

## **LEGAL LIABILITY FOR LOSSES OF THIRD PARTIES IN THE AGREEMENT TO TRANSFER PROPERTY RIGHTS WITH AN ABSOLUTE POWER OF ATTORNEY**

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**Abstrak:** Perjanjian pengalihan hak milik atas tanah yang didasarkan pada kuasa mutlak merupakan sesuatu yang dilarang oleh hukum, tetapi realitas yang terjadi masih terdapatnya suatu perjanjian jual beli tanah menggunakan surat kuasa mutlak sehingga menyebabkan kerugian bagi pihak lain. Penelitian ini bertujuan untuk mengetahui pertanggungjawaban hukum pihak penjual dan notaris terhadap kerugian pihak ketiga akibat penggunaan surat kuasa mutlak dalam perjanjian pengalihan hak milik atas tanah. Metode yang digunakan dalam penelitian ini yaitu metode yuridis normatif dengan menggunakan pendekatan perundang-undangan dan pendekatan kasus. Hasil penelitian ditemukan bahwa pertanggungjawaban pihak penjual dan notaris yakni berdasarkan Pasal 1365 KUHPerdara yaitu dengan memberikan ganti kerugian kepada pihak ketiga yang dirugikan karena perbuatan yang dilakukan oleh pihak penjual dan/atau notaris merupakan perbuatan melawan hukum yang merugikan pihak ketiga sebagai pembeli yang beritikad baik.

**Kata Kunci:** Kuasa Mutlak; Ganti Kerugian; Pengalihan Hak Milik

**Abstract:** Even if an agreement to transfer the ownership on the land using absolute power is not allowed by law, there is still a land transaction agreement using an absolute power of attorney, which causes losses to other parties. This study aims to determine the legal liability of the seller and the notary against the losses of third parties due to the use of absolute power of attorney in the agreement to transfer the ownership of land rights. The method used in this study is a normative juridical method using a statutory approach and a case approach. The result of the study is that for the accountability of the seller and the notary, based on Article 1365 of the Civil Code, they should provide compensation to the third parties due to an unlawful act that harms the third party as a buyer with good intentions.

**Keywords:** Absolute Power of Attorney; Compensation; Transfer of Property Rights

## INTRODUCTION

Humans are creatures that cannot stand alone without the help of others and only by living in society can humans carry on their life, one of which is in the matter of an agreement.<sup>1</sup> Article 1313 of the Civil Code explains the meaning of an agreement, and if an agreement is not implemented, it will receive a penalty in the form of compensation.

The Civil Code (KUHPerdata) divides compensation into two, namely, compensation caused by default and compensation caused by acts against the law. The concept of default is derived from an act that is born from an agreement, while the concept of an act against the law comes from an act that is born from law, which is contained in Article 1365 of the Civil Code.<sup>2</sup> In other words, an act against the law is the same as an act against the law.<sup>3</sup>

In connection with the concept of the agreement, there are several types of agreements, one of which is the sale and purchase agreement, in this case the sale and purchase is the sale and purchase of land. Regarding the land sale and purchase agreement, there is a power of attorney that may not be made or used or prohibited, namely an absolute power of attorney relating to land.

Based on the Ministry of Home Affairs Instruction No. 14 of 1982 explains that absolute power is a power which contains an element that the power that has been given cannot be withdrawn by the authorizer. The use of absolute power gives authority to the buyer as much as the authority of the seller and in practice the buyer can act as both the seller and the buyer.<sup>4</sup>

The prohibition of absolute power is also described in Government Regulation No. 24 of 1997 Article 39 paragraph (1) letter d concerning land registration, which states that the Land Deed Making

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<sup>1</sup> Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana, 2008), hlm. 41.

<sup>2</sup> Sri Redjeki Slamet, "Tuntutan Ganti Rugi Dalam Perbuatan Melawan Hukum: Suatu Perbandingan Dengan Wanprestasi," *Neliti: Lex Jurnalica* 10, No. 2 (2013): 107.

<sup>3</sup> Sedyo Prayogo, "Penerapan Batas-Batas Wanprestasi Dan Perbuatan Melawan Hukum

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Dalam Perjanjian," *Jurnal Pembaharuan Hukum* 3, No. 2 (2016): 281.

<sup>4</sup> Clara Vania dan Gunawan Djajaputra, "Keabsahan Penggunaan Kuasa Mutlak dalam Perjanjian Pengikatan Jual Beli (PPJB) Tanah yang dibuat Oleh Notaris," *Jurnal Hukum Adigama*,

Official has the right to refuse to make a deed if one of the parties or the parties acts on the basis of absolute power which in essence contains the legal act of transferring rights. In this case the Land Deed Making Official, as the party making the deed, has the right to refuse due to the impact of making absolute power of attorney, which can cause harm to others so that in civil terms it may violate the provisions of Article 1365 of the Civil Code.

In addition, regarding the prohibition on the use of absolute power of attorney is also contained in the rules of the Supreme Court Decision of the Republic of Indonesia Number 2584 / Pdt / 1986 dated April 14, 1988, where the decision states that the absolute power of attorney regarding land sale and purchase is not justified, moreover in practice it is often misused for the smuggling of the sale and purchase of land. However, there are still those who use absolute power, causing losses.

Among these, two cases were taken regarding the use of absolute power which caused losses to the land owner, namely the Supreme Court decision Number 680 K/Pdt/2020, which occurred between DS (owner), AY (seller) and EM, MD and ER (third party). Where this problem was preceded by a debt and receivable

agreement that occurred between DS and AY, then DS filed a lawsuit at the Banda Aceh District Court where AY sold DS's land to EM, MD, and ER which had changed the name 3 times, that is, without the knowledge of DS. The land sale originated from a debt agreement between DS and AY where the parties agreed to make a letter of agreement of debt to a notary, in this case IS. At the time of signing the agreement letter, IS gave a blank paper without the contents of the agreement in it and said that the signature of DS and her husband would be included in the debt agreement. However, the signature was apparently made for absolute power, causing losses for DS.

Therefore the District Court's decision won the lawsuit from DS where the judge decided to return the land belonging to DS in a vacant state where the land was in the hands of a third party. Then in the Banda Aceh High Court decision the judge accepted the buyer's lawsuit (EM, M.D, and ER) as a third party without neglecting the element of absolute power in the sale and purchase carried out, which was later strengthened in the Supreme Court decision where the lawsuit from DS was rejected.

Furthermore, with the same case, namely the Supreme Court decision

Number 458 K / Pdt / 2020, also preceded by a debt and credit agreement, then the owner (AS) filed a lawsuit at the Batu Licin District Court due to an element of absolute power in the sale of AS-owned land. by PT. PNM to B without notification to the AS and PT. PNM has bought and sold and transferred AS-owned land made by a notary PAP at a price that is far from the original price of the land. In the decision of the Batu Licin District Court to grant the AS lawsuit. Then PT. PNM and the notary PAP filed a lawsuit at the High Court, which accepted the appeal and overturned the Batu Licin District Court's decision. Then the AS filed a cassation lawsuit in the Supreme Court whose verdict was accepted in which the judge decided the seller and the notary to pay compensation and the third party returned the land owner to its original state which then canceled the High Court's decision due to wrongly applying the law.

Studies on absolute power have been carried out by several authors, but this study differs from a number of these studies because this study focuses on the losses of third parties who have good faith in land sale and purchase agreements, which are caused by the creation of absolute power. Therefore, the authors are interested in examining

the legal liability for losses of third parties in the agreement to transfer land rights by using a power of attorney. This is to find out how the seller and/notary will be legally responsible for the losses of third parties due to the use of absolute power of attorney in the agreement to transfer title to land.

The theory used to answer the problem in this study are 3 theories, namely: the theory of justice, where justice is defined as impartial, impartial, siding with the truth, natural and not arbitrary.<sup>5</sup> Then the principle of good faith, which is civil, is explained in Article 1338 of the Civil Code. And the theory of acts against the law as described in Article 1338 of the Civil Code.

## METHOD

The research method used in this research is normative juridical research with a statute approach and a case approach. The nature of the analysis of this research is prescriptive. Then the data sources used are primary data sources and secondary data sources.

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<sup>5</sup> Ernawati Waridah, *Kamus Bahasa Indonesia*, (Jakarta: Bmedia, 2017), hlm. 3.

## RESULTS AND DISCUSSION

### 1. The Seller's Legal Liability for The Lost of Third Party Due to Absolute Power of Attorney

The seller's legal liability is seen from the losses suffered as a result of the actions he has committed so as to cause losses to third parties.

An agreement is considered valid by law, if the agreement has met the requirements that are obligatory to be obeyed by the two parties who are bound by the agreement so that in this case the land sale and purchase agreement does not harm the other party.<sup>6</sup> Based on Article 1320 of the Civil Code, there are several legal requirements in an agreement, namely:

- a. Agree those who bind themselves;
- b. The ability to make an engagement;
- c. A certain thing;
- d. A cause that is lawful.

One of the conditions mentioned is that there is a cause that is lawful, which can be interpreted as a cause that is not prohibited and if there is a violation, the agreement that has been made is considered invalid or null and void.

According to Article 1335 in

conjunction with Article 1337 of the Civil Code states that a cause is declared prohibited if it is contrary to law, morals and public order.<sup>7</sup> Based on the land sale and purchase agreement using absolute power in this study, in addition to violating the legal terms of the agreement, namely a lawful cause, there is also an act that causes losses to third parties.

The prohibition of absolute power itself has been regulated in the Instruction of the Minister of Home Affairs No. 14 of 1982 Prohibition of Absolute Power, namely concerning the Prohibition of Using Absolute Power as Transfer of Rights to Land. The absolute power referred to is the power in which it contains an irrevocable element by the power of attorney.

The impact that results from an absolute power of attorney, namely that the recipient of the power of attorney becomes authorized to take legal actions or actions for the benefit of and on behalf of the power of attorney, can also act on the basis of *volmacht* and the authorizer to carry out all actions relating to the object of the agreement. As a result of the party being aggrieved, the transfer of land rights based on a

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<sup>6</sup> Rahmat GM Manik, "Tanggung Jawab Penjual Terhadap Tanah Yang Bersengketa, *JOM Fakultas Hukum*, Vol. 1, No. 2, Oktober 2014, hlm. 12.

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<sup>7</sup> Retna Gumanti, "Syarat Sahnya Perjanjian (Ditinjau Dari KUHPerdara)", *Jurnal Pelangi* 5, No. 01 (2012): 8-9.

power of attorney is absolutely invalid or null and void.

The prohibition of absolute power is also contained in Government Regulation No. 24 of 1997 Article 39 paragraph (1) letter d concerning land registration which reads "The Official for Making Land Deeds has the right to refuse to make a deed if one of the parties or the parties acts on the basis of an absolute power of attorney which in essence contains the legal act of transferring rights." Therefore, if there is a party that does not follow the stipulated rules that causes harm to the third party, based on Article 1365 of the Civil Code which states that "every act against the law that brings harm to others, obliges the person who due to his fault to issue the loss, compensate for the loss. " So the party who violates must compensate for the losses suffered.

Based on the case in the decision of the Supreme Court Number 680 K/Pdt/2020, where there were illegal acts committed by the seller because the seller sold land belonging to the owner to a third party using absolute power made by a notary where the absolute power was made without the knowledge owner.

The absolute power of attorney is based on a debt agreement between the

seller and the owner, which, with the agreement of both parties, makes a debt agreement with a notary public. The notary gives a blank paper to the owner to sign, which is said if the blank paper will be filled with a debt agreement. However, the signature is filled with the absolute power of attorney by the owner to the seller as the party receiving the power of attorney.

The owner who feels aggrieved due to the actions committed by the notary, then sues to the district court, where the judge grants the lawsuit from the owner because there is an element of absolute power over the sale and purchase of land carried out by the seller and the third party in the judge's consideration decides to return the land certificate to the owner, even though the land is in the hands of a third party.

The third party who feels aggrieved by the judge's decision, submits an appeal to the high court, where the judge accepts the third party's claim, whose consideration the judge decides to grant the claim from the third party because the third party is a party with good intentions which is then approved by the decision of the Supreme Court No. 680 K/ Pdt/2020.

Judging from the principle of good faith, based on Article 1338 paragraph (3) of the Civil Code states that "an

agreement must be carried out in good faith." Third parties in good faith must be protected by law.

As explained in the agreement of the Plenary Meeting of the Civil Chamber of 14-16 March 2012, which is stated in the Supreme Court Circular Letter (SEMA) No. 7/2012 Regarding the Legal Formulation of the Results of the Supreme Court Plenary Meeting as Guidelines for the Implementation of Duties for the Court, in points VIII and IX it is formulated that:

a. Holders of security rights who have good intentions must be protected even if it is found out later that the guarantor of the mortgage right is an illegitimate person.

b. Protection must be given to a buyer who has good intentions even if it is discovered that the seller is an illegitimate person (the object of sale and purchase of land), and the original owner can only file a claim for compensation against the unauthorized seller.

In contrast to the decision of the Supreme Court No. 680 K / Pdt / 2020, in the decision of the Supreme Court Number 458 K / Pdt / 2020 which is the same case, namely there is an element of absolute power in the sale and purchase of land where the seller without the knowledge of the owner

makes a power which contains elements of absolute power which prohibited from its use. Furthermore, on the basis of absolute power of attorney, the seller sells the land owned by the owner to a third party. Therefore, the actions taken by the seller are against the law. However, the decision of the Supreme Court Number 458 K/Pdt/2020 requires a third party to return the land to the owner. This is of course detrimental to third parties who have good faith for actions committed by the seller.

As a result of the existence of an element of absolute power in the power made, it causes owner loss by the seller which results in losses to the third party, based on Article 1365 of the Civil Code in which the Supreme Court decision No. 680 K / Pdt / 2020 the owner who was injured under Article 1365 of the Civil Code can claim compensation from the seller and notary public without involving a third party to bear the losses. while the decision of the Supreme Court Number 458K/Pdt/2020 a third party who was injured under Article 1365 of the Civil Code can sue the seller and the notary to compensate for the losses suffered.<sup>8</sup>

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<sup>8</sup> Muhammad Qodrat Husni Putra, Pengacara, *nawancara*, 3 Maret 2020, Kantor Hukum Husni Bahri dan rekan

The seller, as the party selling the land belonging to another person whose sale of the land is not known by the owner, must provide compensation to the party who is injured as a result of the actions taken, then the third party can hold the seller and the notary who has made the power accountable, absolute. Likewise, the third party should not share in the losses suffered because the third party is a party that has good faith in the agreement.<sup>9</sup>

In this decision, the judge did not see from the point of view of a third party that should not have been included in the coverage for losses, because if a third party was involved to bear the loss, the third party who was injured ended up being injured.

Furthermore, based on the theory of acts against the law, seen from the accountability of the seller, namely based on Article 1365 of the Civil Code where the seller provides compensation due to the illegal act committed.

Compensation is not always by paying money. According to Hoge Raad in the verdict of May 24, 1918, considering that "the return to its original state is the most appropriate compensation payment." The meaning is like returning the sufferer to its original state, at least in a situation that would

have been possible had PMH not done by the seller.<sup>10</sup>

According to Article 1365 of the Civil Code regarding acts against the law, which states that "every act against the law which causes other people to suffer losses, obliges whoever is guilty of causing the loss to be compensated for the loss." The intended action is behavior that is inconsistent with legal rights and obligations.<sup>11</sup>

Based on the theory of justice, the seller does not apply the element of justice, because it has sold other people's property on the basis of absolute power where absolute power is obtained from a debt agreement between the owner and the seller which is clearly detrimental to the owner.

In order for justice to be applied, the seller must be responsible for the losses that are felt, which is based on Article 1365 of the Civil Code by compensating third parties because the seller is still using the sale and purchase based on absolute power which is prohibited from its use and the sale of land belonging to the owner of the land which is carried out without the knowledge of the owner

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<sup>10</sup> Sri Rejki Slamet, "Tuntutan Ganti Rugidalam Perbuatan Melawan Hukum: Suatu Perbandingan dengan Wanprestasi," *Lex Jurnalica*, vol.10. No. 2 Agustus 2013, hlm. 7.

<sup>11</sup> Amran Suadi, *Penyelesaian Sengketa Ekonomi Syariah: Penemuan dan Kaidah Hukum*, (Jakarta: Prenadamedia Group, 2018), hlm. 119.

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<sup>9</sup> *Ibid*



which results in the loss of third parties.

Referring to the decision of the Supreme Court No. 680 K / Pdt / 2020, which agrees with the decision of the Banda Aceh High Court, has fairly applied the law whereby a third party in good faith is protected from losses and also the land owner based on the judge's consideration can file a claim for compensation for the loss of land ownership status.

When compared to the decision of the Supreme Court Number 458 K / Pdt / 2020 with the same case but the judge applied a different decision which caused losses to the third party. So due to differences in the judge's decision, there is no justice for third parties.

## **2. Notary's Legal Liability for Third Party Losses Due to Absolute Power of Attorney**

The responsibility of a notary, both his obligations and authorities, is legally binding and shall be enforced when the notary takes his oath of office as a notary. This should be the basis of the notary's responsibility in his work and be ready for the sanctions that are obtained.<sup>12</sup>

In civil terms, the responsibility of a

notary is included in Article 1365 of the Civil Code, which means that anyone who causes harm to another person has the right to provide compensation. The notary's responsibility is in the form of compensation for his mistakes that have caused losses to others. So because of the losses suffered, the notary is also entitled to bear the losses because the notary must have responsibility with respect to the deed he has drawn up.

If it is related to the case in the Supreme Court decision Number 680 K/Pdt/2020 and the Supreme Court decision Number 458 K/Pdt/2020, in terms of the land sale and purchase deed which is based on absolute power of attorney, the notary is the party making the absolute power of attorney and the sale and purchase deed. Land which is the basis of the loss felt by a third party, should be responsible for his actions that have caused losses, which is based on Article 1365 of the Civil Code.

As explained in Government Regulation Number 24 of 1997 Article 39 paragraph 1 letter d concerning Land Registration, that "Land Deed Making Officials have the right to refuse to make deeds if one of the parties or parties acts on the basis of absolute power which in essence contains the legal act of transferring rights, "and by his actions that cause harm to other

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<sup>12</sup> Ariy Yandillah, Sihabuddin dan Herlin Wijayanti, "Tanggung Jawab Notaris Pengganti Terkait Pembuatan Akta Notaris yang Merugikan Para Pihak Akibat Kelalaiannya," *Jurnal Hukum*, tahun 2015, hlm. 6.

third parties, the notary must participate in providing compensation for such losses.

Absolute power must not be given to objects of land and/or buildings, because if absolute power is given it will be misused, meaning that it can become legal smuggling. Where the parties who are given absolute power to sell may not carry out other obligations, such as: not making a Sale and Purchase Deed (SPD), not carrying out the process of transferring names, even eliminating state taxes and hanging up to their children and grandchildren. This is the reason why absolute power is not allowed.<sup>13</sup>

Then, based on the decision of the Supreme Court Number 458 K/Pdt/2020 by canceling the sale and purchase deed made by a notary based on absolute power is true, but those who have the right to bear are only those who have violated the provisions of Article 1365 of the Civil Code, namely the party causing losses to other people and must replace or provide responsibility for losses suffered, namely the seller and the notary without involving a third party to bear which results in losses to the third party.

On the basis of absolute power of

attorney, the seller has sold land that is owned by someone else by making a sale and purchase deed and this is done by reversing the name on behalf of the seller without being noticed by the owner.

The responsibility of the notary based on Article 1365 of the Civil Code, namely in terms of compensation, namely by means of a third party can ask for compensation from the notary concerned. Therefore, a notary can be held accountable in a civil manner, because the judge decided the sale and purchase was canceled and did not have legal force.

The making of absolute power made by the notary is a mistake not only because of the making of the absolute power of attorney but also the process of making it which is considered unfair because there is an element of the owner's ignorance of the contents of the power of attorney, which is why the seller can act like the owner and sell the land. by making a sale and purchase deed at a notary/Land Deed Making Official.

The notary's responsibility as the power maker arises because of the obligation and authority given, which legally and is bound to come into effect when the notary pronounces his oath of office which then controls all the actions

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<sup>13</sup> Teuku Abdurahman, Notaris, *Wawancara*, 11 Januari 2021, Kantor Notaris Teuku Abdurahman Banda Aceh.

he takes.<sup>14</sup>

Imposing sanctions against notaries who do not carry out their obligations in accordance with the applied code of ethics is the responsibility of the notary in carrying out its function as deed maker. In determining the accountability, one must consider how big the mistake made by the notary subsequently impacts on his responsibility.<sup>15</sup>

The responsibility of a notary is seen from the element of error, especially in Articles 1365, 1366 and 1367 of the Civil Code, which explains that a person can be held accountable legally. Article 1365 of the Civil Code stipulates that there are four elements of error, namely the presence of PMH itself, errors and losses.

## CONCLUSION

It is the responsibility of the seller and the notary public for violating the Instruction of the Minister of Home Affairs No. 14 of 1982 Concerning Prohibition of Absolute Power, Government Regulation No. 24 of 1997 Article 39 paragraph (1) letter d, and the Supreme Court Decision of the

Republic of Indonesia Number 2584 / Pdt / 1986 dated April 14, 1988. In civil terms, on Article 1365 of the Civil Code, the seller, and the notary must compensate a third party because their actions caused losses to the third party.

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<sup>14</sup> Tengku Erwinsyahbana, "Kewenangan dan Tanggung Jawab Notaris Pengganti Setelah Pelaksanaan Tugas dan Jabatan Berakhir," *Jurnal Lentera Hukum* 5, No. 2 (2018): 336.

<sup>15</sup> *Ibid.*

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