



# JLPH: Journal of Law, Politic and Humanities

E-ISSN: 2962-2816  
P-ISSN: 2747-1985<https://dinastires.org/JLPH>    [dinasti.info@gmail.com](mailto:dinasti.info@gmail.com)    +62 811 7404 455DOI: <https://doi.org/10.38035/jlph.v5i2>  
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## Legal Study of Nominee Agreements in Villa Business Management: Perspectives of Decision No. 129/Pdt.G/2021/PN. Amp

Elvira Triana Putri<sup>1</sup>, Surahmad<sup>2</sup>.

<sup>1</sup>Universitas Pembangunan Nasional “Veteran” Jakarta, Jakarta, Indonesia, [elviratriana99@gmail.com](mailto:elviratriana99@gmail.com).

<sup>2</sup>Universitas Pembangunan Nasional “Veteran” Jakarta, Jakarta, Indonesia, [surahmad@upnvj.ac.id](mailto:surahmad@upnvj.ac.id).

Corresponding Author: [elviratriana99@gmail.com](mailto:elviratriana99@gmail.com)<sup>1</sup>

**Abstract:** In Indonesia, foreigners' land ownership is restricted by law. However, in practice, some foreigners legally own Indonesian land through a nominee agreement. This study aims to find out the importance of understanding legal protection for the parties involved in the nominee agreement, as well as the judge's considerations in deciding the case of villa business management with a nominee agreement in Decision No. 129/Pdt.G/2021/PN. Amp. The research method used is normative juridical which involves the analysis of regulations and cases related to land ownership by foreigners through nominee agreements, and through literature studies and data access through journals, as well as the Internet. The results of this study show that the form of protection for the parties involved in the nominee agreement is that the interests of the parties can be protected if there is a basis to prove when negligence occurs as a result of a legally made agreement. Then the judge's consideration in Decision No.129/Pdt.G/PN. Amp is indeed in accordance with the provisions applicable in Indonesia, but there is still a void regarding the regulation of ownership of land and buildings on it which if not regulated in the decision will have the potential to cause illegal control by foreign citizens.

**Keyword:** Judge's Consideration, Legal Protection, Nominee Agreement.

### INTRODUCTION

Indonesia is a promising market for investors who want to invest in various sectors (Gita et al., 2024). There are several factors that underlie Indonesia as the best place to invest in property in Asia, namely political and economic stability as well as government policies that participate in increasing investor interest in the property sector in Indonesia. According to Ardiansyah & Solihah, (2020), there is a general view from many foreign countries that Indonesia has great potential as a promising investment area, driven by abundant natural resources and the quality of human resources which are considered important assets in driving global economic growth, making this country attractive to foreign investors who see great opportunities for future

economic development. This situation encourages both foreign and domestic investors to invest in Indonesia, especially in the property sector.

The Ministry of Investment/BKPM (2024) stated that the realization of investment in Indonesia in the housing, industrial estate, and office sectors reached Rp 29.4 trillion. Of this amount, Domestic Investment (PMDN) was recorded at Rp 15.19 trillion with 6,324 projects, while Foreign Investment (FDI) investment reached 946.4 million US dollars or equivalent to Rp 14.19 trillion (with an exchange rate of Rp 15,000), involving 6,208 projects (Lusia Raras, 2024). Overall, the property sector occupies the fourth largest position in investment realization in Indonesia in the first quarter of 2024. This figure reflects the strong interest of foreign investors to invest in the domestic property market, driven by economic growth and promising market prospects.

However, behind this increasing investment interest, there are concerns about investment practices by foreign nationals that override the applicable laws in Indonesia. One of them is legal smuggling carried out by foreign nationals to build a villa in Indonesia. In Indonesia, all existing property ownership is fully owned by the state in order to achieve the prosperity of the people, as stated in Article 33 Paragraph (3) of the 1945 Constitution which states that (Indonesian government, 1945):

"(3) The earth and water and the natural resources contained therein are controlled by the state and used for the greatest prosperity of the people."

In addition, basically, there are several limitations on the use of land in the social function of land, which are listed in Article 9 of the Basic Agrarian Law (UUPA), namely:

"(1) Only Indonesian citizens may have a full relationship with the earth, water and space, within the limits of the provisions of articles 1 and 2.

(2) Every citizen of the Indonesian state, both men and women, has the same opportunity to acquire a right to land and to benefit from the results, both for themselves and their families."

The article explains that the right for the Indonesian people to enjoy full ownership of land is prioritized over granting ownership rights to foreign citizens, so that foreigners are only allowed to enjoy the right to use land in this country, no more (Sridinata & Lukman, 2022).

In this case, because there are limitations for foreign nationals on the ownership of land Title (HM) as stipulated in Article 9 and Article 21 Paragraph (1) of the UUPA, which reads:

"(1) Only Indonesian citizens can have property rights."

Where in this article strictly prohibits the ownership and control of land by foreigners, there are efforts to circumvent these rules, one of which is by using the name of an Indonesian citizen to buy land with property rights status, while the funds used actually come from foreigners, which is called a nominee agreement or a name loan agreement (Sekarmadji et al., 2022).

A nominee agreement or better known as a name lending agreement is one of the nominal agreements or unnamed agreements that are basically unknown to the Civil Code (KUHPPerdata, 1847), but are developing in Indonesian society (Amalia & Ma'ruf, 2021). According to Diva & Marzuki, (2024), in this agreement, a foreign citizen (WNA) acts as a power of attorney and owner of money while an Indonesian citizen (WNI) who is his partner is appointed as a power of attorney to buy a piece of land on his own behalf. The practice of nominee agreements allows foreign investors to control the company without violating the share ownership provisions stipulated in the law (Pandin et al., 2024). In the common law legal system, the concept of a nominee structure is known that allows the ownership of an object for and on behalf of others, but Indonesia, which adheres to the civil law legal system, does not recognize nominee agreements, so this agreement can be considered legal smuggling used by foreigners to obtain land ownership (Putra, 2022).

Nominee agreements are also explained in previous research compiled by oleh Febrina & Sudiro, (2024), where the study found that a nominee agreement by a foreign citizen to control land in Indonesia is an act that is contrary to national law, especially Article 26 Paragraph (2)

of the Law and Article 1320 of the Criminal Code. The study also states that the nominee agreement has no legal force even though it is made in the form of a notary deed. In addition, in a study compiled by Irawan et al., (2024) also stated that parties involved in the nominee agreement can be subject to civil liability, including Indonesian citizens whose names are borrowed. Then, according to Sari et al., (2021) found findings that the practice of nominee agreements is a form of legal smuggling that aims to circumvent restrictions on land ownership by foreigners in Indonesia, so that it can pose a risk of legal disputes, especially if there is a sale and purchase without the knowledge of the parties involved.

One example of a case regarding foreigners' ownership of land in Indonesia using a nominee agreement is the Amlapura District Court Decision Number 129/Pdt.G/2021/PN. Amp. In this case, PS or known as S bought four plots of land located in Purwakerti Village, Bali starting with a debt and receivables agreement between PS and IGA before PPAT, where PS is the creditor and IGA is the debtor. In the agreement, both parties have agreed that the Loan Return can only be done by the Sale of the Land Object to be purchased, on the grounds that IGA's financial limitations do not allow it to pay off its debt except by selling the Land Object to be purchased, IGA also agreed to pledge the land to PS.

The implementation of the sale and purchase or the making of the sale and purchase deed is also made in front of the local notary and PPAT. Then, on the purchased land, an inn building was built with a tourist lodging permit with the name "Lily Amed Bungalows", where IGA was in charge and PS was the funder. Based on the previous debt and receivables agreement, both parties agreed to sign Deed No. 1x in the form of a statement of name loan agreement or nominee agreement which basically states that the object of dispute or villa building on the land purchased through IGA belongs to PS. Also, the issuance of Deed No. 2x regarding power of attorney, namely the granting of power of attorney from the Plaintiff to the Defendant to sell the Object of Dispute, determine the selling price, sign the deed and all actions that can be taken by a legal "Owner" over the Object of Dispute. Based on the Power of Attorney and the statement, as well as the submission of the original Certificate to PS, PS can control and manage the villa as befits an entrepreneur who is an Indonesian citizen and PS does not involve IGA during the control and management of the villa.

In this case, Deed No. 1x is considered to be contrary to Article 21 Paragraph (1) of the UUPA, so it is also contrary to the 4th (fourth) element of Article 1320 of the Civil Code where the Article reads:

1. the agreement of those who bind them;
2. the ability to make an alliance;
3. a specific subject matter;
4. A cause that is not forbidden."

If an agreement does not meet one of the elements in the article, then the agreement is invalid and null and void. Based on the case, IGA and PS were proven to have committed legal smuggling through a nominee agreement to control a plot of land and buildings on it so that PS or foreign nationals could do business in Indonesia.

In addition, IGA filed a lawsuit on the basis of feeling disadvantaged because during the control of the villa by PS, IGA could not enjoy the results of PS's business. IGA demanded that PS compensate for losses of Rp. 4,800,000,000 (four billion eight hundred million rupiah) which was calculated based on monthly income and the length of its ownership. However, in consideration, the judge decided to reject the IGA lawsuit and instead sided with PS as a foreign citizen. In the judge's consideration, there was an injustice for IGA as an Indonesian citizen where IGA should have the right to have its lawsuit accepted. Therefore, the author is interested in researching this matter with the title "Legal Study of Nominee Agreements in Villa Business Management: Perspectives of Decision No. 129/Pdt.G/2021/PN. Amp". This study has limitations on how to protect the law for the parties involved in the nominee agreement on the

management of the villa business in Decision No. 129/Pdt.G/2021/PN. Amp, as well as how the judge considered in deciding the case of villa business management with a nominee agreement in Decision No. 129/Pdt.G/2021/PN. Amp.

## **METHOD**

Normative law research is legal research that lays down law as a building of a norm system. The norm system in question is about the principles, norms, and rules of laws and regulations, court decisions (Rifa'i et al., 2023). The author uses a legislative approach by examining all laws and regulations related to the legal issues being handled. In addition, the author also uses a case approach which is an approach by examining cases that are related to the issue being faced and have become court decisions and have permanent legal force, where this research will refer to Decision No. 129/Pdt.G/2022/PN. Amp.

Data collection is in the form of legal materials, namely primary legal materials, namely the Civil Code, Law No. 5 of 1960 concerning basic regulations on agrarian principles, and the Amlapura District Court Decision Number 129/Pdt.G/2021/PN (Indonesian government, 1960). Amp and secondary legal materials are in the form of literature books, journal articles, previous research results published in theses, theses and dissertations, opinions of experts competent in their fields, to data and releases from assessment institutions that can be used to support this research.

## **RESULTS AND DISCUSSION**

### **Legal Protection for the Parties Involved in the Nominee Agreement for the Management of the Villa Business in Decision No. 129/Pdt.G/2021/PN. Amp**

An agreement is a process of interaction or legal relationship and two legal acts, namely an offer by one party and acceptance by the other party so that an agreement is reached to determine the content of the agreement that will bind both parties (Sumriyah & Djulaeka, 2023). The meaning of an agreement is also explained in Article 1313 of the Civil Code which explains that: "An agreement is an act in which one or more persons bind themselves to one or more other persons." From Article 1313 of the Criminal Code, it is explained that in essence an agreement is said to be a form of act that gives birth to an agreement between at least two people who make the promise.

The birth of an agreement is based on the agreement of the parties' will, where the agreement of the will is the agreement of the parties on the subject matter of the agreement and the terms specified in the agreement (Hartono & Prananingtyas, 2023). This refers to 4 (four) conditions for the validity of the agreement regulated in Article 1320 of the Criminal Code which contains an important element, namely the agreement between the two parties. In addition, it is also in line with Article 1233 of the Criminal Code, which states that: "Every alliance is born either because of consent, because of the law." However, basically an agreement is not just a legal relationship carried out by both parties reciprocally (bilaterally) or not (unilateral), but the agreement also prioritizes how the agreement is formed based on the will or desire of the parties who make the agreement to bind themselves (Lubis, 2021).

With the agreement between the parties, it is clear that the rights and obligations for them or it is also commonly referred to as the contract has been obligatoir, namely since the occurrence of the agreement, the rights and obligations of the parties have arisen (Hifni, 2024). The determination of these rights and obligations aims to ensure that each party has clear guidance in carrying out their respective responsibilities in accordance with the content of the clauses outlined in the agreement based on the agreement between the two parties.

However, in fact, humans are never spared from negligence, either intentionally or unintentionally. Even though the rights and obligations have been stipulated in the agreement, often one of the parties does not fulfill or carry out its achievements or is commonly referred

to as default or a circumstance due to negligence or fault, the debtor cannot fulfill the achievements as specified in the agreement (Wewo & Wewo, 2023). Civil lawsuits are not only tort lawsuits, but there are also lawsuits for unlawful acts. Basically, a lawsuit for unlawful acts must be filed differently from a lawsuit for default. Unlawful Acts (hereinafter referred to as PMH) is regulated in article 1365 of the Civil Code which reads "every act that violates the law and causes harm to another person, obliges the person who caused the loss due to his fault to replace the loss." From the sound of the article, elements of PMH can be drawn, including: the existence of unlawful acts; there is an error; there is a causal relationship between loss and action (causality); and the existence of losses (Wardani, 2020). In legal theory, unlawful acts refer to actions that violate the rights and obligations recognized by civil law, and thus form the legal basis for claims for damages (Halipah et al., 2023).

One of the cases that exists is Decision Number 129/Pdt.G/2021/PN. Amp. In the decision, PS (Defendant) purchased four plots of land located in Purwakerti Village, Bali (hereinafter referred to as the Object of Dispute) starting with a debt and receivables agreement between PS and IGA (Plaintiff) before PPAT, where PS is the creditor and IGA is the debtor. IGA used the object of the dispute to build a villa building with the name "Lily Amed Bungalows" which was originally managed by IGA itself. During its management period, IGA met with PS to cooperate by signing Deed No. 1x on the Statement which essentially contains a statement that the villa building belongs to PS, which is contrary to the 4 (four) conditions of Article 1320 of the Criminal Code, this statement is said to be a nominee agreement. The nominee agreement in the land sector is to provide the possibility for foreigners to own land that is prohibited by the UUPA by "borrowing the name (Nominee)" of Indonesian citizens in buying and selling or building a business as in the case of the decision (Hetharie, 2019). In addition, the parties also signed Deed No. 2x concerning IGA giving power to PS to sell the object of dispute.

Because after giving power of attorney to PS, IGA considers PS to be very disadvantaged because it cannot enjoy the results of IGA's business as long as the villa is managed by PS. The loss is calculated based on the villa's business income for 1 (one) month when IGA is still managing the villa as much as Rp. 40,000,000 every month. If added up to the duration of PS holding, which is for 10 years, the total loss is Rp. 4,800,000,000. So in this case, IGA submitted to the Amlapura District Court regarding the compensation claims that must be fulfilled by PS to IGA through its calculations. Basically, the filing of a lawsuit by IGA is appropriate if the nominee agreement made by the two parties contains the distribution of the proceeds of the villa business built on the object of the dispute.

In this case, the interests of the parties can be protected if there is a basis to prove the negligence, because one of the consequences of an agreement that is legally made is that the agreement will apply as a law to those who make it, as this refers to Article 1338 paragraph (1) of the Civil Code. The right to request the cancellation of the agreement, demand restoration, and even the right to demand compensation is the right of the parties who feel aggrieved, while the other party who has already received achievements from the other party is obliged to return it (Hidayat & Risky, 2023). Based on the above case, the form of legal protection for IGA is in the form of filing a lawsuit for compensation to the court because they feel aggrieved because they do not benefit from the management of the villa business established on the object of dispute. Based on Article 571 of the Criminal Code which states that: "Ownership of a piece of land includes the right to ownership of everything on and in the land. On a piece of land, the owner may cultivate all plants and erect buildings of his will, this does not reduce the exceptions in Chapters IV and VI of this book." In essence, the article explains that the land and buildings on it are an inseparable unit. So legally the object of the dispute is the property of IGA. Thus, the building also belongs to IGA, and PS has no right to fully manage the villa. During the court proceedings, all parties are entitled to the same legal protection in the eyes of the law as guaranteed in Article 28D Paragraph (1) of the 1945 Constitution, which reads:



"Everyone has the right to fair legal recognition, guarantee, protection, and certainty as well as fair treatment and equal treatment before the law." Similar to the case in the above decision, the defendant also has the right to file a lawsuit for compensation with considerations from different aspects. This is based on Article 1246 of the Criminal Code, which states that: "Costs, damages and interest, which may be claimed by the creditor, consist of the losses he has suffered and the profits that he could have earned, without prejudice to the exclusions and changes mentioned below." The defendant considered the losses based on the value of the loan for the purchase of four land objects, the interest rate of the loan for 12 years (6% per year), the cost of building Lily Amed Bungalows, maintenance costs for 10 years (120 months), and maintenance costs and staff salaries per month, where the total loss felt by the defendant was Rp. 7,008,000,000.

### **Judge's Considerations in Deciding the Nominee Agreement Case in Decision No. 129/Pdt.G/2021/PN. Amp**

Judicial power according to the Indonesian constitutional system is an independent power exercised by a Supreme Court and the judiciary under it, and by a Constitutional Court, to organize the judiciary to uphold law and justice (Suherman, 2019). As state officials, judges have an important role and function in realizing the principles of the rule of law, such as respecting the human rights of others (Arifin, 2023). In Indonesia, the embodiment of judicial power is clearly regulated in Law of the Republic of Indonesia number 48 of 2009 concerning Judicial Power (Indonesian government, 2009). Judges in examining civil cases are passive in the sense that the scope or subject matter of the case submitted to the judge for examination is basically determined by the parties to the case and not by the judge (Afriana et al., 2022).

However, even though the civil procedure law puts judges in a passive position, the judge's consideration in each case is still a key factor. For example, in deciding Decision No. 129/Pdt.G/2021/PN. Amp, the judge must still make considerations to ensure justice for the parties. In the decision, the judge considered several things, namely:

1. Decision No. 129/Pdt.G/2021/PN. Amp has fulfilled the elements of the same demand as explained in Article 1917 Paragraph (2) of the Criminal Code that:

- "1. The demand is based on the same reason;
2. Submitted by and against the same parties; and
3. In the same relationship."

Based on these provisions, if it is associated with the lawsuit filed by the Plaintiff which has permanent legal force in the Amlapura District Court Decision Number: 257/Pdt.G/2019/PN Amp dated May 5, 2020 jo Denpasar High Court Decision Number: 101/PDT/2020/PT DPS dated September 7, 2020, this lawsuit has fulfilled the elements of *ne bis in idem* or *res judica*.

2. Deed No. 1x dated December 12, 2011 and Deed No. 2x dated December 12, 2011 are declared null and void. Deed Number 1x is about a Nominee Agreement (nominee agreement) which includes an anonymous agreement that is not known in Indonesian civil law, such an agreement is an invalid agreement because it is an *unhalal causa* so that the conditions for the validity of the agreement as referred to in Article 1320 of the Civil Code are not met, so based on these considerations the Notary Deed Number 1x dated December 12, 2011 is invalid and null and void and Deed Number 2x dated December 12, 2011 is a Deed of Absolute Power of Attorney as referred to by the Instruction of the Minister of Home Affairs Number 14 of 1982 concerning the Prohibition of the Use of Absolute Power of Attorney as a Transfer of Land Rights, because the nature of this power of attorney is independent and not an assessor agreement or an agreement accompanying the principal agreement, an Absolute Power of Attorney that cannot be withdrawn in the sale of land rights is an invalid power of attorney so it must be declared null and void.

In this case, in decision No. 129/Pdt.G/2021/PN. The judge decided not to accept the plaintiff's lawsuit and accepted the defendant's exclusion by considering that the plaintiff's lawsuit was a Ne Bis In Idem lawsuit which in the a quo case was the same as the Amlapura District Court decision case No. 257/Pdt.G/2019/PN. Amp, corroborated by the Denpasar High Court Decision No. 101/PDT/2020/PT. DPS which is basically the same lawsuit filed. Therefore, the judge considered that the previous decision had permanent legal force because no legal remedies had been filed again.

However, in Decision No. 257/Pdt.G/2019/PN. The judge had different considerations in deciding the case of the decision, where the judge considered rejecting the plaintiff's lawsuit and rejecting the defendant's exclusion on the grounds that in the plaintiff's lawsuit there were 2 different legal interests, where on the one hand the plaintiff asked for a stipulation regarding ownership so that the defendant's control of the disputed object land was invalid and unlawful but on the other hand the plaintiff wanted to declare the invalidity of Deed Number 1x and Deed No. 2x arising as a result of an agreement between the Plaintiff and the Defendant. In this case, the Judge argued that in the Plaintiff's lawsuit there was a merger between Default and Unlawful Acts, while based on the Supreme Court's decision No.879K/Pdt/1997 dated January 29, 2001 explaining that the merger of PMH and Default in one lawsuit violated the order of procedure because both had to be resolved separately, the Panel was of the opinion that the Plaintiff's lawsuit was unclear/vague and unacceptable. Since the lawsuit is declared vague (obscure libel), thus against the Reconvention lawsuit of the Reconvention Plaintiff according to the Assembly, the Reconvention lawsuit of the Reconvention Plaintiff will also not be considered further and declared inadmissible.

When viewed from the two decisions, there are differences that base the lawsuit on Decision No. 129/Pdt.G/2021/PN. Amp with an unlawful act where the plaintiff wants to plead with the judge to declare Deed No. 1x and Deed No. 2x null and void. Then the judge should be able to consider further for the reclaim filed by the Plaintiff.

The judge, in carrying out his duties, has acted in accordance with his authority by considering various aspects relevant to the case. The judge's considerations in this case seem quite profound, including ruling that the deeds in question are null and void. However, even though there has been a ruling declaring the deeds null and void, the court decision still seems to leave a legal vacuum regarding the status of land ownership and buildings on it. With the cancellation of the deed without clarity regarding ownership, the decision has the potential to cause uncertainty for interested parties.

The gaps in this decision, especially related to the status of land and building ownership, are loopholes that can cause problems in the future. By simply declaring that the deeds are null and void, but do not specify who has the right to land and buildings, the judge risks leaving room for further disputes to arise. Supposedly, after declaring the deeds null and void, the judge may consider describing the ownership status of the object of dispute, so that there is no confusion or potential conflict between the parties after the judgment is rendered. This ambiguity regarding ownership status also has implications for legal certainty, which should be the main goal in any court decision. The parties need clarity not only regarding the validity of the deed, but also regarding which party legally owns the rights to the land and buildings that are the object of dispute. Without this clarity, further legal proceedings may be required to determine ownership, which means additional time, cost, and effort for the parties. Therefore, further consideration from the judge regarding the status of ownership can help achieve more comprehensive justice and avoid the occurrence of protracted disputes.

## **CONCLUSION**

The practice of nominee agreements allows foreign investors to control the company without violating the share ownership provisions stipulated in the law. Legal protection in the nominee

agreement in the case of Decision No. 129/Pdt.G/2021/PN. Amp allows both the Plaintiff and the Defendant to seek damages if it can prove negligence. The Plaintiff felt aggrieved by the loss of potential profits from the management of the villa, while the Plaintiff filed a claim for investment and maintenance costs. In accordance with Article 1338 and Article 1246 of the Civil Code, this agreement provides the right for the party who feels aggrieved to seek compensation. The agreement contained in the Decision involves the use of a third party's name for asset ownership in Indonesia. As a result, the deed of agreement was declared null and void because it was contrary to the legal conditions of the agreement as stipulated in Article 1320 of the Civil Code.

In Decision No. 129/Pdt.G/2021/PN. Amp, the judge could not accept the Plaintiff's lawsuit, that the Plaintiff's lawsuit was *ne bis in idem*, considering that this case had been decided with permanent legal force in Decision No. 257/Pdt.G/2019/PN. Amp. The judge also stated that the deeds in question were null and void, because they violated the provisions of the law related to the agreement. However, even though the deeds are declared null and void, these rulings do not provide clarity on the status of ownership of the disputed land and buildings, thus creating legal uncertainty and potential disputes in the future. Clarity regarding the parties who are entitled to land and buildings should be further considered by the judge to achieve comprehensive legal certainty for the parties involved.

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