

Legal Certainty of Land Ownership Rights by Foreign Nationals Through Nominee Agreements

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ABSTRACT

The purpose of this study is to examine the legal certainty of the ownership of land rights by foreign nationals through name loan agreements or nominees in Indonesia. **The methodology** used is normative legal research with a legislative and conceptual approach, as well as analysis of primary and secondary legal materials. **The results** of the study show that the practice of nominee agreements is often considered illegal and has the potential to cause legal disputes, because it is contrary to the Indonesian Basic Agrarian Law which only allows Indonesian citizens to have property rights to land. In addition, this agreement can result in losses for all parties involved, including foreign citizens who lose their rights and Indonesian citizens who lend their names. This research provides an understanding of the need for clearer regulations to protect the interests of all parties and prevent the abuse of the law in land tenure by foreign nationals in Indonesia.

Keywords: Nominee Agreement for Foreign Nationals, Legal Certainty in Land Ownership, Agrarian Law in Indonesia.

INTRODUCTION

Land ownership in Indonesia is currently attracting the attention of foreign citizens to invest. One of the commonly used ways is through a nominee agreement, also known as a name loan agreement. In this agreement, one party agrees to take legal action that makes them the right holder of the land. By using the name of an Indonesian citizen, foreign citizens can include their name in the land certificate, thus giving the impression of stronger ownership compared to only using the right of use or rent. This allows foreign nationals to access land ownership directly, as only Indonesian citizens are allowed to have land rights in Indonesia (Hasibuan, 2016). Furthermore, the Indonesian land law stipulated that Indonesian land is based on the principle of nationalism. The principle of nationalism is regulated in Law Number 5 of 1960 concerning the principles of agrarianism (the Indonesian Basic Agrarian Law). Referring to Article 1 of the Indonesian Basic Agrarian Law which states "that the entire territory of Indonesia is the unity of the homeland of all Indonesian people, this article also explains that the earth, water, and space are national assets that have an eternal relationship with the Indonesian nation". Article 9 paragraph 1 of the law further reaffirms "that only Indonesian citizens can have a full relationship with the earth, water, and space. Every Indonesian citizen, both men and women, has the same opportunity to acquire land rights and their benefits" (Naiborhu, 2024).

In Indonesia's national land law, foreign nationals are not allowed to own land ownership. This is regulated in the Indonesian Basic Agrarian Law, which states that only Indonesian citizens are entitled to land ownership. Alternatively, foreigners can obtain the right of use or lease rights for the building, which has certain limitations in terms of the period and conditions that must be met (Rizki, 2021). This situation has prompted some foreign investors to look for other solutions, one of which is by making a nominee agreement. In this agreement, foreigners borrow the names of Indonesian citizens for land ownership. In addition, according to several studies, the ownership of land by foreign nationals in Indonesia is usually carried out through a name loan agreement or nominee. Common land disputes are more about land used for development projects, mining, industrial estates, and others. Where the interests of the local population often conflict with the goals of foreign investors (Winardi, 2017). In this regard, it has been explained in Article 26 paragraph (2) of the Indonesian Basic Agrarian Law "If a foreign citizen obtains property rights, then the land will automatically become state property after a certain time if the property rights are not released". This shows that although there are

mechanisms such as nominees that allow access to land, there are still strict legal restrictions to protect national interests and prevent land accumulation by foreign parties. Therefore, *the nominee* agreement will have a significant impact on all parties involved. For foreign nationals, they will suffer losses, both in the form of loss of desired rights and financial losses from payments that have been made (Pulungan, Madjid, & Arliman, 2024). In general, nominee agreements in Indonesia, which are often used by foreign nationals to access land rights, involve several different forms of agreements consisting of a Master Agreement consisting of a Land Ownership Agreement and a power of attorney, Option Agreement, Lease Agreement, Power of Attorney to Sell, Wills Grants and Heirs Statement. Such an agreement is possible because it does not transfer ownership rights directly. However, transferring institutional land rights to land ownership (*Hak Milik*/HM) and building use rights (*Hak Guna Bangunan*/HGB) (Saputri, 2015).

Our study argues that many land disputes are rooted in a lack of understanding of the law and history of land ownership in Indonesia. By understanding the formulation of this problem, it is hoped that it can provide further insight into the dynamics of land ownership and its implications for society and law in Indonesia. Therefore, clearer, and fairer regulations regarding the ownership of land ownership are needed so that all parties are protected. Therefore, this study wants to examine the legal certainty of the ownership of land by foreign nationals carried out through a nominee loan agreement. Also, the subject matter that will be examined is how the legal consequences for the control of land ownership by foreign nationals are carried out through a name loan agreement (nominee). The purpose of this research is to find out the legal certainty and legal consequences as well as the risks of the nominee agreement according to the laws and regulations in Indonesia.

RESEARCH METHOD

This study used legal normative research method or doctrinal legal research or library research from several types of approaches, the combination of approaches can be done effectively by combining elements of each approach to obtain a more comprehensive and accurate picture of the research object being researched (Rustan, Hsieh, & Umar, 2021). The initial purpose of this study is to study relevant legal issues to achieve legal objectives. The type of legal approach in this study used statutory approach and conceptual approach. Primary legal materials used are laws and regulations, and secondary legal materials use

laws and regulations library research, on the other hand, refers to the nature of research that used secondary data obtained from libraries, such as books, journals, and official government documents, to review and analyze (Sung & Umar, 2020).

RESULTS & DISCUSSION

Legal Certainty of Land Ownership by Foreign Nationals Through Nominee Registration

A nominee agreement or loan agreement is made between two parties to appoint a person as a representative in the use of a name, which is generally stated in an authentic deed or legal document prepared by the provisions applicable in the law based on a statement or power of attorney. In other words, this agreement involves two parties who use their power to purchase assets such as company shares, land, or buildings, even though the party using the name is not the legal owner of these assets. This agreement aims to grant authority or ownership of an asset to another person for the benefit of the borrower. Under this agreement, foreign citizens can take various legal actions of the assets. Although born from the principle of freedom of contract, nominee agreements are not specifically regulated in the Indonesian law and are often considered an abuse of the law because it violate existing provisions. The use of the concept of nominee agreement in Indonesia emerged to overcome restrictions imposed by state law, such as the prohibition for foreign nationals to own shares in companies, land, or buildings as owners (Sudini & Utama, 2018).

In addition, foreigners can only obtain the Right to Use and Lease Rights for Buildings. This is emphasized in Article 42 the Indonesian Basic Agrarian Law that regulates who can have the right to use land. According to the article, the parties entitled to the right of use are:

- a. Indonesian citizen
- b. Foreigners domiciled in Indonesia
- c. Legal entities established under Indonesian law and domiciled in Indonesia
- d. Foreign legal entities that have a representative in Indonesia”.

Furthermore, Article 2 paragraph (1) Government Regulation No.103 of 2015 on "Foreigners who have a residence permit in Indonesia are allowed to own a house for residence or residence with the right of use". The practice of the nominee agreement was chosen because property rights in the name of Indonesian citizens can last for a long time or forever as long as the party named in the certificate is still alive and can be passed on to the heirs. If the certificate is handed down to the heirs, then the foreigner can renew the agreement by including the name

of the heir. This is certainly different when using the Right to Use Business (*Hak Guna Usaha/HGU*), Right to Use Building (*Hak Guna Bangunan/HGB*), or other rights other than property rights (*Sertipikat Hak Milik/SHM*) where these rights have limitations, such as time limits and restrictions on the type of business that can be run. Therefore, a nominee agreement or name loan agreement is preferred and chosen by foreigners who will try and live in Indonesia (Nisa, 2023).

Nominee agreements on land rights in Indonesia are considered illegal based on the provisions contained in the Indonesian Basic Agrarian Law. The law expressly states that only Indonesian Citizens can have property rights to land (FERNIAWAN, 2023):

1. Only Indonesian citizens can have property rights.
2. The government stipulates legal entities that can have property rights and conditions.
3. Foreigners who, after the enactment of this Law, acquire property rights by inheritance without a will or by marriage of property, as well as Indonesian citizens who have property rights and after the enactment of this Law lose their citizenship shall relinquish such rights within a period of one year from the acquisition of such rights or the loss of such citizenship. If after that period the property rights are released, the rights are abolished because the law and the land fall on the State, provided that the rights of other parties who burden them continue.
4. As long as a person besides his Indonesian nationality has foreign nationals, he cannot own land with property rights and for him, the provisions in paragraph (3) of this article apply.

In addition, Article 26 paragraph (2) the Indonesian Basic Agrarian Law "means that every sale, purchase, exchange, grant, gift by will and other acts intended to directly or indirectly transfer property rights to a foreigner, to a citizen who, in addition to his Indonesian nationality, has foreign citizenship or to a legal entity, except as stipulated by the Government including Article 21 paragraph (2), "The law commands that such legal acts are null and void" and the land falls to the State, provided that the rights of the other party who incriminate it shall continue and that all payments which have been received by the owner shall not be recovered (Rizqi, Putri, Kusumadara, & I, 2024). In addition, the use of nominees by foreigners to acquire land in Indonesia can result in the invalidity of the transaction. This has the potential to cause disputes regarding ownership rights and legal actions against the parties involved.

In some cases, nominee agreements agreed upon Indonesian citizens and foreigners are considered invalid due to the violation the provisions of the Indonesian Basic Agrarian Law. For example, a nominee agreement deed made by a notary can be revoked if it is proven to violate legal provisions. Some jurisprudence shows that a null and void nominee agreement is considered a form of protection for the interests of the parties. Even though it meets the material and formal requirements, the agreement can be declared invalid by the judge to achieve good faith and equality of position of the parties. Examples of cases such as Ninik Handayani and Ingrid J. Driehuizen show how the content of an agreement declaring the right to land to a foreign party is contrary to Article 21 paragraph 1 of the Indonesian Basic Agrarian Law (Haspada, 2018).

In this nominee agreement, several parties are involved, consists of foreign citizens, people whose names are borrowed, those who sell their land, and notaries. In this case, the notary also plays an important role in making a deed of the name loan agreement or nominee agreement, which can cause the notary to face legal consequences and can be sentenced to civil sanctions, administrative sanctions, and ethical sanctions (Sudini & Utama, 2018). Notary Liability Civilly, a Notary can be asked for civil liability in the form of a claim for compensation by the parties who feel aggrieved for the unlawful acts committed by them, Criminally Liability of Notaries, Notaries can be asked for liability by being prosecuted for fraud and forgery of deeds made by Notaries. Responsibilities of Notaries administratively, Notaries because of the making of nominee deeds that are categorized as unlawful acts, notaries can be subject to administrative sanctions up to dishonorable dismissal (Wahid, Fachrur, & Mahka, 2024). The use of the nominee agreement can also result in losses for these parties.

The aggrieved parties also have the potential to prosecute other parties. Therefore, it is important that all nominee agreements meet clear legal requirements and do not violate the law so that the interests of all parties are protected. In the development of law in Indonesia, many foreign nationals illegally own land with property rights, although this should not be allowed. They often use a nominee agreement, where the name of an Indonesian citizen is used to register land rights in a certificate, even though the land is purchased by a foreigner (Iswara, Widhiyanti, & Dian Ph, 2024). This practice is considered legal smuggling that allows foreigners to control and own land titles in Indonesia. In practice, foreigners buy a piece of land with ownership rights using the name of an Indonesian citizen as the buyer in the sale and purchase deed which is carried out in front of the Land Deed Making Officer (*Pejabat Pembuat Akta Tanah/PPAT*)

(Giovanni Rondonuwu, 2017). As a result, the land was registered in the name of Indonesian citizens in the ownership certificate. To ensure legal protection for foreigners, an agreement was made between foreigners and Indonesian citizens stating that all funds for the purchase of land came from foreigners. One example of a case is the Supreme Court Decision Number 3200K/Pdt/2014, where Susan Eileen Mather (Plaintiff) sued I Nyoman Sutapa (Defendant I) and other parties related to the purchase of land. In this case, Plaintiff wanted to buy a house but because of his status as a foreigner, Defendant I offered his name to be used in the land certificate. An agreement was reached where Plaintiff paid for the land but the name of Defendant I was registered. In this agreement, although there is an official document stating that all payments originate with the Claimant and that the land rights should have belonged to the Claimant, this practice carries risks. Defendant I then sold the land to a third party without Plaintiff's knowledge, resulting in losses for Plaintiff. Defendant I sold the land to Farida Said at a price much lower than the market price and this sale was carried out without the permission and knowledge of Plaintiff, creating a legal dispute regarding the ownership and rights to the land.

This case highlights the issue of legal certainty in nominee agreements in Indonesia, where such agreements are not explicitly regulated in applicable law, so the parties involved often face significant legal risks. The Supreme Court affirmed that despite the agreement between Plaintiff and Defendant I, the legal status of the transaction was the main issue. The Court acknowledged that Defendant I's act of selling land without Plaintiff's consent was a violation of the agreement that had been made, so the Supreme Court decided to provide legal protection to Plaintiff. This case shows the importance of drafting clear and legal documents to protect the rights of landowners, especially foreigners. Although nominee agreements are often used to overcome legal restrictions, this practice carries high risks and can lead to complex legal disputes. The Supreme Court's decision sets an important precedent in the protection of the rights of land buyers and emphasizes the need to comply with legal provisions in property transactions in Indonesia (Hartono, Saleng, & Lahae, 2022).

Legal Consequences of Land Ownership by Foreign Citizens Through Nominee Agreement

The practice of nominee agreements is often considered legal smuggling. The Supreme Court emphasized that this agreement is not recognized and is not considered valid because it conflicts with the Indonesian Basic Agrarian Law (Kresnadjaja & Dharsana, 2024). Therefore,

if there is a problem or dispute over the status of this land, the problem will be complicated and has the potential to cause disputes. In addition, if proven to violate the law, this means that the land controlled through this agreement will fall to the state (Saraswati, 2018). The ownership of land by foreign nationals through name loan agreements or nominees in Indonesia produces various significant legal consequences, including the emergence, change, or disappearance of a certain legal relationship.

The principal agreement accompanied by other agreements on the control of land ownership by foreigners shows that there is legal smuggling. The Indonesian citizen who lends his name to a foreigner is bound by a legal relationship that provides benefits, without considering the material truth of the agreement. By the provisions of Article 1320 of the Civil Code, the validity of an agreement must meet four conditions: "agreement between the parties involved, the ability to make an agreement, a clear and specific object, and a lawful cause. The third and fourth conditions relate to the object of the agreement; The object must exist and not conflict with applicable regulations. The non-fulfillment of these objective conditions results in the agreement becoming null and void", meaning that the agreement never existed and did not give rise to an obligation. Article 1335 of the Civil Code emphasizes that agreements made with false or prohibited causes have no legal force. Thus, the agreement is considered null and void from the outset because not all agreements can be binding as law, only a valid agreement is binding on both parties. Therefore, a pretended agreement has no binding force because it was agreed illegally (Ferniawan, 2023).

There are also legal acts that are specifically mentioned, as stated in the provisions of Article 26 paragraph 2 of the Indonesian Basic Agrarian Law, which are formulated as "legal acts that indirectly aim to transfer property rights to an unqualified party. These deeds:

1. Buying and selling under the guise of using someone else, as if that person is buying, even though the person who buys is not qualified.
2. Fraud may also be his act which is a fraud. For example, the rent is paid in a lump sum, which is equal to the price of the land if purchased, after 60 years it can be asked back, by paying compensation that will be taken into account later. So, pretending to do renting, which is buying and selling, means avoiding the provisions of Article 26 of the UUPA.
3. In mixed marriage, it is also possible for a person to obtain Proprietary Rights, namely by performing marriage. A foreigner deliberately marries a native Indonesian who owns the land of the Milik Property, with the aim that the Hak Milik is obtained. As is known, by

making a mixed property marriage agreement, there is a comprehensive joint property between husband and wife, including land belonging to the husband/wife before the marriage takes place.

The consequences of the acts prohibited by Article 26 paragraph (2) of the Indonesian Basic Agrarian Law are:

- a. The act is null and void.
- b. The land that became the object fell on the State.
- c. The rights of other parties who use it still exist.
- d. All payments that have been received by the owner cannot be claimed back.

Therefore, this is often abused and violates Article 26 paragraph (2) of the Indonesian Basic Agrarian Law, which emphasizes the need for legal protection for consumers who are in a weak bargaining position. The use of a name loan agreement or nominee in the sale and purchase of land by foreign citizens has many impacts and demands that are important to pay attention to. First, we have to look at the legality and validity of this agreement. If the agreement is made to circumvent existing rules, such as the prohibition for foreigners to own land, the agreement is considered null and void because it violates the law. Furthermore, legal certainty for all parties involved is also very important.

Uncertainty about the legal status of the nominee agreement can create problems for foreigners and for Indonesian citizens involved in the nominee agreement. If this agreement is considered invalid, foreigners risk losing their land rights, and Indonesian citizens can be subject to lawsuits. In addition, there is also a risk of legal disputes that can arise, both between foreigners and Indonesian citizens as well as with third parties. So, it is very important to understand the legal consequences of this agreement to reduce the risk of disputes and find the right solution. Another aspect that needs to be considered is law enforcement and compliance with regulations or understanding of the law and the implications of agreements that are often used to get around the prohibition of ownership by foreign nationals in Indonesia. Agreements made to circumvent rules must be strictly acted upon so that all parties comply with the provisions of the Indonesian Basic Agrarian Law and other regulations. It is also important to protect national interests, as restrictions on land ownership by foreigners aim to maintain control over agrarian resources. Finally, there are also criminal and civil consequences that can be faced. If the nominee agreement violates the law, the parties involved could be subject to sanctions, including cancellation of the transaction and possible fines or even detain in

prison. Furthermore, it is important to understand all these aspects can be impacted of the use of nominee agreements in the sale and purchase of land by foreigners in Indonesia (Irawan, Nasser, & Marniati, 2024).

In addition, the use of name loan agreements or nominees in the control of land ownership by foreign citizens in Indonesia has many impacts and lawsuits that are important to pay attention to. First, the legality and validity of this agreement should be the first consideration. In case the agreement is agreed to circumvent existing rules, such as the prohibition of foreigners owning land, then the agreement is considered null and void because it violates the Indonesian Basic Agrarian Law. This study argue that while nominee agreements may provide a temporary solution for foreigners to invest in Indonesia, this practice is not legally justified. This is because the nominee agreement does not meet the legal requirements stipulated in the Civil Code and is contrary to the basic principles of the Indonesian Basic Agrarian Law. The practice creates legal uncertainty and has the potential to harm the parties involved, especially Indonesian citizens who act as nominees (Santi & Lukman, 2023).

While nominee agreements can be seen as an attempt to attract foreign investment, this practice should not be left unclear. The legal uncertainty caused can harm Indonesian citizens and create potential conflicts in the future. Therefore, it is important to establish strict and transparent regulations regarding nominee agreements, so that all parties understand their rights and obligations. The government needs to immediately reforms in the field of agrarian law to accommodate the development of foreign investment in a legitimate way. The new law must be able to protect the rights of Indonesian citizens and prevent the practice of legal smuggling (Lumbanraja, 2023). In addition, there needs to be a strict supervision mechanism so that the practice of nominees is not abused. A proactive approach from the government in creating more inclusive and transparent regulations will be more beneficial than allowing nominee practices to continue unattended. Thus, both Indonesian citizens and foreigners can invest with a sense of safety and security by the applicable legal provisions.

CONCLUSION

The conclusion of this study shows that the practice of nominee agreements used by foreign nationals to control land ownership rights in Indonesia has significant legal implications. Although this agreement provides access for foreigners to invest, legally, this practice is considered illegal and can cause disputes and losses for all parties involved. Lack of

understanding of existing agrarian laws is often the root of the problem, thus it is important to increase awareness and understanding of the legal risks associated with nominee agreements. Therefore, this study suggests the need for clearer and fairer laws in the control of land ownership to protect national interests while providing legal certainty for foreign investors. Stricter and more transparent regulations are expected to prevent abuse of the law and create a safer and more sustainable investment environment in Indonesia's land sector.

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