

OWNERSHIP OF LAND RIGHTS WITH THE STATUS OF PROPERTY RIGHTS BY FOREIGN NATIONALS AS BENEFICIARIES USING INDONESIAN CITIZENS

Annisa Fitria

Universitas Esa Unggul
annisa.fitria@esaunggul.ac.id

Abstract

Normatively, the Government only grants land tenure rights to a foreigner in the form of right of use and lease rights. In practice, with various economic considerations and investment risks, foreigners willing to invest in Indonesia need to have land ownership with property status. Because, property rights are hereditary rights, the most powerful and the most achievable, for a while. In this regard, the national land law policy does not allow foreign Nationals to have property rights on land in the territory of Indonesia. The prohibitions encourage foreigners with an interest in the Nominee Agreement, by using the persons of an Indonesian citizen as a Nominee to be registered as the owner of the land rights. Law Number 5 of the Basic Agrarian Law of 1960, especially Article 26 (2), prohibits such an agreement. The purpose of this research is to analyze the regulation and prevention of land nominees with a normative judicial research method. The primary legal materials used include land legislation and investment laws and regulations. The results of the study confirmed that the prohibition nominee agreement were regulated in Law Number 5 of 1960 of the Basic Agrarian Law but the sanctions against the nominee's practice were not yet clear and firm and the status of the land nominee had not been fully regulated. To ensure legal certainty, there is a need for arrangements regarding land nominees along with sanctions and the status of land rights that are used as nominee objects. Therefore, the government can cease and annul land rights if its not in accordance with as designations. The preventive measures of nominees can be done both through civil and criminal means by returning the land to the State.

Keywords: *Land Ownership, Property Rights, Nominee Agreement*

1. INTRODUCTION

To support investment activities in Indonesia, the Government provides convenience for investors who are Foreign Nationals (hereinafter referred to as WNA) to be able to have a residence in Indonesia. The presence of foreigners or WNA as investors in Indonesia that been increasing for a long time, making WNA need a place to live their daily lives. This situation raises the possibility for Indonesian citizens who are based in Indonesia to be able to buy and have a good house in Indonesia. The Government of Indonesia does not rule out the possibility for foreign nationals to be able to own a house or residence in Indonesia with the terms and conditions as stipulated in Government Regulation Number 18 of 2021 concerning Management Rights, Land Rights, Flat Units, and Land Registration. In addition, houses or residences that can be owned by foreign nationals are limited to flats and tread

houses with the basis of rights in the form of right of use or right of use above property rights or management rights.

Although the government has granted land tenure to WNA in the form of right of use and rental rights, with various considerations of foreigners who want to invest in Indonesia still want the status of property rights. Because, property rights are hereditary, the strongest and most common rights that people can have on land. The value of property rights is higher than other rights, while the procedure of right of use is considered too complicated and ownership with the right to use has a time limit, if the time limit expires then the right to use must be extended. National land law in Indonesia does not allow Indonesian citizens who are married to Indonesian citizens and do not make marriage agreement, nor WNA to have land rights in the territory of Indonesia.

This condition makes the interested parties look for a way to get around things with the intention. The way that is then used is with the Nominee Agreement between WNA and WNI, namely by using the name of another party who is a WNI who is a WNI appointed as a nominee to be registered as the owner of the land. Basically, the agreement is intended to track the ownership of land with property rights status that can only be owned by Indonesian Citizens. The practice of land tenure by foreigners is inevitable, considering its mobility and that entering the territory of Indonesia continues to increase in the era of globalization today. Along with the change in the politics of governance in the New Order, much of the land was controlled by a group of foreign financiers.

2. RESEARCH METHODS

Normative juridical research (doctrinal) was conducted using a combination of statutory approach (Statute Approach), conceptual approach (Conceptual Approach), and analytical approach (Analytical Approach). According to Johnny Ibrahim, in normative legal research and a combination of approaches, a statutory approach will always be used, because normative legal research is based on research conducted on existing legal materials. The relevance between this theory and the author's research is that the rule of law means.

3. ANALYSIS AND DISCUSSION

3.1 Legal Arrangements Regarding Land Nominees in Indonesia

Regarding the terms of validity of the agreement can be reviewed under the Civil Law (Civil Law) and American contract law. In European continental law, these conditions can be seen in Article 1320 of the Civil Code edn., which states the treaty is recognized only if it conforms to the elements of:

- a. There is an agreement from the party that agreed;
- b. Ability to do law;
- c. There is an object;
- d. Reasons.

The nominee agreement is not in accordance with the terms of the recognition of an agreement that is looking but *halal causa*, because the contents of the nominee agreement who wants to obtain ownership rights to land have violated Article 21 Paragraph (1) of Law Number 5 of the Basic Agrarian Law of 1960. The nominee agreement also violates the principle of the agreement, which is the principle of freedom of contract that states if all subjects/people can make an agreement in the form and contain anything as long as it is in accordance with the provisions of the rule of law and based on good faith. Indonesia's legal system is completely unknown regarding nominee agreement, so there is no special and firm arrangement regarding this nominee agreement.

The nominee agreement in the field of land in practice is to provide the possibility for WNA to own land that is prohibited by Law Number 5 of the Basic Agrarian Law of 1960 is by way of "Borrow the name (Nominee)" WNI in buying and selling, so that juridically formally does not violate the regulations. However, if further examined regarding Article 1320 of the Civil Code regarding the validity of a treaty paragraph (4) which states that "*halal kausa*" then judging from article 26 paragraph (2) of the Law Number 5 of the Basic Agrarian Law of 1960 which states that: "Every sale, exchange, worship, giving with will and other acts intended to directly or indirectly transfer property rights to foreigners, to a citizen who in addition to Indonesian citizenship has foreign citizenship or to a legal entity, except as stipulated by the Government stipulated in Article 21 paragraph (2), is void because the law and land falls to the State, provided that the rights of the other party who burdens it continue to take place and all payments received by the owner cannot be re-used".

3.2 The Role of the Government in Order to Handle Investment Practices in Indonesia

Various improvements are carried out by the Government to create a conducive climate for investment, the Government's efforts are to create policies for the creation of a healthy climate and improve the competitiveness of national exports. The policies undertaken by the Government in creating a globally competitive investment climate are as follows:¹

- a) Improvement of laws and regulations in the field of investment;
- b) Simplification of investment procedures;
- c) Providing more attractive investment incentives;
- d) Consolidation of investment planning in the center and region;
- e) Monitoring and evaluation, as well as supervision of the implementation of investment both foreign and domestic;
- f) Development of investment information systems in centers and regions;
- g) Conduct a review of investment policy both domestically and abroad.

¹ Syprianus Aristeus, *Penelitian Hukum Tentang Peranan Hukum Investasi Di Indonesia Dalam era Globalisasi*, (Jakarta: Badan Pembinaan Hukum Nasional Departemen Hukum dan Hak Asasi Manusia RI, 2007), hlm. 19 et seq.

- h) Provide ease of granting land rights facilities for investors who are foreigners or foreigners.

Changes in laws and regulations related to residential ownership for foreigners, become one of the affected legal provisions regulated through the derivative regulations of Law No. 11 of 2020 on Copyright Work, which in its preparation uses the method of drafting omnibus law legislation. Through the Copyright Law, Residential Ownership for Foreigners undergoes changes and adjustments to the development and condition of the global economy. Law No. 11 of 2020 on Copyright Work delegates to 2 (two) arrangements that are general and special in nature including:

- a) Government Regulation No. 18 of 2021 on Management Rights, Land Rights, Flat Units and Land Registration;
- b) Government Regulation No. 40 of 2021 on the Implementation of Special Economic Zones.

Government Efforts to Avoid Legal Smuggling Through Nominee Agreement The State of Indonesia and its government have the authority to make laws and regulations or policies or in other words law. Every Indonesian citizen is bound to obey the laws made by the government. In addition to making laws, the government must also make efforts to make the law effective, so that the function of the government is divided into two, namely as a lawmaker and implementer of the law. Implementation. The law can be done in two ways, namely by conducting supervision and follow-up :²

1. Supervision

Preventive supervision, which is supervision carried out before the implementation of the law. This supervision is usually used as a guideline to prevent irregularities and to determine the suggestions and goals to be achieved, as well as determine the authority and responsibility of the agency in connection with the tasks that must be carried out.

2. Repressive supervision, i.e. supervision carried out after the implementation of the law. This surveillance is done to compare whether what has happened is in accordance with what should have happened.

Follow-up is done through programs and formulation of derivative policies of existing policies, as well as sanctioning violations of the law.

3.3 Ideal Arrangements to Address and Prevent Nominee Action on Land Ownership to Support Investment Policy

Home is a primary need for everyone. Therefore people try to immediately have a residential house or residence. For Indonesian citizens (WNI) as long as they have funds to buy, it is easy to get a residential house, which is set up on a piece of land. The same opportunity is

² H. Bohari, *Pengawasan Keuangan Negara*, (Jakarta: Rajawali Press, 1992), hlm. 25

given to every Indonesian citizen to obtain a right to land and to benefit and its results, for the benefit of himself or his family. The provisions regarding this can be seen in Article 9 of Law Number 5 of the Basic Agrarian Law of 1960, which states that only Indonesian citizens can have a full relationship with the earth, water, and space, as mentioned in paragraph (1). In addition, the ownership of residential homes for Indonesian citizens is stipulated in Article 9 Paragraph (2) states: Every Indonesian citizen, both men, and women have the same opportunity to obtain a right to land and to benefit, and the results, both for themselves and their families. Thus only for Indonesian citizens who have property rights, the transfer of property rights to foreigners is prohibited.

For WNA individuals if they want to own land and buildings on it, the Right to Use on land provides ownership opportunities within a period of time certain. Land-use rights for a certain period of time, rental rights for buildings, property rights to flat units ("Sarusun"), and residential or residential homes for WNA are based on PP Regulations. 18/2020 . Right to Use land with a Certain Period of Time Article 42 letter b Law Number 5 of the Basic Agrarian Law of 1960 jo. Article 49 paragraph

Letter e PP 18/2021 stipulates that foreigners domiciled in Indonesia can have land-use rights for a certain period of time. The right of use is the right to use and/or collect proceeds from land controlled directly by the state or land owned by another person, which gives the authority and obligation specified in the decision of his grant by the competent authority to grant it or in an agreement with the landowner, which is not a lease agreement or land processing agreement, everything of origin does not conflict with the soul and provisions of the Law Number 5 of the Basic Agrarian Law of 1960.

3.4 Arrangements to Prevent Nominee Practices in Land Ownership by Foreign Nationals

The practice of this land nominee arises in Indonesia because it is based on regulatory factors and also other factors, namely personal reasons on the part of the beneficiary itself, this personal reason is actually a secret or personal interest of the beneficiary itself. One of the reasons foreign nationals cannot own property rights in Indonesia is as stipulated in Article 26 Paragraph (2) of the Basic Agrarian Law. That can be one of the trigger factors for foreign nationals to control property rights through nominee agreement. Then in some other respects the lack of knowledge, lack of experience, and the understanding of a Notary who always considers that the deed he made is valid if the parties have agreed, and each party is able to do legal acts. But often not noticed against objects and causa that are allowed.³ In addition, there are pragmatic-pragmatic factors that are considered by each party, both foreign nationals, Indonesian citizens, and Notaries to make nominee agreement as a result of violating the laws and regulations, in this case, is Article 21 and Article 26 of Law No. 5 of 1960 concerning Law Number 5 of the Basic Agrarian Law of 1960.

³ Koeswadji, 2003, *Tanggung Jawab Notaris Selaku Pejabat Umum*, Center of Documentation and Studies of Business Law, Yogyakarta, hlm. 98.

3.5 Legal Policy against the Practice of Indonesian Land Ownership by Foreign Nationals

One of the weaknesses of Law Number 5 of the Basic Agrarian Law of 1960 related to the prohibition of land ownership by WNA is the absence of provisions governing null and void applications for transitional actions (legal acts) with a view to transferring their ownership rights to land either directly or otherwise to foreigners. This is what makes the existence of nominee agreement related to Indonesian land ownership by WNA is still widely happening in Indonesia, especially in tourist areas. Indeed Article 26 paragraph (2) Law Number 5 of the Basic Agrarian Law of 1960 such act is null and void Which means that:

1. The act of the law is considered never existed (never existed) from the beginning;
2. Such legal acts have no legal power or effect; and
3. The law from the beginning could not be implemented.

The judge not only declares the agreement null and void but must also order to take measures that restore the rights of the parties to their original state. However, this cannot be applied in the nominee agreement regarding land ownership by WNA. Because in general both parties involved are equally advantaged so it is impossible to take it to court. This practice only appears to be a legal issue if one party is cheating and harming the other. As long as both benefit, then land ownership by Indonesian citizens by borrowing the name of Indonesian citizens will still occur.⁴ If there are parties who cheat and must be under the court, in general the settlement tends to harm one of the parties, especially WNA as beneficiary. Because the judge generally considers the land as the property of Indonesian citizens whose names are borrowed in certificate as legal owner (legal owner). This can certainly encourage Indonesian citizens whose names are borrowed to cheat so as to reduce WNA's trust in the Indonesian legal system. In addition, it will also cause a clash between justice, expediency and legal certainty. Gustav Radbruch with the theory of legal purpose suggests that if there is tension between the three values then the decision is back to conscience. In this case, the judge has an important role considering that in the laws and regulations the nominee agreement is not known and regulated in the continental European legal system as in Indonesia.⁵

Related to the above issues, the state must play an active role in eradicating the practice of land tenure by WNA through law enforcement efforts that are able to ensure the realization of justice, expediency, and certainty, The active role of the Country is also to carry out the mandate of the constitution and Law Number 5 of the Basic Agrarian Law of 1960 which considers the relationship between the Indonesian nation and the earth, water, and space whose nature of the relationship is eternal. To that end, the State needs to authorize one of the State organs to represent the State and the public interest proposes annulment for the sake of the law of the practice of land tenure by the WNA conducted through the nominee agreement. This must be

⁴ Ibid

⁵ Sa'adah, Nabitus. "Kebijakan Pengampunan Pajak (Tax Amnesty) Berdasarkan Keadilan yang Mendukung Iklim Investasi Indonesia". *Jurnal Masalah-Masalah Hukum* 46, No. 2 (2017): 182-189, hlm. 185.

preceded by making amendments to the military in the Law Number 5 of the Basic Agrarian Law of 1960 by adding provisions for the cancellation of all forms of legal acts intended to transfer land ownership carried out by Indonesians and foreigners.

Furthermore, related to the organs of the State that should be authorized to represent the State applying for null and void nominee agreement in land ownership by WNA, it is necessary to review the organs of the State which have been acting as a representative of the State. In the history of law enforcement in Indonesia, the only officials who can represent the state in criminal and civil justice proceedings are prosecutors, in criminal cases, prosecutors are called Public Prosecutors (JPU), while in civil cases called State Attorneys (JPN)). The term state attorney is a translation of *landsadvocaten* listed in *staatblad* 1922 No. 522 on *Vertegenwoordige van den Lande in Rechten*. Article 2 of the *Staatblad* 1922 No. 522 stipulates that "in a process (or dispute) handled civilly, then acting for the government as the person in charge of the state in court is the justice officer or prosecutor".⁶ Eradication of land ownership by WNA through nominee agreement and the return of land to the State can also be done by prosecutors through criminal means. Criminal efforts can be made by prosecutors by filing demands that the land that is the object of nominee practice be returned to the State. But if the judge does not decide according to the contents of the claim, then JPU needs to entrust it to JPN in order to grant cancellation for the sake of the law to the civil court. This is necessary to avoid unclear land status because the status of the land cannot be declared as the property of the WNA. Meanwhile, if the judge declares the land to belong to the Indonesian citizen (nominee) because the name listed in the certificate is the name of the nominee, it is also not appropriate because it is not in accordance with Article 26 paragraph (2) Law Number 5 of the Basic Agrarian Law of 1960 so as to cause legal uncertainty and injustice because in principle null and void is to restore the state as before the agreement.

Law enforcement through criminal means by JPU against nominee agreement must be preceded by an investigation. At the investigation stage, JPU needs to give instructions to investigators to confiscate the land of nominee agreement objects to facilitate the prosecution process. According to Article 1 number 16 of the *Kuhap*, "Confiscation is a series of actions of investigators to take over and or store under his control moving and or movable objects, tangible or intangible for the purpose of proof in the investigation, prosecution, and trial". The definition is rather long but the understanding contained in it is quite limited because confiscation is only considered for the purpose of proof. Whereas in practice, confiscation is not only for the sake of proof but also necessary for the benefit of other criminal proceedings, such as execution. The implementation of confiscation in advance is expected to facilitate the execution process carried out by prosecutors on goods or objects related to criminal acts. But on the other hand, the return of land objects of nominee agreement to the state must pay attention to the rights of others who give goodwill to the land.

⁶ HukumOnline.com. (2014). Bahasa Hukum: Jaksa Pengacara Negara. Retrieved from <https://www.hukumonline.com/berita/baca/lt53670c63bfe50/bahasa-hukum--jaksa-pengacara-negara>,

3.6 Strengthening the Role of Land Deed Officer For Disclosure of Beneficial Owners

Land Deed Officer (hereditary called PPAT) which has the main task of carrying out some land registration activities by making deeds as evidence of certain legal acts regarding land rights, and as officials who are authorized to make deeds of agreement containing the transfer of land rights play an important role. The legal act of buying and selling is done before the PPAT to ensure that the act does not violate the provisions of applicable law. Cash conditions are fulfilled when there is a legal act of transferring land rights from the seller to the buyer and the legal act of payment of the sale price by the buyer to the seller. Therefore, if there is a nominee agreement as an additional agreement, then the buying and selling transaction actually does not meet the bright and cash element, because the buyer who attends and executes the Buying and Selling transaction in front of PPAT is not the actual buyer, but only the person who borrowed his name. This is what is said to be legal smuggling.

Whether notaries and/or PPAT involved in buying and selling transactions are aware of the nominee agreement between WNA and WNI or not, if this is revealed to the competent agencies in regulating and managing land,⁷ therefore, in accordance with the provisions of Article 26 paragraph (2) of the Law Number 5 of the Basic Agrarian Law of 1960 the sale and purchase are null and void and the land falls to the State.⁸ A notary is a party that plays a role in the disclosure of benefits ownership. As a country that adheres to the Continental European legal system, a Notary in Indonesia is a profession in the field of law that plays an important role for the government. A notary is a direct representative of the Government that is authorized in the making of authentic deeds and providing legal opinions and assessing the validity of an agreement. Authentic deeds made by or before a Notary must be able to guarantee certainty, order, and protection of the law. The duties and authorities entrusted to the Notary require the Notary to uphold the standards of ethics and professionalism and the binding laws and regulations.

The existence of legal smuggling through nominee agreement creates difficulty in fulfilling material conditions in land buying and selling transactions because the name listed in the Certificate of Property Rights is not guaranteed the truth. In addition, this legal smuggling if done to qualify formally in land buying and selling transactions, namely the creation of a Deed of Sale and Purchase on land made by PPAT and signed by the parties in the presence of PPAT, can potentially "endanger" the position of PPAT, because PPAT only makes authentic deeds based on the statements of the parties and certificates given to it, Without knowing the truth. A PPAT has the authority to create a Deed of Sale and Purchase of land between the seller and the

⁷ Lembaga pemerintahan yang mempunyai tugas di bidang pertanahan di Indonesia adalah Kementerian Agraria dan Tata Ruang/Badan Pertanahan Nasional (ATR/BPN) serta unit kerjanya yaitu Kantor Wilayah Badan Pertanahan Nasional di tiap-tiap provinsi, kabupaten dan kota yang melakukan pendaftaran hak atas tanah dan pemeliharaan daftar umum pendaftaran tanah

⁸ Bachtiar Mustafa, *Hukum Agraria dan Perspektif*. (Bandung: Remaja Karya, 1985), hlm. 11

buyer. If the creation of the Deed of Sale and Purchase is done as legal smuggling, then the Deed of Sale and Purchase results in null and void. However, this often does not escape PPAT from the lawsuits of the parties who feel aggrieved.

4. CONCLUSION

Nominee Arrangement in the possession of land rights manifested in the form of beneficial ownership, namely, the nominee is not regulated in the Indonesian Law but there is a prohibition on using nominees stipulated in Article 26 paragraph (2) of Law Number 5 of the Basic Agrarian Law of 1960 and Article 33 paragraph (1) of Law No. 25 of 2007 concerning Investment, therefore the Nominee Agreement can be categorized as legal smuggling because the nominee loan agreement aims to avoid the provisions of the prohibition of Foreign Nationals having land rights as stipulated in Article 21 paragraph (1) of the Law Number 5 of the Basic Agrarian Law of 1960. How to avoid it is to make nominees or borrow names so that foreign nationals can own land in Indonesia even though indirectly. Government efforts in dealing with investment practices related to ownership of land rights i.e. The Government can cease or annul the granting or extension of the right to the land if the land to be used by the investment company or foreign nationals is abandoned, detrimental to the public interest, not by its purpose and purpose, and contrary to the Law on land. The implementation that must be done to overcome and prevent the act of land ownership nominees is law enforcement through both civil and criminal means can be done eradication of land ownership by WNA through nominee agreement and the return of land to the State can be done by the prosecutor through criminal means by filing charges so that the land that is the object of nominee practice is returned to the State. Then legal efforts through civil means by canceling the nominee agreement because the nominee agreement in land ownership by WNA is essentially contrary to the constitution and Law Number 5 of the Basic Agrarian Law of 1960 which determines the enduring nature of the Indonesian nation's relationship with Indonesian land and the prohibition of land ownership by WNA.

REFERENCES

Bachtiar Mustafa, *Hukum Agraria dan Perspektif*, (Bandung: Remaja Karya, 1985).

H. Bohari, *Pengawasan Keuangan Negara*, (Jakarta: Rajawali Press, 1992)

HukumOnline.com. (2014). Bahasa Hukum: Jaksa Pengacara Negara. Retrieved from <https://www.hukumonline.com/berita/baca/lt53670c63bfe50/bahasa-hukum--jaksa-pengacara-negara>,

Koeswadji, 2003, *Tanggung Jawab Notaris Selaku Pejabat Umum*, Center of Documentation and Studies of Business Law, Yogyakarta.

Sa'adah, Nabitatus. "Kebijakan Pengampunan Pajak (Tax Amnesty) Berdasarkan Keadilan yang Mendukung Iklim Investasi Indonesia". *Jurnal Masalah-Masalah Hukum* 46, No. 2 (2017): 182-189.

Syprianus Aristeus, *Penelitian Hukum Tentang Peranan Hukum Investasi Di Indonesia Dalam era Globalisasi*, (Jakarta: Badan Pembinaan Hukum Nasional Departemen Hukum dan Hak Asasi Manusia RI, 2007).