



THE VALIDITY OF OWNERSHIP RIGHTS TO LAND BY FOREIGN CITIZEN THROUGH A NOMINEE AGREEMENT

Eka Wulandari

Faculty of Law, Universitas Jambi, Indonesia. E-mai: ekaliaap@gmail.com

Abstract: This research aims to determine the validity of ownership rights to land by foreign citizens (WNA) through nominee agreements. A Nominee Agreement, commonly known as a name transfer or name borrowing agreement, is an agreement made on behalf of another party. The practice of nominee agreements still often occurs, even though foreigners do not have ownership rights by what is regulated in statutory regulations. Foreigners did this to control ownership rights to land in Indonesia and gain personal gain. No specific regulations govern nominee agreements, so law enforcement is not optimal. This research uses a normative juridical method with a statutory and case approach. The research results show that the nominee agreement entered into by foreigners is invalid because it needs to meet the objective elements of the requirements, namely lawful reasons that are already regulated in Article 1320 in the Civil Code.

Keywords: Foreign Citizen; Nominee Agreements; Right of Ownership

1. Introduction

The Earth was created by God and accompanied by many other gifts, one of which is land. The land itself is an extraordinary gift because the land is an element that forms the earth, and many benefits must be utilized and maintained as a resource as much as possible to achieve the goal of becoming a prosperous nation. As living creatures, humans are blessed with perfect intelligence and thinking and are mandated to protect and manage the earth's functions to achieve the nation's goals and future generations' future. Based on Article 33, paragraph (3) of the 1945 Constitution (UUD 1945), the state has the right to control the earth, water, and natural resources contained therein and use them for the greatest prosperity of the people (article 33 of the 1945 Constitution). Based on this article, the state has the right to control the state and its natural resources, including land. The right to control land includes the right to determine who can have rights to the land¹.

According to the Basic Agrarian Law (UUPA), the earth's scope is the planet's entire surface. In the UUPA, what is meant by land is not only limited to land and all its material aspects but also includes legal aspects. From a legal perspective, it includes rights over land. Land as part of the earth, as intended in Article 4 paragraph (1) of the UUPA, is based on the right to control the state, which, in addition to controlling part of the land, the state also controls the rights contained in the land. This right to control includes the right to own, control, and manage by the state itself and can also be qualified as the right to grant these rights to other people and legal entities. What is meant by the state controlling land does not mean that the land belongs

¹ Isnani and Anggreni A. Lubis, *Hukum Agraria : Kajian Komprehensif* (Medan: Pustaka Prima, 2022).



to the state, but rather, the state has the authority to regulate the distribution of rights resulting from land.

UUPA no. 5 of 1960 in article 16 divides land rights into several types. Furthermore, in determining land ownership rights in Indonesia, article 21 of the UUPA emphasizes that only Indonesian citizens can have land ownership rights. In contrast, foreign citizens do not have the right to land ownership rights in Indonesia. In practice, many foreigners come to Indonesia for purposes other than just being tourists, namely to control land in Indonesia. Things like this happen in Indonesia, especially in tourist areas such as Bali and the Special Region of Yogyakarta (DIY). The method frequently used by foreigners to circumvent legal provisions regarding land rights is a name-borrowing agreement or what is known as a nominee agreement².

A foreigner carries out a nominee agreement on behalf of an Indonesian citizen in purchasing or making a certificate for land or known by another term, namely a name lending and borrowing agreement. Nominee agreements are usually carried out when making land certificates to obtain legal certainty regarding ownership rights to the land, but what happens is that a foreign party purchases the land. So, it can be concluded that the role of Indonesian citizens here is only limited to representing foreigners in making land certificates to obtain legal protection for property rights. Foreigners entering into nominee agreements regarding land control are based on their desire to live, open a business, or invest in Indonesia³.

The widespread practice of nominee agreements by foreigners to obtain land ownership rights raises questions regarding their legal validity. The party purchasing the land and making the certificate is an Indonesian citizen who, in the UUPA, is given the right by the state to obtain ownership rights to the land. The author examines further the relationship between the regulations regarding property rights in the UUPA and the Civil Code (KUHPerdata) and the legal validity of nominee agreements.

2. Research Method

This paper uses a normative legal research method using the following approach: 1.) A legal approach that examines all regulations related to the problems discussed by the author; 2.) The conceptual approach looks at legal views originating from legal theory, doctrine, and general legal views that have developed in society regarding the problems discussed by the author; and 3.) An analytical approach involves solving problems by analyzing existing problems and linking them to existing laws and legal concepts.

3. Discussion

² Yosia Hetharie, "Perjanjian Nominee Sebagai Sarana Penguasaan Hak Milik Atas Tanah Oleh Warga Negara Asing (WNA) Menurut Kitab Undang-Undang Hukum Perdata," *Sasi* 25, no. 1 (2019): 27, <https://doi.org/10.47268/sasi.v25i1.147>.

³ Deny Haspada, "Perjanjian Nominee Antara Warga Negara Asing Dengan Warga Negara Indonesia Dalam Praktik Jual Beli Tanah Hak Milik Yang Dihubungkan Dengan Pasal 1313 Kitab Undang-Undang Hukum Perdata," *Wacana Paramarta: Jurnal Ilmu Hukum* 17, no. 2 (2018): 115–24, <https://doi.org/10.32816/paramarta.v17i2.77>.

3. 1 The Legal Position of Nominee Agreements in the Civil Code (KUHPerdara)

An agreement is a legal event in which two or more parties promise each other something that gives rise to rights and obligations. An agreement entered into by someone will give rise to an agreement because, in the agreement, some parties bind themselves to other parties⁴. The definition of an agreement is also regulated in article 1313 in the Civil Code (KUHPerdara), which reads, "An agreement is an act by which one or more parties bind themselves to one or more people" (article 1313 in the Civil Code). Based on the legal basis, some agreements are regulated by law or are also called named agreements, and some agreements are not regulated by law or are called unnamed agreements. In agreeing, the state frees its people to determine the contents as long as the agreement does not conflict with the law or is unlawful. This is also called the principle of freedom of contract. Even though there is a principle of freedom of contract, agreements must still be made by fulfilling the requirements set out in law.

The conditions regarding the agreement's validity are regulated in Article 1320 of the Civil Code. This article emphasizes that an agreement is considered valid if it meets the following requirements: namely, there is an agreement between the parties, the parties' skills, for a specific reason, and a lawful reason. If an agreement meets these four requirements, then the agreement is said to be legally valid. On the other hand, if one or all of these requirements are not fulfilled, an agreement can be declared invalid. A nominee agreement itself is an agreement that uses the name of a second party. In this discussion, nominee agreements are carried out by foreigners who use the name of Indonesian citizens to carry out sales and purchase acts and record land ownership certificates to control land in Indonesia.

A nominee agreement is a form of legal smuggling so that an agreement that does not meet subjective requirements can be valid from a legal perspective. Even though the subjective requirements for Indonesian citizens as parties with the right to own land ownership rights are fulfilled, in article 1320, the requirements regarding halal causes are not fulfilled because of attempts to smuggle the law into this nominee agreement. The practice of nominee agreements allows foreigners to have ownership rights to land in Indonesia, even though in the UUPA, ownership rights over land control are only given by the state to Indonesian citizens. On the other hand, foreigners are not given and prohibited from owning land rights in Indonesia.

A nominee agreement can be classified as valid if it is compared with the terms of the agreement in Article 1320 in the Civil Code. However, this legality needs to be improved by regulations regarding provisions regarding what subjects are granted ownership rights to land by the state, which is what is regulated in the UUPA. If the nominee agreement is studied in more depth, it can be concluded that this nominee agreement is de jure or legally considered valid. The subject of the ownership rights to the land is an Indonesian citizen. In contrast, in de facto status or reality, this nominee agreement is considered invalid or void for the sake of the law because the person who holds the property rights is the foreigner who acts on behalf of the Indonesian citizen in his land certificate⁵. Apart from being contrary to Article 1320,

⁴ Subekti, *Hukum Perjanjian* (Jakarta: Intermedia, 2005).

⁵ Annisa Maudi Arsela and Febby Mutiara Nelson, "Perjanjian Nominee Dalam Hukum Pertanahan Indonesia," *Palar | Pakuan Law Review* 7, no. 2 (2021): 505–24, <https://doi.org/10.33751/palar.v7i2.4370>.

elements of the nominee agreement also violate objective requirements and are, therefore, legally invalid. Article 1335 in the Civil Code (KUHPdata) states that "Agreements without cause, or made based on false or prohibited reasons, have no force." based on this article, nominee agreements made by foreigners are considered never valid from the start of the agreement because not all agreements have legal force, depending on the elements of the agreement. Only a valid agreement binds both parties; thus, a false agreement has no binding force because it was made illegally. In addition to the provisions in the Civil Code, according to Article 26 paragraph (2) of the UUPA, nominee agreements are also prohibited, and violations of this article result in the agreement being invalid. The meaning of invalid is that from the start, it is assumed that an agreement was never born, and there was never an agreement⁶.

3. 2 Regulations about The Land System in Indonesia

The land system in Indonesia allows people to control land individually, especially regarding ownership rights. In Indonesia's land system, the state only grants ownership rights to land to Indonesian citizens. Article 9 paragraph (1) has regulated and confirmed this provision, stipulating that only Indonesian citizens have the right to property rights on land in Indonesia. At the same time, foreigners are not entitled to these rights. Even though they are not given the right to obtain ownership, the state has given foreigners the right to use or rent the building according to what is regulated in Article 41, which Article 42 UUPA complements. Even though they have been given building use rights and rental rights, in practice, many foreigners are not satisfied with their rights, which makes them seek ownership rights to control the land. This is because assets in the form of land, apart from being able to be used as a form of investment (investing capital or funds), can also be used as collateral to obtain credit. In addition, property rights accompanied by a valid certificate as proof of ownership have solid legal protection. This, of course, makes the ownership rights to the land indisputable and can be owned for an extended period. Property rights in the UUPA are hereditary, so these rights can be passed on from generation to generation without being bound by time limitations⁷.

In fact, in the land system that exists in Indonesia, foreigners cannot own or obtain ownership rights to land in Indonesia except that it is already regulated in the UUPA, namely use rights and building rental rights. When using rental rights, especially for residents, foreigners prefer to rent houses Indonesians own. However, in the context of the foreigner wanting to build their own house, the state only provides a maximum period of 25 years for the right to use and lease the building. Regulations relating to land rights for foreigners relating to control land outside the UUPA are also regulated in the following legal sources:

- 1) Article 33, paragraph (3) of the 1945 Constitution
- 2) Law no. 5/ UUPA
- 3) Law no. 25/2007 concerning Foreign Investment

⁶ Ketut Sudiatmaka Ni Putu Monika Ventari Kusumawati, Ni Ketut Sari Adnyani, "Keabsahan Perjanjian Nominee Antara Warga Negara Indonesia Dengan Warga Negara Asing Dalam Praktik Jual Beli Tanah Hak Milik Dikaji Dari Undang-Undang Nomor 5 Tahun 1960," *Komunitas Yustisia* 3, no. 2 (2020): 102–13, <https://doi.org/https://doi.org/10.23887/jatayu.v3i2.28840>.

⁷ Ega Permatadani and Anang Dony Irawan, "Kepemilikan Tanah Bagi Warga Negara Asing Ditinjau Dari Hukum Tanah Indonesia," *Khatulistiwa Law Review* 2, no. 2 (2021): 348–58, <https://doi.org/10.24260/klr.v2i2.356>.

- 4) Law no. 20/2011 concerning Flats
- 5) Presidential Decree in 1992
- 6) Government Regulation No.40/1996
- 7) Government Regulation no. 41/1996 concerning Ownership of Residential
- 8) Presidential Decree No. 34/1992 concerning land use and Cultivation Rights Use of Buildings for Joint Ventures in the Context of Foreign Investment⁸.

There are many regulations regarding the land system in Indonesia, and the division of rights between the rights given to Indonesian citizens and citizens already has clear boundaries. However, the phenomenon of foreigners looking for ways to obtain more rights than those provided by the Indonesian state remains unavoidable. This is due, in part, to less strict law enforcement, such as the implementation of the selection of qualification requirements, granting of use rights and building lease rights, determination of periods and extensions of time, renewal of rights, transfers, encumbrances, and deletion of rights which are still not implemented strictly by what has been regulated in statutory regulations. In this case, the Head of the Indonesian Land Office is very influential in enforcing laws related to land control rights. Thus, strict enforcement of rules will not only grant control rights over land but also emphasize the obligations and responsibilities that foreigners must comply with in control rights over land and buildings, use rights, and the end of legal relations with foreigners.

Regulations regarding the land rights control system have met existing needs. However, there are still areas for improvement in the registration of land ownership certificates. This weakness is shown in Indonesia's land certificate registration system, which still uses a negative registration system. This means that when the official who has the authority to make a land certificate, namely the National Land Agency (BSN), does not prove the truth of the land that is to be registered first, in other words, there is no guarantee or legal certainty that the name registered in the land certificate is the name of the land owner. With a land certificate registration system like this, the land's original owner will not be registered in BSN's land data, will not bear the risk of registering a land certificate, and there will need clarity regarding the limits of his authority.

The absence of a land verification system is a legal consequence of the legal vacuum in Indonesia. Until now, there have been no regulations governing land evidence. Making land certificates whose contents do not match their reality can be classified as making fake certificates. Making fake certificates is against the law. Meanwhile, in administrative law, something is declared valid if it meets the requirements specified in the law and is not unlawful. On the other hand, if something does not meet the criteria and is against the law, it can be declared invalid⁹.

This kind of land registration system is one of the weaknesses of the existing land system in Indonesia. This weakness is one of the factors that causes legal abuses related to the

⁸ Agung Torang Sitohang et al., "Kepemilikan Tanah Bagi Warga Negara Asing Di Indonesia" 2, no. 1 (2024), <https://doi.org/https://doi.org/10.51903/jaksa.v1i3.1533>.

⁹ Elita Rahmi, *PEMBUKTIAN SERTIFIKAT TANAH & KAPITA SELEKTA HUKUM AGRARIA* (Jakarta: Pentas Grafika, 2021).

procurement of land ownership rights. Foreigners can use this loophole to obtain ownership rights to land through a nominee agreement because there is no land-proof system before the ownership of the registered land is confirmed in the certificate. This should, of course, be a matter of concern for BSN to be more thorough and selective in recording land certificates as proof of legal ownership of land.

3.3 Legal Consequences of Nominee Agreements by Foreigners Regarding Land Ownership

The nominee agreement entered into by the foreigner on behalf of the Indonesian citizen as the subject of the perpetrator in purchasing and making the certificate is contrary to the requirements for halal causes and is known is already regulated in article 1320 in the Civil Code regarding the validity of an agreement because it is against the law. Apart from being contrary to the Civil Code, this nominee agreement is also contrary to the UUPA regarding subjects with ownership rights to land. The legal basis governing agreements does not only come from law but also from other legal sources, and of course, the agreement made by the parties is also the law for the concrete relationship concerned (Article 1338 in the Civil Code (KUHPerdata), but there are limitations, namely cases in the field of land law as long as The agreement made does not violate the laws regulated in the UUPA, as with the provisions regulated in Article 1320 in the Civil Code. The terms of a valid agreement are regulated in Article 1320 in the Civil Code: 1) They agreed to tie themselves together; 2) Capable of making agreements; 3) One thing is sure; 4) One lawful cause.

An agreement must meet the criteria in these four conditions, which are classified into subjective and objective requirements.

1. Subjective Terms If these conditions are violated, the agreement is invalid, including a.) Agreement of the binding parties; b.) Ability to make agreements
2. Objective Terms If these conditions are violated, the agreement is invalid, including a.) A sure thing; b.) A legitimate cause.

Carrying out a nominee agreement can, of course, give rise to legal consequences. Some of the legal consequences that arise due to the existence of a nominee agreement are as follows:

- 1) The agreement is invalid. If the nominee agreement does not comply with or conflicts with existing regulations, especially the Civil Code and UUPA, the court can cancel it and declare it invalid or null and void.
- 2) Administrative sanctions. The government or competent authority in UUPA can impose administrative sanctions against foreigners' violations of land control through nominee agreements.
- 3) Eviction or return of land by the authorities. Suppose foreigners' control of land through a nominee agreement is declared to violate UUPA. In that case, the authorities can take steps to evict or return the land to the rightful party by UUPA.
- 4) Prohibitions or Restrictions. Possible legal consequences include prohibitions or further restrictions on foreigners' ownership or control of land in cases that violate UUPA.
- 5) Invalidity of Agreements. If the nominee agreement conflicts with contractual law regulations, the court may decide that it is invalid or not binding.

- 6) Lawsuit and compensation. Parties who feel disadvantaged by foreigners' land control through a nominee agreement contrary to the agreement's legal regulations can file a lawsuit.
- 7) Contract Sanctions. If the agreement contains provisions regulating sanctions or fines for violation, the party who violates the nominee agreement may be subject to contractual sanctions.
- 8) Cancellation or Renegotiation. If a nominee agreement is deemed to violate contractual law regulations, the aggrieved party or the authorized party can request cancellation or renegotiation of the agreement's terms¹⁰.

4. Conclusion

A nominee agreement entered into by a foreigner using the name of an Indonesian citizen is an agreement that is contrary to the UUPA regarding land control rights. This agreement violates the rules that the state has granted ownership rights to control land in Indonesia. In the UUPA, only Indonesian citizens are given ownership rights over land control by the state. At the same time, foreigners are not entitled to these rights and are only given limited rights to use and build rental rights. Even though in writing this agreement does not conflict with the law and is by the provisions regarding property rights, in reality, there is legal smuggling carried out by foreigners. With this, it can be stated that the nominee agreement contradicts the substance of the UUPA.

If examined based on the Civil Code, nominee agreements do not fulfill the fourth requirement stipulated in Article 1320. This article confirms that an agreement is declared valid if it has a lawful cause, while a nominee agreement is an agreement against the law. With this, it can be said that the nominee agreement is declared invalid and has no binding force. Seeing the many opportunities for foreigners to carry out legal smuggling, the government, especially BSN, should first strengthen the requirements and procedures for registering land certificates by implementing a land verification system. This method will reduce the possibility of foreigners obtaining property rights through a nominee agreement.

References

- Ansa, Feri, Akbar Maulana Wicaksana, Aura Eklesia, Isabella Vania Camilla K, and Verene Praysy Gracia M. "Keabsahan Perjanjian Nominee Sebagai Bukti Kepemilikan Atas Tanah Berdasarkan Prinsip Privity of Contract." *UNES Law Review* 6, no. 4 (2024): 11024–33. <https://doi.org/https://doi.org/10.31933/unesrev.v6i4>.
- Arsela, Annisa Maudi, and Febby Mutiara Nelson. "Perjanjian Nominee Dalam Hukum Pertanahan Indonesia." *Palar | Pakuan Law Review* 7, no. 2 (2021): 505–24. <https://doi.org/10.33751/palar.v7i2.4370>.
- Haspada, Deny. "Perjanjian Nominee Antara Warga Negara Asing Dengan Warga Negara Indonesia Dalam Praktik Jual Beli Tanah Hak Milik Yang Dihubungkan Dengan Pasal 1313

¹⁰ Feri Ansa et al., "Keabsahan Perjanjian Nominee Sebagai Bukti Kepemilikan Atas Tanah Berdasarkan Prinsip Privity of Contract," *UNES Law Review* 6, no. 4 (2024): 11024–33, <https://doi.org/https://doi.org/10.31933/unesrev.v6i4>.

- Kitab Undang-Undang Hukum Perdata." *Wacana Paramarta: Jurnal Ilmu Hukum* 17, no. 2 (2018): 115–24. <https://doi.org/10.32816/paramarta.v17i2.77>.
- Hetharie, Yosia. "Perjanjian Nominee Sebagai Sarana Penguasaan Hak Milik Atas Tanah Oleh Warga Negara Asing (WNA) Menurut Kitab Undang-Undang Hukum Perdata." *Sasi* 25, no. 1 (2019): 27. <https://doi.org/10.47268/sasi.v25i1.147>.
- Isnani, and Anggreni A. Lubis. *Hukum Agraria : Kajian Komprehensif*. Medan: Pustaka Prima, 2022.
- Ni Putu Monika Ventari Kusumawati, Ni Ketut Sari Adnyani, Ketut Sudiarmaka. "Keabsahan Perjanjian Nominee Antara Warga Negara Indonesia Dengan Warga Negara Asing Dalam Praktik Jual Beli Tanah Hak Milik Dikaji Dari Undang-Undang Nomor 5 Tahun 1960." *Komunitas Yustisia* 3, no. 2 (2020): 102–13. <https://doi.org/https://doi.org/10.23887/jatayu.v3i2.28840>.
- Permatadani, Ega, and Anang Dony Irawan. "Kepemilikan Tanah Bagi Warga Negara Asing Ditinjau Dari Hukum Tanah Indonesia." *Khatulistiwa Law Review* 2, no. 2 (2021): 348–58. <https://doi.org/10.24260/klr.v2i2.356>.
- Rahmi, Elita. *PEMBUKTIAN SERTIFIKAT TANAH & KAPITA SELEKTA HUKUM AGRARIA*. Jakarta: Pentas Grafika, 2021.
- Sitohang, Agung Torang, Desy Yolanda, Br Bangun, Lidia Rumapea, Roselli Anjelina, Tasya Br Marbun, Widya Helen, Anjalina Purba, and Ramsul Nababan. "Kepemilikan Tanah Bagi Warga Negara Asing Di Indonesia" 2, no. 1 (2024). <https://doi.org/https://doi.org/10.51903/jaksa.v1i3.1533>.
- Subekti. *Hukum Perjanjian*. Jakarta: Intermasa, 2005.
- Ansa, Feri, Akbar Maulana Wicaksana, Aura Eklesia, Isabella Vania Camilla K, and Verene Praysy Gracia M. "Keabsahan Perjanjian Nominee Sebagai Bukti Kepemilikan Atas Tanah Berdasarkan Prinsip Privity of Contract." *UNES Law Review* 6, no. 4 (2024): 11024–33. <https://doi.org/https://doi.org/10.31933/unesrev.v6i4>.
- Arsela, Annisa Maudi, and Febby Mutiara Nelson. "Perjanjian Nominee Dalam Hukum Pertanahan Indonesia." *Palar | Pakuan Law Review* 7, no. 2 (2021): 505–24. <https://doi.org/10.33751/palar.v7i2.4370>.
- Haspada, Deny. "Perjanjian Nominee Antara Warga Negara Asing Dengan Warga Negara Indonesia Dalam Praktik Jual Beli Tanah Hak Milik Yang Dihubungkan Dengan Pasal 1313 Kitab Undang-Undang Hukum Perdata." *Wacana Paramarta: Jurnal Ilmu Hukum* 17, no. 2 (2018): 115–24. <https://doi.org/10.32816/paramarta.v17i2.77>.
- Hetharie, Yosia. "Perjanjian Nominee Sebagai Sarana Penguasaan Hak Milik Atas Tanah Oleh Warga Negara Asing (WNA) Menurut Kitab Undang-Undang Hukum Perdata." *Sasi* 25, no. 1 (2019): 27. <https://doi.org/10.47268/sasi.v25i1.147>.
- Isnani, and Anggreni A. Lubis. *Hukum Agraria : Kajian Komprehensif*. Medan: Pustaka Prima, 2022.
- Ni Putu Monika Ventari Kusumawati, Ni Ketut Sari Adnyani, Ketut Sudiarmaka. "Keabsahan Perjanjian Nominee Antara Warga Negara Indonesia Dengan Warga Negara Asing Dalam Praktik Jual Beli Tanah Hak Milik Dikaji Dari Undang-Undang Nomor 5 Tahun 1960." *Komunitas Yustisia* 3, no. 2 (2020): 102–13. <https://doi.org/https://doi.org/10.23887/jatayu.v3i2.28840>.

Permatadani, Ega, and Anang Dony Irawan. "Kepemilikan Tanah Bagi Warga Negara Asing Ditinjau Dari Hukum Tanah Indonesia." *Khatulistiwa Law Review* 2, no. 2 (2021): 348–58. <https://doi.org/10.24260/klr.v2i2.356>.

Rahmi, Elita. *PEMBUKTIAN SERTIFIKAT TANAH & KAPITA SELEKTA HUKUM AGRARIA*. Jakarta: Pentas Grafika, 2021.

Sitohang, Agung Torang, Desy Yolanda, Br Bangun, Lidia Rumapea, Roselli Anjelina, Tasya Br Marbun, Widya Helen, Anjalina Purba, and Ramsul Nababan. "Kepemilikan Tanah Bagi Warga Negara Asing Di Indonesia" 2, no. 1 (2024). <https://doi.org/https://doi.org/10.51903/jaksa.v1i3.1533>.

Subekti. *Hukum Perjanjian*. Jakarta: Intermedia, 2005.