



THE VALIDITY OF USING NOMINEE BY NOTARIES TO MEET THE REQUIREMENTS FOR APPLYING THE LIMITED LIABILITY COMPANY CREDIT IN BANKING

Winahyu Erwiningsih

Universitas Islam Indonesia

Corresponding e-mail: winahyu@uii.ac.id

ABSTRACT

The legal principles of contract freedom, *pacta sunt servanda*, and reciprocal good faith are the cornerstones of nameless agreements, or *inomonaat*, which include nominee agreements. The provisions of the nomination agreement are enforceable against the parties who enter it as well as by the courts if it is legitimate and contains the clauses needed by law, custom, and appropriateness. Banks believe that adding a Nominee Agreement signed in front of a Notary Public will strengthen the PT's guarantee given as a debtor and function as a lawful deed with unblemished probative power. The holding of freehold land by a Limited Liability Company utilizing the Deed of Land Ownership Statement (Nominee) may be seen as legal smuggling even though the people who made the deed agreed to its conditions. An agreement is illegitimate and void if it is founded on an illegal reason. Notaries must be aware of any existing rules regulating the substance of nominee agreements when drafting them. Notaries are responsible for the actions they take since they are general officials who conduct acts. A notary may face repercussions if a deed does not adhere to the relevant Law. Financial institutions are adaptable in the primary principle of not requiring guarantees from potential clients when they apply for funding in any way, therefore it is safe to assume that cost loan transactions through financial institutions will go smoothly. Consequently, if this can be executed successfully by banks, real smuggling attempts by other companies or debtors via nominee agreements can be decreased.

Keywords: *Nominee, contractual agreement, limited liability company, notary.*

1. INTRODUCTION

No Limited Liability Company is without a transaction; every Limited Liability Company must be a part of one. The business engages in a transaction while engaging with third parties because this is consistent with its ongoing, uninterrupted, and open activity. The transaction is completed because it serves as a venue for the fulfillment of an agreement with the name of an agreement (Supramono, 2007). The validity of the parties and the collateral used as part of loan arrangements are frequent sources of legal disputes. If the credit arrangement is carried out in this instance by a Limited Liability Corporation (PT) legal organization, where there is a distinct separation between the assets of the business and the owner or management, it is relevant. Because the PT in this instance is a legal entity covered by Law No. 40 of 2007 concerning Limited Liability Companies, which stipulates that the General Meeting of Shareholders (GMS) has the authority to make all strategic decisions for the PT and that the GMS is the highest authority in the PT as stated in the Company's Articles of Association. This case concerns the company's choice to get financing from other parties, which should be made at the GMS and includes approving the directors' ability to secure funding for the business. Providing collateral (guarantee) as part of entering a contract with the bank (Sholihatin, 2022).

Some banks demand that a PT complete a name loan agreement (Nominee Agreement) in front of a Notary if they want to use personal property as collateral. A nominee agreement is a name loan agreement made between two parties who, by law, cannot be the subjects of land rights. This agreement is made so that the party who cannot be the subject of the right to the land can control the land through a freehold with the goal of being able to control the land both *de facto* (in the present situation) and *de jure* (in accordance with the law/legal rights) on behalf of the subject entitled to the land. For instance, a Limited Liability Corporation, which is a legal entity, borrowed the subject person (Soemardjono, 2012). One of the conditions for a Limited Liability Corporation (PT) business entity to be eligible for a bank credit facility includes the usage of a Nominee loan arrangement. Banks anticipate that nominee agreements executed before Notaries will be recognized as authentic documents with superior probative value. If the PT is unable to provide

THE VALIDITY OF USING NOMINEE BY NOTARIES TO MEET THE REQUIREMENTS FOR APPLYING THE LIMITED LIABILITY COMPANY CREDIT IN BANKING

Winahyu Erwiningsih

commitments on the PT's behalf, this stipulation is required. Because Law Number 5 of 1960 concerning Basic Regulations on Agrarian Principles (UUPA) Article 21 paragraphs (1) and (2) essentially states that property rights can only be obtained by Indonesian citizens and legal entities determined by the government, the process of buying and selling rights to freehold land purchased by legal entities such as PT becomes Right to Build (HGB). This promotes PT's attempts to engage out legal smuggling activities related to obtaining rights, particularly land ownership rights, which can be acquired through the transfer of property rights as provided for in Article 20 of the UUPA (Saputri, 2015). The transfer of property rights or transfer of rights, which refers to the transfer of ownership rights to land from one person to another as a result of a legal act, is one type of transfer of property rights. An agreement between the two parties may result in the transfer or transfer of rights. A covenant is a promise made by one person to another or a promise made by two persons to each other. In a partnership transaction (PT), ownership of the land rights is acquired, among other things, by using a name loan arrangement (Nominee) with a reliable third party so that his name is used as the beneficiary of the rights to the property purchased (Gabriella Patricia Trinita Tomaso, 2021).

Nominee Agreements are still in use today, and their presence is clear. Although nominee agreements are sometimes referred to as a type of legal smuggling, all nominee agreements created by the party are valid and enforceable by the creator so long as nothing in them is in contravention of the law as it is in effect. Legal smuggling is an activity that involves breaking some current laws to accomplish a practical objective. This smuggling typically takes place because the designated party does not want to be constrained by existing laws, both to avoid any enforcement actions and to fulfill certain requirements that must be satisfied and in line with certain laws that may be in force (Wardhana, 2020). The Principle of Freedom of Contract and the Principle of *Pacta Sun Servanda* serve as the legal foundation for the Nominee Agreement. Nonetheless, Notaries must be mindful of current regulations regarding the agreement's substance while creating nominee agreements. Being general authorities who perform deeds, notaries are likewise accountable for the deeds they perform. Additionally, if the deed violates any of the applicable laws, including the Notary Position Law, the Notary Code of Ethics, the State Administration Law, the Civil Code, or the Criminal Law, it may have an effect on the notary. This study aims to analyze the principles of *pacta sun servanda* and freedom of contract applied to the Nominee Loan Agreement when a Limited Liability Corporation (PT) owns freehold property. In addition, this study also explains the legality of utilizing a nominee deed created by a notary to meet the requirements for a limited liability company's (PT) credit application in banking.

2. LITERATURE REVIEW

A. The Concept of Nominee Contract

According to Black's Law Dictionary, nominee agreement is defined as one who has been Nominated or proposed for an office. One designated to act for another in his or her place. one designated to act for another as his representative in a rather limited sense. It is used sometimes to signify an agent or trustee. It has no connotation, however, other than that of acting for another, in representation for another, or as the granted of another." According to the interpretation, a nominee is a party who has been chosen by another party to speak for and on behalf of that party. The party nominating the nominee is frequently referred to as the beneficiary, and the nominee who represents the beneficiary's interests must do so in line with the terms of the agreement and the beneficiary's instructions. Hence it follows that there are known to be 2 (two) parties in the idea of a nominee agreement: the legally recorded nominee party and the beneficiary party, who receives the benefits and has them carried out by the legally recorded party. The registered and legally recognized owner (legal owner) and the actual beneficiary owner are the two parties in the nominee agreement, and these two types of ownership are born in situations where foreign parties or foreign legal entities own real estate using the nominee idea. The beneficiary is not acknowledged as the owner of the object legally; rather, the legal owner is the person who is legally entitled to transfer, sell, encumber, pledge, and otherwise act on the object. The beneficiary's name and identity in any form are not included in the land certificate, even though it is obvious that the legal owner is recorded based on the identity of the legal owner in the certificate. The nominee receives remuneration in the form of a nominee fee from the beneficiary for using their name and identity as a legally recognized party.

A nominee is a person who has been chosen or nominated to act in place of another person or on their behalf in a particular legal proceeding. So, it can be concluded that the nominee agreement contains a number of components, including the existence of a power of attorney agreement between two parties, specifically



the beneficiary owner acting as the authorizer based on a belief in the nominee. The Nominee represents the beneficiary owner before the law by using the specific power conferred, which has a narrow scope of activity.

B. Legal Basis for Making Nominee Contract

The fundamental tenet and idea behind nominee agreements in Indonesia is contract freedom, which is expressly outlined in Book III of the Civil Code. There are two sorts of agreements described in article 1319: those that are named by law and are frequently referred to as *nominaat* contracts, and those that are not named by law or are not known by a specific name. These agreements are referred to as *inominaat* contracts. Notaries must understand that the concept of a nominee is not well-known in Indonesia, even though it is frequently used in practice thanks to the principle of contract freedom, provided that the requirements for the agreement's validity can be met. Since the notion of a nominee has not been specifically regulated, the nominee agreement has not been subject to legal restrictions. According to Article 1338, paragraph 1, of the Civil Code, which states that regulations regarding agreements for third parties, which at first glance have the same pattern as the concept of nominee, make it easier to accept and apply the concept of nominee in Indonesian property and property law, the principle of freedom of contract in agreements is stated.

The following components make up the nominee agreement: (a) the Beneficial Owner (the actual owner) and the Nominee, who is the power of attorney based on the Beneficial Owner's faith in the Nominee, have an authorization agreement; (2) the authorized authority can only be used for specific types of legal acts; and (3) the nominee behaves in court as if he were the Beneficial Owner's advocate. This Nominee Agreement falls under the umbrella of nameless agreements, which are community-based contracts that are not covered by the Civil Code. These agreements can be created indefinitely and have names that are specific to the parties who hold them, such as management agreements, marketing agreements, and collaboration agreements. The notion of freedom of contract, engaging into agreements, or *partij* autonomy is the foundation for how this agreement came to be in practice. A covenant that emerges, develops, lives, and evolves in society is known as an anonymous covenant. The nominee agreement made by the parties is more focused on the party appointed as the nominee with the party who will enjoy the benefits of the objects owned by the nominee, namely the beneficiary owner. This makes the nominee agreement the main and most crucial component in the use of the nominee concept. The Nominee Agreement is classified as an agreement that is not governed by the law because there is no explicit rule pertaining to the notion of nominee. The Nominee Agreement was created because of the principle of freedom of contract established in the treaty law. (Badruzaman, 2001)

This nominee agreement was categorized as an unnamed agreement (*inomonaat*), which evolved based on the principles of freedom of contract, *pacta sunt servanda*, and good faith from both parties, due to the lack of defined legislation addressing the idea of nominee. When evaluated from the perspectives of freedom to form agreements, freedom to choose the terms of the agreements established, and freedom to sign the agreements, a nominee agreement is said to be legitimate and have binding effect for the parties who make it. The Civil Code Article 1338 paragraph (1) states that all provisions contained in an agreement made are binding and apply as law to the party making it. As a result, the rules found in Book III of the Civil Code are only complementary. These three aspects are the development and embodiment of the principles of freedom of contract and binding force (*pacta sunt servanda*). The Civil Code's Article 1338, paragraph 1, which stipulates that "all agreements established validly apply as law to those who form them," regulates the conditions that give agreements their legal power and contractual freedom (Putra, 2022).

The freedom of form, content, and kind of contract are all aspects of the freedom of contract principle. According to the needs of the community, several types of agreements have emerged as a result of the freedom of contract principle. As a result, the Civil Code's Article 1320 point (4), which governs a lawful cause, and Article 1337, which states that parties are free to enter into agreements as long as they are not against the law, decency, or public order, both place restrictions on the application of the principle of freedom of contract. The Civil Code's provisions in Article 1339 state that "consent is not only binding on matters expressly stated therein, but also for everything which, by the nature of the agreement, is not expressly stated therein." These limitations relate to the validity of the agreement and state that an agreement is considered valid by the parties who make it if the four elements listed in Article 1320 have been satisfied. The words "apply as law" in Article 1338 paragraph (1) of the Civil Code, which indicates an agreement legitimately established by the parties binding its maker like a law, reflect the fact that the principle of *pacta sunt servanda* is in practice tied to the consequences of an agreement. The agreement's parties must abide by various more conditions as well as what was agreed upon, to the extent that is needed by custom, propriety,

THE VALIDITY OF USING NOMINEE BY NOTARIES TO MEET THE REQUIREMENTS FOR APPLYING THE LIMITED LIABILITY COMPANY CREDIT IN BANKING

Winahyu Erwiningsih

and morality. If the nominee agreement is valid and contains the terms that are required by law, tradition, and appropriateness, then the stipulations therein are enforceable against the parties who enter into the nominee agreement as well as by the courts. Contrarily, if an agreement is made for an unlawful reason, it might be null and void under Article 1337 of the Civil C.

3. RESEARCH METHODS

The subject under study has to do with how notaries' nominee deeds are used. Normative research is the style of study used. Examining legal literature sources is how normative research, commonly referred to as the literature research approach, is done. By evaluating library resources, including: (1) Principal Legal Documents, which include laws that have legal effect in the form of nomination agreements and applicable rules and regulations, it will be possible to collect the needed facts for this research (Statute approach). The legal foundation allows for further development of this strategy; (2) Secondary Legal Documents, gathered via the use of library resources, including books, scholarly journals, media, periodicals, articles, the internet, and numerous other sources to substantiate this text; and (3) Legal dictionaries, thicker legal materials, and large Indonesian dictionaries.

4. RESULTS AND DISCUSSION

A. Nominee Loan Agreement in Ownership of Freehold Land by Limited Liability Company.

The debtor takes a while to provide a certificate of title guarantee to the bank in the case of credit lending by the bank. In the designated land office, the Certificate of Property Rights guaranteed by the debtor must be examined for legitimacy. Because collateral is a deciding factor in the amount of credit that will be supplied by the creditor (bank) to the debtor (customer), in addition to economic considerations, guarantee is a factor that becomes an important guideline in giving credit. The presence of collateral is a crucial component in granting credit facilities because the debtor's financial situation is not always stable. If the debtor's financial situation deteriorates to the point where they are no longer able to pay their obligation, the collateral will be sold (Oktarini, 2020). Banks anticipate that the inclusion of a Nominee Agreement executed before a Notary Public will improve debtor guarantees and function as a genuine deed with flawless evidential power. It appears that PT is attempting to get rights, particularly property rights over land that are illegal under the law, by engaging in legal smuggling activities. The clients who intend to seek for credit, specifically the adaptability of guarantees. Financial organizations take that guarantee into account when figuring out if a potential customer can be trusted to get credit. Financial institutions are flexible in the fundamental idea of not requesting assurances from potential clients when they apply for funding in any way, which means that cost loan transactions through financial institutions can be relied on confidence. Naturally, legitimate smuggling attempts by other businesses or debtors via nominee agreements can be reduced if this can be implemented properly by banks naturally, legitimate smuggling attempts by other businesses or debtors via nominee agreements can be reduced if this can be implemented properly by banks (Puspitasari, 2018).

B. Validity of Limited Liability Company that Owns Land Ownership Rights with Deed of Land Ownership Statement

According to Article 15 of Law Number 2 of 2014 concerning the Notary Position (UUJN), the notary's powers include the following: making authentic deeds regarding deeds, agreements, and provisions that are required by laws and regulations and/or desired by those interested to be stated in authentic deeds; guaranteeing the certainty of the date of making the deed; storing the deed; and providing grosse, copies, and quotations of deeds, provided that the act of making. The deed's ability to serve as a *probationis causa*, or the only proof that can and should be used to prove a thing or an event, is one of its many uses. So, the basis for proving a specific thing or event is the need or function of the deed. As stated in Criminal Code Articles 1320, 1313, 1338, 1868, 1870, and 1866 as well as Law U No. 2 of 2014 Article 38, the event or legal connection that happened cannot be demonstrated in the absence of the deed.

According to their relationship to the creation of authentic deeds, notaries must take care while creating them to ensure that the deeds created do not violate the law and are in line with social norms and propriety. Hence, notaries must be well aware of the restrictions on the creation of nominee structures. As a result, in the course of his duties, the notary must decline if the deed made violates the law, custom, or appropriateness



and must offer legal advice to the party seeking to make a nominee agreement on the land rights, without which it will be void. The notary can be held accountable if there are provisions in an authentic deed that violate the law since they are covered by notary accountability, which also assures that the deed's contents are true and do not violate the law.

According to Wirjono Prodjodikoro, a person's responsibility for their activities is typically essentially useless if they do something that is against the law, and the majority of these actions are what the Civil Code (KUHP) refers to as unlawful acts (Nico, 2003). In this situation, notaries must be aware of the rule that if anybody manages all land rights in the certificate on behalf of the candidates, it has been flagrantly violated. A certificate of land rights is the best proof of ownership of a piece of land. The function of notaries in the establishment of land rights nominee structures is to facilitate the use of such organizations. So in this instance the notary must offer legal advice about the creation of genuine deeds. As a result, the notary really has the option to decline to create a deed that establishes the nominee structure of land rights, but by agreeing to do so, the notary also assumes responsibility (Paulinah, 2022) In addition, according to Articles 21(1) and (2) of Law Number 5 of 1960 Concerning Basic Rules on Agricultural Principles (UUPA), only Indonesian people and entities created by the government are eligible to acquire property rights. Hence, the following groups of people are subject to the prohibition on the transfer of property rights: (a) foreigner; (b) legal entities based in Indonesia (apart from those listed in Government Regulation No. 38/1963); and (c) foreign Legal Entity (UUPA's paragraph 26(2)). (Sumadiono, 2010)

Even though the parties who made the deed had agreed on its terms, it is possible to say that there has been legal smuggling when legal entities indirectly control freehold land using the Deed of Land Ownership Declaration (Nominee). It is said that if an agreement does not violate the law, particularly the UUPA and its implementing laws, it is lawful. Hence, it is necessary to carefully examine the main agreement's substance, which is evidently concealed in the agreement itself and creates the impression of legal smuggling, to demonstrate the occurrence of legal smuggling. The agreement's material accuracy was not questioned by the parties in this case, which gives the appearance that the parties value practical factors over legal ones. There have been violations of Articles 8, 21 and 26 Paragraph 2 of the Law in actual practice. Arrangements involving the exercise of this form of authority and the use of specific people as nominees are illegal because they have a very conflicting core. One element of illegal conduct is the PT's covert acquisition of land rights through an agreement, which must be pursued through alternative channels to acquire land rights in one's name. The corporation utilizes the name of one of the board members or staff it trusts by signing an agreement in writing that the ownership of these land rights is solely owned by the company, which has the strongest and highest ownership rights. The possession of the land right is a covert violation of the contract. Yet, as long as nobody raises a fuss over it, its implementation is not a problem. Future issues will arise when the PT has a non-performing credit because of this.

In addition to the legal requirement to possess ownership rights over land due to the higher value and the fact that if used as credit collateral, the bank prefers property rights as collateral objects over other types of land rights, legal smuggling by PT frequently involves the ownership of property rights over land using other people's names listed in the certificate of ownership of land rights. The requirements of article 21 paragraph (2) of the Basic Agricultural Law offer exceptions for certain legal entities when it comes to the ownership of property by commercial and foreign PTs, and in particular, the ownership of land rights for PT. SOEs that are state-owned by the government. Though PT. Commercial's ownership of land rights is governed by Basic Agricultural Law Commercial firms are governed by Law Number 40 of 2007 concerning Limited Liability Companies, while Foreign PT is governed by the requirements of the Law and Investment Law. Though PT. Commercial's ownership of land rights is governed by Basic Agricultural Law Commercial firms are governed by Law Number 40 of 2007 concerning Limited Liability Companies, while Foreign PT is governed by the requirements of the Law and Investment Law. Jo PP No.40/1999 jo Law Number 25 of 2007 concerning Investment, hereinafter PT. The Investment Law's Article 33 paragraph (1) specifically requires that domestic and international investors who fund PTs establish agreements and/or declarations attesting to the ownership of shares in a limited liability company for and on behalf of third parties. Also, if an investor forms the agreement, it is void according to Article 33, paragraph 2, of the Investment Law. This is in accordance with the Civil Code's rules (KUHP). According to Indonesia's Civil Code, if an agreement is based on a cause that is illegal, it is invalid and null and void. This is stated in Article 1337. (Kolopang, 2021).

THE VALIDITY OF USING NOMINEE BY NOTARIES TO MEET THE REQUIREMENTS FOR APPLYING THE LIMITED LIABILITY COMPANY CREDIT IN BANKING

Winahyu Erwiningsih

5. CONCLUSIONS AND RECOMMENDATIONS

Nominee agreements are under the category of nameless agreements (inomonaat), which are founded on the legal doctrines of contract freedom, *pacta sunt servanda*, and reciprocal good faith. If the nominee agreement is valid and contains the terms that are required by law, tradition, and appropriateness, then the stipulations therein are enforceable against the parties who enter into the nominee agreement as well as by the courts. Banks anticipate that including a Nominee Agreement executed before a Notary Public will improve the PT's guarantee provided as a debtor as well as serve as a valid deed with flawless evidential power. Even though the parties who made the deed had agreed on its terms, the possession of freehold land by a Limited Liability Corporation (PT) using the Deed of Land Ownership Statement (Nominee) might be considered legal smuggling. According to Article 1337 of Indonesia's Civil Code, if an agreement is based on a cause that is illegal, it is invalid and null and void.

While creating nominee agreements, notaries must be mindful of any regulations already in place regarding the agreement's substance. As general officials who do deeds, notaries are accountable for the deeds they perform. If a deed is not in compliance with the applicable Law, a notary may suffer consequences. Financial institutions are flexible in the fundamental idea of not requesting assurances from potential clients when they apply for funding in any way, which means that cost loan transactions through financial institutions can be relied on confidence. Naturally, legitimate smuggling attempts by other businesses or debtors via nominee agreements can be reduced if this can be implemented properly by banks.



REFERENCE

- Supramono, G. (2007). *Kedudukan Perusahaan sebagai Subjek dalam Gugatan Perdata di Pengadilan*. Jakarta: Renika Cipta.
- Sholihatin, L. (2022). Kajian Yuridis Untuk Eksekusi Hak Tanggungan Atas Kredit Perseroan Terbatas Dengan Agunan Aset Pribadi (Studi Kasus Putusan Atas Perkara Nomor 348/Pdt.G/2020/Pn Sby). *8, 1, Selisik*, 96.
- Soemardjono, M. S. (2012). *Penguasaan Tanah oleh Warga Negara Asing melalui Perjanjian Nominee*. Jakarta: Ikatan Notaris Indonesia.
- Saputri, A. D. (2015). Perjanjian Nominee Dalam Kepemilikan Tanah Bagi Negara Asing Yang Berkedudukan Di Indonesia (Studi Putusan Pengadilan Tinggi Nomor: 12/Pdt/2014/Pt.Dps). *2, 2, Jurnal Repetorium*, 97-99.
- Gabriella Patricia Trinita Tomaso, M. T. (2021). Hak Atas Tanah Dan Bangunan Berdasarkan Pelepasan Hak (Studi Kasus Putusan Ma Nomor 2523 K/Pdt/2015). *1, 3, Jurnal Ilmu Hukum*, 21.
- Wardhana, T. A. (2020). *Keabsahan Perjanjian Pinjam Nama (Nominee) Dalam Perjanjian Pinjaman Uang Di Indonesia Fakultas Hukum Universitas 17 Agustus 1945 Surabaya*. Surabaya: Fakultas Hukum Universitas 17 Agustus 1945.
- Badruzaman, M. D. (2001). *Kompilasi Hukum Perikatan*. Bandung: Citra Aditya Bakti.
- Putra, K. K. (2022). Akibat Hukum Perjanjian Nominee Hak Atas Tanah Berkaitan Dengan Kepemilikan Warga Negara Asing. *7, 2, Jurnal Hukum dan Politik Islam*, 151-172.
- Oktarini, A. A. (2020). Peran dan Fungsi Covernote Dalam Pelaksanaan Pencairan Kredit Oleh Bank. *9, 4, Jurnal Magister Hukum Udayana*, 815.
- Puspitasari, F. M. (2018). Determinan Niat Pengajuan Pembiayaan Mudharabah pada BMT Nurul Jannah, Gresik. *5, 1, Jurnal Ekonomi Syariah Teori dan Terapan*, 4.
- Nico. (2003). *Tanggungjawab Notaris Selaku Pejabat Umum*. Yogyakarta: Center for Documentation and Studies of Business Law.
- Paulinah, Y. Q. (2022). Penguasaan Tanah oleh Warga Negara Asing melalui Perjanjian Nomineedi Indonesia. *4, 1, Banua Law Review*, 64.
- Sumadjono, M. S. (2010). *Alternatif Kebijakan Pertanahan Antara Regulasi dan Implementasi*. Jakarta: Kompas.
- Kolopang, A. D. (2021). *Penyeludupan Hukum Kepemilikan Hak Milik Atas Tanah Di Indonesia*. Bandung: Alumni.