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## INTERNATIONAL JOURNAL OF ADVANCED RESEARCH (IJAR)

Article DOI:10.21474/IJAR01/16042  
DOI URL: <http://dx.doi.org/10.21474/IJAR01/16042>



### RESEARCH ARTICLE

#### LAND GRANT A DEED THAT IS MADE BY THE PARTIES WITHOUT BEING WITNESSED BY A NOTARY IN THE DECISION OF THE JUDGE OF THE KENDARI RELIGIOUS COURT NO.0053 PDT-P/2013/PA KDI

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#### Manuscript Info

##### Manuscript History

Received: 20 November 2022  
Final Accepted: 24 December 2022  
Published: January 2023

##### Key words:-

Grant, Land and Validity

#### Abstract

The Kendari City BPN's refusal to change the name and the judge's considerations granted the determination of Nurmiati's mother's grant on the grounds that the Petitioner has controlled the land parcels of the grant object and has no objections to the possession of the land is very much contrary to the intent and purpose of granting the grant which is immediately applicable or legally transferring the grant object to the recipient of the grant if the terms of the grant are met. The Kendari Religious Court Judge's decision sets a bad precedent for the legal certainty of a grant made by the grantor unless it is proven otherwise that the awarding of the grant does not fulfill the legal requirements of the agreement as stipulated in Article 1320 of the Civil Code. The purpose of this research is to analyze the legal standing of grants given based on hand-to-hand grants and to analyze the Kendari Religious Court's decision NO.0053 PDT-P/2013/PA KDI". Regarding this determination, private grants are based on the mastery of the grantee. The research method used is normative research, which is a process to find legal principles, legal principles, and legal doctrines to answer the legal problems faced. The results of the research are that giving private grants invalid, because the position and authority of the grant that has permanent legal force to make the grant deed is a notary appointed by the government as a general official with authority in accordance with the rules stipulated in government regulations. No. 24 of 1997 concerning Land Registration. Whereas proof of a grant letter under the hand where the grantor has died, in the process of transferring names cannot be carried out by the recipient of the grant at the time of the Land Office. So the deed under the hand must get a court order in advance so that it has legal force later when the name changes to the beneficiary.

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#### Introduction:-

A grant is an agreement by which the grantor, during his lifetime, freely and irrevocably surrenders an object for the needs of the grantee who accepts the surrender. the grant is intended to benefit the grantee and vice versa does not

provide benefits to the grantor.<sup>1</sup> Grants are only about goods that already exist, if the grant includes goods that will only exist in the future, then the grant will be void. The formality of the grant is determined by the nature of the object. The granting of immovable objects is stipulated in the form of a notarial deed, while the granting of movable goods with a body or a debt collection letter by appointment (aan tonder) does not require a formality and can be done legally by simply handing over the goods to the grantee or to a third party who accepts the grant on his behalf.<sup>2</sup>

Grants of land rights according to Article 37 paragraph (1) of Government Regulation Number 24 of 1997 concerning Land Registration can only be registered if proven by a deed made by an authorised PPAT in accordance with the provisions of the prevailing laws and regulations.

The provisions of granting land rights that should be made by PPAT in everyday life are often not implemented by grantors due to lack of knowledge about granting arrangements such as Granting Grants by Ambo Rabiah during his lifetime to Nurmiati in the form of a plot of land located in Mandonga Village, Mandonga District, Kendari City. Over time Nurmiati submitted an application to transfer the name of the certificate in question but the Kendari City BPN refused to register or transfer the name even though she had been shown the Grant Deed signed by Ambo Rabiah.

Nurmiati as the grantee filed a grant determination to the Kendari Religious Court. The Kendari Religious Court in its decision granted the applicant's request with the legal consideration being that because the applicant had controlled the land plot of the grant object and there was no objection to the control of the land.<sup>3</sup>

The rejection of the name change by BPN Kendari City and the consideration of the judge granting the grant determination of Nurmiati's mother on the grounds that the applicant has controlled the land plot of the object of the grant and there is no objection to the control of the land is very contrary to the intent and purpose of granting a grant which immediately applies or validly transfers the object of the grant to the grantee if the conditions of the grant are fulfilled.

According to the author, the decision of the Judge of the Kendari Religious Court sets a bad precedent for the legal certainty of the Grant letter made by the grantor unless otherwise it is proven that in the granting of the grant the grant letter does not fulfil the validity of the agreement as stipulated in Article 1230 of the Civil Code.

Based on the above background, several legal issues can be drawn as follows: What is the legal position of the grant given based on the granting of grants under the hand? How is the registration of grants at the land office originating from grants under the hand?

### **Research Method:-**

The type used in this research is normative research. Normative research, namely normative legal research, is a process for finding legal rules, legal principles, and legal doctrines to answer the legal problems at hand. Normative research method, namely research that uses the positivist legis form which states that law is identical to written norms made and promulgated by authorised institutions or officials.

### **Discussion:-**

Based on the Judge's Consideration Number 0053/Pdt. P/2013/PA Kdi which states, that because it turns out that the conditions for making grants have been fulfilled by both parties, namely the grantor and grantee, in which case the grantor (Ambo Rabiah) has granted the applicant his own land without coercion, In the event that the grantor (Ambo Rabiah) has granted the applicant his own land without any coercion, and it is known by the public in the location of the granted land, also there has never been anyone who objected and disputed the land object of the grant since the applicant received the grant and took control of the grant land, then the Court concluded that the act of grant was sufficiently reasonable according to the law by determining the applicant (Dra. Nurminah Zain binti M. Zain) as the grantee from Ambo Rabiah binti Saeho (deceased) of a piece of land measuring 803 M2 (eight hundred and three square metres) with Certificate (Proof of Right) No.3109. with measurement letter dated 21 November 1998 No.

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<sup>1</sup> paragraph 1 Article 1666 of the Civil Code

<sup>2</sup>M. Yahya Harahap, Segi-segi Hukum Perjanjian, Alumni, Bandung, 1986. hlm. 277

<sup>3</sup> Determination Number 0053/Pdt.P/2013/PA Kdi

57/98 in the name of Ambo Rabiah, located at Jalan Taman Surapati, Mandonga Village, Mandonga Sub-District, Kendari City.

The aforementioned stipulation of the judge which states that the transfer of the grant dated 8 March 1999 by Ambo Rabiah binti Saeho to the applicant (Dra. Nurminah Zain binti M. Zain) by way of underhand is valid according to the law is based on:

1. Grant without coercion,
2. The grant was publicly known in the location of the land granted,
3. no one has ever objected and disputed the land object of the grant.
4. the applicant controls the grant land.

Article 1682 of the Civil Code no grant except those mentioned in Article 1687 may, under penalty of nullity, be made otherwise than by notarial deed, the original of which shall be kept by the notary." Article 1683 of the Civil Code, "No grant shall bind the grantor or produce any effect whatsoever, other than from the moment when it is expressly accepted by the grantee himself or by a person whom the grantee has authorised by an authentic deed to accept the grants which the grantee has made or will make in the future. If the grantee has done so in his own letter of grant, it shall be capable of being done in an authentic deed, the original of which shall be preserved, provided that such is done while the grantor is still alive, in which case the grant to the latter shall take effect only from the time when the grantee is notified thereof. "himself or by a person who by an authentic deed by the grantee has been authorised to receive grants that have been given by the grantee or will be given to him in the future.

From these provisions it appears that a grant, which is not immediately followed by the delivery of the goods to the grantee (cash) as can be done under article 1687, must first be accepted by the grantee, so that it binds the grantor. The acceptance can be done by the grantee himself or by a power of attorney authorised by notarial deed, which power of attorney must be a special power of attorney.

The function of a notarial deed in a grant is not merely as evidence, but also as an essential condition for the validity of the grant agreement. Therefore, a grant that is not made with a notarial deed, or a grant that is made freely outside a notarial deed, is a grant agreement that is absolutely void. The same applies to the renewal of a grant.

A grant cannot be renewed at a later date by a notarial deed. That is, an original grant is renewed and perfected by a notarial deed at a later date. Withdrawal of Grant in the Civil Code Although a grant, as with an agreement in general, cannot be withdrawn unilaterally without the consent of the opposing party, the Law provides the possibility for the grantor to in certain cases withdraw or abolish grants that have been given to others.

According to Islamic Law Grant is a free gift of property in a state of life and health,<sup>4</sup> and handed over property given when the grantor is still alive. Article 171 point g of the Compilation of Islamic Law (KHI), "Grant is the giving of an object voluntarily and without reward from someone to another person who is still alive to be owned.

The main evidence that regulates grants is found in QS. al-Baqarah (2): 177 :

".... Giving his beloved property to his relatives, orphans, the poor, travellers (who need help) and those who beg; and (freeing) slaves ...". (QS. al-Baqarah (2): 177).

According to some Ulama, the pillars and conditions that must be fulfilled by a person in carrying out a grant so that the grant is valid are:<sup>5</sup>

- 1) The person who grants (grantor)
  - a. The grantor must own something that is granted.
  - b. The grantor is not a person whose rights are restricted, meaning a person who is capable and free to act according to the law.
  - c. The donor is an adult, reasonable, and intelligent. It is not required that the grantor must be Muslim. This is based on the Bukhari hadith which states that it is permissible to accept gifts from idolaters.

<sup>4</sup>Alfia Raudhatul Jannah , Zaitun Abdullah, Ricca Anggraeni, Pandangan hukum islam tentang hibah, wasiat dan hibah wasiatkajian putusan nomor 0214/pdt.g/2017/PA.PBR Jurnal Legal Reasoning Vol. 1, No. 2, Juni 2019. h. 80

<sup>5</sup> ibid

- d. The donor is not forced because the grant is a contract that requires willingness.
- e. According to Article 210 paragraph (1) of the Compilation of Islamic Law (KHI), the requirements for the person who grants are that a person who is at least 21 (twenty-one) years old and of sound mind without coercion can grant as much as 1/3 of his property to another person or institution in the presence of two witnesses to be owned.

The requirements of the person who grants are not regulated in the Compilation of Sharia Economic Law (KHES). So the requirements of the person who grants in Indonesian positive law are only regulated in the Compilation of Islamic Law (KHI).

The difference in the requirements of the person who grants according to Abdul Rahman Ghazaly et al with the Compilation of Islamic Law (KHI) as described above is that in the Compilation of Islamic Law (KHI) it is explained about the minimum age limit of a person who can grant his property, which is at least 21 (twenty-one) years old, while the requirements for the person who grants according to Abdul Rahman Ghazaly et al are not explained regarding the minimum age limit, but someone who can grant his property must be an adult. In addition, the Compilation of Islamic Law (KHI) also explains the maximum limit a person can grant his property, namely 1/3 (one third) of his property, while the requirements for the person who grants according to Abdul Rahman Ghazaly et al are not explained regarding the maximum limit a person can grant his property.

#### 2) Terms of the person who is given a grant

The person who is given the grant actually exists at the time of the grant, if it does not exist or its existence is estimated, for example still in the form of a foetus, then the grant is not valid. If the person who is given the grant exists at the time of granting the grant, but he is still a child or crazy then the grant must be taken by his guardian, his caretaker, or the person who educates him even if he is a foreigner.

#### 3) Conditions of the object to be granted.

- a. The object granted must be the perfect property of the grantor.
- b. The donated object already exists in the real sense at the time of the execution of the contract.
- c. The donated object is something that is permitted to be owned by religion.
- d. The donated property must be clearly separated from the grantor's property.
- e. The property really belongs to the person who grants. So it is not permissible to
- f. So it is not permissible to grant something that is in his hands but it belongs to someone else such as the property of an orphan who is entrusted to someone.

Article 210 paragraph (2) of the Compilation of Islamic Law (KHI) explains that the condition of the property granted must be the right of the grantee. Article 712 paragraph (1) of the Compilation of Sharia Economic Law (KHES) explains that the property granted is required to come from the grantor's property.

#### 4) Terms of ijab Kabul

Article 693 of the Compilation of Sharia Economic Law (KHES) "ijab in grants can be expressed in words, writing, or gestures, which means the transfer of ownership of property for free." In Indonesian positive law, the requirements regarding ijab kabul in grants are only regulated in the Compilation of Sharia Economic Law (KHES).

According to some scholars, the person who grants and the person who receives the Grant must have ijab Kabul, namely the offer from the granting party and the acceptance of the party who will receive the Grant. This is in line with Article 692 paragraph (1) of the Compilation of Sharia Economic Law (KHES) which requires ijab kabul in the implementation of grants so that ijab kabul is included in the pillars of grants according to the Compilation of Islamic Economic Law (KHES). Without Ijab Kabul, the grant is declared invalid. Although Grant is a gift by not expecting achievement from the recipient, it also requires acceptance or approval from the grantee, so when there is approval by the recipient, Ijab Kabul occurs.<sup>6</sup> Thus it is clear that after the handover, the grant becomes the property of the giver and is prohibited from withdrawing it.

The grant contract is not valid unless after the object is handed over, thus the grant contract has legal certainty or permanence. Withdrawing the grant before the handover occurs shows that the grantor is not happy with the gift. If you are forced to give it up, it is the same as spending money without willingness. This is contrary to the nature of

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<sup>6</sup> ibid

the grant itself, as forbidden by Rasûlullâh (peace and blessings of Allâhu ta'âlâ be upon him) in the words of the Prophet (peace and blessings of Allâhu ta'âlâ be upon him): The one who takes back his grant is like a dog that licks back its vomit [HR: Al-Bukhâri].

Also in the words of the Prophet (peace and blessings of Allaah be upon him):

It is not permissible for a person to give a gift or a grant and then withdraw it, except for what a parent gives to his child. [Ahmad, Ibn Hibban and Abu Dawud. This hadith has been deemed saheeh by Shaykh al-Albani (may Allah have mercy on him) in *Shahîh al-Jâmi*, No. 2775.

According to Islamic law, grants can be made either in writing or orally; in fact, it has been stipulated in Islamic law that gifts of immovable property can be made orally without the use of a written document. However, if there is sufficient evidence of the transfer of property rights, then the gift can be stated in writing. If the gift is made in writing, there are two kinds of forms, namely:

1. A written form that does not need to be registered, if the content only states that the grant has occurred.
2. A written form that needs to be registered, if the letter is a tool of the delivery of the gift itself. That is, if the delivery and declaration of the object concerned is then followed by an official document about the gift, then that is what must be registered.

Parents' grants to children according to Islamic Law are permissible, but the scholars as quoted by Abdul

Rahman Ghazaly, et al, agree that a father must treat his children with fair treatment. A father is not allowed to exceed the grant to some of his children over other children, because such treatment will instil enmity and break the relationship that is ordered by Allah. The act of a father giving more to one of his children is cheating, so he should withdraw the grant.<sup>7</sup>

Withdrawing a grant is forbidden, even if the grant is between two brothers or husband and wife.<sup>8</sup> However, the grant of parents to their children can be withdrawn as in a hadith from Ibn Umar and Ibn Abbas r.a. from the Prophet said, "It is forbidden for a Muslim to give something to another person and then ask for it back, except for the gift of a father to his son."<sup>9</sup>

In addition, Article 212 of the Compilation of Islamic Law (KHI) also explains that grants cannot be withdrawn, except for grants from parents to their children. The principle of implementing a parent's grant to his child must be in accordance with the instructions of the Prophet Rasulullah saw.<sup>10</sup> In a hadith the Prophet said,

"Fear Allah and be fair among your children." (HR. Bukhari Muslim).<sup>11</sup>

The above Hadith explains that the Prophet ordered to be fair to his children and not to give all the wealth to one of his children. The reason why it is permissible for a father to withdraw a gift to his child is because he has the right to look after the interests of his child, as well as paying attention to his child. Withdrawal of a father's grant can be done on condition that the item given is still in the possession of the child. If it has been lost, then the father may not withdraw it even if the goods return to the child in another way.<sup>12</sup>

Based on the explanation above, it can be seen that the Prophet ordered parents to be fair to their children. Grants that have been given basically cannot be withdrawn but the Prophet gave an exception to that, namely the grant of a father to his son can be withdrawn. In Article 212 of the Compilation of Islamic Law (KHI) also explains if the grant cannot be withdrawn, the grant of parents to their children. Thus, it can be concluded that a father must be fair to his children and may not give grants to one of his children only. the hadith provisions apply *matatis muntandis* to all heirs according to Islamic law.

<sup>7</sup> Abdul Rahman Ghazaly, Ghufon Ihsan, dan Sapiudin Shidiq, *Fiqh Muamalat*, (Jakarta: Kencana, 2010), hal 165

<sup>8</sup> *ibid*

<sup>9</sup> Hendi Suhendi, *Fiqh Muamalah*, (Jakarta: RajaGrafindo Persada, 2005), hal 213.

<sup>10</sup> Abd. Shomad, *Hukum Islam: Penormaan Prinsip Syariah dalam Hukum Indonesia*, (Jakarta: Kencana, 2010), hal 139

<sup>11</sup> *ibid*

<sup>12</sup> *ibid*

Grants according to customary law. Ter Haar states that granting or inheritance (Toescheidingen) is the opposite of indivisible inheritance, namely the distribution of the whole or part of the property when the ownership is still alive.<sup>13</sup>

Among Indonesian customary law communities, both in parental, matrilineal and patrilineal family systems, gifts are made when children become adults and form independent families. Then after the granting parent dies, the distribution of the inheritance to the heirs is carried out, the grant will be considered and taken into account with the part that should be received by the children concerned if they have not received part of the family property by grant. The validity of land rights grants according to customary law is a grant that fulfils the elements of clarity, cash and instantaneous.<sup>14</sup> Thus, grants according to customary law are not required in written form, let alone must be made in the form of an authentic deed.

Based on the regulation of grants according to BW, Islamic Law and customary law, the validity of grants is determined by the laws that regulate them. for those who are Muslims, grants are valid if made either in writing or orally as long as the conditions of the grant are carried out in granting grants. but what needs to be considered is that in grants both according to BW, Islamic Law and Customary Law, the principle of legal certainty applies, namely what has been granted is prohibited from withdrawing except for withdrawing grants to heirs according to Islamic Law.

Withdrawal of grants either by the grantee or by the heirs of the grantee is also interpreted as the same as a lawsuit for cancellation of grants or legal defects in court, so written evidence is needed that can be used as evidence for the parties so that the grant has legal certainty both outside the court and in court. In the decision of the Kendari Religious Court Number 0053/Pdt.P/2013/PA Kdi, Considering, that it turns out that the letter of submission/grant dated 8 March 1999, which has a thumbprint on behalf of Ambo Rabiah, which was given to the applicant (Dra. Nurminah Zain binti M. Zain), is a letter under the law. Zain), is a letter under the hand which is only witnessed by one witness, so that the letter of submission / grant, has not fulfilled the formal requirements to be accepted as perfect evidence at the Court trial, as according to the provisions of Article 210 paragraph (1) of the Compilation of Islamic Law, that an act of grant must be witnessed by two witnesses, Therefore, the evidentiary value of the letter of submission/grant is only preliminary evidence of the existence of a legal act, namely the voluntary giving of an object without compensation from a person to another living person to be owned, so that the evidence must be supported by other evidence;

Further consideration by the Judge as in his legal consideration which states, that because it turns out that the conditions for making a grant have been fulfilled by both parties, namely the grantor and grantee, in which case the grantor (Ambo Rabiah) has granted the applicant his own land without any coercion, In the event that the grantor (Ambo Rabiah) has granted the applicant his own land without any coercion, and it is known by the public in the location of the granted land, also there has never been anyone who objected and disputed the land object of the grant since the applicant received the grant and took control of the grant land, then the Court concluded that the act of grant was sufficiently reasonable according to the law by determining the applicant (Dra. Nurminah Zain binti M. Zain) as the grantee from Ambo Rabiah binti Saeho (deceased) of a piece of land measuring 803 M2 (eight hundred and three square metres) with Certificate (Proof of Right) No.3109. with a measurement letter dated 21 November 1998 No. 57/98 in the name of Ambo Rabiah, located on Jalan Taman Surapati, Mandonga Village, Mandonga Sub-District, Kendari City.

The judge's consideration in the decision of the Kendari Religious Court Number 0053/Pdt.P/2013/PA Kdi, has fulfilled the principle of legal certainty even though the Grant deed is an underhand deed but with other evidence such as physical control of the land that was granted and there has never been anyone who objected and disputed the land object of the grant since the applicant received the grant has given confidence to the judge that there has been a grant of land rights from Ambo Rabiah binti Saeho (deceased) to Dra. Nurminah Zain binti M. Zain.

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<sup>13</sup>Azni Eksistensi hibah dan posibilitas pembatalannya dalam perspektif hukum islam dan hukum positif di Indonesia, An-Nida: Jurnal pemikiran Islam Vol 40, 2015

<sup>14</sup>Vita Peni Maryuningrum Efekti fi tas hi bah hak atas tanah menurut hukum adat dalam pendaftaran tanah di Kabupaten Boyolali, Jur nal Repertorium Volume IV No. 1 Januari-Juni 2017

**Conclusion:-**

Granting grants under the hand according to the Civil Code is not valid, because the capacity and authority of grants that have permanent legal force for making grant deeds is a notary appointed by the government as an authorised public official in accordance with the rules stated in government regulation No.24 of 1997 concerning land registration. whereas according to Islamic Law and Customary Law Granting can be done in writing or under the hand or orally as long as the conditions are met. That the evidentiary power of an underhand grant letter in which the grantor has passed away, in the process of turning the name cannot be done by the grantee at the Land Office. So the deed under the hand must get a court order first in order to have legal force later when changing the name to the grantee.

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