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Position and Role of Witnesses in Making Notarial Deeds Based on the Notarial Law on the Cancellation of Authentic Deeds to Become Private Deeds (Case Study of Supreme Court Decision Number 1266 K/PDT/2022)

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Abstract. *An authentic deed is written evidence which has perfect legal force in the civil law system in Indonesia. This deed is made by or before an authorized public official, namely a notary, in accordance with the form and procedures determined in the laws and regulations. However, in practice, deeds are often found that do not meet formal and material requirements so that it causes legal problems and harming the parties involved. One of these problems can be seen in the Supreme Court's Cassation Decision Number 1266 K/Pdt/2022, where the notarial deed was made without being attended and signed by witnesses, which is a violation of the provisions of Article 38 paragraph (4) letter c and Article 40 paragraph (1) of Law No. 30 of 2004 concerning the Position of Notary, and Article 1868 of the Civil Code. This study used a normative legal method with a statute approach and a case approach. The data collection technique was conducted through literature studies and analyzed descriptively qualitatively. The results of the study show that notarial deeds which do not meet formal legal requirements, such as not being attended by witnesses, result in the legal status changing to a private deed. In this case, a notary as a public official can be held legally accountable, either administratively, civilly, criminally, or through a professional code of ethics. Thus, the fulfillment of formal and material requirements in the making of a deed by a notary is an important aspect in ensuring legal certainty and protection for the parties.*

Keywords: *Authentic; Certainty; Deed, Notary.*

1. INTRODUCTION

An agreement must take the form of a legitimate deed between parties engaged in transactions or legal activity in order to have strong legal force, be enforced, and be legally accounted for. A true deed also provides the parties with legal certainty, especially when it comes to performing the agreed-upon performance. A legitimate deed in Indonesia can only be created by a notary or other authorized authority, as stated in Article 1868 of the Civil Code (KUHPerdata).

"A deed executed in the manner prescribed by law by or in front of a public official authorized for that purpose at the location where the deed is made is considered authentic"

This highlights the importance of authentic action in the Indonesian data law system and the strategic role of notaries in developing orderly legal administration that is based on the form and material of a particular trip.

As stated in Article 1868 of the Civil Code (KUHPerdata), an authentic deed must encompass all aspects. According to the cumulative terms, each element that is mentioned in the passage must be thoroughly examined so that the action can be described as authentic. If one of the indicators is not present, even though the action has been reported by the authorities, then the action has lost its status as an authentic action and only has the ability to be developed as an action below the hand. In light of this, it is important to ensure that the actions taken by the notary have met the following formal requirements: they must be created by or under the supervision of a generally authorized official, in a form that is consistent with the law, and in a setting that is authorized. This non-compliance has implications for reducing the strength of deed evidence in the civil law system. (Irma Devita Purnamasari, 2023)

According to Supomo, an authentic act is one that is created by or before by a general person who is appreciative about it, with the intention that the act be considered a valid tool in a particular legal study. This activity has a clean proof because it is made according to the form and method specified in the statutory regulations. (Supomo, 1971) An authentic deed is a written proof that has a high and long-lasting proof in the civil legal system. This act is important for every legal relationship in society since it serves as a tool for addressing legal opinions, whether they are related to economic or social issues. Its existence provides legal certainty and protection for the individuals involved in a certain legal proceeding or procedure. (A Kohar, 1983) Authentic deeds play an important role in a variety of legal aspects of society. As a writing tool, authentic deeds are considered to have a high accuracy and evidentiary value in the judicial process. This important role is seen in various fields, such as business partnerships, banking activities, retail transactions, social activities, and other business ventures. In addition to this, authentic acts as a safeguard for the rights and obligations of individuals, making it a foundation for the execution and enforcement of data law.

The Notary Institute is one of the organizations that the country has established in order to enforce national law. As a component of this organization, Notary is regarded as a public servant with specialized knowledge in the field of law. Notary is given by the nation to create an authentic act and to carry out other legal duties as long as the act's creation is not contested or attributed to other parties in accordance with the requirements of the relevant laws. (Afriana, 2020)

According to Article 1 number 1 of Law No. 2 of 2014 concerning the Amendment to Law No. 30 of 2004 concerning the Position of Notary (UUJN), it is said that: "Notary is a general person who is willing to create other observables and authorities as it is described in UUJN." The minister who organizes government affairs in the field of law and human rights, i.e., the Minister of Law and Human Rights, who is responsible for notary. However, in carrying out this task, Notary does not have the authority to speak for the government. Notary is independent and cannot be interfered with by any entity, including the government, in carrying out its duties and obligations.

Notary's role as a public servant differs from that of the State Administrative Court. Notary creates an authentic act as a tool in data law, while the State Administrative Court creates an administrative decision in national business law. Disputes related to the notarial act are handled by the General Court, whereas the State Administrative Court handles the disputes of the national business.

Notary's responsibilities are outlined in Article 15 paragraph (1) of the Notary Law (UUJN), which states that Notary is responsible for creating authentic actions regarding deeds, agreements, and provisions that are determined by the rules of law or in accordance with the wishes of the parties. Aside from that, Notary is helpful in ensuring the date of certainty, calculating the deed, and providing grosse, copies, and extracts of the deed.

One type of legal protection for Notaries in creating an authentic act is the presence of witnesses. Witnesses play an important role in order to ensure that the process of creating an act is carried out in accordance with the procedures and legal requirements that are in place, as well as as a means of confirming that the actions of the Notary have been explained and carried out by the individuals involved. (Resky et al., 2023) As stated in Article 40 of Law No. 2 of 2014 regarding the Amendment to Law No. 30 of 2004 regarding the Notary, it states:

"In making a deed, a Notary must be attended by at least two witnesses, unless the law stipulates otherwise."

This passage explains that the presence of witnesses is a formal requirement that must be followed in order for the action to be considered authentic. The absence of witnesses may cause this action to be less observable and only occur as an action below the hand.

There is frequently a mismatch between the execution of the deed and the legal requirements that have been established in the statutory regulations in the practice of notarial practice recently. One example may be seen in Supreme Court Cassation Decision Number 1266 K/Pdt/2022, where the cassation's statement addresses the Notary over the activities of the shop housekeepers. According to legal requirements, an authentic must be created by two people, who are typically notaries. However, in this case, the action does not diminish the formal requirements because the witness was not present at the time the action was created and may not even be able to resist it. In addition, the witness mentioned in this act does not refer to a notary public; Rather, it refers to a person who works as a teacher. As a result of the procedural defects, a deed that must have a legal force as an authentic deed will change its status to an deed below the hand. Even if the plaintiff has brought the nation's law up to the level of cassation, the lawsuit has not yet been realized. Based on the aforementioned problem, the researcher emphasized the importance of learning more about the role and position of witnesses in authentic formation.

2. Research Methods

According to Soetandyo Wignyosoebroto, the method of legal research is a systematic approach in which a range of people look for accurate and insightful answers to a particular legal problem. It is necessary to conduct a methodical, objective, and illuminating research process in order to gain a thorough understanding of various legal issues. (Zainuddin Ali, 2016) his study used a normative legal method, which is a type of research which focuses on literature studies. In this approach, the main data source

comes from secondary legal materials; such as, laws and regulations, legal literature, and other related documents. (Ronny Hanitijo Soemitro, 2001)

According to normative legal research, law is understood as the set of rules contained in the book's regulations. More specifically, law is viewed as a set of rules or guidelines that serve as a benchmark for the general public regarding what is considered to be wrong and wrong. In addition, law can be defined as a reflection action or a legal practice that permeates daily life. (Butarbutar, 2018) The legal approach and case approach are characteristics of this research. The legal approach is carried out by examining several relevant legal regulations and statutes as a basis for analysis. The case approach, on the other hand, is used to analyze and evaluate court decisions that are closely related to the issues discussed in this study. (Peter Mahmud Marzuki, 2010) The primary legal precedent in this study is Law No. 2 of 2014, which is a modification to Law No. 30 of 2004 concerning the Notary Position (UUJN). The case approach, on the other hand, is carried out by examining and analyzing the cases that are related to the problems, especially those that have been put to rest by the authorities and have a legal standing (*inkracht van gewijsde*). (M. Syamsudin, 2010)

As the primary target of this study, the focus of the analysis is the Supreme Court Cassation Decision Number 1266 K/Pdt/2022. The data source used in this legal analysis is second-order data, or data that cannot be obtained directly from the research object, such as through third-order organizations or media outlets as a source of information for analyzing problems. (Marzuki, 1991) The secondary data in this study is divided into two categories: primary and secondary legal materials. The fundamentals of law include the 1945 Constitution of the Republic of Indonesia, the 2014 Law No. 2 on the amendment of the 1945 Law on the Position of Notaries, and the 2014 Civil Code. Secondary sources of law include books, scholarly journals, and other relevant documents. (Dyah Ochtorina Susanti and A'an Efendi, 2009) Meanwhile, tertiary legal materials in this study included additional references; such as, legal dictionaries and sources of information obtained through online media (internet). Furthermore, this study used data collection techniques through literature studies. This technique was conducted by tracing various relevant laws and literature as secondary data in order to support the analysis of the legal issues discussed. This approach is also known as normative legal research. (Soerjono Soekanto dan Sri Mamudji, 2001) Furthermore, the data obtained would be analyzed by using a descriptive-analytical method, namely processing data that was originally broad and complex into more concise, structured, and systematic information. (Saebani, 2009)

Based on the above-mentioned background, the identification problem in this study is as follows:

1) How does the law of witness position and the role of witnesses apply to the creation of the travel act in the Supreme Court Cassation Decision No. 1266 K/Pdt/2022?
2) What is the effect of law and notary responsibility on an activity that is created without witnesses?

The purpose of this study is to examine the position and witness in the creation of notarial acts according to Indonesian data and notarial laws, as well as to analyze the type of notarial accountability regarding the creation of authentic acts that turn into deeds at the bottom of the hand because the process is not followed.

3. Results and Discussion

According to Veegens Oppenheim Polak's view as quoted by Tan Thong Kie, a deed is defined as a written document that is specifically prepared with the aim of being used as evidence. In general, both definitions have similar meanings, namely emphasizing that a deed is a writing which is deliberately made for the purpose of proof in a legal context. (Veegens-Oppenheim-Polak dalam Tan Thong Kie, 1987) In general, there are two types of deeds: authentic deeds and underhand deeds. Supomo explains that an authentic act is a document created by or from a generally authorized official, with the intention that the document can be used as a legally sound tool. (Supomo, 1971) Meanwhile, a private deed is a document which is prepared and signed by the parties without involving public officials in the process of making it. They have fundamental differences in terms of the procedure for making, formal form, and evidentiary force in the civil law system.

An authentic deed essentially encompasses all formal statements made by the parties and communicated to the notary. The purpose of a notary is to put the needs of the people in a clear and concise form, ensure that the people understand the deed, and thoroughly review it before reacting to it. In addition, notaries are required to provide information disclosure and access, as well as adherence to relevant laws and regulations. As a result, the individuals have the determination to complete the task or complete the action before completing the final goal through hand signs. (Habib, 2009)

Generally speaking, a notary is an official who is happy to create observable actions and other authority as specified in the regulations for each invitation. The aforementioned legal authority is contained in Article 15 of Law No. 2 of 2014 concerning the Amendments to Law No. 30 of 2004 concerning the Notary Position (UUJN). In carrying out their duties, notaries are supported by notaries who have important roles, one of which is as an essential witness in the process of creating an authentic act. The presence of witnesses serves to provide legal protection for the notary in the event that a legal dispute occurs to the deed that was created, especially if there are parties who are attempting to change the truth of the statement that has already been stated in the deed. Every instrumental witness must adhere to the principles outlined in Article 40, paragraph (2) UUJN. The requirement for witnesses in the creation of an authentic act is stated in Article 16 paragraph (1) letter m in conjunction with Article 40 UUJN, which highlights the importance of formal considerations in ensuring the accuracy of the notarial act. (Prabawa & Wibawa, 2023) According to Article 16 paragraph (1) UUJN, an act must be performed by a person who is present and who is composed of two witness people. As a form of validity and strength of evidence, the presence of witnesses is an essential component in the creation of authentic activities. The identity of the witness is required to be stated at the end of the action.

According to the Supreme Court's Cassation Decision Number 1266 K/Pdt/2022, the agreement that is made in the notary's presence does not diminish the formal as an authentic act since it is not composed of and not explained by the witness. In summary, Ikbal Solin Hutahaean, the witness listed, does not have the authority to inform a trader member. However, in its consideration (page 8 point B), the Supreme Court states that there is no witness that would negate the aforementioned agreement's by law because the substance of that agreement still largely satisfies the valid requirements as stated in Article 1320 of the Civil Code. Accordingly, it can be said that the witness's presence in

creating a particular journey is not only no, but it also serves as the foundation for the journey itself. However, if we go a little further, Law No. 30 of 2004 concerning the Office of Notaries (UUJN) clearly states the form of a certain authentic (notary) act, one of which is the existence of the presence and signature of witnesses as stated in Article 16 paragraph (1) letter m and Article 40 UUJN.

Due to the cumulative nature of the terms used to create the authentic act, if one of the terms is not met, the authentic act will be hindered and will only be seen as an akta below the tangan. In the context of the Supreme Court Cassation Decision Number 1266 K/Pdt/2022, even though the lease agreement does not have a null and void because there is no witness, the witness still has a legal meaning as a part of the formal creation of an authentic deed as stated in Article 40 of Law No. 30 of 2004 concerning the Notary Office (UUJN).

Article 40 UUJN stipulates that each act performed by a Notary must be witnessed by at least two witnesses, unless otherwise specified in the relevant regulations. Witnesses must meet the requirements, among other things, be at least 18 years old or married, legally competent, understand the language of the deed, be able to sign and initial, and have no direct or side family relationship up to the third degree with the Notary or the parties. The witness must also be known by the Notary, or its identity and circumstances must be explained to the Notary, which must then be recorded in writing.

On the surface, Notaries generally consider their employees to be witnesses in the process of creating an act, despite the fact that Article 40 of Law No. 30 of 2004 on Notary Position (UUJN) is still in effect. A minimum of two instrumental witnesses is an absolute requirement in the formation of an authentic deed, but the number can reach two people as needed. The position of witnesses is an important part in ensuring the validity of an authentic deed as good evidence in the civil law evidence system. Aside from that, witnesses provide legal protection to notaries while also ensuring compliance and accountability. If the requirements for the presence and inclusion of witnesses are not met, the deed can lose its evidence as an authentic deed and turn into a deed under hand in Article 41 of the UUJN. Because of this, notarial acts must be created in accordance with the facts of the case and meet procedural standards in order to ensure legal compliance, as stated in the Supreme Court Cassation Decision Number 1266 K/Pdt/2022.

According to Article 171 HIR, witness refers to communication about what is seen, learned, or said. This information must be accompanied by reasons and methods of obtaining knowledge, so that personal opinions or assumptions cannot be considered as information. In the context of notarial acts, witnesses come from notary employees who are parties who directly witness the process of making the deed. They acted as witnesses to the act, stating that the formalities of the act had been followed in accordance with the requirements of Law No. 30 of 2004 on Notaries (UUJN).

The legal provisions governing the issuance and execution of notarial acts are outlined in Article 38 paragraph (4) letter c and Article 40 paragraph (1) of Law No. 30 of 2004 concerning the Notary's Office, as well as Article 1868 of the Civil Code. A notarial deed is considered valid and has perfect evidentiary force if the formal requirements, namely the presence of witnesses, are met. Similarly, if an act is created without a witness, it has the potential to be challenged through the process of enactment.

3.1. Legal Consequences and Responsibilities of Notaries for Deeds Made Without the Presence of Witnesses Which Cause the Deed to Become a Private Deed

In notarial law, there are two types of witnesses that are instrumental witnesses and identifying witnesses. Instrumental witnesses have a direct role in making a deed, must be present when the deed is read and signed, and must also sign the deed. Meanwhile, identifying witnesses (*attesterend betulgen*) function to introduce the parties to the notary. According to the provisions, every notarial deed must be attended by at least two witnesses when it is read and signed. (Setiadewi & Hendra Wijaya, 2020) The presence of witnesses in every notarial deed is a legal requirement. Instrumental witnesses play a role in providing legal protection for notaries if the deed is questioned by related parties or third parties. In addition, witnesses function as evidence in the judicial process since they can provide testimony regarding the formal process of making a deed. Witnesses are required to hear the reading and witness the signing of the deed, although they are not required to understand the substance or remember the contents of the deed. (Prabawa & Wibawa, 2023) Witness as a witness to the deed has a great obligation when the notarial deed is formalized. The witness is required to be a witness to the making of the deed, the reading of the deed, and its signing by the interested party before the notary, as stipulated in the law to ensure the authenticity of the deed.

Notaries in making deeds must consider the personal circumstances of the parties legally, as regulated in Article 39 paragraph (2) of Law No. 30 of 2004, which states that the parties must be known to the notary or introduced by two identifying witnesses. Furthermore, Article 3 of the Notary Code of Ethics confirms the obligations of notaries in carrying out their duties, namely making, reading, and signing deeds. This ethical code serves as a guide for notaries and, while it does not provide legal advice, it does provide moral advice on the events that occur. (Afriana, 2020)

Accordingly, notaries have both legal and moral responsibilities. As a valuable employee, notaries must be familiar with the Code of Ethics and other relevant regulations. If a notary is negligent in carrying out his duties, as in the existing case study, where the deed was made without the presence of the required witnesses, this clearly violates the provisions of Article 40 paragraph (1) of Law No. 30 of 2004 concerning the Position of Notary (UUJN), which states, "Every deed read by a notary must be attended by at least 2 (two) witnesses, unless statutory regulations specify otherwise."

Article 16 paragraph (1) letter m stipulates that a notary must read out a deed in the presence of at least two witnesses, which is then signed jointly by those appearing, the witnesses, and the notary. Furthermore, Article 44 paragraph (1) states that after an act is signed, it must be witnessed by all parties involved, including witnesses and notaries.

Based on the legal basis that exists, a notary deed that is not attended and signed by witnesses must be void by law and considered only as a deed under hand. Notaries are officials who are well-versed in the law. The consequences of the cancellation of an authentic deed must be based on a court decision that has permanent legal force. There are several factors that can cause an act to be challenged by a judge, such as a notary who does not read the act to the parties, a lack of force in the signing, or a lack of witnesses. Notaries are bound by the notary code of ethics in carrying out their duties,

but mistakes made by a notary can have fatal consequences for the deed they make, which causes the deed to be canceled in court.

Article 1365 of the Civil Code stipulates that "Every unlawful act that causes harm to another person, requires the person who legally issues the loss, to compensate for the loss." An unlawful act is an act that is done wrongly, which results in harm to another person. In law, unlawful acts are divided into three categories: (Adiansa et al., 2024)

1) Unlawful acts due to intent;
2) Unlawful acts without fault (without elements of intent or negligence);
3) Unlawful acts due to negligence.

The model of liability law is divided into two parts:

a. Liability without a cause (as stated in Article 1365 of the Civil Code);
b. Liability with a cause, specifically negligence, as stated in Article 1366 of the Civil Code.
c. Absolute liability (without fault), as defined in Article 1367 of the Civil Code.

The liability for a notary who is proven guilty can be seen from several legal aspects as follows: (Thomas, 2023)

The liability for a notary who is proven guilty can be seen from several legal aspects as follows:

1) Job responsibilities based on Law No. 30 of 2004 concerning the Position of Notary.
2) Civil liability based on Article 1365 of the Civil Code which regulates unlawful acts that cause losses to other parties.
3) Criminal liability based on Article 263 paragraph (1) in conjunction with Article 264 paragraph (1) of the Criminal Code and Article 266 paragraph (1) of the Criminal Code. Article 263 paragraph (1) of the Criminal Code stipulates that: "Any person who makes a false letter or falsifies a letter that can give rise to rights, obligations, or debt relief, or which is intended as evidence of something with the intention of using or ordering another person to use the letter as if the contents were true and not falsified, shall be subject to a maximum imprisonment of six years, if such use can cause losses."
4) Responsibility according to the Notary's code of ethics, which regulates the behavior and actions of notaries in carrying out their duties, which if violated can result in moral and professional sanctions.

4. Conclusion

The requirement for witnesses in the creation of a notarial act is outlined in several legal texts, including Article 38 paragraph (4) letter c of Law No. 30 of 2004 concerning the Office of Notaries, and Article 1868 of the Civil Code y If a notarial act is created without being signed, it loses its status as an ostensible act and becomes an act on the margin. In addition, the law of the absence of witnesses can affect the validity of the deed, which can be canceled in a court decision. The responsibility of a notary who is negligent in fulfilling the obligation to present witnesses also includes several legal aspects, as follows. Job Responsibility, Civil Liability based on Article 1365 of the Civil Code, Criminal

Liability, Liability based on the notary's code of ethics, Because of this, if a notary performs a service in relation to a procedure that has been established, whether it is related to a witness or another requirement, the notary may be known by a variety of legal terms depending on the requirement.

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Regulation:

Law No. 2 of 2014 which is an amendment to Law No. 30 of 2004 concerning the Position of Notary