THE POWER OF AUTHENTICATION OF NOTARY DEED IN JUSTICE IN INDONESIA

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ABSTRACT

The notary must always apply the precautionary principle and always pay attention to Article 28 paragraph (1) of the Notary Position Regulation carefully, because in my opinion, whether authentic or not, a deed is not valid if it is only considered to be made by and/or in the presence of officials. In drawing up a deed, attention must also be paid to three aspects, namely: the outward aspect (*uitwendige bewijskrach*) , that is, the ability of the deed itself to prove its validity as an authentic deed[2]; the formal aspect, (*formele bewiskracht*) that is, the Notary Deed must provide certainty that an event and the facts in the deed are actually carried out by the Notary or explained by the parties that appear at the time stated in the deed in accordance with the procedures specified in the making of the Notary Deed. Therefore, the Notary as a public official who is authorized to make the Authentic Deed, can be held accountable or sued by the parties if the deed they made has been proven to cause harm to the parties in the deed.

Keywords: Notary, Authentication and Justice.

INTRODUCTION

The notary must always apply the precautionary principle and always pay attention to Article 28 paragraph (1) of the Notary Position Regulation carefully, because in my opinion, whether authentic or not, a deed is not valid if it is only considered to be made by and/or in the presence of officials, but must also note how to make the Authentic Deed that must fulfill Article 28 paragraph (1) of the Notary Position Regulation, namely, "The Notary must read the deed to the principals and witnesses", so that the deed does not change its legal force (see Article 28 paragraph (6) which determines that, "In the case of violation of one or more provisions in this article, the deed only has the same power as the privately drawn up deed)."

Furthermore, according to Article 1867 of the Indonesian Civil Code, Deeds can be categorized in either of two kinds, namely **Authentic deeds** and **Private Deeds**. Both of the aforementioned kinds of deeds constitute written evidence. Article 165 HIR states that what is meant by **Authentic deed**, is "a valid deed, is a letter made by or in front of a public official in power to make it, sufficient evidence for both parties and their heirs and all those who derive rights from it, about all the things mentioned in the letter and also about what is in the letter as a matter of notification only, in the latter case only if it is notified, it is directly related to the matter of the deed ". Both of these deeds have in practice their own power of authentication. An Authentic Deed is a valid deed that can be used as the strongest and most complete form of evidence, according to Sudikno Mertokusumo, as a perfect form of evidence and binding on the parties making it, while the Private Deed as a preliminary evidence.

In principle, the Authentic Deed contains formal truth (that is, the contents are in accordance with what the parties notified to the Notary) according to the explanation in Law Number 2 of 2014. Concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary (UUJN), it is stated that, "An Authentic Deed is the strongest and most complete evidence and has an important role in every legal relationship in public life at the national, regional and global level". Then through the Authentic Deed the parties can affirm and or clearly determine their rights and obligations; moreover, an Authentic Deed can also guarantee legal certainty, while preventing disputes between the parties.

CONCEPTUAL FRAMEWORK

In drawing up a deed, attention must also be paid to three aspects, namely: the outward aspect (*uitwendige bewijskrach*) , that is, the ability of the deed itself to prove its validity as an authentic deed[3]; the formal aspect, (*formele bewiskracht*) that is, the Notary Deed must provide certainty that an event and the facts in the deed are actually carried out by the Notary or explained by the parties that appear at the time stated in the deed in accordance with the procedures specified in the making of the Notary Deed; and the material aspects (*materiil bewijskracht*) that what is stated in the deed is a valid proof of the parties making the deed or those who get the rights and apply to the public, unless there is evidence to the contrary (*tegenbewijs*). These aspects are related to the authentication value, and at the same time they complete and perfect a notarial deed as an authentic deed and whoever is bound by the deed.

In the session process, the two deeds (authentic deed and private deed) mentioned above have different authentication powers, thus affecting judges' judgment, a private deed is used as preliminary evidence (still requires other evidence), whereas an Authentic Deed is naturally perfect or no longer need to be evaluated for truth (as long as not proven otherwise). An Authentic Deed constitutes binding evidence, in the sense that what is written in the deed must be considered true and trusted by the judge.

There are three possibilities for the withdrawal of a Notary in a civil case in the Court. The first possibility is existence *an sich* of the deed itself; the second possibility is to question the creation of the notarial deed itself so that it its legal validity in court will be uncertain; and the third possibility concerns the contents of the notary deed. Article 65 UUJN, notary liability for deeds made according to Habib Adjie, may include violations of:

1. In matters that are expressly determined by the Regulation of the Position of the Notary.
2. If a deed due to it does not fulfill formal requirements, it is invalidated before the court, or is deemed to be valid only as a private deed.
3. In all cases where according to the provisions in Article 1365, Article 1366 and Article 1367 of the Civil Code, there is an obligation to pay compensation.

In that case, it must be proven first (Regional Supervisory Council) whether the notary in making the Authentic Deed has violated the provisions Article 39 and Article 40, so that the Notary may be subject to a fine, or pay compensation, then in such a case the notary can be withdrawn as a Defendant, by dictum "punishing the Defendant for paying the fine or paying compensation to the Plaintiff". Though in general it is not difficult to prove a loss, to prove that the loss has arisen because of an error and / or negligence of the notary is not easy; in particular, to prove that the error was intentional (*dolus*), the lawsuit must

establish whether the loss was a direct result of the Notary Deed or not. This is because, in reality, it rarely happens that a notary deliberately plans in advance to take action to harm the parties through the deed they made. In terms of proving an error (*culpa*) which can be accounted for by the notary, one must hold the view that a subjective situation of the notary concerned is not sufficient to establish their accountability, but rather that it must be based on objective considerations.

DISCUSSION

3.1 The first possibility is about existence *an sich* of the deed itself.

In this case, let us examine these possibilities one by one. If the Notary is drawn into the Plaintiff's claim regarding the first possibility, then in my opinion the notary does not need to be a party to the lawsuit, but it would be more appropriate if the notary was made **expert witness** (For example, the APHT deed, GMS Deed), not as a Defendant and not as a Secondary Defendant (only subject to the contents of a judge's decision in court). Because according to the theory of procedural law as explained above (vide Article 165 HIR, Article 1867 BW), as well as the opinion of legal experts who say the Authentic Deed is a valid deed that can be used as the strongest and most complete evidence, so that the power of authentication is perfect, therefore it must be considered correct and trusted by the judge, because no one can put forth an alternate interpretation of an Authentic Deed. Then the nullification of the Notary Deed can be cancelled or void by law.

The GMS act is made in the form of copies that have often been made by the Notary, that is to be given a clear position on the procedures of the GMS electronically, so may the electronic ordinance of the GMS be used as a means of evidence in the court? The GMS may be conducted through electronic media, in my opinion in the examination of the court. The evidence that is stored electronically can constitute evidence during the session as an initial proof. Because article 164 HIR does not account for electronic evidence, electronic evidence can be a perfect proof if it is supported by other evidence, so that it can be legitimate evidence in the trial (vide article 5 paragraph (1) IT Law). A GMS Limited Liability company (PT) can be done conventionally or through a *teleconference or videoconference*. But the Notary still makes the original of the deed in the form of ordinary paper that has been done.

3.2 The second possibility: dispute the creation of notarial deed itself.

Next to examine the second possibility of the matter in the case of the creation of the notarial deed itself so that the problem with the legal position (the Authentic Deed) in the courts, can be modeled due to the notary's lack of caution, so that the Authentic Deed is declared invalid (vide article 263 paragraph (1) CRIMINAL CODE), and/or in the absence of negligence of applying article 39 and article 40, then the notary can be made a party (defendant or secondary defendant) in the plaintiff's lawsuit, because according to Article 65 UUJN, a notary is responsible for any deed made by that notary, even if the notary protocol has been handed over to the depository of the notary protocols. Then the notary liability does not end even though the notary has retired, so that at any time he can be held accountable for a deed made before. In addition, there is a consequence that faces a notarial deed that is proven not to apply Article 39 and article 40, so that its power of evidence (in the trial) becomes like a private deed.

In practice, a notary is often drawn to participate in or act as a party to a criminal offence, such as putting false information in a notarial deed. It is an interesting matter to examine, because as it is known that a notarial deed as an Authentic Deed has the power of authenticating the deed as perfect, and binding for the judge to believe the contents of the notarial deed are true, in accordance with what has been explained by the parties in the deed, then in my opinion, a Notary cannot be drawn into participating in conducting or assisting in the criminal offence of providing false information in a notarial deed. Because the Notary in making an Authentic Deed is passive, but if it is proven after the examination by the Regional Supervisory Council, and the Regional Supervisory Council has allowed the Notary in question to be examined, then the Notary can be seated as the Defendant.

CONCLUSION

Then it can be concluded that a deed which is an authentic deed (Notarial deed) which has the power of authentication which is perfect in a trial, may not have the power of authentication that is perfect in a civil case, if the drafting is done not in accordance with the applicable laws, incautiously by the notary, or contrary to the Rules of Position of the Notary. Therefore, the Notary as a public official who is authorized to make the Authentic Deed, can be held accountable or sued by the parties if the deed they made has been proven to cause harm to the parties in the deed.

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