

Ownership of Land Through Nominee Agreement by Foreign Citizens

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ABSTRACT

Land has an attractive market value that entices foreign nationals (FNs) to invest in it. FNs can have usage rights and lease rights to land in Indonesia, but they still strive to have ownership rights over land in Indonesia by making a nominee or borrowing agreement, which essentially states that Indonesian citizens (ICs) are only lending their names, while the right to control the land belongs to FNs. The research method used in this writing is by conducting a normative juridical approach, examining and researching secondary data such as the Decision of the Gianyar District Court, the Civil Code, as well as other literature materials such as books and journals to analyze related judgments. This study also uses descriptive analytics aiming to describe or depict the research object through collected materials. Based on the results of this research, the nominee agreement does not meet the requirements of a valid agreement, specifically the fourth clause, which is a lawful cause because based on the Foreign Ownership of Property Act, FNs are prohibited from owning land in Indonesia, so it is correct if the land reverts to the state because ICs whose names are listed in the Land Certificate also obtain the land with malicious intent. This decision is incomplete because it does not impose sanctions on Notaries/PPATs who do not comply with legal regulations.

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PRELIMINARY

The notary should reject the drafting of deeds used as the basis for land ownership by foreign nationals, using the names of Indonesian citizens as buyers of the property rights. The drafting of such deeds would result in legal consequences, rendering the deeds legally null and void. The creation of such deeds violates applicable legal provisions, thereby rendering the legal acts evidenced by those deeds null and void, and the notary who drafted such deeds can be held accountable both administratively and civilly.

Land is a primary natural resource that holds deep spiritual value for the people of Indonesia.¹ It serves various functions such as agriculture, farming, livestock, tourism, and investment. Land holds attractive commercial value, especially in major cities where its prices are continually increasing. This prompts both Indonesian citizens and foreign nationals to vie for land as an investment opportunity. Foreign nationals residing in Indonesia for purposes such as work and education also contribute to this demand. Consequently, the need for land in Indonesia is on the rise.

One of the Indonesian regions frequently chosen as a tourist destination and investment hub is Bali. Bali is renowned for its rich culture, beautiful beaches, and numerous tourist attractions like Kuta Beach, Sanur Beach, and Tanah Lot. It's understandable why many foreign nationals come to Indonesia not only for leisure but also for investment, particularly in land.

One of the Indonesian regions frequently chosen as a tourist destination and investment hub is Bali. Bali remains rich in its cultural heritage and boasts beautiful beaches and numerous tourist attractions such as Kuta Beach, Sanur Beach, and Tanah Lot. This is quite understandable as it leads to a significant influx of foreign nationals arriving in Indonesia not only for leisure but also for investment, particularly in land.

Foreign nationals can own property in Indonesia as regulated by Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA), as long as the land rights consist of the right to use as regulated in Article 42 letter b of the UUPA and lease rights as regulated in Article 45 of the UUPA. The UUPA has stipulated who can control land in Indonesia. Article 9 paragraph 1 of the UUPA states that, "Only Indonesian citizens can have full relationships with the earth, water, and airspace, within the limits of the provisions of Articles 1 and 2."² This is further clarified in the Explanation of the UUPA that, in accordance with the principle of nationality implied in Article 1 of the UUPA, only Indonesian citizens can have ownership rights over land, and ownership rights cannot be held by foreigners, and the transfer of ownership rights to foreigners is prohibited.

Furthermore, the government has explicitly imposed a prohibition that foreign nationals (FNs) cannot own land with full ownership rights in Indonesia, as mentioned in Article 26 Paragraph 2 of the UUPA, which states, "Every sale, exchange, donation, bequest, and other acts intended to directly or indirectly transfer ownership rights to foreigners, to a citizen who, in addition to Indonesian citizenship, also holds foreign citizenship, or to a legal entity, except as determined by the Government as referred to in Article 21 Paragraph 2 of the UUPA, are null and void, and the land falls to the state, with the provision that the rights of other parties burdened by it remain in force, and all payments received by the owner cannot be reclaimed."³

While foreign nationals cannot own land with full ownership rights, they can still possess property through leasehold or right of use. However, in practice, Foreign Nations strive to obtain ownership rights because ownership is the strongest and most complete right that can be possessed, as also stated in Article 20 Paragraph 1 of the UUPA. This is evidenced by numerous court rulings regarding Foreign Nations' attempts to acquire land ownership, similar to cases such as Court Decision Number 7/Pdt.Plw/2017/PN Mpw and local news reports indicating authorities facing difficulties in registering villas in Bali, with many villas discovered to be owned by Foreign Nations using Indonesian citizens' names.

¹ Boedi Harsono, *Menuju Penyempurnaan Hukum Tanah Nasional*, Penerbit Universitas Trisakti, Jakarta, 2003, hlm. 3

² Pasal 9 Ayat 1, Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria

³ Pasal 21 Ayat 2, Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria

The Foreign Nations practice of using Indonesian citizens' names is known as a nominee arrangement.

A nominee arrangement is an agreement between two or more parties, wherein one party acts as the legal nominee and the other party, the beneficiary, enjoys any profits and/or benefits derived from the nominee's actions. Regulations regarding land ownership in Indonesia by both Indonesian citizens and Foreign Nations are generally governed by Law Number 5 of 1960 concerning Basic Agrarian Principles. However, with societal evolution, legal vacuums arise as laws have yet to address them.

While the UUPA stipulates that if there is a transfer of land ownership to Foreign Nations, such transfer is legally void, and the land reverts to the state, it does not specify the legal consequences of such transfers based on a nominee agreement.

Based on the aforementioned background, the issues relevant to this discussion are: First, What is the status of land ownership in cases of nominee arrangement in land transactions by Foreign Nations as per decision number 137/Pdt.G/2021/PN Gin? Second, What are the responsibilities of a Notary in drafting nominee agreements in land transactions by Foreign Nations as per decision number 137/Pdt.G/2021/PN Gin?

METODE

The research method employed in this journal is doctrinal research. Doctrinal research is a prescriptive legal study, wherein legal science examines the purposes of law, justice values, the validity of legal rules, legal concepts, and legal norms.⁴ The data obtained and collected are in the form of primary legal materials and secondary legal materials. These data are qualitatively processed and analyzed, with the results presented descriptively by explaining, outlining, and illustrating the issues along with their closely related resolutions in the write-up.

HASIL DAN PEMBAHASAN

The status of land ownership in the practice of nominee arrangement in land transactions by foreign nationals (FNs) based on decision number 137/Pdt.G/2021/PN Gin.

The parties involved in this case are NH as the Plaintiff, who is an Indonesian citizen, I.J.D as the Defendant I, who is a foreign national of Dutch nationality, and KAN as the Defendant II, who is a Notary/Public Notary. The Plaintiff and Defendant I have been friends since 2013. According to the Plaintiff, based on their good friendship, Defendant I expressed a sincere desire to give a gift to the Plaintiff in the form of two plots of land with a villa named "Villa Pondok Senang," located in the Bedulu Village area, Blahbatuh District, Gianyar Regency. The Plaintiff agreed, and thus, the process of buying and selling the land and villa took place at the office of Defendant II.

The gift given by Defendant I to the Plaintiff consisted of two plots of land described as follows: 1. A plot of land with buildings and a Certificate of Ownership (SHM) Number 02494, located in Bedulu Village as described in the land measurement letter dated July 21, 2014, Number 1279/Bedulu/2014, with an area of 1000 m² under the name of IKS as the Seller, then sold to the Plaintiff as the Buyer with Deed of Sale and Purchase (AJB) Number

⁴ Peter Mahmud Marzuki, *Metode Penelitian Hukum*, (Jakarta: Penelitian Hukum, 2006), hlm. 33.

491/2014. 2. A plot of land with SHM Number 832, located in Bedulu Village, as described in the situation diagram dated November 15, 1993, Number 3011/1993, with an area of 490 m² where NKS as the Seller then sold it to the Plaintiff as the Buyer.

The buying and selling process for both Certificates of Ownership of the two lands from I.K.S as the Seller to the Plaintiff as the Buyer was conducted on Wednesday, November 5, 2014, at the office of Defendant II with AJB Number 491/2014, while the buying and selling process from N.K.S as the Seller to the Plaintiff as the Buyer was carried out on Tuesday, November 11, 2014, at the office of Defendant II with AJB Number 497/2014. Both deeds of sale and purchase also served as the legal basis for the change of ownership names in Certificate Number 02494, originally under the name of I.K.S, to the Plaintiff's name and the change of ownership names in Certificate Number 832, originally under the name of N.K.S, to the Plaintiff's name.

Agreements, based on their names, are divided into two types, namely named agreements or nominative agreements, and unnamed agreements or innominate agreements.⁵ Named agreements are agreements that have their own names, where such agreements have been regulated and named by the legislator, while unnamed agreements are agreements that are not regulated in the Civil Code, but are widely used by society.⁶

Named agreements are specifically regulated in the Civil Code from Chapter V to Chapter XVIII. For example, contracts of sale, lease agreements, donation agreements, exchange agreements, civil partnership agreements, etc. Unnamed agreements are not specifically regulated in the Civil Code but emerge and develop in society based on the principle of freedom of contract according to Article 1338 of the Civil Code. The number of these agreements is not limited to names tailored to the needs of the parties involved.⁷

Nominee arrangement or nominee agreement is an attempt to provide the possibility for foreign nationals to have ownership rights over land prohibited by the UUPA by conducting property transactions in the name of Indonesian citizens, thus not formally violating the regulations. The definition of an agreement has been explained in Article 1313 of the Civil Code, which states, "An agreement is an act by which one or more persons bind themselves to one or more other persons." According to Subekti, an agreement is an event where one promises something to another or where two persons promise each other to carry out something.⁸ From this event arises a legal relationship between two parties called an obligation.⁹ The word "nominee" comes from Latin meaning "by name of or under the name of designation of ..." which means with the name or under the designation name.¹⁰ It means a nominee is someone appointed to act on behalf of another. In a nominee arrangement or nominee agreement, there is a party who appoints this nominee called the beneficiary.¹¹

During the buying and selling process, the Defendant II found that the costs of purchasing the land and buildings, as well as the documents, originated from the Defendant

⁵ Salim HS, *Perkembangan Hukum Kontrak di Luar KUH Perdata*, PT RajaGrafindo Persada, Jakarta, 2006, hlm. 1

⁶ Taryana Soenandar, *Kompilasi Hukum Perikatan*, PT Citra Aditya Bakti, Bandung, 2016, hlm. 5

⁷ Muhammad Syaifuddin, *Hukum Kontrak: Memahami Kontrak dalam Perspektif Filsafat, Teori, Dogmatik, dan Praktik Hukum*, Penerbit Mandar Maju, Bandung, 2012, hlm. 150

⁸ Syahmin, *Hukum Perjanjian Internasional*, (Jakarta : PT. Raja Grafindo Persada, 2006), hlm 1

⁹ Yosia Hetharie, "Perjanjian Nominee sebagai Sarana Penguasaan Hak Milik atas Tanah oleh Warga Negara Asing (WNA) Menurut Kitab Undang-Undang Hukum Perdata", *Jurnal SASI*, Vol. 25, No. 1, 2019. hlm. 30

¹⁰ Kintania Rizky Putri dan Tri Handayani, "Perjanjian Nominee Jual-Beli Tanah oleh WNA Ditinjau dari Peraturan Perundang-Undangan", *Jurnal Global Ilmiah*, Vol. 7, No. 9 (2023), hlm. 2.

¹¹ Johan Kadir Putra dan Rada Alfathania, "Asas Kebangsaan dalam Perjanjian Nominee Untuk Memperoleh Hak Milik atas Tanah", *Jurnal IUS Kajian Hukum dan Keadilan*, Vol. 8, No. 2 (2020), hlm. 330

I, so the Defendant II drew up Agreement Letter No. 46 dated November 18, 2014, and Agreement Letter No. 48 dated November 18, 2014, to protect the interests of the Defendant I. The agreements contained clauses essentially stating that: a. The Plaintiff's name was only borrowed in the Deed of Sale and Purchase (AJB) and the Certificate of Land Ownership (SHM) of the disputed land; b. All costs of purchasing the disputed land and all taxes and document fees at the Notary's office are borne by the Defendant I; c. The party who has control over the land and can enjoy the land and everything on it is the Defendant I.

The emergence of this nominee agreement is based on Article 1338 of the Civil Code, which states, "An agreement made in accordance with the law applies as law to those who make it." The word "all" in Article 1338 indicates that everyone is free to make agreements.¹² However, this freedom to make agreements does not mean that everyone can make agreements as freely as they want, but is limited by Article 1339 of the Civil Code, which states that in making an agreement, it is necessary to consider justice, customs, and the law.

The principle of freedom to contract is not absolute; its operation is limited to ensure that the agreements made do not harm any party involved. Article 1339 of the Civil Code states that the existence of the principle of freedom to contract does not mean that individuals can make agreements without considering certain limitations. Article 1339 of the Civil Code reads: "An agreement binds not only what is expressly stipulated therein, but also everything that, by the nature of the agreement, is required in accordance with justice, custom, or law." This means that the principle of freedom to contract is restricted while still considering fairness for the parties, observing societal customs, and not violating the law.

Article 1320 of the Civil Code specifies four (4) requirements for the validity of an agreement, namely: First, there must be mutual agreement among the parties involved; Second, the capacity of the parties to enter into a contract; Third, a specific subject matter; and Fourth, a lawful consideration.

The term "agreement" in a contract essentially refers to the meeting or alignment of wills between the parties involved in the agreement.¹³ An individual is considered to give their consent if they genuinely desire what has been agreed upon. Article 1330 of the Civil Code states: "Those who are not capable of giving consent are: 1) Children who are not yet of legal age; 2) Persons under guardianship; 3) Married women in matters specified by law and generally all persons prohibited by law from entering into certain agreements." An agreement must concern a specific subject matter (certainty of terms), meaning that what is agreed upon must at least specify its type.¹⁴

The Civil Code determines the legal consequences for contracts or agreements that do not meet the requirements specified in Article 1320 of the Civil Code. The first and second requirements are referred to as subjective requirements because they concern the parties entering into the agreement.¹⁵ Meanwhile, the third and fourth requirements are referred to as objective requirements because they concern the object of the agreement. If the first and second requirements are not fulfilled, the agreement can be annulled. This means that one party can request the Court to annul the agreement they have entered into. However, if none of the parties object, the agreement remains valid. And if the third and fourth requirements

¹² Aji Halim Rahman, "Perjanjian Baku Kredit Pemilikan Rumah (Kpr) Dihubungkan Dengan Pasal 45 Undang-Undang Nomor 8 Tahun 1999 Tentang Perlindungan Konsumen", *Presumption of Law*, Vol 2, No. 2, 2020, hlm. 79.

¹³ Retna Gumanti, "Syarat Sahnya Perjanjian: Ditinjau dari KUH Perdata", *Jurnal Pelangi Ilmu*, Vol. 5, No. 1, 2012, hlm. 5

¹⁴ Ibid.

¹⁵ Novi Ratna Sari, "Komparasi Syarat Sah Nya Perjanjian Menurut Kitab Undang-Undang Hukum Perdata dan Hukum Islam", *Jurnal Repertorium*, Vol 4, No. 2, 2017, hlm. 84.

are not met, the agreement is void ab initio. This means that the agreement is considered void from the beginning.¹⁶

The annulment of an agreement must be carried out through the court, so the annulment of the agreement is done through a court decision in accordance with Article 1266 of the Civil Code. According to Subekti, the annulment of an agreement can be done in two ways: actively, by directly demanding annulment before a judge, or defensively, by waiting until being sued before a judge to fulfill the agreement and then presenting reasons for the deficiency of the agreement.¹⁷ The time limit for filing a claim for the annulment of an agreement is five years. Additionally, an agreement that can be annulled must be reciprocal, meaning it grants rights and obligations to both parties. The above conditions are requirements that must be met for an agreement that can be annulled, whereas for agreements that are void ab initio, the agreement is not valid, and it is considered as if the agreement never existed.

Article 1335 of the Civil Code states, "An agreement without cause or made for a false or illegal cause has no legal force. In other words, it is void ab initio." Article 1335 of the Civil Code is further elaborated in Article 1337, which states that a causa is illegal if it contradicts the law, morality, and public order. Thus, logically, to determine whether a causa contradicts the law, one needs only to refer to the prevailing laws to see if there are any prohibitions regarding the matter.

The legal consequence of a nominee agreement evidenced by a Notary deed is void ab initio. This is because the legal actions taken by the foreigner, I.J.D, and the Notary, K.A.N, S.H., contradict the law. Not only do they contradict the law, but they also contradict morality and ethics. This is evidenced by the creation of a deed indirectly transferring ownership rights of land belonging to Indonesian citizens to foreigners, resulting in the land reverting to the state.

The Responsibilities of Notaries/PPAT in the creation of nominee agreements in land transactions by foreigners based on verdict number 137/Pdt.G/2021/PN Gin.

A notary is a public official who is exclusively authorized to draw up authentic deeds concerning all acts, agreements, and determinations required by general regulations or by interested parties.¹⁸ Indirectly, the notary can be considered as not fulfilling their obligations in carrying out their professional duties. In this case, the notary actually participates in implementing the nominee concept regarding the ownership of land rights by legal entities not appointed by the government. This is certainly contrary to the regulations of the notarial profession and ethics as well as the applicable laws in Indonesia, considering that the cause contained in the notarial deed is an illegal cause that contradicts the requirements for the validity of the agreement. The notary in this case must be legally accountable for their actions because the notary has moral responsibility and may be sued for compensation by parties harmed due to the notary's negligence in the deeds they make.¹⁹ A notarial deed declared null and void demonstrates the lack of application of the principle of legal certainty in the notary's actions. The notarial deed lacks legal certainty, thus it cannot serve as a basis for resolving disputes that arise. The notary also disregards the principle of caution in acting, as seen from their inability to determine the attitude and actions that should be taken by them. Disputes arising from notarial deeds declared null and void also seem to measure the

¹⁶ Salim HS, hlm 35.

¹⁷ P.N.H. Simanjuntak, 2007, Pokok-pokok Hukum Perdata Indonesia, Djambatan, Jakarta, hlm.347.

¹⁸ Tobing, G.H.S. Lumban. Peraturan Jabatan Notaris. Jakarta: Erlangga, 1999. Hlm 31.

¹⁹ I Putu Eka Dharma, "Tanggung Jawab Notaris Sebagai PPAT Terhadap Akta Yang Mengandung Cacat Hukum", Jurnal Kertha Semaya 3, No. 1 (2015), hlm. 5.

standard of professionalism of the notary. In this case, the notary seems to accept all forms of service submitted to them without considering the consequences of their actions. Accountability arises when there is an unlawful act (tort liability). Additionally, responsibility emerges when someone has authority.

The notary's responsibility essentially pertains to the formal accuracy of the deed in question, thus not prioritizing the material truth as the content of the deed. The responsibility and sanctions for the notary have been regulated in legal provisions which can be distinguished into several aspects, namely:

1. Administrative responsibility, where the notary commits violations as stipulated in the Notary Law and the notary code of ethics, thus they may be subject to sanctions such as oral warnings, written warnings, honorable discharge, and dishonorable discharge.
2. Civil liability, where the notary commits errors or acts in violation of the law, thereby causing harm to interested parties. In accordance with Article 1365 of the Civil Code, "Every act that violates the law and causes harm to others, obliges the person who causes the harm due to their fault to compensate for the loss."

In this case, K.A.N, S.H. as a notary has violated provisions and legal regulations. As stated in Article 33 paragraph (1) of the Investment Law, it prohibits domestic and foreign investors from making agreements and/or statements affirming that the ownership of shares in limited liability companies is for and on behalf of others. Due to the actions of the notary in making agreements prohibited in Article 33 paragraph (1) of the Investment Law and Article 26 paragraph (2) of the UUPA, the notary has violated the Notary Law and the notary code of ethics, as follows²⁰:

1. Violation of the Notary Law: a. Article 4 paragraph (2), Before carrying out his duties, the notary must swear or pledge before the Minister of Law and Human Rights. In this oath, the notary promises to be obedient and loyal to the Unitary State of the Republic of Indonesia, Pancasila, the 1945 Constitution, the Notary Law, and statutory regulations; b. Article 15 paragraph (2) letter e, Obligation to provide legal counseling in connection with the preparation of deeds; c. Article 16 paragraph (1) letter a, Acting with trustworthiness, honesty, carefulness, independence, impartiality, and safeguarding the interests of the parties involved in legal actions; d. Article 16 paragraph (1) letter e, Providing services in accordance with the provisions of the Notary Law, unless there is a reason to refuse; e. Article 17 letter i, Performing an action that can affect the dignity and honor of the notary in his position, such as work that contradicts religious norms, ethics, or propriety.
2. Violation of the Notary Code of Ethics: The violated article in the code of ethics is Article 3 number 4, which is acting honestly, independently, impartially, with a sense of responsibility, based on statutory regulations, and the oath of office of the notary.²¹

PENUTUP

Based on the analysis presented by the author earlier, the nominee agreement is actually prohibited under Indonesian regulations. However, considering the general scheme of the nominee agreement, it is an agreement that can be drawn up by a Notary based on their authority in an authentic deed. As long as it is in the form of an authentic deed, meets all the elements and requirements of the agreement, and does not conflict with the applicable laws and regulations. This is because a Notary can draw up any agreement as long as it

²⁰ Endah Pertiwi, "Tanggung Jawab Notaris Akibat Pembuatan Akta *Nominee* Yang Mengandung Perbuatan Melawan Hukum Oleh Para Pihak", *Jurnal Rechten* 1 No. 1 (2019), hlm. 7.

²¹ Ibid.

complies with their authority and the regulations in force. If it violates all applicable regulations, then the nominee agreement is prohibited, as seen in the Investment Law and the Agrarian Law which prohibit nominee agreements that result in legal smuggling.

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