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Making of Grant Deeds by Land Deed Officials Based on Nominee Agreement in the Legal Certainty's Perspective

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ABSTRACT

The prohibition on absentee or guntai land ownership in society has given rise to practices to circumvent regulations regarding absentee or guntai land ownership, one of the methods used when residents want to purchase land with absentee status is by using a Grant with a Nominee Agreement (nominee). The legal vacuum related to the Nominee Agreement on land ownership in Indonesia has given rise to many cases in the land sector, one of which is the Grant based on the Name Agreement. There are three approaches used in this study, namely: the statutory approach, used to examine the legal rules relating to the Grant Deed made based on the Nominee Agreement; the conceptual approach, used to answer problems regarding the Grant Deed made based on the Nominee Agreement; and the case approach, which is used to find legal certainty for the Grant Deed by Land Deed Officials based on the existence of a Nominee Agreement.

1. Introduction

The Land is a natural resource managed by the state and utilized as much as possible for the welfare of the people. This is stated in Article 33 paragraph (3) of the 1945 Constitution (hereinafter simply referred to as the 1945 Constitution), which is reaffirmed in Article 2 paragraph (1) of Law Number 5 of 1960 concerning Basic Agrarian Principles (hereinafter simply referred to as the UUPA), which states; Based on the provisions in Article 33 paragraph (3) of the Constitution and matters as referred to in Article 1, the earth, water and space, including the natural resources contained therein, are controlled at the highest level by the state, as an organization of power. An important aspect of the UUPA is the regulation of the land reform program in Indonesia. The aim is to increase the income and standard of living of farmers working the land as a basis or prerequisite for economic development towards a just and prosperous society based on Pancasila (Perangin, 1986). One of the land reform programs is the prohibition of absentee or guntai land ownership (Supriadi, 2010).

The prohibition on absentee or guntai land ownership is one of the land reform programs that until now has often caused problems in society. Absentee land is land that is located outside the residential area of the land owner (Harsono, 2008). The implementing regulations of the UUPA that regulate absentee/guntai land ownership are regulated in Article 3 paragraph (1) of Government Regulation Number 224 of 1961 concerning the Implementation of Land Distribution and Provision of Compensation (has been amended and supplemented by Government Regulation Number 41 of 1964). The prohibition on absentee land ownership arises based on Article 10 paragraph (1) of the UUPA which states that every person and legal entity that has a right to agricultural land is in principle required to work or actively cultivate it themselves, by preventing extortion. To fulfill the mandate of the UUPA, Article 3 paragraph (1) of PP No. 224 of 1961, namely: "That land owners who reside outside the sub-district where their land is located, within a period of 6 months are required to transfer their land rights to another person in the sub-district where the land is located or move to the sub-district where the land is located."

The prohibition on absentee or guntai land ownership in society has developed practices to circumvent the regulations on absentee or guntai land ownership, one way to circumvent it is if there are residents who want to purchase land that is absentee because it is outside their residential area, using a Grant with a Nominee Agreement (nominee). A grant is a gift given by one person to another, usually done when the giver and recipient are still alive (Suparman, 1995). According to Article 1666 of *Burgerlijk Wetboek*, a gift is a gift is an agreement by which a gift giver hands over an item free of charge, without being able to withdraw it, for the benefit of a person who receives the gift of the item. The law only recognizes gifts between living people (Article 1666 *Burgerlijk Wetboek*).

Based on the Compilation of Islamic Law (hereinafter simply referred to as KHI), Article 212 in Chapter VI states that: "Grants cannot be withdrawn, except for grants given by parents to their children." Anyone who wants to donate his/her property must be at least 21 years old and without coercion can donate his/her assets to a person or organization to own them. The donation is made in the presence of two witnesses and the property donated must belong to the Donor (Azzam, 2010). Basically, the purpose of the Grant itself in Islam is for goodness alone and is based on sincerity, whereas if viewed from a civil law perspective, it benefits the Grant Recipient solely as a gift or part of an inheritance (Permana, 2023).

The making of a Deed of Gift must be carried out before an official who is authorized to make the deed, this is in accordance with the provisions contained in Article 1682 of Burgerlijk Wetboek. In the case of sales, exchanges, grants, company income (inbreng), division of joint ownership rights, granting building use rights/use rights on land with ownership rights, granting mortgage rights, and granting mortgage power of attorney (Article 2 of Government Regulation Number 37 of 1998), in the form of a deed as referred to in Article I of the Regulation of the Head of the National Land Agency Number 8 of 2012 (hereinafter simply referred to as Perka BPN

No. 8 of 2012), and the Deed Form in the Attachment to Perka BPN No. 8 of 2012, then the legal acts mentioned above are the authority of the Land Deed Making Officer (hereinafter simply referred to as PPAT) to make a deed (Erwiningsih, 2023).

Nominee Agreements are included in special agreements or are often called innominate agreements because there are no specific regulations for this agreement in Burgerlijk Wetboek, but this agreement is spreading and developing in society (Prianto, 2018). There are many regulations that are not yet fully comprehensive regarding name lending agreements and the absence of specific regulations governing them is feared to cause confusion regarding the purpose of the law itself (Fitriana, 2015). However, Nominee Agreements are generally not prohibited by law, as long as the substance of the agreement respects the principles and conditions for a valid agreement according to Book III of Burgerlijk Wetboek.

The granting of the Grant by the Plaintiff to the Defendant above began with the land owned by the Plaintiff being absentee land because the Plaintiff resides outside the area where the land is located, while the Defendant resides in the area where the land is located, therefore the Plaintiff made a Nominee Agreement with the Defendant which was stated in a statement from the Village Head stating that the Deed of Grant made between the Plaintiff and the Defendant was a Deed of Grant based on the Nominee Agreement and then the Plaintiff and Defendant made a Deed of Grant for the land that was the object of the absentee before the Temporary Deed Making Officer (hereinafter referred to as PPATS). The Deed of Grant made by the Plaintiff and Defendant before the PPATS, is one of the deeds or agreements made by and before an official authorized to make the deed. The problem occurred when the Deed of Grant was completed before the PPATS, namely the Defendant felt that he was the legal owner of the absentee object land and wanted to control it based on the Deed of Grant while the Plaintiff felt that the Deed of Grant was an agreement that had no legal force because the making of the Deed of Grant was based on a Nominee Agreement.

Based on the background as mentioned above and seeing the legal vacuum related to the Nominee Agreement on land ownership in Indonesia which then gave rise to many cases in the land sector, the author is interested in conducting a study and conducting research on the legal certainty of proof of the Deed of Grant made based on the Nominee Agreement and the legal implications of the Deed of Grant made based on the Nominee Agreement. Based on the description above, there are still several problems that require clarity and certainty in relation to the making of a Deed of Grant made based on a Nominee Agreement.

2. Method

The research method in this study is the normative legal research method, which is a method of researching law from an internal perspective with legal norms as the object of research. The researcher uses the type of Normative Juridical legal research (legal research), which is a legal research using legal norms as the object of research based on an internal perspective that is able to

provide legal arguments when conflicts, ambiguities, or legal gaps are found (Ibrahim, 2008). The approaches used in this legal study are the statute approach and the conceptual approach. Qualitative descriptive data analysis is carried out by analyzing secondary data that is narrative and theoretical, the definition and substance of which are sourced from several literatures which are then analyzed in order to answer the problem of the limitations of notary authority in the sale and purchase agreement.

3. Analysis & Results

3.1. Legal Certainty of Evidence of Grant Deeds Made Based on Nominee Agreements.

The implementation regulations of the UUPA which regulate absentee/guntai land ownership are stated in Article 3 paragraph (1) of Government Regulation Number 224 of 1961 concerning the Implementation of Land Distribution and Provision of Compensation (which has been amended and supplemented by Government Regulation Number 41 of 1964), that land owners who reside outside the sub-district where their land is located, within a period of 6 months are required to transfer their land rights to another person in the sub-district where the land is located or move to the sub-district where the land is located (Article 3 point 1 Government Regulations No. 224 of 1961). Absentee land is land that is located outside the residential area that owns the land (Harsono, 2008). The prohibition on absentee land ownership stems from the legal basis contained in Article 10 paragraph (1) of the UUPA, namely: "Every person and legal entity who has a right to agricultural land is in principle obliged to work or cultivate it actively themselves, by preventing extortion methods."

The prohibition on ownership of absentee land rights is often violated by the community, where people who live outside the area where the absentee land is located can own the absentee land. People who violate the prohibition on ownership of absentee land often make a Nominee Agreement, namely the original owner of the absentee land who is outside the absentee land area borrows the name of someone who is in the absentee land area, so that formally the owner of the absentee land is someone who is in the absentee land area, while the factual owner is a citizen who lives outside the absentee land area. The Nominee Agreement is a form of legal smuggling that has been prohibited and is contrary to laws and regulations. According to the provisions of Article 33 paragraph (1) and paragraph (2) of the UUPM, the Nominee Agreement is not recognized in the UUPM. In contrast to the provisions of the Nominee Agreement regulated in the Circular of the Supreme Court of the Republic of Indonesia Number 10 of 2020, the party considered to be the legal owner of a plot of land is the party whose name is listed on the certificate even if the land was purchased using money from another party. So in the case of a Nominee Agreement, the party recognized as the legitimate owner is the party whose name is borrowed to be included on the certificate.

Based on this, the Nominee Contract from the type of ownership is categorized into 2 (two), namely the law that recognizes someone's

ownership (de jure) and the actual fact that an object is owned by someone (de facto). The nominee de jure is the legal rights holder (legally recognized) of the object, meaning that the rights holder of the object can transfer, sell, burden, or guarantee the object. The beneficiary de facto means the person who actually owns the object (but is not named legally) (Santoso, 2019). According to Purnadi Purbacaraka and Agus Brotosusilo, legal smuggling occurs when people avoid the implementation of national laws by trying or carrying out illegal actions (Purbacaraka, 1983). There are four conditions for a valid agreement according to Article 1320 of Burgerlijk Wetboek, namely:: First, the capacity to make a contract; Second, the agreement of those who bind themselves; Third, a certain thing; Fourth, a lawful cause. Article 1868 of Burgerlijk Wetboek states that an authentic deed is a deed made in the form determined by law by or before a public official authorized for that purpose at the place where the deed is made.

If seen in Article 5 paragraph (3) letter a of Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Making Officials as amended by Government Regulation Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning the Regulation of the Position of Land Deed Making Officials, which reads, to serve the community in making PPAT deeds in areas where there are not enough PPATs or to serve certain community groups in making certain PPAT deeds, the Minister may appoint the following officials as Temporary PPATs or Special PPATs: Sub-district Head or Village Head to serve the making of deeds in areas where there are not enough PPATs, as Temporary PPATs. That, based on the above, the sub-district head appointed by the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency to become PPATS, is an official who is authorized to make a deed of transfer of land rights.

A Deed of Grant for a land ownership right is one of the reasons for the transfer of land rights, namely the transfer of ownership rights from the Grantor to the Grantee. The definition of a Grant has been regulated by Article 1666 of Burgerlijk Wetboek, which states that a Grant is an agreement by which a grantor hands over an item free of charge, without being able to withdraw it, for the benefit of a person who receives the transfer of the item. The law only recognizes grants between living people. Furthermore, in KHI Article 171 letter (g) defines a Grant as follows: "A grant is the voluntary giving of an object without compensation from one person to another person who is still alive to be owned." The provisions in the KHI, especially regarding Grants, are binding on Indonesian citizens who are Muslim, therefore the conditions and pillars of Grants as contained in the Islamic KHI must be fulfilled so that the Deed of Grant made by the Parties is valid and binding (Larasari, 2015).

A Deed of Grant that has fulfilled the requirements and provisions for making a Deed of Grant is binding on the parties and the Deed of Grant can be used as a basis for the transfer of land rights. A Deed of Grant made by and before an authorized official is an authentic deed that explains an event, namely the transfer of land ownership rights. Article 1688 of Burgerlijk Wetboek states that a Grant may be revoked if the conditions under which the grant was made are not met by the Grantee; if the Grantee is guilty of

committing or participating in a crime to take the life (kill) of the Grant Giver or other crimes against the Grantor; if the Grantee refuses to provide financial assistance to the Grantor, when the Grantor becomes poor, then the revocation of the Grant must meet the provisions. Deeds of Grant have fulfilled all the provisions contained in Article 1320 of Burgerlijk Wetboek including the requirement of a lawful cause, namely that the parties came consciously to the PPAT with the aim of protecting the authentic deed in the future. The unlawful cause and contrary to the law is outside the authentic deed, namely the Nominee Agreement whose creation was not known by the PPAT, so there should be no cancellation of the Deed of Grant made by the PPAT because it is in accordance with the applicable regulations relating to the preparation of the PPAT Deed.

Then, if we look at it from the aspect of making an agreement in an agreement, it cannot be born because of defects in good will in the form of mistakes/mistakes/misguidance (dwaling), violence/coercion (dwang), and fraud (bedrog) (Adonara, 2021). The Grantor cannot be in a state of error/mistake/lost (dwaling) when making the two Grant Deeds, because the Grantor is the initiator in this legal act. In making the two Grant Deeds, the Grantor cannot be in a state of coercion/under threat (dwang), likewise in the case of fraud (bedrog), the Grantor seeks the Grant Recipient, so it cannot be said that the Grantor has been deceived by the Grant Recipient in this legal act (Hanif, 2017). In addition, the legal acts in making these two Deeds of Grant have also fulfilled all the provisions in fulfilling all the conditions and pillars of Grant as stipulated in Article 171 letter (g) of the KHI, Article 1666 of Burgerlijk Wetboek and Article 1683 of Burgerlijk Wetboek as previously mentioned, so that there is no legal reason for the Grantor that he has a defective will that can cause the Deed of Grant to be canceled (Herusantoso, 2024).

The name loan agreement (nominee) is a form of agreement that stands alone and is not binding on other agreements, where the existence of the Nominee Agreement is not recognized by positive law in force in Indonesia and its existence has been null and void since the agreement was made with all its legal consequences, this has been emphasized in Article 33 paragraph (1) and paragraph (2) of the UUPM and Circular of the Supreme Court of the Republic of Indonesia Number 10 of 2020 as mentioned above, thus the Nominee Agreement cannot be used as a basis for canceling an agreement that has been made before an official authorized to make the agreement. The name loan agreement has been legally void since it was first made, and its existence is prohibited by statutory regulations, so that the form of the Nominee Agreement is definitely a private agreement and will never be made into an authentic deed, so that the existence of the Nominee Agreement cannot be a single entity and an inseparable part of an Authentic Deed (in this case a Deed of Grant).

This also happened in other name agreement cases such as in Case Number 259/Pdt.G/2020/PN Pbr which was decided on April 28, 2021 which was then continued at the cassation level with Case Number 980 K/Pdt/2022 on April 27, 2022, which stated that the Certificate of Ownership Number 5322 in the name of Daniel issued by the Pekanbaru City Land Office, has no binding legal force as well as all agreements and/or all rights

obtained by other parties from the Defendant Daniel relating to the disputed land are invalid, worthless and have no binding legal force. All of this shows that an authentic deed, namely in this case a certificate of ownership which has the most complete and full evidentiary force, can be decided by a judge to be revoked and has no evidentiary force based only on the Letter of Statement of Borrowing Name or Deed of Borrowing Name Agreement made before a Notary because this act constitutes legal smuggling and does not fulfill the provisions of Article 1320 of Burgerlijk Wetboek (Wau, 2023).

As explained that in the process of examining civil cases following the Theory of Positive Wettelijk Bewijstheorie, namely the judge examining the case is limited to the evidence submitted by the parties in making a decision. In making a decision, the judge looks at the suitability and truth of the evidence that is valid according to the law submitted by the parties in court in connection with the arguments in the lawsuit and in the answer to the lawsuit. If formal truth has been obtained according to statutory regulations, then the judge can make a decision, without the need for the judge's conviction in the case (Sutiono, 2024). Based on this, the proof of the Deed of Grant made based on this Name Loan Agreement if reviewed based on Radbruch's Theory of Legal Certainty, namely if a rule can provide justice that can truly bring benefits to the good of both parties and does not allow for a conflict between justice, benefit and certainty.

A Nominee agreement is an agreement that has been null and void since the beginning, because it does not fulfill the elements of a lawful cause as referred to in Article 1320 of Burgerlijk Wetboek, so that the Nominee agreement cannot be used as a basis for considering a decision because it is contrary to the provisions of Article 33 paragraph (1) and paragraph (2) of the UUPM and Circular of the Supreme Court of the Republic of Indonesia Number 10 of 2020, Formulation of the Civil Chamber Law Number 4 concerning the Use of Nominee (nominee Agreement), so that the existence of a Deed of Grant made based on the rules for making authentic deeds cannot be canceled by a Nominee Agreement whose existence has been null and void since it was made by the parties (Istighfarin, 2024). By canceling a Deed of Grant based on a Nominee Agreement, the court has indirectly protected parties who carry out legal smuggling and eliminated legal certainty in an authentic deed.

This certainly shows that the Deed of Grant made based on the Nominee Agreement can have consequences beyond the expectations of the parties concerned and the failure to fulfill justice between the two parties, because the reason for the Deed of Grant is based on legal smuggling to obtain the value of benefit by setting aside the existing value of justice, so that the expected legal certainty value cannot be obtained (Kinasih, 2024). Likewise in the Deed of Joint Information regarding the actual matter explaining the Nominee Agreement in both cases of ownership of land certificates as mentioned above. All of these are legal smuggling that cannot produce the value of justice, benefit and legal certainty for the parties.

3.2 Legal Implications of a Grant Deed Made Based on a Nominee Agreement.

This As stipulated in Article 37 paragraph (1) of Government Regulation Number 24 of 1997 which stipulates that the transfer of land rights and ownership rights to apartment units through sale and purchase, exchange, grants, income in companies and other legal acts of transfer of rights, except for transfer of rights through auction (Megawati, 2024), can only be registered if proven by a deed made by a PPAT who is authorized according to applicable laws and regulations. The authority held by the PPAT has legal responsibilities that require the PPAT to comply with all regulations made by the government, and if the PPAT violates these regulations, he will be subject to legal responsibility. In this case, the PPAT cannot carry out any unlawful acts that violate laws and regulations either actively or passively (Hanif, 2017).

In Article 13 paragraph (1) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 2 of 2018 concerning Guidance and Supervision of Land Deed Making Officials, it is explained that PPATs who violate the prohibition provisions stipulated in the laws and regulations can be in the form of a written warning, temporary dismissal, honorable dismissal or dishonorable dismissal. If the unlawful act in the form of an act of legal smuggling in this case the Nominee Agreement is categorized as a serious violation, then the PPAT is dismissed with dishonor as stipulated in Article 10 paragraph (3) letter (a) of the Government Regulation of the Republic of Indonesia Number 24 of 2016 concerning Amendments to Government Regulation Number 37 of 1998 concerning the Regulations on the Position of Land Deed Making Officials (Hereinafter simply referred to as PP No. 24 of 2016) (Malela, 2019). Meanwhile, if the unlawful act is categorized as a minor violation, the PPAT will be temporarily suspended as stipulated in Article 10 paragraph (4) letter (c) of PP No. 24 of 2016. When associated with Article 1320 of Burgerlijk Wetboek, it is possible that there will be legal consequences from the Nominee Agreement made, because the objective requirements of an agreement are not met, namely regarding a lawful cause, resulting in the agreement being null and void and deemed never to have existed. An agreement that has been void does not have any legal consequences, so it is deemed that no agreement has ever occurred (Magawati 2, 2024).

The legal consequences that arise after the decision to cancel the Deed of Grant is that the Deed of Grant no longer has legal force and cannot be a perfect evidence for the parties who made the authentic deed (Prakoso, 2021). As a result, since the cancellation, the legal act carried out has no legal consequences, where the cancellation or ratification of the legal act depends on a certain party, which causes the legal act to be canceled. So that the legal act of Grant carried out by the Grantor to the Grantee is declared never to have occurred because the lawful cause was not fulfilled, namely the act of legal smuggling through borrowing the name (Mahardika, 2022). Then all rights and obligations attached to the Grantor and Grantee are revoked and do not bind each party.

In the case of the Deed of Grant in this study, the PPATS has the authority to make the Deed of Grant as well as the PPAT as stated in Article 2

paragraph 2 of PP No. 37 of 1988 above. However, if the PPATS knows the reason for making the Deed of Grant based on the Nominee Agreement which clearly does not contain a lawful cause, namely in the form of legal smuggling, meaning violating the provisions of Article 1320 of Burgerlijk Wetboek, then the PPATS can be held legally accountable (Sultoni, 2021). Because the PPATS is found to have done something that benefits one party and harms the other party because of the deed he made, and the PPATS violates the existing laws and regulations in making the Deed of Grant, then the PPATS has actively committed an unlawful act (Setiawan, 2021).

This Nominee Agreement has legal implications, because the Nominee Agreement which was verbally stated in the Nominee Statement made by the Head of Tlogosari Village has no evidentiary force because from the beginning the agreement was made it contained formal defects, namely it did not fulfill the provisions of Article 1320 of Burgerlijk Wetboek, namely a lawful cause (Febyanti, 2023). Likewise, in the Joint Statement Deed regarding the actual matter explaining the Nominee Agreement in the two cases of ownership of land certificates as mentioned above, namely between PT Sumatera Musi Persada and Daniel and between the GAPENSI Organization and Gito Suwiryo, it does not fulfill the provisions of Article 1320 of Burgerlijk Wetboek, namely a lawful cause (Prakoso, 2024).

Discussing the Deed of Grant made based on the Nominee Agreement, the researcher in this case refers to the Legal Protection Theory put forward by Moh. Isnaeni, that there are 2 (two) forms of legal protection that can be used, namely internal legal protection and external legal protection (Isnaeni, 2016). Internal legal protection is legal protection that comes from the parties by creating and determining their own desires or rules that are stated in an agreement so that the interests of the parties are accommodated based on mutual agreement. Meanwhile, external legal protection is protection that comes from the authorities through regulations that are made with the aim of protecting the interests of the weak party without being biased and impartial, and must also provide balanced legal protection as early as possible to other parties (Isnaeni, 2016).

Based on Professor Isnaeni's opinion, the state is obliged to be present to protect all interests of citizens including in the case of a Deed of Grant made based on a Nominee Agreement. Because from the Deed of Grant there will be many parties who are harmed, especially the Grant Recipient, the heirs of the Grant Recipient and other parties who will be related to the Grant object in the future. The Grant Giver will very easily revoke his grant and the Grant Recipient cannot sue for this because he does not have rights to the grant object.

4. Conclusion

A Nominee Agreement that has been legally void since its creation cannot be used as a basis for canceling an authentic deed that has been made and signed by the parties before an authorized official. A deed of gift made by the parties as long as it has been made before an authorized official, signed by the parties, read by the official and meets the legal requirements

for making an authentic deed, then the Deed of Gift cannot be canceled by a Nominee Agreement that has been legally void since its creation.

The legal implication of a Deed of Gift made based on a Nominee Agreement on the status of the deed is that the deed has no legal force and cannot be perfect evidence for the parties who made the authentic deed. As a result of the cancellation of the deed, the legal act of Gift carried out by the Grantor to the Grantee is declared to have never occurred. Therefore, all rights and obligations attached to each of them are declared to be revoked and no longer attached. The PPATS who made the Deed of Gift made based on the Nominee Agreement can be held legally responsible for having intentionally benefited one party and harmed the other party for the deed he made..

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