws and regulations such as in the Basic Agrarian Law. Furthermore, this authority is further expanded from the point of view of legal doctrine which classifies Grosse as an *accessoir* agreement as well as the opinions scholars.

The breadth of the authority of the Head of the District Court in assessing the Grosse of the deed, the question arises as to what if after the Grosse of the deed as the basis for the issuance of the mortgage certificate requested for execution does not meet the formal and material requirements? Of course, this is detrimental to the applicant for execution other than the Head of the District Court cannot provide fiat execution, Grosse deed can be non-executable and can be declared null and void.

B. RESEARCH METHODS

The type of research in writing this paper is a normative legal research type, with a statutory approach and a legal concept analysis approach (Analytical and Conceptual Approach). The sources of legal materials used in writing this scientific paper come from primary legal materials, secondary legal materials, and tertiary legal materials. The legal materials were collected using library research techniques. Then analyzed using description, systematization, evaluation and finally concluded with argumentation technique.

C. RESULT AND DISCUSSION

1. The Legal Force Of The Grosse Deed As The Basis For The Implementation Of The Mortgage Execution Auction

Article 1 Paragraph (1) Mortgage Law explains that Mortgage Rights are security rights that are imposed on land rights as referred to in the BASIC AGRARIAN LAW, including or not including other objects

that are an integral part of the land, for the settlement of certain debts, which gives priority to the position, certain creditors against other creditors.

Based on the General Elucidation Number (3) Mortgage Law states that the Mortgage right guarantee institution has the following characteristics:

- a. Giving priority to the creditors (*droit de preference*);
- b. Always follow the object that is guaranteed in the hands of whoever the object is (*droit de suite*);
- c. Fulfilling the principle of speciality and the principle of publicity so that it can bind third parties and provide legal certainty to interested parties;
- d. Easy and definite execution.

Lands and objects related to land that will be burdened with Mortgage right must meet the requirements as objects of Mortgage right, these requirements are as follows:

- a. Can be valued in money, because the debt guaranteed is in the form of money;
- b. Has a transferable nature, because if the debtor breaks the promise, the object used as collateral will be sold;
- c. Including the rights listed according to the applicable land registration regulations, because they must comply with the publicity principle;
- d. Requires a special designation by a law.¹⁶

Based on these requirements, Article 4 MORTGAGE LAW stipulates the object of Mortgage as follows:

- a. Ownership Rights, Cultivation Rights, Building Use Rights;
- b. Use of Land Rights on State Land, which according to the applicable provisions must be registered and according to their nature can be transferred;
- c. Land rights including buildings, plants and works that already exist or will exist are the property of the holder of land rights whose burden is expressly stated in the relevant Deed of Granting Mortgage Rights. If the building, plant and works are not owned by the holder of land rights, the HT is released by signing and on the Mortgage Law concerned by the owner or authorized by him/her with an authentic deed;
- d. Condominium Building and Ownership Rights to Flat Units which are built on HM, HGB, or Use Rights granted by the State (Article 27 in conjunction with Law 16/1985).

Grosse Deed as regulated in Article 224 HIR has executive power, such as court decisions which have permanent legal force. The definition of executorial power over the Grosse deed means that the execution of

16 Boedi Harsono, *Sejarah Pembentukan Undang-Undang Pokok Agraria, Isi dan Pelaksanaannya*, Djambatan, Jakarta, 2005, page.422

the Grosse deed is equated with a judge's decision that has permanent legal force, so that the execution of the Grosse deed can be directly executed without going through a normal lawsuit. Thus, the settlement of cases through the execution of this Grosse deed is an exception from the principle of general justice, namely that a person can resolve disputes based on lawsuits, or legal proceedings.¹⁷

One way of executing Mortgage right as regulated in Article 20 of the Mortgage Law is the Executive Title. The implementation of this executorial title is still using the Dutch Civil Procedure Code which is regulated in Articles 224 HIR and 258 REg. This is based on the provisions of Article 26 Mortgage Law which states that before there are laws and regulations that specifically regulate the execution of Mortgage right, the regulations regarding the execution of Hypotheek was applied against Mortgage right execution. In carrying out the execution, the provisions of Article 14 MORTGAGE LAW states that the Mortgage right Certificate is valid as a substitute for the *Grosse acte hypotheek* as long as the rights to land are the object of Mortgage right, HMSRS. The execution is carried out by submitting a request for execution by the creditor holding the Mortgage right to the Head of the local District Court by submitting an Mortgage right certificate as the basis. Then, the execution will be carried out on orders and with the leadership of the Head of the District Court concerned through a public auction conducted by the State Auction Office.¹⁸

Mortgage right Execution is based on Article 224 HIR as follows:¹⁹

a. Application Stage

- 1) The creditor submits an execution to the District Court where the collateral is located or the District Court where the collateral is located or the District Court which is stipulated in the agreement as the legal domicile.
- 2) The court will summon/reprimand the debtor (*aanmaning*) twice with a grace period of 8 (eight) days for each loan received.
- 3) Debtors can have three attitudes towards the investment, namely:
 - a) Ignorance;
 - b) Acknowledging the debt and the amount owed; in such case, the creditor may directly request payment of the entire amount of the debt or request the cooperation of the debtor to sell the collateral in order to pay off the entire amount of the debt;
 - c) The debtor filed a rebuttal. This objection can be about the amount of the debt that cannot be in accordance with the debtor's record or regarding collateral. Very often the collateral is registered in the name of the wife or husband of the debtor

17 M. Yahya Harahap, *Ruang Lingkup Permasalahan Eksekusi Bidang Perdata, Cet. 5.*, Gramedia Pustaka Utama, Jakarta, 1996, page.37

18 Boedi Harsono, *Op.Cit.* page.457

19 Arie S. Hutagalung, *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, Lembaga Pemberdayaan Hukum Indonesia, Jakarta, 2005, page.235-237

and is considered used as collateral without the consent of the wife or husband. Then the wife/husband in question denied that he had never agreed to use the land and house as collateral. It can also turn out that the wife is a legal husband as evidenced by the existence of a marriage certificate/marriage certificate. In such circumstances the execution is postponed until there is a decision on the rebuttal case.

b. Foreclosure Stage

- 1) Creditors apply for confiscation of the auctioned collateral;
- 2) The court will issue a confiscation order which will then be followed by a confiscation process by a court official as evidenced by a confiscation report. If there is no response from the debtor, the process will continue.

c. Auction Stage

- 1) The creditor submits an auction application to the District Court;
- 2) The Court will publish the terms of the auction and determine the auction time after consultation with the Auction Office;
- 3) Before the auction is held there are two conditions that must be met by the creditor:
 - a) The creditor notifies the court of the price ceiling (minimum price) of the collateral;
 - b) The creditor requests a Land Registration Certificate (SKPT) of the collateral to the local Land Office.
- 4) The auction was held at the local District Court. Buyers must be at least 2 (two) parties, if there are no interested parties, the auction will be postponed for approximately one month and must be preceded by 1 (one) advertisement.

Which may be due to the greater responsiveness of asset prices to shocks when leverage is higher.²⁰ The auction of the HT object from the two executions can be avoided by paying off the guaranteed debt along with the execution costs that have been incurred until the announcement of the auction is issued.

2. Problems in The Execution Of The Mortgage Auction based on The Grosse Deed

In its implementation, the execution of Mortgage right encounters obstacles that come from:²¹

- a. The creditors such as making the ceiling too low, so that the Head of the District Court refuses, does not prepare the buyer, does not prepare the auction price, makes peace with the debtor before the auction;
- b. Courts such as KPN postponed on the grounds that the ceiling was

20 McCarthy, J and R W Peach, Monetary policy transmission to residential investment, *Federal Reserve Bank of New York Economic Policy Review*, Vol.8, No.1, 2002, page.139-58.

21 Arie S Hutagalung, *"Serba Aneka Masalah Tanah Dalam Kegiatan Ekonomi (Suatu Kumpulan Karangan)"*, Badan Penerbit Fakultas Hukum Universitas Indonesia, Depok, 2002, page.238.

not reached, there were objections, the debtor asked for a sign that it was granted; KPT letter; SUPREME COURT OF THE REPUBLIC OF INDONESIA letter; SUPREME COURT OF THE REPUBLIC OF INDONESIA phone:

- c. From the debtors themselves, such as suing, arguing, requesting a fatwa to the PT, requesting a fatwa to the Supreme Court, blocking auctions with fictitious buyers.

In addition, there are also other obstacles in the implementation of creditor rights as the holder of preference rights over Mortgage right often experiencing several problems, including:²²

1. The application process until the receipt of the auction results requires a long time and continuous monitoring;
2. With the application of the negative principle,²³ if the land has been used as collateral and it can be proven that the Mortgage right grantor is not the real owner, it will certainly result in the cancellation of the use of the land rights as collateral and thus pose a risk to the bank;
3. With the application of the horizontal principle, it can cause various obstacles such as:
 - a. If the land in question is encumbered with Mortgage right, then there is a possibility that the debtor may have obtained the machines planted on the land from the leasing company and his obligations to the leasing company have not been paid, the land and factory may be requested to be confiscated without regard to the interests of the bank as creditor of the Mortgage right holder. It is true that banks may make rebuttal efforts and other efforts, but more or less the loans/banks have been disrupted and the handling requires energy and costs that should not have happened.
 - b. Likewise, creditors must be careful to convince themselves that the owner of the land is the same as the owner of the building. If the bank makes a mistake and as a result receives a guarantee that is not entitled to it, then of course the bank will have difficulty executing it.
 - c. If the debtor of the bank is the owner of the building and not the owner of the land, of course, the creditor of the bank must know in advance the legal relationship between the owner of the land and the owner of the building and the creditor must ensure that the creditor has a position of preference over the building so that if there is bad credit and will be executed, it will not be executed. generate objections from the landowners.

22 Arie S. Hutagalung, *Tebaran Pemikiran Seputar Masalah Hukum Tanah*, Op.Cit., page. 336-337.

23 The negative principle is that a person whose name is listed in a certificate on the land is considered as the owner who is sharpening the land but as long as it can be proven otherwise by another party then by a court decision the land ownership can be canceled.

- d. The absence of the husband's/wife's or the Commissioner's/Shareholders' approval will result in objections that hinder the execution.
- e. The certificate is asphalt or fake then the execution cannot be carried out.
- f. Land encumbered by Mortgage right is in dispute so that the execution process will be suspended until the case regarding the land is resolved.
- g. The land in question is being confiscated by the Court so that the execution can only be carried out if the confiscation has been lifted first.
- h. If the wife or husband of the owner of the land encumbered with Mortgage right is a foreign citizen, then the right to the land encumbered by Mortgage right will be transferred to another person or the Mortgage right will also be erased with the abolition of the land right.

3. Legal Protection For The Applicant (Creditor) If The Execution Permit Is Not Granted By The Head Of The District Court

Legal protection for the community is divided into two, namely preventively or in terms of preventing disputes, while repressively after a decision is made by the government and some groups of people cannot accept it and eventually trigger a dispute, this must be resolved in simple language resolving disputes that has happened.²⁴

That the execution of the object of Mortgage has been regulated in the provisions of Article 20 paragraph (1) and paragraph (2) of the Mortgage right Law, one of which is fiat execution on the basis of the executorial title contained in this Mortgage Certificate is not given by the Head of the District Court, then the efforts that can be made carried out by creditors is by way of Bankruptcy.

Bankruptcy according to the provisions of Article 1 point 1 of Act No. 37 of 2004 concerning Bankruptcy and Postponement of Debt Payment Obligations (hereinafter abbreviated as the Bankruptcy Act) is "General confiscation of all assets of a bankrupt debtor whose management and settlement is carried out by the curator under the supervision of a supervisory judge. as regulated in this law".

According to M. Hadi Subhan, "Bankruptcy is a court decision that causes general confiscation of all assets of the bankrupt debtor, both existing and those that will exist in the future".²⁵ The meaning of bankruptcy in the Bankruptcy Law does not indicate the essence of bankruptcy, but only shows the legal consequences of bankruptcy, namely the general confiscation of the assets of the bankrupt debtor.²⁶

24 Philipus M. Hadjon, *Perlindungan Hukum Bagi Rakyat Di Indonesia*, Peradaban, Surabaya, 2007, page.10

25 M. Hadi Shubhan, *Hukum Kepailitan Prinsip, Norma dan Praktik di Peradilan*, Kencana, Jakarta, 2009, page.1

26 *Ibid.*, page 67

Bankruptcy has principles and characteristics that indicate the position of Bankruptcy as an unusual collection effort (*oneigenlijke incassoprocedures*). According to Wessels as quoted again by M. Hadi Subhan, it is said to be unusual because bankruptcy is provided as a means of pressure (*pressie middel*) to force debtors to fulfill obligations.²⁷

Article 2 Paragraph 1 of the Bankruptcy Law explains "Debtors who have two or more Creditors and do not pay off at least one debt that has matured and can be collected, are declared bankrupt by a Court decision, either at their own request or at the request of one or more creditors. " From this article, it can be seen that the requirements for submitting a debtor as a bankrupt debtor are:

- a. The debtor has two or more creditors;
- b. The debtor does not pay at least one debt that is due and collectible.

Whereas through this bankruptcy mechanism, the positions of Creditors and Debtors are no longer directly bound, but a new intermediary appears, namely the Curator who is the "custodian" of the debtor's bankruptcy estate. This includes the Curator, who will then use the proceeds from the sale to pay off the creditors' debts. Considering that creditors need assistance from other creditors to then be able to file an application for bankruptcy to the Commercial Court, this is as stipulated in Article 2 paragraph (1) of the Bankruptcy Law.

D. CONCLUSION

Based on the formulation of the problems that have been discussed in the discussion, it can be concluded The legal force of the Grosse deed as the basis for the execution of the mortgage execution auction Grosse has executorial power, such as a court decision that has permanent legal force which means that the execution (execution) of the Grosse deed is equated with a judge's decision that has permanent legal force, so that the execution from the Grosse of the deed can be directly executed without going through an ordinary lawsuit. The problems in the execution of the mortgage auction based on the Grosse deed arise because of a lawsuit from the debtor, causing the fiat execution to be postponed or rejected by the Head of the District Court. Legal protection for the applicant (creditor) if the execution permit is not given by the Head of the District Court is by submitting a debtor bankruptcy application to the Commercial Court.

²⁷ *Ibid.*, page 38

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