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Unlawful Acts Committed By A Substitute Notary Regarding the Mortgage Deed they Drafted

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Abstract: The role of a notary is indispensable, as notaries are tasked with the duty and obligation to draft authentic legal deeds, which hold great significance, particularly in a legal state such as Indonesia. In certain circumstances, notaries may be required or permitted to take a leave of absence, commonly referred to as notary leave. To prevent any gaps in service, a substitute notary is appointed in accordance with prevailing regulations. These substitute notaries, in fulfilling their duties, are bound by the Law of The Republic of Indonesia Number 30 Of 2004 on Notary Profession. However, in the course of executing their responsibilities, a Substitute Notary may contravene the Law on the Rules of Notary Profession or engage in unlawful act, raising questions regarding the accountability of a Substitute Notary in cases where they commit unlawful acts, such as in verdict number 395/Pdt.G/2011/PN. JKT. Sel. Writing method used in this study is a normative juridical research method.

Keyword: Substitute Notary, Unlawful Act, Responsibility of Substitute Notary.

INTRODUCTION

Notaries are among the most vital professions in Indonesia, particularly given the country's status as the 15th largest nation in the world, with a land area of 1,904,569 km². Indonesia's substantial population further underscores the significant demand for Notarial services. A Notary is a public official vested with the authority to draft authentic legal documents and perform other duties as mandated by law. A notary, in the practice of their profession, functions as an institution that produces written evidence through the deeds they draft, which possess an authentic legal nature.

Notaries can be classified into two primary types:

1. Notarial Functionnel: In this type, governmental authority is delegated to the notary, whereby the content of the deeds is presumed to be accurate, holds formal evidentiary value, and carries enforceable legal power; and
2. Professional Notarial: In this type, notarial deeds do not entail specific legal consequences concerning their accuracy, evidentiary weight, or enforceability.

According to Article 16, paragraph (1) of Law Number 30 of 2004 on the rules Notary Profession, as amended by Law Number 2 of 2014, Notaries are obligated to:

1. Act with trustworthiness, honesty, independence, impartiality, and diligence, safeguarding the interests of all parties involved in legal matters;
2. Create and retain Deed Minutes as part of the Notarial Protocol;
3. Attach relevant letters, documents, and fingerprints to the Deed Minutes;
4. Issue the original Deed, certified copies, and extracts based on the Deed Minutes;
5. Provide services in accordance with applicable laws and regulations, except where justified refusal is warranted;
6. Maintain confidentiality regarding all aspects of the deeds they draft and all information obtained during the process, adhering to the oath or affirmation of office, unless otherwise required by law;
7. Bind the Deeds they have prepared within one month into volumes containing a maximum of 50 (fifty) Deeds each. If the number of Deeds exceeds the capacity of a single volume, they may be bound into multiple volumes, with the number of Deed Minutes, month, and date of creation recorded on each cover;
8. Prepare a list of protest deeds related to non-payment or non-receipt of securities.
9. Compile a monthly list of deeds pertaining to wills, organized chronologically according to the date of execution;
10. Submit the aforementioned list of deeds, or a nil report concerning wills, to the central will registry at the ministry responsible for legal affairs within the first five days of each month;
11. Record in the repertory the date of submission of the wills list at the end of each month;
12. Maintain a seal and stamp featuring the emblem of the Republic of Indonesia, with the Notary's name, position, and place of residence inscribed around it;
13. Read the Deed aloud in the presence of the parties involved, accompanied by no fewer than 2 (two) witnesses, or four special witnesses in the case of a privately executed Will, and have it signed immediately by the parties, witnesses, and the Notary; and
14. Accept interns who are candidates for the position of Notary.

In this context, a Notary is required to adhere to and perform their duties in accordance with the prevailing laws, particularly the Rules of Notary Profession Law. A Notary bears numerous obligations and responsibilities in the discharge of their duties. The Notary's professional responsibility arises from the obligations and authority inherent to the position, which bind the Notary from the moment they take their official oath. During their term, a Notary has the right to take leave, commonly referred to as Notary Leave. This right to leave can only be exercised after the Notary has served for at least 2 (two) years.

When applying for leave, a Notary must submit a formal request, including an application for a leave certificate to the Directorate General of AHU Online. This request must be received by the Regional Supervisory Council, Provincial Supervisory Council, or Central Supervisory Council no later than 30 (thirty) days before the leave commences, except in cases of valid reasons. Furthermore, the law mandates that the Notary must appoint a Substitute Notary. A Substitute Notary is an individual temporarily appointed to replace the Notary who is on leave, ill, or otherwise unable to fulfill their duties and responsibilities as a Notary.

Naturally, the Substitute Notary is also required to comply with the Rules of Notary Profession Law. However, issues often arise when a Substitute Notary, who is bound by law, commits the act of drafting a deed containing false information, resulting in harm to other parties. This is exemplified in case number 395/Pdt.G/2011/PN.JKT.Sel. where the Substitute Notary engaged in unlawful conduct, causing damage to the plaintiff.

METHOD

The method employed in this research is the normative juridical method, wherein relevant legislation serves as the foundation for the study, along with the application of legal theories pertinent to the subject matter. This research utilizes primary legal sources, including statutory regulations related to the topic. In addition, secondary legal sources, such as journals and books relevant to the research topic, are also incorporated.

RESULTS AND DISCUSSION

A substitute notary, in the execution of their duties, is required to adhere to the prevailing legal regulations, specifically the Rules of Notary Profession Law. In their role, the substitute notary functions in the same capacity as a regular notary, bearing identical responsibilities and obligations. Upon the conclusion of the leave period, the appointed substitute notary must return the notarial protocol to the respective notary. This handover must be documented in an official report and submitted to the Regional Supervisory Council. During their tenure, a substitute notary will inevitably draft numerous legal deeds, and under the law, they retain full responsibility for every deed they produce, even after the notarial protocol has been transferred or handed over to the custodian of the protocol.

As previously outlined, a notary requesting leave is required to appoint a substitute notary. Prior to this, the notary must submit a leave permit to the District Supervisory Council, Regional Supervisory Council, or the Central Supervisory Council. The leave permit must include the following details:

1. The name of the notary requesting leave;
2. The start and end dates of the leave period; and
3. The name of the substitute notary, accompanied by supporting documentation as stipulated by legal regulations.

The supporting documents for the substitute notary, as referenced in point 3 above, include:

1. A certified copy of the substitute notary's law degree from an accredited institution;
2. A certified copy of the substitute notary's identity card (KTP);
3. A certified copy of the substitute notary's birth certificate;
4. A certified copy of the marriage certificate, if married, duly notarized;
5. A certificate of good conduct issued by the local police;
6. A health certificate issued by a government physician;
7. Four recent color passport photos (3x4 cm); and
8. A detailed curriculum vitae.

In carrying out their duties, a substitute notary possesses the same authority as a regular Notary, which includes the power to draft Authentic Deeds for all acts, agreements, and stipulations as required by law, or as requested by interested parties to be formalized in an authentic deed. This authority also extends to ensuring the certainty of the date on which the Deed was created, preserving the deed, issuing grosse (official copies), certified copies, and excerpts of the deed, as long as these responsibilities have not been assigned to or excluded by other officials or parties as stipulated by law. Furthermore, a Substitute Notary is also authorized to:

1. Authenticate signatures and certify the certainty of the date on privately signed documents by registering them in a special ledger;
2. Record privately signed documents by entering them into a specific register;
3. Create copies of privately signed original documents in the form of certified copies, containing descriptions as written or illustrated in the original documents;
4. Certify the conformity of photocopies with the original documents;
5. Provide legal counseling related to the drafting of Deeds;
6. Draft Deeds related to land matters; and
7. Prepare auction minutes in the form of authentic Deeds.

As previously mentioned, a Substitute Notary is required to comply with the Rules of Notary Profession Law and bears the same responsibilities and obligations as a Notary. This means that, in exercising their duties, a Substitute Notary is also bound by Article 16, paragraph (1) of the Rules of Notary Profession Law. Specifically, Clause 1 of this article stipulates that a Notary, in performing their duties, must act with integrity, honesty, independence, impartiality, and diligence while safeguarding the interests of all parties involved in the legal acts they oversee.

In the case of verdict number 395/Pdt.G/2011/PN.JKT.Sel, the Substitute Notary, Merisa Herawati, caused financial losses to the Plaintiff, Mrs. Dian Susanty Gunawan, as a result of unlawful actions committed by the Substitute Notary, identified as Defendant V in the case. In her lawsuit, Mrs. Dian Susanty Gunawan claimed that the Deed of Power of Attorney to Encumber Mortgage Rights (SKMHT) Number 114, dated August 26, 2004, drafted by Defendant V, contained a forged signature purported to be that of the plaintiff's husband, as well as a false statement asserting that her husband had never been married, whereas he was, in fact, married to the Plaintiff.

As a result of the unlawful actions in the SKMHT committed by Defendant V, Mrs. Dian Susanty Gunawan incurred material damages amounting to IDR 5,920,000,000 (five billion nine hundred and twenty million rupiah) and non-material damages totaling IDR 5,000,000,000 (five billion rupiah). According to Article 1365 of the Indonesian Civil Code, a tort refers to an unlawful act that involves a violation of the law and results in harm to another party. Consequently, the person responsible for such harm is obligated to compensate the aggrieved party.

Furthermore, R. Wirjono Prodjodikoro defines unlawful acts as actions that not only directly contravene legal statutes but also encompass violations of other regulations beyond the law, which may be considered as indirectly breaching legal principles. In legal theory, unlawful acts are classified into three categories:

1. Intentional unlawful acts – unlawful acts committed with deliberate intent;
2. Strict liability unlawful acts – unlawful acts without elements of intent or negligence; and
3. Negligent unlawful acts – unlawful acts caused by the presence of negligence.

In this case, if the Substitute Notary, Merissa Hermawati (Defendant V), is proven to have committed an unlawful act, it is justifiable that compensation be awarded to the Plaintiff who suffered the resulting losses. In accordance with Article 1365 of the Civil Code, the party responsible for causing the loss is obligated to provide compensation and remedy the damage resulting from their misconduct.

CONCLUSION

A Substitute Notary, who bears the same responsibilities and authority as a regular Notary, is inherently accountable for the deeds they draft, as stipulated by the Law on Notary Positions. An individual is deemed to have committed an unlawful act if all the elements of such an act are fulfilled.

In this context, a Substitute Notary who engages in unlawful conduct by including false information in their deed is legally obligated to compensate the aggrieved party. It is imperative that the government establishes more comprehensive regulations concerning the legal consequences, responsibilities, and obligations of a Substitute Notary, thereby implementing preventive measures to mitigate the recurrence of similar incidents.

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