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Notary Responsibilities in Drawing Up Deeds of Agreements of Land Rights Nominee in Indonesia

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ABSTRACT
The phenomenon of the practice of law smuggling with nominee agreements made notarized is still common in business recently; in fact, its use often leads to disputes between the parties which causes the notary to be summoned to court to be asked for information on the deed he made. Based on the background mentioned above, the researcher is very interested in researching and studying: 1. How is the ownership of land rights for foreigners in Indonesia based on the nominee agreement deed? and 2. What is the notary's responsibility for making nominee deeds related to land rights? The type of research used in this research is normative legal research. As for this study, it uses an approach with a statutory approach and a conceptual approach related to theories, concepts, and doctrines regarding the legal issues raised. Ownership of land rights for foreign nationals in Indonesia based on the deed of nominee agreement is a form of evasion of law because Article 26 paragraph (2) of the Basic Agrarian Law stipulates: country". This is one of the ways for the Indonesian people that the land is not completely controlled by foreign nationals who want to build a business or live in Indonesia. The notary's responsibility for making a nominee deed relating to land rights can be in the form of civil, criminal, and/or professional code of ethics liability.

KEYWORDS
notary, nominee agreement deed, responsibility

Introduction

In line with the development and growth of Indonesian society, now that land is an important commodity for human life, ownership of land is very important to advance the dignity of citizens. The need for land is increasingly important for humans both in its function as a means of earning a living, namely as a support for livelihoods in various fields

such as the existence of agricultural land, plantations, livestock, fisheries, industry, tourism, as well as a place to live with the establishment of housing as a place to live.

Law Number 5 of 1960 concerning Basic Arrangement of Agrarian Principles, hereinafter referred to as Basic Agrarian Law is a juridical provision which is an implementation of the provisions of Article 33 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. In addition, further arrangements regarding the law on land are also contained in other laws and regulations.

Meanwhile, Indonesia adheres to the principle of nationality in the land system, as Article 21 paragraph (1) in conjunction with Article 26 paragraph (2) of the Basic Agrarian Law stipulates: "Only Indonesian citizens have property rights over land or may have a relationship with the earth and outer space. without discriminating between men and women as well as fellow Indonesian citizens, both native and descendant".

Therefore, ownership rights to land cannot be given and/or owned by foreigners, and the transfer of property rights to foreign citizens is prohibited with the threat of null and void. So, with the existence of the Nationality principle in the Basic Agrarian Law it is emphasized that only Indonesian citizens have ownership rights to land. In other words, for foreign citizens, the prohibition applies to land ownership with ownership rights, and it also applies to every legal entity that wants to be domiciled in Indonesia must meet the requirements set by the government.

This is intended as a step to prevent land in Indonesia that is controlled by the state or owned by individuals as Indonesian citizens from being completely controlled by foreign nationals who want to build a business or want to live in Indonesia. If this is not maintained and there are no regulatory provisions, then in the long term it cannot be denied that in the future many foreigners will own land in Indonesia both as a place to live and as a field of business for them in the form of industry, restaurants or control over land. Tourism. As a result, welfare for the community will be reduced or even non-existent. Therefore, property rights by foreign nationals in Indonesia are expressly prohibited by law (Mustafa, 1998).

However, this does not seem to be an obstacle for foreigners to invest in ways other than the applicable provisions. Indonesia as one of the tourist destinations for foreign tourists is believed to be a factor in the high number of investors coming in to invest in the tourism sector, both in the form of lodging, hotels and bars, and restaurants. Currently, notarial deeds can even become a weapon for foreign nationals in controlling land in Indonesia, so this has exceeded the limitations of statutory provisions. In this case, foreign nationals take advantage of the local community, namely Indonesian citizens who have property rights over land to bind themselves in the nominee agreement instrument.

A nominee agreement, better known as a name-borrowing agreement, is an innominate agreement or an anonymous agreement that is basically not recognized by the Civil Code (referred to as KUHPerdata) but has developed in Indonesian society (Muhammad Takkas Siregar, 2020). In the common law legal system, the term nominee structure is known, which contains the concept of ownership of an object for and on behalf of another person (Lucky Haryo Wicaksono, 2016). However, Indonesia, which uses a civil law legal system, does not recognize nominee agreements. Therefore, nominee agreements

can be categorized as legal smuggling used as a way to obtain ownership of land rights by foreign nationals.

This nominee agreement is made by a notarial deed, namely the occurrence of a name borrowing agreement by a foreign national in purchasing a plot of land using the name of an Indonesian citizen. In other words, a nominee agreement is an agreement made between a person who according to the law cannot be the subject of certain land rights (property rights), in this case, a foreign citizen and an Indonesian citizen, with the intention that the foreign national can control (own) de facto freehold land, but legally-formal (de jure) freehold land in the name of Indonesian citizens. In other words, Indonesian citizens borrow their names from foreign citizens (nominees) (Maria S.W. Sumardjono, 2012).

Nominee agreements can be made privately or using the services of a notary, but sometimes the parties to the agreement want to put it in the form of a notarial deed because it has perfect evidentiary power. The formulation of Article 15 paragraph (1) of Law Number 2 of 2014 (UUJN-P) concerning Amendments to Law Number 30 of 2004 (UUJN) concerning the Position of Notary Public explains the making of authentic deeds in the form of all actions, agreements, and stipulations as required by regulations legislation or it is desired by the parties concerned to be copied on an authentic deed to become the authority of the Notary. Making an authentic deed is done by pouring out the will of the interested parties in the deed so that the wishes of the parties can be realized properly and correctly and do not violate or deviate from the rule of law (I. Gede Yusa, 2016). Even though the UUJN, UUJN-P, and the Notary Code of Ethics have mandated a Notary to carry out his duties to be guided by the applicable legal rules, in practice it is not uncommon to find a Notary who provides his services to make a nominee agreement deed.

This research is important because the researcher sees that the phenomenon of the practice of legal smuggling with nominee agreements made notarized is still common in today's business and business world, even its use often leads to disputes between the parties which causes the notary to be summoned to court to be asked for information about deed he made. As previously explained, there are no regulations governing sanctions that can ensnare a Notary if proven guilty of making a nominee agreement deed relating to land rights. This of course raises ambiguity regarding the arrangement of land ownership rights for foreign citizens and the form of responsibility of a Notary in making a deed of nominee agreement relating to land rights.

Therefore, it is necessary to reform the law in Indonesia regarding sanctions for the parties who entered into an agreement or a notary who made a nominee agreement deed related to land rights. Based on the background mentioned above, the researcher is very interested in researching and studying: 1. How is the ownership of land rights for foreign nationals in Indonesia based on the nominee agreement deed? and 2. What is the responsibility of the Notary in making the nominee deed relating to land rights?

Research Methods

The type of research used in this research is normative legal research. In this legal research, the law is conceptualized as what is written in laws and regulations (law in books), or law is conceptualized as rules or norms which are standards for human behavior that are considered appropriate. As for this study, it uses an approach with a statutory approach and a conceptual approach related to theories, concepts, and doctrines regarding the legal issues raised.

Result and Discussion

Ownership of Land Rights for Foreign Citizens Based on the Deed of Nominee Agreement in Indonesia

Land ownership in Indonesia is regulated by the Basic Agrarian Law. Basic Agrarian Law regulates both the allotment and use of land, as well as legal actions that arise between people or legal entities with the land. In Indonesian agrarian law, land rights are divided into two concepts: first, primary land rights, namely land rights that can be owned or controlled by a person or legal entity for a long time and can be transferred to experts. inheritance, such as property rights, building use rights, usufructuary rights, and usufructuary rights; and secondly, secondary land rights, namely temporary land rights, such as lease rights, lien rights, boarding rights, profit-sharing business rights (Supriadi, 2007).

Mastery of land rights in Indonesia must be seen by the subject who will use it. Primary rights especially property rights can only be owned by Indonesian citizens, regulated in Article 9 of the Basic Agrarian Law, which stipulates: "Only Indonesian citizens can have a full relationship with the earth, water, and space." Article 2 of Law Number 12 of 2006 concerning Citizenship of the Republic of Indonesia, stipulates: "Indonesian citizens are people of the original Indonesian nation and people of other nations who are legalized by law as citizens".

Freehold title is the strongest and most fulfilled rights that people can have for generations on land in Indonesia while still paying attention to social functions. The strongest meaning is that property rights last for an unlimited time and can be legally defended against anyone. Fully fulfilled means that the owner of the property right is free to guarantee, transfer, and lease his land rights (Urip Santoso, 2018). Meanwhile, hereditary property rights continue even if the holder dies and can be passed on to heirs as long as they meet the requirements (Urip Santoso, 2007).

Meanwhile, foreign nationals can only have usufructuary rights. The usufructuary right in Article 41 of the Basic Agrarian Law, regulates: “Utilization rights are the rights to use and/or collect produce from land directly controlled by the State or land belonging to another person, which gives the authority and obligations specified in the granting decision by the official authorized to give it or in the agreement with the owner of the land, which is not a lease agreement or land management agreement, everything as long as it does not conflict with the spirit and provisions of this law. Foreign nationals may only have

usufructuary rights over land in Indonesia as long as they are domiciled in Indonesia. In Article 42 of the Basic Agrarian Law, the legal subjects of the right to use include:

Indonesian citizens;

Foreigners domiciled in Indonesia;

A legal entity established according to Indonesian law and domiciled in Indonesia;

A foreign legal entity that has a representative in Indonesia.

The Indonesian government in this case facilitates foreign citizens or foreign legal entities to own Indonesian land rights with usufructuary rights. However, usufructuary rights are not the same as property rights which are the strongest, most fulfilled, and hereditary. A usufructuary right in Indonesia can be granted for a certain period of time or as long as the land is used for a certain purpose. The specified period here is 25 years and can be extended or renewed for a maximum of 20 years. While the right to use for certain purposes is the right to use for representatives of foreign countries, religious bodies, social agencies and departments of non-departmental government agencies, and local governments.

According to Article 26 paragraph (2)Basic Agrarian Law stipulates: "Property rights are prohibited for foreign nationals and violations are subject to sanctions null and void and the land falls to the state". This is a way for the Indonesian people so that the land is not completely controlled by foreign nationals who want to build a business or live in Indonesia (Khunaifi Alhumami, 2016). If many Indonesian lands are controlled by foreign citizens or foreign legal entities, then the people will feel colonized again by other nations who can control potential lands and have high economic value (Kadek Rita Listyanti, 2014). Therefore, the ownership of property rights by foreign nationals is expressly prohibited by law. This is a preventive measure regulated by law as a protection for the people of Indonesia.

Notaries in carrying out their duties are strictly regulated in Law Number 2 of 2014 amendment to Law Number 30 of 2004 concerning the Position of Notary. The duties of a Notary generally lie in his authority in making authentic deeds, by a Notary the deeds he makes have strong evidentiary power when compared to private deeds. Regarding the elements and conditions that must be met in making an authentic deed, it can also be seen in the provisions of Article 1868 of the Civil Code which are formulated as follows:

The deed must be made in the form determined by law (Article 38 UUJN). This means that if the form is not determined by law then one of the authentic elements is not fulfilled and if the elements thereof are not fulfilled then there will never be what is called an authentic deed;

The deed must be drawn up by the door or made before ten overstaan of a public official.

That the deed was made by or before a public official authorized to make it at the place where the deed was made (Sjaifurrachman, 2011).

From all of the said deeds, the Notary explained or gave in his position as a public official the testimony of everything that was seen, witnessed, and experienced by other parties (G.H.S Lumban Tobing, 1980). In principle, the validity of a notary deed includes the form, content, authority of the official who made it, and the making of it must meet the requirements specified in the applicable laws and regulations. Thus, if a deed does not meet these requirements, it cannot be categorized as an authentic deed and the strength of proof is also very weak.

Nominee agreements can take the form of notarial and underhanded deeds, but in practice, most of them are notarized because notarial deeds have perfect evidentiary power. In practice, nominee agreements are made in several forms, including:

1. Sale and Purchase Deed;
2. Purchase Agreement;
3. Sale Power of Attorney;
4. Declaration (ownership of the object of sale and purchase);
5. Recognition of Debt and Receivables;
6. Mortgage Deed (APHT).

Thus, the form of the nominee agreement was drawn up from the borrowing of the name of an Indonesian citizen in a sale and purchase agreement through a sale and purchase deed, which in turn gave birth to additional agreements relating to the borrowing of the name (nominee).

Notary Responsibilities for Drawing up Nominee Deeds Relating to Land Rights

A nominee agreement is a loan or representative agreement, which has developed due to the increasing complexity and increasing needs of the community. Nominee agreements are unknown in the legal system in Indonesia which uses the civil law system, so there are no special arrangements regarding nominee agreements. This agreement is also based on the principle of Freedom of Contract, in which the parties are free to bind themselves to other parties (Mariam Darus Badrulzaman, 2016). The principle of Freedom of Contract is regulated in Article 1338 of the Civil Code, namely:

"All agreements made in accordance with the law apply as laws to those who make them. This agreement cannot be withdrawn other than by agreement of both parties or for reasons determined by law. An agreement must be executed in good faith."

This principle has limits, that is, it may not conflict with laws and regulations, norms, or good faith. Even though nominee agreements are not recognized in the Civil Code, their practice has developed in society. Nominee agreements relating to the scope of land in Indonesia need attention. This is because the purpose of this agreement within the scope of land is to carry out legal smuggling. This agreement is usually carried out by foreign nationals to obtain or control ownership rights to land by appointing a nominee (Cecilia Rina Esti Rahayu, 2019). A nominee is a person appointed as a representative in a limited sense.

This kind of nominee agreement contradicts the requirements for the validity of an agreement in Article 1320 of the Civil Code, for an agreement to be valid four conditions are required:

Agree to those who bind themselves;

The ability to make an engagement;

Something in particular;

A lawful reason.

In the four conditions above, agreement and competence are subjective requirements, if these conditions are not fulfilled then the agreement can be canceled by one of the parties. Whereas something in particular and a lawful cause is an objective requirement, where if these conditions are not fulfilled then the agreement is null and void by law. The nominee agreement is a mock agreement that contains a prohibited cause and does not fulfill the objective requirements of an agreement, namely a lawful cause. If reviewed again Article 1335 of the Civil Code, stipulates: "An agreement without a cause, or which has been made for a reason that is fake or prohibited, has no power". This nominee agreement has the effect of being null and void and deemed to have never existed. So there is no legal protection for foreign nationals who make this agreement because there is not enough evidence regarding their ownership.

The nominee agreement is made in a notarial deed so that this agreement seems legal and has a legal basis. This agreement is made with a statement deed stating that the purchase of land or building uses the name of an Indonesian citizen while the original owner is a foreign citizen. Even though this agreement was made by a Notary, the product of the deed is an authentic deed, but due to reasons that are not lawful, the agreement is null and void by law.

Further analyzing, the transfer of rights in this imposition is related to the role of the Notary as a public official authorized to make authentic deeds based on Article 1 number 1 UUJN-P (Amendment of Law on Notary). This nominee agreement is proof that the Notary ignores the applicable rules and code of ethics. Notaries as public officials are required to be accountable for the deeds they have made, both in terms of code of ethics, and criminal and civil liability.

In Article 16 UUJN-P it is explained that: "In carrying out their duties and positions, a Notary must act in a trustful, honest, thorough, independent, impartial manner, and protect the interests of the parties involved in legal actions;" If the Notary makes a deed product that is contrary to the law, it can be said that the Notary has not carried out his position in a mandate or following Article 16 of the UUJN-P. The UUJN and UUJN-P have also explained, if a Notary violates the provisions stipulated in the law, the Notary will receive sanctions. The sanctions stipulated in the UUJN and UUJN-P include written warnings, temporary dismissals, respectful discharges, or dishonorable discharges.

The aspect of notary responsibility in civil terms is the sanctions imposed if an error occurs, either due to default or an unlawful act (onrechtmatigedaad). This sanction in the form of reimbursement of costs, compensation, and interest is the result that will be received

by the Notary from the lawsuit of the plaintiffs if the deed in question is degraded which results in only having evidence as a private deed or a deed null and void. Therefore, in the case of a nominee agreement made by a Notary, in civil terms, it will result in liability sanctions for the Notary, because the notary commits an unlawful act against the nominee agreement made by the notary. The liability of the Notary is in the form of compensation based on a legal relationship between the Notary and the bearer, namely a foreign citizen. The foreign citizen's loss was due to an unlawful act by a Notary who made a nominee agreement which resulted in the deed being null and void, so the deed is deemed to have never existed or was never made. Thus, a notarial deed that is null and void will result in compensation for the party mentioned in the deed. The aggrieved party may file a civil suit against the Notary.

Practically, the aspect of notary responsibility is that there is a notary deed that is disputed by the parties or the authorities on the notary being withdrawn as a party that participates in committing or helps commit a crime, namely making or providing false information in a notarial deed. In this case, the Notary is not immune from the law, the Notary can be punished if it can be proven in Court that intentionally or unintentionally the Notary together with the appearers made the deed with the intent and purpose of benefiting certain parties appearing or harming other parties appearing. If it is proven by the Court, the Notary must be punished. Regarding criminal liability, in relation to the nominee agreement made by a Notary in the form of an authentic deed, the nominee agreement is a crime as stipulated in Article 266 of the Criminal Code in paragraph (1) regarding the crime of forging letters, namely ordering to enter false information into an authentic deed. The nominee agreement made by a Notary contains a false statement in which the deed intends to use it as if the statement is in accordance with the truth, even though the nominee agreement made by a Notary is based on the interests of foreign citizens to be able to control private land by borrowing Indonesian citizen name.

Aspects of the notary's responsibilities based on the notary's code of ethics, the notary must also adhere to the notary's code of ethics. Because as an honorable profession (officium nobile), a Notary in carrying out his duties must act independently, honestly, and responsibly. The values in the Notary's code of ethics are the dignity of the Notary as a professional, if the code of ethics is violated, the dignity of the Notary will be lost. In carrying out his position, a Notary must behave professionally, have a good personality and uphold the honor of a Notary, and be obliged to respect colleagues and look after each other and defend the honor of the good name of the corps or organization. Thus, if a Notary is proven to have violated the code of ethics, sanctions will be given to the Notary. Sanctions for violations of the code of ethics can be in the form of reprimands, warnings, temporary dismissals, dismissals from membership, and dismissals with respect to membership.

Conclusion

Ownership of land rights for foreigners in Indonesia based on the nominee agreement deed is a form of evasion of law because, Article 26 paragraph (2) of the BAL, stipulates: "Owner rights are prohibited for foreign nationals and violations are subject to

sanctions null and void and the land falls to the state." ". This is one of the ways for the Indonesian people that the land is not completely controlled by foreign nationals who want to build a business or live in Indonesia. The notary's responsibility for making a nominee deed relating to land rights can be in the form of civil, criminal, and/or professional code of ethics liability.

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