

IN THE FAMILY DIVISION OF THE HIGH COURT AT SUVA

APPELLATE JURISDICTION

CASE NUMBER:	22/SUV/0002
[ORIGINAL DVRO CASE NUMBER]:	271 OF 2020
BETWEEN:	ANTONIO & LUISA
AND:	ASENACA
Appearances:	<i>Ms. A. Prakash for the Appellants.</i> <i>Ms. V. Kirti for the Respondent.</i>
Date/Place of Judgment:	<i>Friday 16 August 2024 at Suva.</i>
Judgment of:	<i>Hon. Madam Justice Anjala Wati</i>
Category:	<i>All identifying information in this ruling have been anonymized or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental.</i>
Anonymized Case Citation:	ANTONIO & LUISA v ASENACA – Fiji Family High Court Case number: 22SUV0002

A. Catchwords:

FAMILY LAW –APPEAL – DOMESTIC VIOLENCE RESTRAINING ORDER – Did the issuance of orders under s. 29 of the DVA absolutely affect the property rights of the appellants which was not necessary for the protection of the victim – orders of the court below modified to enable the appellants to access the mataqali land.

B. Legislation:

- 1. Domestic Violence Act 2009 (“DVA”): ss. 27 and 29.***

Cause and Background

1. The appellants are appealing against the s. 29 non-contact orders issued against them in the domestic violence restraining order proceedings in the Family Court.
2. The court had issued s.27 (non-molestation) and s.29 (non-contact) orders in favour of the respondent and the beneficiaries.
3. There were four respondents against whom the order was issued but only the two out of the four have appealed.
4. The respondent (*applicant in the substantive matter*) had filed an application in the court below. The basis for his application was that:-

(a) He and his family members were threatened by all the respondents. They threatened to throw them out of his property. It is alleged that this even occurred when he was on tour. Then his family members were threatened.

(b) The respondents had also burnt down houses near his residence. He is deeply scared about the safety of his family members. He is unable to live peacefully in his own house. This is due to the land dispute. He and his family need protection.

(c) The perpetrators were not going to stop unless he and his family members were thrown out of the mataqali land. As a result non-contact orders were necessary.

The Court's Findings

5. During the hearing, the respondent and one of the alleged perpetrators gave evidence. The appellant's did not give evidence.
6. The court noted from the evidence that the 1st appellant and the respondent are brothers. The 2nd appellant is the son of the 1st appellant.
7. The court referred to the evidence of the respondent. He had testified that one of the alleged perpetrators was threatening to move him from the land. The others had damaged his plantation. They sprayed on the pumpkin and cassava.

8. The respondent is on wheel chair. He said that he saw all that happened. His testimony included that the appellants had told him that they will assault him and he will die. The respondent said that the appellants had also burnt down houses near where he lived.
9. The court found that the evidence of the respondent was unchallenged as he was not even cross-examined. All his evidence was not disputed or discredited. The court accepted the evidence of the respondent.
10. Further, the court found that one of the alleged perpetrators who gave evidence was not being truthful in giving the evidence. Prior to the hearing, he denied any relationship with the respondent, and when it was put to him in court, he accepted it.
11. The court found that given the nature of the threats, there was a need to protect the respondent and his family.

The Appeal

12. The appellants are contending that the court below erred in law and in fact when it:-

(a) Failed to properly deliberate on s. 23 of the DVA when making s. 29 orders against them.

(b) Granted s. 29 orders without considering the responses filed by the appellant.

The Appellant's Submissions

13. The appellants are saying that the property on which the respondent and his family live are mataqali land. They contended that both the appellants and the respondent are rightful members of the mataqali which owns the subject land.
14. It was argued that the issuance of entire s. 29 non-contact orders without specifying the nature of non- contact, restricted the appellants from entering the mataqali land owned by them too.
15. The appellants referred to s. 28(1) of the Constitution of Fiji and stated that ownership of the mataqali land remains with each one of them.

16. It was emphasized that the i-Taukei owners being the mataqali have the customary right to use and occupy the i-Taukei land. The orders have breached their rights.
17. The appellant's further argued that if the dispute concerns the land, as stated by the respondent in his application, then the same cannot be resolved under the DVA.
18. The appellants say that the respondent is adequately protected by s. 27 non-molestation orders. There was no need to issue s. 29 non-contact orders.

The Respondent's Position

19. The respondent's position is that, given his unchallenged evidence, the orders were necessary for his protection. He needs the non-contact orders.

Law and Analysis

20. I will start off with ss. 27 and 29 of the DVA.
21. S. 27 reads:-

"Standard Non-Molestation Conditions

- 27 (1) *The standard non-molestation conditions that apply to every domestic violence restraining order are set out in subsection(2).*
- (2) *The standard non-molestation conditions are that the respondent must not-*
- (a) *Physically assault or sexually abuse the protected person;*
 - (b) *Threaten to physically assault or sexually abuse the protected person;*
 - (c) *Damage or threaten to damage any property of the protected person;*
 - (d) *Threaten, intimidate or harass the protected person;*
 - (e) *Behave in an abusive, provocative or offensive manner towards the protected person;*
 - (f) *Encourage any person to engage in behaviour against a protected person, where the behaviour if engaged in by the respondent would be prohibited by the order.*
- (3) *In addition to the conditions set out in subsection (2), a court may order other conditions having regard to sections 28 to 37."*

22. S. 29 reads:-

“Additional Conditions – Contact

- 29 (1) *Where a court makes, or intends to make, a domestic violence restraining order under this Act for the safety and wellbeing of a person, the court may include either absolutely or on conditions specified by the court, any of the non-contact conditions specified in subsection (2).*
- (2) *The non-contact conditions referred to in subsection (1) are that the respondent must not-*
- (a) *watch, loiter near, or prevent or hinder access to or from, the protected person’s place of residence, business, employment, educational institution, or any other place that the protected person visits often; or*
 - (b) *follow the protected person about or stop or accost the protected person in any place; or*
 - (c) *enter or remain on any land or building occupied by the protected person; or*
 - (d) *enter any land or building or remain there when the protected person is also on the land or in the building.*
 - (e) *make any other contact with the protected person (whether by telephone, correspondence , or otherwise), except such contact-*
 - (i) *that is permitted in domestic violence restraining order made by the court; and*
 - (ii) *that is reasonably necessary in an emergency.”*

23. It is not disputed that the respondent lives on the mataqali land owned by a particular mataqali. The appellants and respondents are members of that mataqali.

24. The issue is, given the nature of the threats, could the respondent be sufficiently protected by orders made under s. 27 and s. 29 (b) and (e) of the DVA and whether issuance of the entire s. 29 orders has an effect on the appellants property rights and disables them from accessing their own land?

25. I find that since the mataqali land is for the use and benefit of all the mataqali members, which includes the parties, none of them ought to be deprived of the use of the land. If there is any dispute about the same, it ought to be resolved through appropriate actions.

26. The respondent is vulnerable and needs protection, I do not overlook that. The purpose of the DVA is to provide safety and protection to the victims. The appellants are not challenging the s. 27 orders.
27. I find that s. 27 and specified s. 29 orders were sufficient to address the issue of the respondent and his family member's safety, wellbeing and protection.
28. The orders under entire s. 29 has an adverse effect on the appellants. Their property rights are affected. The DVA is not meant to resolve parties' property rights. Appropriate applications need to be issued to resolve those rights.

Final Orders

29. I allow the appeal in part. I find that s. 27 and specified orders under s. 29 are sufficient to protect the respondent and his family members.
30. There shall be s. 27 and 29 (b) and (e) orders against the appellants in favour of the respondent and his family members. I do not disturb the court's order against any other respondents in the original proceedings as they have not appealed the orders. They appear to be content with it.
31. Each party is to bear their own costs of the appeal proceedings.

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Hon. Madam Justice Anjala Wati

16.08.2024

To:

- 1. Legal Aid Commission for the Appellant.***
- 2. Legal Aid Commission for the Respondent.***
- 3. File: Family Appeal Case Number: 002 of 2022.***