

LEGAL SMUGGLING IN LAND OWNERSHIP NOMINEE AGREEMENTS BY FOREIGNERS IN INDONESIA

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Abstrak

A nominee agreement is often referred to as a representative or name loan based on a statement or power of attorney made by both parties, a foreigner borrows the name of an Indonesian citizen to include his name as the land owner on the certificate. This act is ratified by a Notary/PPAT who clearly understands the applicable law. The nominee agreement itself is an act of legal smuggling in international private law. So what are the legal consequences of borrowing names for land ownership in Indonesia, which is an act of legal smuggling in international civil law? The research method used in this research is normative juridical. The result of this research is that any legal smuggling, including nominee agreements, results in the cancellation of the relevant act, in international civil law it is called *fraus omnia corrupt*, meaning that legal smuggling results in the legal act being in its entirety being invalid.

Keyword: *Legal Smuggling, Land Ownership, Nominee Agreements, Foreigners*

Introduction

A nominee agreement is an effort to provide the possibility for foreign citizens to have ownership rights to land that is prohibited by the UUPA by using the guise of carrying out sales and purchases in the name of Indonesian citizens, so that legally it does not violate the regulations. The State of Indonesia as a Nominee is legal smuggling. Legal smuggling is still occurring, as a result the validity of the nominee agreement is being questioned, and the position of the land as a result of the nominee agreement is unclear (Yosia Hetharie, 2022;12-20).

In Indonesian law (the Civil Code) there is no specific regulation regarding this nominee agreement because this is an agreement made by a foreign citizen with an Indonesian citizen. This nominee agreement is included in a special agreement in the Civil Code, namely an anonymous agreement or often called an innominaat agreement (Gandasari Bunga, 2016). This nominee agreement is very vulnerable to disputes or problems because this agreement is an agreement that has not been specifically regulated in positive law (I Komang Gede Suwanjaya, 2020;384-387).

Along with the development of state development and the rapid flow of globalization, the position of the state is no longer limited to the relationship between the state and its citizens, but also the relationship between the state and foreign citizens or between citizens and foreign citizens (WNA). These relationships can be in the form of marriage, kinship, or trade relations developed in Indonesia. As a result, foreigners need access in the form of land rights in terms of business management (Fitri Gerri Fitri Anggraeni, 2014).

There are practices that are often carried out by Indonesian citizens and foreigners regarding land. The practice in question is indirect ownership, namely a legal relationship between Indonesian citizens and foreign citizens in the form of an agreement called a nominee trustee agreement. This agreement contains a statement of the status of ownership of land rights belonging to an Indonesian citizen or using the Indonesian citizen's name in the deed of agreement, but in fact all forms of control or management are fully owned by foreigners (Ega Permatadani dan Anang Dony Irawan, 2001; 348-358).

If examined based on Article 9 in conjunction with Article 21 paragraph (1) of the UUPA, it is stated that only Indonesian citizens can have ownership rights to land, while foreigners are only given the Right to Use or can also be given the Right to Lease Buildings as per Article 41 and Article 42 of the UUPA. In reality, Property Rights Ownership status is also sought after by many foreigners who really want to get the highest land rights. Apart from being an investment (investing capital or funds) in the hope of making a profit in the future, it is also a tool for obtaining credit at all banks in Indonesia with the burden of mortgage rights. On the other hand, the status of Property Rights is guaranteed juridically as the strongest and most fulfilled right (Idad Jastrawan dkk, 2019; 1-13). This means that Property Rights have full and strong control over something that is invincible and has no time limit on ownership. This is the reason why many foreigners really want ownership of the land ownership rights, even though they were obtained in an unauthorized manner. The many practices of foreign nationals that have been going on so far have become a precedent for the growth of these practices to have Ownership status instead of having Right to Use status (Ni Ketut Tri Srilaksmi, 2023; 91-100).

The above action is an act of legal smuggling. The meaning of legal smuggling here is that a person commits an invisible violation, even though he knows about the prohibition, he still does it by using another person/other person's name in a nominee agreement to replace the position of ownership of his rights on the basis of a trustee agreement made between himself and the other party. which is trusted in this case between WNA (foreign nationals) and WNI (Indonesian citizens). So what are the legal consequences of borrowing names for land ownership in Indonesia, which is an act of legal smuggling in international civil law?

Methodology

This research uses a normative juridical method (Muhammad Ramdhan; 2021) which examines the realities that occur in the practice of land ownership in Indonesia by foreigners by referring to the provisions of the applicable laws and regulations in national land law. The approaches used are a statutory approach and a conceptual approach with sources of primary legal materials and secondary legal materials. Techniques for collecting legal materials through literature study (library study) (Dameis Surya Anggara dan Candra Abdillah, 2019).

Results and Discussion

A nominee agreement is an agreement made between a person who according to law cannot be the subject of rights to certain land (ownership rights), in this case namely a foreigner and an Indonesian citizen, with the intention that the foreigner can control (own) the land with de facto ownership rights. , but legally and formally (dejure) the land ownership is in the name of an Indonesian citizen. In other words, Indonesian citizens have their names borrowed by foreigners to act as nominees (Luh Devy Larasati dan I Ketut Sudantra; 2013)

This nominee agreement is valid if the agreement meets the requirements for validity of the agreement, good ethics and halal reasons, and does not conflict with existing laws (Srilaksmi). This agreement which is the object of this nominee agreement is freehold land which is clearly regulated in the UUPA that foreign citizens cannot own freehold land in Indonesia. Borrowing a name in order to launch a business, the contents of the nominee agreement must state that foreign citizens can control freehold land in the sense of control means managing, controlling, utilizing, in controlling land owned by foreign citizens, according to the term of the right to use (HGB) specified The specified term is 20 to 25 years and can be extended, but you cannot control it forever, borrowing a name forever violates good ethics (legal smuggling) (Alifia Purnama Dewi dkk, 2023;115-128).

The nominee agreement is clearly a form of legal smuggling to avoid regulations which stipulate that foreigners do not meet the requirements as subjects holding property rights to land in Indonesia in accordance with the provisions in Article 9 paragraph (1) jo. Article 21 paragraph (1) of the UUPA clearly states that only Indonesian citizens can have full connection with the earth, water and space, and clearly regulates that only Indonesian citizens can have property rights. This is then reaffirmed in Article 26 paragraph (2) UUPA which states that every sale and purchase, exchange, gift, gift by will and other acts intended to directly or indirectly transfer property rights to a foreigner, to a citizen as well as Indonesian citizenship having foreign citizenship is null and void by law (Sri Saomi Handayani).

Article 1335 of the Civil Code states that an agreement made for false or prohibited reasons has no force. In this case, the agreement is deemed to have been void from the start because not all agreements made have binding force as law. Only valid agreements bind both parties. Thus, the pretended agreement has no binding force because it is made invalid. In the case of a loan agreement (Nominee), the ownership of land rights in the land certificate is in the name of an Indonesian citizen, if there is a dispute between a foreign citizen and an Indonesian citizen, the foreign citizen does not have strong legal power due to the land regulations in Indonesia has regulated land ownership rights for foreign citizens as use rights. So the legal consequences arising from this land ownership dispute are that land certificates for Indonesian citizens will remain the property of Indonesian citizens and this causes losses for foreign citizens (I Putu Eddy Arnwan dan I Gusti Ngurah Anom, 2023; 66-93).

Apart from that, there are several deeds that underlie the nominee agreement so that it can be used for actions that are detrimental to the parties or detrimental to the state, because nominee agreements can be made for tax evasion or to make it easier for foreigners to control all forms of ownership in Indonesia. A Notarial Deed is an agreement between the parties that binds

those who make it, therefore the conditions for the validity of an agreement must be fulfilled (Article 1320 of the Civil Code). In contract law there are certain legal consequences if subjective and objective conditions are not met. If the subjective conditions are not met, then the agreement can be canceled (*vernietigbaar*) as long as there is a request by certain or interested people. If the objective conditions are not met, then the agreement is null and void (*nietig*), without the need for a request from the parties, thus the agreement is deemed to have never existed and does not bind anyone. Basically, when making a Notarial deed, it is only about consolidating the wishes of the parties, based on the authority of the Notary as stated in Article 15 UUJN and the evidentiary strength of the Notarial deed, so there are 2 (two) understandings, namely, First, the task of the Notary's position is to formulate the wishes/ the actions of the parties to an authentic deed, taking into account the applicable legal rules. Second, the Notarial Deed as an authentic deed has perfect evidentiary power, so it does not need to be proven or supplemented with other evidence, if there are people/parties who judge or state that the deed is not true (Gede Herda Virgananta, dkk).

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Even though the Notary follows the wishes of the parties in making an agreement, in carrying out his duties there are also prohibitions and the Notary does not have the authority to make a Deed in accordance with UUJN Article 52 paragraph (1) and Article 53 which states that in certain circumstances Notaries are not allowed to make a deed, this prohibition only exists on the legal subject of the parties, if the legal subject is prohibited, then any substance (action) is not permitted to be made. A notary has the authority to make a deed, so the notary must also be responsible and if there is a deviation or violation of the deed he made, the deed made by the notary can be canceled if an error or violation occurs. The notary can refuse a party who wants to make a deed where the deed violates the provisions of the law (Ratih Dwiyantri Pemayun).

Basically, the Nominee concept is not known in the Continental European or Anglo-Saxon legal systems that apply in Indonesia. In Indonesia, the Nominee Concept is new and is often used in several legal transactions, especially agreements, since the increase in the number of foreign investments around the 90s, because of its interest. Foreign investors invest in Indonesia based on fairly large profits and relatively cheap labor wages. In practice, there are elements that make nominee agreements not permitted to be made because they are considered an unlawful act. However, the UUPA does not completely close the opportunity for foreigners and foreign legal entities to have land rights in the territory of Indonesia. Regulations regarding land rights for citizens. Foreigners in Indonesia are regulated in the Republic of Indonesia Government Regulation No. 41 of 1996 concerning Ownership of Residential Homes or Residences by Foreigners domiciled in Indonesia (Muhammad Ibnu Isra dan Agus Supriyo, 2023;1-15).

There are several forms of legal smuggling that are encountered in court practice, namely:

- a. legal smuggling through authentic deeds in the form of Deeds of Declaration and Deeds of Power of Attorney to Sell which are followed up with private ownership agreements;
- b. legal smuggling through underhanded borrowing of names agreements and authentic deeds in the form of sale and purchase agreements with authorization to sell;
- c. legal smuggling through authentic deeds in the form of Lease, Acknowledgment of Debt, Statement, Power of Attorney, and Grant of Mortgage Rights;
- d. legal smuggling through authentic deeds in the form of Acknowledgment of Debt, Grant of Mortgage Rights, Lease, Power of Attorney and private agreements in the form of Statement Letters and Ownership Agreements.

Conclusion

In a nominee agreement on land ownership by foreigners in Indonesia, the objective requirement is a cause what is halal is not fulfilled, it will result in the agreement becomes null and void by law. It means from the beginning of an agreement and/or an agreement thought to have never been born/never existed. Article 1335 of the Civil Code states that a an agreement made under false pretenses or forbidden has no power. In this case, the agreement was deemed to have been void from the beginning because not all agreements made have binding force as law.

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