

## **Application of The Principle of Good Faith In Land**

### **Buying**

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#### **ABSTRACT**

Selling and buying land is a legal act that gives birth to rights and obligations for sellers and buyers. In carrying out the sale and purchase of land, it is mandatory to be guided by the legal provisions regarding the legal procedure to be followed, and must prioritize the principle of good faith in the bargaining stage up to the payment and sale and purchase agreement. In practice, it is often found that lawsuits are related to the attitude of one party that does not reflect the principle of good faith in buying and selling, of course this is against the rule of law and can be detrimental to other parties. This research is expected to be a means for legal scholars to understand the context of a land sale and purchase agreement. This research method used a normative juridical method with a conceptual approach, legislation and a case approach. The conclusion of this study is that in making an agreement, it is necessary to pay attention to complying with the elements of Article 1230 BW in the form of a valid condition of an agreement, as well as prioritizing the principle of good faith as the basis for making a land sale and purchase. The process of buying and selling land according to procedures and without any elements of forgery will reduce the level of legal risk in the future, besides the benefits of using the principle of good faith for the buyer, namely the rights of the buyer which are protected by law.

**Keywords:** Good Faith, Buying And Selling, Land

#### **1. INTRODUCTION**

Making an agreement is something that is often done in everyday life, an agreement without us knowing it is formed after the offer and acceptance of several parties after which an agreement is formed. For example, most buying and selling online through well-known buying and selling application platforms. The agreement contains several elements which include the concept of the agreement, the legal terms of the agreement, the principles of the agreement, the object of the agreement, the period of the agreement, the form of the agreement, the parties involved, the rights and obligations of the parties, the time of making the agreement or the method of making the agreement, settlement disputes and termination of the agreement. The concept of an agreement according to Subekti is an agreement between the parties on something that gives birth to a legal engagement/relationship, giving rise to rights and obligations, if it is not carried out as agreed, there will be sanctions (R.Subekti: 2005). The first element in the agreement is an agreement. the agreement in the BW can be seen in Article 1338 paragraph 1 BW (Huala Adolf, Basis: 2006). An agreement is valid when referring to Article 1320 BW which includes several legal requirements, namely the existence of an agreement by both parties, the ability to carry out legal actions, the existence of an object of agreement and the existence of permissible causes. In an agreement, apart from having to pay attention to The legal requirements of an agreement must also be based on



several general principles or principles contained in contract law such as the principle of freedom of contract, the principle of consensualism, the principle of pacta sunt servanda, the principle of good faith, the principle of personality (personality), as well as other principles contained in some legal literature that other.

The urgency of the principle of good faith must be used as the basis for the parties taking legal actions in making an agreement. The consequence of the principle of good faith is that the parties must carry out the substance of the contract based on the trust or confidence of the parties themselves. The agreement that has been agreed upon by the parties must be carried out in accordance with propriety and justice. Good faith is an important factor so that parties with good intentions will receive reasonable legal protection, while parties who do not have good intentions should feel that they play an important role in interpreting or expanding the teachings of good faith. The principle of good faith is mandatory in the implementation of buying and selling land objects, with the ratio that land is an immovable object that has a very high economic value. In practice, land sales and purchase disputes are often encountered because one party has bought or sold it in bad faith. Of the many cases encountered, many decisions provide protection for buyers with good intentions. However, the prevailing laws and regulations do not provide a clear indication of who can be considered as a buyer in good faith. Article 531 of the BW states that the bezit has good intentions if the holder of the position in power "acquires the object by obtaining property rights where he is not aware of any defects or deficiencies in it". Furthermore, Article 1338 paragraph (3) BW only states that the agreement must be carried out in good faith, but also does not further contain the criteria for a buyer in good faith. This study will discuss the concept of the principle of good faith quoted from some literature and legislation, especially the urgency of the principle of good faith in buying and selling land.

## 2. RESEARCH METHODS

Type of research in this legal research is normative legal research, which is a process to find the rule of law, legal principles, and legal doctrines in order to answer the legal issues faced (Peter Mahmud Marzuki, Legal Research, 2011). The researcher uses a normative type of research because this research is to find coherence, namely are there legal rules in accordance with legal norms and are there norms in the form of orders or prohibitions in accordance with legal principles, and whether someone's actions are in accordance with legal norms or legal principles (Peter Mahmud Marzuki, Legal Research Revised Edition, 2014) As this research aims to find. In this study, the researcher used three problem approach methods, namely, the statutory approach, the conceptual approach. The statutory approach is carried out by reviewing all laws and regulations related to the legal issue being researched. The conceptual approach departs from the views and

doctrines that develop in the science of law. Studying the views and doctrines in legal science, researchers will find ideas that give birth to legal understandings, legal concepts, and legal principles that are relevant to the issues at hand. In the conceptual approach, the concept of the principle of good faith in contract law can be found. In this study, researchers used legal sources, including:

- a. Primary legal materials are legal materials that are authoritative, meaning they have authority. Primary legal materials consist of legislation, official records or minutes in the making of legislation and judges' decisions.
- b. Secondary legal materials are all publications on law that are not official documents. Publications on law include textbooks, legal dictionaries, legal journals, and commentaries on court decisions. In this study, the secondary legal materials used include books in the field of law, papers, articles, and theses. The formulation of the problem in this study include the concept of the principle of good faith in contract law and the application of the principle of good faith in the process of buying and selling land.

### **3. RESULTS AND DISCUSSION**

#### **The concept of the principle of good faith in**

Contract law Civil law actions that are often carried out by a person or legal entity are making an agreement, Subekti argues that an agreement is an event where one person promises to another person or where two people promise each other to do something. While the engagement is a legal relationship between two people or two parties, based on which one party has the right to demand something from the other party, and the other party is obliged to fulfill these demands. Article 1313 of the Civil Code states: "Agreement is an act by which one or more people bind themselves to one or more other people. Another opinion regarding agreements or contracts according to Salim HS, said contract law is: "The whole of the legal rules governing legal relations between two or more parties based on an agreement to cause legal consequences. The legal arrangement of the agreement is contained in book III BW which has the characteristics of an open system, meaning that everyone is free to make agreements, both those that have been regulated and those that have not been regulated by law. The official definition of an agreement is contained in Article 1313 BW which states that an agreement is an act where one or more people bind themselves to one or more other people. To guarantee the validity of an agreement, it must be carried out by referring to the provisions of Article 1320 BW, which the formulation of the article states that:

In order for a valid agreement to occur, it is necessary to fulfill four conditions:



1. the agreement of those who bind themselves;
2. the ability to make an engagement;
3. a certain subject matter;
4. a cause that is not forbidden.

The four paragraphs of Article 1320 BW have different legal consequences if they are violated. The agreed element in the first paragraph has the philosophy that an agreement must be carried out voluntarily by the parties and consciously carried out by both parties without coercion, fraud, or intentional error by both parties. arrangements regarding coercion and fraud are regulated in Article 1321 BW which states that no agreement has the power if it is given by mistake or obtained by coercion or fraud. The consequences of the actions in Article 1321 BW are contained in Article 1322 BW which states that an error does not result in the cancellation of an agreement, unless the error occurs regarding the nature of the goods that are the subject of the agreement. Mistakes do not result in cancellation, if the mistake only occurs about the person with whom someone intends to enter into an agreement, unless the consent is given mainly because of the person concerned. The provisions regarding coercion include:

1. Article 1323 BW

Coercion carried out against a person entering into an agreement results in the cancellation of the agreement in question, also if the coercion is carried out by a third party who has no interest in the agreement made.

2. Article 1324 BW

Coercion occurs if the action is such that it gives the impression and can cause fear to a reasonable person, that he, his people, or his wealth are threatened with great loss in the near future. In considering this matter, the age, gender and position of the person concerned must be considered.

3. Article 1325 BW

Coercion makes an agreement null and void, not only if it is carried out against one of the parties making the agreement, but also if it is carried out against the husband or wife or their family in an upward or downward line.

The second element regarding the validity of the agreement is about the competence or not of the legal subjects who agree in the agreement. The competency criteria in Article 1330 BW are stated that those who are not qualified to make an agreement are;

3. minors;
4. a person placed under custody;

5. women who have married in matters determined by law and in general all those who are prohibited by law from making certain agreements (this provision has been excluded by Law No. 1 of 1974 concerning Marriage).

The third element in the agreement that must be fulfilled is the object of the agreement. With regard to the object of the agreement, it is obligatory to refer to Article 1332 BW which states that only goods that can be traded can be the subject of an agreement, besides that, it is regulated in Article 1333 BW that an agreement must have a principal in the form of an item of at least a specified type. The amount of goods does not need to be certain, as long as the amount can then be determined or calculated. Regarding the legal requirements of the 4th agreement in the form of permissible causes in Article 1337 BW it is stated that a cause is prohibited, if the cause is prohibited by law or if the cause is contrary to decency or public order.

Legal acts born of agreements are binding on the parties as stated in Article 1338 BW, namely all agreements made in accordance with the law apply as law for those who make them. The agreement cannot be withdrawn other than by agreement of both parties, or for reasons determined by law. Approval must be executed in good faith. With the binding of the parties after fulfilling all the provisions in Article 1320 BW, then by law the agreement is like law for the parties and must be obeyed and implemented. Considering that the philosophy of the existence of agreement rules is created because of several legal principles such as the principle of good faith, the principle of the principle of freedom of contract (Freedom of Contract). The principle of Consensualism (Consensualism), the principle of legal certainty (*pacta sunt servanda*), and the principle of personality (personality). Each of these principles has its own characteristics. In this study, the discussion is limited, the next sub-chapter will discuss the discussion of the principle of good faith.

The legislators in creating the rule of law must know the legal philosophy that can be viewed from doctrine and legal principles, especially in creating rules in the civil sector that are closely related to the relationship between individuals in the business field. The basis for the creation of implied contract law from several principles in civil law are:

- a. The principle of consensualism is implied in the provisions of Article 1320 paragraph (1) BW, which states that an agreement is valid if there is an agreement between the parties who make an agreement. Based on this principle, it is understood that the source of contractual obligations is the meeting of agreements between the parties themselves
- b. The principle of the binding power of the contract (*Pacta Sunt Servanda*)

The principle of the binding power of the agreement, also known as the *pacta sunt servanda* principle, is a principle related to the binding power of an agreement. The principle of *pacta sunt servanda* can be reviewed in Article 1338 paragraph (1) BW which

states that "all agreements made legally apply as law for those who make them". The result is that the parties to the agreement must comply with the contents of the agreement as well as they comply with the law.

- c. The principle of freedom of contract Basically, every individual is freed in making an agreement. Book III BW follows an open system, meaning that the law (ic Book III BW) gives the parties the freedom to regulate their own pattern of legal relations.<sup>18</sup> The open system of Book III BW is reflected in Article 1338 paragraph (1) of the BW which states that, "all agreements made legally shall apply as law for those who make them." According to Subekti 19, the way to conclude this freedom of contract is by emphasizing the words "all" in front of the words "agreement". Whereas the provisions of Article 1338 contain the understanding that we are allowed to make any agreement and the agreement made will bind the parties like a law.
- d. The principle of good faith The principle of good faith can be reflected in the rules of Article 1338 paragraph (3) BW which states that "Agreements must be carried out in good faith". The legislation does not provide a clear definition of what is meant by good faith. Then in Article 1339 BW, that "Agreement does not only bind what is expressly specified in it, but also everything that by its nature approval is required based on justice, custom, or law". The provisions of Article 1339 BW provide a way out for the parties if they do not stipulate the provisions in the agreement, but the law has regulated it. The consequence of the rule of Article 1339 BW is that the parties must comply with other laws and regulations other than the agreement.

In the National Civil Law Symposium held by the National Legal Development Agency (BPHN), good faith should be defined as follows:

- a. Honesty when making contracts;
- b. At the drafting stage it is emphasized, if the contract is made before an official, the parties are considered to have good intentions (although there are also opinions expressing objections);
- c. As appropriate in the implementation stage, which is related to a good assessment of the behavior of the parties in carrying out what has been agreed in the contract, it is solely aimed at preventing inappropriate behavior in the implementation of the contract.

According to Subekti, good faith has two meanings, namely (Subekti: 1983):

- a. Good faith in an objective sense  
An agreement must be made and implemented by taking into account the norms of decency and decency so as not to harm the other party

b. Good faith in a subjective sense

Good faith in this context can be called the honesty of a person in carrying out the agreement.

In the pre-agreement stage, the seller is obliged to explain that the object will be the object of sale and purchase between the seller and the buyer. Good faith in the pre-agreement stage is needed before an agreement is reached by both parties. This pre-agreement stage is expected to not contain deception from the seller to the buyer. If the element of good faith in the pre-contract stage is not fulfilled, the agreement can be canceled. Not only selling is required to do good faith, but the buyer is also obliged to carry out good faith by making payments to the costs and prices of the objects traded. The application of the principle of good faith in the sale and purchase of land will be analyzed in the next sub-chapter.

**The application of the principle of good faith in the process of buying and selling land**

The sale and purchase agreement is regulated in Book III BW concerning Engagement, more precisely regulated in Article 1457 BW which states that "A sale and purchase is an agreement, whereby one party binds himself to surrender an object and the others pay the promised price. Based on the understanding in Article 1457 BW, buying and selling is an obligatory agreement. The conditions for a valid sale and purchase agreement are also required to comply with the rules in accordance with Article 1320 BW, which include the existence of an agreement between those who bind themselves, the ability to make an engagement, the existence of a certain thing, and a permissible cause. With regard to the nature of the sale and purchase, namely obligatory, that the new sale and purchase agreement lays down mutual rights and obligations between the two parties, or in other words the sale and purchase adopted by Civil Law has not transferred ownership rights while new property rights have been transferred by delivery or levering (Soedharyo Soimin, : 2004). Furthermore, Article 1458 BW stipulates that the sale and purchase of immovable objects is considered to have occurred even though the land has not been handed over or the price has not been paid. For the transfer of rights, it is still necessary to take another legal action in the form of surrender, the method of which is determined by another regulation. From this description, the sale and purchase of land according to Civil Law consists of 2 (two) parts, namely the sale and purchase agreement and the transfer of rights, both of which are separated from one another. So, even though the first thing is usually done with a notarial deed, but if the second thing has not been done, then the status of the land is still the property of the seller.

After Law No. 5 of 1960 concerning Basic Regulations on Agrarian Principles was enacted, the sale and purchase of land used customary law as the law that underlies national agrarian law. Based on Article 5 of the UUPA, the definition of buying and selling property rights according to the UUPA is nothing but the meaning of buying and selling according to customary

law. (Adrian Sutedi: 2010). According to customary law, land sale and purchase is a clear and cash transfer of land rights, clearly means that the act of transferring rights must be carried out before the customary head, who acts as an official who bears the regularity and legality of the act of transferring rights, so that the act is known to the public. . What is meant by cash is the act of transferring rights and paying the price simultaneously. Therefore, cash prices may be paid in cash, or partially paid (cash is considered cash). In the event that the buyer does not pay the balance, the seller cannot sue on the basis of the sale and purchase of land, but on the basis of the law of debt. The requirements in legal actions for the transfer of land rights are divided into 2 (two) types, namely:

a. Material Requirements:

1. seller is the person who has the right to the land to be sold. In this case, it must be clear who the potential seller is, and he must have the right to sell the land he wants to sell. If the seller has a married partner, the husband and wife must be present and act as the seller, if the husband or wife is unable to attend, a written and valid proof of agreement must be made stating that the husband or wife agrees to sell the land. The sale and purchase of land carried out by those who are not entitled to it will result in the sale and purchase being null and void by law. This means that from the beginning the law considered that there had never been a sale and purchase. In such case the interests of the buyer are greatly harmed, because the buyer has paid the price of the land while the rights to the land he bought have never been transferred to him. Although the seller still controls the land, at any time the person who is entitled to the land can sue through the court.
2. Buyer is a person who has the right to have rights to the land he bought and pays attention to the terms of Article 1320 BW and other provisions. This depends on the legal subject and legal object. The legal subject is the legal status of the person who will buy it, while the legal object is what rights exist on the land.
3. The land in question may be traded or not in dispute. According to the BAL, land rights that can be used as objects of transfer of rights are Ownership Rights, Cultivation Rights, Building Use Rights, and Use Rights

b. Formal Requirements in buying and selling land

After all the material requirements are met, a sale and purchase is carried out before the PPAT. In the process of buying and selling land, several provisions are made, such as:

1. Checking the certificate through the system made by BPN
2. Payment of BPHTB and PPH taxes
3. It can be emptied first by the seller and pay off the fees charged to the object

4. The making of the deed of sale and purchase must be attended by the parties conducting the sale and purchase or the legal proxy of the seller and the buyer and witnessed by 2 (two) witnesses who meet the requirements as witnesses.
5. The deed of sale and purchase is made in the original form in 2 (two) copies, namely the first 1 (one) copy is kept by the PPAT concerned and the second sheet in 1 (one) copy is submitted to the Land Office for registration purposes and to other parties. interested parties can be provided with a copy.
6. After the deed is drawn up, not later than 7 (seven) working days from the date of signing the deed in question, the PPAT is obligated to submit the deed he made along with the relevant documents to the Land Office for registration and the PPAT is obligated to submit a written notification regarding the submission of the deed. to the parties concerned.

In the event that the land to be sold has not been recorded (not yet certified), the Village Head or a member of the Village Government who in addition will act as a witness, also guarantees that the land to be sold is indeed the property of the seller and he is authorized to sell it in accordance with the history. land issued by the village head. The principle of good faith in buying and selling land is very necessary to avoid disputes. In practice, there are often disputes over the sale and purchase of land that occur because one party has bought or sold it in bad faith. Of the many cases encountered, many decisions provide protection for buyers with good intentions. However, the prevailing laws and regulations do not provide a clear indication of who can be considered as a buyer in good faith. If you look at Article 531 BW which states that the bezit has good intentions if the holder of the position of power "acquires the material by obtaining property rights where he is not aware of any defects or deficiencies in it". In addition, Article 1338 paragraph (3) BW only states that the agreement must be carried out in good faith, but also does not further contain the criteria for a buyer in good faith. Judges at the Supreme Court made a formula contained in the Circular Letter of the Supreme Court No. 4 of 2016 which can be quoted as follows:

“Regarding the definition of a buyer with good intentions as stated in the agreement of the civil chamber dated October 9, 2014 in letter a, it is refined as follows: good intentions that need to be protected under Article 1338 paragraph (3) of the Civil Code are as follows:

Carry out the sale and purchase of the land object with legal procedures/procedures and documents as determined by the laws and regulations, namely:

1. Purchase of land through a public auction or:
2. Purchase of land before the Land Deed Maker Official (in accordance with the provisions of Government Regulation No. 24 of 1997 or;

3. Purchase of customary/unregistered land which is carried out according to the provisions of customary law, which is carried out in cash and openly (in the presence of/known to the local Village Head/Lurah) purchase and based on the research shows that the land object of sale and purchase belongs to the seller
4. Purchase is made at a reasonable price

Exercise caution by examining matters relating to the object of the land being agreed upon, including:

1. The seller is a person who have the right/have rights to the land which is the object of the sale and purchase, according to the proof of ownership, or;
2. The land/object being traded is not in confiscated status, or;
3. The object land being traded is not in the status of collateral/mortgage rights, or;
4. For land that is certified, it has obtained information from the National Land Agency and a history of legal relations between the land and the certificate holder.

Regarding this problem, the Supreme Court (MA) is of the opinion that one of the criteria for a buyer with good intentions is that the buyer purchases the object of sale and purchase through the auction office.

Then the opinion formulated in the SeMA was confirmed in jurisprudence No. 6/Yur/Pdt/2018, in that jurisprudence it refers to decision number 158 K/Pdt/2005 (PT. Mitra Bangun Griya vs. PT. Bumijawa Sentosa) dated January 31, 2007. In the decision The Supreme Court is of the opinion:

"That the Plaintiff is the winner of the auction of the disputed parcels (land and buildings on it), in accordance with the Letter of Determination of Winner No. PROG-0093/PPA P3/BPPN/0803 dated August 21, 2003, and the sale and purchase of auction objects was carried out on December 2, 2003 (exhibits P 4 and P 5 );

"That as the buyer of the auction of Assets Under Restructuring, the Plaintiff obtains legal certainty of the transfer of rights to the said Assets Under Restructuring (Article 27 paragraph (2) of Government Regulation No. 17 of 1999), even in the Elucidation of Article 27 paragraph (1) of the same Government Regulation , Transferee or Purchaser of Assets Under Restructuring is considered a party in good faith, and therefore must be protected by law."

The Supreme Court's consideration was reaffirmed in decision number 901 K/Pdt/2007 (PT Bank Niaga vs Han Moy) dated October 24, 2007. In that decision, the Supreme Court was of the opinion:

"That the auction process was in accordance with applicable regulations, because it was carried out on collateral items. burdened with mortgage rights. Because the debtor is in default/negligence (bad credit), then the object that is used as collateral can be auctioned, the principle of "accelerated

maturity" applies. That the auction buyer is a buyer with good intentions, therefore it must be protected."

The Supreme Court's decision was reaffirmed in decision number 1175 K/Pdt/2007 (Budi Koeswoyo vs. PT BNI, et al.) dated October 24, 2007, and decision number 724 PK/Pdt/2008 (Kadariati Solihin, et al. vs. PT Bank Artha Graha and Genta Teruna) dated January 20, 2010. In the plenary meeting of the room in 2014, in addition to confirming the legal opinion above, the Supreme Court also added criteria for buyers with good intentions. Through the Supreme Court Circular (SEMA) number 5 of 2014 which was later strengthened in SEMA No. 4 of 2016, the Supreme Court's opinion regarding the criteria for buyers in good faith after the birth of the two SEMAs mentioned above is consistent. In decision number 403 PK/Pdt/2015 dated November 26, 2015, the Supreme Court gave legal considerations that the sale and purchase was carried out before the PPAT and in accordance with applicable regulations, the land buyer was a buyer with good intentions. The Supreme Court's full legal considerations are as follows:

"That the Judex Juris decision rests on the fact that the sale and purchase has been carried out before the PPAT as an authorized official, against a certified object of sale and purchase, then this situation has proven that the Defendant is a buyer with good intentions, buying and selling before PPAT is a sale and purchase whose mechanism has been regulated in accordance with the applicable laws and regulations.

This decision was reaffirmed through decision number 256 K/Pdt/2016 dated 18 July 2016, decision number 1161 K/Pdt/2016 dated 14 September 2016, decision number 2828 K/Pdt/2016 dated 14 December 2016, Decision number 1775 K/Pdt /2017 dated 31 August 2017, Decision Number 2520 K/Pdt/2017 dated 16 November 2017, decision number 734 PK/Pdt/2017 dated 19 December 2017. The Supreme Court's opinion regarding the sale and purchase of land is carried out before PPAT and in accordance with applicable regulations, or buy through the state auction office, then the land buyer is a buyer with good intentions, because it must be protected by law, has been consistent. From the opinion of the judge in the Supreme Court that it has been formulated that a buyer with good intentions who buys a land object through legal procedures and in accordance with laws and regulations is protected by law and the State, it should also be noted that the principle of good faith has been interpreted in the case of buying and selling land and land. used as a guide in similar cases.

#### **4. CONCLUSION**

In making an agreement, it is necessary to pay attention to fulfilling the elements of Article 1230 BW in the form of conditions for the validity of an agreement, as well as prioritizing the principle of good faith as the basis for making an agreement village. The process of buying and

selling land in accordance with procedures and without any elements of forgery will reduce the level of legal risk in the future, besides the benefits of using the principle of good faith for the buyer, namely the rights of the buyer which are protected by law.

### **Suggestions**

Preferably in the pre-agreement stage, the seller provides details of the object being traded and does not contain elements of deceit. As a buyer with good intentions, you should check in detail on the goods to be purchased so you don't feel disadvantaged in the future and Before buying and selling land objects, it is mandatory to check the location to be traded and ask the seller to pay off the costs that are borne by him before buying and selling. If there are parties who have already made buying and selling under the hands without being before the PPAT or the village head, it is better to apply for a determination in the district court regarding the ratification of the sale and purchase by bringing witnesses at the time of the sale and purchase transaction. Then do the recording in the village and it can be registered for a certificate of title to be issued as proof of land ownership, and don't forget to pay the transfer tax on land rights.

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