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Legal Consequences of The Nominee Agreement Law in The Ownership of Land or Buildings by Foreign Nationals

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Abstract

Along with the times and along with the current investment climate in Indonesia, the practice of Nominee Agreements is carried out secretly, not only in the case of Limited Liability Companies but also in cases of land or property. The prices of land and property in Indonesia are getting higher and higher. This increasingly attracts the upper middle class to buy and sell property or land for investment purposes. This investment can bring its own advantages for investors. The practice of the Nominee Agreement occurs when a foreigner who travels or who stops in Indonesia is then interested in owning the land or property, he will practice borrowing his name or nominee from relatives or family who are Indonesian citizens. The Indonesian person borrowed his name to be written in a land certificate to trick the government so that it would not be discovered that the original owner was a foreigner. property field. Individual Indonesian Citizens whose names are used are not always from relatives but can also be from husbands or wives who are married or have mixed marriages between Indonesian Citizens and Foreign Citizens. This can have an impact on the name of the asset ownership listed in a certificate of title to a land or property. The nominee agreement has never been justified by Indonesian law, because it is contrary to the philosophy of the Basic Agrarian Law.

Keywords: Agreement; Nominee; Certificate; legal consequences

A. Introduction

The existence of land in Indonesia is increasingly decreasing in its area. Land in big cities such as Jakarta and Surabaya is very difficult to find which is enough area to build a residential house. The depletion of the existence of this land is due to the fact that there is a lot of development and development that occurs in major cities such as the construction of apartments, condominiums, shopping centers, hospitality, and housing construction for residential areas where in practice the development must require a lot of land.

In recent years, Indonesians have had difficulty finding land to build a house (land home); this is because the amount of land is getting less and less, but the price is getting higher. Even if there is a large land and enough at a sloping price or slightly low, it must be in the suburbs and far from city access and close to activity support facilities. A position away from the city center leads to the absence of time efficiency, fuel, and mobility costs that are far from frugal compared to living in the city center.

The function of the soil is indeed essential for human life both to fulfil the activities of farming, building a place to live, gardening, raising livestock and others. Human activities are inseparable from the use of land. So the vastness of land in Indonesia makes people and investors arbitrary in utilising land. Some of them use the land for their activities with an undue area. Agrarian problems with the land area often occur in Indonesia, this is because they often make their land pegs, namely unofficial land pegs from the National Land Agency Adjudication committee. This unofficial land-stamping activity usually occurs in areas or rural areas far from

the city center and under the supervision of the local government and the National Land Agency.

If this activity is carried out continuously without proper supervision, it can result in existing lands in some parts of Indonesia being controlled by irresponsible individuals. The amount of land that is dwindling from year to year resulting in a land crisis for settlement construction so that some people who are less able to buy enough land and strategically to build their residences must choose to rent a house either boarding or contract or choose to buy apartment units that are equipped with supporting facilities in one building.

The lands scattered in the territory of Indonesia have their legal subjects that can own the land. The object of land that is one with another must be the subject of the law that owns or who controls it varies depending on the type of land rights. Land rights stipulated in Indonesian Agrarian Law, namely in Law No. 5 of 1960 concerning the Basic Rules of Agrarian Principles Article 16 paragraph 1, among others; Property Rights, Business Use Rights, Building Rights, Use Rights, Rental Rights, Land Clearing Rights, Land Acquisition Rights, and other rights not included in the above rights will be established by law and temporary rights.¹

Land rights other than Property Rights can be owned by Indonesian Citizens and Foreign Nationals and Indonesian Legal Entities and Foreign Legal Entities. Only Property Rights can be owned and controlled in full and hereditary by Indonesian citizens. Property rights are one type of land rights for many kinds of land rights that have privileges besides being wholly owned and passed down to their heirs. Property Rights can also be burdened with Dependent Rights to guarantee receivable debts. Property Rights that have these advantages make many foreign law subjects want property rights over land and buildings in Indonesia.

Indonesia has a natural beauty that is very beautiful, so it is not surprising that foreign tourists take into account the destination of their destination in Indonesia. The natural beauty of Indonesia can benefit the country because it can increase its foreign exchange. The number of foreign tourists or tourists who visit Indonesia causes them to be interested in having a residence that is not just an ordinary residence but a residence almost the same as Indonesian citizens, namely having a private house with the status of land property rights.

Foreign Nationals under Indonesian Agrarian Law cannot have the status of land rights in the form of Property Rights. They can only obtain land rights status in the Right to Use form. Right to Use is the right to land that is only temporary or not forever. This is different from property rights that can be owned or owned forever by Indonesian citizens. Foreign tourists who visit Indonesia are often tempted to have assets in Indonesia. One of the assets they want is to own land or buildings that have property rights status. Their purpose is to have land or building assets that have property rights status. Family, friends or relatives can use these assets in Indonesia; primarily, those assets are used to invest.²

The Land Rights Property is not legally justified because Foreign Nationals are only allowed to have the status of land rights in the form of the Right to Use. They obtain Property Rights to land owned by a foreigner employing lawlessness. The action against the law they did was by borrowing the name of an Indonesian citizen to be pinned to his name in a land deed. The act of borrowing this name is commonly referred to as *the nominee*. Landowners who are foreign nationals can borrow the name of an Indonesian citizen to be used in the status of land ownership of Property Rights.

¹ Arba, *Hukum Agraria Indonesia*, Jakarta (Jakarta: Sinar Grafika, 2015).

² Mas Rahmah, *Hukum Investasi* (Jakarta: Refika Aditama, 2020).

The use of someone else's name or borrowing a name is not only done on a company or other legal entity but also used to own assets in the property sector. Indonesian citizens who use their names are not always from relatives but can also be from husbands or wives who marry or have a mixed marriage between Indonesian citizens and foreign nationals. Some land in Indonesia located near tourist attractions with a stunning beauty is owned and controlled by foreigners. They use the names of an Indonesian citizen who is only limited to the borrower's name, not the land owner or building.

Normatively if the land certificate is checked at the National Land Agency of the city or local district owner on behalf of Indonesian citizens when the legal subject of the real owner is a foreigner. This happens because basically foreigners who live or are in Indonesia should only be allowed to use land and buildings in Indonesia with the status of Right to Use only. As a result of the smuggling of the law lately there are often problems in the agrarian field related to *Nominee*.

So essential and valuable land assets to be owned so that not only Indonesians want to own but also foreigners. The more days, the price of land in Indonesia is getting higher, meaning that buying a house or land in Indonesia can bring financial benefits to the owner. No wonder foreigners and foreign investors also want to own these assets in Indonesia. Considering the market share in Indonesia is also very easy to buy and sell land or buildings because of the high interest in making a place to live or just a place of business. The activity of borrowing the name is not justified by law because it is an act against the law that violates the Agrarian Basic Law Number 5 of 1960.

Based on the above problems, researchers are interested in discussing related: *Nominee Agreement* in Indonesian Agrarian Law and Legal Consequences with the nomination of land ownership by Foreign Nationals. This paper aims to analyse the *nominee agreement* in agrarian law in Indonesia and it's the legal consequences.

B. Literature review

Primary legal material is legal material that is authoritative, meaning it has authority.³ The primary legal material consists of laws and regulations, namely Law No. 5 of 1960 concerning Basic Rules of Agrarian Principles, Law No. 25 of 2007 concerning Investment and Law No. 40 of 2007 concerning Limited Liability Companies. Secondary legal materials consist of legal papers in the form of books, journals and articles.

C. Research Methods

The research method used in this study is a type or type of legal research normatively, namely a legal research that solves problems using laws and regulations. So that with normative research will be carried out a review of all laws and regulations related to the problem. The technique of collecting legal materials used in this writing is by the study of literature. Literature studies are carried out by reading, studying, recording, reviewing legal materials that have to do with the rules and concepts of nominee agreements in Indonesian Agrarian Law.

³ Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana Prenada Group, 2010).

D. Results and Discussion

1. *Nominee Agreement in Indonesian Agrarian Law*

Agreements made between a person who by law cannot be subject to certain land rights in this case Property Rights that cannot be owned by foreigners and make agreements with Indonesian Citizens with the aim that the foreigner can own land with The Status of Property Rights commonly referred to as The *Nominee Agreement*.⁴ The purpose of this nominee agreement is to make it easier for foreigners to own assets in Indonesia with ownership status in the form of Property Rights.

In general, *the Nominee Agreement* is used in the use of the ownership name of the Limited Liability Company. Limited Liability Companies that use *the Nominee Agreement* are usually foreigners, and borrow the names of shareholders who are Indonesian citizens to be used in the deed of establishment.⁵ The use of *nominee agreements* has been expressly prohibited in Law No. 25 of 2007 concerning Investment and Law No. 40 of 2007 concerning Limited Liability Companies. *The concept of Civil Law law or Continental Europe* does not know about *nominee agreements*, this is different from the concept of *Common law*.

In the concept of *Nominee Agreement*, the party that appoints a *nominee* is referred to as a *beneficiary*. *Beneficiary* play a role in determining whether or not the substance is promised. Heirs also carry out actions or interests that have been stated in the agreement made with the nominee. The nominee party is legally registered, and *the beneficiary party* is the party that enjoys every benefit and benefit obtained from the implementation of actions or activities carried out by *the nominee party*.⁶

The nominee party is the party that is legally valid for the rights holder of the object owned by *the beneficiary*. It can transfer, sell, burden, guarantee and take any action on the object. *Beneficiary* are limited to being the owner but cannot legally take legal action. *Nominee Agreement* practices are not allowed in Indonesia because they are not in accordance with the provisions of applicable law in Indonesia.⁷

Along with the times and the ongoing investment climate in Indonesia, the practice of *the Nominee Agreement* is carried out clandestinely in the case of Limited Liability Companies and in the case of land or property. More and more land and property prices in Indonesia are as high as the price. This increasingly attracts the upper middle class to buy and sell property or land in the investment framework. These investments can bring benefits to investors.⁸

In general, land or property investment does not have a harmful impact or even does not affect the country. This will remain so when the investor is an Indonesian citizen, different from when the investor is a foreigner. Land that foreigners can own is only land that has the status of the right to use only. Foreigners cannot own land with a status other than the right of use. With this provision, legally applicable in Indonesia, foreigners are not allowed to own land or property in Indonesia because only Indonesian citizens can have property rights.

The practice of *the Nominee Agreement* occurs when a foreigner who travels or stops in Indonesia, then interested in owning the land or property, will practice borrowing names or *nominees* to relatives or families who are Indonesian citizens. The Indonesian borrowed his name to be written on a land certificate to trick the government into not being discovered that

⁴ Ahmadi Meru, *Hukum Perjanjian* (Jakarta: Sinar Grafika, 2020).

⁵ Yahya Harahap, *Hukum Perseroan Terbatas* (Jakarta: Sinar Grafika, 2021).

⁶ I Ketut Oka Setiawan, *Hukum Perikatan* (Jakarta: Sinar Grafika, 2021).

⁷ I Ketut Oka Setiawan, *Hukum Perikatan*.

⁸ Salim, *Hukum Investasi* (Jakarta: Rajawali Press, 2008).

the original owner was a foreigner until the data is on the National Land Agency of local regencies or cities registered as the name of Indonesians.

If it lasts long enough and continuously, this can hurt the following legal consequences. The result of the law will be felt if the land or object is transferred property rights. Transfer of property rights can be through several ways such as buying and selling, grants, renting and others. The transfer of land or objects through buying and selling will make prospective buyers reluctant to buy the thing after knowing that the owner with the land certificate is different from the original.

The use of different names can make some people who do not understand become afraid of the consequences. Related to the legal consequences caused will be discussed on the main issue discussed next. *The practice of nominee agreements* is very risky to legal certainty in the ownership of land or objects. *Nominee Agreement* is not good if applied continuously, because it can make some parties feel overgrown or lied to by the practice.

2. Legal Consequences with the Existence of Land Ownership Nominees by Foreign Nationals

The use of *nominee agreements* in land ownership owned by foreigners can bring legal consequences for other parties. If the land or property is transferred by buying and selling, then the *Nominee Agreement* can cause new problems, namely the legal provision of the landowner or the building itself. Buying and selling land will require documents that match the facts. A *Nominee Agreement* in land ownership is one of the Unlawful Acts because it is not by applicable law.⁹ *Nominee Agreement* in the case of land ownership, can create a misunderstanding related to the status of land ownership, which foreigners should only be limited to the right of use can obtain property rights easily only by means of nominee agreement.

Law No. 5 of 1960 concerning the Basic Rules of Agrarian Principles (hereinafter referred to as UUPA) strongly prohibits foreigners both living in Indonesia and only limited to stopovers, both native foreigners and descendants to have land rights in the form of property rights. They can only use land or property in Indonesia with the status of Right to Use only. If there are foreigners who can own land or property with status other than the right to use more property rights then it can be questioned the acquisition of rights. The acquisition of property rights by foreigners can also be through mixed marriages, namely foreigners marrying Indonesian citizens. The name listed in the certificate uses his wife's name.

In accordance with the provisions of Article 21 paragraph 3 of the UUPA which states that foreigners who after the enactment of this Law obtain property rights due to inheritance of wills or mixtures of property due to marriage, as well as Indonesian citizens who have property rights and after the enactment of this law lose their citizenship must waive that right within one year from the acquisition of the right or the loss of citizenship. If after that period of time the property rights are released, then the rights are removed because the law and the land fall to the State, provided that the rights of the other party that burdens it continue.

The subject of the law in doing legal acts will definitely cause legal consequences in the future. The legal consequences that arise may vary, depending on the type of legal action. All consequences arising from legal actions committed by the subject of law against the object of law are the result of the law. Related to *the nominee agreement* made between Foreign Nationals and Indonesian Citizens can be directly void. This null and void is caused because, not in

⁹ Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum* (Bandung: Mandar Maju, 1953).

accordance with the prevailing laws and regulations in Indonesia, so the agreement is considered never existed.¹⁰

The rights and obligations between the two parties to *the nominee agreement* will automatically disappear, and the party who feels aggrieved cannot obtain legal protection. By the provisions of Article 26 paragraph 2 of the Uupa, which states that any sale and exchange, exchange, grant, gift by will and other acts intended to directly or indirectly transfer property rights to foreigners, to a citizen who, in addition to his Indonesian citizenship has foreign citizenship or to a legal entity is null and void, and the land falls to the State, provided that the rights of the other party who charged it remain ongoing and all payments received by the owner cannot be reclaimed.

E. Conclusion

The result of the law will be felt if the land or object is transferred property rights. Transfer of property rights can be through several ways such as buying and selling, grants, renting and others. The practice of nominee agreements is hazardous to legal certainty in land ownership or objects. Nominee Agreement is not good if applied continuously because it can make some parties feel overgrown or lied to by the practice. The rights and obligations between the two parties to the nominee agreement will automatically disappear, and the party who feels aggrieved cannot obtain legal protection. By the provisions of Article 26, paragraph 2 of the Agrarian Basic Law.

References

Book

- Ahmadi Meru. *Hukum Perjanjian*. Jakarta: Sinar Grafika, 2020.
- Arba. *Hukum Agraria Indonesia, Jakarta*. Jakarta: Sinar Grafika, 2015.
- I Ketut Oka Setiawan. *Hukum Perikatan*. Jakarta: Sinar Grafika, 2021.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana Prenada Group, 2010.
- Mas Rahmah. *Hukum Investasi*. Jakarta: Refika Aditama, 2020.
- Salim. *Hukum Investasi*. Jakarta: Rajawali Press, 2008.
- Wirjono Prodjodikoro. *Perbuatan Melanggar Hukum*. Bandung: Mandar Maju, 1953.
- Yahya Harahap. *Hukum Perseroan Terbatas*. Jakarta: Sinar Grafika, 2021.

¹⁰ Wirjono Prodjodikoro, *Perbuatan Melanggar Hukum*.