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Application of The Principle of Notary Caution In Handling The Legalization of Rental Agreements Towards Mortgage Right Objects

Muhammad Tanzilul Furqon^{1*}, Sri Wahyu Jatmiko²

¹Fakultas Hukum Universitas Narotama, Indonesia, muh.tanzilulfurqon805@gmail.com

²Fakultas Hukum Universitas Narotama, Indonesia, notarismamiek@gmail.com

*Corresponding Author: notarismamiek@gmail.com

Abstract: In lease agreements, the contract is established in writing. Some collateral institutions require the use of a notarial deed. Even if not mandatory, the lease agreement can still be prepared by or executed before a notary. A collateral deed prepared by a notary, as required, will naturally specify the object of the agreement. However, lease agreements often involve legalization within the contract, which frequently leads to conflicts. The question arises regarding the notary's liability when such issues occur. This research is a normative study, focusing on the notary's liability in the legalization of lease agreements involving collateral objects under the principle of prudence.

Keywords: Agreement, Notary, Principle of Prudence

INTRODUCTION

In the course of their lives, humans inevitably interact with one another in various forms. Legal relationships between individuals (as legal subjects) or between legal entities often give rise to legal acts that can be categorized as juridical acts. One such legal relationship is an agreement or contract.

If a dispute arises between the parties involved and there are no clear provisions in the agreement they have entered into, this does not mean the agreement is no longer binding on the parties or automatically null and void by law. Instead, the court may address this legal gap by interpreting the agreement to determine the applicable law.¹

In contemporary society, Notaries are regarded as public officials capable of producing legal instruments with strong evidentiary force. These instruments, known as deeds, inherently pertain to legal relationships between two parties, with their core orientation being mutual agreement.

In principle, deeds prepared by and/or executed before a Notary must be flawless and free from alterations, including revisions, additions, deletions, or insertions. The language of the deed must also comply with standardized Indonesian under the Enhanced Spelling

¹ Suharnoko, S.H.,MLi, Hukum Perjanjian Teori dan Analisa Kasus, 2024 , pRanada Melia , Jakarta hlm12

Guidelines. However, if a deed requires modification, the Notary must amend its substance. Such amendments are permissible only if the deed has not yet been signed by the parties, witnesses, or the Notary. This process of amending a deed prior to its signing is commonly referred to as *renvoi*.

Conversely, if clerical or typographical errors are discovered in the minute of the deed (the original signed copy) after it has been executed by the parties, witnesses, and the Notary, corrections must be made. In such cases, the previously signed deed must be made destroyed.²³

The notary profession was established to assist the public in providing reliable documentation, with signatures and seals that offer strong guarantees and evidentiary value. Notaries are required to act independently, remaining impartial to all parties involved in the deed. Authorized by the government, many legal acts must be formalized through a notary's services to be validated or recognized as authentic deeds.

Notarial deeds can be categorized as authentic or non-authentic. Under statutory definitions, a notarial deed is deemed "authentic" if the law explicitly designates the notary as the authorized official to prepare it. Conversely, a notarial deed is considered "non-authentic" if another public official is legally mandated to create it. Among notarial deeds, collateral deeds are frequently prepared. In such deeds, the detailed description of the collateralized object is critical for evidentiary purposes and the validity of the guarantee. If errors in the notarial deed harm third parties—for instance, if the collateralized object is later proven to belong to a third party—the matter should be resolved through legal channels.

Authentic deeds carry conclusive evidentiary weight, making them the strongest form of legal proof. Parties appearing before the notary must provide truthful statements based on actual facts and events witnessed by the notary. In performing their duties, notaries must adhere to the requirement under Article 39 Paragraph 2 of the Notary Office Law, which stipulates that the notary must personally know the appearing parties or have them identified by two identifying witnesses or two other appearing parties. Additionally, the obligation for notaries to verify the identity of parties is further detailed in Minister of Law and Human Rights Regulation No. 9 of 2017 on the Implementation of Customer Due Diligence Principles for Notaries.⁴

The regulation explicitly mandates that notaries exercise heightened caution when verifying the identity of appearing parties, recording their statements, examining the authenticity of all submitted documents, and assessing whether transactions executed before them involve money laundering. This underscores the obligation of notaries to implement the precautionary principle in their professional practice.

In practice, adhering to the precautionary principle is critical for notaries, as it ensures that authentic deeds do not lead to legal complications that could expose the notary to liability. However, notaries occasionally disregard this principle due to negligence when drafting authentic deeds, resulting in legal repercussions.⁵

This principle also applies to lease agreements executed before a notary, where the collateral object (mortgaged property) is a critical element of the agreement. If the notary fails to exercise due diligence in overseeing the contractual process, legal issues may arise, potentially harming third parties who suffer losses as a result.

² Habib Adjie. (2015). *Tafsir Tematik Hukum Notaris Indonesia Berdasarkan Undang-Undang Nomor 2 Tahun 2014 tentang Jabatan Notaris*. Bandung: Refika Aditama, h. 107.

³ Pasal 1 Ayat 7 Undang-Undang Nomor 2 Tahun 2014 tentang Jabatan Notaris,

⁴ Mandala Marthinus Mesak, (2021), *Prinsip Mengenali Pengguna Jasa Bagi Notaris Menurut Peraturan Menteri Hukum Dan Hak Asasi Manusia Nomor 9 Tahun 2017*, *Jurnal Officium Notarium* 1(2), hlm. 319.

⁵ Subekti, *Hukum Pembuktian*, Cetakan Ketujuh Belas, (Jakarta: Pradnya Paramita, 2008), hlm. 28.

Based on the background outlined above, the author formulates two research questions to be addressed in this study:

1. How is the legal accountability of Notaries regulated under Indonesian law?
2. What are the legal consequences of a Notary's liability in the legalization of lease agreements involving collateral objects, based on the principle of prudence?

METHOD

In this study, to address legal issues concerning the types of legal research methodologies, their respective characteristics, and their functions in analyzing contemporary legal problems, a literature review is employed as the foundation for answering these questions. The data used in this research is secondary data, obtained through comprehensive literature searches conducted for the study.

RESULTS AND DISCUSSION

Regulation of Notary Liability in Indonesian Law

Before being appointed as a notary, a candidate must first complete a legal education and either undergo a two-year consecutive internship or have practically worked as an employee at a notary's office. Alternatively, after completing a Master's degree in Notarial Studies, the candidate may initiate their own practice or obtain a recommendation from a notarial organization.⁶ This is done to ensure that prospective notaries understand the administrative aspects of a notary's work. Completing a Master's in Notarial Studies signifies that they have acquired theoretical knowledge, but this does not automatically certify them as experts. Therefore, it is mandatory for candidates to undergo an internship before taking the oath to become a notary.

In performing their duties, notaries possess several authorities outlined in Article 15 of Law No. 30 of 2012 concerning the Office of Notary, which include, among others:⁷

1. A Notary is authorized to create authentic deeds regarding all acts, agreements, and stipulations required by legislation or requested by interested parties to be recorded in an authentic deed. They are also authorized to:
 - Ensure the certainty of the deed's execution date,
 - Store deeds,
 - Issue official copies (grosse), duplicates, or excerpts of deeds,Provided that the creation of such deeds is not assigned or excluded by law from the authority of other officials.
2. A Notary is further authorized to:
 - a. Certify signatures and confirm the date of private agreements by registering them in a special ledger;
 - b. Record private agreements by registering them in a special ledger;
 - c. Prepare duplicates of private agreements, reproducing all written and visual elements contained in the original document;
 - d. Verify the conformity of photocopies with their original documents;
 - e. Provide legal counseling related to deed preparation;
 - f. Draft deeds related to land affairs or prepare auction reports.
3. In addition to the authorities stipulated in Paragraphs (1) and (2), a Notary holds other powers regulated under Regulation No. 2 of 2014, Article 16.

Errors in professional practice may arise from a lack of knowledge, experience, or understanding. Similarly, errors by Notaries in performing their duties often stem from

⁶ Ibid hkm 14

⁷ Pasal 15 Undang undang No 30 Tahun 2012 tentang Jabatan Notaris

insufficient knowledge of the legal or other aspects of the issues presented by clients. For certain Notaries, particularly new practitioners with limited experience in addressing client requests, mistakes in translating the client's intent into the deed are not uncommon. A Notary's failure to fully grasp the client's instructions or requests may also lead to errors in drafting the deed.⁸

Violations or errors committed by a Notary in the performance of their duties may result in harm to clients or other parties. Mistakes made by a Notary in their official capacity can affect the legal validity of the deed they produce. Specifically, such a deed may only retain legal force as a private agreement if it is signed by the parties involved. The downgrading of an originally authentic Notarial deed to a mere private agreement may obligate the Notary to provide compensation for damages. Parties harmed by such violations or errors may file a lawsuit or claim for damages against the Notary in question through the court.⁹

The legal standing of a Notarial deed, which holds evidentiary force equivalent to a private agreement, carries probative value that cannot be claimed for damages in any form. Similarly, if a deed is deemed nullified by law (*batal demi hukum*), it is regarded as never having existed or been created. Therefore, claims for costs, compensation, or interest do not arise from the deed's status itself but rather from the legal relationship between the Notary and the parties involved. This legal relationship is one whose consequences are governed by law.¹⁰

When parties appear before a Notary to formalize their actions or agreements into an authentic deed within the Notary's authority, and the Notary prepares the deed based on the parties' request, this establishes the basis for a legal relationship between the Notary and the appearing parties. Consequently, the Notary must ensure that the deed complies with applicable legal requirements, thereby protecting the interests of those involved. Such a legal relationship defines the legal standing of the parties' obligations, which marks the starting point of liability.¹¹

The legal relationship between the appearing parties and the Notary may be classified as a breach of contract (*wanprestasi*) only if the relationship is inherently contractual. For instance, this applies when the parties grant a specific power of attorney (*kuasa*) to the Notary to perform a particular task on their behalf. However, in practice, parties typically approach a Notary voluntarily, and Notaries are generally open to serving anyone. It would be inappropriate to require every individual seeking a Notary's service to first execute a power of attorney agreement solely for the purpose of drafting a deed.

In the absence of a written, oral, or implied agreement between the Notary and the parties to create the desired deed, it is incorrect to qualify their legal relationship as contractual. Consequently, if the Notary fails to fulfill obligations (*wanprestasi*), they cannot be sued solely on the grounds of breach of contract, as no such contractual basis exists.¹²

The determination of the legal relationship between a Notary and the appearing parties must be linked to Article 1869 of the Civil Code (BW), which stipulates that an authentic deed may be downgraded to the evidentiary level of a private agreement on the grounds of:

1. Lack of authority on the part of the relevant public official;
2. Incapacity or incompetence of the relevant public official.¹³

⁸ Ibid

⁹ Ibid

¹⁰ Habib Adjie. (2017). *Sanksi Perdata dan Administratif Terhadap Notaris Sebagai Pejabat Publik*. Bandung: Refika Aditama, h. 82.

¹¹ Ibid

¹² Ibid

¹³ Ibid Hlm 102

- a. A defect in the formal requirements of a deed, or the annulment of a Notary's authority by a legally binding court decision, may serve as grounds to sue the Notary for an unlawful act (*perbuatan melanggar hukum*). In other words, the relationship between the Notary and the appearing parties may be classified as a legal act (*perbuatan hukum*) if:
 1. The Notary lacked the authority to draft the relevant deed;
 2. The Notary was incompetent in drafting the deed;
 3. The Notarial deed contains formal defects.
- b. Claims against the Notary for reimbursement of costs, compensation, and interest—arising from the deed's downgraded evidentiary status (to that of a private agreement) or its nullification (*batal demi hukum*)—are based on the following:
- c. A unique legal relationship between the Notary and the appearing parties, characterized as an unlawful act;
- d. Negligence, inattention, or errors in:
- e. Administrative procedures for drafting deeds under the Notary Office Law (UUJN);
- f. Application of legal rules within the deed to the appearing parties, due to the Notary's failure to demonstrate specialized expertise in Notarial practice or general legal competence.¹⁴

In addition to being named as a defendant, a Notary may also be joined as a co-defendant (*turut tergugat*). According to Retnowulan Sutantio and Iskandar Oeripkartawinata, in legal practice, the term “co-defendant” is used for individuals who neither control the disputed property nor bear any obligation to act but are included in the lawsuit solely to ensure procedural completeness. In the *petitum* (the prayer for relief), such parties are merely requested to submit to and comply with the court's ruling.¹⁵

Thus, when a Notary is named as a co-defendant (*Turut Tergugat*) in a lawsuit, their role is merely supplementary. The Notary is included as a co-defendant to ensure procedural completeness of the claim, with the sole request in the *petitum* (prayer for relief) being that they submit to and comply with the court's ruling. The directly interested parties remain the Plaintiff (*Penggugat*) and the Defendant (*Tergugat*).

Based on the above explanation, it is evident that a Notary may be sued for compensation by the appearing parties if they suffer harm due to a deed prepared by the Notary. Such claims may be filed on the grounds of:

1. A legal relationship between the parties and the Notary, characterized as an unlawful act (*perbuatan melanggar hukum*);
2. Negligence, inattention, or errors by the Notary in:
 - a. Drafting the deed in accordance with administrative procedures under the Notary Office Law (UUJN);
 - b. Applying relevant legal rules within the deed to the parties, due to the Notary's failure to demonstrate specialized expertise in Notarial practice or general legal competence.

While a Notary may be joined as a co-defendant, their role in such cases remains strictly procedural and supplementary.

¹⁴ _____. (2016). *Pengantar Hukum Jaminan Kebendaan*. Surabaya: Revka Petra Media. Retnowulan Sutantio dan Iskandar Oeripkartawinata. (1989). *Hukum Acara Perdata Dalam Teori dan Praktek*. Jakarta: Mandar Maju

¹⁵ Retnowulan Sutantio dan Iskandar Oeripkartawinata. (1989). *Hukum Acara Perdata Dalam Teori dan Praktek*. Jakarta: Mandar Maju, h. 2.

Legal consequences of a notary's liability in the legalization of a lease agreement for the object of the mortgage based on the principle of prudence

The role of a notary in preparing authentic deeds can help provide legal certainty as well as legal protection to the public.¹⁶ An authentic deed serves as valid evidence in legal proceedings. In procedural law, the concept of proof holds legal significance that applies exclusively to the disputing parties or those who derive rights from them. The purpose of such proof is to provide certainty to the Judge regarding the occurrence of a specific event or incident.

The prudential principle is a key principle mandated for banks under Indonesian law. As stipulated in Article 2 of Law Number 10 of 1998, which amended Law Number 7 of 1992 concerning Banking, the Indonesian banking sector must operate based on the principles of economic democracy while adhering to the prudential principle. This principle is understood as one of the most critical foundations that banks and financial institutions must implement in conducting their business activities. It underscores the obligation to exercise caution, diligence, and risk management to ensure stability and accountability in the financial system.¹⁷

In addition to the provisions of Article 2 mentioned above, Law No. 10 of 1998 further reinforces the importance of the prudential principle in all banking activities through Article 29 Paragraph 2. This article stipulates that banks are obligated to maintain their financial health in compliance with established standards, including capital adequacy, asset quality, management quality, liquidity, profitability, solvency, and other aspects related to banking operations. Furthermore, banks must conduct their business activities in strict accordance with the prudential principle.¹⁸

The prudential principle is a principle that must be upheld by notaries in performing their functions and duties. This principle aims to safeguard the interests of the public entrusted to them as public officials, ensuring accountability and legal certainty in their professional conduct.¹⁹

While the Notary Law (Undang-Undang Jabatan Notaris) does not explicitly mention the prudential principle, it is imperative for notaries to adhere to this principle in their professional conduct. This necessity underscores the importance of establishing clear guidelines to ensure that notaries exercise heightened diligence, thoroughness, and care when drafting authentic deeds. Such obligations align with the mandate under Article 16 Paragraph 1(a) of Law No. 2 of 2014 concerning the Notary Profession, which requires notaries to act with precision and responsibility in fulfilling their duties as public officials entrusted with safeguarding legal interests.²⁰

The public necessity to validate or authenticate documents has led to the development of processes such as waarmeking (authentication), legalization, and the creation of notarial deeds. Document legalization is required for various purposes, including educational needs, agreements, or contracts established through mutual consent. Authentication serves to

¹⁶ Komang Ayuk Septianingsih, Septianingsih, I Nyoman Putu Budiarta, dan Anak Agung Sagung Laksmi Dewi, (2020), Kekuatan Alat Bukti Akta Otentik Dalam Pembuktian Perkara Perdata, Jurnal Analogi Hukum, 2(3), hlm. 339.

¹⁷ Hermansyah, (2020), Hukum Perbankan Nasional Indonesia Ditinjau Menurut Undang-Undang No. 7 Tahun 1992 Tentang Perbankan Sebagaimana Telah Diubah Dengan Undang-Undang No. 10 Tahun 1998, Dan Undang-Undang No. 23 Tahun 1999 Jo. Undang-Undang No. 3 Tahun 2004 Tentang Bank Indonesia, Serta Undang-Undang No. 21 Tahun 2011 Tentang Otoritas Jasa Keuangan (OJK), Jakarta : KENCANA, hlm. 115.

¹⁸ Undang-Undang Nomor 10 Tahun 1998 Tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 Tentang Perbankan, hlm.15.

¹⁹ M. Luthfan Hadi Darus, (2017), Hukum Notaris dan Tanggungjawab Jabatan Notaris, Yogyakarta: UII Press, hlm. 38.

²⁰ Undang Undang nO 2 Tentang Jabatan Notaris

strengthen a document's status as valid written evidence in legal contexts.

A notary's authority to legalize agreements is accompanied by accountability for their actions. Regarding notarial legalization, the procedure must adhere to the requirements outlined in Article 1874a of the Indonesian Civil Code (Kitab Undang-Undang Hukum Perdata), which states:

"If requested by the concerned party, beyond the cases mentioned in the second paragraph of the preceding article, a declaration may be added to a signed agreement by a Notary or another legally authorized official. This declaration confirms that the Notary recognizes the signatory or has verified their identity, that the contents of the document have been explained to the signatory, and that the signing occurred in the presence of the official. In such cases, the provisions of the third and fourth paragraphs of the preceding article shall apply."

This framework emphasizes the notary's duty to ensure transparency, verify identities, and witness the execution of documents, thereby upholding the integrity and evidentiary value of legal instruments.²¹

The legal consequences of a lease agreement notarized by a Notary are intrinsically tied to the Notary's authority. The evidentiary validity of such an agreement in court proceedings hinges on the Notary's legalization authority. Under Articles 1874, 1874(a), and 1880 of the Indonesian Civil Code (KUHPerdata), legalization by a Notary involves formalizing the agreement by reading it aloud in the presence of the parties, who then sign or affix their thumbprints before the Notary. This process ensures the certainty of the document's execution date.

The Notary must verify the identity of the appearing parties (either by recognizing them or through proper introduction). The Notary is obligated to explain the contents of the document to the signatories or those affixing their thumbprints. The signing or thumbprinting must occur immediately in the Notary's presence. Following this, the Notary records the legalization number in a dedicated legalization register.²² The date of signing or affixing a thumbprint must coincide with the date of legalization. For the document to serve as valid evidence in court proceedings, the legalized document must also bear adequate stamp duty as required by law.²³

The objective of evidentiary proceedings is to enable judicial rulings grounded in the proof presented. The role of legalization in contractual documents is to certify the date and authenticity of the parties' signatures, as well as confirm that the Notary has explained the contents of the deed to the signatories. This ensures that the signatories cannot later repudiate the terms of the document they have endorsed.

In evidentiary proceedings, the court's function is twofold:

1. Admissibility of Evidence: Determining whether the evidence presented is legally acceptable.
2. Assessment of Probative Value: Evaluating the strength and credibility of the evidence after it has been examined.²⁴

The legalization of an agreement by a Notary provides the parties with a guarantee or certainty from the Notary regarding the date, authenticity of signatures, and the identities of

²¹ Mamiek Jatmiko. "Prosedur dan Syarat Penandatanganan Akta Jual Beli", Handout Kuliah Akta-akta PPAT, Surabaya, 2017.

²² Mamiek Jatmiko. "Tentang Pejabat Pembuat Akta Tanah", Handout Kuliah Akta-akta PPAT, Surabaya, 2017

²³ Sudikno Mertokusumo, 2002, *Hukum Acara Perdata Indonesia*, Edisi Kedelapan, Liberty, Yogyakarta, hal. 153.

²⁴ C.S.T Kansil, Pengantar Ilmu Hukum dan Tata Hukum Indonesia, (Jakarta: Balai Pustaka, 1989), hlm. 46.

the signatories. Such legalization must be carried out based on the mutual agreement of the concerned parties.

According to *Article 1880 of the Indonesian Civil Code (KUHPerdato)*, contractual documents not legalized by a Notary or another official authorized under *Articles 1874 and 1874a of the KUHPerdato* do not hold legal force against third parties regarding their execution date, except in cases where:²⁵

- a. From the date the agreement is officially registered in accordance with the law;
- b. From the date of the death of the signatory (either all or one of the signatories);
- c. From the date the existence of the agreement is proven through deeds issued by a public official; or
- d. From the date the agreement is acknowledged in writing by a third party who relies on it.

CONCLUSION

Based on the data analysis and preceding discussion, it is concluded that the application of the prudential principle by notaries in drafting agreements must be strictly implemented. Failure to apply this principle appropriately may result in harm to multiple parties, including the notary themselves, due to the ensuing legal repercussions and sanctions imposed under prevailing laws and regulations.

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²⁵ R. Soegondonotodiseorjo, (1982), *Hukum Notariat di Indonesia*, Jakarta, Rajawalipres.

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Undang Undang nO 2 Tentang Jabatan Notaris

UndUndang-Undang Nomor 10 Tahun 1998 Tentang Perubahan Atas Undang-Undang Nomor 7 Tahun 1992 Tentang Perbankan, hlm.15.