

INSTRUMENTAIR WITNESS IN MAKING NOTARIAL DEEDS

Hendra Jonathan Sibuea

ABSTRACT

The parties in making the notarial deed have the obligation to keep the notarial deed confidential, but the law does not clearly stipulate the obligation of the instrumentaire witness to maintain the confidentiality of the notary deed. The instrumentaire witness is an important witness in making a notarial deed, without his presence the notary deed is only valuable as a deed under the hand. because the instrumentaire witness's obligation to maintain the secrecy of the deed is not regulated in the law, the witness has the potential to leak the notarial deed. This paper aims to review the responsibility of the notary and instrumentaire witnesses in relation to the act of the instrumentaire witness who leaked a notarial deed. This paper uses a type of normative research with a statue approach. The notary is not responsible for the actions of the instrumentaire witness who leaked a notarial deed, especially if the notary has carried out his obligations, duties, functions and authority according to the applicable rules. The instrumentaire witness himself is responsible for these actions.

Key words: instrumentair witnesses, notaries, confidentiality, responsibility.

INTRODUCTION

Article 1868 of the Civil Code states that one of the conditions for the establishment of an authentic deed is a deed determined by law. This provision is then regulated in Article 38 of Law No. 2 of 2014 Jo Law No. 30 of 2004 regarding Notary Office. One of the formal requirements in making a notarial deed is the presence of two witnesses as regulated in Article 40 paragraph 1; the two witnesses are known *Attesterend* witnesses and *instrumentaire* witnesses (*instrumentaire getuigen*). An *Attesterend* witness is witnesses who introduced the appellant to a notary, and an *instrumentaire* witness is a witness who participates in making a deed, this *instrumentaire* witness is generally a notary employee himself as long as he meets the requirements of Article 40 of Law No. 2 of 2014 Jo Law No. 30 of 2004 regarding Notary Office.

Employees play a major role in assisting the implementation of notary duties in the making of deeds. The appointment of a notary employee as an instrument witness in making a notarial deed means that the employee knows firsthand the process of making and the contents of the deed. The confidentiality of the contents of the deed is relatively safe when the employee is still working with the notary, but often the confidentiality of the notarial deed becomes vulnerable openly when the *instrumentaire* witness is no longer the employee of the notary or when asked as to be a witness in court. The *instrumentaires'* actions leaked the contents of the deed in addition to bringing legal consequences to the witnesses themselves and to the notary whether they were still employees or when they were not employees of the notary. In the Notary office Act, it is explained that the purpose of maintaining the confidentiality of a deed is to protect all parties related to the deed, but this law does not regulate the obligations and responsibilities of instrumentair witnesses to maintain the confidentiality of the contents of a notarial deed.

Considering the instrumentaire witness is a formal aspect of making an authentic deed without its presence making the deed to be an underhanded deed based on art 41 of Law No 2 of 2014 Jo Law No 30 of 2004. The obligation to maintain the confidentiality of the contents of the deed should also be attached to the instrumentaires' obligation. The existence of a vacuum or obscurity of the norms governing the obligation of instrumentaire witnesses to maintain the confidentiality of the contents of the deed, it is necessary to examine how the responsibility of the notary and witness of the instrumentaire itself if the instrumentaire witness leaks the contents of the notarial deed.

POSITION AND OBLIGATIONS OF INSTRUMENTAIR WITNESS RELATED TO THE CONFIDENTIALITY OF NOTARIAL DEEDS

A. Position of Instrumentaire Witness

The provisions governing witnesses can be found in several regulations, including in the Civil Procedure Code Article 164 to Article 172 Chapter nine HIR stb.1941 Number 44 which regulates witnesses in a case examination in the trial process for civil cases which are under the authority of the District Court. (RBg): Stb. 1927 No. 227 Titel IV on procedures for adjudicating civil cases in the first instance becomes the authority of the District Court and Titel V regarding evidence in civil cases. In the Civil Code in the fourth book of the third chapter on evidence and witnesses in Article 1895 of the Civil Code, 1902 Civil Code, and Articles 1904 to 1912 the Civil Code also regulates witnesses. Article 1866 of the Civil Code explains that witness statements are legal evidence.

Deed witnesses or often referred to as instrumentaire witnesses (*Instrumentaire Getuigen*) are witnesses who participated in making notarial deeds. The existence of a deed witness is a formal condition of a notary deed referred to as an authentic deed as regulated in Article 38 of the Notary Position Law and Article 1868 BW. The failure to fulfill article 38 not only results in a deed only as an underhanded deed, but can also be the basis for the party suffering losses to sue for compensation to the Notary as regulated in Articles 41 and 50 of the Notary Office Law.

According to article 40 (2) of the Law of Notary Position, the requirements to be a witness to the deed are as follows:

- a. At least 18 (eighteen) years or previously married;

- b. Competent in carrying out legal actions;
- c. Understand the language used in the Deed;
- d. Can sign and initial; and
- e. Do not have marital relations or blood relations in a straight line up or down without limitation of degrees and lines sideways to the third degree with the Notary or the parties.

Article 16 (1) (m) of the Notary Position Law requires the notary to read the deed in front of witnesses and it is hoped that what is read by the notary can be understood by the parties. The reading of the deed serves to confirm that the contents of the deed are in accordance with the wishes of the parties and do not harm or burden the parties. Affirmation of the statement of the contents of the deed made then signed by the parties including the witnesses of the deed. In this case, the deed witness has vital role, without the presence of the deed witness, the notarial deed cannot be called an authentic deed.

B. Deed witness obligation to keep the deed confidentiality

Notarial deed is confidential, Law No. 2 of 2014 Jo Law No. 30 of 2004 concerning Notary Office only regulates the obligations of the Notary, Supervisory Board and Prospective Notary Public to keep the contents of the notary deed confidential. The confidentiality of the contents of this deed is basically aimed at protecting the interests of all parties related to the deed. Even notaries who violate them may be subject to sanctions warning up to the termination of respectful discharge.

In the Law on Notary Office there is no provision governing the obligation of instrumentaire witnesses to keep the notarial deed confidential, moreover the witness concerned is no longer working as a notary employee and asked as witness in the court. No longer as a notary employee makes the employee who was once a witness of the instrumentaire feel he no longer has the responsibility to keep the deed confidential. Instrumentaire witnesses who are asked to be witnesses in a court are often asked for information by investigator, prosecutor and the court for the settlement of a particular case because the notary has the right of disavowal to provide information about the deed.

However, if a former employee who acts as an instrumentair witness leaked a notarial deed then it violates at least 2 related provisions, namely:

a. Art 1365 Civil Code

Art 1365 Civil Code states that "Every act that violates the law, which brings harm to others, obliges the person who because of his mistake to issue the loss compensates for the loss". The act is categorized as violating the law if it meets the following 4 elements, including:

- 1) The Act
Acts include doing something and not doing something that becomes an obligation. These actions can be interpreted that an action can be done either intentionally or unintentionally.
- 2) The act is against the law
Acts against the law have a broad understanding, including:
 - a. Violating applicable law
 - b. Violating the others rights which guaranteed by law
 - c. Contradicts the doer's obligations
 - d. Contradicting decency
 - e. Contradicts principle of propriety and prudent
- 3) There is a fault of the doer
The doer has the following elements:
 - a. Intentional
 - b. Negligence
 - c. There is no reason to justify and forgive
- 4) The act incurred losses
Losses include material and immaterial losses. Payment of material compensation can be based on article 1246 of the Civil Code governing defaults/breach of contract and payment of immaterial compensation can be based on article 1372 of the Civil Code
- 5) The causality between actions and losses / actions and losses must have causality
The theory commonly used to explain causality is adequate veroorzaking. According to this theory the cause of an act against the law is a balanced act using proper calculations.

Instrumentaire witnesses who are summoned at court must provide information in accordance with their responsibilities. Instrumentaire witnesses are prohibited from providing information related to content of notarial deed. Providing information on a notarial deed, the instrumentaires' actions can be categorized as unlawful acts based on the above article.

Although the Act does not regulate the obligations of instrumentaires to keep a notarial deed confidential, but if it looks at the formal aspects of notary deed formation and the confidentiality nature of the notary deed described in the Act, it should be that the instrumentaire witness because of his position has the responsibility to also keep the contents of the notary deed. Therefore, instrumentaire witnesses are also possible to use the right to resign as a witness in a court (*verschoningsrecht*) based on article 1909 (3) Civil Code and Article 146 HIR. Both articles basically allow witnesses to resign as witnesses in court because of blood ties and related to their position, occupation or position, are required to keep something confidential.

Article 1909 (3) of the Civil Code allow witnesses to resign as witnesses, including:

- a. The kinship of blood in the side lines in the second degree or in a partnership with one of the parties.
- b. Blood ties in an infinite straight line and in the side lines in the second degree with the husband or wife of one of the parties.
- c. All work or position under the law is required to keep something confidential, but only solely on matters whose knowledge is entrusted to him as such

According to article 146 HIR, those who have the right to resign as witnesses, including:

- a. Brother and sister, and brother-in-law of one party.
 - b. Blood relatives according to righteous descendants and brothers and sisters of men or wives of one party
 - c. All people who, because of their official occupation or position, are required to keep a secret, but solely only on such matters entrusted to them.
- b. Law no. 14 of 2008 regarding Public Information Openness

Article 17 (g) of Law No. 14 of 2008 prohibits providing personal authentic deed information. Article 18 gives exception to the provision of information on the contents of the deed if it gets written approval from the parties. According to article 54, people who provide information on the contents of an authentic deed can be sentenced to prison for two years and a fine of ten million rupiah.

C. Notary responsibility to employees who act as instrumentaire witnesses

According to Grace and Trisnomurti, the notary is not responsible for the actions of the instrumentaire witness who gave information outside his authority or leaked the notarial deed. According to them, it was the personal responsibility of the instrumentaire witness as long as the notary had carried out his obligations, duties, functions and authorities in accordance with applicable regulations. Meanwhile, according to Rosalina and Jaury, the notary was responsible both legally and morally if the instrumentair witness as well as his employee leaked the deed so that the parties felt disadvantaged over the action. According to Yetty Komalasari, the employer can be responsible for the actions of his subordinates if the subordinate is a worker who works for the employer and the subordinate must carry out activities according to the scope of his work when the subordinate made a mistake.

According to Ridwan Indra, the employer is also responsible for the actions of his subordinates if the person who gets the order acts according to the tasks assigned to him and he only performs actions that are truly ordered by him. According to Abdul Kadir, the notary is not responsible for the actions of his employees who were carried out when he was not carrying out his work. Rutten provides a narrow limit, according to him the responsibility can be imposed on the notary if the act is against the law during working hours, meaning that if the act is done outside working hours then the action is not the employer's responsibility.

In the Jurisprudence of the decision of the Supreme Court of the Republic of Indonesia in the decision of Register Number 558 K / SIP / 1971 which was decided on June 4, 1973, stated that the employer must also be responsible for the negligence of subordinates because of mistakes made in doing their work. Article 1367 paragraph (1) of the Civil Code states that a person is not only responsible for losses caused by his own actions, but also for losses caused by the actions of people who are under his responsibility or due to goods under his control. Article 1367 (3) of the Civil Code states that the Employer or person who appoints others to represent their affairs, is responsible for losses caused by their servants or subordinates in carrying out the work assigned to these people. Limitation of liability is set out in 1367 paragraph (5) which states that the responsibility stated above ends if the employer can prove that they cannot prevent acts for which they should be held responsible. However, the formulation of the paragraph above does not provide limits on the extent to which the employer must be responsible if his subordinates make a mistake. The absence of formulation regarding the limitation of employer responsibility towards his subordinates raises the perception that the employer's responsibility is unlimited.

CONCLUSION

The Notary is not responsible for the employee's actions as an instrumentaire witness if the notary has carried out his obligations, duties and functions in accordance with applicable regulations and the instrumentaire witness will be personally responsible for the action.

The instrumentaires' obligation to maintain the confidentiality of the notary deed remains attached even though he is no longer an employee. Therefore, the government needs to set clearer and more explicit norms governing these obligations. Instrumentaire witnesses who are no longer employees are personally responsible for their own actions and cannot be charged to the Notary.

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KUH Perdata

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Hendra Jonathan Sibuea
Postgraduate Program, Law Faculty
Universitas Sebelas Maret,
Surakarta, Indonesia
Email: Josibuea79@yahoo.co.id