

NOTARY RESPONSIBILITIES WHO PARTICIPATED IN THE CERTIFICATE EMBEZZLEMENT CRIME

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ABSTRACT

This study aims to analyze: 1) The responsibility of a notary who participates in the crime of certificate embezzlement. 2) Juridical implications for deeds issued by notaries participating in the crime of certificate embezzlement. The approach used in this study is a sociological-juridical approach. The specification of the research used is descriptive analytical research. Types of data using primary data and secondary data obtained through interviews and literature. The data analysis method used in this research is descriptive analysis. The results of the study concluded: 1). Responsibilities of Notaries who participated in committing the crime of certificate embezzlement in Samarinda City were sentenced to 3 months in prison. Notary MS was legally and convincingly proven guilty of committing the crime of participating in embezzlement and fulfilling the elements in Article 372 of the Criminal Code juncto article 55 paragraph 1 of the Criminal Code. This proves that notaries are not above the law, notaries are the same as ordinary people who must comply with laws and regulations. 2) The juridical implication of the deed issued by a notary who participated in the crime of embezzlement of certificates in Samarinda City, namely that the DA as the legal owner can apply for the cancellation of the deed of sale and purchase and certificates to the Court. The filing for annulment aims to maintain legal certainty and certainty of the rights to his land. The imposition of a criminal sentence against Notary MS does not necessarily mean that the deed in question becomes null and void by law.

A. INTRODUCTION

The existence of a Notary is very important in the midst of people's lives. Notaries play a role in providing guarantees of certainty¹, order and legal protection to the public regarding the making of authentic deeds. This authentic deed is very necessary in every aspect of people's lives. The making of an authentic deed which contains formal truth really needs the help and services of a notary so that the authentic deed can be understood and accepted by all parties and has guaranteed legal certainty.²The role of a notary regarding assistance in providing legal certainty and legal protection for the community is very important. The role of this notary is more

1 Rizki Nurmayanti & Ahmad Khishni, The Roles and Responsibilities of Notaries in the Making of Deeds, *Deed Journal*, Vol. 4, No. December 4, 2017, page. 611

2 Putri AR, *Legal Protection for Notaries (Indicator of the Duties of a Notary's Office which has implications for Criminal Acts)*, Medan, Softmedia, 2011, page.32

preventive or preventive for future legal problems by making authentic deeds related to legal status, rights and obligations of a person in law, and so on which functions as the most perfect evidence in court, namely in the event of a rights dispute. and that obligation.³

The position of a notary as an official for making authentic deeds is stated in Article 2 Paragraph 1 of Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary, which states that a Notary is a public official authorized to make authentic deeds and has other authorities as referred to in this Law or based on other laws. Authentic deed drawn up by or before a notary according to the form and procedure stipulated in the law.⁴ Every time a notary performs his/her duties in making a deed, he has responsibility for the deed he makes as a realization of the wishes of the parties in the form of an authentic deed. Notary responsibilities are closely related to duties and authority as well as morality both personally and as public officials.⁵

Notaries in carrying out their duties must be guided by the UUJN and the notary's code of ethics. Notaries who commit violations will receive sanctions. Notaries cannot escape from civil and even criminal prosecution, meaning that all actions of a Notary in carrying out their duties and obligations must be legally accountable, including with all the consequences to be subject to legal sanctions for violations of the underlying legal norms.⁶ As happened in Samarinda City, where the MS Notary person who participated in the crime of embezzlement of certificates which for his actions, based on the 2018 Samarinda District Court Decision, was proven to have committed a crime of participating in embezzlement as stipulated and punishable by Article 372 of the Criminal Code. There are two elements contained in Article 372 of the Criminal Code, namely objective elements and subjective elements. The objective element, namely owning goods that are wholly or partly owned by another person; the goods are in his possession or controlled by him not because of a crime. While the subjective element, namely deliberately against the law. The intention of owning is any act of controlling goods or a will to control goods over his real power and is an act as the owner of the goods.⁷

The imposition of criminal sanctions against a Notary must be based on the provisions of the Criminal Code, which means that the Notary will be punished based on the crime he committed. Article 486 of Act No. 1 of 2023 Concerning the Criminal Code (KUHP) in the Second Book Concerning

3 Erina Permatasari, Latifah Hanim. Roles and Responsibilities of Notaries for the Implementation of Limited Liability Company Legal Entity Registration Through the Online System, *Deed Journal*, Vol. 4, No. 3, September 2017, page.401

4 Nawaaf Abdullah & Munsyarif Abdul Chalim, Position and Authority of a Notary in Making Authentic Deeds, *Deed Journal*, Vol. 4, No. 4, December 2017, page.658

5 Sri Utami, Legal Protection for Notaries in the Criminal Justice Process According to Law No. 2 of 2014 concerning Amendments to Law No. 20 of 2004 concerning the Position of Notary, *Repertorium Journal*, January 2015 issue, page.89

6 Ary Yuniastuti and Jawade Hafidz, Juridical Review of Deed Cancellation and Notary Liability, *Deed Journal*, Vol. 4, No. 2, June 2017. page.132

7 Ismu Gunadi and Jonaedi Efendi, *Quickly and Easily Understand Criminal Law*, Jakarta, Kencana Prenadamedia Groupage, 2015, page. 14

Criminal Acts, Chapter XXVI concerning the Crime of Embezzlement explains that every person who unlawfully owns an object that partially or wholly belongs to another person, who is in his power not because of a criminal act, shall be punished for embezzlement, with a maximum imprisonment of 4 (four) years or a maximum fine of category IV. In the eyes of the law, a person who is a notary is the same as the public in general, who is not immune to the law, and can be held criminally responsible. The criminal actions of the Notary MS in Samarinda City who committed the crime of participating in embezzlement had an impact on his profession.

B. RESEARCH METHODS

The approach method in this research is a sociological juridical approach. The specification of the research used is descriptive analytical research. Types of data using primary and secondary data. Data collection by interview method and literature study. The data analysis method used is descriptive qualitative analysis.

C. RESULTS AND DISCUSSION

1. Responsibilities of Notaries Who Participate in the Crime of Certificate Embezzlement in Samarinda City

The position of a Notary in the eyes of the law is the same as that of society in general, who are not immune to the law⁸, and can be held criminally responsible. An example of a case that the author raises is a case of embezzlement committed by a Notary/PPAT. Defendant Notary MS in Samarinda was criminally prosecuted for participating in embezzlement of certificates based on the 2018 Samarinda District Court Decision. Briefly, the chronology of the case was that Notary MS made a sale and purchase deed of a plot of land where a shop stood on it to complete administrative requirements when transferring rights in Office of the National Land Agency.

The investigators and the public prosecutor indicted Notary MS for embezzlement of certificates based on Article 372 of the Criminal Code in conjunction with Article 55 paragraph (1) first of the Criminal Code. The Panel of Judges in charge of adjudicating this case at the Samarinda District Court in 2018 provided legal considerations that the public prosecutor had charged the defendant with alternative forms of indictment, so that the panel of judges by taking into account the legal facts mentioned above chose directly the First Alternative indictment as stipulated in Article 372 Criminal Code Jo. Article 55 paragraph (1) 1st of the Criminal Code, the elements of which are as follows:

a. Elements of "Whoever"

The whoever element is any person who is a legal subject to whom he can be held accountable according to law for his actions. The whoever element refers to the perpetrator/subject of the crime, namely people and corporations. The element of whoever refers to a

8 Abdul Ghofur Ansari, *Indonesian Notary Institution, Legal and Ethical Perspectives*, Yogyakarta, UII Press, 2009, page. 46.

legal subject, whether in the form of an individual or a corporation or legal entity, if proven to fulfill the elements of a crime, then he can be called a perpetrator.⁹

- b. The element "Deliberately and unlawfully owns something that should or partly belongs to another person, but what is in his power is not because of a crime". This intentional element is a subjective element in the crime of embezzlement, namely an element that is attached to the subject of the crime, or attached to the person of the perpetrator. This is because the element is deliberately an element in the crime of embezzlement, by itself this element must be proven.¹⁰.

The panel of judges also considered the accompanying indictment, namely Article 55 paragraph (1) of the Criminal Code with the following elements:

- a. Elements of "who did, who ordered to do and who took part in doing the action", with the following considerations:
 - 1) Considering, that based on the facts revealed in court both based on the testimony of witnesses and the statement that the defendant as a notary made a Sale and Purchase Deed for witness SH sold 1 unit shophouse with certificate of ownership number 3640 to witness DM where 1 unit shophouse is wholly owned by the witness DA but that was within the power of the witness and the defendant because in the process of transferring names to witness DA, as a result witness DA suffered a loss of IDR 223,000,000, so that the defendant participated in the act.
 - 2) Considering whereas thus this element has also been proven and fulfilled according to law.
 - 3) Considering that because all the elements of Article 372 of the Criminal Code juncto article 55 paragraph 1 of the Criminal Code have been fulfilled, the defendant must be declared legally and convincingly proven to have committed the crime as charged in the first alternative indictment of the public prosecutor. So the Panel of Judges made a decision as stated in the 2018 Samarinda District Court Decision.
 - 4) Considering, that because the defendant was sentenced to a crime, he must also be burdened with paying court fees.
- b. Taking into account, Article 372 of the Criminal Code juncto article 55 paragraph 1 of the Criminal Code, Act No. 8 of 1981 concerning criminal procedural law and other relevant laws and regulations. At trial, stated that the defendant MS mentioned above, was legally and convincingly proven guilty of committing the crime of participating in embezzlement as stated in the first alternative indictment.

9 Hawariah, *Juridical Review of the Crime of Embezzlement with Weighting (Case Study of Makassar District Court Decision No. 1131/Pid.B/2014/PN.Mks)*, Thesis Faculty of Law, Hasanuddin Makassar University, 2016, page. 14.

10 *Ibid.* page. 14.

- c. Sentenced punishment to the defendant, therefore with imprisonment for 3 months.

According to the results of research conducted by the author, the decision taken by the Panel of Judges was very appropriate, because in the trial process Notary MS was proven legally involved in the crime of embezzlement of the DA's certificate. In addition, MS Notary can also be charged with guilt because it fulfills all elements that can be given criminal sanctions, namely:

- a. Responsible Ability.
- b. Intentional (*dolus*) or negligence (*culpa*)
- c. No excuses.

The author also believes that the article handed down against the defendant Notary MS is also appropriate, namely Article 372 of the Criminal Code in conjunction with article 55 paragraph 1 of the Criminal Code. Where the actions of Notary MS have fulfilled all the elements contained in the Article, as described in the 2018 Samarinda District Court Decision.

Notary MS, even though he received a prison sentence, was not dismissed from his position as a notary. This matter regarding the dishonorable discharge sanction is regulated in Article 12 and Article 13 of the Act No. 2 of 2014 concerning Amendments to Act No. 30 of 2004 concerning the Position of Notary, that the Notary who is sentenced to imprisonment is less than 5 (five) years may be subject to dishonorable dismissal, so there is an opportunity for a Notary to become a Notary again with the sanction revoked. It has been proven that MS Notary has returned to notary practice. Based on the example of the MS Notary case, the factor in the violation of the law committed by the Notary stems from low morale and integrity as well as demands for welfare from the Notary concerned.

Criminal liability for embezzlement committed by a Notary, namely a Notary will be given a prison sentence if he has fulfilled the elements of the crime of embezzlement as set forth in Article 372 of the Criminal Code Jo Article 55 paragraph (1).¹¹The theory of legal liability has been developed by Hans Kelsen. Hans Kelsen divides the principles of accountability into 4 (four), namely:

- a. Individual responsibility, namely accountability that must be carried out for violations committed by themselves.
- b. Collective accountability means that an individual is responsible for a violation committed by another person.
- c. Liability based on fault means that an individual is responsible for a violation committed intentionally and is expected to cause harm.

11 Dicky Armandau, Accountability of Notary Persons in the Crime of Participating in Embezzlement of Certificates, *Law Journal University of August 17 1945 Samarinda*, page.1

- d. Absolute accountability means that an individual is responsible for a violation he committed accidentally or unexpectedly.¹²

Based on the theory of legal responsibility, the MS Notary case above is individual responsibility, the notary's actions in committing the crime of embezzlement of certificates fulfill the elements of the embezzlement article, namely Article 372 of the Criminal Code, which reads:

"Anyone who intentionally owns against the rights of an item which completely or partly belongs to another person and the item is in his hands not because of a crime, is punished for embezzlement, with a maximum prison sentence of 4 (four) years."

The responsibility of the notary MS is also liability based on error because the embezzlement of certificates was done intentionally and caused a loss to the owner of the certificate in the amount of IDR 223,000,000.-. Criminal accountability is an assessment that is carried out after all elements of a crime have been fulfilled or a crime has been proven. Assessment is carried out objectively and subjectively, objectively evaluating is related to the maker with the legal norms he violated, so that it relates to the actions and moral values he violated.¹³Criminal responsibility arises with the continuation of objective reproach (*verwijibaarheid*) for actions that are declared as criminal acts based on the applicable criminal law, and on the subject to the maker who fulfills the requirements to be subject to punishment because of his actions.¹⁴Criminal responsibility as a conception is different from the terms of criminal responsibility which include inability to take responsibility, mistakes and the absence of excuses.¹⁵

2. Juridical Implications of Deeds Issued by Notaries Who Participated in the Crime of Embezzlement of Certificates in Samarinda City

Based on the case of the MS notary in Samarinda City, the judge decided that the MS notary had been proven guilty of embezzling certificates and was sentenced to 3 months in prison. This decision has an impact on the legal certainty of the certificate and Sale Purchase Deed made by Notary MS to third parties as well as the legal certainty of the original owner. According to Radbruch, there are 4 (four) things related to the meaning of legal certainty, namely:¹⁶

12 Shidarta, 2006, *Revised Edition of Consumer Protection Law*, Jakarta, Gramedia Widiasarana Indonesia, page.73.

13 Agus Rusanto, 2016, *Crime and Criminal Liability (Critical Review Through Consistency between Principles, Theory and Its Application)*, Jakarta, Prenamedia Group, page.14.

14 H. Dwidja Priyanto, 2017, *Corporate Criminal Liability System in Legality Policy*, Depok, Kencana, page. 29.

15 Fahmi Tanjung, 2019, *Construction of Paguyuban Criminal Liability (Analysis Through Corporation Theory Approach)*, Surabaya, Media Friends of Scholars, page. 14.

16 Sudikno Mertokusumo, 1984, *Anthology of Law Studies*, Yogyakarta, Liberty, page.107.

- a. The law is positive, meaning that positive law is statutory regulations.
- Each land has a unique history, so status and legality must be ensured so as not to cause disputes when it is to be used. Therefore, it is not only land owned by residents that must be certified, but local government assets must also be certified. Article 19 of the Basic Agrarian Law confirms that in order to guarantee legal certainty, the government will register land throughout the territory of the Republic of Indonesia according to the provisions stipulated by Government Regulations. The purpose of land registration is to provide legal certainty, so land registration is not only the responsibility of the government, but also the obligation of the rights holders concerned. Because land registration is a big job that requires a lot of experts, equipment and big money, so that if the registration of the land is not obligatory on the holder of the rights to the land in question, then what is expected from the registration of the land will not mean much. Efforts regarding the direction of legal certainty and certainty of land rights require land registration that is rechtskadaster in nature, meaning that it aims to guarantee legal certainty by providing certainty of rights to the holders of the rights concerned. Making a sale and purchase deed by Notary MS to a third party which was carried out without the knowledge of the DA as the legal owner is an act of embezzlement which cannot guarantee legal certainty for the sale and purchase deed or certificate made by the notary MS. then what is expected from the land registration will not mean much. Efforts regarding the direction of legal certainty and certainty of land rights require land registration that is rechtskadaster in nature, meaning that it aims to guarantee legal certainty by providing certainty of rights to the holders of the rights concerned. Making a sale and purchase deed by Notary MS to a third party which was carried out without the knowledge of the DA as the legal owner is an act of embezzlement which cannot guarantee legal certainty for the sale and purchase deed or certificate made by the notary MS. then what is expected from the land registration will not mean much. Efforts regarding the direction of legal certainty and certainty of land rights require land registration that is rechtskadaster in nature, meaning that it aims to guarantee legal certainty by providing certainty of rights to the holders of the rights concerned. Making a sale and purchase deed by Notary MS to a third party which was carried out without the knowledge of the DA as the legal owner is an act of embezzlement which cannot guarantee legal certainty for the sale and purchase deed or certificate made by the notary MS. Efforts regarding the direction of legal certainty and certainty of land rights require land registration that is rechtskadaster in nature, meaning that it aims to guarantee legal certainty by providing certainty of rights to the holders of the rights concerned. Making a sale and purchase deed by Notary MS to a third party which was carried out without the knowledge of the DA as the legal owner is an act of

embezzlement which cannot guarantee legal certainty for the sale and purchase deed or certificate made by the notary MS. Efforts regarding the direction of legal certainty and certainty of land rights require land registration that is rechtskadaster in nature, meaning that it aims to guarantee legal certainty by providing certainty of rights to the holders of the rights concerned. Making a sale and purchase deed by Notary MS to a third party which was carried out without the knowledge of the DA as the legal owner is an act of embezzlement which cannot guarantee legal certainty for the sale and purchase deed or certificate made by the notary MS.

- b. The law is based on facts meaning that the law is based on reality

Errors that occur in the deeds made by a notary will be corrected by the judge when the notary's deed is submitted to the court as evidence. The authority of the judge to declare a notarial deed null and void, can be canceled or the notary deed is declared to have no legal force. In the case of the MS notary, the DA as the legal owner can apply for the cancellation of the deed of sale and purchase and the certificate to the Court. This aims to maintain legal certainty and certainty of land rights.

- c. Reality (facts) must be formulated in a clear way so as to avoid mistakes in meaning, besides being easy to implement.

Proof of the transfer of land rights must be proven by a deed made by and before the Official for Making Land Deeds called PPAT, namely a deed of sale and purchase which will then be used as the basis for registering changes to land registration data as referred to in the provisions of Article 95 paragraph 1 letter a Regulation of the Minister of Agrarian Affairs/Head Bodyland National No. 3 of 1997. The sale and purchase deed drawn up before the Land Deed Making Officer is called the PPAT with the aim of providing legal certainty to the right holder of a plot of land (land buyer).¹⁷

- d. Positive law should not be easily changed.

The deed of sale and purchase of land drawn up by and before the Land Deed Official, called PPAT, is evidence of the implementation of a certain legal action, so that legal acts of transfer of land rights can be registered at the local Land Office.

The imposition of a criminal sentence against a Notary does not necessarily mean that the deed in question becomes null and void by law. It is not legally appropriate if there is a criminal court decision to cancel the notary deed, on the grounds that the notary is proven to have committed a crime. Thus what must be done by those who will or wish

17 Rifan Agrisal Ruslan and Umar Ma'ruf. Community Legal Awareness in Buying and Selling Land with PPAT Deeds in Tinanggea District, South Konawe Regency, Southeast Sulawesi, *Deed Journal*, Vol. 4, No. 3, September 2017, page.427

to get the Notary in question, then the legal action that must be taken is to cancel the deed in question through a civil lawsuit.¹⁸

D. CONCLUSION

The juridical implication of the deed issued by a notary who participated in the crime of embezzlement of certificates in Samarinda City is that the DA as the legal owner can apply for the cancellation of the deed of sale and purchase and certificates to the Court. The filing for annulment aims to maintain legal certainty and certainty of the rights to his land. The imposition of a criminal sentence against Notary MS does not necessarily mean that the deed in question becomes null and void by law. A matter that is not legally appropriate if there is a criminal court decision with a ruling canceling the notarial deed.

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¹⁸ Habib Adjie, 2013, *Cancellation and Cancellation of Notary Deed*, Bandung, Refika Aditama, page.29s

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