



Responsibility of notary for the embezzlement of the client's building rights certificate

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Abstract

Notary is a position of trust given by the state and society, therefore Notary must provide legal services honestly and professionally in accordance with the authority regulated in applicable regulations. The reality is that not all Notary in carrying out their duties and positions are always honest and correct, one of which is a Notary that commits embezzlement regarding its client's building use rights certificate. The purpose of writing this journal is to determine the form of Notary's responsibility as a result of its actions in embezzling the client's Building Use Rights certificate. The research method used is doctrinal research. The results of the discussion in this journal are that the accountability carried out by Notary is divided into three forms, namely administrative (code of ethics), civil and criminal. The conclusion from this journal is that a Notary can be subject to civil and administrative sanctions depending on the type of violation, while criminal sanctions can only be imposed if he is proven to have committed a criminal act.

Keywords: Reponsibility, notary, building rights certificate

Introduction

The increasing dynamic needs of society also influence the community's need for public services that provide legal certainty, one of which is services in the field of Notary. Notaries play an important role in creating legal traffic, especially those related to making deeds (Anand, 2014). Notaries are public officials who have attributive authority from the state to carry out certain public functions of the state, especially in the field of civil law in making authentic deeds.

Notaries as a public official, are given the position of creating authentic deeds. The deeds made by Notaries must be able to serve as a strong evidence in the event of a dispute or other cases in various fields of law. According to Hans Kelsen, the concept related to the concept of legal obligation is the concept of legal responsibility. This means that a person is legally responsible for a particular act or that he has assumed legal responsibility (Kelsen, 2007) [2]. Notary is obliged to apply the principle of accuracy in carrying out its obligations. The principle of accuracy means that a decision must be based on complete information and documents to support the legality of making decisions in order to carefully prepare those decisions before they are final (Abdulkadir, 2021). In real life practice, there are times when cases in the community, which are carried out by Notary, giving rise to legal disputes. One of which is in the process of buying and selling property rights and buildings because there are parties who may feel disadvantaged. Many problems that occur from the transfer of land rights are caused by the unprofessional behavior of Notaries, causing clients to suffer losses.

One of the cases involving a Notary with the initials ASC in Balikpapan City embezzling a client's Certificate of Building Use Rights (SHGB) so that the client suffered an estimated loss of Rp. 6,603,060,000.00 (six billion six hundred three million and sixty rupiahs). Starting from the client's interest in carrying out the process of making a deed of sale and purchase and transfer of name as well as a debt guarantee for three SHGBs carried out by H (Seller) to J

(Buyer). The defendant as Notary was entrusted with three SHGB by J to make a deed of sale and purchase and change of name, in this case J had paid the fees for notary services, taxes, Acquisition Duty of Right on Land and Building (BPHTB), and Tax Payment Letter (SSP). After the sale and purchase deed was completed, H came to the defendant's office to ask for the 3 SHGBs back and the defendant handed over the SHGBs without J's knowledge. Feeling aggrieved and the defendant's lack of good faith, J reported the defendant to the police. In the decision, the defendant was sentenced to 2 years in prison. The defendant's attorney filed an appeal at the Samarinda High Court based on Decision Number 69/PID/2020/PT SMR, this decision accepted the appeal requests from the defendant and the public prosecutor, and confirmed the previous decision. Then the defendant's attorney again filed an appeal at the Supreme Court of the Republic of Indonesia. The result of decision Number 788/K/Pid/2020 was to reject the cassation request, amending the high court's decision on the length of prison sentence imposed on the defendant to 1 year and 6 months imprisonment. This case certainly tarnishes the dignity of Notary where Notary as a public official who is given authority and trust by the government should act in a trustworthy manner.

Notaries who commit acts against the law are obliged to be held accountable for their actions. Notaries accountability for the actions they commit can guarantee legal certainty to the Notary itself and the injured parties. In connection with the above background, the research will examine the Notaries responsibility for embezzlement of clients' building use certificates.

Research Method

The current research is a doctrinal research that is conceptualized or developed on the basis of the doctrine adhered to by its developer. The approach used in this research is a conceptual approach and a case approach (Abdulkadir, 2004) [6]. The conceptual approach examines the views and doctrines that have developed in legal

science. The case approach is carried out by examining a case that has become a court decision that has legal force (Marzuki, 2021). The data collection process in this research was carried out through various types of legal sources including primary legal materials and secondary legal materials. Library research was used to collect the research material. Literature studies are carried out by collecting various statutory regulations, court decisions, literature books, journals and other documents that are relevant to the legal issues being faced. The legal material analysis technique used in this research is deductive syllogism (Soekanto, 1986)^[7].

Result and Discussion

According to the legal dictionary, responsibility can be described as liability and responsibility. Liability refers to legal responsibility, namely responsibility as a result of mistakes committed by legal subjects, while responsibility is a form of political responsibility. The accountability required of Notary as a public official who has the authority to make land deeds, is not only limited to creating the deed, but in a broad sense includes the responsibility during the process of making the deed and responsibility after signing the deed. Notary professional responsibilities can be categorized into two things, namely ethical responsibilities and legal responsibilities. Legal responsibility can also be divided into three types, namely responsibility based on administrative law, civil law and criminal law.

There are two theories that underlie this, namely the theory of *fautes personnelles* and *fautes de services*:

Theory of *fautes personnelles*

The theory states that losses to third parties are borne by the official whose actions have caused the loss. In this theory the burden of responsibility is given to humans as individuals.

Theory of *fautes de services*

The theory states that losses to third parties are charged to the agency of the official concerned. In this theory the burden of responsibility is given to the position. In its application, the existing losses are adjusted to the size of the error made

Based on the theory of *fautes personnelles*, Notary can be responsible for making sale and purchase deeds that contain legal defects, because Notary is a public official who is given the authority to make authentic deeds regarding certain legal acts on land rights, as a strong means of proof that should be able to provide legal certainty for rights holders. However, in the case of H vs J, Notary ASC, as a public official with the authority to make land deeds, embezzled three building use rights certificates which belongs to the client.

In carrying out its duties and obligations, Notary must have a sense of responsibility, independence, honesty, and the ability to not sides with any party as explained in Article 3 letter f of the Notary Code of Ethics. Notary is also prohibited from carrying out actions that violate the provisions of the Notary Position Regulations and other laws and regulations (Article 4 letter r number 1 of the Notary Code of Ethics). Apart from that, Notary as a public official who has the authority to make authentic deeds is required to

1. Create deeds that can be used as a strong basis for registering the transfer of rights or assignment of rights;

2. Notary is responsible for the fulfilment of the elements of skill and authority of the person in the Deed and the validity of the legal action according to the data and information submitted by the person who is known or introduced;
3. Notary is responsible for ensuring that the documents used as a basis for taking legal action, their strength and evidence have fulfilled the guarantee of legal certainty to be followed up in authentic deeds and in accordance with applicable provisions;
4. Notary is responsible for the validity of legal acts according to the data and information of the parties as well as guaranteeing the authenticity of the deed and is responsible for making it according to procedures.

The form of responsibility in cases of negligence committed by Notary can be explained as follows

Firstly, responsibility as an administrative Notary. Administrative errors made by Notary will have legal consequences, Notary can be held administratively and morally responsible. The form of administrative responsibility carried out by Notary is related to negligence and intentionality in carrying out their duties and positions, making authentic deeds subject to administrative sanctions, where the sanctions are adjusted to the extent of the violation committed. Administrative sanctions for violating the Notary code of ethics stated in Article 6 paragraph (1) are divided into

1. Reprimand;
2. Warning;
3. Schorsing (temporary dismissal) from membership of the INI association;
4. Onzetting (dismissal) from membership of the INI association; And
5. Dishonorable dismissal from membership in the INI association.

In relation to the case of H and J, after the agreement was reached, Notary ASC was asked by H and J to make a sale and purchase deed and change of name, as well as a debt guarantee for the 3 SHGB entrusted to the Notary. Apart from that, J has carried out his responsibilities, namely paying fees for notary services, taxes, BPHTB and SSP. However, Notary ASC actually colluded with H, namely giving the 3 SHGB knowingly to the Seller (H) even though the deed had already been completed where J (Buyer) was the new owner. Feeling aggrieved, J reported the Notary to the police where the decision reached the Supreme Court level where the Notary ASC was sentenced to prison for 1 year and 6 months.

In this case, Notary ASC can be held administratively responsible because it is proven to have provided SHGB guarantees unilaterally so that it is deemed to have no sense of responsibility, and is siding with one party. Notary ASC's administrative responsibility is the imposition of administrative sanctions in the form of temporary dismissal for committing disgraceful acts, as well as being a defendant in a criminal act which is punishable by imprisonment or imprisonment for a maximum of five years or worse.

Secondly, the responsibility of Notary in civil liability. Notaries liability related to intentional and negligent actions in the process of making the deed until after the deed is made deviates from the formal requirements and material requirements can not only be subject to administrative

sanctions, but also civil sanctions. Civil liability applies if there is a civil claim from a party related to a deed made by Notary, and that party feels disadvantaged. Civil claims for Notary errors must first be examined to see whether the error constitutes a breach of contract or an unlawful act (*onrechtmatige daad*). Default occurs if it starts with an agreement, whereas if it is not related to the agreement, the form of violation is called an unlawful act. In Article 1365 of the Civil Code which states "Every unlawful act that causes loss to another person, requires the person whose fault it was to cause the loss, to compensate for the loss."

In relation to the case of H vs J, Notary ASC could be subject to civil charges based on unlawful acts in Article 1365 of the Civil Code by parties who feel disadvantaged due to the embezzlement of a number of building use rights certificates belonging to clients (Wijayanta, 2014) ^[9]. In filing a lawsuit based on Article 1365 of the Civil Code, four elements must be met, namely the existence of an unlawful act, error, loss, and a causal relationship between the error and the loss suffered. The legal action carried out by Notary ASC was to provide three SHGBs which were used as collateral consciously to the Seller (H) even though the deed had already been completed where J (Buyer) was the new owner. The mistake made by Notary ASC was irresponsibility in carrying out its duties and positions. Notary ASC should not take sides with one party considering that H came before J without J's knowledge to take 3 SHGBs which SHGBs were used as collateral. The losses suffered by J as the buyer were material and immaterial losses. After calculating the material loss experienced by J, it was IDR. 6,603,060,000.00 (six billion six hundred three million and sixty rupiah). He also experienced immaterial losses, namely because of this problem, J felt worried, stressed, depressed, and felt ashamed of his relationships. The existence of a causal relationship between the error committed by Notary ASC not being responsible for safeguarding the documents provided by the parties and the loss suffered by J, means that J can demand compensation from Notary ASC with a lawsuit for an unlawful act (Article 1365 of the Civil Code), with a request for compensation for losses. according to Article 1246 of the Civil Code, namely costs, interest and losses.

Thirdly, Notaries criminal responsibility. Criminal sanctions can be imposed on Notary ASC if he is proven to have committed a disgraceful act in the process of making the deed he made. In this case, it is as if Notary ASC owns the three SHGBs because he gave the SHGBs to one of the parties without any agreement between the two parties. If proven true, then the Notary can be subject to Article 372 of the Criminal Code in conjunction with Article 374 of the Criminal Code. Article 372 of the Criminal Code states that, "Any person who intentionally and unlawfully possesses something which wholly or partly belongs to another person, but which is in his control not because of a crime, is threatened with embezzlement, with a maximum imprisonment of four years or a maximum fine of IDR. 900,000,- (nine hundred thousand rupiah), while Article 374 of the Criminal Code states that "Embezzlement committed by a person whose control over goods is due to an employment relationship or because of a search or because he received wages for this is punishable by a maximum imprisonment of five years". Notary ASC was legally proven to have committed a criminal act of embezzlement

by the person who controlled the goods because of an employment relationship and received wages for it. In this case, up to the cassation level through the Decision of the Supreme Court of the Republic of Indonesia Number 788/K/Pid/2020, the cassation request was rejected, correcting the high court's decision on the length of prison sentence imposed on the defendant to 1 year and 6 months imprisonment.

Notary in making a deed must pay attention to material and formal requirements. Deviations regarding these requirements of the deed making procedure must be seen from the limits of the formal aspects determined by the laws and regulations related to Notary. If a Notary commits a violation from formal aspects, the sanctions that can be imposed are civil sanctions and administrative sanctions depending on the type of violation or sanctions from the INI code of ethics, while criminal sanctions can only be imposed if the Notary in question has been proven to have committed a criminal act.

Conclusion

The form of Notary responsibility that is proven to be negligent and made errors in carrying out its duties and position is a legal and moral responsibility. Legal responsibility can take the form of administrative, civil and criminal responsibility. Administratively, Notaries who are negligent and irresponsible with client documents can be subject to sanctions, namely a warning and/or temporary dismissal for committing minor violations of Notary obligations. In civil terms, he can be sued for an unlawful act based on Article 1365 of the Civil Code by a party who feels aggrieved as a result of the sale and purchase deed he made. Criminally, a Notary can also be subject to Article 372 of the Criminal Code in conjunction with Article 374 of the Criminal Code if he is proven to have committed a criminal act of embezzlement with aggravation because the Notary is legally proven to have committed a criminal act of embezzlement committed by a person who controls the goods because of an employment relationship and receives wages for it (Nasution, 2016) ^[8].

It is recommended that government officials participate in changing or amending regulations regarding the stages of making deeds and maintaining client documents and their confidentiality. It is also necessary to consider that the court will better examine and decide cases related to the length of the sentence and the type of sentence imposed so that the sanctions given to the Notaries are more optimal and appropriate.

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