



Legal Efforts for Notary Who Becomes a Defendant in Civil Cases Regarding the Deed He/She Made

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Abstract

In Indonesia, a notary is one of the positions that provides services to the public in the inclusion of their wishes in written form. However, in reality, the role of the notary, in providing services in the civil sector, also often places them as a defendant or co-defendant in a case between the parties to the dispute. Thus, it raises the presumption that the notary is a party to the deed. The formulation of the problems in this study include: a) How is the legal effort for the notary who became a defendant in a civil case related to the deed he/she made? b) How is the strength of proof on the deed that the notary made? c) What efforts have been made by the notary to defend the deed he made? This study applies a sociological juridical approach. In addition, this study uses primary and secondary data in which they are analyzed qualitatively. The results of the study indicate that: 1) In the case of a notary who is also a defendant in a civil case, the provisions of Article 66 of the Law of Notary Position do not apply to him/her. So, in order to protect themselves and their positions in court, the notary may make several legal efforts. The first, before the verification phase in the court, is to make a claim of reconciliation. The second, after the decision of the panel of judges, is to make an ordinary legal effort; i.e. appeal to the High Court, appeal to the Supreme Court and review. Then, the effort of the resistance law (*verzet*) was carried out on the decision of the *verstek*. 2) The strength of proof of the notarial deed is divided into 3 (three) types, i.e. the strength of outward proof, the strength of formal proof, the strength of material proof. 3) Efforts made by the notary to defend the deed that he/she made are divided into 2 (two) types: first is before a lawsuit takes place in the court and second after a claim is made in court.

Keywords: Legal Effort; Notary; Authentic Deed

Introduction

Muamalah is all transactions or agreements made by humans in terms of exchange of benefits. *Muamalah* is a human culture to make ends meet. In ancient societies even today, there are still forms of *muamalah* that are carried out verbally and ended with shaking hands as a sign of agreement. However, transactions with large values should be noted in a written form. In Indonesia, a notary is one of the positions that provide services to parties by stating their wishes in written form that has been regulated in legislation separately.

Based on Law No. 2 of 2014 which is a change to Law No. 30 of 2004 concerning Notary Office in the provisions of Article 1 number (1), it is stated that a notary is a general official authorized to make authentic deeds and has other authorities as referred to in this Law or under other Laws. Referring to the provisions of Article 1868 of the Civil Code, there is an understanding of an authentic deed which states that an authentic deed is a deed made in the form determined by the Law by or before the authorized official for that on the place the deed was made.

A notary is a public official who is appointed and dismissed by a general authority; in this case the Minister of Law and Human Rights.¹ Before being appointed, the notary is obliged to take an oath/ promise according to their respective beliefs before the minister or appointed official as stipulated in Article 4 of the Law of Notary Position. After being sworn and appointed, a notary has the authority to make a deed in which the deed must be desired by the parties or appearers and not the will of the notary him/ herself. This will must not conflict with the Law, religious norms, customs, social and morality. In addition, it must first provide legal counseling to the parties seeing him/ her in connection with making a deed.

The philosophical foundation of the existence of Notaries in Indonesia is stated in legal considerations on the Law of Notary Position. One of the considerations states that notaries as public officials who carry out positions in providing legal services to the public need to get protection and guarantees in order to achieve legal certainty. The philosophy of the appointment of notaries as public officials is to provide protection and guarantees to achieve legal certainty. Legal protection is an effort to provide security to the notary so that they can carry out their authority as well as possible. So, the deed that he/ she made can be used by the parties.

Sociologically, arrangements regarding Notary Position are included in the form of the Law because of the many problems that afflict the notary in exercising authority. For example, he/ she is sued or reported to law enforcement by the parties or by the community in general. Related to the problem, the notary needs to get legal protection from the state which is included in the form of the Law.²

The role of the notary, in providing services that produce products in the form of authentic deeds as evidence, is inseparable from his/ her position as a public official appointed by the government to serve the public in the civil sector. Errors in the notarial deed can cause the revocation of one's rights or the burden of someone for an obligation.³

A notary, as a public official, has the duty to provide services to community members who need their services in the manufacture of written evidence; especially authentic deeds in the field of civil law. The existence of a notary is an implementation of the law of proof.⁴

Legal products, issued by notaries in the form of authentic deeds that have the strength of perfect proof, are expected to be able to provide a sense of security and order in social life. The existence of authentic deeds is expected to minimize the occurrence of disputes because the deed has clearly stated the rights and obligations of each party. For this reason, in making authentic deeds, the notary must fulfill the formal provisions for making deeds such as Article 16 No. (1) letter m, Article 38 concerning the form and nature of the deed, Article 40 concerning witnesses and terms, Article 44 concerning signing of deed, Article 48 concerning changes to the contents of the deed and procedures, Article 51 concerning corrections to written errors on the original deed signed and Article 54 concerning notification of the contents of the deed, giving duplicates, *grosse*, and copies. All the things listed in these articles must be

¹ Wawan Setiawan, 2001, *Position and Existence of Public Officials and Conveyancers Compared with the Position of State Administration Officials According to the National Legal System*, Central Board of Land Deed Officials, Jakarta, page 8.

² Salim HS, 2016, *Technique of Making Deed One*, PT Raja Grafindo Persada, Jakarta, page 36.

³ Abdul Ghofur Anshori, 2009, *Indonesian Notary Society Law and Ethics Perspective*, UII Press, Yogyakarta, page 7.

⁴ Herlien Budiono, 2013, *Collection of Civil Law Writing in the Area of Notary: Second Book*, Citra Aditya Bakti, Bandung, page 220

fulfilled and obeyed by a notary. If that is not fulfilled, the proof value of the notarial deed will come down to the proof of private deed.⁵

The notary's liability for the deed, which is the object of the dispute, covers several aspects which include:⁶ 1) Formality of the deed, i.e. notary is absolutely liable if there is an error related to the formality of a deed; if the deed becomes private deed which causes losses to the parties, the notary must be responsible in the form of reimbursement of costs, compensation, and interest. 2) Material deeds, i.e. notaries are relatively responsible; if he is proven to have committed negligence or intentions that could cause harm to the parties or the involvement of a notary in order to benefit one party or a notary intentionally made a mistake, the notary may be a defendant or co-defendant and can be held to hold civil liability.

From a civil case point of view, a notary, as a public official who makes authentic deeds for the benefit of the parties in the deed is often used as a co-defendant to complete a lawsuit in the Court and even becomes a defendant in the event of a dispute between the parties on the deed he/ she made. Meanwhile, the deed made by the notary public is the will of the parties who agree to include it in written form as a legal act that they agree on together. So, the defendant's status makes the notary as a party who is also involved in a legal case between the disputing parties so that he/ she had to go back and forth to the Court as if the notary was the party involved in the deed.

Based on the above description, the main problem in this study is how is the legal effort for the notary who became a defendant in a civil case related to the deed he/she made? How is the strength of proof on the deed that the notary made? and What efforts have been made by the notary to defend the deed he made?

Research Method

The type of research used in this study is sociological legal research; i.e. the approach taken through the existing legislation and is associated with the facts in the field that there will be many notaries who become defendants in court against the deeds they made or with facts about the research problems. Problem approaches through research are in the form of empirical studies to find theories about the process of occurrence and the process of law in society.⁷

The legal material used in the study consists of primary, secondary and tertiary legal materials. The data collection technique is done by studying documents. Data analysis is done qualitatively and deductively as a method for drawing conclusions.

Legal Efforts for Notary Who Becomes Defendant in Civil Cases Regarding the Deed He/ She Made

The defendant is a person who is dragged into the court because he/ she is considered to have violated the plaintiff's rights. If in a claim there are many parties sued, the parties are stand for defendant I, defendant II, defendant III and so on. In addition, co-defendant is a party that is used for people who do not control the goods in dispute or are not obliged to do something; however, for the sake of its complete an action they must be included. In practice, notaries are often seized as co-defendants or defendants by parties who feel that legal actions in deeds are categorized as actions/ behaviors committed by notaries and other parties referred to in the deed. Thus, supervision of the notary is needed for this.

Supervision of a notary public is an aspect of legal protection for a notary in carrying out his/ her duties as a public official. A notary, as a natural human being, can make mistakes that are personal as well as those involving professionalism in carrying out his/ her duties. The Law of Notary Position has placed

⁵ Andre Prima Ramanda, 2015, *Responsibility of a Notary Against Deed for which the Values of Verification Are Degraded to Private Deed*, Master's Program Thesis in Notary of Andalas University, Padang, page 8.

⁶ Muhsin Makbul, 2016, *Legal Protection Against Notaries as Defendants Based on the Deed that He/ She Made*, Master's Program Thesis in Notary of Gadjah Mada University, Yogyakarta, page 75.

⁷ Zainuddin Ali, 2013, *Legal Research Methods*, Sinar Grafika, Jakarta, page 34.

a notary as a public official who runs a legal position. Therefore, the position of a notary needs to get legal protection; not a notary as a person. Legal protection, in this case, must be interpreted as protection by using legal means or protection provided by law. Protection provided by law is the protection of the rights of a notary which is the result of the transformation of interests carried out through a legislative process in a law-forming institution or parliament. So, notary rights can be obeyed, protected and respected.⁸

In order for legal protection against a notary to be carried out effectively, it requires legal efforts which include non-judicial legal efforts that are justified by the rules to be carried out or legal efforts through judicial ways. Non-judicial efforts include preventive legal measures so that violations of the rights of the notary can be avoided by giving warnings, reprimanding, objections, complaints to executive officials. On the other hand, if a violation has occurred, legal efforts are not preventive but are corrective because the aim is to correct the consequences that occur because of the actions committed by violators of rights. Corrective efforts can be non-judicial because they involve non-judicial institutions; for instance, state administration officials. Meanwhile, the other is corrective legal efforts carried out by judicial institutions so that it is included in the law enforcement process.⁹

Legal protection provided for Notary Position is regulated in Article 66 of the Law of Notary Position. This article regulates the formation of a Notary Honorary Assembly consisting of notary representatives, government and academics who function as legal protection institutions for Notary Position related to deeds made by or before him/ her. Meanwhile, if he is dragged into a co-defendant or defendant in a civil case related to the deed that he/ she has made, the provisions of Article 66 of the Law of Notary Position do not apply or it does not require the approval of the Honorary Board of Notaries. Provisions in Article 1865 of the Civil Code state that if someone postulates the existence of a right, that person is obliged to prove the existence of this right. Conversely, if someone denies the existence of a right that points to an event, the person who denies it is obligatory to prove the existence of the event. In addition, Article 50 of the Criminal Code states "Whoever commits an act to carry out the provisions of the Law, he/ she will not be convicted". Notary position protected by the Honorary Board of Notaries only serves to protect the position of a notary not a personal notary. Thus, when a notary performs or is suspected of committing an act that is detrimental to another person, specifically in a civil case and according to the law, he/ she is obliged to prove it.

Thus, legal efforts that the notary can do if the parties in the deed harm him/ her and his/ her position by dragging the notary into the defendant or participating in the case, to protect themselves and their position, the notary may do a number of ways. First, it is done before there is a decision from the court; in a sense, it is performed before the verification phase in the District Court. This is in line with the decision of the Supreme Court No. 239K/SIP/1968. According to the ruling, the reconciliation lawsuit can be submitted during the answer process because Article 132b paragraph (1) and Article 158 *Reglement Buitengewesten* only mentions answers while replication and duplication are answer too even though not the first answer. It is the same as the decision of the Supreme Court No. 642K/SIP/1972 that the submission of the reconciliation lawsuit was still opened until it entered the process of examining witnesses.

Article 132a *Herziene Indonesische Reglement* contains an affirmation that the defendant in every civil case has the right to file a claim for reconciliation. This also applies if a claim involves a notary as a co-defendant. Therefore, based on the article, the notary may make legal efforts to defend his/her interests by making a reconciliation lawsuit. This is in accordance with Article 132 paragraph (1) *Herziene Indonesische Reglement*: the claim filed by the defendant is a form of retaliation against the claim filed by the plaintiff against it. The defendant's claim was submitted to the District Court at the time the claim was filed by the plaintiff. This lawsuit means a counter-lawsuit directed by the defendant to the plaintiff. In this case the plaintiff stands for the plaintiff's convention at the same time. He is domiciled to be the defendant for the reconciliation of the reconciliation lawsuit and vice versa.

⁸ Sjaifurrachman dan Habib Adjie, 2011, *Aspect of Notary Liability in Making the Deed*, Mandar Maju, Bandung, page 231.

⁹ Harjono, 2008, *Constitution as a House of Nations, Secretariat General and Registrar's Office of the Constitutional Court*, Jakarta, page 386.

Furthermore, the second is after the decision in the Court by the Panel of Judges which is related to the case at hand. So, legal protection that can be carried out by a notary is by carrying out ordinary legal action through the court in the form of an appeal to the High Court, appeal to the Supreme Court or a review to the parties if the decision is detrimental to the Notary as an official in making authentic deeds since it relates to in Article 1865 of the Civil Code. It states that if someone postulates the existence of a right then that person is obliged to prove the existence of that right. Conversely, if someone denies the existence of a right that points to an event, the person who denies it is obligatory to prove the existence of the event.

Then, the *verstek* verdict is the decision handed down by the Panel of Judges without the presence of the defendant and without a valid reason even though he/ she has been formally and appropriately summoned to come to the trial. So, he/ she still given the opportunity to defend his/ her interests for the negligence of attending the previous trial. Then, the defendant who is defeated by the *verstek* decision and did not accept the decision could file a resistance (*verzet*) against the decision. Resistance (*verzet*) to *verstek* is submitted and checked with regular session. It is the same as a civil suit with a period of 14 (fourteen) days after the date of notification of the *verstek* decision to the original defendant if the notification is directly submitted to the concerned person him/ herself. According to Article 391 of the *Herziene Indonesische Reglement*, if the decision is not immediately notified to the defendant and when the defendant is present during the *aanmaning*, the grace period will arrive on the eighth day after the *aanmaning* (warning). When the resistance (*verzet*) has been submitted to the Chair of the District Court, the work in carrying out the *verstek* decision is delayed unless it has been decided that it can be carried out even if there is resistance (*uitvoerbaar bij voorraad*). If the decision of the *verstek* has been decided for the second time, the next resistance submitted by the defendant cannot be accepted according to what is stipulated in Article 129 paragraph (3) to paragraph (5) *Herziene Indonesische Reglement*/ Article 153 paragraph (3) to paragraph (5) *Reglement Buitengewesten*.

Resistance (*verzet*) is associated with a *verstek* decision which means that the defendant attempts to fight the *verstek* decision or the defendant opposes the *verstek* decision with the aim that the re-examination is carried out thoroughly against the decision in accordance with the applicable inspection process. It was accompanied by a request that the *verstek* decision be canceled and at the same time request that the plaintiff's claim be rejected because it closed the appeal against the *verstek* decision. Therefore, appeals against him/ her are formally flawed and as such they are not acceptable. In the Circular Letter of the Supreme Court No. 9 of 1964, it is affirmed that appeals filed against *verstek* decisions are not acceptable because legal remedies against *verstek* are *verzet*.

Strength of Proof of Notarial Deed

The strength of perfect proof contained in an authentic deed is a combination of several evidentiary strength and requirements contained in it. There are three types of strength of proof from the notarial deed as follows:¹⁰

1. The strength of outward proof (*uitwendige bewijskracht*)

It is a strength of proof which means the ability of the deed itself to prove itself as an authentic deed. This capability, based on Article 1875 of the Civil Code, cannot be given to deeds that are made privately. The deed that has been privately made is valid only, as actually originating from the party/ to whom the deed is used; if the party who signed it acknowledges the truth of the signature or in a lawful manner that has been recognized by the person concerned. Meanwhile, authentic deeds prove their validity (*acta publica probant sese ipsa*), a deed that appears as an authentic deed means that it signifies itself from outside and from its words as a public official. So, the deed to each person is considered an authentic deed until it can be proven that the deed is not an authentic deed.

¹⁰ Habib Adjie, 2015, *Nullification and Cancellation of Notarial Deed*, PT Refika Aditama, Bandung, page 18.

2. The strength of formal proof (*formale bewijskracht*)

It is a certainty that an event and fact in the deed is actually carried out by a notary or explained by the parties. It means that the official concerned has stated in the writing as stated in the deed and apart from that the truth of what was described by the official in the deed is what he/ she did and witnessed in that position. In a formal sense, as long as it is about official deeds (*ambtelijke acte*), the deed proves the truth of what is witnessed, i.e. that which is seen, heard, and also carried out by the notary him/ herself as a public official in carrying out his/ her position. In private deed the strength of this proof only covers the fact that the information is given if the signature stated in the deed under the hand is recognized by the person who signed it or is considered to have been recognized according to the law. In a formal sense, it guarantees the truth/ certainty of the date of the authentic deed, the truth of the signature, the identity of the concerned people, and the place of deed was made. Authentic deeds apply to each person, i.e. what is there and above their signature. However, there are exceptions or denial of the strength of this formal proof. First, the denial can admit directly that the signature affixed to the deed is not his/ her signature. Second, the denial can state that the notary, in making a deed, made an error or mistake, but the denial did not deny the signature contained in the deed. It means that the denial does not question the deed formality but questions the substance of the deed. To prove this according to the law, it can use everything that is in the formal legal corridor of proof.

3. The strength of material proof (*materiele bewijskracht*)

It is a certainty that what is stated in the deed is a valid proof of the parties making the deed or those who get the rights and apply to the public, unless there is evidence to the contrary. It means that an authentic deed not only proves the reality, but the contents of the deed are considered as the right thing for everyone, who ordered to make the deed as proof of it. Thus, regarding the contents, authentic deeds apply as true, have certainty as a matter of fact, and become legally proven among the parties. Therefore, if it is used before the Court, it is sufficient and the judge is not permitted to ask for another proof other than the authentic deed. The judge is bound by authentic evidence because if it is not so, people will question the usefulness of the law designates officials assigned to make an authentic deed as evidence if the judge can simply override the deed made by the official.

Efforts Made the Notary to Defend the Deed that He/ She Made

The efforts made by the notary to defend the deed that he/ she made are divided into 2 (two) types as follows:

1. The efforts of the notary in defending the deed that he/ she made before the lawsuit occurred in the Court are:
 - a. Carefully verify the subject and object data from the appearer.

The purpose and objective of verifying is to examine subject data from the parties whether or not they are authorized and capable of carrying out legal actions so that they can fulfill the legal requirements of a deed; for instance, whether the party that will make the deed is at least 18 (eighteen) years old or married, according to Article 39 paragraph (1) letter a Law of Notary Position. Meanwhile, part of the process of validating object data is a part of the process of examining object documents carried by an appearer for example checking land certificates to the National Land Agency; whether or not the certificate is an original or fake certificate or the truth of the ownership (appearer) toward the certificate.

- b. Give a grace period for authentic certificate making.

To produce a good deed, the notary should provide a grace period in the process of making the deed so that it is not rushed and can work carefully and thoroughly in order not to cause errors in the

notarial deed because there are many deeds in question because the words are written vaguely or raises multiple interpretations.

- c. Meet all technical requirements for making notarial deeds.

To make a notarial deed that is far from an indication of legal problems, the notary must certainly fulfill the formal requirements and material requirements of the notarial deed. Based on the Law of Notary Position, formal requirements in making deeds are regulated in Article 38 while the material requirements that must be fulfilled in making authentic deeds are regulated in Article 1320 of the Civil Code.

- d. Participate in seminars and trainings to improve the quality of resources in carrying out the position of notary.

It is carried out by attending seminars and trainings by notary organizations or other educational institutions related to the world of notary in terms of following the progress of the times and the development of legal science.

2. The efforts of the notary in defending the deed that he/ she made after a lawsuit in the court are:¹¹

- a. Using the right of refusal (*verschoningrecht*) and obligation of refusal (*verschoningsplicht*) owned by a notary.

Based on the Law, a Notary can actually not be examined as a witness regarding the deed and use of the deed. In addition to the existence of infringement rights, Article 322 paragraph (1) of the Criminal Code and Article 170 paragraph (1) of the Criminal Procedure Code also explains the obligation to keep secrets of office, so that he/ she can be released from being a witness. A notary can only be a witness to a crime that is suspected of someone who committed or happened before a notary. The privilege is also regulated in Article 1909 paragraph (3) of the Civil Code and Article 322 of the Criminal Code, therefore, every notary must keep the contents of the deed confidential and information obtained in making a notarial deed, unless instructed by law. In a civil case, it seeks formal truth (*formele waarheid*) from a deed. It means if a notary is summoned as a defendant in court regarding the deed made before him/ her, the notarial deed is in principle sufficient (to represent) him/ her to be used as evidence. Thus, the presence of the notary is no longer needed.

- b. Conducting a back suit against the party suing the notary.

The notary must be able to prove that the deed he/ she made has the strength of perfect proof that does not violate the provisions of Article 84 of the Law of Notary Position by carrying out resistance and explanation that the deed he made is based on the request of the parties in accordance with the procedure for making a deed; i.e. to prove the truth of the act from the outward, formal and material aspects as an attempt by the notary to defend the rights and obligations of the notary in carrying out his/ her position in relation to the deed made before the notary. In this case, the notary believes that the deed he/ she has made is in accordance with the laws and regulations and the code of ethics of the notary office that applies so that the counterclaim is the right of the notary to defend him/ herself from the lawsuit filed by the plaintiff against him/ her.

¹¹ Khairulnas and Leny Agustan, 2018, *Guide to Notary/ Conveyancer in the Face of Civil Lawsuits*, UII Press, Yogyakarta, page 44.

Conclusion

Based on the description of the results of the research conducted by the author, the following conclusions can be drawn:

1. That the provisions of Article 66 of the Law of Notary Position do not apply to notaries who become co-defendants or defendants in civil cases; i.e. there is no need for approval from the Notary Honorary Assembly by the court to summon a notary to the court because suing the claim is the right and obligation of every civilian. So, in order to protect themselves and positions, there are several legal efforts that can be taken by notaries: The first is before the stage of verification in court by making a claim of reconciliation to the plaintiff. Second is after there is a verdict by the Panel of Judges by carrying out an ordinary lawsuit such as filing an appeal to the High Court, appealing to the Supreme Court and judicial review, and legal remedies against the Judge's *verstek* decision.
2. The strength of proof of the notarial deed is divided into 3 (three) types: the strength of outward proof (*uitwendige bewijskracht*), the strength of formal proof (*formale bewijskracht*), the strength of material proof (*materiele bewijskracht*).
3. The efforts made by the notary to defend the deed he/ she made are divided into 2 (two) types: First is the effort of the notary to defend the deed he/ she made before the lawsuit in court, such as verifying the data of the subject and object appearances carefully, giving a grace period authentic deed, fulfilling all technical requirements for making notarial deeds, and attending seminars and trainings to improve the quality of resources in carrying out the position of notary. The second is the effort of the notary in defending the deed that he/ she made after the lawsuit in court, such as the use of infringement rights and infidelity obligations held by the notary and making a counter-claim against the party suing the notary.

Suggestion

1. It is expected that the government returns the authority to supervise, guide and protect the notary to the District Court as a rule prior to the coming into force of the Law of Notary Position. Thus, the notary position and authority, as the official of the perfect evidence, can be protected from claims involving the substance of the deed made other than the lawsuits concerning the formal aspects of making the deed set out in the Law of Notary Position to make an authentic deed.
2. It is suggested to the notary to be more careful, careful and thorough in applying the legal rules which he/ she would include in the deed and always be aware of the legal consequences arising from each deed he/ she made because the notarial deed is an authentic deed that has perfect strength of proof.
3. It is suggested to the notary that before the process of making a deed and agreeing to receive a request for a deed for the parties, the notary should first be able to provide legal counsel to the appearers in accordance with the deed they wish to make with the knowledge of the deed that he/ she has.

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