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Nominee Practices Toward Land Ownership Status in Indonesian Positive Law

Raihan Hasbi

Magister Kenotariatan, Universitas Indonesia, hasbiraihan15@gmail.com

ABSTRACT

Nominee is a term used in various contexts to refer to an individual or entity authorized to act on behalf of another individual or entity. The use of nominees is quite common, particularly in situations where there are legal restrictions on direct ownership by foreign parties or individuals who wish to conceal their true identity as the actual owner. In Indonesia, nominees are usually based on an agreement. However, the practice of nominee is often misused to circumvent existing regulations, particularly in land ownership. This research was conducted with the aim of knowing how practice of name-lending (nominee) through the lens of positive law and subsequently, examine how land ownership status is influenced by this practice, with a focus on its implementation provisions. By using normative juridical research methods, it can be concluded: 1. in general, the practice is allowed as long as it refers to the applicable laws and regulations If the practice is accompanied by an agreement, it should not contradict the positive law in force in Indonesia, especially those that regulate agreements 2. The status of land ownership with Nominee Practices or Nominee Agreement, as seen from the Supreme Court Circular Letter No. 10 of 2020 in the formulation of civil law, letter B number (4), states that the one listed on the certificate is the rightful owner. Based on this provision, the status of the land, even if registered in someone's name as a nominee, remains the property of the nominee, regardless of who provided the funds to purchase the land object. Therefore, the name listed on a land certificate is not separate from the rights and obligations towards the land. In this case, the regulation closes the possibility of having rights to land through nominee practices in Indonesia.

Keywords	*Nominee Practices; Nominee Arrangement; Land Ownership; Positive Law*
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Manuscript History: *Received:* June 13, 2024 *Accepted:* December 4, 2025 *Corresponding Author:* Raihan Hasbi, hasbiraihan15@gmail.com	Legal Spirit is *Licensed under a Creative Commons Attribution-ShareAlike 4.0 International License* **Indexed:** **Layout Version:** V8.2024

PRELEMINARY

Nominee is a term used in various contexts to refer to an individual or entity authorized to act on behalf of another individual or entity. In Indonesia, the concept of a nominee is often associated with asset or business ownership held in someone else's name, which can include property, shares, or other business interests. The use of nominees is quite common, particularly in situations where there are legal restrictions on direct ownership by foreign parties or individuals who wish to conceal their true identity as the actual owner.

According to Black's Law Dictionary, a nominee is defined as a person appointed to act on behalf of another as a limited representative. . In other words, a nominee is someone who has been appointed or nominated to act in place of another person. Therefore, nominee agreement in this context refers to an agreement between two or more parties, where there are two main parties: the nominee who is legally registered and the beneficiary who receives all the benefits and/or profits generated by the nominee. However, nominee agreements are often identified as a form of legal evasion because individuals or parties want to avoid the consequences of their actions or certain requirements that must be met according to specific regulations.

The concept of a nominee is an agreement between two parties, namely the nominee whose name is lent and the beneficiary who enjoys the benefits. In Indonesia, nominees are usually based on an agreement. A nominee agreement, also known as a name-lending agreement, is a type of agreement commonly used by individuals or legal entities as legal subjects, including in Indonesia. Although the use of nominee agreements is not explicitly stated in the Civil Code (KUH Perdata), this agreement emerges based on the needs of the parties involved, and can be categorized as an "innominate agreement". In the business world, this agreement is quite common for the sake of business convenience. The practice of nominee without a binding agreement is not impossible, as long as it is in accordance with the prevailing legal principles. In other words, the practice of nominee itself is not strictly prohibited in Indonesia.

However, the practice of nominee is often misused to circumvent existing regulations, particularly in land ownership. For example, it is evident that the use of nominee agreements is dominated by foreign nationals. The practice of using nominees is frequently employed by foreigners, primarily to acquire or exercise control over land rights within the territory of the Republic of Indonesia. This is possible due to the legal restrictions that prohibit foreigners from directly owning or purchasing land in Indonesia. As a result, this agreement creates a loophole that enables foreigners to own land in Indonesia, circumventing the existing legal provisions. While the use of nominees is often associated with foreign nationals seeking to acquire land in Indonesia, it is not exclusive to them. Indonesian citizens also engage in this practice, borrowing someone's name to act as a nominee.

Based on the previous discussion, the author is interested in conducting a more comprehensive examination of the Nominee Practices Toward Land Ownership Status in Indonesian Positive Law. This analysis will delve into the practice of nominee through the lens of positive law, and subsequently, examine how land ownership status is influenced by this practice, with a focus on its implementation provisions.

METHOD

The research method used in this study is the normative legal method. which involves an examination of written laws and documents that refer to legal norms contained in legislation. In normative legal research, problems are analyzed and studied based on literature reviews and relevant legislation. This stems from the existence of a gap between legal norms and principles related to a legal issue.

RESULT AND DISCUSSION

Legal Analysis of Nominee Practices through the Lens of Positive Law

Positive law, also known as 'stellingrecht', embodies a dominant legal principle that delineates a harmonious correlation between legal provisions and their attendant legal consequences, abstracted from the entirety of judicial decrees. According to Logemann, the definition of positive law is "the recognized legal reality". On the other hand, according to Bender, positive law, when viewed from its existence and origin, is "law created specifically by human action", and therefore, positive law in its existence is dependent on those human actions themselves. Author undertakes an examination of the nominee practice in the context of the prevailing laws of Indonesia.

The nominee agreement differs from ordinary agreements, being a special type of agreement, referred to in various legal literature as a "nominaat agreement", which is recognized in Civil Code. The nominee agreement is a contract that falls outside the scope of the Civil Code, commonly referred to as a non-typical agreement, known as an "innominaat agreement", which emerges, develops, and adapts in the practice of community life. The innominaat agreement, in essence, was not recognized at the time the Civil Code was enacted.

Although it is classified as an innominaat agreement, in practice, the nominee agreement in Indonesia is not exempt from the applicable laws of contract. The definition of an agreement in Book III of the Indonesian Civil Code is regulated in Article 1313 of the Civil Code, which states that an agreement is "an act by which one or more persons bind themselves to one or more other persons". An agreement is the starting point of a legal act involving two or more parties and gives rise to rights and obligations between the parties involved. The agreements in the Civil Code are based on several principles or axioms, including:

1. The Principle of Consensualism, which states that in entering into an agreement, the consent of the parties involved is essential regarding the agreed-upon terms of the agreement. This principle is based on Article 1320 paragraph (1) of the Civil Code, which stipulates that one of the requirements of an agreement is the consent of the parties. However, an agreement cannot be validly entered into under duress. If it is proven that the agreement was made under duress, it can be annulled by filing a petition with the court.

2. The Principle of Freedom of Contract, as stipulated in Article 1338 paragraph (1) of the Civil Code, which states that "all agreements made in a lawful manner shall be binding as law upon those who make them". This principle grants parties the freedom to decide with whom they wish to enter into an agreement, whether to enter into an agreement or not, the contents of the agreement, the manner of its implementation, and the terms and conditions of the agreement. Parties are also free to determine whether the agreement will be made in writing or orally.

3. The Principle of Pacta Sunt Servanda, which is an application of Article 1338 paragraph (1) of the Civil Code, stating that an agreement is valid and binding, having the same legal effect as a law between the parties. This emphasizes that parties must respect the contents of the agreement made in accordance with the law. This principle is also known as the principle of legal certainty, which relates to the consequences of an agreement and its binding nature for the parties involved.

4. The Principle of Good Faith, Article 1338 paragraph (3) of the Civil Code states that agreements must be performed in good faith. The application of the principle of good faith involves the application of moral and ethical norms that are considered fair and cannot be ignored by the parties involved. This means that parties must not engage in actions that violate moral and ethical norms. If this principle is violated, the agreement can be declared invalid by the court.

The formation of an agreement requires the achievement of consensus among the parties, namely the convergence of wills and declarations from each party. If, formally, there is an agreement, but the parties do not intend to be bound by its legal consequences, in terms of their declarations of intent. In such a situation, it is said that there has been a deviation from the agreed-upon settlement, where the parties intentionally engage in legal actions that deviate from what should have occurred. There is a conflict between the intention and the declaration that is intentionally made and not known to third parties, which is known as a simulated agreement or a sham agreement.

The Simulated Agreement has been regulated in Article 1873 of the Civil Code, which states that: "A subsequent agreement made in a separate deed that contradicts the original deed, only provides evidence between the parties, their heirs, or assignees, but cannot be effective against third parties who act in good faith." The determination of whether an agreement is a sham agreement or a simulated agreement depends on the legal principles or axioms that provide a consistent standard for evaluating the validity of the agreement.

Other articles in the Civil Code related to determining whether an agreement is a simulated agreement or not, include Article 1320 of the Civil Code, which states that for an agreement to be valid, it must meet four conditions, one of which is that the agreement must have a "halal" or lawful cause. Furthermore, Article 1335 of the Civil Code states that: "An agreement without a cause or made for a false or prohibited cause, has no legal effect". Additionally, Article 1337 of the Civil Code states that: "A cause is prohibited if it is prohibited by law or if it is contrary to public order". In this regard, an agreement that contravenes the provisions of these articles can be categorized as a simulated agreement or a sham agreement.

Although the nominee agreement is not specifically regulated in the Civil Code, in practice, the nominee agreement must comply with the requirements of a valid agreement as stipulated in the Civil Code, particularly with regard to the element of "lawful cause". This means that the nominee agreement cannot violate the provisions of Indonesian laws and regulations. The nominee agreement must also adhere to the general principles of contract law, and if there are elements that violate the contractual elements contained in the law, the agreement should be deemed null and void.

Beyond the discussion on the practice of nominee agreements in Indonesian contract law, there exist regulations pertinent to the practice of nominee agreements in Indonesia. This is as stipulated in the provisions of Indonesian laws and regulations, including Law Number 25 of 2007 concerning Capital Investment (Law Number 25/2007). Article 33 paragraph (1) of the Law Number 25/2007 explicitly states that "Domestic and foreign investors who invest in the form of a limited liability company are prohibited from entering into agreements and/or making statements that confirm the ownership of shares in the limited liability company for and on behalf of another person". In this context, the provision in the article proscribes the creation of any agreement that seeks to utilize another person's name or a third party for the ownership of shares in a limited liability company. As elucidated in the explanation of Article 33 paragraph (1) of the Law Number 25/2007, "the objective of this regulation is to prevent the occurrence of a company that is nominally owned by one person, but in substance, the owner of the company is another person".

Furthermore, Article 33 paragraph (2) of the Law Number 25/2007 explains that "In the event that domestic and foreign investors make agreements and/or statements as referred to in paragraph (1), such agreements and/or statements shall be declared null and void". In other words, if it is proven that a nominee agreement has been made for the ownership of shares in a Limited Liability Company, then the agreement shall be deemed null and void. In addition to the regulations regarding nominee practices in the Law Number

25/2007, the Law Number 40 of 2007 concerning Limited Liability Companies (Law Number 40/2007) also regulates the prohibition of nominee practices for the purpose of owning shares in a Limited Liability Company.

In contrast to the Law Number 25/2007, which explicitly prohibits the practice of nominee agreements in the form of share ownership, particularly for foreign nationals, the Law Num. 40/2007 does not explicitly proscribe this practice. This is as stipulated in Article 48 paragraph (1) of the Law Number 40/2007, which provides that "Shares of the Company shall be issued in the name of the owner", and in its explanation, "What is meant by this provision is that the Company is only permitted to issue shares in the name of the owner and the Company is not allowed to issue shares in the name of a nominee". This explanation implies that the company can only issue shares with the name of the registered owner, not in the name of another person other than the owner of the shares. Consequently, if there is a nominee practice in share ownership, the beneficiary party does not have the right as a shareholder in the company.

Land Ownership Status with Nominee Practices Based on Implementing Regulations

In the study of agrarian law, one of the main principles adopted by agrarian law is the Principle of Nationality. This is contained in Article 33 paragraph (3) of the 1945 Constitution of The Republic of Indonesia, which states that "the land, water, and natural resources contained therein are controlled by the state and utilized for the greatest prosperity of the people". The Principle of Nationality is a principle that emphasizes that only the Indonesian nation can have a full legal relationship with the natural resources in Indonesia. The Principle of Nationality is a principle that prioritizes the interests and needs of the people within the state's territory. In other words, the state's rights are the primary source of all other land use rights, both directly and indirectly.

Land ownership in Indonesia is regulated as stated in Law Number 5 of 1960 concerning the Basic Agrarian Law (Law Number 5/1960). Every citizen has the right to own land in Indonesia, but the ownership is specifically regulated as stated in the Law Number 5/1960. In Article 16 paragraph (1) of the Law Number 5/1960, it is stated that the rights to land that can be owned in Indonesia are: "Right of Ownership, Right of Cultivation, Right of Building, Right of Use, Right of Lease, Right to Open Land, Right to Harvest Forest Products, and other rights that are not included in the above-mentioned rights that will be determined by law, as well as temporary rights".

The highest right to land, which is exclusively reserved for Indonesian citizens, is the Right of Ownership. This is based on Article 9 paragraph (1) of the Law Number 5/1960, which states that "Only Indonesian citizens can have a full relationship with the land, water, and airspace, within the limits specified in Articles 1 and 2". This is reinforced by Article 20 of the Law Number 5/1960, which states that "The Right of Ownership is a hereditary, strongest, and most complete right that can be held by a person over land, subject to the provisions of Article 6". From the previous explanation, it can be concluded that non-Indonesian citizens are not possible to have a full Right of Ownership.

Furthermore, Article 21 paragraph (1) of the Law Number 5/1960 states that "only Indonesian citizens can have the Right of Ownership". This right can only be held by Indonesian citizens. If a foreign national acquires land through inheritance without a will or through the mixing of assets due to a mixed marriage, and an Indonesian citizen changes their citizenship, the provisions are regulated in Article 21 paragraph (3) which states, "Foreigners who, after the enactment of this law, acquire the Right of Ownership through inheritance without a will or through the commingling of assets due to marriage, as well as Indonesian citizens who hold the Right of Ownership and, after the enactment of this law, lose their citizenship, are obligated to relinquish their Right of Ownership within one year from the date of acquisition of the Right or the loss of citizenship. If, after the expiration of this period, the Right of Ownership is not relinquished, it shall be null and void by law, and the land shall revert to the state, with the provision that the rights of other parties that encumber it shall remain in effect".

Furthermore, if there is a transfer of the Right of Ownership that is intended for a foreign national or a legal entity that is not regulated by the government, then the transfer of the Right is null and void by law and the Right of Ownership shall revert to the state. This is as stated in Article 26 paragraph (2) of the Law Number 5/1960 which states, "Any transaction, including but not limited to sales, exchanges, gifts, bequests, or other acts, that are intended to directly or indirectly transfer the Right of Ownership to a foreign national, to an Indonesian citizen who also holds foreign citizenship, or to a legal entity except those specifically designated by the government as stated in Article 21 paragraph (2), shall be deemed null and void by operation of law, and the land shall revert to the State, with the proviso that the rights of other parties that encumber it shall remain in effect, and all payments received by the owner shall be deemed non-recoverable". In this context, the transfer of land rights to a foreign national is not permissible if the land is held under the Right of Ownership.

The regulations related to land ownership by foreign nationals and foreign legal entities with representatives/branches in Indonesia are governed by Articles 41 and 42 of the Law Number 5/1960, which concern the Right of Use. In addition, foreign nationals can also hold the Right of Ownership, specifically the Right of Ownership of a Condominium Unit. The Right of Ownership over a Strata Title can be granted to Foreign Nationals who hold a permit in accordance with the provisions of laws and regulations. The permit in question has been regulated in Article 69 paragraph (1) of Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Strata Title, and Land Registration (Government Regulation Number 18/2021), which states, "Foreigners who are eligible to own a residential property or dwelling are those who hold valid immigration documents, as stipulated by the prevailing laws and regulations ".

In relation to land ownership status based on nominee practices or nominee agreements, the Supreme Court Circular Letter Number 10 of 2020 provides guidance on the status of disputed land ownership in court. Specifically, the Circular Letter regulates the use of nominee arrangements, stating that the registered owner of a piece of land is the party whose name appears on the certificate, regardless of whether the land was purchased using funds or assets owned by a foreign national or another party. Notably, SEMA 10/20 clarifies that a nominee remains accountable for the rights and responsibilities associated with the asset, despite their limited role as a nominee.

Based on the previous explanation, if a Foreign National has a right to land that should not be owned by them, except as determined by the Basic Agrarian Law (the Law Number 5/1960), then the land will revert to the state. Furthermore, even if the transfer process has been agreed upon by all parties involved (in this case, between the Foreign National and the Indonesian National), the transfer will still be null and void by law. And if a dispute arises regarding the ownership of land with nominee practices, then the rightful owner of the disputed land is the one whose name is listed on the land certificate. In this case, the nominee who is the rightful owner of the land is not the party providing the capital or the beneficiary.

In terms of implementation, there have been several notable court cases in Indonesia involving nominee practices. In the course of judicial proceedings, judges must prioritize fairness and impartiality for all parties involved. To maintain public confidence in the judicial system, justice must be upheld in a fair and transparent manner, and legal certainty must be ensured. Judges bear a significant responsibility to deliver justice in complex cases by making informed, wise, and fair decisions. As such, the judge's deliberation in rendering a verdict is a critical aspect in ensuring a fair and just outcome for all parties, in accordance with applicable laws and regulations.

As in the case that occurred at the Gianyar District Court, Bali. In the Gianyar District Court Decision Number 137/Pdt.G/2020/PN.Gin, the Plaintiff was an Indonesian citizen who sued a Foreign National as Defendant I and a Notary as Defendant II, who had entered into an agreement between them. The disputed object was a piece of land with a Certificate of Right of Ownership Number 02494, Bedulu Village (SHM No. 02494) and a piece of land with a Certificate of Right of Ownership Number 832, Bedulu Village (SHM No. 832). The Defendant in this case had evidence in the form of a nominee agreement, which stated that the Plaintiff was only a nominee, and therefore the disputed object was controlled by the Defendant. In its decision, the Judge in this case ruled to reject the Plaintiff's lawsuit and reject the exception from Defendant II, the Notary who made the agreement.

The basis for the decision was due to the Judge's consideration of the nominee agreement between the parties, which stated that "Article 1321 of the Civil Code determines that an agreement is invalid if it is made due to mistake, coercion, or fraud. Articles 1332 and 1333 of the Civil Code require that an agreement must be made with a lawful purpose, and therefore cannot be made to perform acts that are contrary to the law, and the contents of the agreement must not be prohibited by law or contrary to public order and morality, as stated in Article 1337 of the Civil Code. Furthermore, Article 1335 of the Civil Code also determines that an agreement made without a valid reason or made due to a false or prohibited reason is void" This is categorized by the Judge as a sham agreement or simulation, also known as a nominee agreement.

According to the Judge's consideration, if we look at what is stated in Article 9 paragraph (1) of the Law Number 5/1960, which reads "Only Indonesian citizens can have a complete relationship with the land, water, and airspace, within certain limits as stated in Articles 1 and 2". And as stated in Article 21 paragraph (1) and Article 26 paragraph (2) of the Law Number 5/1960, only Indonesian citizens can have the Right of Ownership, so if there is a practice of buying and selling, exchanging, granting, bequeathing, and other acts intended to directly or indirectly transfer the Right of Ownership to a Foreign National, it can be declared null and void and the land will revert to the state. Therefore, the Judge in his consideration views the nominee agreement as a form of legal circumvention. In Article 1320 of the Civil Code, it is explained that an agreement must have a "lawful cause". Because the nominee agreement aims to legitimize a Foreign National as the indirect owner of the Right of Ownership object, the nominee agreement is considered to violate the lawful cause principle.

The Judge in his decision rejected the lawsuit from the Plaintiff with the consideration that "...based on the above considerations, if linked to the non-fulfillment of the objective requirements in Article 1320 of the Civil Code and the nominee agreement in this case is null and void by law, which means that from the beginning there was no agreement and no legal bond, where the purpose of the parties making the agreement was to create a legal bond, but it failed, then there is no basis for the Parties to sue each other in front of the Judge, because the substance of the agreement has violated the objective requirements and therefore is null and void by law".

Therefore, in this case, the Judge evaluated in his consideration that the Certificate of Right of Ownership (SHM) No. 02494 and SHM No. 832 registered in the name of the Plaintiff, originated from a nominee agreement that was a violation of the law and was considered null and void by law, so the Plaintiff's ownership of the land that was the object of the nominee agreement was also cancelled. Therefore, the land should have reverted to the state. In other words, according to the Judge's view, the status of the disputed land ownership should have been that the land reverted to the state, even though there was a provision in SEMA 10/20 regarding the practice of nominee agreements or nominee arrangements.

Furthermore, there is another case related to nominee practices involving a foreign party as the beneficiary or controller of the disputed object. In the Supreme Court Decision Number 42 PK/Pdt/2021, the panel of judges in their consideration stated that, "...there is no error or clear mistake by the Judge". In their deliberation, the judges also stated, "...because in the positive law that applies in Indonesia, nominee ownership is not recognized and Foreign Nationals are not allowed to own land, and for Foreign Nationals, building use rights, business use rights, or use rights can be granted with a certain time limit". In this case, the Judge evaluated that positive law does not recognize nominee ownership and specifically, Foreign are only allowed to own land rights other than the Right of Ownership.

In this case, the Appellant for Judicial Review, is a Foreign National who controls the disputed object, while the Respondent is the owner whose name is listed on the certificate. In their consideration, the panel of judges stated, "That because the disputed land in this case, as stated in the Certificate of Right of Ownership (SHM) Number 113/Senteluk in the name of the Respondent Judicial Review, the control of the Appellant over the disputed object without the consent of the Respondent as the owner is an act against the law". In this case, the Appellant who claims to be the beneficiary of the disputed object and controls the disputed object, has no rights whatsoever over the disputed object and their control over the disputed object is an act against the law. In other words, the rightful owner of the disputed object is the one whose name is listed on the certificate, which is the Respondent, an Indonesian citizen. Therefore, the Judge in their decision rejected the application from the Appellant.

The two cases above are examples of disputes in court regarding nominee practices between Foreign Nationals and Indonesian citizens. In addition, there are also examples of disputes regarding nominee practices where all parties involved are Indonesian citizens. "In the Supreme Court Decision Number 138 PK/Pdt/2021, both the Appelant and the Respondent Judicial Review are Indonesian citizens. The panel of judges in their verdict granted the lawsuit of the Appellant. The panel of judges in their consideration stated, "That in Indonesian land law, the one recognized as the owner is the one whose name is listed on the certificate".

Furthermore, the Judge stated, "That the act of nominee is a legal circumvention that cannot be justified by law, thus there has been a mistake by the Judge because they recognized and validated the nominee, therefore the decision of the High Court of Surabaya must be annulled because it is not in line with the land law in Indonesia". In other words, in this case, the panel of judges viewed that the name listed on the certificate, which is the object of dispute, is the owner of the disputed land rights and stated that the nominee practice in this case is a form of legal circumvention.

Based on several cases that the author has described, namely the Gianyar District Court Decision Number 137/Pdt.G/2020/PN.Gin, the Supreme Court Decision Number 42 PK/Pdt/2021, and the Supreme Court Decision Number 138 PK/Pdt/2021, all three cases occurred due to the practice of nominee or nominee agreements that led to disputes among the parties. In their decisions, all three have a similarity, namely that Indonesian law, specifically land law in Indonesia, does not recognize the term nominee. If we look back at SEMA 10/20 letter B number (4), it states that if there is a nominee practice in land ownership, the rightful owner of the land is the name listed on the land certificate. Therefore, it is advisable to avoid using nominee practices or nominee agreements for land ownership, especially for someone who wants to be a beneficiary in a land object, to avoid disputes among parties in the future.

CLOSING

Indonesian positive law does not recognize the term of nominee, but in general, the practice is allowed as long as it refers to the applicable laws and regulations. If the practice is accompanied by an agreement, it should not contradict the positive law in force in Indonesia, especially those that regulate agreements. In this case, the nominee agreement should not contradict the provisions contained in the Civil Code. Regarding specific prohibitions related to nominee practices, they are regulated in Article 33 paragraph (1) and paragraph (2) of the Investment Law and Article 48 paragraph (1) of the Limited Liability Company Law. The status of land ownership with Nominee Practices or Nominee Agreement, as seen from the Supreme Court Circular Letter Number 10 of 2020 in the formulation of civil law, letter B number (4), states that the one listed on the certificate is the rightful owner. Based on this provision, the status of the land, even if registered in someone's name as a nominee, remains the property of the nominee, regardless of who provided the funds to purchase the land object. Therefore, the name listed on a land certificate is not separate from the rights and obligations towards the land. In this case, the regulation closes the possibility of having rights to land through nominee practices in Indonesia.

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