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ANALYSIS OF NAME LOAN AGREEMENT IN THE PERSPECTIVE OF FREEDOM OF CONTRACT

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Abstract
Nominee agreements are one of the interesting legal issues in the Indonesian legal system, especially in the context of acquiring land ownership rights. This practice is often used to avoid various applicable legal restrictions, both related to the legal subject and the land use itself. In agrarian law, land ownership rights can only be owned by Indonesian citizens (WNI), as regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles (UUPA). However, nominee agreements are often used to get around mandatory legal provisions, thus raising questions about their validity from the perspective of freedom of contract. This study aims to analyze the legality of nominee agreements between Indonesian citizens concerning acquiring land ownership rights, using a descriptive qualitative approach. The data were analyzed based on the provisions of the Civil Code (KUHPerdata), especially Articles 1320 and 1338 which regulate the requirements for the validity of agreements and the principle of freedom of contract. The results of the analysis show that although a name-borrowing agreement can be made based on an agreement between the parties, objectives that are contrary to the law make this agreement legally invalid. This practice also violates the principle of freedom of contract because it is used to smuggle coercive legal provisions. The legal consequences of a name-borrowing agreement are null and void so the rights and obligations arising from the agreement are not recognized. In conclusion, the title loan agreement cannot be legally protected and has the potential to pose legal risks to the land objects involved. Therefore, legal protection can only be given to agreements made per applicable legal provisions.
Keywords: Name Borrowing Agreement, Land Ownership Rights, Freedom of Contract

Abstrak
Perjanjian pinjam nama atau nominee agreement menjadi salah satu isu hukum menarik dalam sistem hukum Indonesia, terutama dalam konteks perolehan hak milik atas tanah. Praktik ini sering digunakan untuk menghindari berbagai pembatasan hukum yang berlaku, baik terkait subjek hukum maupun peruntukan tanah itu sendiri. Dalam hukum agraria, hak milik atas tanah hanya dapat dimiliki oleh Warga Negara Indonesia (WNI), sebagaimana diatur dalam Undang-Undang Nomor 5 Tahun 1960 tentang Peraturan Dasar Pokok-Pokok Agraria (UUPA). Namun, perjanjian pinjam nama sering kali dimanfaatkan untuk menyiasati ketentuan hukum yang bersifat memaksa, sehingga menimbulkan pertanyaan tentang keabsahannya ditinjau dari perspektif freedom of contract. Penelitian ini bertujuan untuk menganalisis legalitas perjanjian pinjam nama sesama WNI dalam kaitannya dengan perolehan hak milik atas tanah, menggunakan pendekatan kualitatif deskriptif. Data dianalisis berdasarkan ketentuan dalam Kitab

Undang-Undang Hukum Perdata (KUHPerdata), khususnya Pasal 1320 dan 1338 yang mengatur syarat sahnya perjanjian dan prinsip kebebasan berkontrak. Hasil analisis menunjukkan bahwa meskipun perjanjian pinjam nama dapat dibuat atas dasar kesepakatan para pihak, tujuan yang bertentangan dengan hukum menjadikan perjanjian ini tidak sah secara hukum. Praktik ini juga melanggar asas kebebasan berkontrak karena digunakan untuk menyelundupi ketentuan hukum yang bersifat memaksa. Akibat hukum dari perjanjian pinjam nama adalah batal demi hukum, sehingga hak dan kewajiban yang timbul dari perjanjian tersebut tidak diakui. Kesimpulannya, perjanjian pinjam nama tidak dapat dilindungi secara hukum dan berpotensi menimbulkan risiko hukum terhadap objek tanah yang terlibat. Oleh karena itu, perlindungan hukum hanya dapat diberikan pada perjanjian yang dibuat sesuai dengan ketentuan hukum yang berlaku.
Kata kunci: *Perjanjian Pinjam Nama, Hak Milik atas Tanah, Kebebasan Berkontrak*

INTRODUCTION

An agreement is an event where one person promises to another or it can also be interpreted as two people promising each other to carry out a matter. An agreement is closely related to an obligation, an obligation is a legal relationship between two people or two parties who are obliged to fulfill these demands. The relationship between an agreement and an obligation is that an agreement will give rise to an obligation, in other words, the obligation originates from the agreement. An agreement is also called an agreement because two parties or two or more people do something agreed upon. The agreement is regulated in the Civil Code in article 1313 which reads 'an act by which one or more people bind themselves to one or more people'. According to R. Setiawan, 'an agreement is a legal act, in which one or more people bind themselves or bind each other to one or more people' (Setiawan, 2007).

Agreements have two forms, including named agreements and unnamed agreements. A named agreement is a form of agreement that has been regulated in law, while an unnamed agreement is a form of agreement that has not been regulated in law. One example of an unnamed agreement is a *nominee agreement* commonly called a name loan agreement. A *nominee* agreement is an agreement in which a person is appointed by another party to represent him or her in performing a certain legal act following the agreement of the parties, and the legal acts performed by the *nominee* are limited to what has been previously agreed with the authorizing party (Perdana, 2011). The party that appoints the *nominee* is known as the *beneficiary.* The nominee itself represents the interests of the *beneficiary*, therefore the *nominee* in representing the interests of the *beneficiary* in carrying out legal acts must be under what is agreed and of course, must be per the orders permitted by the *beneficiary*.

Regarding the name loan agreement, there are related regulations that can be seen in the regulations of Law Number 25 of 2007 concerning Investment, Law Number 40 of 2007 concerning Limited Liability Companies, and Law Number 5 of 1960 concerning Basic Agrarian Regulations. Law No. 25/2007 on Investment regulates the name borrowing agreement in Article 33 paragraph (1) which reads that domestic investors and foreign investors who invest in the form of a limited liability company are prohibited from making agreements and/or statements confirming that the ownership of shares in a limited

liability company is for and on behalf of another person. Article 33 paragraph (2) reads If a domestic investor and a foreign investor make an agreement and/or statement as referred to in paragraph (1), the agreement and/or statement shall be declared null and void.

Law No. 40 of 2007 on Limited Liability Companies also regulates name borrowing agreements as stipulated in Article 48 paragraph (1) which states that company shares are issued in the name of the owner, then paragraph (2) states that share ownership requirements can be stipulated in the articles of association by taking into account the requirements stipulated by the authorized agency following the provisions of laws and regulations, and paragraph (3) states that if the share ownership requirements as referred to in paragraph (2) have been stipulated and not fulfilled, the party obtaining the share ownership cannot exercise rights as a shareholder and the shares are not taken into account in the quorum that must be reached following the provisions of this law and/or the articles of association.

Law No. 5/1960 on the Basic Regulation of Agrarian Principles in Article 21 paragraph (1) states that only Indonesian citizens who are single nationals can, in principle, have property rights to land, the three regulations can explain related borrowing agreements. The investment regulation clearly explains the prohibition of domestic investors or foreign investors from entering into a name lending agreement related to share ownership and regulates the legal consequences if such an agreement is made. Meanwhile, the limited liability company regulations clarify that the shares issued must be in the name of the owner and the Company is not allowed to issue shares by appointment. However, the Company Law does not expressly regulate the prohibition on the use of nominee shareholders.

Likewise, the basic agrarian regulations, do not expressly explain the name borrowing agreement in land ownership, but it is expressly regulated the prohibition for foreigners not to be able to own freehold land in Indonesia, this is also clarified in Government Regulation No. 40 of 1996 Article 42 concerning Building Rights, Business Rights, and Use Rights, that foreign citizens in Indonesia are only limited to use rights, unless otherwise determined by the government or the authorities. Control of land rights by foreigners in Indonesia. So when foreigners make a loan agreement with Indonesian citizens, it violates the rules of the law.

Looking at the three regulations, it can be seen that Law Number 25 of 2007 concerning Investment has regulated the prohibition of name borrowing agreements and their limitations regarding local investors who make name borrowing agreements and or foreign investors and are strengthened by Law Number 40 of 2007 concerning Limited Liability Companies. The problem occurs in Law No. 5/1960 on the Basic Regulation of Agrarian Principles, which does not expressly regulate the prohibition of name lending agreements and the limitations of legal subjects conducting name lending agreements. Law No. 5/1960 on Basic Agrarian Principles only mentions and prohibits foreign citizens who own property rights to land in Indonesia.

The name borrowing agreement occurs, among others, in the acquisition of property rights to land. About land, Law No. 5/1960 on the Basic Regulation of Agrarian Principles

(UUPA) regulates policies related to land rights, where the UUPA contains legal certainty and rights related to the control of land rights. This is stated in General Elucidation I of Law Number 5/1960 on the UUPA:

1. To lay the foundations for the preparation of a national agrarian law which is a tool to bring prosperity, happiness, and justice to the state and the people, especially the peasantry, in the framework of a just and prosperous society;
2. To lay the foundations for unity and simplicity in land law;
3. To lay the foundations for providing legal certainty regarding land rights for the people as a whole.

One of the objectives of Law Number 5 Year 1960 is to guarantee legal certainty, as stated in Article 19 which reads:

1. To ensure legal certainty, the Government shall conduct land registration throughout the territory of the Republic of Indonesia following the provisions regulated by Government Regulation;
2. The registration mentioned in paragraph 1 of this article includes:
    a. Measurement, mapping, and bookkeeping of land;
    b. Registration of land rights and the transfer of such rights;
    c. Provision of evidence of rights which shall serve as strong evidence.
3. Land registration shall be carried out with due regard to the state of the country and society, the needs of socio-economic traffic, and the possibility of its implementation, according to the considerations of the Minister of Agrarian Affairs;
4. In a Government Regulation, the costs related to land registration referred to in paragraph (1) above shall be regulated, with the provision that people who are unable shall be exempted from paying such costs.

Boedi Harsono argues that land registration is a series of activities carried out by the State or Government continuously and regulated regarding collection, processing, and presentation for the benefit of the people in providing legal certainty (Boedi, 1999). Legal certainty includes certainty regarding the person or legal entity that is the holder of the right, which is also called certainty regarding the subject of the right, and certainty regarding the location, boundaries, and area of the land parcels, which is also called certainty regarding the object of the right.

The transfer of land rights is one of the legal actions arising from land registration. The transfer of land rights has 2 forms, namely (Santoso Urip, 2010).

1. Switching, what is meant by switching is the transfer of land rights from the previous right holder to another party due to a legal event such as the death of a person. This results in the land rights transferring to the heirs who are entitled juridically as long as the heirs have met the requirements as subjects of rights on the object of inherited land rights.
2. Transfer, meaning the transfer of land rights from the land rights holder to another party due to a legal action. Examples of sale and purchase, exchange, waqf, grants, auctions, and capital input (*inbred)*.

In the process of acquiring land rights about the transfer by way of sale and purchase, the author takes an example of a case in which there is a name loan agreement between an Indonesian citizen and an Indonesian citizen where the UUPA has not been expressly regulated regarding the name loan agreement and the limitations of the legal subject who makes a name loan agreement among Indonesian citizens. The following:

1. Mulyasari Lesmana v. Alihanafia Lijaya, Notary Edison Jingga, S.H., M.H., and Musdalifah. Which has been decided in District Court Decision Number 360/Pdt.G/ 2020/ PN JakSel, High Court Decision Number 64/Pdt/ 2023/ PT.DKI, Cassation Decision Number 4647 K/Pdt/2023.
2. Budiarto Siswojo v Setya Mindari Djoenaedi et al. Where it has been decided in District Court Decision Number 505/ Pdt.G/ 2015/ PN.Smg, High Court Decision Number 401/Pdt/2017/ PT. Smg, Cassation Decision Number 73/ Pdt/ 2019.
3. Ivan Wirata against Karyani Ahmad et al. Where it has been decided in District Court Decision Number 69/ Pdt.G/2020/PN. Jmb.

In the three court decisions, it can be seen that there are differences in the interpretation of the judges, where the opinion of the judge is that the name borrowing agreement is legally binding, other than that one side of the judge thinks that the name borrowing agreement between Indonesian citizens is a form of legal smuggling. Therefore, it makes the author want to examine more deeply the name borrowing agreement in the transfer of property rights to land carried out by fellow Indonesian citizens, which has not been expressly regulated in Law Number 5 of 1960 concerning Basic Agrarian Principles regarding name borrowing agreements related to the transfer of land rights and there are differences in the interpretation of judges in several cases of decisions that the author has described above. On this basis, the author feels the need to write and study in the form of an article entitled 'Analysis of Name Borrowing Agreements Among Indonesian Citizens Regarding the Acquisition of Land Ownership Rights Viewed From the Perspective of Freedom Of Contract'.

METHOD

This research uses a descriptive qualitative method with a legal research approach (Rizal Pahleviannur, Anita De Grave et al., 2023). As explained by Peter Mahmud Marzuki, legal research is a process of finding legal rules and legal doctrines to answer certain legal issues. The focus of this research is to analyze the name-borrowing agreement between Indonesian citizens related to the acquisition of land ownership rights, viewed from the perspective of *freedom of contract*. In addition, this research aims to understand whether the agreement falls into the category of legal smuggling and analyze its legal consequences for the parties and the land object concerned.

The approaches used in this research include a statutory *approach* and a conceptual approach. The statutory approach is conducted by examining various relevant regulations, such as the Civil Code, Law No. 5/1960 on Basic Agrarian Principles (UUPA), and relevant court decisions. This approach aims to understand the legal rules that apply in the context of name-borrowing agreements. Meanwhile, the conceptual approach is used

to explore legal doctrines and thoughts of legal experts as the basis for analyzing the legal issues raised based on the principle of freedom *of* the contract.

The data used in this research is qualitative, consisting of primary and secondary legal materials. Primary legal materials include the Civil Code, UUPA, and relevant court decisions. Secondary legal materials include books, scientific articles, legal journals, and other sources from the internet that are valid and relevant. Data collection techniques were conducted through library *research*, namely the collection of legal materials from legal literature, laws and regulations, and related documents. The data obtained was then analyzed using a qualitative analysis method through a deductive approach. This method utilizes syllogism, where the major premise in the form of applicable legal rules is combined with the minor premise in the form of legal facts found in the case of a name loan agreement. This analysis aims to answer the main legal issue, namely whether the name borrowing agreement is legal smuggling and what are the legal consequences for the parties and the land object.

RESULT AND DISCUSSIONS

Name Borrowing Agreement Between Fellow Indonesian Citizens In Acquiring Land Ownership Rights Including Legal Smuggling

In the Indonesian legal system, the phenomenon of *nominee* agreements is often debated, especially about the acquisition of land titles. This is due to its use, which often aims to avoid applicable legal restrictions (Suwanjaya, Sumardika, & Ujianti, 2020). One of the legal questions that arise is whether name-borrowing agreements between fellow Indonesian citizens can be considered a form of legal smuggling (*fraus legis*). To answer this, it is necessary to conduct an in-depth analysis from the perspective of *freedom* of contract as regulated in the Indonesian legal system. A name-borrowing agreement is a form of agreement in which a person uses the name of another party to perform certain legal actions, for example, to control property rights over land. In practice, such agreements often aim to avoid certain legal restrictions, both regarding legal subjects and land allotments. In cases between fellow Indonesian citizens, the motives may include taxation reasons, avoiding family conflicts, or other legal restrictions related to land tenure.

The principle of freedom of contract, which is stipulated in Article 1338 of the Civil Code, gives parties the right to determine the content and form of their agreement as long as it fulfills the requirements for a valid agreement by Article 1320 of the Civil Code: agreement, capacity, specific object, and lawful cause (Romli, n.d.). However, freedom of contract has limitations, including the principles of propriety, justice, and public order. Therefore, agreements that aim to circumvent the law or violate compelling legal provisions are considered to violate the principle of freedom of contract itself. Legal smuggling occurs when a legal action is carried out formally by the law but aims to violate compelling legal provisions. In the context of land, Article 21 paragraph (1) of the UUPA stipulates that only Indonesian citizens can own property rights to land (Wicaksono, Yurista, & Sari, 2019). If a name-borrowing agreement is used to circumvent restrictions such as the maximum limit of land ownership or the requirements of the legal subject of

the land owner, the agreement can be considered as legal smuggling The following is an analysis of the Name Borrowing Agreement:

1. Agreement of the Parties. A name loan agreement involves the agreement of the parties. However, if the purpose of the agreement is to circumvent the law, the agreement may be deemed to violate the principle of good faith.
2. Halal Cause. The cause of the agreement must not be contrary to law, decency, or public order. If the cause is to avoid legal obligations, such as taxation or land ownership limits, then the cause is not lawful.
3. Restricted Freedom of Contract. Freedom of contract cannot be used to legitimize unlawful acts. Therefore, a name loan agreement that aims to circumvent the law is invalid.
4. Legal Effects. Agreements that are considered legal circumvention can be declared null and void. As a result, the rights obtained through the agreement are not recognized, and the parties involved may face legal risks, such as cancellation of the land certificate or a lawsuit from a third party.

A name-borrowing agreement between Indonesian citizens in the context of acquiring land ownership rights can be categorized as legal contrivance if it aims to avoid compelling legal provisions. From the perspective of *freedom of contract*, although this agreement is made based on the agreement of the parties, the agreement is invalid because the reason is not lawful and contrary to public order. Therefore, such agreements do not receive legal protection and can lead to legal consequences that are detrimental to the parties involved.

The Law on Name Borrowing Agreements and Land Objects Containing Name Borrowing Agreements

In Indonesian law, *nominee agreements* are often used as a means to circumvent applicable legal restrictions. Such agreements attract attention because, although they are agreed upon by the parties involved, they often contravene compelling legal provisions. In the context of land, this issue is relevant because land ownership rights are strictly regulated in Law No. 5/1960 on the Basic Regulation of Agrarian Principles (UUPA), particularly Article 21 paragraph (1), which states that only Indonesian citizens (WNI) can own land ownership rights.

The principle of freedom *of contract* stipulated in Article 1338 of the Civil Code (KUHPerdata) provides space for parties to make agreements according to their will (Ali, Fitrian, & Hutomo, 2022). This principle guarantees that as long as the agreement is made legally and fulfills the conditions specified in Article 1320 of the Civil Code, the agreement will apply as law to the parties involved. However, this freedom is not absolute. Some limits bind this freedom, such as the principles of propriety, justice, and mandatory *rules*. In the context of a name loan agreement, the analysis of the validity and legal consequences of this agreement must examine the extent to which the agreement fulfills the principle of freedom of contract and does not violate applicable law.

One of the requirements for the validity of an agreement according to Article 1320 of the Civil Code is the existence of a lawful cause (Samudra & Hibar, 2021). In a loan-name agreement, the parties involved usually have hidden objectives, such as avoiding the maximum limit of land ownership, getting around certain legal restrictions, or avoiding tax obligations. If the reason for this agreement is to circumvent the law, then the agreement is deemed to have no lawful cause and is therefore invalid under Article 1337 of the Civil Code. In addition, although there is an agreement between the parties, good faith in the execution of the agreement is an important factor. If the agreement is made to conceal unlawful intentions, then the good faith of the parties to the agreement may be questioned.

From a freedom of contract perspective, although the parties have the right to make agreements according to their will, this right cannot be used to override the coercive law. In this case, the UUPA expressly regulates that land ownership rights can only be owned by qualified legal subjects. If a loan-name agreement is used to transfer land to a party who is not entitled to it, the agreement violates the compelling provisions of agrarian law. This agreement can also be considered an act of legal smuggling (*fraus legis*), which is an action that formally appears legal but has the purpose of avoiding or violating the law.

The legal consequence of a loan agreement that is considered unlawful is that the agreement can be declared null *and void*(Pratiwi, Budiartha, & Styawati, 2021). This means that the agreement has no legal force from the start, so it cannot give rise to rights or obligations for the parties. In the context of land, this means that the party whose name is borrowed cannot be recognized as the legal owner of the land, and the party borrowing the name also has no legal right to claim ownership of the land. The land object that is part of the name borrowing agreement is potentially subject to legal risks, such as cancellation of the land certificate or possession of the land by an aggrieved third party.

Other legal repercussions may also occur if legal authorities find that the agreement violates applicable provisions. In this case, the land certificate issued in the name of the party whose name was borrowed may be canceled through legal proceedings (Bhawika Wimala Pastika, Aprilia, Yuslani Eoh, & Zoe Faith, 2022). In addition, the parties involved in a name lending agreement are at risk of facing lawsuits, either from government authorities or from other parties who feel aggrieved. This risk is even greater if the agreement involves land that is of high value or located in a strategic location. While the principle of freedom of contract entitles parties to make agreements as they see fit, name loan agreements that aim to circumvent the law cannot be considered valid. Such agreements violate the coercive provisions of the law, and thus cannot be legally protected. The land objects associated with these agreements may also face significant legal risks, including cancellation of land rights or future legal disputes. Therefore, parties need to ensure that the agreements they make not only fulfill the legal requirements of the agreement but are also in line with the applicable law.

CONCLUSION

Based on the analysis of name-borrowing agreements among Indonesian citizens related to the acquisition of land ownership rights from the perspective of *freedom* of contract, it

can be concluded that although the principle of freedom of contract provides space for parties to make agreements according to their wishes, this freedom is not absolute. A loan-name agreement that aims to circumvent the law, such as avoiding restrictions on land ownership or other legal obligations, is contrary to the validity of the agreement as stipulated in Articles 1320 and 1337 of the Civil Code. This kind of agreement violates the provisions of coercive law, especially in the context of the UUPA, which explicitly regulates the legal subjects entitled to own land and restrictions on land ownership. The legal consequence of the name-borrowing agreement is that it is null and void so it does not give rise to any legal rights or obligations for the parties. In addition, the land object involved in this agreement may also face legal risks, such as cancellation of the certificate or the emergence of disputes from third parties who feel aggrieved. Not only can a name loan agreement not be legally protected but it also has the potential to cause legal consequences that are detrimental to all parties involved. In practice, all parties need to ensure that legal actions taken, particularly about land, are following the applicable legal provisions to avoid potential legal risks in the future.

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