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APPLICATION OF THE PRECAUTIONARY PRINCIPLE IN THE RECORDING OF THE DEED OF NOTARIAL SALE AND PURCHASE BINDING AGREEMENT ON LAND AT THE LAND OFFICE

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Abstract

An agreement is an agreement of both parties to do a deed. Agreements are very often used in everyday life, both underhand and notary agreements. In the content of the agreement the parties make in accordance with the principle of freedom of contract. Agreements under hand often have problems between parties because the agreement is not strong binding. For this reason, the role of the Notary Public is needed in making a notarial agreement deed so that the parties can achieve their respective goals and it is safe if one day there is a party who defaults, the notarial agreement deed can be used as valid evidence. The principle of prudence into the deed of Notarial Sale and Purchase Binding Agreement on registered land to be recorded at the Land Office. Using normative methods with a statutory approach and a legal concept approach. The results of this study show that the Notarial Sale and Purchase Binding Agreement Arrangement on registered land registered at the Land Office can only be carried out against the Notarial Sale and Purchase Binding Agreement that has been paid off. The formulation of the precautionary principle into the Notarial Sale and Purchase Binding Agreement deed on registered land that will be registered at the Land Office can be seen in the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia Number 16 of 2021, which can be done using analogous arguments by Notaries in applying the precautionary principle to the preparation of the Sale and Purchase Binding Agreement Deed.

Keywords: Prudence Principle; Deed; Sale and Purchase Binding Agreement

1. INTRODUCTION

The State of Indonesia is a country consisting of various tribes, religions, and customs from Sabang to Merauke. These customs are very different from each other. Since the country proclaimed independence, Indonesia has been formed into a unitary state by having a legal system that applies nationally (Utama, 2022). The legal system is one of the tools of integration of this nation. The role of law in regulating people's lives has been known since society knew the law itself, because the law was made to regulate human life as social beings. The relationship between society and law is expressed by an adagium that is very famous in legal science, namely: *ubi societas ibi ius* (where there is a society there is law) (Satjipto Rahardjo, 1983). In positive law in Indonesia, the Notary Position regulation is expressly stated in the Constitution of the Republic of Indonesia Number 30 of 2004

concerning the Law on Notary Position, as amended by the Constitution of the Republic of Indonesia Number 2 of 2014, as one of the general officials authorized to make authentic deeds. The description of an authentic deed can be seen from the formulation of Article 1868 of the Indonesian Civil Code stated that: An authentic deed is a deed made in the form prescribed by law by or before public officials authorized for it, at the place where the deed was made. Based on this article, an authentic deed is a deed whose form is determined by law or formed by or before a public officer authorized for it. An authentic deed is a designation given to a particular qualified as a general official (Rahardjo & Sulistyandari, 2022). Furthermore, in the explanation of the Constitution of the Republic of Indonesia Number 2 of 2014, it is also stated that authentic deeds made by or before a Notary, not only because they are required by laws and regulations, but also because they are

desired by interested parties to ensure the rights and obligations of the parties for certainty, legal order for interested parties as well as for society as a whole (Hauro & Widayati, 2021; Ramadhani et al., 2021). The position of a Notary Public as a functionality in society is considered to be an official where one can obtain reliable advice and the creation of strong documents in a legal proceeding. So the community needs a figure whose provisions are reliable, trustworthy, whose signature and everything (stamp) provide guarantees and strong evidence, an impartial expert and advisor who has no defects, who keeps his mouth shut, and makes an agreement that can protect him in the future (Tan Thong Kie, 2000), because it is closely related to efforts to increase legal awareness among Indonesian society in particular.

Therefore, notaries must have high idealism in carrying out their duties and responsibilities, where the attitude and behavior of a Notary Public must be able to reflect the values of Pancasila (Saputri et al., 2020), obey the law, oath of office and Notary Code of Ethics (Chrysilla & Yudhaprawira, 2023). In addition, as professionals, Notaries must also always improve capabilities and be able to provide legal certainty for the parties (Hayati, n.d.). An important aspect in the implementation of the position of Notary Public is that the Notary is authorized to make authentic deeds regarding the agreement desired by the interested party as authentic written evidence that can guarantee certainty, order and legal protection for the interested parties. Notary authority as referred to in the Constitution of the Republic of Indonesia Number 30 of 2004 concerning the Law on Notary Positions and the Constitution of the Republic of Indonesia Number 2 of 2014 includes 4 (four) things, namely: (Pieter I Made Puryatma, 2016)

Authority regarding the subject,

Authority regarding the object,

Authority regarding time, and

Authority regarding the place. The following are described each element of notary authority, Authority regarding subject, Authority regarding object, Authority regarding time.

Furthermore, the authority regarding the place, meaning that the Notary is authorized to make an authentic deed in the area of authority of his position. A Notary Public has an area of authority covering one province. Related to this, of course, notaries have an important role in making a land sale and purchase binding agreement.

Notarial Sale and Purchase Binding Agreement is a form of deed made before a Notary Public on the will and desire of the parties by fulfilling the provisions of Article 38 of the Constitution of the Republic of Indonesia Number 2 of 2014, can be recorded at the local Land Office.

This is in line with the enactment of the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 16 of 2021, Article 127 B states: Interested parties can apply for the recording of a Sale and Purchase Binding Agreement or lease agreement on registered land to the Land Office. Furthermore, Article 127 A states: In the event that the Land Deed Making Officer makes a deed based on the Sale and Purchase Binding Agreement made before a Notary with a place of residence that is not in accordance with the location of the agreed land, the Land Deed Making Officer must examine the completeness of the documents by applying the precautionary principle to protect the real owner and reduce conflicts in the land sector. Regulation for Recording of Deed Notarial Sale and Purchase Binding Agreement is a new thing in the practice of notarial law and cannot be separated from the provisions of Article 15 paragraph (2) letter f of the Constitution of the Republic of Indonesia Number 2 of 2014 which states that Notaries are also authorized to make deeds related to land. However, a more in-depth study is needed related to the presence of the recording institution.

The Regulation of the Minister of Agrarian Affairs and Spatial Planning/Head of the National Land Agency substantively regulates the obligation of Land Deed Making Officials to examine the completeness of documents by applying the precautionary principle with the aim of protecting the real owner and reducing conflicts in the land sector, is a must. The policy to apply the precautionary principle addressed to Land Deed Making Officials can be understood because the process of appointing and dismissing Land Deed Making Officials is with the Ministry of Agrarian and Spatial Planning/Head of the National Land Agency of the Republic of Indonesia, and on the other hand the Deed of Sale and Purchase Binding Agreement is a product of Notary law. Using the method of *argumentum per analogiam* (analogy), contextually the precautionary principle is actually intended for the legal product of the Notary Deed.

2. METHOD

This research is a normative research or dogmatic legal research because it specializes in certain positive legal rules and legal principles (Jonaedi Efendi & Johnny Ibrahim, 2018). In accordance with the normative character of this study, the approach used is the statute approach. The relevance related to legal issues with contextual analogy arguments The precautionary principle is actually intended for the legal product of the Notary Deed in applying the precautionary principle to the completeness of documents to protect the real owner and reduce conflicts in the land sector in the process of Recording the

Deed of Binding Agreement for Binding Sale and Purchase of Notary Land at the Land Office.

3. DISCUSSION

Notarial Sale and Purchase Binding Agreement Deed on Registered Land Registered at the Land Office

A sale and purchase binding agreement is an agreement that arises from the agreement of two or more parties with the aim of arising an engagement for the benefit of one on the burden of the other or also called a reciprocal agreement in terms of its nature and legal consequences, and on the other hand referred to as an assistance agreement (Herlien Budiono, 2018). As an aid agreement, its function is to prepare the parties to the main agreement, whose final purpose is the main agreement, namely the sale and purchase agreement. In line with this, Herlien Budiono (Herlien Budiono, 2011) explained that the aid agreement is in nature to strengthen the main agreement and its existence is only possible if the main agreement exists. The term Sale and Purchase Binding Agreement can be found in Government Regulation Number 12 of 2021 concerning Amendments to Government Regulation Number 14 of 2016 concerning the Implementation of Housing and Settlement Areas, which equates the term Sale and Purchase Binding Agreement, with the term Preliminary Sale and Purchase Agreement, as mentioned in Article 1 number 11 of PP Number 12 of 2021, namely: "Preliminary Sale and Purchase Agreement or Sale and Purchase Binding Agreement hereinafter referred to as A Sale and Purchase Binding Agreement is an agreement between the development actor and each person to carry out the sale and purchase of houses or units of flats that can be carried out by the development actor before the construction of flats or in the process of construction for residential houses and row houses stated in the notarial deed." Furthermore, the term Sale and Purchase Binding Agreement in notarial law practice is found several names / designations at the beginning of the deed, namely: Sale and Purchase Bond, Sale and Purchase Bond, Sale and Purchase Binding Agreement or with a very short name, namely the Agreement. Notarial Sale and Purchase Binding Agreement is a principal agreement that requires additional instruments / participation for its

implementation, namely with the Deed of Power of Attorney to sell, so that the name of the Deed of Sale and Purchase Binding Agreement and Power to Sell appears which is a series of legal actions carried out by the parties before a Notary. In line with this, Habib Adjie in one of his writings argues that the Deed of Sale and Purchase Binding Agreement and Power of Attorney is often made in land rights transactions for reasons including:

The buyer does not want to change the name / transfer of rights, on the grounds that he wants to sell again to another party (even though in this case the buyer has paid in full to the seller).

The buyer does not want to immediately change the name / transfer of rights, on the grounds that he does not have money to pay taxes, (even though in this case the buyer has paid in full to the seller).

In relation to the Binding Agreement for Sale and Purchase and Power to Sell, the two Notarial Deeds are often referred to as the Binding Agreement for Sale and Purchase in Full. In the Binding Agreement for Sale and Purchase in Full, the function of the Power of Attorney to Sell deed can be carried out to himself or another person he wants himself, as referred to in Article 1792 of the Civil Code which states: "A grant of power is an agreement by which a person gives power to another person, who receives it, to on his behalf conduct a business". The granting of power (lastgeving) contained in Article 1792 of the Civil Code consists of 3 (three) elements, namely:

elements of the agreement as referred to in article 1320 of the Civil Code;

The element of giving power to conduct a business, must be in accordance with what has been agreed by the parties, whether formulated generally or expressed in express words; and

element on behalf of the power of attorney, means that the power of attorney is authorized to represent the power of attorney.

As a result, legal actions taken by the power of attorney are legal actions from the power of attorney. This means that the provisions of the power of attorney arrangement in Article 1792 of the Civil Code have two parties, namely: the Power of Attorney and the Power of Attorney who are given orders or mandates to do something for and on behalf of the power of attorney.

For this Sale and Purchase Binding Agreement in full because one day it will be followed up by the deed of the Land Deed Making Officer, the Notary Public must ask the Seller and Buyer to avoid price disparity, then the amount and method of payment must be expressly stated in the deed of the Sale and Purchase Binding Agreement. A Notary Sale and Purchase Binding Agreement can also be made before a Notary Public on the purchased land parcel not paid in full by the seller to the buyer, but must be paid in stages / installments or installments. That in making a deed of Sale and Purchase Binding Agreement for land parcels paid in installments/ installments/stages, the payment method must be determined, for example:

The amount of selling price has been determined, then the rest will be paid in installments / installments / gradually in the form of nominal money per month until paid off or or the rest will be paid off within a certain period of time which is not determined by the amount of installments / in installments / gradually.

The payment must be clear, because it relates to determining the time / time of the Default Buyer.

Whether Default will be determined if the Buyer does not pay several times in a row or not on time as promised.

Also determine the method of payment whether cash, bookkeeping, by check or giro or other means. The payment procedure will also be related to the time of default.

In relation to the Deed of Power of Attorney to Sell as a follow-up to the Binding Agreement for Sale and Purchase in Full, the power of attorney cannot be terminated or is an inseparable part of the Deed of Binding Sale and Purchase Agreement in Full. This is to guarantee the rights of the Buyer who has paid in full the sale price to the Seller. This means that the irrevocable grant of power is valid if the agreement on which the power of attorney is based has a valid legal reason. It can be concluded that the irrevocable grant of power of attorney is required if:

The grant of power is an inseparable part of an agreement (*integrerende deel*) that has a valid legal reason; and

Power of attorney is given for the benefit of the power of attorney.

The provision for the termination of the Power of Attorney becomes non-binding if

the deed of Power of Attorney includes a clause that the provision of the termination of the power is excluded from this power, meaning that it is not bound by the causes of the expiration of the power of attorney. The above overview shows that the Notarial Sale and Purchase Binding Agreement Deed can occur because of 2 (two) things, namely the Sale and Purchase Binding Agreement in Full and the Unpaid Sale and Purchase Binding Agreement (Installments). For the Binding Agreement for Sale and Purchase in Full, it must be followed by a Power of Attorney Deed. In connection with the possibility of the Deed of Sale and Purchase Binding Agreement made by the parties to be recorded at the Land Office, the Regulation of the Minister of Agrarian and Spatial Planning/Head of the National Land Agency Number 16 of 2021, regulates and determines the following:

Interested parties can apply for recording a binding sale and purchase agreement on registered land to the Land Office.

Submit a copy of the deed of sale and purchase binding agreement on the land and the identity of the parties to the Land Office.

Bring the original Certificate of Land Rights or Ownership Rights to the relevant Flats Unit to be recorded.

The regulation of the provisions for recording the Notary Sale and Purchase Binding Agreement, in the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency Number 16 of 2021, in the author's opinion that the object of the Notary Sale and Purchase Binding Agreement is directed at land that has been certified, and on the other hand is still inadequate in terms of requirements. This means that additional requirements are needed to better guarantee legal protection and legal certainty for the parties, namely:

Obligation to check the object of the land referred to in the Notary Sale and Purchase Binding Agreement,

Obligation to make payment of Land and Building Tax (PBB) based on the latest SPPT,

Obligation to make Income Tax (PPH) payments, because the seller has received money from the buyer

Obligation to submit a copy of the Power of Attorney to Sell Notary. With this description, the author argues that the

recording of the Notarial Sale and Purchase Binding Agreement on land registered with the Land Office can only be done against the Notary Sale and Purchase Binding Agreement that has been paid off.

This is in line with the provisions of Article 127 B paragraph (6) of the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency which states: In the event that there is a record of the Sale and Purchase Binding Agreement recorded, Land Rights cannot be transferred other than to the parties stated in the agreement. Meanwhile, the possibility of deletion of the recording of the agreement is still possible by the interested party, on the grounds that: (a) cancellation is made by the parties who made the Notary Sale and Purchase Binding Agreement, (b) cancellation is carried out based on a Court Decision that has obtained permanent legal force, (c) the Buyer Party waives its rights to the Seller. Meanwhile, what is meant by the interested party is the Buyer Party or Creditor Party, if the Notary Sale and Purchase Binding Agreement on the registered land uses a credit facility in the sale and purchase process.

The Precautionary Principle into the Deed of Notarial Sale and Purchase Binding Agreement on Registered Land to be Registered at the Land Office

The precautionary principle requires Notaries to always be careful in carrying out their positions, that is, they must be consistent in carrying out their positions in accordance with laws and regulations in the field of notarial affairs based on professionalism and good faith. Such precautionary principles should be instilled in a Notary to prevent Notary involvement in legal conflicts with his clients or parties concerned. In the provisions of the Constitution of the Republic of Indonesia Number 30 of 2004 concerning the Law on Notary Positions and the Constitution of the Republic of Indonesia Number 2 of 2014 it is not expressly stated regarding the precautionary principle, but by referring to the provisions of Article 16 paragraph (1) letter d of the Constitution of the Republic of Indonesia Number 30 of 2004 concerning the Law on Notary Positions states that in carrying out their positions, Notaries are obliged to provide services in accordance with the provisions of this law unless there is a reason to refuse it. In line with this, based on a

search of Indonesian-language literature, it can be concluded that the application of this precautionary principle must be carried out in making a deed of Notary Sale and Purchase Binding Agreement related to registered land rights which will be recorded at the Land Office, namely: (Paramaningrat Manuaba et al., 2018)

Identify the Facing Identity.

Carefully verify the subject data and the facing object.

Ask, then listen and observe the wishes or desires of the parties

Examine the evidence of letters relating to the will or will of the parties.

Provide a grace period in working on authentic deeds.

Provide advice and make a deed framework to fulfill the wishes or will of the parties.

Act carefully, meticulously and conscientiously in the process of making a deed.

Fulfill all the requirements for Notarial deed making techniques such as in terms of reading, signing, providing copies and filing for minuta.

Report to the authorities if there is an indication of money laundering in transactions at a Notary.

The application of the principle of Notary prudence in making a deed of Sale and Purchase Binding Agreement on registered land rights to be recorded at the Land Office can be classified into several stages, namely: First, the stage before making the deed, (referring to numbers 1 to 6), Second, the stage when making and reading the deed. (referring to numbers 7 through 9). Meanwhile, the accountability of the deed of Notary Sale and Purchase Binding Agreement will be tested by the interested parties, at the third stage, namely during the execution of the deed, especially if the deed causes conflicts, meaning whether the deed of Sale and Purchase Binding Agreement made before the Notary Public already reflects the attitude and actions of the Notary Public prudently or vice versa. Potential problems that easily entangle Land Deed Making Officials to be prosecuted either civilly, administratively, or criminally, will not arise if they follow existing regulations and apply the precautionary principle which is very influential both now and in the future in maintaining the spirit of the position held.

The precautionary principle is reflected in the juridical content in consideration of the Constitution of the Republic of Indonesia Number 2 of 2014 which affirms that the presence of a Notary Public is to ensure certainty, order, and legal protection related to authentic written evidence regarding deeds, agreements, determinations, and legal events made before or by a Notary because anyone will admit that the Notary deed has perfect evidentiary strength (I. W. K. J. U. Utama, 2019). To distinguish the Notarial Sale and Purchase Binding Agreement recorded from the unrecorded one, it must be affirmed in the Concluding Notarial Deed with the formulation of the sentence: This Sale and Purchase Binding Agreement Deed is recorded by the Second Party (Buyer) at the Land Office, or if the Buyer Party uses a credit facility, it is stated that the Deed of Sale and Purchase Binding Agreement is recorded by, as the Creditor.

4. CONCLUSION

The regulation of the Notarial Sale and Purchase Binding Agreement on Registered Land Registered at the Land Office is contained in the Regulation of the Minister of Agrarian Affairs and Spatial Planning / Head of the National Land Agency of the Republic of Indonesia Number 16 of 2021 which stipulates that the recording of the Notary Sale and Purchase Binding Agreement on registered land at the Land Office can only be done against the Notarial Sale and Purchase Binding Agreement that has been paid off and is clear where there is a record of The Sale and Purchase Binding Agreement that is recorded then the Land Rights cannot be transferred other than to the parties stated in the agreement agreed by the parties in the deed of Sale and Purchase Binding Agreement.

The precautionary principle into the deed of the Notary Sale and Purchase Binding Agreement by using analogous arguments by the Notary in the deed of the Sale and Purchase Binding Agreement by applying the precautionary principle of making the deed, to the stage when making and reading the deed, to provide legal protection and certainty to the real owner and reduce conflicts in the land sector by providing justice values, and providing protection to the Land Deed Making Officer which will make the Deed of Land Deed Making Office from the deed of Sale and Purchase Binding Agreement and Power to Sell that has been Notarially made. In addition, the precautionary

principle is reflected in the juridical content in consideration of the Constitution of the Republic of Indonesia Number 2 of 2014 which affirms that the presence of a Notary Public is a form of guaranteeing certainty, order, and legal protection related to authentic written evidence regarding deeds, agreements, determinations, and legal events made before or by a Notary.

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