Amicable Settlement Through Mediation in Land Disputes

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ABSTRACT
Land disputes has for long made up the majority of the cases numbered to enter the court. However, a lot of issues are yet to be solved with regards to both the available settlement procedures and the necessity for a specialized forum, as well as the quantity and quality mediators involving and the conflict of interests encountered by the National Land Institution at the forefront of land disputes settlement. The Supreme Court Regulation No. 1 Year 2016 has paved the way-forward by adjusting the role of representatives in either advancing or hampering the success of mediation process, taking into account the spirit to settle disputes amicably with low costs and speedy manner.
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1. INTRODUCTION

It is commonplace for disputes to arise in any business environment. In the contemporary world where growth and development all occur in swift pace, disputes are prevalent and are part of the inevitable reality. While no one would genuinely involve in any disputes of some sort, it is a fact of life that all have to encounter and face. Each of them should be properly settled, and it is best to settle them amicably. Ideally, amicable settlement shall be obtained through peaceful deliberation aiming for win-win solutions delivering a sense of justice to the disputing parties. The fact, however, is never as simple.

The disputes failing to be settled through amicable settlement will make their course into either the courts of law or arbitration tribunals, both are simply a waste of money, time, and energy. Therefore, dispute settlements through means of peaceful deliberation which manage to reach an amicable settlement will always be the better option, with advantages as follows:

a. Efficient spending of time;
b. Lower costs (litigation expenses and advocates fee being unnecessary);
c. Speedy settlement;
d. Settlement being relatively fair and is win-win in nature.

The concepts of amicable settlement or mediation are regulated in the Indonesian Civil Code (ICC), Civil Procedural Regulation (RBG), and the Updated Civil Procedural Regulation (HIR), as well as scattered in other laws and regulations prevailing in Indonesia, among other in the Supreme Court Regulation No. 1 Year 2016 concerning the Mediation Procedure in the Courts of Law. A successful mediation procedure shall reach an agreement among the disputing parties which shall then be poured into a written Deed of Amicable Settlement. As stipulated in Article 1858 of the ICC, the result of an amicable settlement has a strong position before the law, where each possesses a force equal to that of a final and binding court verdict, despite further assessment being necessary with regards to the fact that a Deed of Amicable Settlement remains subject to voidability in the following cases [1]:

a. Certain mistake(s) occurred with regard to the parties or subject matters of the dispute;
b. Concluded with fraud or under duress;
c. Misunderstanding occurs with regards to the merits of the case.

In the current development era, land disputes have become widespread and garnered much attention due to its correlation with the needs for growth and development, which are considered the primary needs of human beings. Construction activities little or much related to the working of the ground. Yet land/agrarian matters are one of the fields from which the greatest number of disputes has sprung up between the parties having interests over the land, mostly claiming the rights of ownership, or otherwise suffering losses as a result to certain legal action carried out by certain party in connection with such rights of ownership. Therefore, the discourse on the land disputes and subsequently the aspect of applicable means in the form of amicable settlement or mediation to address such disputes is quintessential to deepen the understanding of an efficient and effective land dispute settlement. This paper will further discuss about the issues triggering land disputes as well as the available means of settlement.

2. ANALYSIS

2.1 Typical Land Disputes

Among the many land disputes in Indonesia, there is a typology of cases most often encountered by the Ministry of Spatial and Agrarian Affairs [2],

hereafter elaborated and ordered based on their frequency of occurrence:

a. Disputes on land possession and ownership

First of all, with regards to the possession and ownership of forest land, the departments under the Ministry of Forestry have their own database of maps independent from that of the National Land Institution. As an example, the map owned by the National Land Institution might show certain residential areas occupied with people while the map held by the Ministry of Forestry for the same plot of land might show raw forest with the right to possess has been entitled to certain parties. This results to the overlapping of land possession and ownership borders, uncertainty, and disputes.

The second type of these disputes concerns the land plots which are assets of the State or certain State-Owned Entities, including the military forces. In these cases, mediation is a difficult endeavor since the State institutions do not easily let go of assets possession. Procedural and bureaucratic errors during the relinquishment of assets will be scrutinized by the Financial Assessment Institution (*Badan Pemeriksa Keuangan*) as well as the Corruption Eradication Commission (*Komisi Pemberantasan Korupsi*) upon any suspicion of corruption taking place, and could end up with criminal charges against the official in charge of facilitating the relinquishment of such right of ownership. Moreover, the Indonesian court decision is notorious for its complex and difficult execution. Regardless of whether the issuance of land certificate has been cancelled by the land institution, the entitlement of new right to the winning party cannot be carried out until the assets are officially disposed or removed from the State list of Assets.

b. Disputes arising from the erroneous physical or juridical land data input in the process of entitlement of rights and land registration

Various errors are committed during the issuance of certificate resulting to uncertainty and disputes of land ownership, either simply due to the recklessness of the land registration officials, or because of fraud or forgery with regards to the data being used as the basis for registration.

c. Errors committed in the measurement and determination of land borders or location during land plotting

By negligence or otherwise, these have resulted to many overlaps and uncertainties with regards to land ownership.

d. Disputes arising with regards to land procurement for public interests

These cases often involve the compensation payment to the original owner, disagreements with regards to the land borders, as well as the terms and conditions of land clearance. In addition, compensation payments were often mistakenly paid to certain wrong parties which claimed ownership over the plots of land; the original owners mostly came to find out that they are late and the land plots have indeed been developed or utilized for public interests.

e. Discrepancies between the goal envisioned in the Basic Agrarian Law and its implementation

This issue is prevalent in all legal fields in Indonesia. In particular, with land matter, for example, there are errors with regards to the recipient of certain ownership rights. The Basic Agrarian Law entitled such rights to farmers, but the fact shows another parties being the ultimate recipient of such rights, with the rightful owners have not properly obtained their due compensation.

f. Disputes with regards to claim for damages with regards to particular land plots

Pursuant to Law No. 1 Year 1958 concerning The Elimination of Particular Lands, the elimination of such lands shall be carried out with compensation in monetary form or replacement with another land plot. Any claim for damage will be throughly followed up insofar as the land remains existent and is physically possessed by the Party claiming interest, in addition to providing the Land and Building Tax payment as supporting evidence.

g. Disputes relating to the recognition of indigenous land

Indigenous lands are only acknowledge based on the existence of land occupied by certain indigenous societies with rights as regulated in the regional regulations. These rights still exist mainly in Sumatera, Jambi, Nusa Tenggara Barat, and Papua. In fact, many societal groups have claimed themselves to be of indigenous nature and therefore entitled to the ownership right over the so-claimed indigenous lands, despite the prerequisite regional regulation officiating such rights being nonexistent. Additionally, in the 1990s, more or less 500 regional regulations pertaining to indigenous lands have been revoked by the Indonesian Ministry of Domestic Affairs.

h. Disputes arising from overlapping court decisions

Multiple Indonesian court decisions with regards to a certain land plot may overlap, either resulting to confirm or oppose against each other. This ultimately hampers the execution of decisions by the National Land Institutions which is likely undertake careful actions to avoid any risks to its reputation. An example of this is the infamous case involving Graha Metropolitan Nuansa located near Ratu Plaza, Jakarta.

i. Disputes arising from land grants and inheritance

Land grants and inheritance made up the majority case of land disputes. Such cases occur due to either internal factors (such as the land grants endowed by the living parents to certain candidate inheritor(s) being unequal in calculation against the other candidates or not being carried out with proper construction of Grant Deed, matters involving a couple without any descendants as future inheritors, greed or otherwise lack of understanding on the part of certain inheritor(s), mistakes committed in determining the effect of siri' on marriage and inheritance, and pending distribution of the bundle of inherited assets), or external factors (such as land grant being given to certain adopted child, the involvement of certain provocator(s) against the giving of grants or the passing of inheritance, and the lending of certain inheritance asset to a non-inheritor which has not been returned) [3].

Following an event of death, the candidate inheritors gather before a public notary to take care of the documents and determination of inheritors. Done in bad faith, the appearing parties might deceive the public notary by leaving out and not acknowledging the existence of other inheritors having legally endowed entitlement in the inheritance bundle. In other cases, the ownership of rights is registered under the name of several land holders, or in the case of inheritance, several inheritors, collectively. It often occurs that one registered holder unbeknownst to and without first obtaining permission of the others managed to sell the land plot. The pending execution of inheritance bundle distribution aggravates the complexity of the matter since gathering all the Parties rightfully entitled to the inheritance will be an increasingly difficult task over time; some "forgotten" inheritors might be left out in the distribution process and only come later after feeling the asset distribution is unequal. In such cases, conflict over the inheritance, including land ownership, will be inevitable.

2.2 The Concept of Indonesian Land Registration

A purely positive principle means that the data in the register is deemed infallible as the government official has scrutinized the truth and validity of each documents/certificates submitted for registration in the first place before such data is entered into the register [4]. Such register is everything and the only source of reference to find out the ownership of certain land plot. In case of erroneous registration due to certain mistakes committed by the registration official, the true right holder could only claim for monetary damages or compensation in the form of assurance fund allocated by the Government.

Meanwhile, a purely negative system of land registration as regulated in the Indonesian Government Regulation No. 10 Year 1961 concerning Land Registration means the registration of rights in the land register will not render the true and rightful owner losing his rights [4]. In fact, Indonesia adopting the negative system with an addition of positive element renders the land certificate a strong, absolute evidence of ownership [5] which shall be accepted by the judges as the true information, insofar as and to the extent there is no other evidence to proof otherwise. Therefore, the State does not guarantee the validity of the physical and juridical data presented and the certificate owners hold no guarantee since other interested parties retain the rights to sue upon the existence or possibility of loss due to the issuance of such certificate.

Article 32 (2) filled the gap of uncertainty which is exactly the weakness of Article 32 (1) by providing legal protection to the certificate owner through the absoluteness and infallibility of such certificate as evidence, that is, in such cases where [4]:

1. The certificate was legally issued under the name of certain individual or legal entity;
2. The land was acquired in good faith;
3. The owner is *de facto* possessor of the land;
4. There have been no written claims of complaint or objection concerning the land ownership submitted within 5 years following the issuance of certificate to the certificate holder, the local land institutions, and/or the court of laws.

2.3 Available Means for Dispute Settlement

There are several instruments that can be utilized in carrying out amicable settlement. Law No. 30 Year 1999 stipulates that out of court settlements can be pursued through negotiation, conciliation, mediation, or arbitration. These means are made applicable to most kind of disputes and possess a strong standing before the law since execution is much more likely to take place upon the peaceful settlement reached by the disputing parties. Seeing that amicable settlement give rise to the most efficient settlement with lower cost and speedy process, as well as awarding win-win solution embedding more sense of justice to the disputing parties, the Indonesian Supreme Court through the Supreme Court Regulation No. 1 Year 2016 concerning Mediation Procedure in the Courts of Law regulates that the litigation proceedings in the lower court (with some statutorily regulated exceptions set out in the Supreme Court Regulation No. 1 Year 2016 Art. 4) have to first go through mediation process [6]. In this phase, both parties shall meet in person and actively participate to discuss the matter at hand, seeking solutions acceptable to the disputing parties.

This arrangement where the duly authorized representatives of the respective parties are not allowed into the mediation process is a particularly novel element. Their presence of representatives often

drives the course of negotiation to opposite directions, bearing in mind the interests of only the party they happen to represent in a particular case, focusing to win the arguments instead of reaching for mutual, win-win compromise, therefore proves to ruin the spirit for amicable settlement which is the very essence of mediation processes.

Following the first hearing in the district court, a mediator will be appointed to start leading the mediation between the parties. The mediating judge will then summon the disputing parties, preferably in person without the representation of their representatives. The mediating judge will endeavor to assist and facilitate interaction between the disputing parties, while at the same time seeking out the best solutions for the case with the mediating skillset possessed supported by the objective neutrality as a judge. The promise of a speedy procedure requires mediation to reach settlement in the most efficient manner within the given time limit. In case of a successful mediation, the parties will construe a deed of peaceful settlement with final and binding characteristics to which they shall not endeavor to take any further legal action but commencing with execution. Unfortunately, not every mediation cases can be settled amicably. In cases where the mediating judge failed to offer mutually acceptable solutions and the parties failed to reach an agreement, the case shall proceed to the court.

2.4 The Prevailing Issues and The Way-Forward Concerning Mediation Process in Land Disputes Settlement

In land disputes settlement, mediation process is usually carried out by an officer of the land institution once a case surfaced and brought to the Institution for clarification. Unfortunately, no specific department within the land institution has been formed to handle disputes and mediation at the forefront immediately upon discovery of issues despite the mounting number of cases brought forth. The manpower employed in the land institutions are generally trained as civil servants. With the exceptions to certain individuals, they are trained not to deal with land disputes settlement in the first place. This lack of special skillset to lead mediation results to the mediation process in the first stage being almost completely ineffective, therefore impeding the achievement effective and efficient amicable settlement.

Moreover, inasmuch as the Land Institution strives to settle land disputes in speedy, most effective process conducted with professional manners, the Institution itself plays huge role in the escalation of the case in the first place. The involvement of the Land Institution as a party in many cases often and will continue to render dispute settlement efforts led by itself less objective. Admitting previous mistakes made by the Institution and/or its employees will only stain the reputation of the Institution as a trusted, supposedly reliable public institution. In such cases where the Institution itself is a part of the land conflict, there exists much likelihood that the mediation will be far less objective without being able to form an amicable settlement, therefore pushing the case forward to be solved through examination in the district court.

Forward to the mediation process that follows submission of lawsuit in the district court, issues arise since the mediating judges specifically capable in examining and providing solutions for land/agrarian matters are only few in number, often forcing the court to seek advices from the Land Institution as the perceived authority in land matters. This bring back the abovementioned issue of less objectivity into the examination. To aggravate the situation, these mediating judges might have also been appointed to handle other cases at the same time in ordinary trial procedures. The judicial body has already more than a handful of cases to handle, assess, and solve. This overload likely results to a less effective organization and renders the court examination of the case less efficient or otherwise, rendering lower quality decisions with reduced effectivity (i.e., the likelihood for effective enforcement).

In light of the above, continually making efforts of improvement of the mediation procedure itself including by improving the quality and quantity of land disputes mediators, will significantly reduce the number of land cases going to the judicial courts for the long-winding and costly litigation process. The National Land Institution might take actions to strengthen of its institution, in this case through the training of capable civil servants as mediating officials to handle arising land disputes at the forefront. Moreover, taking into account the number of land cases end up in the courts of law for examination, the Government shall contemplate the idea of forming a new branch of specialized court adding to the ranks of the existing ordinary civil court, criminal court, commercial court, tax court, state administrative court, religious court, and military court, that is, a court specialized in handling land/agrarian affairs.

3. CONCLUSION

Land disputes has for long made up the majority of the cases numbered to enter the court. However, many more improvements are necessary to ensure effective and efficient settlement of such cases. To begin with, the Supreme Court Regulation No. 1/2016 has made huge contribution by obliging the disputing parties to actively take part themselves in undergoing mediation, taking into account the spirit to settle disputes amicably with low costs and speedy manner. With such procedure already in place, the writer hereby offers the following means of improvement to contemplate. First of all, the role of (legal) representatives during mediation shall be more heavily regulated since their presence often hinder the

disputing parties from reaching an amicable settlement through mediation. Notwithstanding the exception for many individuals who do not always resort to such practice, their widely-perceived tendency to "win the case" is not for nothing. Therefore, it is essential that the leading mediator shall ensure to strictly limit the involvement of representatives in a mediation process to facilitate and encourage all endeavors to reach a settlement.

It is quintessential that the Land Institution has more experienced mediators competent in dealing with land disputes once they surface to deal with effectively before being brought to the litigation court. This will significantly reduce the number of land cases going to the court, thus easing the burden heaped upon the judges and rendering the land dispute litigation proceedings that do have to go to the court more efficient. In addition, it is similarly necessary for the Court to have increasing number of mediator judges with expertise in the field of Land/Agrarian Law to ensure objectivity in deciding on land disputes. Lastly, taking into account the number of arising land disputes as well as the availability of manpower with the right skillset to handle the settlement process in such amicable manner, the Government should consider establishing a special branch of court to handle land disputes, adding to the existing ranks of specialized courts.

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