SANLaR Sultan Agung Notary Law Review
Sultan Agung Notary Law Review
ISSN 2686-4428
published by Master of Notarial Law Faculty of Law Universitas Islam Sultan Agung Semarang


# The Tenure of Land by Foreigners through Nominee Agreements & *Waarmerking* by Notaries

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***Abstract.*** *Land tenure between foreigners and Indonesian citizens through a nominee agreement is an effort made so that foreigners own land in Indonesia with Own rights status, which is done by borrowing the name of the Indonesian citizen to be included in the land certificate. However, this is contrary to the applicable laws and regulations. The problem in this research is what are the legal consequences of land tenure by foreigners through a nominee agreement made under the hand and waarmerking by a notary in Jepara Regency. This study uses an empirical juridical approach. The research specification is descriptive analytical, the type of data comes from primary data obtained through field studies and secondary data through library studies. Methods of collecting data through interview techniques, literature studies and document studies. The method of data analysis is descriptive qualitative. The results of the study indicate that the practice of land tenure through nominee agreements made under the hands of foreigners and Indonesian citizens with the aim that foreigners can control land with property rights status like Indonesian citizens is legally a form of legal smuggling so that the agreement is not valid or deemed to have never existed and resulting in the sale and purchase of the land being null and void and the land falling to the state, this is based on Article26 paragraph (2) BAL.*

*Keywords: Land Tenure; Foreigners; Nominee Agreement; Waarmerking.*

## 1. Introduction

Land is a very important factor for human life, because it is not only used for footing and shelter but has a high economic value.[1] Land is also a country's potential that plays a very important role in supporting development. Ownership is essentially a reflection of man's view of himself as a human being in relation to land. Human relations with land give rise to authority and responsibility for the welfare of oneself and others.[2]

Land Law is the entirety of legal regulations, both written and unwritten, that regulate land tenure rights.[3] In this regard, there is a provision in Article 33 paragraph (3) of the 1945 Constitution where it is stated that: "earth, water and natural resources contained therein are controlled by the state and used for the greatest prosperity of the people". the establishment of Law of the Republic of Indonesia Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (hereinafter referred to as UUPA) which regulates Agrarian Law in Indonesia.

In connection with the provisions in Article 2 of the UUPA which regulates the Right to Control the State, one of the manifestations of the State's authority is to determine and regulate the legal relationship between people and land. The state can determine various types of land rights with their respective contents and authorities, including requirements regarding the subject or holder of land rights.

The LoGA determines that only Indonesian citizens can be subject to Property Rights, this is stated in Article 9 paragraph (1) junto Article 21 paragraph (1) of the BAL. According to Article 9 paragraph (1) of the UUPA, it is stated that "Only Indonesian citizens can have a full legal relationship with the earth, water and space". And in Article 21 paragraph (1) it is stated that "Only Indonesian citizens can have property rights". So that it can be interpreted that only Indonesian citizens (WNI) can have the status of property rights.

However, in practice, until now it is still common for foreigners to have land ownership rights made through various agreements. However, in essence this act is a form of legal smuggling. According to Prof. GG Siong, legal smuggling is

[1]Indra Kurniawan & Umar Ma'ruf, 2019, "*Penyelesaian Sengketa Hak Atas Tanah Melalui Proses Mediasi Dengan Melibatkan Pihak Ketiga Sebagai Pembeli (Studi Kasus Di Kantor Pertanahan Kabupaten Blora)*", Vol. 6, No. 1, p. 133, March, Univesitas Islam Sultan Agung Semarang.
[2]Winarti, Rofi'atun & Ngadino, 2019, "*Tinjauan Pelaksanaan Registrasi Yuridis & Pengalihan Tanah Atau Bangunan Dengan Akta Jual Beli Tanah Di Kota Samarinda*", Jurnal Akta, Vol. 6, No. 3, p. 711, December, Univesitas Islam Sultan Agung Semarang.
[3]Jaya Setiabudi, *Tata Cara Mengurus Tanah Rumah Serta Segala Perizinannya,* Jakarta, Buku Pintar, p. 3.

breaking the law improperly, so that it can be said to be breaking the law. Legal smuggling occurs when there is a person or parties who use the entry into force of foreign law in ways that are not right, with a view to avoiding the application of national law.[4] One of them is in the nominee agreement.

With the nominee agreement, an agreement is born so that the parties must obey and carry out the contents of the agreement that has been agreed upon. This has been regulated in Article 1338 paragraph (1) of the Civil Code, which states that all agreements made legally apply as law for those who make them.

The nominee agreement is one of the types of innominate agreements, namely the entire rule of law that examines various contracts that arise, grow and develop in the community and were not known at the time the Civil Code was promulgated.[5]An agreement letter made under the hand can be declared authentic if it is supported by an endorsement from an authorized official. And in this case, the notary who plays a role is the official who has the authority to ratify the agreement letter. The process of ratification from the Notary is called *Waarmerking*, namely by affixing a stamp that is registered in the Notary's books.

As is the case in the case that occurred in the city of Jepara between a foreign citizen of Japanese nationality named Mr. Masakazu Sugiyama and an Indonesian citizen named Mr. Bambang Eko Winarto. Seeing the potential for industrial activities in Jepara, Mr. Masakazu intends to collaborate with Mr. Bambang to establish a company under the name UD. WEST HOUSE and intends to buy land to be used as a place of business. Considering that there are laws and regulations that prohibit foreigners from owning land with Own rights status, Mr. Masakazu entered into an agreement with Mr. Bambang which was made under the hands. In the agreement Mr. Masakazu borrowed Mr. Bambang's name to be listed as the owner in the certificate of title to the purchased land even though the owner of the land was Mr. Masakazu as the provider of funds. In the agreement, it was agreed that the Indonesian citizen (Mr. Bambang) is the giver of power who gives all authority that may arise in the legal relationship between a person and his land to the foreigner (Mr. Masakazu) as the beneficiary to act like an actual owner of a piece of land which according to regulations the applicable laws cannot be owned. However, as time went by without Mr. Masakazu's knowledge,

[4]Sri Rahmayani, "Penyelundupan Hukum", http://srirahmayani212.blogspot.com/2017/10/penyeludupan-hukum.html Accessed on November 27, 2020, at 10.12 WIB.
[5]Salim H.S., *Perkembangan Hukum Kontrak Innominaat Di Indonesia*, Jakarta, Sinar Grafika, 2010, p. 4.

it turned out that Mr. Bambang had pledged the land to someone else. This is the cause of land disputes and disputes.

Based on the above background, the authors are interested in conducting research with the title "The Tenure of Land by Foreigners through Nominee Agreements & *Waarmerking* by Notaries".

This study has an objective objective, namely to be able to understand and analyze the legal consequences of land tenure by foreigners through a nominee agreement made under the hand and *waarmerking* by a notary and the subjective goal is to increase understanding, sharpen analysis, and add insight, especially in the field of civil law, especially regarding the powers and responsibilities of a notary in carrying out his office.

## 2. Research Methods

This study uses an empirical juridical approach. The research specification is descriptive analytical, the type of data comes from primary data obtained through field studies and secondary data through library studies. Methods of collecting data through interview techniques, literature studies and document studies. The data analysis method is descriptive qualitative using theories and positive laws that have been poured then deductively drawn conclusions to answer the problem.

## 3. Results and Discussion

### 3.1. Land Control By Foreigners Through Nominee Agreements And In *Waarmerking* By Notaries In Jepara Regency

To find out the legal consequences of land tenure by foreigners through a nominee agreement made under the hand and *waarmerking* by a notary, the thing that needs to be done is to analyze the validity of the nominee agreement. Examining the validity of an agreement means examining the conditions for the validity of the agreement.

Based on the provisions of Article 1320 of the Civil Code there are four conditions for the validity of an agreement, namely:

a. Agree on those who bind themselves;
b. The ability to make an engagement;
c. A certain thing;
d. A lawful cause;

The conditions for the validity of the agreement include subjective conditions and objective conditions. Subjective conditions are conditions related to the subject in the agreement, namely the agreement of the parties and the ability to act. While the objective conditions, namely the conditions related to the object, including the material of the agreement, namely a certain thing and a lawful cause (causa). Violation of the legal terms of the agreement has different consequences. Violation of the subjective terms can result in the agreement being cancelled, while the violation of the objective conditions will result in the agreement being null and void.

Limitations concerning the validity of the agreement mean that an agreement is considered valid by the parties who made it if in making the agreement it has fulfilled the four elements required by the provisions of Article 1320 of the Civil Code. Legal actions are limited by three things, namely if prohibited by law, contrary to decency, or public order.[6]

In the UUPA it has been determined that only Indonesian citizens can be subject to the Property Rights as stated in Article 9 paragraph (1) junto Article 21 paragraph (1) of the BAL. According to Article 9 paragraph (1) of the LoGA it is stated that "Only Indonesian citizens can have a full relationship with the earth, water and space", and Article 21 paragraph (1) states that "Only Indonesian citizens can have property rights". Thus, it is clear that only Indonesian citizens can have property rights. These provisions are not only about land, but also about natural resources and other agrarian objects.[7]So that various agreements made so that foreigners can control land in Indonesia are acts that should not be carried out. This act is a form of legal smuggling when viewed from the reason for making the agreement. Foreigners who are domiciled in Indonesia and foreign legal entities that have representatives in Indonesia can only be granted the Right to Use as regulated in Article 41 and Article 42 of the UUPA which has been further regulated in Government Regulation Number 40 of 1996 concerning Business Use Rights (HGU). Use of Building (HGB), and Right of Use (HP) on Land.

However, according to a Notary in Jepara Regency, the basis for making a nominee agreement is the fulfillment of the conditions for the validity of the agreement and the agreement he made legally applies as law for the party who made it.[8] Each of these conditions will be analyzed together with a discussion on the validity of the agreement made between Mr. Masakazu Sugiyama and Mr. Bambang Eko Winarto as the basis for land control by foreigners.

[6]Abdul Kadir Muhammad*, Hukum Perikatan*, Bandung, PT. Citra Aditya Bhakti, 1992, p. 225.
[7]Boedi Harsono, *Sejarah Penyusunan, Isi & Pelaksanaannya,* Jakarta, Djambatan, 1970, p. 175.
[8] Results of an interview with Mr. Zainur Rohman, SH, as a Notary and PPAT in Jepara Regency, on June 11, 2021.

When viewed in terms of the conditions for the validity of an agreement, as regulated in outline in Article 1320 of the Civil Code, namely that:

a. Regarding the agreement of the will between the parties making the agreement (consensus)
   What is meant by agreement of will is an agreement between the parties regarding the subject matter of the agreement made. Mr. Masakazu Sugiyama (beneficial owner) and Mr. Bambang Eko Winarto (nominee) have agreed to enter into an agreement. This is evidenced by the signing of the agreement by both parties, without any coercion, error or fraud, as stated in Article 1321 of the Civil Code that there is no valid agreement if the agreement was given by mistake, or obtained by force or fraud.
b. Regarding the ability of the parties to make agreements (capacity)
   Based on the provisions of Article 1330 of the Civil Code, it is stated that those who are not qualified to make agreements are people who are not yet mature, those who are under guardianship and women with husbands. But as its development, women who are already married are considered capable of carrying out legal actions based on the Circular Letter of the Supreme Court Number 3 of 1963 concerning the Idea of Considering Burgerlijk Wetboek Not as Law.
   In this regard, Mr. Masakazu Sugiyama (beneficial owner) and Mr. Bambang Eko Winarto (nominee) are people who are capable of entering into agreements. In terms of age, they are people who are considered adults according to Article 330 of the Civil Code because Mr. Masakazu Sugiyama is 39 years old and Mr. Bambang Eko Winarto 49 years old. In addition, there is also no letter of determination or decision from any court stating that they are under custody
c. Regarding the existence of a certain thing (a certain subject matter)
   The condition that the performance must be certain or can be determined in use is to determine the rights and obligations of both parties if a dispute arises in carrying out the agreement. If the achievement is not fulfilled so that the agreement cannot be implemented, it is considered that there is no object of the agreement. Due to non-fulfillment of these conditions, the agreement is null and void (*void nietig*). In this case, the object of the agreement is an item whose type and quantity are certain, namely a plot of land with a certificate of Ownership Number 2616, covering an area of 4.375M2 (four thousand three hundred

seventy-five square meters), along with the buildings located on it;

d. Regarding the existence of a lawful cause (legal cause)
Based on Article 1337 of the Civil Code that a lawful cause means that it is not prohibited by law, does not conflict with decency and public order.

Article 1335 of the Civil Code stipulates that an agreement without cause or containing false causes or prohibited causes has no legal force. A false or prohibited cause exists if, an agreement is made under sham, to conceal a cause that is not actually permitted by law.[9]

The Nominee Agreement in relation to a lawful cause, it was found that there were indications that the nominee agreement was made to contain legal smuggling efforts carried out by the parties. The legal smuggling attempt is related to the reason or background of the nominee agreement, namely that the foreigner wants to control the land with Ownership Rights, which is legally prohibited in the applicable laws and regulations. This is based on Article 9 paragraph (1) in conjunction with Article 21 of the LoGA.

So that by not fulfilling one of the legal conditions of the agreement, namely a lawful cause, then the agreement does not meet the objective requirements, namely the conditions related to the object.

Contract law that adheres to an open system provides freedom of contract and therefore it is possible to make an agreement that binds the parties to the agreement as a law. Although people are free to enter into an agreement, they are not bound by existing provisions, but the conditions for the validity of the desired agreement must be fulfilled in order for the agreement to be effective without blemish.[10]

According to the Civil Code, the principle of freedom of contract is closely related to the principle of the power to bind an agreement, this means that the legislators give the parties the freedom to regulate their own legal relationship between them, including determining the causes, terms, conditions, forms as well as the title of an agreement and at the same time provide binding legal force for the parties who make it. Restrictions contained in the principle of freedom are limitations on the validity of an agreement and limitations on the contents of an agreement. Subekti also argues that only agreements made

[9]R. Subekti, *Aneka Perjanjian*, Bandung, Penerbit Alumni, 1985, p. 12.
[10]Achmad Busyro, *Hukum Perikatan Berdasarkan Buku III KUHPerdata*, Yogyakarta, Pohon Cahaya, 2012, p. 80.

legally binding both parties.[11] The provisions in Article 1335 of the Civil Code also state that an agreement without cause or containing false causes or prohibited causes has no legal force.

However, with the nominee agreement, it provides the possibility for foreigners to own land which in this case is prohibited by the LoGA. If a notary is asked to give ratification (*waarmerking*) of such an agreement, he is obliged to refuse it. Likewise, in warming underhanded deeds, even though they only mark and record underhanded deeds, in fact the warmerking is limited to being recorded in a certain list that is kept at the notary's office, but notaries are also not allowed to warm up underhanded deeds whose contents are contrary to the law. , public order and or decency.[12]

There are several factors that cause a dispute between the parties related to the deed for 2 reasons, namely: a default by one of the parties that resulted in a loss and not the acquisition of the rights of one of the parties, and the deed made by a notary error was carried out in terms of aspects formal and material.[13]

The responsibility of the notary in the event of negligence in proving the deed or making an error in the deed he made so that it loses its authenticity is the responsibility of the notary himself. Notaries must carry out their duties and obligations as well as possible in order to achieve the purpose of a deed and can be proven as an authentic deed.[14]

The use of the nominee agreement is carried out by "borrowing the name" (nominee) of Indonesian citizens in buying and selling, so that in a formal juridical manner it does not violate the rules. Efforts to make agreements between foreigners and Indonesian citizens are carried out by granting power of attorney, namely absolute power. With the absolute power of attorney gives rights that can not be withdrawn by the power of attorney (WNI). The granting of this power of attorney gives authority to the recipient of the power of attorney (WNA) to carry out all legal actions related to land rights, which according to the

[11]Subekti I, Op. Cit., p. 193.
[12]Monicha Rossalia Adigita, Umar Ma'ruf & Aryani Witasari, 2019, "*Peran & Perlindungan Hukum Terhadap Notaris Terkait Dengan Perselihan Yang Terjadi Antara Para Pihak*", Jurnal Akta, Vol. 6. N0. 4,p. 789, December, Universitas Islam Sultan Agung Semarang, p.13.
[13]Monicha Rossalia Adigita, Umar Ma'ruf & Aryani Witasari, 2019, "*Peran & Perlindungan Hukum Terhadap Notaris Terkait Dengan Perselihan Yang Terjadi Antara Para Pihak*", Jurnal Akta, Vol. 6. N0. 4, p. 789, December, Universitas Islam Sultan Agung Semarang.
[14]Muhammad Hakiki Dharmawan, Lathifah Hanim & Ngadino, 2019, "*Peran & Tanggung Jawab Notaris Atas Pembatalan Akta Yang Telah Dibuat Dihadapannya*", Jurnal Akta, Vol. 6, No. 4, p. 821, December, Universitas Islam Sultan Agung Semarang.

law can only be carried out by the right holder (WNI), so that in essence this act is a form of transfer of land rights.

The characteristics or characteristics of the use of the nominee concept in land ownership include:[15]

a. There are 2 (two) types of ownership, namely legal ownership, namely based on the name recorded in the land certificate and indirectly, namely the actual purchase of land entirely using money from foreigners.
b. The name and identity of the nominee will be registered as the owner of the land in land ownership in Indonesia which will later be recorded in the land certificate and land book at the local National Land Agency;
c. There is a nominee agreement that must be signed between the nominee and the beneficiary as the basis for the use of the nominee concept;
d. The nominee receives a fee in a certain amount as compensation for the use of his name and identity for the benefit of the beneficiary.

The practice of using nominee agreements is still common in the community, because the existence of this agreement seems to provide a practical solution to the complicated process of land ownership by foreigners. According to Bambang Eko Winarto, this agreement is much more practical and profitable for both parties from a business point of view.[16] Even though this is the opposite, the nominee agreement has the consequence that the parties who make the agreement are not legally protected, both in material and formal law, considering that the agreement in the land law system in Indonesia has not been regulated. Legally, the party listed in the certificate is the legal holder according to the law as long as it cannot be proven otherwise. In the nominee agreement, the name listed in the certificate is the name of the person whose name is borrowed, so legally the legal owner of the land is the one listed in the certificate, namely an Indonesian citizen, although all financing comes from the foreigner.

So that by not fulfilling one of the valid conditions of the agreement, namely a lawful cause, the nominee agreement is considered invalid because it does not

[15] Results of an interview with Mr. Zainur Rohman, SH, as a Notary and PPAT in Jepara Regency, on June 11, 2021.
[16] Results of an interview with Mr. Bambang Eko Winarto, an Indonesian citizen, as a party to the nominee agreement on June 10, 2021.

meet the objective requirements, namely the conditions related to the object. As a result of non-fulfillment of the objective conditions, the agreement is null and void or deemed to have never existed. The provisions in Article 1335 of the Civil Code state that an agreement without cause or containing false causes or prohibited causes has no legal force. As a result of the violation of Article 9 paragraph (1) in conjunction with Article 21 paragraph (1), the land isfall to the state. This is based on the provisions of Article 26 paragraph (2).

## 4. Closing

Ownership of land by foreigners through nominee agreements made under the hands and *waarmerking* by a notary in Jepara Regency is illegal. This violates the provisions in Article 9 paragraph (1) in conjunction with Article 21 paragraph (1) in conjunction with Article 26 paragraph (2) of the BAL concerning the ownership of land rights which states that only Indonesian citizens can own land with the status of Own rights and Article 1320 paragraph (4) The Civil Code regarding the legal terms of the agreement, including a lawful cause, with the non-fulfillment of these conditions, the agreement is considered illegal or deemed to have never existed and resulting in the sale and purchase of the land being null and void (*void nietig*) and the land falling to the state, this is based on Article26 paragraph (2) BAL.

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[2] Code of Civil law
[3] Act No. 5 of 1960 concerning Basic Regulations on Agrarian Principles
[4] Government Regulation No. 40 of 1996 concerning Business Use Rights (HGU), Building Use Rights (HGB), and Land Use Rights
[5] Act No. 2 of 2014 concerning amendments to Act No. 30 of 2004 concerning the Position of Notary

*Interview:*

[1] Results of an interview with Mr. Zainur Rohman, SH, as a Notary and PPAT in Jepara Regency on June 11, 2021

[2] Results of an interview with Mr. Bambang Eko Winarto, an Indonesian citizen, as a party to the nominee agreement on June 10, 2021

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